

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

CRIMINAL APPEAL NO.AAU 054 of 2018
[Magistrates Court of Nausori Case No. 221 of 2013]

BETWEEN : **PENI MATAIRAVULA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. N. Misra for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **06 June 2023**

Date of Ruling : **12 June 2023**

RULING

[1] The appellant had been tried along with two others in the Magistrates court in Nausori under extended jurisdiction on a single count of aggravated robbery by robbing an Alcatel mobile phone value at \$200.00, Taxi Meter valued at \$300.00 and \$40.00 cash all to the total value of \$540.00 from Mahesh Chand contrary to section 311(1) of the Crimes Act, 2009 on 01 May 2013 at Mokani, Bau Road, Nausori in the Central Division. The appellant had also been charged with resisting lawful arrest on 06 May 2013 but found not guilty and acquitted by the Magistrate.

[2] The learned Magistrate had found the appellant guilty as charged and case had been remitted to the High Court for sentencing. The appellant was sentenced on 18 May 2018 by the High Court to an imprisonment of 08 years and 01 month with a non-parole period of 06 years and 01 month.

- [3] The appellant in person had appealed against conviction and sentence within time. Subsequently, he had also filed an application for bail pending appeal. The single judge of this court on 23 September 2020 refused leave to appeal against conviction but allowed leave to appeal against sentence and refused bail pending appeal. The appellant through the Legal Aid Commission has now tendered a fresh bail pending appeal application.

Law on bail pending appeal

- [4] 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)].
- [5] 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.

- [6] 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’.
- [7] The appellant has not urged any fresh grounds of appeal for this bail pending appeal application. His grounds of appeal against conviction were earlier held to be having no reasonable prospect of success but leave to appeal against sentence was granted on the basis that the learned High Court judge had made a sentencing error by adopting the sentencing tariff of 08-10 years meant for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature) set in **Wallace Wise v The State** Criminal Appeal No. CAV 0004 of 2015; (24 April 2015) when the already settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers was 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [see **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].
- [8] Having regard to the appellant’s previous convictions for the offence of robbery, the trial judge had been satisfied that he constituted a threat to the community and therefore, after declaring the appellant a habitual offender for the purposes of Part III of the Sentencing and Penalties Act, by virtue of the provisions of section 11 of the Sentencing and Penalties Act, the trial judge had taken 10 years as the starting point as *‘provisions of section 12(b) of the Sentencing and Penalties Act justifies selecting of a higher starting point’*.
- [9] However, by taking a starting point of 10 years following the sentencing tariff guidelines for aggravated robberies involving night home invasions set out in **Wise**, the learned High Court judge had acted upon a wrong principle. Instead the learned

sentencing judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers namely 4-10 years of imprisonment. When the sentencer chooses the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence [vide **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)]. It also appears to be an error that having taken 10 years as the starting point wrongly based on **Wise** the sentencing judge had taken the fact that the offences had been committed against a public service provider to enhance the sentence by 03 more years.

- [10] The head sentence imposed on the appellant was 13 years with a non-parole period of 11 months and the ultimate sentence became 08 years and 01 month with a non-parole period of 06 years and 01 month mainly because of the deduction of the pre-trial remand period of 04 years and 11 months.
- [11] If one were to replicate sentencing methodology set out in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) *mutatis mutandis* to the facts of this case, the appellant's offending may be considered medium (as opposed to high) in terms of harm and the culpability is of second degree (the offending committed by two or more without offensive weapons). Since the sentencing range is between 4-10 years and even allowing for the enhancement possible due to the appellant being declared a habitual offender, he may not receive a final sentence at the higher end of the range by the full court particularly after making due allowance for the remand period of 04 years and 11 months.
- [12] The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[13] The appellant has already served over 05 years since being sentenced and with the pre-trial remand period of 04 years and 11 months, he has been in incarceration for almost 10 years.

[14] After the Supreme Court delivered sentencing guidelines for street mugging and introduced a new methodology based on the two axis of culpability and harm in *Tawake* which the Supreme Court expected to be suitably adopted to other offences, I think given *inter alia* his long remand period, the appellant has a very high likelihood of success in his appeal against the current sentence.

[15] The appeal records had been submitted for certification on 02 June 2023 and there is a chance that this appeal may reach the full court in the not so distant future. However, when that date would be cannot be definitely predicted at this point of time. Therefore, if the appellant is not released on bail now, there is a risk of him having to serve a sentence longer than what the full court may impose on him. It could also be assumed that during the last 10 years of confinement the appellant may have been sufficiently rehabilitated not to be a threat to the community in the future. If the appellant proves otherwise, the consequences for him would be severe which he will repent. This court expects him to be of his best behaviour as a law abiding citizen upon being released on bail.

[16] Therefore, I am inclined to release the appellant on bail pending appeal.


Order of the Court:

1. Bail pending appeal is granted subject to the following conditions:

- (i) The appellant shall reside at Cautata Village, Nausori with the two sureties.
- (ii) The appellant shall report to Nausori Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

- (iii) The appellant shall attend the Court of Appeal and all other courts when noticed on a date and time assigned by the registry of the Court of Appeal and registries of other courts.
- (iv) The appellant shall provide in the persons of Peni Visagai (cousin – Phone:(679)2182243) of Cautata Village, Nausori and Saula Uluinatauloa (brother - date of birth – 06 September 1975; Phone: (679) 2182243) of Cautata Village, Nausori to stand separately and jointly as sureties.
- (v) The sureties shall produce to the CA Registry sufficient proof of their identities, residence addresses and contact details (phone, email etc.).
- (vi) Appellant shall be released on bail pending appeal upon condition (iv) and (v) above being complied with.
- (vi) Appellant shall not reoffend while on bail.




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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent