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

CRIMINAL APPEAL NO.AAU 141 of 2017
[In the Magistrates' Court at Nausori Case No.393 of 2017]

BETWEEN : **SAMUELA MOCE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **14 December 2020**

Date of Ruling : **15 December 2020**

RULING

[1] The appellant had been charged with another in the Magistrate's court of Nausori exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 18 June 2017 at Kasavu in the Eastern Division.

[2] The appellant had pleaded guilty to the charge voluntarily and admitted the summary of facts. Having been satisfied of the same, the learned Magistrate had convicted the appellant and sentenced him on 28 August 2017 to 08 years and 11 months of imprisonment with a non-parole term of 06 years.

[3] The appellant being dissatisfied with the sentence had tendered a timely notice of appeal on 27 September 2017. Legal Aid Commission on 19 June 2020 had submitted an amended notice of appeal against sentence along with written submissions. The respondent had filed its written submissions on 17 July 2020. Thereafter, the Legal Aid Commission had filed an application for bail pending appeal on behalf of the appellant, his affidavit and written submissions on 03 August 2020. The state had responded to the application for bail pending appeal by way of written submissions on 23 October 2020.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellants could appeal against 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.

[5] 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 filed out of time to be considered arguable there must be a real 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.

[6] ***Ground of appeal***

> *'That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.'*

[7] The summary of facts as stated in the sentencing order is as follows.

> *On the 18th day of June, betweeb 12.00 am, at Kasavu, Nafiz Hassan (PW 1), 24 years, taxi driver of Verata,Nausori was robbed by one Jonacani Qilisaivalu (Accused 1), 22 years, unemployed of Kasavu village. In the process of robbery the following items were taken: HTC mobile valued at $720.*
>
> *On the above mentioned date and time, (PW 1) was driving in Nausori town when (Accused 1) and (Accused 2) asked (PW 1) if (PW 1) could drop them at Naduruloulou. (PW 1) agreed and took both (Accused 1) and (Accused 2) to Naduruloulou. Once at Naduruloulou (PW1) was told to go to Waidra then from Waidra to the Kings Road pass Kasavu. (Accused 1) then got off the taxi came around drivers side and pulled the drive out of the vehicle. (PW-1 was then punched and made to sit in the taxi and the taxi was driven around by (Accused 1) before both accused left the vehicle and (PW1) at Kasavu. The above mentioned items were taken from (PW 1). Once both accused left, (PW 1) drove to the station and reported the matter to police. After intensive investigation the identity of (Accused 1) and (Accused 2) came to light. (Accused 1) and (Accused 2) were then checked at their homes but were not found.*
>
> *Both (Accused) were interviewed under caution in which they admitted to the offence, (Accused 1) in Q46 to Q52 of his interview and (Accused 2) in Q28 to Q42 of his interview. Both (Accused 1) and (Accused 2) were then charged for the offence of Aggravated Robbery contrary to Section 311 of the Crimes Act number 4 of 2009 and will be appearing in custody at the Nausori Magistrates Court on the 06th day of July 2017.*

Ground of appeal against sentence

[8] 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. He had enhanced the sentence on account of aggravating features by 03 years but given a discount of 03 years for mitigating features and another reduction of 1/3 of the sentence due to the 'early guilty plea' ending up with the head sentence of 09 years of imprisonment. After the period of

remand was taken into account the ultimate sentence had been 08 years and 11 months.

[9] 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 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. The factual background in ***Wise*** was as follows.

> *'[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*
>
> *[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.*
>
> *[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'*

[10] From the summary of facts it cannot be seen how the factual background of this case fits into a factual scenario the Supreme Court encountered in ***Wise.*** It appears to me that this is an '***aggravated robbery against providers of services of public nature including taxi, bus and van drivers***' where the sentencing tariff is between 04 to 10 years of imprisonment [vide **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011 (15 May 2012), **State v Bola** [2018] FJHC 274; HAC 73 of 2018 (12 April 2018) and **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].

[11] What is relevant to the appeal point taken up is that the learned Magistrate had committed a sentencing error in following the sentencing tariff set in ***Wise*** and therefore, he had acted on a wrong sentencing principle warranting the appellate court's possible intervention in the matter of sentence.

[12] As the Court of Appeal remarked in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020), acting upon a wrong sentencing range could affect the whole sentencing process and eventually the ultimate sentence.

> '[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.*

[13] Therefore, following the sentencing tariff set in **Wise v State** and picking 12 years as the starting point demonstrates a sentencing error by the Magistrate having a reasonable prospect for the appellant to succeed in appeal regarding his sentence.

[14] The fact that the final sentence of 08 years and 11 months of imprisonment is still within the tariff of 04-10 years for '*aggravated robbery against providers of services of public nature including taxi, bus and van drivers*' does not necessarily mean that the appellant had received a sentence that fit the crime.

[15] However, it is for the full court to decide on the appropriate sentence being mindful of the applicable tariff. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). 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)].

[16] Though not an issue in the appeal, some guidance seems to be called for in the matter of 1/3 discount for the guilty plea, for the learned Magistrate had given the appellant an automatic 1/3 discount. In Fiji the decision as to what discount should be given to the guilty plea is governed by the decisions 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 even for an early guilty plea. **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) had not been regarded as an absolute benchmark to follow in guilty pleas.

[17] It is equally wrong for the learned Magistrate to have guided himself on ***Wise*** guidelines on tariff for aggravated robberies of home invasion type and added 03 more years to the starting point considering this to be an attack on a taxi driver. Had the Magistrate picked the starting point based on the correct tariff for '*aggravated robbery against providers of services of public nature including taxi, bus and van drivers*' he could not have once again considered the attack on a taxi driver as an aggravating factor without being guilty of 'double counting'.

Law on bail pending appeal.

[18] 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:*

"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."*

[19] 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)

[20] 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.'*

[21] 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).'*

[22] 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'*

[23] 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...."*

[24] 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 ... ."*

[25] ***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."*

[26] 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.

[27] 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.

[28] 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 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'.

[29] The appellant has already satisfied this court that he deserves to be granted leave to appeal against sentence as he has a reasonable prospect of success in his appeal in getting the sentence revisited by the full court in terms of section 23 (3) of the Court of Appeal Act. However, to what extent the full court would adjust his sentence cannot be decided at this stage and therefore it cannot be said that he has a very high likelihood of success in his appeal against sentence.

[30] I shall also 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.

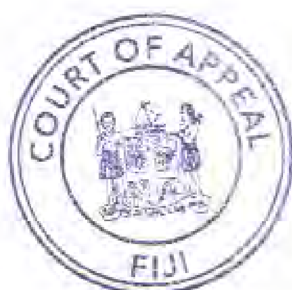
[31] The appellant has served about 03 years and 03 ½ months of imprisonment. However, given that the sentencing tariff for ''*aggravated robbery against providers of services of public nature including taxi, bus and van drivers*' is between 04 to 10 years of imprisonment and that the appellant is not likely to be visited with a sentence at the

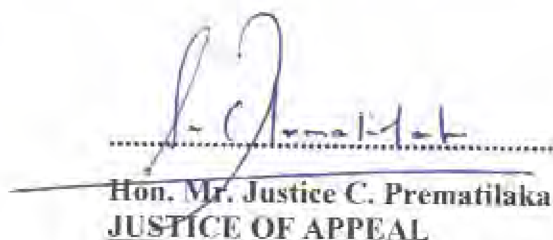
lower end of the tariff due to the facts and circumstances of the case, in particular the fact that the complainant was robbed between 12.00 noon and 2.00 a.m., he was pulled out of the vehicle, punched and made to sit in the taxi while the appellant and his accomplice driving the vehicle around before leaving it at Kasavu. Therefore, the appellant has not and is not likely to serve the possible sentence the full court is likely to impose on him after hearing his appeal if he is not enlarged on bail pending appeal at this stage. Therefore, section 17(3) (b) and (c) cannot be necessarily considered in favour of the appellant at this stage.

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

Order

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





Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL