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

CRIMINAL APPEAL NO.AAU 0043 of 2018
[In the Magistrates' Court at Suva Case No. EJ22/15]

BETWEEN : **ISAIA LEDUA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **20 October 2022**

Date of Ruling : **16 December 2022**

RULING

[1] The appellant had been charged in the Magistrate's 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 on 25 February 2015 at Nabua in the Central Division.

[2] Upon conclusion of the trial, the learned Magistrate had convicted the appellant as charged in his judgment dated 15 December 2017 and sentenced him on 24 January 2018 to 07 years and 11 months of imprisonment with a non-parole term of 07 years and 04 months.

[3] I refused enlargement of time to appeal against conviction and sentence by the Ruling delivered on 22 December 2020 [**Ledua v State** [2020] FJCA 256; AAU0043.2018 (22 December 2020)] as there was no real prospect of success of his appeal against conviction on the evidence of PW2 and PW3 on the crucial issue of identity of the appellant which, as per my Ruling is as follows. The manager of the service station had confirmed that cash worth $2288.35 belonging to Pacific Energy Company had been lost.

> *'[19] The evidence of the appellant's identification was as follows. PW2, Tito Waqavou who had gone to the shop at the service station had seen the appellant entering the shop, jumping over the counter and taking cash from the cashier's till. After taking money, the appellant had jumped over the counter again and left the shop. There had been enough light inside the shop and only a glass had separated the witness from the appellant. He had observed the appellant for about one minute. The witness had known the appellant and used to call him by his nickname Madula. Both had lived in the same area in Nabua three years before the appellant had left the area. The witness and the appellant used to play rugby every evening after school.*
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> *[20] PW3 who was an employee of the service station filling a vehicle on the day in question had seen a person wearing a jacket entering the shop and jumping over the counter. Having stopped filling, he had gone towards the shop and seen that person taking money from the cashier's cupboard. The lights inside the shop had been on and the intruder was holding a pinch bar in his hand. He had observed the offender 02 meters away and identified that person as the appellant known to him as Madula. He had known him for 10 years as the appellant was residing on the opposite side of the road where the witness resides. They used to hang around together for long periods of time.*
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> *[21] The appellant had not disputed the fact that that he was known as Madula. Neither had he denied that he was known to the above two witnesses. However, he had denied his involvement in the robbery.'*

[4] The Court of Appeal in **State v Liku** [2022] FJCA 9; AAU067.2016 (3 March 2022) approved the use of ***Wise*** tariff (**Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015) *i.e.* 08-16 years of imprisonment not only for a single act of home invasion but also for other aggravated robberies similar to a home invasion in terms of level of harm and culpability.

[5] In **Cikaitoga v State** [2020] FJCA 99; AAU141.2019 (8 July 2020), the appellant and the other three had forcefully entered Comsol Moive Shop at Centerpoint, Nasinu and robbed one person of his mobile phone valued at $200.00. Whilst inside they had assaulted and locked another in the toilet and stolen $950.00 in cash, one Nokia N65 brand mobile phone valued at $400.00 all to the value of $1,350.00 from him. The single Judge of the Court of Appeal said it sees no reason why the same tariff should not apply to the current case involving an invasion of business premises in broad daylight with accompanying violence.

[6] In **Nabainivalu v State** CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 where two persons armed with a cane knife entered a gas station and took away a mobile phone, laptop and money after threatening the gas station attendant and the mobile phone and laptop were subsequently recovered, but the money could not be found, the Supreme Court said:

> *'[3] I have said on a number of occasions that an appealable error cannot arise by comparing sentences imposed in other cases. Other cases are only relevant in identifying the range of sentence for a particular offence. Otherwise, each case is considered on its own facts.*
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> *[4] In this case, the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (**Nawalu v State** Cr. App. No. CAV0012 of 2012).'*

[7] Thus, there is no sentencing error in the sentence of 07 years and 11 months of imprisonment with a non-parole term of 07 years and 04 months imposed on the appellant for this aggravated robbery of a commercial establishment.

[8] Since the delivery of EOT Ruling, the appellant had renewed his appeal before the full court and filed amended grounds of appeal, an application for fresh evidence and a bail pending appeal application at different times. The amended grounds of appeal along with those urged at the EOT stage and the application for fresh evidence have to be taken up before the full court while I shall only consider the bail pending appeal at this stage.

Law on bail pending appeal

[9] 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)].

[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] The appellant could not satisfy this court that he had a real prospect of success to be granted EOT to appeal against conviction or sentence for the reasons given in the EOT Ruling and therefore he does not have a very high likelihood of success in his appeal against conviction or sentence, either on grounds of appeal urged at the EOT stage or on the fresh grounds of appeal tendered for the full court hearing.

[13] Though legally not required now, I shall also 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 likely to be taken up before the full court in due course in the future before the appellant's term of imprisonment is served as the CA Registry has been directed to prepare the appeal records.

[15] Therefore, I am not inclined to allow the appellant's application for bail pending appeal and release him on bail pending appeal at this stage.

Order of the Court:

1. Application for bail pending appeal is refused.

COURT OF APPEAL FIJI

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