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

CRIMINAL APPEAL NO.AAU 0044 of 2018
[Magistrates Court of Suva Case No. 679 of 2015]

BETWEEN : **ASESELA SALABALE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

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

Date of Hearing : **19 October 2020**

Date of Ruling : **20 October 2020**

RULING

[1] The appellant had been arraigned in the Magistrates court in Suva under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 27 March 2015.

[2] The appellant had pleaded guilty and the learned Magistrate having been satisfied that the appellant pleaded voluntarily and unequivocally had convicted and sentenced him on 01 September 2016 to an imprisonment of 08 years with a non-parole period of 06 years.

[3] The appellant in person had appealed against sentence on 20 April 2018 (dated 31 January 2018). The delay is almost 01 year and 06 months. The Legal Aid Commission had tendered an amended notice of appeal, appellant's affidavit seeking an extension of time and written submissions 30 June 2020. LAC had also filed an application for bail pending appeal on 19 August 2020. The State had tendered its written submissions on 10 August 2020 and 31 August 2020.

[4] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[5] In ***Kumar*** the Supreme Court held

> '[4] *Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(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?*

[6] ***Rasaku*** the Supreme Court further held

> '*These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.*'

[7] I think the remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> '*(a) ....*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[8] Sundaresh Menon JC also observed

'27……… It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[9] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ***'real prospect of success'*** *(see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

Law on bail pending appeal.

[10] 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 repeal 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:*
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> > *"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:*

"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."*

[11] 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)

[12] 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.'*

[13] 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).'*

[14] 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'*

[15] 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...."*

[16] 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 ... ."*

[17] ***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."*

[18] 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.

[19] 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.

[20] 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'.

Ground of appeal

[21] The ground of appeal urged by the appellant are as follows.

<u>***Against sentence***</u>

> *(1) THE final sentence imposed on the Appellant is harsh and excessive given the name of the offending in that*
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> > *(i) The learned sentencing Magistrate had applied the wrong tariff;*
> >
> > *(ii) Selecting the starting point outside the applicable tariff;*
> >
> > *(iii) Enhancing the sentence with an element of the offending and part of the sentencing tariff as aggravating factors.*

[22] The brief summary of evidence as narrated in the learned Magistrate's sentencing order is as follows.

> *'The complainant in this matter is Kailash Kumar Patel, taxi driver of Toorak Road.*
>
> *The accused is Asesela Salabale of Tamavua-i-wai village.*
>
> *The accused has been charged with 1 count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree 2009.*
>
> *On 27th March 2015, at about 10:15pm, the complainant was driving his taxi registration no: LT 7217 along Victoria parade. He was then stopped by 4 itaukei males. They all got into the taxi. One of them sat on the front seat while 3 others sat at the back. The complaint smelt liquor from the 4 males. The one who sat in front asked the complainant to drive to Delainavesi. The complainant then drove along the Queens Road and when they reached the roundabout at Reservoir Road, the itaukei male that sat in front asked the complainant to take them to the cemetery but the complainant told him that the road does not lead to the cemetery. He then continued to take them to Delainavesi. Before they reached the Delainavesi bridge, the men told the complainant to turn to the gravel road on the right. The complainant then drove along the gravel road and this is when the itaukei male who sat in front pulled the handbrake, blocked the complainant's mouth with his hands and punched his left cheek. The male who sat behind the complainant pulled him backwards as the other two got off the taxi. One of them pulled the*

complainant's wallet from his trousers while the other one stood. In total, they stole $17 worth of coins and there was $25 worth of cash in the complainant's wallet. They all then walked away while the complainant drove to Delainavesi police post. The officers then accompanied the complainant to the scene where he was robbed.

On 28th March 2015, the complainant was medically examined and the medical report reveals that there was a laceration and swelling noted on his forehead, soft tissue swelling noted over his left mandible and soft tissue injury noted over the nachal area. A copy of the medical report is attached herewith as (A1).

The police investigations led to the accused being arrested and interviewed under caution on 30th March 2015 at Samabula Police Station where he made full confessions. At question and answer 46, the accused explains that he was the one who held the complainant from behind in the taxi while the others took out the complainant's wallet from his pocket. A copy of the caution interview is attached herewith as (A2).

The stolen cash worth $42 in total was not recovered in this matter.'

Length of Delay

[23] As already pointed out the delay is about 01 year and 06 months which is substantial.

[24] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused.'*

[25] Faced with a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application'*

[26] I also wish to reiterate the comments of Byrne J. in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

[27] Therefore, delay alone is sufficient to defeat the appellant's appeal if that is the only consideration.

Reasons for the delay

[28] The appellant states in his affidavit that the LAC lawyer who appeared for him had advised him not to appeal against sentence and that is the reason why he had not appealed. If there is any truth in this allegation the counsel for the appellant could have verified it with the former counsel or checked the trial file with the LAC to see the veracity of the claim. However, there is no submission filed in support of the appellant's position in the written submissions tendered for the bail pending appeal application. Therefore, there is no acceptable explanation given for the belated appeal.

Merits of the appeal

[29] The appellant complains of the wrong tariff adopted by the learned Magistrate which according to him, had contributed to a harsh and excessive sentence. He also complains of the factors considered as aggravating factors.

[30] In the **State v Ramesh Patel** (AAU 2 of 2002; 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[31] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the substantial delay and want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

[32] The Learned Magistrate 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 picked the starting point at 12 years following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). He had added 04 years for the aggravating features and deducted 03 years for mitigating features and another 1/3 of the sentence due to the guilty plea ending up with the head sentence of 08 years and 08 months. After the period of remand of 07 months was taken into account the ultimate sentence had become 08 years.

[33] The trial judge had applied the sentencing tariff set in ***Wise*** and taken 12 years as the starting point without being mindful that the tariff in ***Wise*** was set in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.

[34] The factual background of this case does not fit into the kind of situation the Supreme Court was confronted with in ***Wise.*** Neither is this a case of simple street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as 'street mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present.

[35] The learned Magistrate seemed to have committed a sentencing error in following the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) in this instance as discussed below and therefore, he could be said to have acted on a wrong sentencing principle requiring appellate court's possible intervention in the matter of sentence.

[36] Instead of picking a starting point of 12 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise***, the learned Magistrate should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers as articulated in the following decisions.

[37] The decision in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

> '[10] The maximum penalty for aggravated robbery is 20 years imprisonment.
>
> [11] In ***State v Susu*** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.
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> [12] In ***State v Tamani*** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing ***Joji Seseu v State*** [2003] HAM043S/03S and ***Peniasi Lee v State*** [1993] AAU 3/92 (apf HAC 16/91).
>
> [13] In ***State v Kotobalavu*** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing ***Tagicaki & Another*** HAA 019.2010 (Lautoka), ***Vilikesa*** HAA 64/04 and ***Manoa*** HAC 061.2010, said at p6:
>
> > "Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."
>
> [14] Similar pronouncement was made in ***Vilikesa*** (supra) by Gates J (as he then was):
>
> > "violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in

prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."

[38] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea....'*

[39] Therefore, I held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[40] 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.'*

[41] It also appears that the Magistrate had been forced into the error of taking the fact that the offence had been committed against a public service provider as an aggravating factor to enhance the sentence because he had not applied the correct tariff for attacks on providers of public transport such as taxi, bus or van drivers, for otherwise the Magistrate would have realized that the said factor was already included in the tariff itself.

[42] However, I do not see anything wrong with taking into account the injuries caused to the complainant as an aggravating factor if the correct tariff was applied.

[43] I also find that the appellant had received a 1/3 discount which he did not deserve as his plea had not come at an early opportunity but after sometime (according to the Magistrate).

[44] It should be kept in mind that in Fiji the decision as to what discount should be given to the guilty plea is governed by the judicial pronouncements in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) and there is no entitlement for an automatic 1/3 discount for early guilty pleas.

[45] A discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was once considered as the 'high water mark' in **Ranima v State** [2015] FJCA17; AAU0022 of 2012 (27 February 2015) relied on by the Magistrate but it had not been regarded as an absolute benchmark in subsequent decisions such as ***Mataunitoga***. The Supreme Court dealing with ***Ranima*** said in ***Aitcheson:***

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[46] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*

[47] However, I am convinced that the objective seriousness of the offending (not the offender) warrant a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender) and if the starting point is taken at the lower end then a substantial increase in the sentence is warranted for all aggravating features (offending and offender) as described by the Magistrate in paragraph 7 of

the sentencing order. In either of the above scenarios, the appellants would have the benefit of mitigating factors being 19 years old and first offender [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[48] Nevertheless, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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 [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. 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)].

[49] However, the error of principle in applying the wrong tariff by the sentencing judge justifies intervention by the full court that could then decide either to affirm the existing sentence or what the appropriate sentence should be. This sentencing error as a ground of appeal has a reasonable prospect of success in appeal.

Prejudice to the respondent

[50] No prejudice would be caused to the respondent by an enlargement of time.

Bail pending appeal

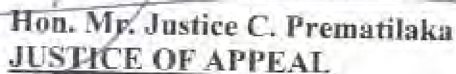
[51] However, the ground of appeal against sentence does not have a 'very high likelihood of success' to consider bail pending appeal as the sentence is still within the tariff for attacks on providers of public transport such as taxi, bus or van drivers *i.e.* 4-10 years.

[52] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

[53] In addition, in the absence of a 'very high likelihood of success' and any other exceptional circumstances the other two factors in section 17(3) of the Bail Act are not directly relevant and need not be considered and the substantial delay and unsubstantiated explanation for the delay in tendering the appeal would further adversely affect the appellant's chances of bail pending appeal, for granting of bail pending appeal is a matter for the exercise of the court's discretion. A court of law would not exercise its discretion in favour of a party that has slept over his rights. The law assists those that are vigilant with their rights, and not those that sleep thereupon (*vigilantibus non dormientibus jura subveniunt*). Therefore, the appellant cannot be the beneficiary of his own fault namely waiting for 01 year and 06 months to file an appeal against sentence. Had he filed a timely appeal it would have been heard by now and no need for bail pending appeal would have arisen.

Orders

1. Enlargement of time to appeal against sentence is granted.
2. Bail pending appeal is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL