

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

**CRIMINAL APPEAL NO.AAU 141 of 2019**  
**[In the Magistrates Court at Lautoka Case No. CF 283 of 2016]**

**BETWEEN** : **JOSAIA MOCESARA LEONE**

*Appellant*

**AND** : **STATE**

*Respondent*

**Coram** : **Prematilaka, RJA**

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

**Date of Hearing** : **12 December 2022**

**Date of Ruling** : **15 December 2022**

**RULING**

[1] The appellant had been arraigned in the Magistrates court at Lautoka exercising extended jurisdiction on five counts of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and five counts of theft contrary to section 44(1) and 291(1) of the Crimes Act, 2009 committed with three others.

[2] The appellant pleaded guilty to all charges and the learned Magistrate had convicted the appellant on his own plea and he had been sentenced on 12 July 2019 to an aggregate imprisonment of 65 months (05 years and 05 months) with a non-parole period of 04 years.

[3] The summary of facts are not available at the moment and the learned Magistrate's sentencing order too does not set out the facts even briefly.

- [4] By the ruling on 19 June 2020, I allowed leave to appeal against sentence primarily on the issue arising from the Magistrate's application of the 'new tariff' of 06 to 14 years in sentencing the appellant as opposed to the 'old tariff' of 18 months to 03 years.
- [5] 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.
- [6] The certified appeal records have been served on the appellant and the State and the appellant has even tendered written submissions for the full court hearing. The State's written submissions are pending. However, the state counsel informed this court that the certified appeal record did not contain summary of facts, charge sheet and the cautioned interview of the appellant and he would gather them as soon as possible and submit to the Court of Appeal Registry to make a supplemental appeal record in due course.
- [7] In the meantime the appellant had tendered an application for bail pending appeal on 22 November 2022 through the Legal Aid Commission which agreed to assist him in filing those papers though the appellant does not wish the LAC to represent him in the substantive appeal.

**Law on bail pending appeal**

- [8] 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), **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)].

- [9] 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.
- [10] 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'.
- [11] The appellant satisfied this court that he deserved to be granted leave to appeal to appeal against sentence and it now appears that 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.
- [12] The appellant has so far served 03 years and 06 months of imprisonment for this case. In the absence of summary of facts or at least the charge sheet and the cautioned interview, it is difficult to decide whether the appellant's offending was low, medium or high on the scale of harm. However, it appears that he was involved with others but they did not carry any weapons. Thus, I am inclined to make a reasonable assumption that his case would fall into the sentence range of 01-05 years or 03-08 years on

**Kumar & Vakatawa** guidelines though the former looks more likely. 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. On the above assumption, I guess that the full court is not likely to impose a higher sentence than 03 years and 06 months of imprisonment on the appellant unless the summary of facts, the charge sheet and the cautioned interview prove the above assumption wrong.

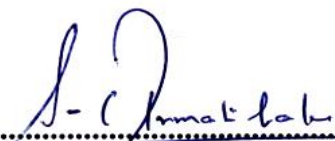
- [13] I shall now consider the second and third limbs of section 17(3) of the Bail Act namely ‘(b) *the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard*’ together.
- [14] The appeal is not likely to be taken up before the full court in the immediate future (being an appeal filed in 2019) though the complete appeal records are almost ready. 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.
- [15] 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, given his antecedents, the appellant is 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. Bail pending appeal is granted to the appellant, **JOSAIA MOCESARA LEONE** subject to the following conditions:

- (i) The appellant shall reside with his mother in the family house at Qeleloa road, 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 Mereoni Rokosevuya [appellant's mother: - DOB – 28/10/1965 & Voter Identification Card No. 0546 048 01875] of Qeleloa road, Nadi.
- (v) Surety shall provide sufficient and acceptable documentary proof of her identity.
- (vi) The appellant shall be released on bail pending appeal upon condition (iv) and (v) above being fulfilled.
- (vii) The appellant shall not reoffend while on bail.



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