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

CRIMINAL APPEAL NO.AAU 054 of 2018
[Magistrates Court of Nausori Case No. 221 of 2013]

BETWEEN : **PENI MATAIRAVULA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **22 September 2020**

Date of Ruling : **23 September 2020**

RULING

[1] The appellant had been tried along with two others in the Magistrates court in Nausori under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1) of the Crimes Act, 2009 committed on 01 May, 2013 at Mokani, Bau Road, Nausori in the Central Division. The appellant had also been charged with resisting lawful arrest on 06 May 2013 but found not guilty and acquitted by the Magistrate. The charge of aggravated robbery against the appellant was as follows.

*'**FIRST COUNT***

Statement of Offence

***AGGRAVATED ROBBERY:** contrary to section 311 (1) of the Crimes Decree No.44 of 2009.*

Particulars of Offence

> ***SOSICENI TIKOMAIREWA, JOPE KOVEI AND PENI MATAIRAVULA*** *on the 1st day of May, 2013 at Mokani, Bau Road, Nausori in the Central Division, robbed an Alcatel mobile phone value at $200.00, Taxi Meter valued at $300.00 and $40.00 cash all to the total value of $540.00 from* ***MAHESH CHAND.***

[2] After trial, the learned Magistrate had found the appellant guilty as charged in her judgment dated 18 January 2018 and case had been remitted to the High Court for sentencing. The appellant was sentenced on 18 May 2018 by the High Court to an imprisonment of 08 years and 01 month with a non-parole period of 06 years and 01 month.

[3] The appellant in person had appealed against conviction and sentence within time on 07 June 2018. The appellant had tendered additional grounds of appeal and submissions from time to time and at the stage of leave to appeal hearing he relied on his amended grounds of appeal and submissions filed on 12 July 2019, 04 March 2020 and 21 July 2020. He had also filed an application for bail pending appeal on 18 June 2019. The State had tendered its written submissions on 24 June 2020 and 24 July 2020.

[4] In terms of section 21(1)(b)and (c) of the Court of Appeal Act, the appellant could appeal against conviction and 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.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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). 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 timely preferred against 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.*

Law on bail pending appeal.

[6] 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.*
>
> *[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:

> *"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 Vuniyayawa 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."*

[7] 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)

[8] 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.'*

[9] 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).'

[10] 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'*

[11] 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...."*

[12] 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 ... ."*

[13] ***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."*

[14] Therefore, the legal position appears to be 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. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] 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.

[16] 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'.

Grounds of appeal

[17] The grounds of appeal urged by the appellant are as follows.

> ***Against conviction***
>
> *(1) 'THAT the learned magistrate erred in law and in fact in convicting the appellant to the, when there was no reliable evidence to the charge of aggravated robbery.*
>
> *(2) THAT the Learned magistrate erred in law and in fact in not fairly considering the appellant's alibi defence witness.*
>
> *(3) THAT the learned magistrate erred in law and in fact in not properly weighing the complainant's entire evidence and the very poor quality of identification process made out in the night against the Appellant.*
>
> *(4) THAT the learned magistrate erred in law and in fact in not properly weighing that the Appellant had stated in his caution interview that the complainant had already seen the appellant before making out the identification parade at the police station.*
>
> *(5) That the Learned Magistrate contrary to the rules set out by the Court of Appeal in Raymond Johnson –v- State; AAU 90/2010 and Joseva Vakanawakoro –v- State; AAU 14/2011 failed to consider in its entirely all the specific weaknesses of the sole prosecution identification evidence as per R.V. Turnbull (1977) Guidelines.*
>
> *(6) That the learned trial magistrate erred is not considering in distinct the evidence of alibi, when she was required to first consider whether the alibi put*

forward was reasonably true before considering whether the state rebutted such evidence particularly where the defence evidence relied wholly on alibi R –V- Amyouni NSW CC18 (1988) R.V. Mohammed (2011) 112 SASR 17 (2011).

(7) That the learned magistrate erred in not bearing in mind the liberato direction in her final analysis of the evidence particularly given the significant conflict between the evidence of defence and prosecution witness as per – guidelines established in Liberato –v- The Queen (1985) 159 CLR 507 61, which was approved R –V- Chen (2002) 130 A Crim and Salmon –v- The Queen (2001) Wasca 270.

(8) That the proper identification code of provision procedure was not properly and fairly followed and/or applied by the police thus causing the appellant's conviction to be unsafe and unsatisfactory in all circumstances.

Against sentence.

(9) THAT the learned magistrate and the learned sentencing judge made an error of law by the disparity in sentence whereby the two accused person were sentenced to a term of 18 months and the Appellant had to serve 8 years, since they were charged on the same set of facts and evidence by the police.'

[18] The brief summary of evidence as narrated in the High Court sentencing order is as follows.

'3. According to the evidence led before the Learned Magistrate you with two others instructed the second prosecution witness ("PW2") who was the driver of the taxi the three of you were travelling to drive to a relatively isolated area and one of you held a 'beer glass' underneath his throat. Then the one sitting in the front passenger seat took the said witness' mobile phone and his money. Thereafter, PW2 managed to run away from the three of you. This offence was committed in the night. PW2 had said in his evidence that he feared for his life given the manner and the circumstances under which he was threatened by the three of you. The taxi meter had been later recovered from one of the aforementioned accused who had pleaded guilty.

4. The evidence in this case does not disclose how much money was stolen and the value of the phone that was stolen. The first prosecution witness ("PW1") who was the owner of the aforementioned taxi PW2 drove had testified that the meter that was stolen cost him $300. Even though the value of the property stolen does not form part of an element of the offence, it is relevant for the purpose of sentencing. This is something most prosecutors often overlook when they lead evidence in cases involving theft offences.'

01st, 03rd and 05th grounds of appeal

[19] The above three grounds could be conveniently considered together. They all seek to challenge the identification of the appellant by the complainant (PW2). The learned Magistrate had fully described the complainant taxi driver's evidence in paragraph 9 of the judgment where it is stated that the complainant had seen the person, whom he later identified as the appellant at the identification parade, when he waived to stop the taxi with the lights which was bright and was sufficient to recognise him near Courts. Having got into the taxi the appellant had sat on the front seat next to the complainant who was the driver of the vehicle. Two others also had got into the vehicle and sat on the back seat. On their way to Mokani the complainant had engaged in a conversation with them and the appellant was wearing a hat but not glasses and therefore his face was clear to him. There were lights from oncoming vehicles as well. At Mokani one of the passengers seated behind had kept a beer glass underneath the appellant's neck and the appellant had robbed his mobile phone worth $200 and $30 in cash from the pocket. Then he had got off the taxi and stood beside the complainant. The perpetrators had been discussing what to do with the complainant and this had taken about 10-15 minutes and according to the complainant the appellant had been in his sight for 15-20 minutes altogether during the whole episode. In the meantime, the complainant had managed to escape and run away to Mokani settlement while the robbers had taken his vehicle away to a place called Ovea junction where they had removed the taxi meter worth about $300.

[20] The complainant had been requested to participate at an identification parade on 06 May 2013, 05 days after the incident where he had identified the appellant whom he had again identified in the dock at the trial.

[21] Having set out the prosecution evidence relating to the identification of the appellant by the complainant in great detail in paragraph 9 of the judgment, the learned Magistrate had correctly identified that the state's case against the appellant was dependent on the complainant's identification of the appellant at the scene of the crime and then at the identification parade. Then, she had directed herself on Turnbull guidelines in paragraph 16 and posed herself the question whether PW2 had properly identified the

appellant and in response enumerated 04 distinct circumstances in paragraph 19 arising from PW2's evidence why she accepted PW2's identification of the appellant at the crime scene and in paragraph 26 accepted the complainant's evidence as truthful.

[22] The learned Magistrate had also turned her attention to the evidence relating to the identification parade. Firstly, the Magistrate had considered PW1's evidence in paragraph 9 in relation to the ID parade where the appellant had been once again identified by PW2. Then, the Magistrate had considered PW4 ASP Rajesh Maharaj's evidence in paragraph 11 of the judgment on conducting the ID parade. PW4, an officer of 28 years of experience with the police force had been entrusted with the task of organising the identification parade (as he was not involved in the investigation) and he had described all the steps taken to summon 09 persons of similar appearance to the appellant in terms of height, built and complexion and stated that the appellant had been given the right to object to any one of them and to stand anywhere he wanted in the parade. According to PW4 the complainant had been thereafter escorted to the parade held in the Police Bure during the day time where the complainant had identified the appellant. According to the witness the appellant had not raised any objection to the people in the parade, their looks or the manner in which it was held.

[23] The Magistrate had also considered the evidence of PW5 DC 3737 Vishant who was the investigating officer in paragraph 12 of the judgment, in relation to the ID parade. He had confirmed that the complainant was at the former crime office away from the cell where the appellant had been locked up. He had escorted both the appellant and the complainant separately to the ID parade and left the Police Bure while the parade was in progress. After the parade was over PW4 had informed him that the complainant had positively identified the appellant. He had confirmed that the complainant did not see the appellant in the cell or in handcuffs but the appellant after the parade had complained in his cautioned interview about unfairness in the ID parade.

[24] The Magistrate in paragraph 13 of the judgment had fully considered the appellant's position as well. He had stated that while he was being taken to the Bure for the ID parade the complainant could see him from the side of the post office where he had seen PW5 also. He had also taken up the position that he complained of unfairness of

the ID parade to police officers as the others standing there were young people and slim built and that he was asked where to stand at the parade. However, he had admitted that he willingly participated in the ID parade. According to him, the complainant had been coached to implicate him as he was well known.

[25] In this background the Magistrate had given her mind to the validity of the ID parade from paragraphs 22- 25 and considered the legal principles set down in **Lesumailau & Others v State** [2001] 1 FLR 446 and **R. Jeffries** [1949] NZLR 595 in ensuring fairness in holding an ID parade and concluded that the ID parade had been held properly and the appellant had been treated fairly.

[26] The appellant has not demonstrated any basis as to why the conclusion of the Magistrate as to his identification by the complainant at the crime scene and at the ID parade should be disturbed. The trial Magistrate was in the best position to evaluate the evidence in terms of its credibility and weight and on the totality of evidence available it was open to the Magistrate to have come to the conclusions she came.

[27] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd and 06th grounds of appeal

[28] The appellant complains that his defence of *alibi* had not been properly considered by the Learned Magistrate and that she had not considered whether it was reasonably true before considering whether the state had rebutted it.

[29] I find from the judgment that the Magistrate had given her mind at length to the appellant's defence in paragraph 13 and the evidence of his *alibi* witness Peni Veisagani, the cousin of the appellant in paragraph 14 and then from paragraphs 27-43 of the judgment and concluded that she did not find that witness to be reliable.

[30] The appellant's position had been that he was at home on the day of the incident at Cautata drinking grog with Peni Veisagani from 5.00 p.m. to 9.00/10.00 p.m. According to Peni Veisagani the appellant had come to his house and had grog from about 6.00 to

9.00 p.m. Then the appellant had left his home. It looks from paragraphs 13 and 14 of the judgment that both the appellant and his cousin Peni Veisagani had spoken to only two of them having a grog session. However, as pointed out by the Magistrate the appellant from time to time had submitted *alibi* notices containing several other names who, of course were not called to give evidence. In addition the Magistrate had remarked that Peni Veisagani who had admitted that he would do anything for the appellant had not offered to inform the police that the appellant was with him in the night of the day of the incident.

[31] As a result, the Magistrate had not believed the *alibi* defence of the appellant. Therefore, the typical directions on ***alibi*** defence as articulated in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020) were not applicable in this situation and it has caused no prejudice to the appellant. The Magistrate had refereed to **Delaibatiki v State** [2011] FJCA 44; AAU0018.2007 (16 September 2011) where it had been held

> *'[10] In his written and oral submissions to the court the first appellant appears to be of the perception that once an alibi is raised, it is incumbent on the State to disprove it, and if they do not do so, then the trial Judge should direct the assessors that it is alibi evidence on which they can rely.*
>
> *[11] The reason for Magistrates giving alibi warnings to accused persons and requiring them to file notice of alibi in advance is to give the prosecution time before trial to take whatever steps they wish to check the alibi. There is certainly no legal compulsion on the prosecution to rebut any alibi raised. When the alibi is a very general one, such as it is here ("I was at the village") it will not usually be possible to adduce evidence in rebuttal. It becomes yet another piece of evidence for the assessors to make a finding of credibility.*

[32] There is no reasonable prospect of success in this ground of appeal.

04th ground of appeal

[33] The appellant complains that the Magistrate had not properly weighed the fact that he had stated in his cautioned interview that the complainant had already seen him before the ID parade.

[34] It is not possible to probe this matter further at this stage without looking at the cautioned interview which does not appear to have been submitted by the prosecution at the trial. The appellant too had not submitted it as part of his case. It appears from the judgment that the cautioned interview had commenced prior to the ID parade which had been suspended for the parade and resumed after the parade was over. DC Vishant's evidence had been that the appellant had complained of unfairness of the ID parade in the cautioned interview only after the ID parade was held.

[35] There is no reasonable prospect of success in this ground of appeal.

07th ground of appeal

[36] The appellant argues that the Magistrate had erred in not being guided by ***Liberato*** principles in evaluating the evidence of the prosecution and defence. This direction is usually given in cases turning on the conflicting evidence of a prosecution witness and a defence witness. The direction requires that*, ". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt".*

[37] In **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 High Court of Australia held:

> *'11. When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue....'*

[38] While there is no doubt in the principle expressed in ***Liberato*** it does not arise in this case as this was not a trial with a jury and in any event the Magistrate had no doubt that

the prosecution had proved its case beyond reasonable doubt. In **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the High Court of Australia, in a majority decision, dismissed an appeal from the Court of Appeal of the Supreme Court of Queensland (*R v De Silva* [2018] QCA 274 decided 16 October 2018). The High Court appeal was concerned with whether the trial judge (Judge Farr of the District Court of Queensland) should have given the jury a direction of the type discussed in the case *Liberato v The Queen* (1985) 159 CLR 507 (a "**Liberato direction**")

[39] The Court of Appeal of the Supreme Court of Queensland (Fraser, Gotterson and Morrison JJA) unanimously dismissed the appellant's appeal against conviction holding that there was no need for Judge Farr to have given a Liberato direction, since there was no oral testimony of the appellant's to directly conflict with the complainant's oral testimony. The position taken by the majority on the High Court was that a "Liberato direction" is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* As a result, a "Liberato direction" need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way, regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview.

[40] The High Court majority dismissed the appeal, because it found that a "Liberato direction" was not needed in the circumstances of the case in question as the trial judge (Judge Farr) had given repeated and correct directions as to the onus and standard of proof. Further, there was nothing in the summing-up to suggest that the jury might have been left with the impression that its verdict turned on a choice between the complainant's evidence and the appellant's account in the interview. Thus the trial did not miscarry by reason of the omission of a "Liberato direction".

[41] There is no reasonable prospect of success in this ground of appeal too.

08th ground of appeal

[42] The gist of this complaint is once again the manner in which the ID parade had been held. As already discussed the learned Magistrate had given her mind to this aspect and held that the appellant had been treated fairly during the ID parade.

09th ground of appeal (sentence)

[43] The appellant complains of disparity of sentence on the basis that each of his co-accused had been given 18 months imprisonment whereas the appellant had been delivered a sentence of 08 years. The co-accused had pleaded guilty and sentenced by the Magistrate whereas the appellant had been sentenced by the High Court.

[44] The High Court judge in the sentencing order had stated as follows.

> *'2. The other two accused who were jointly charged with you had pleaded guilty in the magistrate court but before a different magistrate and each accused had been sentenced on 12/12/13 to an imprisonment term of 4 years. It is pertinent to note that the Learned Magistrate had ordered 18 months of that sentence to be served forthwith and the balance period to be suspended for a period of 03 years. It is unclear as to how the Learned Magistrate assumed jurisdiction to suspend a sentence of 4 years when section 26(2) of the Sentencing and Penalties Act provides that the magistrate court may only make an order suspending a sentence if the period of imprisonment imposed does not exceed 02 years.*
>
> *'7. Your counsel had submitted that this court should consider the sentences imposed on your co-accused when I determine your sentence. <u>In my view, the final sentences imposed on each co-accused are lenient and do not conform to the current law. However, I also note that they were first offenders when they were sentenced and you are not.'</u>*

[45] Thus, the co-accused had been sentenced to 04 years of imprisonment each but except 18 months the rest of the period had been suspended which, of course was illegal in terms of section 26(2) of the Sentencing and Penalties Act as pointed out by the High Court judge. However, for reasons unknown the state had not appealed against the illegality of the said sentences of the co-accused.

[46] The learned High Court judge had itemised in paragraphs 8 and 9 the appellant's numerous previous convictions and stated as follows.

> *10. Your previous conviction report therefore bears testimony that you have formed a habit of committing the offence of robbery.*
>
> *11. Whereas you are sentenced for the offence of aggravated robbery in this case which is an offence of the nature described under section 10(c) of the Sentencing and Penalties Act; and having regard to your previous convictions for the offence of robbery committed inside Fiji, I am satisfied that you constitute a threat to the community. Therefore, by virtue of the provisions of section 11 of the Sentencing and Penalties Act, I hereby determine that you, Peni Matairavula is a habitual offender for the purposes of Part III of the said Act.*
>
> *12. Accordingly, in determining the length of your sentence in this case, I shall regard the protection of the community from you as the principal purpose for which the sentence is imposed in terms of section 12 of the Sentencing and Penalties Act and I am mindful that in order to achieve that purpose I can impose a sentence longer than which is proportionate to the gravity of the offence by virtue of section 12(b) of the said Act.*
>
> *13. The aforementioned provisions of section 12(b) of the Sentencing and Penalties Act justifies selecting of a higher starting point and accordingly, I would select 10 years imprisonment as the starting point of your sentence.'*

[47] The higher starting point that the High Court judge had mentioned appears to be based on the sentencing tariff selected by the learned judge in paragraph 5.

> *'5. The maximum sentence for the offence of aggravated robbery contrary to section 311(1) of the Crimes Act is 20 years imprisonment. The tariff for this offence is an imprisonment term between 8 to 16 years. [**Wallace Wise v The State**, Criminal Appeal No. CAV 0004 of 2015; (24 April 2015)]'*

[48] The tariff in ***Wise*** was set 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.

[49] The factual background of this case does not fit into the kind of situation court was confronted with in ***Wise.*** Neither is this a case of simple street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as 'street

mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present.

[50] The decision in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

> *'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*
>
> *[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*
>
> *[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*
>
> *[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*
>
> > *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*
>
> *[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was):*
>
> > *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[51] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea…'

[52] Therefore, I held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'

[53] However, by taking a starting point of 10 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise*****,** the learned High Court judge has acted upon a wrong principle. Instead the learned sentencing judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers.

[54] The Court of Appeal held in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) that

'19……When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence.'

[55] Therefore, I have no doubt that the appellant should have been dealt with in accordance with the sentencing tariff for offences of aggravated robbery against providers of services of public nature.

[56] It also appears to be an error that having taken 10 years as the starting point based on ***Wise*** the sentencing judge had taken the fact that the offences had been committed against a public service provider to enhance the sentence by 03 more years.

[57] However, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warrant a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender) and if the starting point is taken at the lower end then a substantial increase in the sentence for all aggravating features (offending and offender). In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any. [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[58] Nevertheless, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

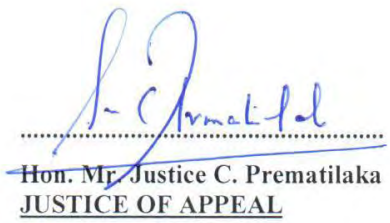
[59] However, the error of principle in applying the wrong tariff or departure from the applicable tariff without assigning any reasons therefor by the sentencing judge requires intervention by the full court that could then decide either to affirm the existing sentence or what the appropriate sentence should be.

[60] However, none of the grounds of appeal has a 'very high likelihood of success' to consider bail pending appeal.

[61] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.
2. Bail pending appeal is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL