

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

CRIMINAL APPEAL NO.AAU 42 of 2021
[In the High Court at Suva Criminal Case No. HAC 111 of 2019]

BETWEEN : **JONE CAMA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **14 October 2022**

Date of Ruling : **17 October 2022**

RULING

[1] The appellant had been charged in the High Court of Suva with another on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and seven counts of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 06 March 2019 at Suva in the Central Division.

[2] After the appellant had pleaded guilty to all counts having accepted the summary of facts, the learned High Court judge had convicted the appellant on his own plea of guilty and sentenced him on 14 October 2019 to an aggregate sentence of 06 years (effectively 05 years 04 months and 23 days after deducting the period of remand) subject to a non-parole period of 03 years 04 months and 23 days.

[3] The relevant portion of summary of facts is as follows.

Brief Facts:

1. *The accused person is charged with another and he has voluntarily pleaded guilty to one count of Aggravated Burglary, contrary to Section 313 (1) (a) of the Crimes Act 2009 and 7 counts of Theft, contrary to section (1) of the Crimes Act 2009.*
2. *On the 6th March 2019 between 12am – 4am, the accused person and his accomplice in the company of each other entered into the Fiji Bureau of Statistics (FBS) office at Sukuna House, Suva and dishonestly, appropriated a number of items.*
3. *To simplify this, a tabular form is created on the next page to illustrate what items were dishonestly appropriated, from whom were they dishonestly appropriated in the premises of FBS and what items were recovered.*

<i>Prosecution Witness</i>	<i>Items Stolen from FBS</i>	<i>Items Recovered</i>
<i>Meli Nadakuca</i>	<i>1x Pair of Nike canvas (blue & yellow in colour), 1x Nike Bag, 1x Electronic dictionary, 1x HP Laptop (grey in colour) with charger</i>	<i>1x Nike Bag</i>
<i>Vaciseva Dravi</i>	<i>1x HP Laptop (Black in colour), 1x Pair of Puma canvas (Black & pink in colour).</i>	<i>1x HP Laptop (black in colour).</i>
<i>Salanieta Tubuduadua</i>	<i>1x Dell Laptop (black in colour).</i>	<i>1x Dell Laptop (black in colour).</i>
<i>Josese Ragigia</i>	<i>1x Rip Curl Cap</i>	-
<i>Filomena Browne</i>	<i>1x Sony Camera (black in colour), 1x Pair of Reebok canvas, 1x CCC Jacket (black in colour), 1x Carton</i>	<i>1x Pair of Reebok canvas.</i>

	<i>of Rewa Powdered Milk (24 packets) and \$100.00 cash.</i>	
<i>Niraj Chandra</i>	<i>1x Kenwin Radio (black in colour), 1x torch (Yellow in colour).</i>	-
<i>Poasa Nimila</i>	<i>1x Dell Laptop.</i>	-

4. *In addition to the above items recovered as tabulated above, another HP Laptop belonging to the Fiji Bureau of Statistics was also recovered from PW11.*
5. *A CCTV footage was uplifted from the crime scene by police in which PW17 identified the accused person as one of the persons who had committed the alleged offence.*
6. *On the 7th of March 2019, at around 3pm, PW8 received information that PW10 had bought 3 laptop's from the accused person. PW8 then left with a team of police officers to conduct a search at PW10's residence. PW10 in his statement stated that the accused whom he also knew as "Small Dee" came with another i-Taukei youth to sell him four laptops.*
7. *PW10 then called PW11 and asked if he was interested in buying the laptops. PW10 then went to PW11's house with the four laptops. From there, PW10 and PW11 then went to PW12's house to sell PW12 the laptops.*
8. *PW12 bought two of the laptops whilst PW11 kept one of the laptops. The fourth laptops was not recovered.*
9. *Police officers upon receiving information from PW10 then made their way to PW11's residence whereby PW9 then seized 1x HP Laptop from PW11.*
10. *Police officers upon receiving information from PW11 then made their way to PW12's residence whereby PW12 voluntarily handed over 1x Dell Laptop (black in colour) and 1x HP Laptop (black in colour) with both chargers.*
11. *On the 7th of March 2019, PW13 arrested the accused. The accused was then caution interviewed and charged. The accused person did not make any admissions in his record of interview as he chose to answer in court.'*

[4] The single judge of this court had allowed enlargement of time to appeal against sentence on 27 October 2020 on the basis that the trial judge had erred in applying a

tariff of 06 years to 14 years ('new tariff') in sentencing the appellant following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu - Sentence** [2018] FJHC 548 (25 June 2018) without applying the established tariff of 18 months to 03 years for aggravated burglary.

[5] The Court of Appeal in **Legavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the pronouncement of the 'new tariff' in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the 'old tariff' to the appellant who had been sentenced on 13 November 2017 (after the pronouncement of the 'new tariff' in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases the offence had been committed prior to the date of the decision in **Prasad** *i.e.* 12 October 2017. In the current case the offences had been committed on 06 March 2019 and sentenced on 14 October 2019 after the decision in **Prasad**.

[6] A Similar ground of appeal had been considered favorably in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020), **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020), **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Naulivou v State** [2020] FJCA 166; AAU0043.2019 (9 September 2020). It was held in **Daunivalu** in reference to the 'new tariff' of 06-14 years of imprisonment for aggravated robbery purportedly set in **Prasad** that:

'....., there is a fundamental question of legal validity of the 'new tariff'.

[7] Though the learned trial judge had applied the 'new tariff' in sentencing the appellant and picked 06 years as the starting point, no complaint has been made of the enhancement of the sentence by 02 years on account of aggravating factors and the discount of 02 years for the early guilty plea. This is undoubtedly a serious case of aggravated burglary of an important government institution namely Fiji Bureau of Statistics (FBS). The appellant has 04 previous convictions against his name.

[8] The appellate court may also consider if the aggravating circumstances of the case justify the departure from the ‘old tariff’ of 18 months to 03 years of imprisonment to decide whether the appellant’s sentence of 06 years should be interfered with and if so, to what extent.

Bail pending appeal

[9] 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), **Ourai 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)].

[10] 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.

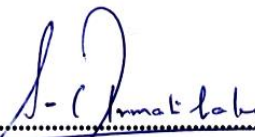
- [11] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [12] I have allowed enlargement of time leave to appeal against sentence due to the issue concerning the tariff adopted by the trial judge which has a real prospect of success.
- [13] Though, it is now not technically required, I shall still 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.
- [14] The appellant has so far served 03 years of imprisonment after trial. He had been in remand for 07 months and a week prior to trial. It may at this stage be reasonably assumed for the purpose of this application that if the traditional tariff for aggravated burglary is adopted (despite the aggravating circumstances surrounding the offending), the sentence to be imposed on the appellant by the full court may not likely to be more than the total period of the appellant’s incarceration of 03 years and 07 months. However, it is for the full court to decide on the ultimate appropriate sentence [vide (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) & **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015))].
- [15] The appeal records have not yet been prepared by the Registry and the appeal is not likely to be ready to go before the full court in the near future. It appears that there is a possibility of the appellant having to serve a sentence longer than he deserves if he is not enlarged on bail pending appeal at this stage.
- [16] Therefore, I am inclined to allow the appellant’s application for bail pending appeal and release him on bail at this stage.

Order of the Court:

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

- (i) The appellant shall reside with his parents in the family house at Omarkar Road, Narere, Nasinu.
- (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 not leave Fiji jurisdiction until the appeal is finally disposed of by the Court of Appeal and attend the Court of Appeal when noticed on any dates and times assigned by the Court or the Court of Appeal registry.
- (iv) The appellant shall provide in the person of Ms. Eseta Buivanua Ravuravunisali (older sister of the appellant) of Lot 51, Karobo Street, Peela Place, Makoi, Nasinu (Tax Identification No. 02-40247-0-5).
- (v) The appellant shall provide proof of his identification and that of the surety such as the dates of birth, postal addresses, telephone numbers, email addresses (if available) etc. to the Court of Appeal registry.
- (vi) Appellant shall be released on bail pending appeal upon condition (iv) and (v) above being complied with.
- (vi) Appellant shall not reoffend whilst on bail.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL