

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

CRIMINAL APPEAL NO.AAU 122 of 2019
[In the High Court at Suva Case No. HAC 072 of 2018]

BETWEEN : **RICHARD ALLEN**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. S. Waqainabete for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **12 August 2022**

Date of Ruling : **16 August 2022**

RULING

[1] The appellant stood indicted in the High Court of Suva with another on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft of items and cash to the total value of \$1,748.00 contrary to Section 291 (1) of the Crimes Act 2009 committed on 21 January 2018 at Nasinu in the Central Division.

[2] After trial, the assessors had unanimously found the appellant guilty of the two counts as charged and delivering his judgment, the learned High Court judge had partially agreed with the assessors and convicted the appellant of burglary and theft instead of aggravated burglary. He had been sentenced on 09 August 2019 to 06 years and 06 months of imprisonment as an aggregate sentence.

- [3] Leave to appeal against conviction and enlargement of time to appeal against sentence was allowed on 09 November 2021. Leave to appeal against conviction had been mainly allowed under the 01st ground of appeal and enlargement of time to appeal against sentence had been allowed on the sole ground of appeal. They are as follows;

Ground 1- conviction

THAT the Learned Trial Judge may have erred in fact and law to unreasonably convict the appellant without independently assessing and considering the totality of the evidence on the doctrine of recent possession, thereby causing a substantial miscarriage of justice.

Ground 1 - sentence

THAT the Learned Trial Judge may have erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence of aggravated burglary.

- [4] In the meantime Legal Aid Commission has filed an application for bail pending appeal on behalf of the appellant and the LAC is expected to file draft appeal records for certification by the end of September, 2022.
- [5] Evidence of recent possession and accomplice evidence with no warning by the trial judge appear to be the only evidence against the appellant. Admittedly, there had been three persons including the driver in the van when it was stopped by the police. The police had seen part of the loot inside the van but nothing had been recovered from any of the travelers. Even when the police found some money in the appellant's possession both money and he had been released. The single judge felt that when the DPP decided to charge only the appellant, upon the evidence led in this case it is doubtful whether one could say that the appellant was in possession of the property because there were co-existing circumstances which point to the possibility of another person as having been in possession.
- [6] The state counsel conceded that leave to appeal could be granted on this ground of appeal so that the full court may more fully consider the propriety of the appellant's

conviction based on the doctrine of recent possession coupled with the absence of any accomplice warning.

- [7] The ‘old tariff’ for burglary is supposed to be 18 months to 03 years. However, some High Court judges and Magistrates do follow the ‘new tariff’ of 20 months to 06 years following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018). The trial judge has followed the new tariff. Thus, there is currently no uniformity in the applicable tariff for burglary and it on this basis that enlargement of time to appeal against sentence was allowed so that the full court could decide the proper sentence. However, there is now an appeal before the Court of Appeal to be heard in the coming September session where the State is seeking guidelines for sentencing tariff for aggravated burglary and most likely the court may deal with tariff for burglary as well.

Bail pending appeal

- [8] 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)].

- [9] 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.
- [10] 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’.
- [11] There are real concerns regarding the conviction and sentence as highlighted in the Ruling. Therefore, there is a very high likelihood of success in the appellant’s appeal against conviction and sentence.
- [12] 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.
- [13] The appellant has so far served just over 03 years in prison after trial. Earlier he had been in remand for 01 year and 06 months. According to the sentencing order, the appellant was expected to serve only a period of 05 years as his sentence. Thus, altogether the appellant has been in incarceration for 4 ½ years so far. 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, even if the conviction is upheld, would not most likely to be much 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)].

[14] In all the circumstances, it appears to me that the appellant may have already served an appropriate sentence for his crime and if he is not enlarged on bail pending appeal at this stage, any further incarceration might result in a miscarriage of justice. This is so, despite the fact that the appeal records are being prepared by the LAC, as it will take some time for it 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.

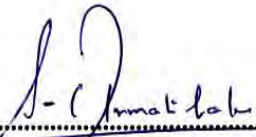
[15] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage.

Orders

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

- (i) The appellant shall reside with his uncle Ilai Senivau Dauqito and his family at Nabua village, 43 Ibu Square, Sukanaivalu Road, Suva.
- (ii) The appellant shall report to Nabua 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 Ilai Senivau Dauqito (uncle – Tax Identification No. 044766708 & phone number +679 2764155) and Laisenia Jese Sorovi of Lot 8, Sabeto Road, Nadi (uncle – Tax Identification No. 19-37717-0-1 & phone number +679 9237985) and as sureties.
- (v) The appellant shall provide sufficient evidence of his identification in the form of his birth certificate and photograph or any other proof.
- (vi) The sureties also shall provide proof of their residential/postal addresses, telephone numbers, email address (if available) etc.
- (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