

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

CRIMINAL APPEAL NO.AAU 0107 of 2018
[High Court of Suva Criminal Case No. HAC 212 of 2018]

BETWEEN

: NIKOTIMO KOROVOU

Appellant

AND

: THE STATE

Respondent

Coram

: Prematilaka, JA

Counsel

: Mr. I. Ramanu for the Appellant
: Mr. M. Vosawale for the Respondent

Date of Hearing

: 02 June 2020

Date of Ruling

: 10 June 2020

RULING

[1] The appellant had been indicted in the High Court on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009.

“Count 1

Statement of Offence

Aggravated Robbery: Contrary to section 311(1)(a) of the Crimes Decree No.44 of 2009.

Particulars of Offence

Nikotimo Korovou with others on the 18th day of May, 2018 at Suva in the Central Division, robbed SAMAN KUMAR MENDI of his wallet containing Driving License, ANZ ATM card and \$160.00 cash all to the total value of \$160.00, the property of SAMAN KUMAR MENDI.

- [2] After trial, the assessors had expressed a unanimous opinion of guilty against the appellant on 04 October 2018 and the learned High Court judge had agreed with the assessors and convicted him of the count as charged in his judgment delivered on the same day. The appellant was sentenced on 17 October 2018 to imprisonment of 10 years and 07 months with a non-parole period of 08 years and 07 months.
- [3] The appellant had submitted an appeal within time only against conviction on 16 November 2018. He had tendered an application for bail pending appeal on 25 June 2019 along with written submissions of the same date. The State had filed written submissions on 05 May 2020. The appellant's solicitors had filed an affidavit from the appellant on 11 March 2020 and further submissions on bail pending appeal on 29 May 2020.
- [4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is '**reasonable prospect of success**' to determine whether leave to appeal should be granted (see Caucau 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] FJCA87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

Law relating to bail pending appeal

- [5] 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."*

- [6] 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))

[7] 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.'

[8] 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).'

[9] 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'

[10] 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...."

[11] 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"*

- [12] **Ourai** 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."*

- [13] 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 to that the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to satisfy the requirement 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.
- [14] Further, 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.
- [15] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them he cannot then obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect 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’.

- [16] The learned trial judge had summarized the prosecution evidence as follows in the summing-up.

’16. *The prosecution alleges that the accused together with the two others came behind the complainant and strangled him while he was walking along the Victoria parade in the night of 18th of May 2018. One of them squeezed his neck, while other one twisted his hand. The third person had put a cloth inside his mouth. The complainant had started to scream, asking for help. Then the three assailants took the wallet of the complainant and pushed him away. They then walked across the road. According to the complainant, this incidence lasted only two to three minutes. The complainant had then seen that one of the assailants was caught by some people who were at the other side of the road. The complainant had then approached them. One of the people, who caught the suspect, had asked the complainant whether the wallet that was found in the possession of the suspect belonged to him. That person was in a civilian dress. The complainant later came to know that he was a police officer. You may recall that the complainant explained in his evidence about the colour of his wallet and the items that were inside it.*

17. *Special Constable Romeo Nasila was the officer who arrested the accused at the scene of the crime on the 18th of May 2018. According to the evidence given by SC Nasila, he was walking towards to the Temptation night club as he wanted to talk to bouncers at the night club in respect of a murder investigation. While he was passing the Maya Daba restaurant, SC Nasila saw that three i-taukei youth were strangling an Indian man. They were near the Temptation night club. They were approximately 3 to 5 meters away from him. SC Nasila recognized those three i-taukei youth as Niko, Joeli and Tale Daulako. They are known faces to the Police as they used to roam around the town. SC Nasila had searched them many times when he was doing his night petrol before this incident. After few seconds, three of them left the Indian man and walked and crossed the road. Three of them went three different directions. He had observed this incident about five seconds. Time was around 9.45 p.m. There were street lights, verandah lights of the shops and the night clubs. You may recall that SC Nasila said that the place was brighter than the court house. There were people, walking along the verandah, but SC Nasila said that he had a clear view of this incident.*

18. *SC Nasila said that he went after Niko as other two went to different directions. When SC Nasila came close to the Suva City Library, he saw another i-taukei person had caught Niko and was punching on him. SC Nasila had approached them and asked them to stop the punching. He had introduced himself as a police officer and arrested Niko. He then took Niko to the corridor of the Suva Library in order to check him. While checking the pockets of the*

trousers of Niko, SC Nasila felt that something was in front of his underwear. He then found that it was a black colour wallet. SC Nasila had seen the driving licence of the complainant and his photographs inside the wallet. He then escorted Niko to the Totogo Police Station. You may recall that SC Nasila identified the accused as Niko.

- [17] The appellant's position had been one of denial but he had not given evidence at the trial.

Grounds of appeal

- [18] The grounds of appeal urged by the appellant are as follows.

Grounds of appeal against conviction

- '(1) That the itaukei man was not brought to court nor any statement obtained from him.
- (2) That the appellant was denied the opportunity to cross-examine the itaukei man, he should have been in court to say why he was punching or arresting the appellant.
- (3) That the complainant failed to identify the appellant at the time of arrest when he was arrested by constable Romeo Nasila and the itaukei man gave him his wallet but claimed to positively identify him at Totoga police Station where he came to know the appellant's name.
- (4) That the learned trial judge failed to sum-up fairly.
- (5) That the existing decree does not allow any disclosure of previous conviction during trial.'

01st ground of appeal

- [19] The appellant complains that the person who had caught him while fleeing the scene of the robbery before being handed over to the police officer had not been called by the prosecution to give evidence. From the above summary of evidence it is clear that there was no need on the part of the prosecution to call the person who had caught the appellant as the wallet containing the complainant's driving licence and his photographs were found by SC Nasila in the appellant's possession and they were later identified by the complainant.
- [20] This evidence had been considered by the learned trial judge in his judgment as well. In addition, the police officer had clearly identified the appellant at close range as one

among three persons trying to strangle the complainant before fleeing the scene in different directions.

[21] This ground of appeal has no merit.

02nd ground of appeal

[22] This ground is closely connected to the first ground of appeal. While the person who arrested the appellant and punched him, if called, may have completed the ‘story’ there was no prejudice caused to the appellant by his absence as a witness in as much as the evidence of the complainant and SC Nasila was sufficient to prove the charge against the appellant. This ground too has no merit.

03rd ground of appeal

[23] The complainant’s evidence at the trial had been that he could not identify any of the assailants. Whatever the complainant had done at the police station is immaterial. As far as the identification of the appellant by SC Nasila goes the learned trial judge had addressed the assessors on Turnbull guidelines in paragraph 33 of the summing-up. He had given his mind to the aspect of SC Nasila’s identification of the appellant in the judgment. The appellant does not appear to have challenged the evidence of SC Nasila on the basis that the complainant’s wallet was given to him by someone else, for example the man who arrested the appellant at the scene. The complainant’s evidence also shows that his wallet had been shown to him by a police officer in civilian clothes who later turned out to be SC Nasila when he approached where the appellant had been held by a group of people. This ground of appeal has no merit.

04th ground of appeal

[24] The appellant had been represented by a senior counsel at the trial and he had not sought any redirections on the alleged non-directions or omissions in the summing-up on any of the points now raised by the appellant. Therefore, the appellant is not entitled to raise

such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[25] The summing-up is objective and well balanced and deals with all areas requiring directions by the trial judge. The learned trial judge had addressed himself on all vital areas in his judgment as well in agreeing with the assessors. This ground of appeal is devoid of any merits.

[26] In **R. v. Brown**, 1993 CanLII 114 (SCC), [1993] 2 SCR 918 L'Heureux-Dubé J's dissenting view is also helpful in this regard.

‘ Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue, including a Charter challenge, for the first time on appeal: first, there must be a sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and third, the court must be satisfied that no miscarriage of justice will result. In this case there has been no change in the substantive offence, the issue was not raised at trial, with the result that the record necessary for appellate review of the issue is unavailable, and there has been no denial of justice to the accused. The Court of Appeal therefore properly concluded that no appeal on this new issue should be entertained.’

05th ground of appeal

[27] The basis of this ground of appeal is the evidence of SC Nasila that he recognised the appellant and his accomplices because they were known faces to the Police as they used to roam around the town. The appellant argues that this ‘damaging’ piece of evidence had forced the assessors to arrive at an ‘unfair’ verdict against him. He cites the decision in **Sagasaga v State** [2012] FJCA 52; AAU0116.2011 (28 September 2012) in support of his argument.

[28] In **Sagasaga** it was held as follows.

'3. With regard to the disclosing of the previous convictions, the applicant stated that the learned Judge had referred to him in his summing up to the Assessors as "a General of the criminal world". The learned counsel for the State submitted that it was not something prompted by the State. However an application was made for a redirection of the Assessors. The Record does not bear such an application for a redirection and such redirection had not been made.

'10. The applicant submitted that the trial Judge referring to the applicant as "General in the Criminal World" has caused a serious miscarriage of justice. It appears that the assessors in this case have expressed their unanimous opinion that the applicant was guilty of the charges. Therefore considering the evidence led in this case, even if one considers this as a misdirection, the applicant has failed to show that this appeal has every chance of success.'

[29] In this case the reference to the appellant and his accomplices as known faces as they used to roam around the city by SC Nasila was necessary to explain how he managed to identify the appellant in the act of strangling the complainant a few meters away. It has a solid evidentiary basis. It was not an embellishment or exaggeration to identify the appellant with any previous convictions. Saqasaqa would not apply to the appellant's case.

[30] The appellant also relies on Sheik M. Hussein v State and State v Prakash Chetty [2001] 1FLR 347 at page 348 where the Court of Appeal held as follows when the evidence of a previous conviction had been led and the appellant had been called the 'Master' in prison and the trial judge had failed to warn the assessors.

'Where evidence of a previous conviction is led, where A1 was called "Master" in prison, and it is inconceivable that any person other than the two accused was responsible for the killing, there is a high degree of possibility that assessors will be prone to reason that the accused has a propensity to commit such an offence. Where there has been a misdirection or non-direction, a Court may still uphold the conviction if satisfied assessors would have reached the same conclusion. Here failure of the trial Judge to direct the assessors that they must not use the fact a previous conviction as tending to the guilt of A1 amounted to a miscarriage of justice'.

[31] The impugned portion of the evidence of SC Nasila falls far short of the situation dealt with in Sheik M. Hussein v State and State v Prakash Chetty and therefore, it has no application to the appellant's complaint here.

[32] In addition, there was direct evidence of SC Nasila of the appellant's involvement in the attack on the complainant and strong recent possession evidence. **Lal v State** [2018] FJCA 147; AAU154.2014 & AAU8.2015 (4 October 2018) it was held on recent possession evidence as follows.

*'..... In **R –v- Aves**, 34 Cr. App. R. 159 CCA, it was held that, where the only evidence is that the defendant was in possession of property recently stolen, a jury may infer guilty knowledge if he offers no explanation to account for his possession, or if they are sure that the explanation he does offer is untrue; if, however, the explanation offered is one which leaves them in doubt whether he knew that the property was stolen, they should be told that the case has not been proved and therefore the verdict should be not guilty.....'*

[33] As stated in **Sheik M. Hussein v State** and **State v Prakash Chetty** the evidence against the appellant was such that any rational and reasonable assessors and a trial judge would have found the appellant guilty with or without the aforesaid impugned portion of SC Nasila's evidence.

[34] Before parting with the aspect of the appeal, I must place on record the sentiments expressed by Pathik J, in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) and as far as this appeal is concerned I can only concur with them.

'[18] (a) The grounds advanced by the appellant are completely without merit. In fact I find that this is a frivolous and vexatious application. Further the application is an abuse of the process of the court.

(b) It is a case which I should have summarily dismissed.'

[35] Therefore, none of the grounds urged by the appellant has any reasonable prospect of success to be given leave to appeal. Nor do they, logically have a 'very high likelihood of success' to consider bail pending appeal.

[36] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

[37] However, I wish to place on record that 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 12 years as the starting point ending up with the final sentence of 11 years. 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.

[38] This is a more a serious form of street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) [see **Tawake v State** [2019] FJCA 182; AAU0013 of 2017 (3 October 2019) and **Oalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)]. The learned trial judge had stated in the sentencing order

2.It was proved at the conclusion of the hearing that you together with two other accomplices came from behind the complainant and assaulted him when he was walking alone the Victoria Parade in the night of the 18th of May 2018. One of you have strangled his neck, while another had twisted his hand. The third one had put a cloth into his mouth. After that, you and your two accomplices had robbed his wallet which contained \$160 and assorted cards.'

6.Crimes of this nature have the effect of endangering innocent public and their freedom of life. You and your accomplices have found an opportunity when the complainant was walking along the Victoria Parade in the night at about 9.45 p.m. You then assaulted him from behind using substantial amount of violence. The complainant in his evidence said that he was frustrated and scared.

7.Certainly, the impact of this offence on the complainant must be a horrific and frustrating experience. Specially, he was suddenly grabbed from his behind and stole his belongings. Therefore, I find the level of harm and culpability in this offending are substantially high.'


[39] Therefore, there is clearly a sentencing error (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).

[40] Nevertheless, without speculating on the appropriate sentence as the appellant has not appealed against sentence, it looks to me that he deserves a deterrent sentence within or even beyond the upper limit of 5 years set in *Ragauqau* because it had been carried out by a group of offenders and the prevalence of offences of this nature in the city.

Orders

1. Leave to appeal against conviction is refused.
2. Bail pending appeal is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL