

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

CRIMINAL APPEAL NO.AAU 150 of 2019
[In the Magistrates Court at Suva Case No. 595 of 2017]

BETWEEN : **JOSEFATA VALESASA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **28 July 2022**

Date of Ruling : **01 August 2022**

RULING

- [1] The appellant had been arraigned in the Magistrates court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with others on 07 June 2017 by stealing a 1 x white Samsung mobile phone valued at \$600 from Worachart Thong Don Fane by using force immediately before robbery.
- [2] The appellant pleaded guilty and the learned Magistrate convicted the appellant on his own plea of guilty. He had been sentenced on 13 September 2019 to 06 years and 07 months of imprisonments with a non-parole period of 04 years.

[3] The appellant was granted leave to appeal against his sentence on 22 May 2020 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. Leave to appeal 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 guidelines and applicable tariff for the offence [aggravated robbery] of this nature.’

[4] The summary of facts had revealed that when the complainant who had got off from a bus, was walking home the appellant had followed him, overpowered and pinned him to the ground. The other three accomplices had come and assisted the appellant to hold the complainant to the ground. Seeing the melee, when a passerby came to the complainant’s help all four had grabbed his shopping bag containing *inter alia* his mobile phone and fled the scene. The appellant had started running chased by two people and a third person, a police officer, who saw the appellant running away had pursued and caught him at the bus stop and handed him over to the police station. The robbed Samsung mobile phone had been found in the possession of the appellant.

[5] The appellant argues that the offence of which he was convicted on his plea of guilty was one of ‘street mugging’ and it was wrong for the learned Magistrate to have applied the tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). Given the facts of the case the learned trial judge could be said to have acted on a wrong principle. The tariff in **Wise** was set in a situation where the accused had been engaged in a single instance of home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.

[6] However, the trial judge had applied even a higher sentencing tariff of 10-16 years of imprisonment as set out in **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11. According to **Wise v The State** (supra) tariff of 10-16 years is for spate of robberies in the form of home invasions.

- [7] 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 **Oalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) and cannot be equated with an act of aggravated robbery involving ‘*home invasion*’ .
- [8] 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.
- [9] 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.
- [10] 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 to reach a sentence within the appropriate sentencing range in the following table adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.

	ROBBERY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED ROBBERY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)	AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)
HIGH	<i>Starting point:</i> 5 years imprisonment <i>Sentencing range:</i> 3-7 years imprisonment	<i>Starting point:</i> 7 years imprisonment <i>Sentencing range:</i> 5-9 years imprisonment	<i>Starting point:</i> 9 years imprisonment <i>Sentencing range:</i> 6-12 years imprisonment
MEDIUM	<i>Starting point:</i> 3 years imprisonment <i>Sentencing range:</i> 1-5 years imprisonment	<i>Starting point:</i> 5 years imprisonment <i>Sentencing range:</i> 3-7 years imprisonment	<i>Starting point:</i> 7 years imprisonment <i>Sentencing range:</i> 5-9 years imprisonment
LOW	<i>Starting point:</i> 18 months imprisonment <i>Sentencing range:</i> 6 months-3 years imprisonment	<i>Starting point:</i> 3 years imprisonment <i>Sentencing range:</i> 1-5 years imprisonment	<i>Starting point:</i> 5 years imprisonment <i>Sentencing range:</i> 3-7 years imprisonment

[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 low or medium in terms of level of harm and therefore his sentence should start with either 03 years with the sentencing range being 01-05 years or with 05 years of imprisonment with the sentencing range being 03-07 years of imprisonment.

[12] There had been some degree of planning with the appellant taking the leading role. The complainant had been overpowered and pinned to the ground by the appellant. 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 leave to appeal against sentence due to the issue concerning the tariff adopted by the trial judge which has a reasonable prospect of success. However, I cannot say that there is a very high likelihood of success in his appeal against sentence in the sense that his current sentence would be adjusted downwards in terms of *Tawake* (Supreme Court) guidelines to the point of reducing it to less than 3 ½ to 4 ½ years of imprisonment.
- [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 02 years and 10 ½ months of imprisonment. It may at this stage be reasonably assumed for the purpose of this application that given all the circumstances surrounding the offending, the sentence to be imposed on the appellant by the full court would likely to be about 3 ½ to 4 ½ years of imprisonment 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] The appeal records have been certified and collected by both parties and the appeal is ready to go before the full court in the not so distant future. In all the circumstances, it appears that there is no 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. If not, the appellant may make another application for bail pending appeal at an appropriate stage.
- [20] Therefore, I am not inclined to allow the appellant’s application for bail pending appeal and release him on bail at this stage.

Order

1. Bail pending appeal is refused.




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