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

CRIMINAL APPEAL NO.AAU 0010 of 2018
[In the High Court at Suva Case No. HAC 335 of 2016]

BETWEEN : **SAULA VUNIVESI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Ms. E. Rice for the Respondent**

Date of Hearing : **18 August 2021**

Date of Ruling : **20 August 2021**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed with another on 07 September 2016 at Suva upon property belonging to Ronald Rohitesh. The information read as follows:

Statement of Offence

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

Particulars of Offence

SAULA VUNIVESI *with another on the 7th day of September 2016 in the Central Division, stole cash in the sum of $100 and 1 Samsung mobile phone valued at $300; all to the total value of $400, the property of* ***RONALD***

ROHITESH *and immediately before stealing used force on the said* ***RONALD ROHITESH***.

[2] On 24 October 2017, following a trial, the assessors expressed a unanimous opinion of guilty against the appellant of having committed aggravated robbery. The learned High Court judge in his judgment delivered on 25 October 2017 had agreed with the assessors and convicted the appellant of aggravated robbery. He had been sentenced on 27 October 2017 to 13 years and 04 months of imprisonment with a non-parole period of 11 years and 04 months.

[3] The appellant being dissatisfied with the conviction and sentence had in person signed a timely application for leave to appeal against conviction and sentence on 02 November 2017. He had preferred additional grounds of appeal on 27 February 2019. The appellant had filed his written submissions on 25 May 2020. The respondent's written submissions had been tendered on 22 June 2020.

[4] This Court in its Ruling delivered on 29 June 2020 refused leave to appeal against conviction but granted leave to appeal against sentence only on the 13th and 14th grounds of appeal. The appellant is now seeking bail pending appeal.

> '*13. That the sentencing judge was not fair in imposing a higher sentence of (13) years imprisonment which the appellant was so aggrieved and truly finds the impact of the sentence was excessively harsh and burdensome to serve.*
>
> *14. However, the sentencing judge failed to properly analysed with care the facts of the case, in that the sentence imposed does not attract the alleged offending, as it is a street mugging robbery – which the sentence shall be ranging from (18) months to (5) years respectively.*

[5] I do not need once again to embark on an analysis of the above two grounds but would only reproduce the paragraphs relating to the sentence appeal from the previous Ruling:

> *'[34] It is convenient to consider both grounds together. The contention of the appellant is that his case was a case of 'street mugging' where the sentencing tariff was between 18 months to 05 years and the learned judge had committed a sentencing error by taking the tariff of 08-16*

*years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) resulting in a harsh and excessive sentence.*

*[35] Given the facts of the case the learned trial judge had acted on a wrong principle. 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.*

*[36] In **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused and one of them had grabbed the complainant from the back and held his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of remarked:*

> *'[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in **Basa v The State** Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*
>
> *[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of **Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)** (the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:*
>
> - ***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.*

*[37] The sentencing tariff for street mugging was once again discussed by Nawana, JA as a member of the Full Court which I was part of in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) in the following terms: (See **Tawake v The State** AAU0013 of 2017 (03 October 2019) [2019] FJCA 182 also):*

> *'[15] The learned single Justice of Appeal, in giving leave to appeal, distinguished facts in **Wallace Wise** (supra), which involved a home invasion as opposed to the facts in **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (04 August 2008), where aggravated robbery was committed on a person on the street by two accused using low-level physical violence.*
>
> *[16] Low threshold robbery, with or without less physical violence, is sometimes referred to as street-mugging informally in common parlance. The range of sentence for that type of offence was set at eighteen months to five years by the Fiji Court of Appeal in **Ragaugau's** case (supra).*
>
> *'[19] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted a upon wrong principle when he applied the tariff set for an entirely different category of cases to the facts of this case, which involved a low-threshold robbery committed on a street with no physical violence or weapons. 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.*

[38] Considering that the sentencing tariff of 18 months to five years (of course with the possibility of the higher end going up further due to aggravating factors) was set for street mugging as far back as in 2008, if a review of the tariff for this type of aggravating robberies known as street mugging is needed in the current circumstances, it is up to the State to take it up before the Full Court in an appropriate case.

[39] Therefore, the sentencing error above highlighted offers a reasonable prospect for the appellant to succeed in appeal.

[40] Accordingly, leave to appeal against sentence is allowed.

Law on bail pending appeal

[6] 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.*
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> *[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:*
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> *"[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.*
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> *[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."*

[7] 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).

[8] 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.'*

[9] 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).'

[10] 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'.*

[11] 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...."*

[12] 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 ... ."*

[13] ***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."*

[14] 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.

[15] 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.

[16] 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'.

[17] The appellant had already satisfied this court that he deserved to be granted leave to appeal against sentence and it now appears that there is not only a reasonable prospect of success but also a very high likelihood of success in his appeal against sentence.

[18] I shall now 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.

[19] The evidence of the case had been summarised by the learned trial judge as follows in the judgment:

> *'5. The prosecution alleges that the accused together with two others came and robbed the complainant when he was coming out from a shop on the 7th of September 2016. The complainant had gone to one of his friend's place, where he drank two glasses of beer with one Sione. He then went to a shop beside the Happy Garden Restaurant to buy cigarette. It was about midday. When he was coming out of the shop, the accused and two of his accomplices came towards him. Two of them grabbed him from behind and the accused punched on his face. After that the accused took the mobile phone and money from the trousers' pocket of the complainant. The accused was dressed in a red t-shirt, while other two*

accomplices were dressed in white t-shirt, and green and black vest respectively.

6. *The accused denies the allegation. However, he admits that he was at the vicinity of the scene of the crime when it took place. According to his evidence, the accused came to buy marijuana from a friend with one Sakaraia and another man. While he was talking to his friend, he saw Sakaraia and other man together with another, who was dressed in a red t-shirt, assaulted and robbed the complainant.*

[20] The appellant has already served 03 years, 09 months and 03 weeks in imprisonment. In addition he had been in remand custody for this case for a period of 8 months. Given that the sentencing tariff for *'street mugging'* is between 18 months and 05 years and that the appellant is not likely to be visited with a sentence towards the higher end of or above the tariff due to the specific facts and circumstances as enumerated above, if he is not enlarged on bail pending appeal at this stage, he is likely to serve perhaps even more than the whole of the sentence the full court is likely to impose on him after hearing his appeal which, as things stand at present, may not happen in the immediate future. The appellant has filed a timely appeal and the considerable time taken since then to consider the question of leave to appeal and time that would be taken to hear the final appeal by the full court in the future, are matters beyond his control. Therefore, it is in the interest of justice that section 17(3) (b) and (c) are considered in favour of the appellant in this case.

[21] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail on the conditions given in the Order.

Orders

1. Bail pending appeal is granted to the appellant, **SAULA VUNIVESI** subject to the following conditions:

   (i) The appellant shall reside at Lot 4, Wailekutu, Lami with his aunt Kalesi Likurua (telephone - 2142189) and sister Elina Tinai (telephone - 9048237).

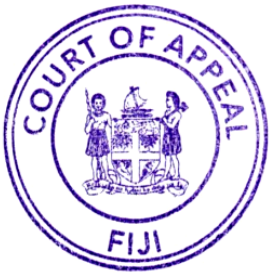
   (ii) The appellant shall report to Lami Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

(iii) The appellant shall attend the Court of Appeal when noticed on a date and time assigned by the registry of the Court of Appeal.

(iv) The appellant shall provide in the persons of (1) Kalesi Likurua (aunt/Tax Identification Number 12-33583-0-9) and (2) Elina Tinai (sister/Tax Identification Number 20-33393-0-5 & Passport No. 912556) both of Lot 4, Wailekutu Road, Lami to stand as sureties.

(v) Appellant shall be released on bail pending appeal upon condition (iv) above being complied with.

(vi) Appellant shall not reoffend while on bail.



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