IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 149 of 2019
[In the Magistrates Court of Suva Case No. 688 of 2016]
[Extended jurisdiction No. 048 of 2016]

BETWEEN	:	**KAMINIELI RADOVU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**14 August 2020**
Date of Ruling	:	**17 August 2020**

RULING

[1] The appellant had been charged with another in the Magistrates Court of Suva on two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009, committed on 23 April 2016 at Samabula in the Central Division.

[2] The information read as follows.

'COUNT ONE

Particulars of Offence

With another, on 23 April 2016 at Samabula, in the Central Division, robbed Shivneel Chand Denzel of cash in the sum of $1,200.00 and one till box worth $300.00 the properties of Shivneel Chand and immediately before robbing him used force on him.

'COUNT TWO

Particulars of Offence

With another, on 23 April 2016 at Samabula, in the Central Division, robbed Karishma Shaw of one I Phone worth $1,999.00 and one till box worth $300.00 the properties of Karishma Shaw and immediately before robbing him used force on him.

[3] Upon the case being transferred to the High Court by the Magistrates court pursuant to section 191 of the Criminal Procedure Act, 2009 as aggravated robbery was an indictable offence, the High Court had extended jurisdiction to the Magistrates court to hear case.

[4] Summary of facts had revealed that on 23 April 2016 between 20.05 and 20.10 hours when the victims were in their shop at Ruve Street, Samabula, the appellant and his group armed with pinch bars and choppers had ambushed them. When the assailants had breached the security grill, the victims had retreated to a room and locked themselves in for safety and the appellant with his accomplices had removed the till, cash and the iPhone and escaped. Upon being arrested by the police the appellant had confessed to having committed the crime.

[5] On 29 August 2018 the charges had been put to the appellant in the presence of his counsel and he had pleaded guilty and admitted the summary of facts. The learned Magistrate, being satisfied that the appellant had pleaded to the charges voluntarily and unequivocally, had convicted him. He had been sentenced following **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the sentencing tariff was set at 08-16 years of imprisonment in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. I do not see why the same tariff should not apply to the current case involving an invasion of business premises in the night with the propensity and readiness to use violence on the inmates.

[6] Accordingly, the Magistrate had adopted a starting point of 08 years of imprisonment and after weighing aggravating and mitigating factors, he had arrived at the final sentence of 09 years and 07 months of imprisonment as the aggregate sentence for

both counts with no non-parole period as permitted at the time of sentencing by section 18(2) of the Sentencing and Penalties Act.

[7] The appellant being dissatisfied with the sentence had in person signed an untimely appeal on 07 October 2019 (received by the CA registry on 23 October 2019). The Legal Aid Commission had thereafter filed an amended notice for leave to appeal against sentence, bail pending appeal application and written submissions on 31 July 2020. The respondent's written submissions had been tendered on 13 August 2020 where it had specifically stated that it did not object to the substantial delay in filing the appeal given the error of law involved in the sentence.

[8] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[9] Grounds of appeal against sentence:

> *'Ground One:*
>
> *That the learned sentencing Magistrate erred in law and in fact when he sentenced the appellant to a custodial term of imprisonment exceeding two years which is in breach of section 30 (1) of the Juveniles Act.'*

[10] Both the appellant's and respondent's counsel agree that the appellant was born on 11 May 1998 and aged 17 years, 11 months, 12 days by the date of offending on 23 April 2016 which is proved by the birth certificate produced.

[11] Section 30 of the Juveniles Act is as follows.

> *'30.- (1) No child shall be ordered to be imprisoned for any offence.*
>
> *(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.*
> *(Amended by 23 of 1975 s.3)*
>
> *(3) A young person shall not be ordered to be imprisoned for more than two years for any offence.' (emphasis added)*

[12] In section 2 of the Juveniles Act 1973 a juvenile is defined as a person who has not attained the age of 18 years and includes a child and a young person. A young person is a person who has turned 14 but has not yet reached 18 years. As a result the appellant was a young person at the time the offence was committed. Under section 30(3) of the Juveniles Act a young person shall not be ordered to be imprisoned for more than 02 years for any offence. Therefore the appellant should not have been sentenced to a term of imprisonment of more than 2 years.

[13] It may be mentioned for the purpose of clarity that the definitions of 'juvenile' and 'young person' in section 2 of the Juveniles Act was amended by section 57 of the Prisons and Corrections Act by increasing the upper age limit from 17 years to 18 years. 'Child' still means a person who has not attained the age of fourteen years.

[14] The Court of Appeal had confirmed that under section 30(3) of the **Juveniles Act** 1973, a young person shall not be imprisoned for more than 2 years for any offence [see **Ralulu v State** [2019] FJCA 260; AAU19.2018 (28 November 2019); **Matagasau v State** AAU 120 of 2017: 4 October 2018 [2018] FJCA 161; AAU0120 of 2017: 3 July2018 [2018] FJCA 101; & AAU0120 of 2017: 13 July 2018 [2018] FJCA 115 and **Komaisavai v State** [2017] FJCA 43; AAU154.2015 (28 April 2017)].

[15] Unfortunately, neither the prosecutor nor the counsel for the appellant had appraised the learned Magistrate of the actual age of the appellant at the time of offending. As a result, the Magistrate had obviously treated him as an adult and accordingly imposed a sentence which has now turned out to be illegal. Perhaps, had the learned Magistrate also been a little more vigilant the illegality of the sentence may still have been avoided.

[16] Therefore, clearly there is a sentencing error and a solid basis for intervention by this court to rectify the error in terms of judicial guidelines provided (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011).

[17] The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal deemed timely on sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration

[18] The next question to be considered is the appellant's bail pending appeal application, for he is supposed to complete 02 years of imprisonment (out of the full term of prison sentence imposed) which is the maximum that he could have been subjected to in terms of section 30(3) of the Juveniles Act as already adverted to above.

Law on bail pending appeal

[19] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3

December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong -v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
>
> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
> >
> > *(a) the likelihood of success in the appeal;*
> >
> > *(b) the likely time before the appeal hearing;*
> >
> > *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*
>
> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from*

taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that ***bail pending appeal*** *should only be granted where there are exceptional circumstances. In* ***Apisai Vunivayawa Tora and Others –v- R*** *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[20] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the*

Court accepts there is a real likelihood of success' otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[21] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[22] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[23] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[24] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[25] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... ..."*

[26] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"'The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[27] Therefore, the legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to satisfy the requirement of exceptional circumstances. However, an appellant can rely only on 'exceptional circumstances' including extremely adverse personal circumstances even when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[28] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[29] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[30] As already discussed, the appellant not only has a reasonable prospect of success in his appeal against sentence but also has a very high likelihood of success to the extent that it is almost inevitable that this court would intervene to quash the existing sentence and pass a legal sentence on the appellant in terms of section 23(3) of the Court of Appeal Act. Therefore, it could be said that the appellant has demonstrated exceptional circumstances to warrant bail pending appeal.

[31] In addition, state has submitted that the appellant would complete 02 years of imprisonment by 12 October 2020. Any period of sentence thereafter would be illegal according to section 30(3) of the Juveniles Act. This is clearly an exceptional circumstance to consider granting bail pending appeal in favour of the appellant. No court could turn a blind eye to a patent illegality and allow it to perpetuate.

[32] However, having examined the gravity of the offence the appellant was involved in and considering the fact that the learned Magistrate had thought that 09 years and 07 months of imprisonment would be the appropriate sentence for the appellant (if not for the fact that he was a young person at the time of offending), I am of the view that he should serve his sentence till 12 October 2020. Therefore, while I am inclined to grant leave to appeal and release the appellant on bail pending appeal, I think that the appellant should be released on such bail only on 13 October 2020.

[33] I have also considered the fact that the appellant seems to have not attended the Magistrates court whilst on bail and a bench warrant had been issued for his arrest on 09 September 2016 as his surety Ananaiasa Cakausese, being the father of the appellant, had not discharged his duty towards court in producing the appellant in court. These are maters relevant in deciding upon the conditions of bail.

Order

1. Leave to appeal against sentence is granted.
2. Bail pending appeal is granted subject to the following conditions.
3. The appellant shall reside at Jittu Estate Settlement, off Grantham Road, Samabula.
4. The appellant shall report to Samabula Police Station every Saturday between 6.00 a.m. and 6.00 p.m.
5. The appellant shall attend the Court of Appeal when noticed on a date and time assigned by the registry of the Court of Appeal.
6. The appellant shall provide in the persons of Ananaiasa Cakausese (father/date of birth - 04 June 1962) and Pita Naitiqa (cousin brother/ date of birth – 18 May 1979) both of Jittu Estate Settlement to stand separately and jointly as sureties.
7. Appellant shall be released on 13 October 2020 on bail pending appeal, provided condition 6 above is complied with.
8. Appellant shall not reoffend while on bail.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL