

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 7 OF 2016
(High Court HAC 89 of 2010[Lautoka])

BETWEEN : **ILIESA VAKABUA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the Appellant**
Mr S Babitu for the Respondent

Date of Hearing : **8 August 2019**

Date of Ruling : **30 August 2019**

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted on one count of aggravated robbery and acquitted on the count of murder and the alternative count of manslaughter. He was one of five accused tried on charges of murder and aggravated robbery. Each was convicted on at least one count and each has applied for leave to

appeal against conviction and or sentence. There are five separate rulings in respect of their applications.

- [2] On 1 December 2015 the appellant was sentenced to 13 years imprisonment with a non-parole term of 12 years.
- [3] The appellant filed a timely handwritten notice of appeal against conviction and sentence dated 21 December 2015. On 8 August 2019 the appellant applied in writing to abandon his appeal against conviction. That application is to be listed at the same time as the appeal against sentence in the event that leave is granted or alternatively on a date to be fixed.
- [4] This is the appellant's application for leave to appeal against sentence pursuant to section 21(1)(c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against sentence is whether there has been an arguable error in the exercise of the sentencing discretion: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [5] On 22 May 2018 the appellant filed an amended notice of appeal relying upon the following ground of appeal against sentence:

“1. The final sentence imposed is harsh and excessive in the circumstances of the case.”

- [6] It must be stated that the ground of appeal does not identify any specific error in the exercise of the sentencing discretion. The learned Judge has based the sentence upon the approach for sentencing for aggravated robbery that was considered by the Supreme Court in **Wise -v- The State** [2015] FJSC 7; CAV 4 of 2015, 24 April 2015. That case involved a late night home invasion that awoke the occupants. That offence occurred in the early hours of 17 April 2010. In the present case the offences occurred in August 2010. The Supreme Court decision was delivered on 24 April 2015. The appellant in the

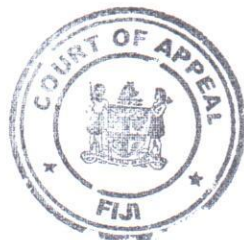
present case was sentenced on 1 December 2015. It would appear that the present appellant is an appropriate candidate to be sentenced in accordance with the approach adopted by the Supreme Court in Wise (supra).

[7] In Naivalu -v- the State [2013] FJSC 11; CAV 12 of 2012, 28 August 2013 the Supreme Court appeared to acknowledge that even as at 2011 a head sentence of 13 years fell within the range for robbery with violence under the now repealed Penal Code.

[8] However it is arguable on the evidence accepted by the trial Judge that there has been an arguable error in the exercise of the sentencing discretion. The learned Judge appears not to have considered the extent of the involvement of the appellant in the commission of the offence of aggravated robbery. Where, as part of a group robbery, an appellant has played a minor or peripheral role during the course of the robbery, this should be regarded as a mitigating factor. As a result leave to appeal against sentence is granted.

Orders:

- 1). *Leave to appeal sentence is granted.*
- 2). *Application to abandon the conviction appeal is to be listed for hearing at the same time as the sentence appeal.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL