

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

CRIMINAL APPEAL NO.AAU 0147of 2017
[Magistrates Court of Suva Case No. 986 of 2017]

BETWEEN : **JOJI DONU**
: **APISAI ROKOTUIVUNA ROSERUTABUA**
Appellants

AND : **STATE**
Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. S. Ratu for the 01st Appellant**
: **Ms. A. Prakash for the 02nd Appellant**
: **Mr. R. Kumar for the Respondent**

Date of 01st appellant's : **02 September 2022**
Bail pending appeal
application and written
submissions

Date of 02nd appellant's : **13 September 2022**
Bail pending appeal
application and written
submissions

Date of Hearing : **04 October 2022**

Date of State's : **20 December 2022**
written submissions

Date of Ruling : **22 December 2022**

RULING

- [1] The appellants had been arraigned in the Magistrates' court at Suva under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 09 July 2017 at Suva in the Central Division.
- [2] The appellants had pleaded guilty and the learned Magistrate had convicted and sentenced them on 26 September 2017 to an imprisonment of 07 years, 11 months and 10 days of imprisonment with a non-parole period of 06 years.
- [3] The brief summary of facts as narrated in the learned Magistrate's sentencing order is as follows:

'The summary of facts indicate that on Sunday 9th July 2017 at around 0430 hours, the Accused robbed one Nitesh Navlin Prasad along Victoria Parade outside the corner of Fexco Pacific Western Union office, Suva. The Accused used force and grabbed the complainant and stole an Alcatel phone and \$40 cash. Roserutabua strangled the complainant. She followed the Accused who ran towards ANZ main branch and alerted the Police Officers who were on patrol and the Accused were arrested in front of Totogo Police Station. In the station both Accused were identified by the complainant and Losalini. Both Accused admitted being at the scene but denied the offence.'

- [4] I allowed enlargement of time to appeal against sentence mainly on the basis that the learned Magistrate had committed a fundamental error in following the sentencing tariff for home invasion in the night with accompanying violence perpetrated on the inmates set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) to this instance of street mugging thereby acting on a wrong sentencing principle.
- [5] Sentencing tariff for street mugging had been consistently taken earlier as 18 months to 05 years of imprisonment [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) & **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)].
- [6] The Supreme Court in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) handed down fresh sentencing guidelines for street mugging which are relevant to the determination of the appellants' appeal on sentence. The appellants have already served over 05 years and almost 03 months of imprisonment after sentencing

and prior to trial they had been in remand for 21 days making the total incarceration almost 05 years and 04 months.

- [7] In view of Tawake, the appellants' sentence range could be 01-05 (low harm) or 03-07 (medium harm) years of imprisonment based on their having committed the offending in each other's company but with minimal or moderate harm (strangulation) to the complainant. Even if one were to go by the then existing tariff still they had served over and above its high end.

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 appellants 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 appellants have shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [11] The appellants have already satisfied this court that they deserved to be granted enlargement of time to appeal against sentence and it now appears that they have a very high likelihood of success in their appeal against sentence due to the sentencing error of wrong tariff being applied and in view of *Tawake* guidelines.
- [12] 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.
- [13] The appellants have already spent almost 05 years and 04 months in incarceration. The appeal is not likely to be taken up before the full court in the immediate future as the Legal Aid Commission has not yet prepared appeal records for full court hearing. If the appellants are not enlarged on bail pending appeal at this stage, they may be forced to serve a longer sentence than what the full court may ultimately impose on them Therefore, it appears that section 17(3) (b) and (c) should be considered in favour of the appellants in this case.
- [14] Therefore, I am inclined to allow the appellants’ application for bail pending appeal and release them on bail on the conditions given in the Order.

Order of the Court:

1. Bail pending appeal is granted to both appellants, **JOJI DONU** and **APISAI ROKOTUIVUNA ROSERUTABUA** subject to the following conditions:

JOJI DONU (01st appellant)


- (i) The appellant shall reside with his father's younger brother and his family at Block 6, Flat 16, Mead Road Housing, Nabua.
- (ii) The appellant shall report to Nabua 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 Serafina Tinaiqolisiga, his aunt [Tax Identification No.17-03293-0-7 & Passport No.P00076270] of Block 6, Flat 16, Mead Road Housing, Nabua.
- (v) The surety shall provide sufficient and acceptable documentary proof of their 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.

APISAI ROKOTUIVUNA ROSERUTABUA (02nd appellant)

- (i) The appellant shall reside with his father at Nadovu Village, Muaira, Naitasiri.
- (ii) The appellant shall report to Vunidawa 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 Solomonai Naiqua, his father [Tax Identification No.14-24135-0-8 & Voter Identification No.0227 366 00653] of Nadovu Village, Muaira, Naitasiri.

- (v) The surety shall provide sufficient and acceptable documentary proof of their 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