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

CRIMINAL APPEAL NO.AAU 088 of 2020
[In the High Court at Lautoka Case No. HAC 100 of 2016]

BETWEEN : **NAZEEM SHEERAZ ALI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **04 December 2023**

Date of Ruling : **21 December 2023**

RULING ON BAIL PENDING APPEAL

[1] The appellant had been indicted in the High Court at Lautoka with one count of murder of Susana Vakaloloma contrary to section 237 of the Crimes Act, 2009 committed on 07 May 2016 at Yalalevu Ba in the Western Division.

[2] The appellant had been represented by the same counsel in the Magistrates court and the High Court up to the point of filing mitigation submissions. The trial had been fixed from 16–20 September 2019. However, on the date of the trial (*i.e.* 16 September 2019) prior to the commencement of the trial, the appellant had pleaded guilty to the charge of murder and summary of facts had been read over on 17 September 2019 which he had admitted. The sentencing had been adjourned to 15 October 2019 and in the meantime both parties had tendered mitigation submissions. However, the appellant's counsel had not been present on 15 October 2019 and the appellant had submitted a note to the High Court judge seeking to vacate his guilty plea. This fact had been recorded by the

prosecuting state counsel in his file. Sentencing had been adjourned to the following day. On 16 October 2019 the trial judge had proceeded to sentence the appellant on his guilty plea to mandatory life imprisonment with a minimum serving period of 19 years.

[3] The sentencing order contains a brief summary of facts as follows:

> *3. On 17 September 2019 the summary of facts was read out and explained to you. According to the summary of facts you were in a de facto relationship with the deceased. On 07 May 2016 you were drinking wine with the deceased. After drinking about 7 bottles of wine, an argument arose with the deceased as she asked for more liquor. In the process you took a cane knife and struck the deceased on her neck. The deceased collapsed on a mattress and you kept on striking the deceased several times on her neck, arms and legs. Thereafter you took the body of the deceased to the kitchen and severed the arms and the legs from the body with the cane knife. You packed the arms and the legs of the deceased in a garbage bag and packed the remaining body parts of the deceased in a drawer. On 8 May 2016 you rang one Ratu Samu Raganitoga and confessed to him that you killed the deceased. You requested him to assist you in burying the body. You took him home and showed him the body parts. You told him that you wiped off the blood that was in the sitting room. You asked him to assist you to load the body in the car. He refused to assist and asked you to drop him off at Ba Town. On 10 May 2016 he reported the matter to the Police. Later you were arrested, and you admitted under caution that you killed the deceased. As per the Postmortem report the death is caused by Exsanguination and multiple traumatic slashed injuries.*

[4] On 06 January 2023, a judge of this court allowed enlargement of time to appeal against conviction[1] only on the 04th ground of appeal but some matters submitted by the appellant under the 01st and 03rd grounds of appeal also seem to have some bearing on the complaint under the 04th ground of appeal as follows.

> *THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to consider the submission of the appellant for a change of plea from guilty to not guilty prior to sentencing on this matter.*

[1] **Ali v State** [2023] FJCA 5; AAU088.2020 (6 January 2023)

[5] The appellant insists that he wanted to withdraw his guilty plea on 15 October 2019 and submitted a note to the trial judge to that effect. This is confirmed by the note made by the prosecuting counsel on his file as Mr. Babitu informed this court at the hearing. This episode had happened in the absence of the appellant's trial counsel who had not turned up in court on that day or even on the following day. According to the appellant, his application to withdraw the plea of guilty was rejected by the trial judge as there was still a counsel on record and the judge proceeded to sentence him on the following day. The reason/s why the trial judge rejected the appellant's application to withdraw the plea of guilty is not given in the sentencing order. The single judge ruling states:

> *[24] I think given the circumstances discussed above, this is a fit case to grant enlargement of time in the interest of justice to enable the full court to examine the full record to see the merits of the ground of appeal in the light of above principles of law.*

[6] The appellant in the meantime had made an application for bail pending appeal in August 2023 and both parties agreed to have a ruling on bail pending appeal application on the written submissions filed.

Law on bail pending appeal.

[7] 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)].

[8] 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.

[9] 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'.

[10] It is clear from the single judge ruling that leave to appeal was being allowed on the conviction appeal '*in the interest of justice to enable the full court to examine the full record to see the merits of the ground of appeal'* and not based on 'reasonable prospect of success' of the appeal itself [see **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)]. Therefore, the requirement of 'very high likelihood of success' for bail pending appeal is not satisfied.

[11] If I may consider (though not legally required) the time possibly taken to hear the appeal by the full court and what part of the sentence the appellant will have served by then, only 04 years and 02 months have passed since the appellant was sentenced and he still has to serve the rest of the minimum period of 19 years (to apply for a pardon) out of the life sentence. There is no risk that the appellant will have served a substantial portion of the sentence by the time his appeal is heard by the full court.

[12] This being a case of guilty plea, no trial proceedings are involved and therefore, transcripts of audio recording are not available; nor are they required to prepare appeal

records. Judge's notes, if available would suffice. The rest of the documentation is even simpler. Therefore, I would expect the Legal Aid Commission to ready the appeal records for the full court hearing without delay. If the appellant's counsel could have the appeal records ready sooner than later, there may be a possibility that the appellant's appeal be heard by the full court in the first half of next year.

[13] In the circumstances, I am not inclined to release the appellant on bail pending appeal at this stage (particularly given the brutality of the offending and overwhelming evidence in the form of confessions and other evidence.) as the full court may finally decide the appeal proper itself in the not so distant future. I am also mindful that even if the appellant succeeds in appeal it would only result in a new trial and not an acquittal.

Orders

1. Bail pending appeal is refused.
2. The Legal Aid Commission is directed to liaise with the Court of Appeal Registry and take necessary steps to prepare the appeal records without delay for full court hearing.

COURT OF APPEAL FIJI

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