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

CRIMINAL APPEAL NO.AAU 107 of 2019
[In the High Court at Lautoka Case No. HAC 194/2018]

BETWEEN : **ALIPATE RAVUNICAGI CAWI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **15 March 2023**

Date of Ruling : **16 March 2023**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 and another count of driving motor vehicle without being a holder of a valid driving license contrary to section 56(3)(a), (6) and 114 of the Land Transport Act of 1998 committed on 17 October 2018 at Lautoka in the Western Division.

[2] Upon the appellant's guilty plea 20 December 2018 and admission of the summary of facts on 28 February 2019, the High Court judge had convicted the appellant and sentenced him on 27 March 2019 to an aggregate sentence of 08 years and 06 months and 25 days of imprisonment with a non-parole term of 07 ½ years.

[3] The appellant had been given leave to appeal against sentence by the Single judge of this court on the following ground of appeal.

'1. The learned sentencing judge may have fallen into an error in law by imposing a sentence 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 as reproduced by the High Court judge is as follows:

'The complainant in this matter is SATISH CHANDRA (PW1), 60 years old, Taxi Driver of Vuda back Road, Lautoka.

The accused in this matter is ALIPATE RAVUNICAGI CAWI, 28 years old, Cane cutter of Manumanu, Mataso, Ra.

On the 17th of October 2018 at about 3pm, PW1 was driving a taxi registration number LT 992 which was parked in front of BSP Bank at Tukani Street, Lautoka.

Whilst parked in front of the bank he noticed the accused with another iTaukei man. They boarded his taxi and told him to take them to Qalitu. PW1 agreed to take them and the accused sat in the front passenger seat while the other man sat at the back. PW1 switched the taxi meter on and drove them to Qalitu. Whilst entering Qalitu Road about half kilometre inside the accused asked PW1 to turn into a feeder road. PW1 turned into the feeder road and as they were travelling for a few meters in, the accused told PW1 to get out of the car. PW1 parked the car and the man sitting behind them got off and dragged PW1 out of the car and into the back seat. The accused then sat in the driver's seat and drove the car. PW1 lay in between the front and back seats and the other man sat on his back. PW 1 yelled and both men told him to keep shut or else they will kill him. The accused drove the car for a while and after that he switched with the second man. The accused tied PW1's hands when PW1 was trying to look up, the accused kept pushing his head down. After 30 minutes the car stopped and the accused with another grabbed the money inside the counsel box which was about $40.00 worth of coins, PW1's wallet containing $210.00 and mobile phone. Before leaving PW1, both men threw the car keys and left PW1 behind. PW1 then got up, untied himself and searched for the key. PW 1 then found the key and drove to the Police Station to report the matter.'

[5] The Learned High Court judge 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 08 ½ years considering it as the lower range of the tariff. He had enhanced the sentence on account of the aggravating features by 04 years. The judge had reduced the sentence by 03 years for the early guilty plea and 06

months for mitigation. After discounting the remand period the final sentence had been fixed at 8 ½ years and 25 days.

[6] The appellant argues that the starting point of 08 ½ years used by the trial judge was wrong as this was an aggravated robbery against a taxi driver. 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.

[7] The summary of facts shows that what had happened was an *'Attack against taxi drivers'* where the sentencing tariff is between 04 to 10 years (see **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020). When the sentencer choses the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point [see **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)]. Therefore, picking 08 ½ years as the starting point by the High Court judge based on ***Wise*** may demonstrate a sentencing error which resulted in the current sentence.

[8] The Single judge ruling states that:

> *[16] However, there were many aggravating factors the trial judge had not considered. He had only considered the fact that it was an attack on a taxi driver as the aggravating feature. The appellant and his co-accused had robbed the taxi itself making it more than an attack or robbery on the taxi driver. They held the complainant hostage for about 30 minutes inside his own vehicle confining him to the space between the front and back seats with his hands tied after dragging him out of the taxi. They drove the vehicle during that time and also threatened the complainant with death if he was to raise cries and kept pushing his head down. Finally after robbing the complainant they threw the car key away. Therefore, the objective seriousness of this particular aggravated robbery could have justified a higher starting point of the sentencing tariff between 04 years to 10 years for 'Attack against taxi drivers'. If the starting point was taken at the lower end the aggravating features would have justified a substantial increase of the sentence.*
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> *[17] The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. The appellant's criminal history of 02 previous convictions (and one of them for a similar offence) warrants deterrence to be treated as a main consideration in deciding the length of the sentence imposed to safeguard*

the public and the providers of public services from his propensities to engage in similar crimes and for other prospective offenders.

[18] Though the sentence of 08 ½ years and 25 days is still within the sentencing tariff for 'Attack against taxi drivers' had the trial judge considered the correct tariff the ultimate sentence may not have been as long as 08 ½ years and 25 days even going through the same sentencing process the trial judge had adopted.'

[20] Without necessarily concluding that the appellant has a reasonable prospect of success in appeal on this ground of appeal, in all the circumstances of this case including the sentencing error of wrong tariff being applied, I am inclined to grant leave to appeal against sentence so that the full court could decide on the appropriateness of the ultimate sentence based on all the factors above discussed.

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 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'.

[12] The appellant had been given leave to appeal against sentence purely on the application of the wrong tariff and not because the sentence was so excessive and harsh. It is still within the sentencing tariff for *'Attack against taxi drivers'*. Therefore, I cannot say that he has a very high likelihood of success in his appeal against sentence due to the sentencing error of wrong tariff being applied though the full court might adjust the existing sentence after correcting the sentencing error. However, the full court is not likely to reduce it drastically given the facts and circumstances of the offending.

[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 spent nearly 04 years in incarceration. He has not yet reached even the lower end of sentencing tariff for aggravated robberies against providers of public services. The appeal records are ready and already served on the DPP and the LAC. Both parties would rely on the written submissions filed at the leave stage for the full court hearing. Thus, the appeal is likely to be taken up before the full court in the not

so distant future. Therefore, currently there is no risk that he may be forced to serve a longer sentence than what the full court may ultimately impose on him if the appellant is not enlarged on bail pending appeal at this stage. Therefore, section 17(3) (b) and (c) need not be considered in favour of the appellant. Overall, the appellant's application for bail is premature at this stage.

[15] Therefore, I am not inclined to allow the appellant's application for bail pending appeal and release him on bail.

Order of the Court:

1. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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