

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

CRIMINAL APPEAL NO. AAU 121 of 2019
[High Court at Suva Case No. HAC 364 of 2018]

BETWEEN : **SAKEASI RADRAVU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **30 June 2023**

Date of Ruling : **30 June 2023**

RULING

[1] The appellant had been charged in the High Court at Suva with a single count of robbery of \$56 belonging to one James Mani, a taxi driver contrary to section 310 (1)(a) (i) of the Crimes Act, 2009 committed on 18 August 2018 at Nasinu in the Central Division. The information read as follows:

'Statement of Offence

ROBBERY: *Contrary to Section 310(1) (a) (i) of the Crimes Act 2009.*

Particulars of Offence

SAKEASI RADRAVU on the 18th day of August 2018 asinu in u in the Central Division, robbed James Mani of \$56.00 cash, the property of the said James Mani.'

[2] The trial judge had succinctly described the prosecution and defense cases in the judgment as follows:

[5] The first witness called on behalf of the prosecution was Mr. James Mani. His evidence was that;

- (a) He is the owner and the driver of taxi No. LT4252.*
- (b) On the 18th of August 2018 at about 5.30pm he was robbed of \$56.00 by a passenger.*
- (c) On that day he was driving his taxi from Lami. A boy and a girl has got into it from Lami and wanted to go to Kinoya.*
- (d) As he reached the AOG School in Kinoya, they told him to stop for the female passenger to get down. Once the female passenger got down he was asked by the male passenger to take him to Vesivesi Road as he lives there. When at Vesivesi Road he was asked to turn to the right and later to the left to Kokila Drive. At the roundabout, he was asked to stop the car and the said passenger has got down and come around and asked of the fare. When informed that it was \$12.60, the witness was punched on the side of the face and opening his door, was dragged out on to the tar sealed road. The person, who punched, has got into the car and it was moving slowly as it was in a running gear. The witness has got up and gone behind and hanged on to the T-Shirt of the assaulter and pulled him out. Then both of them have fallen down on to the road and assaulter has got on top of the witness and while pressing him down has taken his money from the shirt pocket. They have fought thereafter for a while and the assaulter has tried to run away. The witness has held on to the assaulter's T-Shirt and it has torn. Then two persons have come and the assaulter has run away. Those persons have called the police and the police came and assisted him.*
- (e) The witness affirms that he has been fighting with the assaulter for about 5-6 minutes, face to face, and the at a very close proximity under day light, around 5.30 pm. The witness further states that while he was fighting with the assaulter, his car went into the drain and got damaged.*
- (f) The witness states that while driving them from Lami, which was about a 45 minute drive, he has looked at them for about 6-7 times. Further the witness states that it was the day of the Hibiscus Festival, it was a bright day, and it had sufficient day light at the time of the incidence.*

(g) Further, having dropped the female passenger while driving with the male passenger for about 10 minutes, he has been talking to him and looked at him 2-3 times in the rear view mirror.

(h) When the assaulter pulled him out and he fell on to the road, he fell sideways and saw his vehicle moving. At that time the assaulter kicked him and he tried to block the kicks.

[10] The accused elected to give evidence. His evidence is that;

(a) He has been living in Chadwick Road, Nakasi. Since two months prior to the alleged incidence.

(b) Prior to that he was living at Kaloa Street, Kinoya at his mother's house.

(c) The accused states what the PW1 stated is incorrect and on the said particular date he was at home in Chadwick Road.

(d) The witness further states that he has never had a fight with a taxi driver and he has been falsely framed.

[3] After the conviction and sentence (on 18 July 2019 to 06 years, 02 months and 20 days of imprisonment with a non-parole period of term of 04 years, 02 months and 20 days) entered against him in the High Court, the appellant had initially appealed only against his conviction in a timely manner to the Court of Appeal. The single Judge of this court refused leave to appeal against conviction on 20 August 2021 and two renewal notices of appeal against conviction had been filed by the Legal Aid Commission (LAC) and the appellant in person on 14 September 2021 and 07 October 2021 respectively. The LAC however would not appear for the appellant before the full court in respect of his conviction appeal. Accordingly, the CA Registry has been directed to call for judge's notes and transcript of audio recordings, if any and prepare appeal records for the full court hearing.

[4] Subsequently, on 20 May 2022 the appellant in person had lodged an appeal against sentence out of time seeking extension of time on the following sole ground of appeal. He had also submitted an application for bail pending appeal on 09 February 2023.

'Ground 1

THAT the Learned Sentencing Judge had erred in law in applying:

- (a) the wrong sentencing principle or the wrong tariff or departure from the applicable tariff;*
- (b) the wrong case law to guide him passing the sentence; and*
- (c) the highest tariff of 8 years to be the starting point as the law and or common laws requires that it should not be higher than the middle tariff of which is 4-10 years imprisonment.*

[5] When the matter was mentioned on 30 June 2023, the appellant made oral submission on his sentence appeal and wanted this court to consider the bail pending appeal simultaneously. The state counsel too made oral submissions on the sentence appeal and opposed granting bail pending appeal. In addition, both parties relied on the written submissions already filed for a ruling on sentence appeal and bail pending appeal.

[6] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[7] Further 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)].

- [8] The delay in the sentence appeal is nearly 03 years which is very substantial. The appellant has adduced no reasons for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.
- [9] This is a case of robbery of a taxi driver. The appellant's ground of appeal against sentence is based on the submission that the learned High Court judge had made a sentencing error by adopting the sentencing tariff of 08-14 years. In **State v Tamani** [2011] FJHC 725; HAC290.2011 (11 November 2011) and **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018, Gounder, J in the High Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened. The trial judge had noted the tariff of 04-10 years but refused to follow it preferring the tariff of 08-14 years.
- [10] The trial judge had taken 08 years as the starting point and added 06 months for aggravating factors and deducted 18 months for mitigating factors. Once the remand period was discounted the final sentence became 06 years, 02 months and 20 days of imprisonment.
- [11] However, by taking a starting point of 08 years, the learned High Court judge had acted upon a wrong principle. Instead the learned sentencing judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers namely 4-10 years of imprisonment. When the sentencer chooses the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence [vide **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)].
- [12] If one were to replicate sentencing methodology set out in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) *mutatis mutandis* to the facts of this case,

the appellant's offending may be considered medium (as opposed to high) in terms of harm and the culpability is that of robbery. In this situation, the starting point is 03 years and sentencing range is between 01-05 years *only if the offending was mere street mugging*. But, this is a case of robbery against a public service provider which is a lot more serious than simple street mugging. Thus, given also the fact that the appellant was credited with a previous conviction for theft in 2012 in Nasinu Magistrates court (and apparently a pending hearing against him *inter alia* for aggravated robbery committed on 19 May 2019 in Suva Magistrates court - current sentence was imposed on 18 July 2019 for the offending on 18 August 2018), the High Court judge not even having considered the appellant's violent attack on the complainant for 5-6 minutes and damage to the taxi as aggravating factors, the ultimate sentence appears to be justified; not excessive or harsh. However, given the sentencing error of applying the wrong tariff the appellant is entitled to have his sentence re-examined by the full court.

[13] In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[14] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

Bail pending appeal

[15] 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)].

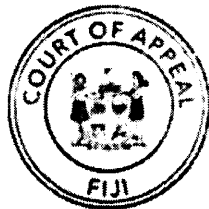
- [16] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [17] If the 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'.
- [18] Though, enlargement of time to appeal was granted due the error in the tariff applied by the trial judge, I am of the view that there is no real prospect of success in the appellant's appeal against sentence of 06 years, 02 months and 20 days of imprisonment, and therefore obviously his sentence appeal does not have a very high

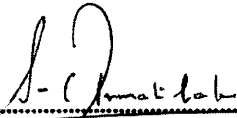
likelihood of success. Even the other two considerations namely (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard cannot be answered in his favour at this stage, for the appellant has served only less than 04 years of the sentence and the appeal records are to be prepared by the CA Registry and if the appellant renews his sentence appeal before the full court, the full court would hear both his conviction and sentence appeals together in the not so distant future.

[19] Therefore, bail pending appeal application should be refused.

Orders of the Court:

1. Enlargements of time to appeal against sentence is allowed.
2. Bail pending appeal is refused.





Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent