

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, RJA**

Counsel : **Ms. T. Kean for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Ruling : **28 February 2023**

RULING IN CHAMBERS

- [1] The appellant had been indicted in the High Court on one count of aggravated robbery committed with others on 18 May, 2018 at Suva in the Central Division contrary to section 311(1)(a) of the Crimes Act, 2009.
- [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 was granted enlargement of time to appeal by the single Judge of this court against sentence on 30 March 2021. On 17 August 2022, Mr. Romanu who was the appellant's counsel was directed to file affidavits of prospective sureties and written submissions in respect of the bail pending appeal application filed on behalf of

the appellant in person within 14 days for a bail pending appeal ruling in Chambers. The Respondent was required to respond if necessary within a week. The appellant's counsel has failed to do comply with the directives. The Legal Aid Commission has informed the CA Registry on 15 February 2023 that the appellant had informed it that Mr. Romanu no longer represents the appellant and the LAC has filed affidavits of the prospective sureties.

[4] 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.'

[5] Enlargement of time to appeal against sentence was allowed on the following ground of appeal:

- '(1) That the sentencing tariff of 08 to 16 years should only apply to more serious offences like home invasion and not street type of offences like this.*
- (2) That the sentence is quite excessive given the circumstances of the offending.'*

[6] 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.

- [7] Therefore, it is clear that the facts of the appellant's case reveal a more a serious form of 'street mugging' than a home invasion involved in Wise.
- [8] I allowed enlargement of time to appeal against sentence mainly on the basis that the learned Magistrate had committed a fundamental error in following the sentencing tariff for home invasion in the night with accompanying violence perpetrated on the inmates set in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) to this instance of street mugging thereby acting on a wrong sentencing principle.
- [9] Sentencing tariff for street mugging had been consistently taken earlier as 18 months to 05 years of imprisonment [vide Raqauqau v State [2008] FJCA 34; AAU0100.2007 (4 August 2008) & Qalivere v State [2020] FJCA 1; AAU71.2017 (27 February 2020)].
- [10] However, the Supreme Court in State v Tawake [2022] FJSC 22; CAV0025.2019 (28 April 2022) handed down fresh sentencing guidelines for street mugging which are relevant to the determination of the appellant's appeal on sentence. The appellant has already served over 04 years and 04 months of imprisonment after sentencing and prior to trial they had been in remand for 04 months and 17 days making the total incarceration over 04 years and 08 ½ months.
- [11] In view of Tawake, the appellant's sentence range could be 03-07 (medium harm) years of imprisonment based on their having committed the offending in others' company but with moderate harm to the complainant. Even if one were to go by the then existing tariff he has already served over and above its high end.

Law on bail pending appeal

- [12] 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)].
- [13] 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.
- [14] 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’.

[15] The appellant has already satisfied this court that he deserved to be granted enlargement of time to appeal against sentence and it now appears that he has a very high likelihood of success in his appeal against sentence due to the sentencing error of wrong tariff being applied and in view of Tawake guidelines.

[16] 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.

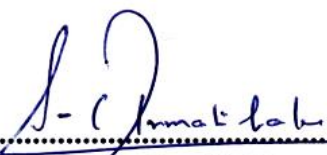
[17] The appellant has already spent over 04 years and 08 ½ months in incarceration. The appeal is not likely to be taken up before the full court in the immediate future as the appeal records for full court hearing are yet to be prepared. If the appellant is not enlarged on bail pending appeal at this stage, he may be forced to serve a longer sentence than what the full court may ultimately impose on him. Therefore, it appears that section 17(3) (b) and (c) should be considered in favour of the appellant in this case.

[18] 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 of the Court:

1. Bail pending appeal is granted to the appellant, Nikotimo Korovou subject to the following conditions:
 - (i) The appellant shall reside with father and his family at family home at Tacirua, Valelevu.
 - (ii) The appellant shall report to Valelevu 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 Waisea Kaloumaira, his father (FRCS/FNPF joint card identification No.118119506 of Tacirua, Valelevu and Phone No. 9481315).
 - (v) The appellant shall provide in the person of Waisea Kalou, his uncle FRCS/FNPF joint card identification No.117920608 of Namadi Heights.
 - (vi) The appellant (Birth Certificate or similar documentary proof) and sureties shall provide sufficient and acceptable documentary proof of their identities.
 - (vi) The appellant shall be released on bail pending appeal upon condition (iv) to (vi) above being fulfilled.
 - (vii) The appellant shall not reoffend while on bail.




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