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

CRIMINAL APPEAL NO.AAU 113 of 2017
[Magistrates Court of Lautoka Criminal Case No. 368 of 2013]

BETWEEN

: **IOWANE NAIO**
SENIVALATI NAVOTI

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu and Mr. K. Chang for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **15 September 2020**

Date of Ruling : **17 September 2020**

RULING

[1] The appellants had been tried in the Magistrates court in Lautoka under extended jurisdiction on four counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009. The charges against the appellant were as follows.

'FIRST COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY: *Contrary to Section 311(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence (b)

IOWANE NAIO *and* ***SEINIVALATI NAVOTI*** *on the 3rd day of March 2013, at Lautoka in the Western Division, robbed Rajnesh Rohindra Chand of*

$33.00 Cash and immediately before such robbery, did use personal violence on the said Rajnesh Rohindra Chand.

SECOND COUNT

Statement of Offence (a)

***AGGRAVATED ROBBERY**: Contrary to Section 311(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence (b)

***IOWANE NAIO** and **SEINIVALATI NAVOTI** on the 3rd day of March, 2013, at Lautoka in the Western Division, robbed Mohammed Imtiaz of $60.00 Cash and immediately before such robbery, did use personal violence on the said Mohammed Imtiaz.*

THIRD COUNT

Statement of Offence (a)

***AGGRAVATED ROBBERY**: Contrary to Section 311 (1) (a) of the Crimes Decree No.44 of 2009*

Particulars of Offence (b)

*IOWANE NAIO and **SEINIVALATI NAVOTI** on the 3rd day of March 2013, at Lautoka in the Western Division, robbed Parmeshwar Naidu of $708.00 Cash and immediately before such robbery, did use personal violence on the said Parmeshwar Naidu.*

FOURTH COUNT

Statement of Offence (a)

***AGGRAVATED ROBBERY**: Contrary to Section 311 (1) (a) of the Crimes Decree No.44 of 2009*

Particulars of Offence (b)

***IOWANE ANIO** and **SENIVALATI NAVOTI** on the 3rd day of March, 2013, at Lautoka in the Western Division, robbed Diwani Amma of $300.00 Cash and immediately before such robbery, did use personal violence on the said Diwani Amma.*

[2] After trial, the learned Magistrate had found the appellants guilty as charged in his judgment dated 24 April 2017. The appellants were sentenced on 19 July 2017 to an imprisonment of 09 years with a non-parole period of 06 years.

[3] The 01st appellant in person had appealed against conviction and sentence within time on 31 July 2017. Although the covering letter dated 01 August 2017 sent by the Officer-in-Charge of Lautoka Correction Centre refers to an appeal by both appellants, I do not find any accompanying notice of appeal signed by the 02nd appellant. The only notice of appeal attached to the covering letter had been signed by the 01st appellant. Later both appellants had filed an abandonment notice in Form 3 dated 05 April 2019 against sentence. However, no further directions had been given or orders made regarding it. The 01st appellant had tendered additional grounds of appeal on 16 March 2020. Legal Aid Commission appearing for both appellants had filed a joint amended notice of appeal against conviction (03 grounds of appeal) and sentence (one ground of appeal) on 18 May 2020 along with written submissions. The LAC had tendered an application for bail pending appeal purportedly on behalf of the both appellants on 24 June 2020 along with written submissions but I find only the affidavit of the 02nd appellant. The 01st appellant had in person filed additional grounds on 15 July 2020 without any reference to his lawyers namely LAC. The State had tendered its written submissions on 20 July 2020.

[4] The state, however, has considered that both appellants had filed timely appeals against conviction and sentence and thereafter an application for bail pending appeal.

[5] In terms of section 21(1)(b)and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration*

Law on bail pending appeal.

[7] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013: 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*

[26] The starting point in considering an application for ***bail pending appeal*** *is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing;*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that ***bail pending appeal*** *should only be granted where there are exceptional circumstances. In* ***Apisai Vuniyayawa Tora and Others –v- R*** *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

s"*It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."*

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[8] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004*)* the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[9] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[10] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).

On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'

[11] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[12] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[13] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for **bail pending appeal** should attempt even to comment on. They are matters for the Full Court ... ."*

[14] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"The general restriction on granting **bail pending appeal** as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[15] Therefore, the legal position appears to be 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 and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional

circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[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 practical purpose or result.

[17] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would 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'.

Grounds of appeal

[18] The grounds of appeal urged by the appellants are as follows.

> ***Against conviction***
>
> '***Ground One***
>
> *The learned Magistrate erred in law and facts by not directing himself to consider the truthfulness and weight to be attached to the confessional statements.*
>
> ***Ground Two***
>
> *The learned Magistrate erred in law and facts by not directing himself to consider the Turnbull principles.*
>
> ***Ground Three***
>
> *The appellant's right to a fair trial is infringed by lack of legal representation.*

Against Sentence

Ground Four

The final sentence imposed on the appellants is excessive given the nature of the offending in that

(i) The learned Magistrate had applied the wrong tariff.

(ii) Selecting a starting point outside the applicable tariff; and

(iii) Enhancing the sentence with an element of the offending as an aggravating factor.

01st ground of appeal

[19] The appellants had challenged their cautioned interviews at the *voir dire* inquiry *inter alia* for the reasons that they were fabricated and already prepared by the police and the appellants were forced to admit the crimes under oppression. The police had denied the allegations. However, the learned Magistrate had ruled both cautioned interviews to be voluntary and therefore, admissible. It appears that the appellants had again challenged the confessions at the trial among other things on the basis they had been forced to sign ready-made cautioned statements by the police.

[20] The appellants rely on **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51) in support of their submission under the first ground of appeal that the learned Magistrate had not considered the weight and truthfulness of the cautioned interviews in the judgment and it is not enough for him to have simply adopted and relied on them on the basis of voluntariness.

[21] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal stated analyzing previous decisions including ***Volau*** [see also **Rokomaraivalu v State** [2020] FJCA 62; AAU18.2018 (1 June 2020)].

> *'The correct law and appropriate direction on how the assessors should evaluate a* ***confession*** *could be summarised as follows.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide* ***Volau v State*** *Criminal Appeal*

No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).

(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the ***confession*** *(vide* ***Volau****).*

(iii) Once a ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau).***

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[22] The learned Magistrate had simply stated in the judgment that he had earlier ruled the confessions to have been properly obtained and therefore admissible. The trial Magistrate does not seem to have considered the voluntariness of the appellant's cautioned statements in the judgment, not in relation to the admissibility which had already been decided, but regarding the weight and value to be attached to them as the appellants had challenged the voluntariness once against at the trial proper. Did not the Magistrate have to consider in the judgment whether the appellants had in fact made the alleged confessions, whether they were truthful and then the weight/value to be attached to them, in the judgment after the trial proper in the same way the assessors are expected to do? This appears to be the case even when the Magistrate had no reason to reconsider his decision on the issue of voluntariness during the trail.

[23] I said in **Vakarusaqoli v State** [2020] FJCA 57; AAU032.2017 (20 May 2020) on the same issue as follows:

> *[24] It is an important question of law as to whether the same principles would apply mutatis mutandis to a trial by the judge (without assessors) who has admitted a confessional statement at the voir dire as having been made voluntarily but the accused has continued to agitate the issue of voluntariness and kept that alive at the trial. Going by the existing decisions including **Maya** the learned Magistrate need not have gone into the question of voluntariness in his judgment unless he had changed his mind during the trial. What about the issues as to whether the accused made the confession, it is true and sufficient for the conviction (i.e. the weight or probative value)?*
>
> *[25] However, the matter does not end there. Even if the trial judge has not changed his mind during the trial proper on the confession being voluntary, should the trial judge in the absence of assessors not have addressed his mind in the judgment to the issue as to whether the confession is true and sufficient for the conviction (i.e. the weight or probative value) as required in a trial with assessors? To me this sounds an important question of law.'*

[24] The learned Magistrate had simply taken the cautioned interviews as given in the judgment on the basis of his decision to admit them based on its voluntariness at the *voir dire* inquiry and seems to have been satisfied that what the appellants had stated there proved the elements of the crimes and obviously the identities of the appellants. To some extent this could be regarded as considering the weight/value to be attached to the confessions going to the sufficiency of such admissions for the convictions. Still the question of truthfulness of the confessions seems to have gone unnoticed and unanswered.

[25] This is an important question of law to be clarified by the Full Court for future guidance though the absence of such an express consideration would not be fatal to the conviction if the totality of the evidence at the trial justifies the verdict. Leave is not required in this connection.

[26] However, as a matter of formality I grant leave to appeal on the above question of law but I am not inclined to conclude that the answer to that question would lead to a 'high likelihood of success' in his appeal required in the grant of bail pending appeal.

02nd ground of appeal

[27] The appellants argue that the learned trial judge had not directed himself on Turnbull guidelines on their identities. It looks as if the prosecution had not sought to establish the identity of the appellants through the complainants, for the complainants had identified them in court only when cross-examined by the appellants who appeared in person. In other words the complainants' identifications of the appellants appear to have been first time dock identifications, though one of the complainants had spoken at the trial of having identified both appellants at an ID parade. However, both police officers had testified that there was no identification parade. The other complainants had not mentioned having participated at an identification parade either.

[28] The learned Magistrate had simply stated in the judgment that the case was based on direct evidence where the appellants had been properly identified by the complainants in cross-examination. It is true that the complainants had described how they identified the appellants in the night between midnight and 1.20 am. Nevertheless, the fact that the dock identifications came in cross-examination, in my view, does not relieve the Magistrate of having to give his mind as to whether those identifications could be relied upon to establish the appellants' identities. This could only be done by giving his mind to the Turnbull guidelines and directing himself on the maters set out therein.

[29] In fact, the Magistrate had not even warned himself of the danger of first time dock identification as the appellants were earlier not known to the complainants who had seen them for the first time at the time the offences were being committed. It appears from the confessions that there had been two or three others other than the two appellants who participated in committing the crimes at different locations in the same night playing different roles and therefore, the question arises whether the complainants were simply identifying the appellants because they were in the dock as accused and they had chosen to cross-examine them. However, it is not clear whether the appellants had challenged the opportunity and ability of the complainants to identify them in the surroundings where the crimes took place in the night.

[30] The appellants rely on **Savu v State** [2014] FJCA 208; AAU0090 of 2015 (05 December 2014) and **Naicker v State** [2018] FJSC 24; CAV0019 of 2018 (01 November 2018) to drive home their argument under the second ground of appeal.

[31] The tests were formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24, **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) and **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) on first time dock identification directions. In ***Korodrau*** it was held as follows.

> *'[35] However, the Supreme Court in **Naicker** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty and answered the question in the affirmative. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial Judge. The test to be applied is found in the following paragraph.*
>
> > *'45. I return to the irregularities in the trial as a result of the **dock identifications** and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a "substantial miscarriage of justice" occurred?.....The question, in my opinion, is whether the judge **would** have convicted Naicker of murder if there had been no **dock identification** of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge **could** have convicted Naicker without the **dock identifications.** The question now is whether he **would** have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the **dock identifications,** the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.' (Emphasis added)*
>
> *[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's*

> *identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.*

[32] The issue whether in the given circumstances the Magistrate should have directed himself on Turnbull guidelines before accepting the dock identifications as conclusive is a question of mixed law and fact which deserves to be considered by the full court though without the benefit of the complete record I cannot definitely say that it has a reasonable prospect of success. The full court may also apply the above tests to see whether ignoring the dock identification the Magistrate *could* have found the appellants guilty and also *would* have convicted them on the other evidence available namely the cautioned interviews.

03rd ground of appeal

[33] The appellants complain that lack of legal representation had adversely affected them. They rely on **Prasad v State** [2019] FJCA 3; CAV0024 of 2018 (25 April 2019) to substantiate their position that the right to a fair trial had been infringed and they had been adversely prejudiced by lack of legal representation.

[34] In **Balelala v State** [2004] FJCA 49; AAU0003.2004S (11 November 2004) where *inter alia* the appellant had exercised his right of cross-examination thoroughly, gave evidence, and called several witnesses, the Court of Appeal held

> *'The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted. In this case, the appellant sought, but was refused legal aid by reason of an assessment of a lack of merits in his defence. The decision was properly reviewed and dismissed. Section 28 of the Constitution does not require the provision of legal aid in absolute terms. The obligation which is implicit in that respect is one which arises where "the interests of justice so require."*

[35] In **Ramalasou v State** [2010] FJCA 19; AAU0085.2007 (28 May 2010) where *inter alai* trial within trial and in the trial proper the appellant had cross-examined the police officers at length and challenged their evidence and the appellant had also competently cross-examined the prosecution witnesses and quite ably put his case to the prosecution witnesses, the Court of Appeal said that the appellant had not been prejudiced by lack of legal representation at his trial and remarked:

> *"[9] This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice. Although, as this Court observed in* ***Asesela Drotini v. The State*** *Cr. App. AAU1/05, 24 March 2006:*
>
> > *"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.*
>
> *The question for this Court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently."*

[36] The counsel for the appellant conceded that he cannot confirm whether the appellant had requested legal assistance at all or whether they had voluntarily opted out of taking legal assistance and decided to appear in person. Further, the appellants appear to have fully cross-examined the police officers at the *voir dire* inquiry and done so at the trial proper as well.

[37] This ground of appeal has no reasonable prospect of success.

04th ground of appeal

[38] The appellants complain that the Magistrate had applied the wrong tariff in sentencing them and enhanced the sentence on account of an element of the offence charged.

[39] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 08 years as the starting point without perhaps being mindful that the tariff in ***Wise*** was set in a situation where *inter alai* the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.

[40] From the evidence as narrated in the judgment it is difficult to see how the factual background of this case fits exactly into the scenario the Supreme Court dealt with in ***Wise.*** It appears to me that this is a more serious form of street mugging where sentencing tariff had been recognized as 18 months to 05 years as formulated in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where it was also held that

- ***The sentencing bracket was 18 months or 5 years****, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.*
- *An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.*
- *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.*

[41] While reiterating the sentencing tariff for street mugging as 18 months to 05 years the Court of Appeal held in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) that

> *'19.....When the learned Magistrate chose 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.'*

[42] While the Magistrate had erred in picking 08 years as the starting point following the tariff in ***Wise***, I am convinced that the facts of this case certainly warrant a custodial sentence over and above the tariff of 18 months to 05 years set for street mugging. The Magistrate also had erred in taking the fact that the appellant had committed the offence in the company of others, for one of the ways in which a robbery becomes an aggravated robbery is when it is committed by an accused in company with one or more persons in terms of section 311(1)(a) of the Crimes Act, 2009. Therefore, to that extent the Magistrate had taken an element of the aggravated robbery as an aggravating factor. However, apart from that the Magistrate had considered the offences of aggravated robbery as a crime spree, the shock and trauma caused to the victims and preplanning with no respect to proprietary rights of the victims as aggravating factors.

[43] In my view, what the appellants had indulged in is an extreme form of street mugging (if the spate of incidents could still be called by that name) not far from the gravity of committing home invasions in the night. As pointed out by the state the appellants with others had been travelling around in a twin cab targeting innocent and unsuspecting civilians (some of whom were elderly people) returning home around mid-night, pretending to be law enforcement officers and committing violence at times, almost in front of their homes. Thus, the sentence on the appellants in this case, in my view, should fall between the high end of the tariff for usual street mugging cases and low end of the tariff for home invasions in the night *i.e.* between 05 years and 08 years towards the high end. It is a matter for the full court to decide.

[44] However, due to the sentencing error of taking the wrong tariff to fix the starting point I grant leave to appeal against sentence though the ultimate sentence may not be drastically lower than the current sentence.

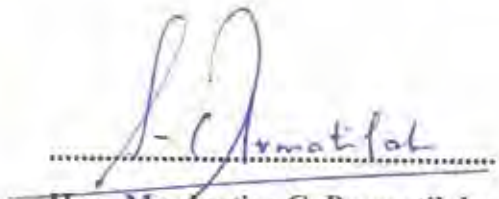
[45] Though some grounds of appeal have been held to be sufficient to reach the full court on account of perceived errors of law involved, I would not consider any of the above grounds to constitute exceptional circumstances to consider bail pending appeal.

[46] The appellants have not submitted any other exceptional circumstances for this Court to consider their bail pending appeal applications favourably.

[47] Before parting with this ruling, I feel constrained to state as an observation that given the fact that this case was a spate of extreme form of street mugging in the night with accompanying violence, it should not have been referred to the Magistrates court to try the appellant under its extended jurisdiction. The High Court judges should exercise more care and vigilance in investing the magistrates with jurisdiction to try indictable offences under section 4(2) of the Criminal Procedure Act, 2009.

Orders

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL