

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

CRIMINAL APPEAL NO. AAU 0042 OF 2024
[Suva High Court: HAC 230 of 2023]

BETWEEN : **EPARAMA LESUMAIVAVALAGI** *Applicant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : Ms. L. Ratidara for the Applicant
Mr. R. Kumar for the Respondent

Date of Hearing : 8 August, 2025

Date of Ruling : 12 August, 2025

RULING

BAIL PENDING APPEAL

(A). Background

[1] The Appellant was charged with three others for, Count 1 - Aggravated Burglary contrary to section 46 and 313(1)(a) of the Crimes Act 2009 and Count 2 - Theft contrary to section 46 and 291(1) of the Crimes Act 2009 before the Suva High Court.

[2] The Appellant pleaded guilty to both counts and was sentenced on 17th January, 2024 to 38 months imprisonment with a non-parole period of 32 months.

[3] The Appellant filed an untimely appeal against sentence on the grounds that the learned sentencing Judge:

- (i) *Erred in law and in fact in sentencing the Appellant. considering that the starting point selected and the possibility of a double counting resulting in a sentence that is harsh and excessive.*
- (ii) *Erred in law and in fact when the value of the recovered items was not considered when the Appellant was sentenced.*
- (iii) *Erred in principle by fixing a non-parole period too close to the head sentence.*

[4] At the leave stage, Appellant's application for enlargement of time to appeal sentence was allowed in a Ruling dated 28 July 2025.

[5] The Appellant, through the Legal Aid Commission had on 31 July 2025 filed a Notice of Motion Seeking Bail Pending Appeal pursuant to section 33(2) and 35(1) of the Court of Appeal Act. The Notice was supported with the Affidavit of the Appellant [Inmate] and Anaseini Sasala [Guardian of the Appellant]. An Affidavit in support was subsequently filed on 8th August 2025 by Finau Lakalaka [Older Cousin of Appellant].

(B). Affidavits in Support

Appellant's Affidavit

[6] In his Affidavit in Support the Appellant stated that he pleaded guilty for a count of aggravated burglary and theft; that he agreed to the summary of facts and was sentenced on 17th January 2024 to 38 month's imprisonment with a non-parole period of 32 months imprisonment.

[7] That the Appellant appealed against sentence in Appeal AAU 42 of 2024, which was heard before a single Judge of Appeal who granted leave on 28th July 2025.

[8] That should bail be granted, the Appellant will reside at Lot 9, Makosoi Road, Pacific Harbour with his mother the first named proposed surety.

- [9] The Appellant understood that his bail application will be determined pursuant to the Bail Act 2002. That he relies on the factors provided under section 17(3) in seeking bail and there is a high likelihood of success in his appeal.
- [10] The Appellant states that he had already served 1 year and 5 months and 10 days, which is nearly half of his head sentence, and that he has been informed by the Correction authorities that his tentative discharge date is the 16th September 2026.
- [11] Th Appellant states he is willing to report to the nearest police post, which is the Pacific Harbour Police Post. The Appellant also confirms that he has no criminal cases pending, and he is serving time only for this case of aggravated burglary and theft.
- [12] The Appellant promises to abide by the bail conditions as imposed by the Court.

Affidavits of Anaseini Salala and Finau Lakalaka (Proposed Surety)

- [13] Anaseini Salala of Lot 9 Makosoi Road, Pacific Harbour states that she is the Appellant's guardian and had brought the Appellant up as her own child since birth. That the Appellant will be residing with her at Lot 9 Makosoi Road, Pacific Harbour if he is granted bail. That she is aware of the responsibilities and consequences of being a surety and she undertook to uphold her duty to the Court diligently.
- [14] Finau Lakalaka of Naidiri Settlement, Khalsha Road, Nasinu, Litigation clerk, states that she has known the Appellant since birth. She is aware of the responsibility and consequence of being a surety and she undertook to uphold her duty to the Court with dignity.

(C). Leave Stage before a single Judge

- [15] In reviewing the sentence, the single Judge stated that the issue is whether the learned trial Judge acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts, or failed to take into account some relevant considerations: **Kim Nam Bae v State** [1999] FJCA 21 and endorsed by the Supreme Court in **Naisua v State** [2013] FJSC 14.

[16] The Appellant had urged three grounds against sentence, namely that the sentence is harsh and excessive under the circumstances; the learned trial Judge had not taken into account the value of the recovered items, and that, the non-parole period is too close to the head sentence contrary the requirement under the Sentencing and Penalties Act 2009. The single Judge determined that the three grounds are arguable, and for the reasons stated in the Ruling, enlargement of time to appeal against sentence was allowed.

(D). Respondent's Submissions

[17] The Respondent agrees that it is proper that the Appellant was granted enlargement of time for leave to appeal sentence on 28th July 2025, as was the co-Appellant in AAU 12 of 2024-**Sabina Naibili v The State** [2024] FJCA 204; AAU 012.2024 (Ruling on 29 October 2024), primarily due to the fact that the learned Sentencing Judge had erred to have categorized this case as medium harm case and have selected a disproportionately high starting point of 5 years.

[18] The Respondent submits that this was a low harm level case which would overall attract a range of 01 to 05 years imprisonment as per the applicable tariff.

[19] The Respondent submits that in the case of the co-Appellant's Leave Ruling vide AAU 12 of 2024 **Sabina Naibili v The State** (supra) a mistake had occurred where the Court noted that the admitted summary of facts in the substantive case had lacked "*the use of force*" to support a charge of aggravated robbery. It is submitted that the substantive case had never been a robbery case (*aggravated or otherwise*), and from the outset to the conclusion, it had always remained an aggravated burglary and theft case. The error was innocently overlooked and was uncontroversial accepted in the subsequent bail pending appeal Ruling of co-offender Ms Naibili.

[20] The Respondent submits that it is unfortunate that in this s case, the Court was also misled in this regard. That also impacted the Ruling delivered on 28th July 2025, however, the Respondent submits that, be that as it may, in both cases it is accepted that ultimately it was proper in both cases, that the respective Appellants were permitted to challenge their sentences before the full Court.

(E). Relevant Statutory Requirements

Bail Act 2002

- [21] The granting of bail and related matters is regulated under the Bail Act 2002 (“the Act”).
- [22] There is a presumption in favor of the granting of bail to a person. The presumption may be rebutted by a person who opposes the granting of bail-section 3(3) of the Act.
- [23] The presumption aforesaid is displaced where “the person has been convicted and has appealed against his conviction”- section 3(4) (b) of the Act.
- [24] When deciding whether to grant bail to a person who has appealed against conviction or sentence the court must take into account-
- (a) the likelihood of success in the appeal;
 - (b) the likely time before the appeal hearing;
 - (c) the proportion of the original sentence which will have been served by the applicant when the appeal is heard: section 17(3) of the Act.
- [25] Section 33(2) of the Court of Appeal Act provides that, that Court may, if it sees fit, on the application of an appellant, admit the appellant to bail pending appeal.
- [26] Section 35(1) (f) of the Court of Appeal Act empowers the Court to admit an appellant to bail.

(F). Relevant Case Law

- [27] It is established through cases that, the Court is vested with the discretion whether or not to grant bail pending appeal, and there is no presumption in favor of bail for a convicted person appealing against conviction and/or sentence. Also, the Court, in exercising its discretion is not limited to the factors specified in section 17(3) of the Act. It has also been established by case law that bail pending appeal should only be granted where there are exceptional circumstances.

[28] In **Zhong v The State** [2014] FJCA 198; AAU44 of 2913 (15 July 2014) this Court stated;

“[25] Whether bail pending appeal should be granted is a matter for the exercise of the Court’s discretion. The words used in section 33(2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.

[26]

[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17(3) of the Bail Act.....

[28] Although section 17(3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances”

[29] What constitutes an “*exceptional circumstance*” in the context of an application for bail pending appeal has been a subject of comment in numerous cases. In **Apisai Vuniwawa Tora and Others v R** (1978) 24 FLR 28, it is said:

“The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17(3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17(3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.”

[30] In **Ratu Jope Seniloli and Others v The State** (Unreported) Criminal Appeal No.41 of 2004, delivered on 23 August 2004, at page 4, Ward P stated:

“It follows that the long-standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why “the chances of the appeal succeeding” factor in section 17(3) has been interpreted by this Court to mean a very high likelihood of success.”

[31] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) this Court stated:

“It would appear that exceptional circumstances is a matter that is considered...after the matters listed in section 17(3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17(3). This means that exceptional circumstances of the applicant is also relevant when considering each of the material listed in section 17(3).”

[32] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said:

“This Court has applied section 17(3) on the basis that three matters listed in the section are mandatory but not the only matters that the Court may take into account.”

(G). Assessment of Section 17(3) Factors

[33] **Likelihood of success of appeal:** Based on the Ruling delivered on 28 July 2025 allowing enlargement of time, it is most likely that the appeal against sentence will succeed in reducing the sentence. The starting point of 5 years imprisonment places the offence in the Medium Level of Harm Category in relation to tariff available for Aggravated burglary committed with another. This is a sentencing error as the Respondent noted. There is a possibility too of double counting, considering the aggravating factors.

[34] The learned trial judge did not take into consideration the value of the recovered items in sentencing. There is also an issue that the non-parole period is too close to the head sentence and in breach of the provisions of the Sentencing and Penalties Act.

[35] **Likely time before the appeal hearing:** Given that about half of the sentence has already been served, it is likely that the hearing of the case will not be scheduled for hearing near to or after the sentence has been fully served by 16th September 2026.

[36] **The proportion of the original sentence which will have been served by the applicant when the appeal is heard:** The Appellant has already served approximately half of his sentence. About three quarters of the sentence would have been served. There is a possibility that if at the appeal hearing before the full court the sentence is reduced and bail is not granted, it is likely that the Appellant would be

in prison for longer period than he should be lawfully. It will not serve the interest of justice were that to occur.


[37] **Exceptional circumstances:** The Appellant’s appeal has a **high likelihood of success**. The Respondent seems to agree with the outcome of the enlargement of time application and did not object to the Appellant having an opportunity to challenge his sentence in the full Court. Paragraph 4.1 of the Respondent’s submissions states:

“....., the Appellant may properly be allowed Bail Pending Appeal, with standard strict conditions, while he awaits to be heard by the Honourable Full Court however, it may need to be impressed on the youthful appellant to always be mindful of their duties whilst on Bail Pending Appeal (if allowed in this case) as any violation of bail conditions will result in the appellant reverting to the care of the Corrections Services.”

Order of Court

1. *Bail Pending Appeal is granted on conditions.*
2. *Appellant is restricted to remain within the Pacific Harbour/ Navua boundaries during the bail period.*
3. *Appellant must not commit any criminal offence during the bail period.*
4. *Appellant is prohibited from the vicinity of the business premises known as “The Establishment “in Pacific Harbour.*
5. *Bail on his own recognizance in the sum of \$2000.00 - (Non-Cash).*
6. *Surety (Both) in the sum of \$2000.00 each - (Non-Cash).*
7. *Appellant to report at the Navua Police Station on each Wednesday and Saturday between the hours of 6am to 7pm during the bail period.*




Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors

Legal Aid Commission for the Applicant

Office of the Director of Public Prosecutions for the Respondent