

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

CRIMINAL APPEAL NO.AAU 156 of 2016
[In the Magistrates' Court at Suva Case No. CF1157/16]

BETWEEN : **TAITO RAWAQA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Mention : **02 August 2022**

Date of Ruling : **15 August 2022**

RULING

[1] The appellant had been charged with another on one count of Aggravated Robbery contrary to section 311(1) (a) of the Crimes Act 2009 in the Magistrates court at Suva. He pleaded guilty and was convicted. On 16 September 2016 the appellant was sentenced to 07 years and 09 months imprisonment with a non-parole period of 5 years.

[2] The appellant had filed a timely appeal against sentence on the basis that the sentence was harsh and excessive and against conviction. On 05 July 2018 the single judge had allowed leave to appeal against sentence but not against conviction. Leave to appeal against sentence was allowed due to the failure on the part of the Magistrate to give a separate discount for the early guilty plea treating it as amounting to acting on a

wrong principle. The appellant had also urged an additional ground of appeal to be taken up before the full court on the basis that the facts of the case do not justify the sentencing tariff adopted by the Magistrate.

[3] Pending the full court hearing, the appellant had filed an application for bail pending appeal along with written submissions on 08 August 2022 and the state counsel indicated on 02 August 2022 that the DPP had no objection to the appellant being released on bail.

[4] The summary of facts admitted reveals as follows:

“On the 12th July 2016 on Stinson Parade Suva at around 06 a.m., Katy Chang (hereinafter PW 1) was in town to attend a church service whilst she was walking towards the minivan car park an unknown i-Taukei man came and grabbed the plastic she was holding onto. He managed to pull the plastic containing the following items and robbed her of the said items:

- Reading glass valued at \$200.00
- \$7.00

Total value \$207.00”

[5] The Magistrate in sentencing the appellant had picked a starting point of 09 years and 06 months having stated that the tariff was 08 to 16 years, Thus, it is clear that the 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 09 years and 06 months. The appellant is now challenging the sentence also on the basis that the Magistrate had applied the wrong tariff.

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

- [7] In the meantime, the Supreme Court in the recent decision in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for 'street muggings' particularly **Raqauqau** remarked that the sentencing range of 18 months' to 05 years' imprisonment, with no other guidance, can itself give rise to the risk of an undesirable disparity in sentencing and a more nuanced approach was necessary.
- [8] The Supreme Court accordingly set new guidelines for sentencing in cases of street mugging by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.
- [9] The Supreme Court identified starting points for three levels of harm *i.e.* high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed to the appropriate sentencing range for offences as previously used and stated that the sentencing court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.
- [10] The appellant seems to have caused minimal physical or psychological harm to the victim. However, the victim may have been chosen because of perceived vulnerability and the appellant appears to have played a leading role in the offending. In my view the appellant's offending under section 311 of the Crimes Act, 2009 (*i.e.* offender without a weapon but with another) could be considered to be low in terms of level of

harm and therefore his sentence should start with 03 years of imprisonment with the sentencing range being 01 to 05 years.

Bail pending appeal

- [11] 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)].
- [12] 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.

- [13] 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’.
- [14] There are real concerns regarding the sentence based on the application of wrong tariff and inadequacy of discount given for early guilty plea. Therefore, there is a very high likelihood of success in his appeal against sentence in the sense that his current sentence would in all probability be revisited and adjusted downwards in terms of ***Tawake*** (Supreme Court) guidelines.
- [15] Though, it is now not technically required, I shall still 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.
- [16] The appellant has so far served nearly 06 years. It may at this stage be reasonably assumed that given all the circumstances surrounding the offending, the sentence to be imposed on the appellant by the full court would not most likely to be any longer than what the appellant has already served, of course, subject to the fact that it is for the full court to decide on the ultimate appropriate sentence [vide (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) & **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015))].
- [17] In all the circumstances, it appears to me that the appellant may have already served a sentence longer than he deserves and if he is not enlarged on bail pending appeal at this stage, any further incarceration will result in a miscarriage of justice. This is so, despite the fact that this appeal is now ready to be taken up before the full court hearing. Therefore, I think that the interest of justice is served by considering section 17(3) (b) and (c) in favour of the appellant at this stage.


[18] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage.

Orders

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

- (i) The appellant shall reside with his family at River Road, Navosai, Narere.
- (ii) The appellant shall report to Nasinu 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 person of Sereima Qalibau Neibavu (appellant's mother) of River Road, Navosai, Narere (Tax Identification No. 14-72990-0-6 and phone number +679 9562123) as surety.
- (v) The appellant shall provide proof of his identification by his birth certificate bearing No. 1045157 (which is already available in the case record).
- (vi) The surety shall provide proof of her residential/postal addresses, telephone number, email address (if available) etc. to the Court of Appeal registry.
- (vii) Appellant shall be released on bail pending appeal upon (iv) to (vi) conditions above being complied with.
- (viii) Appellant shall not reoffend while on bail.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL