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

CRIMINAL APPEAL NO.AAU 109 of 2020
[In the High Court at Suva Case No. HAC 221 of 2019]

BETWEEN : **ILISAVANI TAMANISAVE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Hearing : **20 December 2023**

Date of Ruling : **21 December 2023**

RULING

[1] The appellant stood indicted in the High Court at Suva on a single count of aggravated robbery by stealing a bag containing a Samsung mobile phone charger and a pair of sunglasses with others on the 04 June 2019 at Nasinu in the Central Division in the company of each other, contrary to section 311(1)(a) of the Crimes Act, 2009.

[2] After the assessors' unanimous opinion, the High Court Judge had concurred with them and convicted the appellant and sentenced him on 21 February 2020 to 06 years of imprisonment with a non-parole period of 05 years (effectively 05 years, 06 months and 14 days with a non-parole period of 04 years, 06 months and 14 days after the remand period was deducted).

[3] The appellant has sought extension of time to appeal against conviction and sentence. A judge of this court allowed the appellant to abandon his conviction appeal and granted

extension of time to appeal his sentence on 07 June 2023[1] on the following ground of appeal.

> *<u>THAT</u> the Learned Trial Judge erred in law and in fact by imposing a sentence deem harsh and excessive with having no regards to sentencing guidelines and applicable tariff for the offence of "street mugging" of this matter.*

[4] The facts of the case as set out in the sentencing order suggest that this is a case of street mugging. They are as follows.

> *2. Briefly, the accused with two others attacked the victim who was on his way home after work and stole the bag the victim was carrying which contained a Samsung mobile phone charger, a pair of sunglasses and a bunch of keys. While the two accomplices grabbed the victim from behind and put him down, the accused tried to grab the said bag from the victim. When the victim held onto the bag, the accused punched the victim on his chest a few times which caused the victim to let go of the bag. The accused was caught with the said stolen bag soon after the robbery.*

[5] At the time of sentencing, the sentencing tariff for '*street mugging'* was 18 months to 05 years [vide **<u>Raqauqau v State</u>** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **<u>Tawake v State</u>** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **<u>Qalivere v State</u>** [2020] FJCA 1; AAU71.2017 (27 February 2020)] which should have been adopted by the sentencing judge.

[6] However, the learned High Court judge had followed **<u>State v Bulavou</u>** [2019] FJHC 877; HAC 28 f 2018 (10 September 2019) and started with 05 years and after adjusting for aggravating and mitigating factors and pre-trial remand period, ended up with the sentence of 05 years, 06 months and 14 days with a non-parole period of 04 years, 06 months and 14 days.

[7] The Supreme Court in **<u>State v Tawake</u>** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for 'street muggings' particularly ***Raqauqau***

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[1] **<u>Tamanisave v State</u>** [2023] FJCA 93; AAU109.2020 (7 June 2023)

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 <u>starting points</u> 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 only the appropriate <u>sentencing range</u> 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) may be considered to be low in terms of level of harm and therefore his sentence may start with 03 years of imprisonment with the sentencing range being 01 to 05 years. This is, of course, subject to the decision of the full court after the hearing of the appeal.

[11] Therefore, had the trial judge started with 03 years instead of 05 years the ultimate sentence would have been lower than what the appellant has received now.

[12] A guideline judgement applies to all sentencing that takes place after that date regardless of when the offending took place, however, it only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal

against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant [vide **Zhang v R** [2019] NZCA 507 by the Court of Appeal of New Zealand as referred to in **Jone Seru v The State** AAU 115 of 2017 (25 May 2023)]. If this principle is adopted, ***Tawake*** guidelines may be applied to the appellant's case as the application of ***Tawake*** may result in a more favourable outcome as far as his sentence is concerned.

[13] The appellant has made an application for bail pending appeal in June 2023 and both parties agreed to have a ruling on the application (no submissions filed by the appellant) and submissions (19 December 2023 - DPP).

Law on bail pending appeal.

[14] 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)].

[15] 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.

[16] 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'.

[17] It is clear from the single judge ruling that leave to appeal was being allowed on the sentence appeal on the basis that the appellant had a real prospect of success of the appeal itself [see **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)]. For the purpose of bail pending appeal, it could be said that the requirement of 'very high likelihood of success' is also now satisfied given the application ***Tawake*** guidelines.

[18] If I may consider (though not legally required) the time possibly taken to hear the appeal by the full court and what part of the sentence the appellant will have served by then, the appellant has already served 03 years and 10 months out of 05 ½ years and 14 days of his sentence. Earlier he had been in pre-trial custody for 05 months and 16 days. This being an appeal filed in 2020, there is a risk that the appellant will have served a substantial portion of the sentence, if not the full sentence itself by the time his appeal is heard by the full court which is likely to take some time in the future. In my view, there is little chance that the full court will resentence the appellant to a period of incarceration longer than the period he has already served.

[19] In the circumstances, I am inclined to release the appellant on bail pending appeal at this stage.

Orders

1. Bail pending appeal is granted subject to the following conditions.

   (i) The appellant aka Jegesa Ilisavani (Voter Identification Card No. 0269 129 00688) shall reside at Rokara Road, off Khalsa Road, Nasinu, with the two sureties.

   (ii) The appellant shall report to Valelevu Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

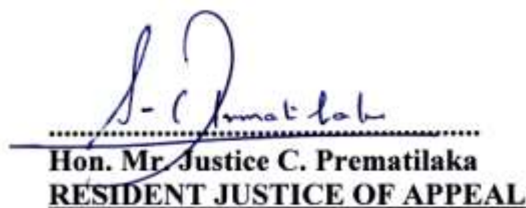
   (iii) The appellant shall attend the Court of Appeal and all other courts when noticed on a date and time assigned by the registry of the Court of Appeal and registries of other courts.

   (iv) The appellant shall provide in the persons of Talika Raiova (mother – Voter Identification Card No. 0011 176 03570 of Rokara Road, off Khalsa Road, Nasinu and Vata Koroi Lui (step father- Driving License No. 611387 of Rokara Road, off Khalsa Road, Nasinu to stand separately and jointly as sureties.

   (v) The sureties shall produce to the CA Registry sufficient proof of their identities, residence addresses and contact details (phone, email etc.).

   (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