

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

CRIMINAL APPEAL NO.AAU 100 of 2019
[In the Magistrates' Court at Taveuni Case No. 288/12]

BETWEEN : **OSEA KOLI** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, RJA**

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

Date of Hearing : **27 July 2022**

Date of Ruling : **28 July 2022**

RULING

[1] The appellant had been charged in the Magistrate's court of Taveuni exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 15 December 2012 at Naiyalamudu , Taveuni in the Northern Division.

[2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant as charged and sentenced him on 21 October 2016 to 07 years and 10 months of imprisonment with a non-parole term of 05 years.

[3] The appellant was granted enlargement of time to appeal his sentence on 02 February 2021 by the single judge. Thereafter, the appellant had filed an application for bail pending appeal and both parties agreed to have a ruling on bail pending appeal on

written submissions alone. Enlargement of time was allowed on the following ground of appeal.

‘That the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence (aggravated robbery) of this nature.’

[4] The summary of facts admitted by the appellant revealed the follows:

- *At about 8pm on the 15th of December, 2012, the complainant was on his way to Wairiki when the incident occurred.*
- *He had just passed Naiyaladamu when the Accused and another iTaukei man approached him. He noticed that one of these two iTaukei man was the Accused. The two approached the complainant and asked if he could give them \$10.00.*
- *He replied by saying that he had no money. All of a sudden, the Accused and another surrounded him and the Accused punched him on his face and he fell. The other iTaukei man began kicking the complainant on his ribs. He then heard the Accused tell the other man to go and get a knife. Upon hearing this, he took off his t-shirt and ran as fast as he could. Before the complainant could run away, the Accused managed to steal \$75.00 that was inside his wallet.*
- *The complainant then saw a Police vehicle where he was later conveyed to the hospital for medical examination. He has sustained injuries as a result of this incident.*

[5] 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 09 years and 06 months. The appellant had deemed the sentence to be harsh and excessive on the basis that the appropriate tariff was 18 months to 03 years and 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 had punched the complainant on his face and his co-accused had kicked him on the ribs when he was lying on the ground. The appellant had told his co-accused to go and get a knife which made the complainant run as fast as he could to

save his life. This must have caused a significant mental trauma to the complainant. He was later conveyed to hospital by a police vehicle for medical examination as he had sustained physical injuries as a result of this incident.

- [11] In my provisional 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 medium in terms of level of harm and therefore his sentence should start with 05 years of imprisonment with the sentencing range being 03 to 07 years.
- [12] There had been some degree of planning and the offending had been committed in darkness with the appellant taking a leading role. These factors have aggravated the crime.

Bail pending appeal

- [13] 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)].

- [14] 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.
- [15] 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’.
- [16] I have allowed enlargement of time to appeal against sentence due to the issue concerning the tariff adopted by the trial judge. 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.
- [17] 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.
- [18] The appellant has so far served 05 years, 08 months and a week of imprisonment. 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 likely to be not more than 06 years subject, of course, 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)].

[19] In all the circumstances, it appears that there is a possibility of the appellant having to serve a sentence longer than he deserves if he is not enlarged on bail pending appeal at this stage. Further, given that this being an appeal filed in 2019 the hearing of the appellant's appeal is likely take some time. 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.

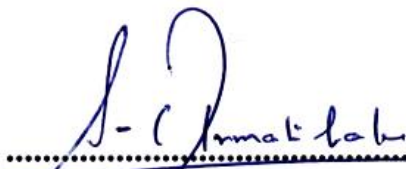
[20] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage.

Orders

1. Bail pending appeal is granted to the appellant subject to the following conditions.
 - (i) The appellant shall reside at surety Eremasi Uluiviti's residence at Mama's Place, Caubati, Nasinu.
 - (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 person of Eremasi Uluiviti (older brother of the appellant's father) of Mama's Place, Caubati, Nasinu (Voter Identification Card No. 0967 008 00398 and mobile phone number +679 7482655) as surety.
 - (v) The appellant shall provide an affidavit *inter alia* confirming (i) to (iv) above.
 - (vi) The appellant shall provide proof of his identification (in the absence of a birth certificate) in the form of his photograph and duly filled ID Form.

- (vii) The surety shall provide proof of his identification such as the date of birth, postal addresses, telephone number, email address (if available) etc. to the Court of Appeal registry.
- (viii) Appellant shall be released on bail pending appeal upon (iv) to (vii) conditions above being complied with.
- (ix) Appellant shall not reoffend while on bail.




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