IN THE COURT OF APPEAL, FIJI

[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 132 of 2019

[In the Magistrates Court at Nadi Case No.202 of 2014]

BETWEEN	**:**	**JONE NAUTU**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**01 November 2021**
Date of Ruling	**:**	**03 November 2021**

RULING

[1] The appellant stood charged with another in the Magistrates' court at Nadi on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 08 March 2014 at Nadi in the Western Division. Particulars of the offence read as follows:

*'**Count One***

Statement of Offence

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

Particulars of Offence

> ***JONE NAUTU*** *and* ***LEONE NIUMATAIWALU*** *on the 08th day of March, 2014 at Nadi in the Western Division robbed* ***MOHAMMED FEROZ*** *cash $500 and before the time of such robbery did threatened the said* ***MOHAMMED FEROZ****.'*

[2] After trial the appellant had been convicted and sentenced on 24 December 2018 to 08 years of imprisonment (effectively 07 years and 11 months after the remand period was deducted) with a non-parole period of 06 years.

[3] The appellant being dissatisfied with the sentence had forwarded an application for enlargement of time (and grounds of appeal) and an affidavit in person on 30 August 2019 against conviction and sentence. He had filed further papers subsequently including an application for bail pending appeal. The Legal Aid Commission on 28 July 2021, 06 August 2021 and 14 September 2021 had submitted formal appeal papers for extension of time to appeal against conviction and sentence and bail pending appeal along with written submissions. The respondent had filed its written submissions on 20 October 2021.

[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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (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?

[5] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[6] The delay of the appeal (over 07 months) is substantial. His explanations for the delay is that he had initially filed his appeal in the High Court of Lautoka under HAA 5 of 2019 but was told that the correct forum was the Court of Appeal and to get legal assistance. A counsel from the Legal Aid Commission had informed the appellant that she would assist him to lodge his appeal but for two months she had not returned. Thereafter, he had filed his appeal papers with the assistance of some inmates. There appears to be some credibility to the appellant's explanation for the delay in the appeal reaching the Court of Appeal. I would therefore see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] 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.*

[8] ***Grounds of appeal***

Grounds (conviction)

Ground 1
THAT the verdict is unreasonable and not supported by the totality of the evidences in consideration of the joint enterprise.

Ground 2
THAT the Learned Trial Magistrate had erred in law and in facts having not adequately evaluated the discrepancies as to the testimonies of the prosecution witnesses that such contradictions are materially significant to be attached to the credibility and reliability of prosecution's case, having an impact on the conviction.

Sentence

Ground 1
THAT the Learned Trial Magistrate erred in his sentencing discretion by imposing a sentence that is harsh and excessive resulting in there being double counting regarding the aggravating factor.

[9] The facts have been succinctly summarized by the appellant's counsel as follows:

'6. In brief, the incident in question happened on the 8th of March, 2014 inside a barber shop belonging to the complainant. The account of the complainant is that he was attending to a customer when the Appellant entered, held his collar and swore at him for which he did not know why. At this point his son was taking money from the tilt to be put in a container when other person took the container containing monies and that both fled the scene, despite his son punching the other person. The complainant asserted $500 was stolen. He had received from Police a plastic bag of money recovered from the other person. The son testified that he was outside the barber shop when he saw the Appellant holding his father's collar. He entered and punched the Appellant to leave his father's collar. He entered and punched the Appellant to leave his father's collar, which the Appellant did so and in doing so both ran away with a plastic of money. The arresting police officer had testified that he attended to the crime scene and PC Maba had brought a Fijian boy whom he recognized as Niu of Navoci who was holding a small plastic bag of coins. He asked Niu as to the other boy who he learnt was Jone. He contacted the Appellant's mobile phone and asked him for his whereabouts, to which he was informed at the handicraft centre. He proceeded to the handicraft centre and arrested the Appellant.

7. The Appellant testified that he was consuming alcohol in his tattoo shop with some friends when he was informed that a staff of the complainant had damaged a banner used to promote his business. He had gone over to the complainant to enquire and may have spoken harshly that the complainant

held his collar which led him to retaliate by holding the complainant's collar that the son hit him on the nose with a 4 x 2 stick. His nose was broken which made him to leave the shop hurriedly. He had gone to a friend to change his t-shirt as it was covered with blood. He was on his way home, when he received a call from the police station which he returned and at the handicraft centre he received another call, when he was arrested by a police officer. He was searched at the station with nothing found on him.'

01st ground of appeal

[10] At a trial by the judge assisted by assessors the test for approaching a ground of appeal that the verdict is '*unreasonable or cannot be supported having regard to the evidence'* has been formulated as follows.

[11] Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[12] When the above test is recalibrated to a situation where the trail is by the Magistrate alone it may be restated as follows. The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the

Magistrate to be satisfied of guilt beyond reasonable doubt; whether or not the Magistrate must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the Magistrate to be satisfied beyond reasonable doubt of the commission of the offence.

[13] The appellant's argument is that he had not participated in the robbery; nor had he had any knowledge of it as he was at the complainant's barber shop to confront him as to some damage caused to a banner used to advertise his tattoo business and he hurriedly left the shop with a broken nose after the complainant's son punched him. He further argues that there was no evidence of any pre-planning between him and the co-accused and any communication or exchange of words, expressed or implied between the two suggesting an intention to rob.

[14] The Court of Appeal in **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) considered in detail the principles relating to criminal liability under section 46 of the Crimes Act, 2009.

[15] Under the principle of joint enterprise in terms of section 46 of the Crimes Act, 2009 (earlier section 22 of the Penal Code), the first limb is whether the appellants had formed a common intention to prosecute an unlawful purpose [see also **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016)]. Common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which criminal law requires [vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019)].

[16] The second limb of 'joint enterprise' is that there should be proof that in the prosecution of the unlawful purpose an offence has been committed which is of such a nature that its commission is a probable consequence of the prosecution of such purpose.

[17] **Gillard v The Queen** [2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 also elaborates the operation of the doctrine of joint criminal enterprise as follows:

> *'110. In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, all are equally guilty of the crime regardless of the part played by each in its commission[98].'*
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> *111.The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose[100]. And "[w]hatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement"[101].*

[18] The respondent argues that the evidence had clearly shown that upon entering the complainant's barber shop the appellant had collared him while his co-accused had stolen cash; one as the intimidator and the assaulter and the other as the thief. According to the respondent's submissions both had entered the barber shop and left it more or less together.

[19] Nothing was recovered from the appellant whereas a bag containing coins was with the co-accused soon after the incident. The Magistrate's judgment shows that the appellant and the co-accused had consumed alcohol together earlier (see paragraphs 10 and 14) and the appellant was drunk even when he was arrested by the police. It also appears that it was from the information given to the police by the co-accused that the appellant had been traced and then he was called upon to meet the police. The appellant had not attempted to escape but complied with the police request. According to the appellant, he was having alcohol with the co-accused when he received information that the complainant had damaged a banner (belonging to one of his friends) he used to promote his business and gone to the complainant's shop to inquire about it together. There is nothing to show that the complainant had testified to the appellant having questioned him of such an allegation but according to him the appellant had simply abused him and held on to his shirt collar.

[20] Therefore, the question is whether the appellant and the co-accused entered the complainant's shop together to confront him with the allegation of damaging a banner but without the appellant's knowledge or participation the co-accused acted independently and stole money. In other words whether the appellant could not foresee the commission of the robbery as a probable consequence of the confrontation with the complainant which was the declared unlawful purpose. Or, whether both of them were deliberately playing different roles in the act of robbery; the appellant picking up a fight and diverting the complainant's attention while the co-accused stealing money and after that both left the shop together. In the first scenario, there may be a question whether the appellant could be held liable for the robbery if it was not within the scope of the common purpose while he certainly would be liable on the basis of joint enterprise if it were the second scenario. Third scenario is whether entering and exiting the complainant's shop by the appellant and the co-accused at the same time were mere coincidental which the least credible.

[21] The Magistrate had held that the fact that the appellant was holding the complainant's shirt collar and punching him while the co-accused took the money proved that the offending was the result of a joint enterprise. He had not believed the appellant's position that he came to question the complainant about a damaged banner.

[22] The appellant's counsel submits that the Magistrate had failed to evaluate the appellant's subsequent conduct which was relevant to the issue of 'joint enterprise' particularly the fact that the appellant and the co-accused parted their ways and the co-accused was arrested shortly thereafter with a bag of coins whereas nothing was found in the appellant's possession. He also never attempted to evade the police but complied with the request by the police officer and waited for his arrival without going home. The suggestion is that his subsequent conduct is consistent with his innocence and does not suggest that he was acting in furtherance of a joint enterprise with the co-accused. All in all, the appellant submits that the evidence was not sufficiently strong to draw an inference beyond reasonable doubt of the appellant having formed a common intention to rob the complainant.

[23] However, in order to make him liable under the joint enterprise, the appellant need not have formed a common intention with the co-accused to rob the complainant but it was enough if the common intention was to enter the appellant's shop, confront, hold and threatened him and if in carrying out that unlawful purpose a robbery was committed and if the robbery was a probable consequence of the carrying out the unlawful purpose or robbery was within the scope of the common purpose as contemplated by the parties.

[24] As submitted by the appellant's counsel, the Magistrate had not examined the appellant's subsequent conduct but whether his conduct soon after the alleged robbery may have shown his innocence unequivocally is another matter. However, I am of the view that in the overall context, whether the appellant could be held liable for robbery based on a joint enterprise is a matter that needs to be examined by the full court in the light of the test formulated above with the aid of the complete appeal record.

[25] Therefore, I am inclined to grant extension of time to appeal against conviction on this ground of appeal to enable the full court to examine the question of joint enterprise more fully. However, on the material considered at this stage, I would not say that the Magistrate 'must', as opposed to 'might', have entertained a reasonable doubt about the appellant's guilt on the charge.

02nd ground of appeal

[26] The appellant complains that the Magistrate had not adequately evaluated the discrepancies in the testimonies between the complainant and his son. The main discrepancy relates to what had happened when the appellant was holding on to the complainant's collar. According to the complainant (father) that is the time his son was taking money from the till to be put in a container and the co-accused took the container away whereas the son's evidence was that he was actually outside the shop and the co-accused had taken the money in a plastic bag. When the co-accused was arrested soon after the robbery he was in possession of a bag containing coins. The appellant argues that the evidence of the son and the arresting officer shows that the

co-accused had acted on his own. I do not think that such an unequivocal assertion is possible on this piece of evidence alone.

[27] The Magistrate had examined this discrepancy in the judgment at paragraph 18 and disregarded it (I think correctly) stating that such discrepancies were possible among witnesses after 04 years of the incident.

[28] I do not think this ground of appeal on its own has merits but it could also be examined under the first ground of appeal.

01st ground of appeal (sentence)

[29] The appellant argues that the final sentence is harsh and excessive as the Magistrate had taken the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment though this offending was not a case where the appellant had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. However, it was a robbery that had happened in a commercial establishment.

[30] The appellant further submits that the Magistrate had considered lack of respect for property rights as an aggravating factor to enhance the sentence by one year. There is merit in that submission.

[31] This is not the type of aggravated robbery called '*street mugging'* where the sentencing tariff is 18 months to 05 years [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)]. Robbery or aggravated robbery committed at a business entity or commercial establishment is not even exactly similar to attacks on public service providers where the sentencing tariff is 04 years to 10 years of imprisonment **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020). There does not appear to be a fixed sentencing tariff for this kind of aggravated robberies at a business entities or commercial establishments.

[32] 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)].

[33] The final sentence of 08 years with a non-parole period of 06 years after trial cannot be said to be totally outside the permissible range or excessive or harsh. I am not inclined to allow enlargement of time to appeal against sentence. However, if renewed, the full court may look into the sentence once again.

Bail pending appeal

[34] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81;

AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[35] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[36] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[37] Though, I have decided to grant enlargement of time to appeal against conviction on the first ground of appeal on the application of 'joint enterprise' that does not mean that the appellant has a 'very high likely likelihood of success' in his appeal at this stage.

[38] The appellant has not shown any other exceptional circumstances either. Though it is not required to consider now, I may also state that the appellant is not likely to serve a substantial portion of the sentence before his appeal is heard and in any event bail pending appeal application at this stage is premature. The appellant has not served even 03 years into his sentence.

[39] Accordingly, the application for bail pending appeal is refused.

Orders

1. Enlargement of time to appeal against conviction is allowed on the first ground of appeal.
2. Enlargement of time to appeal against sentence is refused.
3. Bail pending appeal is refused.

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