

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

CRIMINAL APPEAL NO.AAU 073 of 2020
[In the High Court at Suva Case No. HAC 267 of 2018]

BETWEEN : **PONIPATE BOKADI** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Ruling : **15 July 2022**

RULING

[1] The appellant stood indicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 23 June 2018 at Nasinu in the Central Division.

[2] The appellants had pleaded guilty to the charge on 14 August 2018. The learned judge had convicted the appellant and sentenced him on 22 August 2018 to 10 years of imprisonment with a non-parole period of 08 years (effectively 09 years and 10 months with a non-parole period of 07 years and 10 months after the remand period was deducted).

[3] The appellant through his counsel Legal Aid Commission sought extension of time to appeal against sentence which was granted by this court in its Ruling on 01 November 2020 on the sole ground appeal that the learned trial judge erred in law and in fact when he sentenced the appellant using the wrong sentencing tariff resulting in a harsh sentence. Since then the appellant had filed an application for bail pending appeal. Both

parties agreed to have a ruling on the papers filed which process was completed on 11 July 2022.

- [4] The Learned High Court judge had applied the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment and sentenced the appellant to 10 years of imprisonment. The basis of allowing enlargement of time to appeal the sentence was that the summary of facts (quoted below from the sentencing order) resembled ‘street mugging’ and it was difficult to see how the factual background of this case fit into the factual scenario the Supreme Court encountered in **Wise** which dealt with a ‘home invasion in the night’.

3. According to the summary of fact, which you admitted in open Court, that you with other accomplices, came behind the complainant, who was returning home from his morning walk, and assaulted him. The complainant had retaliated. While the complainant was retaliating, he had fallen down. The complainant managed to pull down one of the assailants while he was falling down. You and the accomplices then fled the scene. You and the accomplices had stolen the wallet of the complainant with cash \$600 therein.

- [5] This Court felt that the sentencing tariff for ‘street mugging’ *i.e.* 18 months to 05 years [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)] should have been adopted by the sentencing judge.

- [6] The Ruling adverted to the fact that this act of aggravated robbery had been committed in the early hours of the day while the 58 year old elderly complainant (a retiree) was alone on his way home after his morning walk, the fact that he was assaulted causing injuries to his eyes and the ankle and the fact that stolen money of \$600.00 was not recovered and felt that those factors may safely be treated as having the effect of increasing the seriousness of the crime warranting a higher sentence than an act of usual street mugging might attract. This court also noted that in addition, the appellant had had 08 previous convictions of which 07 were related to property crimes.

- [7] In the meantime, the Supreme Court in the recent decision in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for ‘street muggings’ particularly **Raqauqau** remarked that the sentencing range of 18 months’ to

05 years' imprisonment, with no other guidance, can itself give rise to the risk of an undesirable disparity in sentencing and a more nuanced approach was necessary.

- [8] The Supreme Court accordingly set new guidelines for sentencing in cases of street mugging by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.
- [9] The Supreme Court identified starting points for three levels of harm *i.e.* high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed to the appropriate sentencing range for offences as previously used and stated that the sentencing court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.
- [10] In my provisional view the appellant's offending under section 311 of the Crimes Act, 2009 (*i.e.* offender without a weapon but with another) could be considered to be either low or medium in terms of level of harm and therefore his sentence should start with 03 or 05 years of imprisonment with the sentencing range being 01 to 05 years or 03 to 07 years.

Bail pending appeal

- [11] 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), **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)].

- [12] 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.
- [13] 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’.
- [14] I have allowed enlargement of time to appeal against sentence due to the issue concerning the tariff adopted by the trial judge. Therefore, there is a very high likelihood of success in his appeal against sentence in the sense that his current sentence would in all probability be reduced in terms of **Tawake** (Supreme Court) guidelines.
- [15] 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.

- [16] The appellant has served almost 04 years of imprisonment when his remand period is also taken into account. It may at this stage be reasonably assumed that given all the circumstances surrounding the offending, the sentence to be imposed on the appellant by the full court would likely to be not more than 05 years subject, of course, to the fact that 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)].
- [17] In all the circumstances, 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. Further, given that this being an appeal filed in 2020 the hearing of the appellant's appeal is likely take some time. Therefore, I think that the interest of justice is served by considering section 17(3) (b) and (c) in favour of the appellant at this stage.
- [18] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage.

Order

1. *Bail pending appeal is granted to the appellant subject to the following conditions.*
 - (i) *The appellant shall reside at Lot 10, Tokai Court, Nakasi, Nausori.*
 - (ii) *The appellant shall report to Nakasi 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. Arieta Cadrawale (sister of the appellant's de facto partner) of Lot 10, Tokai Court, Nakasi, Nausori (Voter Identification Card No. 0034 742 00862.*
- (v) *The appellant shall provide proof of his identification and those 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 while on bail.*



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