

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

CRIMINAL APPEAL NO.AAU 0108 of 2019
[In the Magistrates' Court at Suva Case No. 2106 of 2016]

BETWEEN : **LEBA BALE TUILOMA**
Appellant

AND : **STATE**
Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **20 December 2022**

Date of Ruling : **21 December 2022**

RULING

- [1] The appellant had been charged in the Magistrate's court at Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 26 December 2018 by mugging the complainant of a mobile phone valued at \$840.00.
- [2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant and had been sentenced on 17 February 2017 to 07 years and 10 months of imprisonment with a non-parole term of 05 years.
- [3] The appellant being dissatisfied with the sentence had signed an untimely notice of leave to appeal against sentence on 19 March 2019. The delay is over 02 years. Legal Aid Commission on 31 August 2020 submitted an application for enlargement of time to appeal out of time against sentence along with written submissions. The respondent

did not tender written submissions but made oral submissions at the leave to appeal hearing.

[4] The summary of facts as stated in the sentencing order is as follows:

'The complainant in this matter is Maria Buresea, 23 years, Customer Service Officer of Newtown, Nasinu. The accused person is Leba Bale Tuiloma, 23 years, domestic duties of Raiwaqa, Suva.

On 26 December 2016 at about 4.30am, complainant was outside Vineyard Palace along Victoria Parade, Suva, waiting for a taxi. At that time she was talking to a friend on her black and yellow LG brand mobile phone.

While on the phone, the complainant noticed that she was surrounded by 3 Itaukei women. The accused person was one of the three women. The accused person in the company of two others, with intent to commit theft of the complainant's property, used force on her by punching her on her forehead and stole her mobile phone. The accused person's accomplice stole the complainant's handbag and ran away. The handbag contained the complainant's wallet and \$50 cash. The value of the mobile phone was \$800. The total value of the complainant property was \$840.

The complainant raised alarm about the robbery as the accused person was running away. Through the assistance of some of passer-by's the accused person was arrested.

A police patrol vehicle arrived and upon being briefed by the complainant, the accused person was questioned by the police about the mobile phone. The accused was found to be sitting on a flower bed beside the road. On being asked to stand up, it was found that the accused was sitting on the complainant's LG brand mobile phone.

The complainant's handbag was also recovered by passer-by's but its contents were not recovered. She positively identified both items as her property.'

[5] I allowed enlargement of time to appeal against sentence mainly on the basis that the learned Magistrate had committed a fundamental error in following the sentencing tariff for home invasion in the night with accompanying violence perpetrated on the inmates set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) to this instance of street mugging thereby acting on a wrong sentencing principle.

- [6] Sentencing tariff for street mugging had been consistently taken earlier as 18 months or 05 years of imprisonment [vide Raqauqau v State [2008] FJCA 34; AAU0100.2007 (4 August 2008) & Qalivere v State [2020] FJCA 1; AAU71.2017 (27 February 2020)].
- [7] The Supreme Court in State v Tawake [2022] FJSC 22; CAV0025.2019 (28 April 2022) handed down sentencing guidelines for street mugging which are relevant to the determination of the appellant's appeal on sentence. The appellant has already served over 05 years and 10 months of imprisonment after sentencing and prior to trial she had been in remand for 01 month and 20 days making the total incarceration almost 06 years.
- [8] In view of Tawake, the appellant's sentence range could be 1-5 (low harm) years imprisonment based on her having committed the offending with others but minimal harm to the complainant. Even if one were to go by the then existing tariff still she has served over and above its high end.

Law on bail pending appeal

- [9] The legal position is that the appellants have 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 appellants 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 appellants have 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, appellants 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)].

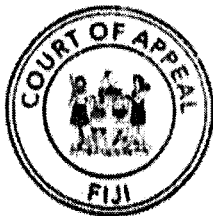
- [10] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [11] If appellants 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 appellants have shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [12] The appellant has already satisfied this court that she deserved to be granted enlargement of time to appeal against sentence and it now appears that he has a very high likelihood of success in her appeal against sentence due to the sentencing error of wrong tariff being applied and in view of **Tawake** guidelines. In my view, the full court is likely to release the appellant with the pronouncement of the judgment.
- [13] 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 appellants when the appeal is heard*’ together.
- [14] The appellant has already spent almost 06 in incarceration. The appeal is not likely to be taken up before the full court in the immediate future (being an appeal filed in 2019). If the appellant is not enlarged on bail pending appeal at this stage, a serious


injustice would be caused to her by having to serve an excessive sentence than the offending deserves. Therefore, it appears that section 17(3) (b) and (c) should be considered in favour of the appellant in this case.

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

Order of the Court:

1. Bail pending appeal is granted to the appellant, **LEBA BALE TUILOMA** subject to the following conditions:
 - (i) The appellant shall reside at her family house at 36 Sharma Lane, Raiwaqa.
 - (ii) The appellant shall report to Raiwaqa Police Station every last Saturday of the month 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 enter into an agreement, without security, to forfeit FJD \$500.00 if she fails to comply with her bail undertaking.
 - (v) The appellant shall provide sufficient and acceptable documentary proof of her identity.
 - (vi) The appellant shall be released on bail pending appeal upon condition (iv) and (v) above being fulfilled.
 - (vii) The appellant shall not reoffend while on bail.




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