

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

CRIMINAL APPEAL NO. AAU 012 of 2017
[In the High Court of Suva Case No. HAC 281 of 2013]

BETWEEN : **PAULA VURA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

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

Date of Hearing : **15 November 2021**

Date of Ruling : **15 November 2021**

RULING

[1] The appellant had been charged with two others in the High Court of Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) of the Crimes Act, 2009 allegedly committed on 19 July 2013 at Namadi Heights in the Central Division.

[2] The information read as follows:

'FIRST COUNT

AGGRAVATED BURGLARY: *Contrary to Section 313(1)(a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence

PAULA VURA, VERETI ISIMELI VANANALAGI, JOHNNY MAFUTUNA and ENERIKO SERU on the 19th day of July 2013, at Namadi Heights in the Central Division broke into and entered the dwelling house of **SOPHIA JI** and **WEN YI** as trespassers with intent to commit theft therein.

SECOND COUNT

Statement of Offence

THEFT: Contrary to Section 291(1) of the Crimes Decree No.44 of 2009..

Particulars of Offence

PAULA VURA, VERETI ISIMELI VANANALAGI, JOHNNY MAFUTUNA and ENERIKO SERU on the 19th day of July 2013 at Namadi Heights in the Central Division dishonestly appropriated 1 Anna Klein brand wrist watch valued at \$1000.00, a CK brand wrist watch valued at \$150.00, 1 men's wrist watch valued at \$1000.00, 1 laptop notebook and 1 Deli brand laptop together valued at \$4000.00, 1 A45 mobile phone valued at \$2000.00, 1 Nokia mobile phone valued at \$70.00, 1 Nokia battery and charger valued at \$35.00, 1 belt buckle valued at \$25.00, 1 Adidas bag valued at \$80.00, cash in the sum of FJD \$3000.00, assorted clothes valued at \$300.00 and 1 carton of Shuangxi cigarettes valued at \$3325.00 all to the total value of \$14,985.00 the property of **SOPHIA JI** and others.'

- [3] The appellant had absconded since 30 April 2015 and the prosecution had applied to try him *in absentia* on 01 October 2015 and accordingly, the trial proper had commenced on 07 October 2015 in his absence. After trial, on 09 October 2015 the assessors had unanimously found the appellant guilty of the two counts as charged and delivering his judgment on the same day, the learned High Court judge had agreed with the assessors and convicted the appellant of both charges. He had been sentenced on 15 October 2015 to 4 years and 03 months of imprisonment on each count to run consecutively. Thus, the total sentence of 08 years and 06 months was directed to take effect with a non-parole period of 08 years from the time of his capture. He had been arrested on 01 October 2016 and has been serving his sentence for 05 years and 01 ½ months.

[4] The appellant being dissatisfied with the conviction had in person signed an untimely notice of appeal against sentence. The Legal Aid Commission had thereafter filed an application for enlargement of time to appeal against conviction and sentence and written submissions on 09 June 2020. The respondent's written submissions were tendered at the leave to appeal hearing on 29 July 2020.

[5] This Court considered his extension of time application and granted enlargement of time to appeal against sentence on 30 July 2020 on the 02nd ground of appeal which is as follows:

***'Ground 2** – The Learned trial Judge erred in law and in fact in finding and declaring the appellant as a habitual offender and in turn using that to sentence the Appellant to a consecutive sentence without considering and exercising his discretion in granting a concurrent sentence and in failing to consider or exercise this discretion also failed to take into account relevant consideration which would have warranted a concurrent sentence.*

[6] The single judge of the Court has remarked in the earlier ruling as follows:

[26] Nevertheless, following the best traditions of the DPP, the state counsel conceded that even if the appellant had been handed over 05 convictions in 2004 that alone would not justify him being treated as a habitual offender because the trial judges hardly classify an accused as a habitual offender on the basis of a few convictions. He cited the case of Suguturaga v State [2014] FJCA 206; AAU0084.2010 (5 December 2014) as an authority that has dealt with a similar issue where the trial judge had classified the appellant as a habitual offender which was reversed by the Court of Appeal.

[32] The learned trial judge has made the appellant's sentences for the two offences committed in the same transaction consecutive rather than concurrent thereby lengthening the total sentence to 08 years and 06 months which otherwise would have been concurrent and only 04 years and 03 months. Therefore, as formulated in paragraph 30 above this could be regarded as a question of law and no leave is required for the appellant to take it up before the full court.

[33] In the circumstances above discussed, the appellant seems to have a real prospect of success in appeal on the second ground of appeal.'

[7] Why the trial judge had decided to make the sentences consecutive can be understood when one considers the evidence as summarised by the learned trial judge in the summing-up.

- ‘18. *The prosecution’s case were as follows: The accused was 40 years old on 19 July 2013. He is married with 2 daughters aged 21 and 19 years old. He is a casual labourer at the Kings Wharf, and had resided at Tamavua-i-wai Settlement most of his life. He reached Form 6 level education at Laucala Bay Secondary School. On 19 July 2013, at about 11pm, he met a friend and others at Upper Ragg Avenue Road. They had previously planned to break into the complainants’ house to steal some money other valuables. They later went to the complainants’ dwelling house.*
19. *When they arrived, the complainants were still awake. They waited at a nearby cassava patch for the complainants to sleep. Later the complainant went to sleep. The accused and his friends then cut the complainant’s fence and went into their compound. They went through the back door. It was unlocked. They then ransacked the complainants’ house. They woke the complainant’s up and told them not to resist or they will be hurt. They demanded money.*
20. *They continued to ransack the house and later stole the properties mentioned in count no.2. The accused and his friends tried to escape in the complainants’ vehicle, but they crashed the same against the complainant’s gate. They later fled the scene on foot. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.’*

[8] Since the delivery of the earlier ruling the Legal Aid Commission is still awaiting the transcript of trial proceedings which were audio recorded in the High Court to prepare the draft appeal records for submission to be certified by the Chief Registrar. Therefore, the substantive appeal has a long distance to go before it is heard by the full court in the future. In the meantime the LAC on behalf of the appellant had filed an application for bail pending appeal (20 September 2021) along with written submissions. The state in its submissions filed on 05 November 2021 had responded to the bail pending appeal application. Both counsel agreed to have a ruling based on their respective written submissions.

Law on bail pending appeal

- [9] The legal position is 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 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 appellant 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 appellant has 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, an appellant 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)].
- [10] 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.
- [11] 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 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’.

[12] The appellant had 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 making the two sentences consecutive. However, I am convinced that had the trial judge not decided to make them consecutive he would have imposed a longer aggregate sentence than 04 years and 03 months of imprisonment on both counts. In fact given the proven facts such a higher sentence was warranted. At the same time in my view the full court is not likely to impose 08 ½ years as an aggregate sentence either.

[13] 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.

[14] The appellant has already served over 05 years and 01 ½ months in imprisonment. I am mindful that the ‘old tariff’ for aggravated burglary is 18 months to 03 years [see **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) and **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)]. However, some High Court judges and Magistrates do follow the ‘new tariff’ of 06 years to 14 years following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018).

[15] This court has granted leave to appeal and/or enlargement of time to appeal against sentence where the ‘new tariff’ had been applied as *there is a fundamental question of legal validity of the ‘new tariff’* so that the full court may revisit the question of appropriate tariff for aggravated burglary (see **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020), **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020), **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020), **Naulivou v**

State [2020] FJCA 166; AAU0043.2019 (9 September 2020) and **Cama v State** AAU 42 of 2021 (27 October 2020)].

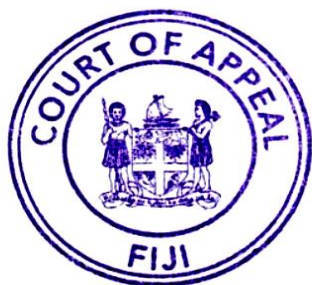
[16] If the appellant is not enlarged on bail pending appeal at this stage, he is likely to serve more than the whole of the sentence the full court is likely to impose on him after hearing his appeal which could also be regarded as an exceptional circumstance. Therefore, it is in the interest of justice that section 17(3) (b) and (c) are also considered in favour of the appellant in this case.

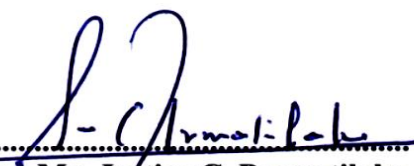
[17] Therefore, I am inclined to allow the appellant's application for bail pending appeal and release him on bail on the conditions given in the Order.

Orders

1. Bail pending appeal is granted to the appellant, **PAULA VURA** subject to the following conditions:

- (i) The appellant shall reside at Tamavua – I- Wai settlement, Samabula, Suva City with his brother-in-law Edward Kustom aka Edward Kustel and the appellant’s wife.
- (ii) The appellant shall report to Samabula 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 his brother-in-law Edward Kustom aka Edward Kustel of Tamavua – I- Wai settlement, Samabula, Suva City (DOB 24/07/1969; Driving Licence number 610563 to stand as surety.
- (v) The appellant shall provide in the person of his wife (sister of the said Edward Kustom aka Edward Kustel) to stand as the second surety who shall tender an affidavit to court.
- (vi) The second surety shall provide sufficient and acceptable proof of her identity and the relationships to the appellant.
- (vi) The appellant shall be released on bail pending appeal upon condition (iv), (v) and (vi) above being fulfilled.
- (vi) The appellant shall not reoffend while on bail.




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