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

CRIMINAL APPEAL NO. AAU 47 of 2020
[In the High Court at Suva Case No. HAC 430 of 2018S]

BETWEEN	**:**	**JEKEMAIA RABONU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. S. Prakash for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**10 March 2023**
Date of Ruling	**:**	**13 March 2023**

RULING

[1] The appellant along with Setareki Ravia (the appellant in AAU 149 of 2020) had been convicted in the High Court at Suva on two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 10 November 2018 at Nasinu in the Central Division.

[2] The information read as follows:

> ***'Count 1***
>
> ***Statement of Offence***
>
> ***AGGRAVATED ROBBERY****: Contrary to Section 311 (1) (a) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***SETAREKI RAVIA & JEKEMAIA RABONU*** *on the 10th day of November 2018, at Nasinu in the Central Division, in the company of each other, robbed*

SAT DEO MAHARAJ of a wallet containing $340.00 cash and assorted cards, the property of the said SAT DEO MAHARAJ.

Count 2

Statement of Offence

AGGRAVATED ROBBERY*: Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

SETAREKI RAVIA & JEKEMAIA RABONU *on the 10th day of November 2018, at Nasinu in the Central Division, in the company of each other, robbed PARBHA WATI of handbag which contained: $204.00 (cash), 1 x Alcatel mobile phone, 1 x Gold plated bangle, 1 x Silver and purple coloured bangle and 1 x Gold chain, the property of the said PARBHA WATI.'*

[3] The appellant pleaded guilty to both counts and the learned High Court judge had convicted him and sentenced the appellant on 05 December 2019 to a period of 08 years' imprisonment with a non-parole period of 06 years on each of the counts and directed that both sentences should run concurrently.

[4] The appellant's appeal in person against sentence could be considered timely though out of time by about 02 months.

[5] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] 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)].

[7] The brief facts of the case were as follows. The first complainant, Mr. Sat Deo Maharaj (PW1) was married to the second complainant, Ms. Parbha Wati (PW2). They had been married for 49 years, and on 10 November 2018, the date of the aggravated robberies, PW1 was 71 years old, while PW2 was 65 years old. At about 11 am on a sunny Saturday morning, the 10th November 2018, they were walking on Bal Govind Road near Veiraisi Settlement to visit relatives in Nadawa. Suddenly, two i-taukei youths aged about 18 and 20 years old jumped out of the bush and confronted them. They repeatedly punched PW1 in the face, chest and stomach, and dragged PW2 along the road. PW1 fell on the road and injured himself. He later needed 07 stiches to close his facial injuries. The two youths were later identified to be the appellant and another. They later stole the complainants' properties, as itemized in the charge and fled the crime scene.

[8] The sole ground of appeal against sentence urged on behalf of the appellant are as follows:

> ***Ground 1***
>
> *THAT the final sentence imposed on the appellant is harsh and excessive given the nature of the offending in that:*
>
> *i) The learned sentencing judge had applied the wrong tariff; and*
>
> *ii) Selecting a starting point outside the applicable tariff.*

01st ground of appeal (sentence)

[9] The appellant argues that the trial judge had used the wrong principle which resulted in a harsh and excessive sentence. The appellant seems to join issue with the trial judge having applied tariff of 08-16 years set in **Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015). He argues that the tariff of 08-16 years is applicable to aggravated robbery in the form of a home innovation and the learned trial judge had erred in applying the same tariff to his offending which is a street mugging.

[10] While this case is not case of home invasion as in ***Wise*** it is still a very serious case of street mugging which may fall into medium or high band in terms of level of harm as per **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) guidelines on street mugging carrying a sentence between 3-7 or 5-9 years of imprisonment. This is a case where serious physical and psychological harm (or both) has been suffered by the elderly victims. The victims do not appear to have offered resistance and I see no reason for the violence perpetrated, particularly on PW1.

[11] The appellant's guilty plea had not been tendered early in the proceedings, being 07 months after the first call date. Nevertheless, he had received 05 years and 04 months for mitigating factors including the guilty plea.

[12] In my view, a sentence towards the higher end of medium band or middle of high band may be warranted given all circumstances of the case.

[13] However, I note that the trial judge had applied the wrong tariff and the matters mentioned under the second aggravating factor – *'Your attack on the complainants were pre-planned'* do not appear to form part of the summary of facts admitted by the appellant.

[14] Therefore, it is best that the full court will decide the appropriate sentence as 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) and 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 them 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).

Bail pending appeal

[15] 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)].

[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 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'.

[18] I have allowed leave to appeal against sentence due to *inter alia* the issue concerning the tariff adopted by the trial judge. However, I cannot say that there is a very high likelihood of success in his appeal against sentence in the sense that his current sentence appears in all probability to be not very far from what the full court may eventually impose (if it so decides) on the appellant adopting ***Tawake*** (Supreme Court) guidelines.

[19] 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.

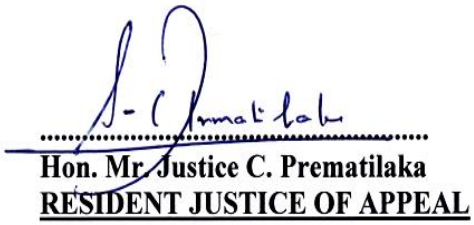
[20] The appellant has so far served about 03 years and 03 months of imprisonment. It cannot at this stage be reasonably assumed that given all the circumstances surrounding the offending, the sentence to be imposed on the appellant by the full court would likely to be close to that subject, of course, to the fact that it is for the full court to decide on the ultimate appropriate sentence.

[21] Therefore, there is no 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.

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

Orders of the Court:

1. Leave to appeal against sentence is allowed.
2. Bail pending appeal is refused.



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