

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

**CRIMINAL APPEAL NO.AAU 96 of 2016**  
**[In the Magistrates Court at Nasinu Case No. 1456 of 2014]**  
**[HAC 316 of 2014]**

**BETWEEN** : **MANOA TABUALUMI**

***Appellant***

**AND** : **STATE**

***Respondent***

**Coram** : **Prematilaka, ARJA**

**Counsel** : **Mr. N. Tuifagalele for the Appellant**  
: **Ms. P. Madanavosa for the Respondent**

**Date of Hearing** : **19 October 2021**

**Date of Ruling** : **20 October 2021**

**RULING**

[1] The appellant had been arraigned in the Magistrates' court at Nasinu 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 15 November 2014. The charge read as follows:

***Statement of Offence (a)***

***AGGRAVATED ROBBERY:*** *Contrary to Section 311 (1)(a) of the Crimes Act No. 44 of 2009.*

***Particulars of Offence (b)***

***MANOA TABUALUMI AND TANIELA OONIMACAWA,*** *on the 15<sup>th</sup> day of November 2014 at Kukukawa Road, Laqere, Nasinu in the Central Division,*

*stole \$200.00 cash, the property of **ATESH PRASAD** and immediately before stealing, they used force on the said **ATESH PRASAD**.*

[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 06 May 2016 to 08 year's imprisonments with a non-parole period of 05 years.

[3] The appellant being dissatisfied with the sentence had filed what this court had considered a timely notice of leave against sentence. The then Hon. President of this court considered his sentence appeal and granted leave to appeal against sentence on 22 February 2019.

*(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 certified appeal records had been collected by both parties and the appellant's written submission for the full court hearing had been tendered (23 February 2021) and the respondent's written submissions filed on 26 March 2021 appears to cover both the main appeal and bail pending appeal application. The substantive appeal is yet to be heard by the full court. The appellant had filed an application for bail pending appeal (05 March 2021). The state had tendered its submissions on 26 March 2021 and resisted the bail pending appeal application. However, at the hearing the State conceded that bail pending appeal could be favourably considered by this court.

[5] The summary of facts had revealed the following:

*'On 15 November 2014, at about 3.50am, the complainant picked both accused and two other unknown itaukei men from Laqere and conveyed them to Nakasi, Tovata and back to Laqere. When the complainant dropped them back to Laqere, three men got off the taxi while one of the men from the back seat grabbed the complainant's neck from behind. The accused persons stole his wallet \$100 cash from the complainant pockets. In the process, the complainant was punch several times his face, head and back. The accused persons also stole another \$100 from a box in the complainant's taxi. Both accused persons then fled the scene. The complainant sought assistance from Laqere police checkpoint.*

*Accused 1 was interviewed under caution on 22 November 2014 at Nasinu Police Station. Under caution, the first accused said he drank alcohol and was drunk. He was with the second accused and two others. He sat on the front passenger seat of the complainant's taxi while the second accused and two others sat at the back seat. He said the taxi was hired for a joy ride to Nakasi and back to Laqere. At Laqere, the first accused grabbed the complainant while the second and another reached the complainant's pockets.*

*Accused two was interviewed under caution 21 November 2015 at the Nasinu Police Station under caution, he said he met the first accused and the two others at Lawere Bridge. They hired the taxi for a joy ride to Nakasi. At Nakasi, the first accused changed his seat and act at the back passenger seat. When the first accused grabbed the complainant neck, second accused then punched the complainant's face and fled the scene.'*

- [6] The then Hon. President of this court has observed that there is a question whether sufficient discount (01 years was allowed) had been afforded for the early guilty plea noting that the appellant was also a first offender and demonstrated remorse (both of which received a deduction of 02 years) and whether the ultimate sentence was proportionate to the gravity of the offence which involved a group offending at night whereby a taxi driver was assaulted during the course of the theft of \$200.00 but it was still not a night time group invasion of home while the occupants were asleep.
- [7] The learned Magistrate had taken 08 years as the starting point which is the lower end of the tariff for aggravated robbery where an accused is engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery as set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). However, the factual scenario in this case does not fit into the kind of situation the Supreme Court dealt with in **Wise**. The offending in this case had been a joint attack against the complainant taxi driver in the course of his employment in the night. Thus, the Magistrate appears to have committed a sentencing error by adopting a wrong tariff.
- [8] It has been judicially held that the providers of services of public nature serves country well and provides a cheap vital link in short and medium haul transport and at the same time violent and armed robberies of taxi, bus, van etc. drivers have become all too frequent. Therefore, the risk of personal harm they take every day by simply

going about their business could only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm such people (who undoubtedly should be protected against such callous and wanton disregard of their safety and property), they will receive a lengthy term of imprisonment.

- [9] Thus, the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers has been taken to be 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [vide **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012, **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 and **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].

**Law on bail pending appeal**

- [10] 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. Thereafter 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 [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17

June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [11] 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.
- [12] 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’.
- [13] 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.
- [14] 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.
- [15] The appellant has already served 05 years and 05 months in imprisonment beyond the non-parole period of 05 years. Given that the sentencing tariff is between 04 years and 10 years and that the appellant is not likely to be visited with a sentence towards the higher end of the tariff due to the specific facts and circumstances as enumerated above and sentencing errors including applying the wrong tariff, 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, a first time offender who

pleaded guilty and showed some remorse, 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.


[16] 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, **MANOA TABUALUMI** subject to the following conditions:

- (i) The appellant shall reside at Wakanisila Settlement, Nasinu with his father Nemani Turaga and mother Ana Lomani Turaga.
- (ii) The appellant shall report to Nasinu 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 persons of his father Nemani Turaga (phone no. 9700357) and mother Ana Lomani Turaga (phone no. 9700357) at Wakanisila Settlement, Nasinu to stand as sureties.
- (v) The sureties shall provide sufficient and acceptable proof of their identities, 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.



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