

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

CRIMINAL APPEAL NO.AAU 118 of 2017
[In the Magistrates' Court at Nausori Case No.821 of 2016]

BETWEEN : **SITIVENI BAINIVALU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **05 November 2020**

Date of Ruling : **06 November 2020**

RULING

- [1] The appellant had been charged with another in the Magistrate's court of Nausori exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 06 December 2016 at Nausori town in the Eastern Division.
- [2] The appellant had pleaded guilty to the charge voluntarily and admitted the summary of facts. The learned magistrate had convicted the appellant and sentenced him on 20 July 2017 to 06 years and 06 months of imprisonment with a non-parole term of 04 years.

- [3] The appellant being dissatisfied with the sentence had tendered a timely notice of appeal on 18 August 2017. Legal Aid Commission on 19 June 2020 had submitted an amended notice of appeal against sentence along with written submissions. The respondent had filed its written submissions on 17 July 2020. Thereafter, the Legal Aid Commission had filed an application for bail pending appeal on behalf of the appellant, his affidavit and written submissions on 03 August 2020. The state had responded by way of written submissions on 30 October 2020.
- [4] In terms of section 21(1) (c) of the Court of Appeal Act, the appellants could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see Caucu v State AAU0029 of 2016; 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016; 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017; 4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015; 06 June 2019 [2019] FJCA 87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.
- [5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013; 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No. AAU0015 and Chirk King Yam v The State Criminal Appeal No. AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a ground of appeal filed out of time to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid guidelines are as follows.
- (i) *Acted upon a wrong principle;*
 - (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
 - (iii) *Mistook the facts;*
 - (iv) *Failed to take into account some relevant consideration;*

[6] **Ground of appeal**

‘1. That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.’

[7] The summary of facts as stated in the sentencing order is as follows.

‘On the 6th of December, 2016 at about 231 6hrs at Nausori Town two unknown youths robbed one AARAV ANISH CHAND, (A-1), Naval Officer of Vuci Road Nausori of Atcatel Piri Mobile phone valued \$350.00 on N.G Patel Road in front of Rup’s Big Bears.

On the above date time and place (A-1) was returning from clubbing at Whistling Duck night club. Whilst drinking in the club (A-1) ran short of cash and wanted to withdraw more cash. (A-1) then proceeded to BSP Bank to withdraw. After withdrawing the cash, (A-1) was standing in front of the ATM machine and was attempting to call a taxi when suddenly the two unknown youths pushed him and robbed him off his mobile phone. Both ran towards the Pak N Save. One of the youths ended up in club again, whereby (A-1) followed him inside.

In the Night Club approached one of them and questioned one of the youth and he owned up stealing the mobile he came to know that his name was JOSEFA RAIKADROKA (B-1), 20 yrs, unemployed of Vunimono, Nausori and the other was SITIVENI BAINIVALU (B-2) 19 yrs, unemployed of Vunimono Nausori were arrested interviewed and subsequently charged. Both admitted to the offence and charged for Aggravated Robbery Section 311(a) of the Crime Decree.’

01st ground of appeal

[8] The Learned Magistrate 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 10 years. He had enhanced the sentence on account of aggravating features by 03 years but given a discount of 03 years for mitigating features and another reduction of 1/3 of the sentence due to the ‘early guilty plea’ ending up with the head sentence of 06 years and 08 months. After the period of remand was taken into account the ultimate sentence had been 06 years and 06 months.

- [9] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 10 years as the starting point without being mindful that 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. The factual background in Wise was as follows.

[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.

[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth \$550 and \$150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.

- [10] From the summary of facts it is difficult to see how the factual background of this case fits into a factual scenario the Supreme Court encountered in Wise. It appears to me that this is a kind of aggravated robbery called ‘*street mugging*’ where the sentencing tariff is 18 months to 05 years [vide Ragauqau v State [2008] FJCA 34; AAU0100.2007 (4 August 2008), Tawake v State [2019] FJCA 182; AAU0013.2017 (3 October 2019) and Qalivere v State [2020] FJCA 1; AAU71.2017 (27 February 2020)].
- [11] The fact that this act of aggravated robbery had been committed around 11.00 p.m. near a ATM machine at BSP Bank, a place where the public should have access round the clock without fear of being robbed, soon after the complainant had withdrawn cash may safely be treated as having the effect of increasing the seriousness of the crime warranting a higher sentence than an act of usual street mugging would attract.

- [12] On the other hand, the appellant had not robbed the complainant of any cash but only his mobile phone and in the process minimal force *i.e.* a push had been employed. Further, the appellant's accomplice had admitted stealing the mobile phone soon after the incident. The appellant was 19 years at the time of committing the offence and was a first offender and he appears to have tendered an early guilty plea.
- [13] What is relevant to the appeal point taken up is that the learned Magistrate had committed a sentencing error in following the sentencing tariff set in Wise and therefore, he had acted on a wrong sentencing principle warranting the appellate court's possible intervention in the matter of sentence.
- [14] As the Court of Appeal remarked in Qalivere v State [2020] FJCA 1: AAU71.2017 (27 February 2020), acting upon a wrong sentencing range could affect the whole sentencing process and eventually the ultimate sentence.

[19]When the learned Magistrate chose 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.

- [15] Therefore, following the sentencing tariff set in Wise v State and picking 10 years as the starting point demonstrates a sentencing error by the Magistrate having a reasonable prospect for the appellant to succeed in appeal regarding his sentence.
- [16] The final sentence is outside and above the tariff for 'street mugging' mainly due to the fact that the sentencing magistrate had been guided by the wrong sentencing tariff. Therefore, it is for the full court to decide on the appropriate sentence being mindful of the applicable tariff. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (**vide** Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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)].

- [17] Though not an issue in the appeal, some guidance seems to be called for in the matter of 1/3 discount for the guilty plea, for the learned Magistrate had given the appellant an automatic 1/3 discount. In Fiji the decision as to what discount should be given to the guilty plea is governed by the decisions in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) and there is no entitlement for an automatic 1/3 discount even for an early guilty plea. **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) had not been regarded as an absolute benchmark to follow in guilty pleas.

Law on bail pending appeal.

- [18] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

*"[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] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been*

convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.

[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 which states:

"When a court is considering the granting of 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 appellant when the appeal is heard."

[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. In Apisai Vuniyayawa Tora and Others -v- R (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] 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] This second aspect of exceptional circumstances was discussed by Ward P in Ratu Jope Seniloli and Others –v- The State (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:

*"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (Koya v The State unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] 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."

- [19] In Ratu Jope Seniloli & Ors. v The State AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) 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 applicant when the appeal is heard" are directly relevant 'only if the Court accepts there is a real likelihood of success' otherwise, those latter matters 'are otiose' (See also Ranigal v State [2019] FJCA 81; AAU0093.2018 (31 May 2019)
- [20] 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 the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'
- [21] In Qurai v State [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal 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).

On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).³

- [22] In **Balaggan** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

- [23] In **Qurai** it was stated that:

"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."

- [24] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155,2016 (4 July 2017)].

*"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for **bail pending appeal** should attempt even to comment on. They are matters for the Full Court....."*

- [25] **Qurai** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

*"The general restriction on granting **bail pending appeal** as established by cases by Fiji ___ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

- [26] Therefore, the legal position appears to be 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 and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional

circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

- [27] 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 practical purpose or result.
- [28] 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 would 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'.
- [29] The appellant has already satisfied this court that he deserves to be granted leave to appeal against sentence and it now appears that there is not only a reasonable prospect of success but also a very high likelihood of success in his appeal against sentence.
- [30] 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 appellant when the appeal is heard"* together.
- [31] The appellant has already served more than 03 years and 03 months of imprisonment. Given that the sentencing tariff for 'street mugging' is between 18 months and 05 years and that the appellant is not likely to be visited with a sentence towards the higher end of the tariff due to the specific facts and circumstances as enumerated above, if he is not enlarged on bail pending appeal at this stage, he is likely to serve perhaps even more than the whole of the sentence the full court is likely to impose on him after hearing his appeal which, as things stand at present, may not happen in the immediate future. The appellant has filed a timely appeal and the considerable time taken since then to consider the question of leave to appeal and the final appeal by the full court in the future, are matters beyond his control. Therefore, it is in the interest

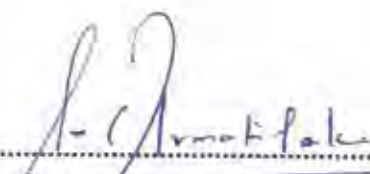
of justice that section 17(3) (b) and (c) are considered in favour of the appellant in this case.

- [32] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail on the conditions given in the Order.

Order

1. Leave to appeal against sentence is allowed.
2. Bail pending appeal is granted subject to the following conditions.
 - (i) The appellant shall reside at Nadali Village in Nausori with his parents.
 - (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 when noticed on a date and time assigned by the registry of the Court of Appeal.
 - (iv) The appellant shall provide in the person of Jope Vatanitawake (father/date of birth – 25 September 1974; Driving Licence No. 1004145) of Nadali Village, Nausori to stand as surety.
 - (v) Appellant shall be released on bail pending appeal upon condition (iv) above being complied with.
 - (vi) Appellant shall not reoffend while on bail.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL