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

CRIMINAL APPEAL NO.AAU 110 of 2016
[In the Magistrates Court at Suva Case No. 639 of 2016]

BETWEEN	**:**	**AKEAI RANUKA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**08 October 2021**
Date of Ruling	**:**	**08 October 2021**

RULING

[1] The appellant had been arraigned in the Magistrates' court at Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with another on 16 April 2016 regarding a white Alcatel Mobile Phone valued at $144, the property of Prashant Lal.

[2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant on his own plea of guilty. He had been sentenced on 05 August 2016 to 07 years and 08 months of imprisonments with a non-parole period of 05 years.

[3] The appellant being dissatisfied with the sentence had filed a timely notice of leave to appeal against sentence. This Court considered his sentence appeal and granted leave to appeal against sentence on 03 June 2020 on the 06th ground of appeal:

(6) *That the appellant's nature of offending cannot support the charge and sentence since the nature of offending falls into the category of 'street mugging' therefore the sentence is harsh and excessive.*

[4] The summary of facts revels that when the complainant was walking along Fugala Street and Moala street junction two youths who were seen in a gang of drunken youths had approached him. The two had grabbed his hands from behind while the others had searched his pockets. One of them who had threatened the complainant to keep quite or face being punched had stolen the complainant's Alcatel mobile phone valued at $139.00. The complainant had reported the matter to the police quickly and when the police took the complainant around looking for the suspects, he had seen the appellant at a bus stop and upon his arrest the stolen mobile phone from the complainant had been recovered from him.

[5] The Court observed in the leave to appeal ruling as follows:

06th ground of appeal

[7] I shall deal with the last ground of appeal first. His argument is that the nature of his criminal act falls into the category of aggravated robberies commonly known as street mugging but the learned Magistrate had sentenced him according to the tariff set for aggravated robbery in the form of home invasion in the night.

*[8] There is merit in the appellant's contention and therefore the learned trial judge could be said to have acted on a wrong principle in sentencing the appellant. The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 08 years as the starting point. 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.*

*[9] From the impugned judgment and the sentencing order of the learned Magistrate I cannot see how the factual background of this case fits into a similar scenario the court was dealing with in **Wise.** This is a case of street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. One of them had grabbed the complainant from the back and held*

his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of Appeal remarked:

'[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in ***Basa v The State*** *Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*

[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** *(the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:*

- ***The sentencing bracket was 18 months or 5 years****, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.*

- *An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.*

- *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.*

[10] However, as opposed to ***Ragaugau*** *a gang of drunken youth had been involved in this case and the appellant had been one of them who had stolen the mobile phone making it a more serious form of street mugging.*

[11] ***Tawake v State*** *[2019] FJCA 182; AAU0013 of 2017 (3 October 2019) and* ***Qalivere v State*** *[2020] FJCA 1; AAU71.2017 (27 February 2020) are two decisions that have reiterated* ***Ragaugau*** *in the recent past but still imposed appropriate custodian sentences in the end.*

[6] The appellant had filed written submissions for the full court hearing (09 July 2020) and the respondent had indicated on 17 February 2021 that it would rely on the submissions filed at the leave to appeal stage. However, the substantive appeal is yet to be heard by the full court. In the meantime the appellant had filed an application for bail pending appeal (05 March 2021). The state in its submissions filed on 06 October 2021 had conceded that the appellant's application for bail pending appeal could be favourably considered.

Law on bail pending appeal

[7] 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.*
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> *[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."*

[8] 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).

[9] 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.'*

[10] 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).*
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> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[11] 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'.*

[12] 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...."*

[13] 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 ... ."*

[14] ***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."

[15] 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 namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. After that and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act.

[16] 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 direct relevance, practical purpose or result.

[17] 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 may 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'.

[18] The appellant had already satisfied this court that he deserved to be granted leave to appeal against sentence and it now appears that there is not only a reasonable prospect of success but also a very high likelihood of success in his appeal against sentence.

[19] I shall now consider the second and third limbs of section 17(3) of the Bail Act namely:

> '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard'* together.

[20] The appellant has already served over 05 years and 02 months in imprisonment beyond the non-parole period of 05 years. Given that the sentencing tariff for *'street mugging'* is between 18 months and 05 years and that the appellant is not likely to be visited with a sentence above the tariff due to the specific facts and circumstances as enumerated above, if he is not enlarged on bail pending appeal at this stage, he is likely to serve more than the whole of the sentence the full court is likely to impose on him after hearing his appeal which could be regarded as an exceptional circumstance. The appellant has filed a timely appeal and the considerable time taken since then to consider the question of leave to appeal and the time that would be taken to hear the final appeal by the full court in the future, are matters beyond his control. Therefore, it is in the interest of justice that section 17(3) (b) and (c) are also considered in favour of the appellant in this case.

[21] 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.

Orders

1. Bail pending appeal is granted to the appellant, **AKEAI RANUKA** subject to the following conditions:

    (i) The appellant shall reside at Vunivaivai Village, Tailevu with his mother Salanieta Raico Ralagi.

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

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

    (iv) The appellant shall provide in the person of his mother Salanieta Raico Ralagi at Vunivaivai Village, Tailevu to stand as surety.

    (v) The surety shall provide sufficient and acceptable proof of her identity, place of residence and relationship to the appellant.

    (vi) The appellant shall be released on bail pending appeal upon condition (iv) and (v) above being fulfilled.

    (vi) The appellant shall not reoffend while on bail.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL