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

CRIMINAL APPEAL NO.AAU 084 of 2018
[High Court Criminal Case No. HAC 172 of 2015]

BETWEEN : **VERETI WAQA (*alias* Vereti Vananalagi, Vereti Isireli and Vereti Isireli Vananalagi)**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 November 2020**

Date of Ruling : **06 November 2020**

RULING

[1] The appellant had been charged together with the two appellants in AAU 086 of 2018 and AAU 077 of 2018 and another in the High Court of Lautoka for having committed aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on the 11 October 2015 at Sigatoka in the Western Division. The charge was as follows.

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

KELEPI SALAUCA , VERETI WAQA & TUI LESI BULA in the company of another *on the 11th October, 2015 at Sigatoka in the Western Division robbed* ***KAVITESH KIRIT PRASAD*** *of the following items: Nissan Navara (Registration HA 448) valued at $60,000.00, $300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNPF/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at $10, 000.00, Bangles valued at $6,000.00, Hair set valued at $9,000.00, Bracelet valued at $2,000.00, Ear ring valued at $3,000.00, Bedstone Necklace valued at $900.00, Wedding Ring (Female) valued at $2,000.00, Wedding Ring (Male) valued at $1,200.00, Gold Chain (22 carat) valued at $1,200.00, Wrist Watch (Fossil-Citizen) valued at $800.00, Ladies Watch (Pulsar) valued at $300.00, Black Label (x 15 bottles) valued at $1,350.00, Bombay Sapphire (x 5 bottles) valued at $400.00, Galaxy Samsung S5(x2) valued at $2,400.00, ITB Hardware (x2) valued at $1,000.00, 1 Flash Drive valued at $500.00, 1 Toshiba laptop valued at $1,800.00 and assorted branded BLK Clothing valued at $80.00 all to the* ***Total Value of Approximately $93, 930.00.***

[2] After full trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The learned High Court judge had agreed with the unanimous opinion of the assessors and convicted the appellant of the same count on 15 June 2018 and sentenced him on 10 July 2018 to 13 years 9 months and 27 days imprisonment with a non-parole period of 12 years (his sentence to commence from the day of his arrest).

[3] The hearing of the appellant's application for leave to appeal took place on 18 March 2020 and leave to appeal was granted by the ruling delivered on 20 April 2020.

[4] The Legal Aid Commission on 28 October 2020 has filed a notice of motion seeking bail pending appeal in terms of section 33(2), 35(1)(d) of the Court of Appeal Act and section 17(3) of the Bail Act 2002, an affidavit and written submissions. Two supplementary affidavits of the appellant had been filed on 04 November 2020. The respondent had tendered an affidavit dated 05 November 2020 in reply.

[5] The following grounds of appeal against conviction were considered at the leave to appeal hearing as the appellant had already filed an application to abandon his sentence appeal in Form 3 dated 18 March 2020.

> '1. ***THAT*** *the Learned Trial Judge erred in law when he failed to properly direct the Assessors in the Summing Up on the principles regarding Trial in Absentia and thereby breached section 14(2)(h)(i) of the Constitution.*
>
> 2. ***THAT*** *the Learned Trial Judge erred in law when he failed to properly warn himself in the Judgment on the principles regarding Trial in Absentia and thereby breached Section 14(2)(h)(i) of the Constitution.*
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> 3. ***THAT*** *the Learned Trial Judge erred in law and fact when he failed to properly investigate the whereabouts of the Appellant during the trial and sentencing, especially since the Appellant had been in remand for certain periods in 2017 and 2018.*
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> 4. ***THAT*** *the Learned Trial Judge erred in law and in fact, when he proceeded with the hearing of the matter pursuant to section 14(2)(h)(i) of the Constitution whereby the requirements of the same was not satisfied, whereas the court had failed to ascertain beyond reasonable doubt that the Appellant was aware of the date of trial but had voluntarily chosen not to attend.*
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> 5. ***THAT*** *the Learned Trial Judge erred in law and in fact that the Appellant did not evade the Court on purpose since the Appellant was remanded by the Suva Magistrates Courts in August 2017, for criminal cases CF 1291/17 and CF 1292/17 and it was beyond the appellants control to attend the case.*
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> 6. ***THAT*** *the Learned Trial Judge erred in law and in fact, when he failed to consider the second limb of section 14(2) (h) (i) of the Constitution as he failed to satisfy the requirement of a summon or similar process to be served requiring his attendance where by the similar process would include a bench warrant port to be provided to court where by the appellant was arrested just days before the sentence was passed.*
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> 7. ***THAT*** *the Learned Trial Judge erred in law and in fact when he failed to consider the provision of section 172 of the Criminal Procedure Act 2009.*

[6] At the leave to appeal hearing, the gist of the appellant's complaint against conviction related to the trial against him in absentia. His position was that he had no intention to evade the trial but attended all mention dates whilst on bail since 23 December 2015.

He had pleaded not guilty to the information on 26 November 2015. According to him the trial had been fixed to take place originally from 31 July 2017 to 04 August 2017 but had finally been conducted from 31 May to 12 June 2018.

[7] He submitted that he was in remand in Suva Remand Centre in respect of some other cases [Nasinu Magistrates Court (2) Case No. CF 900/17 and Suva Magistrates Court (4) Cases No.CF1291/17 and CF1292/17] during the period of the trial in the High Court. He claims to have missed appearances in the High Court from 19 September 2017 due to his remand custody commencing from early September. He stated that he was in remand in respect of case No. HAC 289 of 2018 of Suva High Court when conviction and sentence were recorded against him. He further submitted that he had received no summons or any other process of court for his appearance in the High Court regarding the current case.

[8] Ms. Kiran Lata Singh, the Administrator Litigation and Registry of the ODPP in her affidavit dated 05 November 2020 had stated that the appellant had been present on bail in the High Court in respect of HAC 172 of 2015 on 06/10/2016, 28/03/2017, 27/04/2017, 30 May 2017 and 17 August 2017. From 19/09/2017 he had been absent and a bench warrant had been issued for his arrest which had remained unexecuted until the trial was concluded. The trial in HAC 172 of 2015 had been fixed to be taken up in absentia against the appellant on 04 May 2018 and the trial had been conducted in his absence from 31 May 2018 to 10 July 2018. Ms. Kiran Lata Singh had confirmed that Nasinu Magistrates Court had been informed on 23 May 2018 in cases No. CF1291/17 and CF1292/17 that the accused in the two cases by the names of Vereti Vananalagi and Vereti Isireli respectively was in remand custody and production orders had been issued from time to time and she had further confirmed that the accused was in remand custody even by 18 July 2018.

[9] The sentencing order in HAC 172 shows that the trial had commenced in the absence of the appellant on 31 May 2018 and concluded with the sentence on 10 July 2018.

[10] Therefore, it appears that if Vereti Vananalagi and Vereti Isireli, the accused in cases No. CF1291/17 and CF1292/17 in Nasinu Magistrates Court is one and the same person by the name Vereti Waqa, the appellant, and then he had been in remand

custody during the entire duration of the trial in Lautoka High Court HAC 172/2015. He has stated in his supplementary affidavit dated 04 November 2020 that he was the accused in cases No. CF1291/17 and CF1292/17 in Nasinu Magistrates Court and is known by the names Vereti Vananalagi (CF1291/17) and Vereti Isireli (CF1292/17) and Vereti Isireli Vananalagi (CF900/17 in Nasinu Magistrates Court).

[11] The letters written to the Chief Registrar on 27 April 2018 (received on 07 May 2018) and the DPP on 25 May 2018 (received on 28 May 2018) by the appellant shows that he had informed both authorities that he was in remand custody in respect of cases No. CF1291/17, CF1292/17 and CF 900/17 in Nasinu Magistrates Court and wanted assistance for him to be present for trial in Lautoka High Court HAC 172/2015. However, there is nothing to indicate that either the DPP or the Chief Registrar had taken any action regarding the appellant's request. If appropriate steps were taken on those two letters it would still have been possible to ensure the appellant's presence at the trial which commenced only on 31 May 2018.

[12] Appellant now claims to have been acquitted of cases No. CF1291/17 and CF1292/17 while CF 900/17 is still continuing in the Nasinu Magistrates Court where the appellant's name is given as Vereti Isireli Vananalagi. He is supposed to be having two pending cases in the High Court and Nasinu Magistrates Court (case numbers not disclosed)

[13] Therefore, there is sufficient material to be satisfied for the purpose of the appellant's bail pending application that he had been in remand during the entire duration of the trial in his absence in Lautoka High Court HAC 172/2015.

[14] However, I cannot fully understand why the appellant had maintained four different names in four different cases. Perhaps, it may or may not have been a deliberate tactic to suppress his true identity, be illusive and mislead the law enforcement agencies, prosecutors and courts of law. In any event, all the parties and particularly the DPP are advised to record all names of the appellant's under known cases in the database CASES and in other supposedly pending cases in the High Court and Nasinu Magistrates Court by making suitable amendments to reflect all four names. It is clear from the names of proposed sureties (appellant's brother and sister) that the surname

of his father and the siblings of his family is 'Waqa' and therefore, the appellant is hereby warned not to resort to this dubious practice of using different names other than Vereti Waqa in his encounters with public authorities and law enforcement agencies and courts would take serious note of it if he does so again in the future.

[15] The appellant argued that his rights under section 14(2)(h)(i) of the Constitution had been violated as a result of the trail against him in absentia. Section 14(2)(h)(i) is as follows.

> *'Every person charged with an offence has the right to be present when being tried, unless (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or (ii)……'*

[16] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

[17] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trail while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.

[18] The common law sheds more light on this issue. It appears that even when an accused waives his right to be present the court is not necessarily bound by law to proceed with the trial without the accused. Discretion is vested in the trial judge to decide whether the accused should be tried in his absence or not. In **R v Abrahams** 21 VLR 343 where the appellants were present at the commencement of the trial but were absent at a later stage due to illness, Williams J said, at p 346:

> *'The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence.'*

[19] **Regina v Jones** (On Appeal From The Court of Appeal (Criminal Division) [2002] UKHL 5 Lord Hutton said

> *'23. I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.*
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> *24. The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.'*

[20] It is not ascertainable at this stage without the full record whether the learned trial judge had been satisfied with the fulfillment of the conditions set out in section 14(2)(h)(i) of the Constitution and thereafter exercised his discretion in proceeding with the trial in the absence of the appellant.

[21] Only the following paragraphs in the summing-up deal with the trial without the appellant and nothing more can be found in the judgment either to find an answer to the above questions.

'6. You will notice that the information has three accused persons mentioned, however, only accused one and accused three are present in court. The second accused Mr. Vereti Waqa is not present in court. The law provides for an accused to be tried in his absence known as trial in absentia. Although the second accused was not in court throughout the duration of the trial he is entitled to all the rights of an accused who is present in court that is a fair trial

'174. The second accused was absent from the proceedings so he was taken to have exercised his right to remain silent.'

Law on bail pending appeal.

[22] 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.*
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> *[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:*
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> *(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."*

[23] 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)

[24] 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.'*

[25] 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).'

[26] 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'*

[27] 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..."

[28] 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 ... ... "*

[29] ***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."*

[30] 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.

[31] 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.

[32] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, 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'.

[33] Therefore, if the appellant's complaint can be sustained at a hearing before the full court, there is a reasonable prospect of his succeeding in his appeal and being granted an opportunity to face a new trial. The respondent too does not object to leave to appeal being granted against conviction. However, if the appellant's position is not borne out by the copy record, he will have to advise himself as to place material before the full court to substantiate his contention. The respondent is advised to verify the appellant's claims of having been in remand before and after the trial and not having had notice of the trial in order to assist the full court at the hearing of the appeal.

[34] Thus, leave to appeal has already been granted to the appellant on the ground whether a miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia and it now appears that there is a very high likelihood of success in his appeal. Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail on the conditions given in the order. However, this order would apply only to this appeal and not to any other pending cases against the appellant.

Order

1. Bail pending appeal is granted subject to the following conditions.

    (i) The appellant shall reside at 137 Makosoi Estate, Pacific harbour, Deuba.

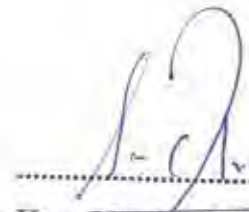
    (ii) The appellant shall report to Navua Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

(iii) The appellant shall attend the Court of Appeal and all other courts when noticed on a date and time assigned by the registry of the Court of Appeal and registries of other courts.

(iv) The appellant shall provide in the persons of Joji Waqa (brother/date of birth– 22 August 1991; Driving Licence No. 911207; Phone: 8425021) of 137 Makosoi Estate, Pacific Harbour, Deuba and Eleni Marama Waqa (sister/ date of birth – 28 May 1985 & Passport No.1013581; Phone: 7222875) of Salesi Road, Namadi Heights to stand separately and jointly as sureties.

(v) Appellant shall be released on bail pending appeal upon condition (iv) above being complied with, subject to existing remand orders in other pending cases.

(vi) Appellant shall not reoffend while on bail.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL