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

CRIMINAL APPEAL NO.AAU 97 of 2020
[In the High Court at Suva Case No. HAC 148 of 2019]

BETWEEN : **VILIAME GUKISUVA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing (LA): **17 October 2022**

Date of Bail Application: **02 November 2022**

Date of Ruling : **15 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and one count of theft contrary to section 291(1) of the Crimes Act, 2009 in the company of another on 16 April 2019 at Tacirua in the Central Division.

[2] After trial, the assessor in their majority opined that the appellant was guilty of both counts. The learned High Court Judge agreed with that opinion, convicted the appellant and sentenced him on 10 August 2020 to an aggregate imprisonment of 08 years with a non-parole period of 05 years (06 years, 08 months and 06 days with a non-parole period of 03 years 08 months and 06 days after the remind period was discounted).

[3] The appellant's in person appeal against conviction and sentence is timely. 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. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[4] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[5] The evidence in this case had revealed that on 16 April 2019 the appellant had broken into the complainant's (PW1) house around 3.00am with another while the complainant, her husband, her two children and her mother-in-law were sleeping and stole $60 cash, one Samsung S6 mobile phone, one tablet, one Samsung J1 mobile phone, one wrist watch and one school bag. The total value of the stolen items according to the complainant was about $2498. The complainant was awake at the time the two of them were inside her house.

[6] The appellant had urged the following grounds of appeal.

'Conviction

Ground 1

THAT the investigation carried out by the Police was procedurally flawed prejudiced and based on false information where prosecution witnesses had conspired in concert with police to defeat or subvert the course of justice contrary to section 16-(1)(a) of the Constitution.

Ground 2

THAT the judge's direction to the assessors in relation to the identification evidence of the complainant was inadequate, insufficient and failed to meet the standards required under the principles of the Turnbull guidelines.

Ground 3

THAT the judge erred in law and in fact by not direction himself on the totality of the evidence tendered in court rendering conviction unsafe.

Ground 4

THAT the evidence upon which the appellant was convicted was flawed, inadequate of poor quality and unsafe for the trial court to convict.

Ground 5

THAT the judge erred when he ignored and failed to adequately sufficiently investigate or properly take into account the alibi defence of the appellant, a failure that is tantamount to a miscarriage of justice.

Ground 6

THAT the judge erred in law when he converted the appellant on bad character or propensity evidence of the complainant and prosecution witnesses and further erred in fact when he erroneously assumed that the evidence by the complainant was credible proving the elements of the offense beyond reasonable doubt.

Ground 7

THAT the judge erred in law and in fact when his directions to the assessors during the summing up did not effectively canvas the defense's cases thereby encumbering the appellants right to a fair trial pursuant to section 15 (1) of the Constitution.

Sentence

Ground 8

THAT the sentence ordered by the court is too harsh and very excessive.

01st ground of appeal

[7] The complaint about flawed police investigation is baseless. The appellant had not disputed the fact that two individuals entered PW1's house on 16 April 2019 and that items were stolen from that house. Thus, he had not disputed that the offence of aggravated burglary and the offence of theft were committed by more than one person on the day in question at PW1's house. His position had been that he did not take part in committing the two offences and he was not one of the burglars.

[8] The complaint about not having ID parade or uplifting fingerprints can be explained by the fact that PW1 had identified the appellant as 'Billkodi' as one of the burglars and he was a resident of the same area living two houses away (05 minutes' walk) and she used to see him almost daily. 'Billkodi' was brought to her house by the police within a short time of the incident and she again recognized him as one of the intruders. PW1 had been steadfast in her evidence that out of the two burglars, the appellant was one and the other was unknown and she had disclosed that fact quite promptly. No suggestion had been made by the appellant's trial counsel that the police had conspired with PW1 (and possibly PW2) to falsely implicate the appellant due to his past antecedents where he had been credited with 14 previous convictions, 08 of which were property related offences but committed 10 years ago.

02nd ground of appeal

[9] Contrary to the appellant's assertion, PW1 had given clear evidence as to how she came to recognize the appellant whom she had seen almost daily crossing her compound for the last 02-03 months. The trial judge had given equally clear directions on Turnbull guidelines on identification at paragraph 23 of the summing-up.

03rd ground of appeal

[10] One and only issue in the case was the identity of the appellant. Having directed himself in accordance with the summing-up which is unblemished, the trial judge turned his attention to PW1's evidence of identification and her reliability and credibility and concluded that:

> 5. *The fact that the offence of aggravated burglary and the offence of theft were committed by two persons on 16/04/19 at PW1's house is not in dispute. The main trial issue was whether the accused in this case was one of those two offenders where the defence claimed that this is a case of mistaken identity.*
>
> 6. *PW1 was a credible and a reliable witness. It is clear that the majority of the assessors were satisfied beyond reasonable doubt that PW1 was not mistaken when she recognised one of the two persons who committed the two offences as the accused in this case. It was open for them to reach that conclusion based on the evidence presented during the trial.*

[11] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021), the Court of Appeal said of a trial judge's duty when agreeing with assessors:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter….'*

[12] When one examines the summing-up and the judgment it is absolutely clear that the trial judge was fully conscious of the crucial issue in the case namely the identity of the appellant and ultimately that issue was resolved against the appellant on this occasion of PW1 having identified him whilst committing the burglary with another.

[13] By stating at paragraph 20 of the summing-up and paragraph 5 of the judgment that the fact that the offence of aggravated burglary and the offence of theft were committed by two persons on 16 April 2019 at PW1's house is not disputed by the appellant, the trial judge was only trying impress upon the assessors and himself that the decision of the case was solely dependent on how reliable, credible and accurate the identification of the appellant was by PW1.

04th ground of appeal

[14] The matters the appellant raises here relate to the evidence of PW1 and PW4 with regard to the injuries the appellant had at the time of his arrest.

[15] When the police brought the appellant to PW1's house, she had recognized him but hurried inside because the appellant had threatened her with a 'watch out' warning. She had not seen any injuries on his face when he was inside the house in the night despite having seen the entire face. Neither had she seen them when the appellant was brought by PW4 to her house about an hour later. PW4 went to the appellant's house within about one hour of the incident. He had seen injuries on the appellant's body including his forehead. Medical evidence corroborated those injuries on the appellant. The appellant had admittedly been limping but managed to walk with PW4 from his house to PW1's house. According to the appellant, he had sustained those injuries on the previous day in the settlement and he was at home the whole night with his wife when the alleged burglary had taken place at PW1's house. His wife had confirmed the same to PW4. PW4 had not found any of the stolen articles at his house. Did the other intruder take the loot away? Or is it because the appellant was not inside PW1's home in the previous night?

[16] The trial judge had correctly brought to the attention of assessors these aspects and the possibilities arising therefrom *vis-à-vis* the appellant's identity or mistaken identity at paragraphs 39 - 42 of the summing-up, because if PW1 had not seen any injuries on the face of the intruder whom she thought was the appellant when the appellant had such a facial injury along with a limp, would it have been a mistaken identity? One assessor may have believed that it was a case of mistaken identity but the two

assessors and the trial judge had thought otherwise. I am somewhat concerned by the fact that the trial judge having pointed out all possibilities to the assessors, had not said why he decided to answer those possibilities and hold the issue of identity of the appellant in favor of PW1 other than 'credibility and reliability' of PW1, because as stated by the trial judge an honest and a convincing witness can still be mistaken. He should in my view have stated how and why he resolved those issues against the appellant. For example, was it possible that PW1 in the rather disturbed and frightful state of mind she was in the night not knowing what the intruders would do to the wellbeing of her and her family members, missed the injury on the appellant's forehead? Or did PW1 make an honest mistake in her identification?

[17] Therefore, I am inclined to grant leave to appeal on the issue of identity so that the full court with the benefit of the trial proceedings may look carefully into this crucial aspect.

05th ground of appeal

[18] Contrary to the appellant's complaint, the trial judge had addressed the assessors on a possible *alibi* arising from the prosecution case itself (the appellant remained silent and did not call any evidence) at paragraph 30-36 of the summing-up. I do not think that the appellant's criticism of the trial judge in this respect is justified. However, this apparent *alibi* also can be considered by the full court as part of the 04th ground of appeal as it ultimately relates to the identity of the appellant.

06th ground of appeal

[19] In fact some indication of the appellant's previous bad character in the form of his antecedents had been introduced in the course of his cross-examination of PW1 by suggesting that PW1 had heard bad stories about the appellant from her neighbors and she picked him as a person who was inside her house on 16 April 2019 because of the bad stories she had heard about him. The trial judge at paragraph 37 of the summing-up, had done his utmost and warned the assessors that such material is not relevant for their decision.

07th ground of appeal

[20] This ground has no merits at all. Despite the absence of any evidence for the defense, the trial judge as pointed out above had placed before the assessors, items of evidence and various possible inferences favourable to the defense throughout the summing-up. It is a very fair, balanced and objective summing-up.

08th ground of appeal (sentence)

[21] I am inclined to allow leave to appeal against sentence primarily on the issue arising from the application of the 'new tariff' of 06 to 14 years following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** [2018] 548 548 (25 June 2018) in sentencing the appellant as opposed to hitherto followed 'old tariff' of 18 months to 03 years.

[22] This controversy has now been resolved by the Court of Appeal in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022) by issuing sentencing guidelines for burglary and aggravated burglary at paragraphs [76] to [79]. As a result, 'new tariff' of 06 to 14 years and the 'old tariff' of 18 months to 03 years for aggravated burglary are no more valid and should not be followed by the sentencing Magistrates and Judges.

Bail pending appeal application

Law on bail pending appeal

[23] The legal position is that the appellants have 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 appellants 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 appellants have 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, appellants 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)].

[24] 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.

[25] 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'.

[26] I have already held that the appellant deserves to be granted leave to appeal to appeal against conviction and sentence. He has a very high likelihood of success in his appeal against sentence *inter alia* due to the sentencing error of wrong tariff being applied and in view of **Kumar & Vakatawa** guidelines.

[27] The appellant has so far served 02 years, 04 months and 05 days of imprisonment since the date of sentence. He had earlier spent 01 year, 04 months and 04 days in remand for this case. Altogether, the appellant has been in incarceration for about 03 years and 08 months and 09 days.

[28] Thus, I am inclined to believe that his case would fall into the medium category in terms of level of harm and since he had committed the offending with another the resulting sentence range would be 03-08 years on **Kumar & Vakatawa** guidelines. If arguably the 'old tariff' of 18 months to 03 years is applied (given the date of the offence) to the offending, the appellant has already served beyond the high end of that tariff. I make a reasonable assumption that the full court is not likely to impose a sentence towards the high end of the sentencing range of 03-08 years of imprisonment on the appellant. I am mindful of the issue relating to his identity and conviction as well.

[29] 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 appellants when the appeal is heard'* together.

[30] The appeal is not likely to be taken up before the full court in the immediate future (being an appeal filed in 2020) and the preparation of the complete appeal records itself would take a considerable time. If the appellant is not enlarged on bail pending appeal at this stage, he is likely to serve perhaps more than the whole of the sentence the full court is likely to impose on him after hearing the appeal in the future. Therefore, it appears that section 17(3) (b) and (c) should be considered in favour of the appellant in this case.

[31] I am aware of the very pertinent observations made by the High Court judge at paragraphs 9-12 and 15 of the sentence order regarding the gravity of the offending and the appellant's antecedent report. Though not mentioned by the Judge, I consider the appellant's threat issued to PW1 as a very substantial aggravating factor and warn the appellant to be very mindful that this court would exercise zero tolerance on any

such behavior. I have also taken into account the fact that the appellant would be residing in Solovi, Nadi in the Western Division instead of Central Division where the incident happened in Tacirua and the general profile of proposed sureties.

[32] Thus, 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, given his antecedents and post-incident behavior, the appellant is sternly warned that any breach of any conditions, even slightly, would result in cancellation of bail and him being arrested and handed over to the Corrections Department to serve the sentence.

Order of the Court:

1. Leave to appeal against conviction and sentence is allowed.
2. Bail pending appeal is granted to the appellant, **VILIAME GUKISUVA** subject to the following conditions:

    (i) The appellant shall reside with his wife in the family house at Solovi, Nadi.

    (ii) The appellant shall report to Nadi 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 Kalisiana Camaikoroi Vani Naiorosui [Tax Identification No.14-31936-0-5] of Nasole, Nasinu.

    (v) The appellant shall provide in the person of Sosiveta Raura [Voter Identification Card No.0035 173 00111] of Lot 13, Makosoi Place, Nasinu.

    (vi) The sureties shall provide sufficient and acceptable documentary proof of their identity.

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

    (vii) The appellant shall at all times desist from having any contact whatsoever with PW1.

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

COURT OF APPEAL FIJI

.....

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