

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

**CRIMINAL APPEAL NO.AAU 136 of 2017**  
**[In the Magistrates Court at Nausori Case No. 394 of 2017]**  
**[High Court Case No.207/2017]**

**BETWEEN** : **EMOSI MOLIVEITAVI**

**AND** : **STATE** *Appellant*  
*Respondent*

**Coram** : **Prematilaka, RJA**

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

**Date of Hearing** : **20 December 2022**

**Date of Ruling** : **29 December 2022**

**RULING**

- [1] The appellant with another had been arraigned in the Magistrates' court of Nausori exercising extended jurisdiction charged with one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on 25 June 2017.
- [2] The appellant had pleaded guilty to the charge preferred, admitted the summary of facts and the learned Magistrate convicted the appellant and sentenced him on 28 August 2017 to imprisonment of 08 years and 11 months with a non-parole period of 06 years.
- [3] Upon considering his appeal against conviction and sentence, the Single Judge dismissed the appeal against conviction and allowed leave to appeal against sentence primarily because the trial judge had applied the sentencing tariff of 08-16 years of

imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 12 years as the starting point considering that the 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 and the appellant was involved in a robbery of a taxi driver.

- [4] The summary of facts recorded by the learned Magistrate in the sentencing order dated 28 August 2017 is as follows.

*“On the 25<sup>th</sup> day of June, between 12.00am and 1.00am, at Bautikina, Amitab Singh (PW-1), 34 years, Driver of Naulu, Nakasi was robbed by one Jonecani Qilisaivalu (Accused-1), 22 years, unemployed of Kasavu Village and Emosi Molveitavi (Accused-2), 25 years, Security Officer of Kasavu Village. In the process of robbery the following items were taken: \$280.00 cash, Samsung J3 mobile phone valued at \$500.00, Alcatel mobile phone valued at \$69.00, pompom valued at \$5.00 and a belt valued at \$5.00.*

*On the above mentioned date and time, (PW-1) was driving in Nausori town when (Accused-1) and (Accused-2) stopped (PW-1) and asked (PW-1) if (PW-1) could drop them at Bautikina (PW-1) agreed and took both (Accused-2) to Bautikina. Once half way in the Bautikina bypass (PW-1) was told to stop. (Accused-1) then got off the taxi came around to the driver’s side and pulled out the keys. (PW-1) was then punched, tied up and dragged in to the bushes by (Accused-1) and (Accused-2) and was tied to a tree. The vehicle registration number IN 869 was driven off by the (Accused-1) and abandoned a few meters from the scene where (PW-1) was tied. The above mentioned were taken from (PW-1).*

*(PW-1) was able to free himself and reported the matter to police. After intensive investigations the identify of (Accused-1) and (Accused-2) came to light. (Accused-1) and (Accused-2) were then checked at their homes but was not found. (Accused-1) then surrendered himself to police custody.*

*Both (Accused) were interviewed under caution in which they admitted to the offence, (Accused-1) in Q32 to Q39 of his interview and (Accused-2) were then charged for the offence of Aggravated Robbery contrary to Section 311 of the Crimes Act number 44 of 2009 and will be appearing in custody at the Nausori Magistrates Court on the 6<sup>th</sup> day of July 2017.’*

- [5] The settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [vide **State v Ragici** [2012] FJHC 1082; HAC

367 or 368 of 2011, 15 May 2012, **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 & **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].

[6] I stated as follows in the earlier Ruling and allowed the proper sentence to be determined by the Full Court.

*‘[21] The state has argued that despite the error in being guided by **Wise** guidelines the Magistrate had ended up with a head sentence within the tariff for aggravated robbery against providers of services of public nature including taxi, bus and van drivers and therefore, the ultimate sentence is justified. However, the mere fact that the head sentence is within the sentencing tariff by itself does not mean that the sentence fits the crime. In my view, the sentence of 08 years and 11 months of imprisonment though within the tariff for aggravated robbery against providers of services of public nature is still disproportionate to the gravity of the offending.’*

*[19] However, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warrants a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender, if any) and if the starting point is taken at the lower end then an appropriate increase in the sentence for all aggravating features (offending and offender) is warranted. In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any.*

### **Law on bail pending appeal**

[7] 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 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), **Ourai 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)].


- [8] 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.
- [9] 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’.
- [10] Though, the appellant does have a reasonable prospect of having his sentence adjusted downwards in appeal, it does not have a very high likelihood of success of having it drastically reduced. He has not demonstrated any exceptional circumstances either.
- [11] I shall in any event 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.
- [12] The appellant has served 05 years and 04 months whereas the sentencing tariff is 04-10 years. There is no danger that the appellant is likely to serve a longer sentence than what the full court upon the hearing of the appeal would impose. The appeal is ready

to be listed on a call over date to fix a date and time for full court hearing. The appellant has filed his submissions for the hearing of the appeal and respondent's submission is yet to be filed. Therefore, section 17(3) (b) and (c) too cannot be considered in favour of the appellant at this stage.

**Order:**

1. Bail pending appeal is refused.



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