

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

CRIMINAL APPEAL NO.AAU 0173 of 2019
[High Court Criminal Case No. HAC 84 of 2018]

BETWEEN : **EMINONI BULUBULUTURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **13 October 2023**

Date of Ruling : **16 October 2023**

RULING

[1] The appellant had been charged in the High Court of Suva for having committed aggravated burglary contrary to section 313(1)(a) of the Crimes Act and theft contrary to section 291(1) of the Crimes Act at Nadera in the Central Division between 18 November 2017 and 19 November 2017.

[2] After full trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion on 14 November 2019 that the accused was guilty of both counts. The learned High Court judge had agreed with the unanimous opinion of the assessors and convicted the appellant of both counts on 15 November 2019 and sentenced him on 09 December 2019 to 04 years and 06 months of imprisonment with a non-parole period of 03 years and 06 months.

[3] A single judge of this court considered the appellant's appeal against conviction on the following grounds of appeal and he abandoned the sentence appeal.

'Conviction:

1. **THAT** the High Court Judge erred in law when his Lordship failed to ascertain that the charge is defective in nature before proceedings to the trial in absentia causing a fundamental error of law.
2. **THAT** the High Court Judge erred in law when his Lordship insisted to proceed to trial in absentia despite the appellant not being aware of the trial date without any third party being present to defend on his behalf throughout the trial to constitute a fair trial in absentia.'

[4] The single judge had dealt with both grounds of appeal in detail and refused leave to appeal against conviction in a Ruling delivered on 19 March 2021 reported as **Bulubuluturaga v State** [2021] FJCA 76; AAU0173.2019 (19 March 2021).

Law on bail pending appeal

[5] 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), **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)].

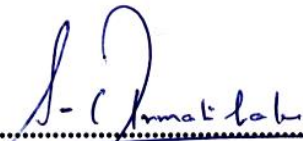
- [6] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [7] If the 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’.
- [8] The leave to appeal ruling had already held that the appellant did not have a reasonable prospect of success in his appeal against conviction. Therefore, there is obviously no question of his conviction appeal having a ‘very high likelihood of success’. Thus, it is not even necessary to consider the matters under section 17(3)(b) and (c) of the Bail Act namely the likely time before the appeal hearing and the proportion of the original sentence which will have been served by the appellants when the appeal is heard. The appellant has by filing a Form 3 dated 24 December 2020 had abandoned the sentence appeal which he never formally appealed in the first place. He has already served the non-parole period and also more than 2/3 of the total sentence. Thus, the appellant appears to be eligible to be released subject, of course to earned remission, good behaviour and relevant law & regulations governing early release of prisoners.
- [9] In any event, the sentence imposed on the appellant is within the sentencing range of 01-05 years for aggravated burglary with low harm but committed with another as per **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022). Even if there

is an appeal against sentence it has no overall success in appeal [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Order of the Court:

1. Bail pending appeal is refused.




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