IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
exercising extended jurisdiction

CRIMINAL APPEAL AAU 79 of 2014
(High Court HAC 116 of 2013)
(Magistrates Court No. 1116 of 2013 at Nasinu)

BETWEEN : **THE STATE**

Appellant

AND : **WILLIE KOI**
SEREMAIA TUWAI

Respondents

Coram : **Calanchini P**
Chandra JA
Aluthge JA

Counsel : **Mr S Vodokisolomone for the Appellant**
No appearance for the Respondent

Date of Hearing : **2 July 2018**

Date of Judgment : **24 August 2018**

JUDGMENT

Calanchini P

[1] When this appeal was called on for hearing there was no appearance by or on behalf of the respondents. Counsel for the appellant informed the Court that the State's

submissions together with notification of the appeal hearing date and time had been served on both respondents. The Court directed the appellant to file an affidavit to that effect in respect of both respondents. On 4 July 2018 the appellant filed two affidavits of service both of which were sworn on 4 July 2018 by Sekonaia Vodokisolomone. The affidavits establish that the respondents were served with a copy of the appellants submissions together with a letter advising the date, time and place of the appeal hearing being 2 July 2010 at 9.30am in Court No.7. Service was effected on the respondent Koi at Kasabia Arcade Suva City Centre personally by Joji Donu on 19 June 2018. Service was effected on the respondent Tuwai at Nasinu Police Station personally by Sekonaia Vodokisolomone on 19 June 2018.

[2] The first respondent (Koi) and the second respondent (Tuwai) were each charged with one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act 2009. Tuwai was also charged with four counts of breach of suspended sentence contrary to section 28(1) of the Sentencing and Penalties Act 2009. Both respondents pleaded guilty to the charges and the Magistrate found that their pleas had been voluntary and unequivocal. On 2 June 2014 both respondents were convicted and sentenced on the count of aggravated robbery to be bound over for 12 months in the sum of $1,000.00. Tuwai was convicted and sentenced to 12 months imprisonment for the four counts of breaching suspended sentences.

[3] The appellant filed a timely notice of appeal against sentence on 1 July 2014. Leave to appeal against sentence was granted on 23 December 2015 by Goundar JA who observed in paragraph 4:

> *"But the sentences imposed on the respondents are clearly in breach of the established tariff for aggravated robbery. A vulnerable young woman was attacked by two men on a street at night time when she was returning home from work. There has to be very compelling reasons not to impose an immediate custodial sentence for street mugging especially when physical violence is used to carry out the robbery. The sentences imposed on the respondents are arguably manifestly lenient."*

[4] Although the sentencing decision was not available to the single judge at the leave hearing, it appears in the appeal record at pages 14 to 18. At page 16 the following summary of the background facts is set out by the Magistrate. On 20 September 2013, while Tuwai was on a suspended sentence, at about 8.00p.m the complainant was walking along Khalsa Road, returning home. The respondents saw the complainant and planned to rob her. Tuwai proceeded ahead and waited at a lamp post nearby while Koi continued to follow the complainant. Suddenly Koi ran towards the complainant and grabbed her handbag. There was a struggle between the two as the complainant refused to let go of her handbag. The complainant was punched in the face by Koi causing her to fall to the ground. Koi forcefully obtained the complainant's bag and ran off with it. Both respondents then fled the scene. The contents of the handbag included a mobile phone, eye glasses, cash of $60.00, assorted cards and personal documents. All but the cash was eventually recovered. The complainant was medically examined later the same night. She had suffered facial swelling and elbow contusions. It must be acknowledged that both respondents made full admissions when interviewed by police on 21 September 2013. These admissions may be regarded as guilty pleas being made at the earliest possible opportunity.

[5] The appellant State relies on the following two grounds of appeal:

> *"1. The learned Magistrate erred in law and fact in sentencing both respondents to be bound over for 12 months in the sum of $1000 for aggravated robbery when the circumstances of the case warranted a custodial sentence in light of the tariff being 8 – 14 years.*
>
> *2. The learned magistrate erred in law and in fact when sentencing the second respondent Seremaia Tuwai for counts 2, 3, 4 and 5 to a concurrent term of 12 months imprisonment when the circumstances of the case called for consecutive sentences to the aggravated robbery sentence."*

[6] It cannot be disputed on the facts that the actions of the respondents constituted the offence of aggravated robbery. First the respondents satisfied the requirements for the offence of robbery under section 310(1) of the Crimes Act in that whilst stealing the

handbag force was used on the complainant either immediately before or at the time of committing the theft with the intent to commit theft. The actions constituted aggravated robbery under section 311(1)((a) in that the offence of robbery was committed by each respondents in company with the other. The maximum penalty for aggravate robbery is 20 years.

[7] The appellant has submitted that the sentencing Magistrate has failed to take into account some relevant considerations such as the degree of planning, the extent of the injuries caused to the complainant as a result of the assault, the requirement for hospital treatment and the need to impose a sentence that would reflect the need to deter others.

[8] The appellant has referred the Court to the earlier decision of this Court in **Raqauqau –v- The State** [2008] FJCA 34; AAU 100 of 2007, 4 August 2008. Although Raqauqau was charged with robbery with violence under section 293(1)(b) of the Penal Code Cap 17 (now repealed) the circumstances of the offence are similar to the facts of the present case. In that case the complainant, a male aged 18 years old, was walking home on a back road after finishing work. He was approached by Raqauqau and a co-accused. Raqauqau grabbed the complainant from the back and held his hands while the co-accused punched him. They stole $71.00 in cash from the complainant and fled. Raqauqau pleaded guilty in the Magistrates Court and was sentenced to 5 years imprisonment. He appealed to the High Court against conviction and sentence. The appeal against conviction was dismissed but the High Court allowed the sentence appeal and reduced the term of imprisonment from 5 years to 4 years. Raqauqau filed a timely appeal against sentence to this Court under section 22 of the Court of Appeal Act.

[9] In the course of its judgment this Court re-affirmed the proper approach that should be adopted in an appeal against sentence which was clearly stated in **Bae –v- The State** [1999] FJCA 21; AAU 15 of 1998, 26 February 1999. The Court stated:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong*

*principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House –v- The King**) (1936) 55 C.L.R 499)."*

[10] In Raqauqau this Court accepted that *"irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances*" (at paragraph12). The Court accepted that the offence would be more serious if the victim was vulnerable because of age. The prevalence of such offences was to be regarded as an aggravating feature. There was no error on the part of the High Court and the appeal was dismissed. A subsequent appeal to the Supreme Court was dismissed.

[11] In my judgment the sentencing Magistrate has failed to consider the vulnerability of the complainant, the injuries sustained by the complainant, the prevalence of the offence and the need to impose a sentence that would act as a deterrent. I consider that a different sentence should have been passed. A custodial sentence was called for and should have been imposed.

[12] Therefore I would quash the sentences ordered and sentence each respondent to 5 years imprisonment with non-parole terms of 3 years with effect from the date the respondents are apprehended to serve the sentences.

[13] In relation to the second ground of appeal against Tuwai raised by the State, the position is to some extent determined by reference to section 28(5) of the Sentencing and Penalties Act 2009 which requires the restored sentence or sentences to be served consecutively on the term of imprisonment previously imposed for the offence that constituted a breach of the suspended sentence, unless the Court orders otherwise. There were in this case four suspended sentences which were breached by the present offence. However, taking into account that Tuwai is being sentenced to a custodial sentence for

the aggravated robbery offence, it would be unfair and contrary to the totality principle to order consecutive sentences in this case.

[14] Finally, one comment about the drafting of the grounds of appeal. In a sentence appeal under either section 21(1)(c) or section 21(2)(c) leave is required and the appellant is required to demonstrate that there is an arguable error in the exercise of the sentencing discretion. The words *"errors of law"* and/or *"errors of mixed law and fact"* do not need to be included in the drafted grounds of appeal against sentence as leave is required for all sentence appeals.

[15] In my judgment this case can be distinguished from **Naiveli –v- The State** [1994] FJCA 29; AAU 4 of 1992, 12 August 1994. For that reason I would not adopt the approach that was submitted by the Appellant that the appeal was intended to correct a sentencing error rather than to compel the respondents to serve terms of imprisonment. This was a serious case of aggravated robbery that involved considerable violence on a vulnerable witness.

[16] In conclusion I would allow the appeal on ground one and for the reasons stated refuse the appeal on ground two. I would set aside the sentences imposed by the Magistrates Court and impose on each respondent a term of imprisonment of 5 years with a non-parole term of 3 years with effect from the date of apprehension to serve these sentences. I would affirm the sentence of 12 months imposed on Tuwai for breaching his suspended sentences to be served concurrently with the sentence imposed for aggravated robbery.

Chandra JA

[17] I agree with the reasons and conclusions of Calanchini P.

Aluthge JA

[18] I have read the draft judgment of Calanchini P. I agree with the judgment and the reasons given.

Orders:

1. *Appeal against sentence on ground 1 is allowed.*
2. *The sentence imposed on each respondent for the offence of aggravated robbery is quashed.*
3. *Each respondent is sentenced to a term of imprisonment of 5 years with a non-parole term of 3 years with effect from the date of apprehension.*
4. *Appeal against sentence imposed on Tuwai under ground 2 is dismissed.*
5. *The respondent Koi is sentenced to 5 years imprisonment with a non-parole term of 3 years with effect from the date he is apprehended to start serving the sentence.*
6. *The respondent Tuwai is sentenced to 5 years imprisonment to be served concurrently with the sentence of 12 months imposed by the Magistrates Court in consequence of breaching the suspended sentences with a non-parole term of 3 years with effect from the date he is apprehended to serve the sentence.*

Hon Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice S Chandra
JUSTICE OF APPEAL

Hon Mr Justice A Aluthge
JUSTICE OF APPEAL