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

CRIMINAL APPEAL NO.AAU 0009 of 2018
[In the Magistrates' Court at Suva Case No. 374/16]

BETWEEN : **APENISA VUALILI**

Appellants

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. J. Rabuku for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **01 April 2021**

Date of Ruling : **07 April 2021**

RULING

[1] The appellant had been charged in the Magistrate's court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 20 February 2016 at Suva in the Central Division. The information read as follows:

Statement of Offence

AGGRAVATED ROBBERY*: contrary to section 311(1)(a) of the Crimes Decree Number 44 of 2009*

Particulars of Offence

APENISA VUALILI*: with others on the 20th day of February, 2016 at Suva in the Central Division, used force on one SALVIN KUMAR before robbing*

him of his Nokia Lumia phone valued at $150.00 and a Black Leather Wallet containing $100.00 and Assorted cards total value of $250.00 the property of one SALVIN KUMAR.'

[2] Upon conclusion of the trial, the learned Magistrate had convicted the appellant as charged in his judgment dated 31 November 2017 and sentenced him on 25 January 2018 to 07 years and 10 months of imprisonment with a non-parole term of 07 years and 04 months.

[3] The appellant had filed a timely petition of appeal only against conviction on 25 January 2018. However, he had later applied to abandon the appeal against conviction on 25 January 2021 by filing an application in Form 3. His solicitors, Law Solutions had filed summons seeking enlargement of time to appeal out of time against sentence, the appellant's affidavit and amended grounds of appeal on 03 September 2020. The delay is over 02 year and 07 months. Written submissions had been filed on 23 September 2020. The respondent had filed its written submissions on 28 September 2020.

[4] The grounds of appeal against sentence urged on behalf of the appellant are as follows:

Sentence

Ground 1 *That the Appellant's amended grounds of appeal are as follows:-*

a. *That the learned Magistrate erred in law and in fact at paragraph 3 of its sentence judgment dated 25th January 2018 by stating that the tariff for the offence that the Appellant was convicted of was between 8 to 16 years imprisonment.*

b. *That the Learned Magistrate erred in law and in fact at paragraph 4 and thereafter in its sentence judgment dated 25th January 2018 by proceeding to consider the Appellant's sentence to be consistent with tariff of 9 to 16 years imprisonment when the tariff for the type of offending was convicted of, being "Street mugging" is 18 months to 5 years imprisonment as was set by the Full Court of Appeal in Raqauqau v State [2008] FJCA 34; AAU 0100.2007 (04 August) ; and*

c. *That in all circumstances of the case the sentence of 7 years and 10 months with a non-parole period fixed at 7 years and 4 months is manifestly excessive.*

[5] The facts of the case as summarised by the Magistrate in the judgment are as follows:

> *'On 20/2/2016 at about 4.00 am the complainant was walking on a street in Suva City, having spent the night in a night club, when he was confronted by 3 youths. These youths who came behind pushed him out and took away his wallet and the mobile phone all of which were in his pocket. They passed went and entered into a night club by the name of "Temptation" as the complainant notice. The complainant did not have money to go home and he managed to find money from a friend. He then stopped a police vehicle on the road and told about the incident. PW-2 went to the "Temptation" nightclub accompanied by the complainant who was asked to identify the persons. The complainant identified the accused. He said that the accused was wearing a green T-Shirt and 3 quarter pants when he was confronted. The dress was the same when he was found inside the Night Club.'*

[6] This court delivered its ruling allowing enlargement of time to appeal against sentence on 26 January 2021 based on the following reasons:

> *[21] 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 the lower end of 08 years. He had not enhanced the sentence on account of any aggravating features and after the period of remand was taken into account the ultimate sentence had been 07 years and 10 months.*
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> *[22] The appellant had deemed the sentence to be harsh and excessive on the basis that the appropriate tariff was 18 months to 03 years.*
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> *[23] The sentencing 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.*
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> *'[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.*
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> *[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.'

[24] It appears to me that the factual scenario in this case constitutes an act of 'street mugging' where sentencing tariff had been recognized as 18 months to 05 years and cannot be equated at all with an act of aggravated robbery involving 'home invasion'.

*[25] In **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. 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 Appeal 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.*

*[26] The sentencing tariff for street mugging was once again discussed in **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) where the complainant was going home at about 4.30 p.m. when the appellant with another person had called him and asked for money and when told that he had no money, the appellant had hit him with a knife and the other had assaulted him with an iron rod. After assaulting the complainant the appellant had taken $20 from him and run away. The Court of Appeal having discussed **Raqaugau** and other decisions said as follows.*

*'[35] The adoption of the tariff in **Wise** (Supra) does not seem to be appropriate to the present case as it does not come within the nature of a home invasion category of aggravated robbery and is a situation which would come within the type of street mugging cases. Considering the objective seriousness of the offending and the degree of culpability, the harm and loss caused to the complainant it would be appropriate to follow the sentencing pattern suggested for instances of street mugging*

*[27] Again the Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) dealt with a case of street mugging in the following terms.*

*'[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 **Raqaugau 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 **Raqaugau'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.

*[28] Therefore, picking 08 years as the starting point by the Magistrate based on **Wise** may demonstrate a sentencing error having a real prospect for the appellants to succeed in appeal regarding his final sentence. It is the starting point of 07 years based on **Wise** that had led to the current sentence which appears to be harsh and excessive for the act of 'street mugging' the appellant was convicted.*

*[29] On the other hand, I am conscious of the fact that 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 **(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)].*

[30] When the appellant's sentence of 07 years and 11 months is considered, given the facts of this case I am of the view that he may have a real prospect of success in appeal as far as his sentence is concerned. However, it is the full court that has to consider and decide what the appropriate sentence should be in terms of section 23 (3) of the Court of Appeal Act.

[7] After the delivery of the ruling, the solicitors for the appellant had filed an application for bail pending appeal on 10 February 2021 by way of a notice of motion along with his affidavit and the state had filed written submissions on 15 March 2021 opposing the grant of bail.

[8] When the matter was mentioned on 01 April 2021, both parties requested that an order be made regarding the appellant's application for bail pending appeal by court on the appellant's affidavit and written submissions of the state.

Law on bail pending appeal.

[9] 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.*
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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.*
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> *[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."*

[10] 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)

[11] 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.'*

[12] 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).*
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> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[13] 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'*

[14] 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...."*

[15] 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 ... ."*

[16] ***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."*

[17] 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.

[18] 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.

[19] 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'.

[20] The appellant has already satisfied this court that he deserves to be granted enlargement of time against sentence and it now appears that there is not only a real

prospect of success but also a very high likelihood of success in his appeal against sentence.

[21] 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.

[22] The appellant has already served about 03 years and 02 months and 02 weeks of imprisonment. 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 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. 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.

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

Order

1. Bail pending appeal is granted to the appellant subject to the following conditions:

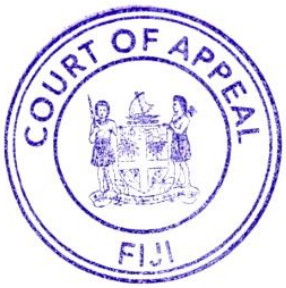
    (i) The appellant shall reside at Lot 25, Voce Road, Nadawa (family home).
    (ii) The appellant shall report to Valelevu Police Station every Saturday between 6.00 a.m. and 6.00 p.m.
    (iii) The appellant shall not leave Fiji jurisdiction until the appeal is finally disposed of by the Court of Appeal and attend the Court of Appeal when noticed on any dates and times assigned by the Court or the Court of Appeal registry.
    (iv) The appellant shall provide in the persons of Mr. Kevueli Kunamomo (father) of Lot 25, Voce Road, Nadawa and Ms. Vani Chang (aunt) of Valelevu,

Nasinu to stand as sureties whose affidavits confirming the same shall be provided to the Court of Appeal registry by the appellant.

(v) The appellant shall provide sufficient proof of his identification and those of the sureties such as the dates of birth, postal addresses, telephone numbers, email addresses (if available) etc. to the Court of Appeal registry.

(vi) The appellant shall be released on bail pending appeal upon condition (iv) and above being complied with.

(vi) The appellant shall not reoffend while on bail.



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL