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

CRIMINAL APPEAL NO.AAU 0010 of 2018
[In the High Court at Suva Case No. HAC 335 of 2016]

BETWEEN : **SAULA VUNIVESI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Ms. E. Rice for the Respondent**

Date of Hearing : **23 June 2020**

Date of Ruling : **29 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed with another on 07 September 2016 at Suva upon property belonging to Ronald Rohitesh. The information read as follows.

Statement of Offence

AGGRAVATED ROBBERY*: Contrary to Section 311 (1) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SAULA VUNIVESI *with another on the 7th day of September 2016 in the Central Division, stole cash in the sum of $100 and 1 Samsung mobile phone valued at $300; all to the total value of $400, the property of* ***RONALD***

ROHITESH *and immediately before stealing used force on the said* ***RONALD ROHITESH***.

[2] On 24 October 2017, following a trial, the assessors expressed a unanimous opinion of guilty against the appellant of having committed aggravated robbery. The learned High Court judge in his judgment delivered on 25 October 2017 had agreed with the assessors and convicted the appellant of aggravated robbery. He had been sentenced on 27 October 2017 to 13 years and 04 months of imprisonment with a non-parole period of 11 years and 04 months.

[3] The appellant being dissatisfied with the conviction and sentence had in person signed a timely application for leave to appeal against conviction and sentence on 02 November 2017. He had preferred additional grounds of appeal on 27 February 2019. The appellant had filed his written submissions on 25 May 2020. The respondent's written submissions had been tendered on 22 June 2020.

[4] The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against sentence as well.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[6] **Grounds of appeal**

Against conviction

1. That the learned trial judge erred in law and in fact, when failing to remind the State to tender in court during trial the station diaries and cell diaries to prove the whereabouts of the defence witness (2) and other investigation officers in this matter. This issues which was highlighted by appellant on notice of witnesses, before the pre-trial conference as he referred to the section 290(1) (B) (C) (D) of the Criminal Procedure Act, 2009. In reference to a same findings on Blackstone's Criminal Practice 2018.

2. That the learned trial judge erred in law and in fact in considering the issue of dock identification by the complainant and witnesses. However, at the instance of trial, the learned judge disallowed the dock identification, but later allowed it to proceed before assessors affirming a verdict which was unsafe and unfair giving rise to a grave miscarriage of justice had occurred.

3. That the trial judge erred in law in not adequately directing the assessors relating to the quality of the identification evidence. When appellant denies the allegation and submits that it was a mistaken identification.

4. That furthermore, the trial judge failed also to direct the assessors on the third limb of the Turnbull Guidelines and why there was no proper identification parade being conducted to test the witnesses identification.

5. That the learned trial judge was swayed and biased in not carefully examining with care the prior statements of the complainant Ronal Rohitesh and the eye-witness Sione Susan tendered at the Nabua Police Station surely contradicted to each other and what stated under-oath were recent inventions. However, there was no red t-shirt ever mentioned in both of their statements given to police at the station.

6. The trial judge erred in not assisting or directing the assessors on the inconsistent statements and the additional statements of PW2 – Sione Susan which was cross-examined by the appellant during trial.

7. That the learned trial judge erred in law and failed to properly analyse deeper the sworn evidence of the investigation officer during trial, when he gave incriminating evidence against the appellant in the presence of assessors to believe his testimonies (PW-3).

8. That moreover, the trial judge had biased and swayed in not fairly weighing the sworn evidence of (DW-2) Keresoni Waqatairewa in court after the trial of this matter.

9. Elina Koroi Wise – defence witness (1) who was present when the Nabua Police raided our residence at Lot 16 Reba Circle in Nadera. She gave evidence under-oath and stated that the police raided the house and told her that there was a robbery in Nabua and searched the house for a red t-shirt, which the police alleged to be worn by appellant. Therefore, she also confirmed during the trial regarding the black t-shirt appellant was wearing when he left home for work on 7/9/16. Furthermore, the appellant submits that (DW-1) is the one and only important witness who must be believed as she actually saw what really occurred on this day at our residence and there was no one else expected to be called as a credible witness for the defence. Ms Koroi was the only person present with the appellant on this particular day 7/9/16.

10. That the learned trial judge erred in not fairly observing and failed to fully show assessors, the appellant's defence in giving sworn evidence regarding the clothing he was wearing on 7/9/16 is the day of the allegation.

11. That surely, the trial judge extremely failed to specify by not explaining the exact reasons of rejecting the appellant's evidence and the defence witnesses testimonies before the assessors in his summing-up and after delivering his judgment at the conclusion.

Against sentence

12. That firstly, the learned sentencing judge erred in law and in fact, when not fully weighing the mitigatory factors of the appellant, regarding his care of dependents as a sole-breadwinner of the family, even though the appellant still maintains his pleas of not guilty.

13. That the sentencing judge was not fair in imposing a higher sentence of (13) years imprisonment which the appellant was so aggrieved and truly finds the impact of the sentence was excessively harsh and burdensome to serve.

14. However, the sentencing judge failed to properly analysed with care the facts of the case, in that the sentence imposed does not attract the alleged offending, as it is a street mugging robbery – which the sentence shall be ranging from (18) months to (5) years respectively.

[7] The evidence of the case had been summarised by the learned trial judge as follows in the judgment.

'5. The prosecution alleges that the accused together with two others came and robbed the complainant when he was coming out from a shop on the 7th of September 2016. The complainant had gone to one of his friend's place, where he drank two glasses of beer with one Sione. He then went to a shop beside the Happy Garden Restaurant to buy cigarette. It was about midday. When he was coming out of the shop, the accused and two of his accomplices came towards him. Two of them grabbed him from behind and the accused punched on his face. After that the accused took the mobile phone and money from the trousers' pocket of the complainant. The accused was dressed in a red t-shirt, while other two accomplices were dressed in white t-shirt, and green and black vest respectively.

6. The accused denies the allegation. However, he admits that he was at the vicinity of the scene of the crime when it took place. According to his evidence, the accused came to buy marijuana from a friend with one Sakaraia and another man. While he was talking to his friend, he saw Sakaraia and other man together with another, who was dressed in a red t-shirt, assaulted and robbed the complainant.

01st ground of appeal

[8] The learned trial judge had correctly understood the main issue as the identity of the appellant. The prosecution had not relied on a confessional statement of the appellant to prove its case. In the circumstances, the station and cell diaries could not have had much of an impact on the appellant's defense and their relevancy is not clear. If the purpose of those documents was for the appellant to show that he was questioned at Nabua police station and that one Keresoni Waqutairewa was in the police cell with him then both matters were not in dispute and in fact referred to in paragraph 27 of the summing-up. This ground of appeal is devoid of any merits.

02nd, 03rd and 04th grounds of appeal

[9] All three grounds deal with different aspects of dock identification. The evidence had revealed that the complainant managed to have the appellant who was dressed in a red color t-shirt under observation in front of him for a few minutes while he was being robbed and described his as a medium built man with a dark complexion. The complainant's friend (Sione) who came to help him and the complainant had seen the man in the red t-shirt looking at them while fleeing the scene while being pursued by both friends towards Yarawa road. Upon the advice of DC Pelasio who had arrived at the scene and met the complainant and Sione, the friends had waited at the bus station and then seen the man in the red t-shirt and another who was part of the gang coming

out of a shop. The two friends had informed the police officer of what they just saw and confronted the two men and a fight had ensued. DC Pelasio had arrived at the scene and immediately recognized the appellant in the red t-shirt whom he used to see almost daily in Nabua and called him by his name. The appellant had looked at the police officer and escaped the scene while his companion was arrested. Later, the police officers had gone in search of the appellant to his work place and then to his house where the appellant had started to run away from the house only to collide with DC Pelasio near the back door whereupon the appellant had been arrested.

[10] Therefore, it appears that the dock identification of the appellant had not taken place for the first time in court at the trial after the incident of robbery. The complainant and Sione have recognized him twice after the incident. Therefore, the dock identification appears to be in fact recognition of a person previously known to the complainant and Sione rather than first time identification in court since the robbery.

[11] In **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006) which is relevant to the case in hand (though the appellant was a relative as opposed to an unknown person in ***Wainiqolo***) it was held

> *'[17] The circumstances in the present case were different from a case where the first identification after the offence takes place in court. This was a case of recognition rather than identification of a stranger and different considerations arise.*
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> *[18] The witness in this case told the court that she recognised the person committing the robbery as someone she already knew. Whether that recognition was reliable was a matter for the assessors taking into account the Turnbull guidelines against the circumstances in which the sighting occurred as suggested by the learned judge.*
>
> *[19] An identification parade would have added nothing because it would not have tested the accuracy of her previous identification of the robber. She believed she had seen a person, a relative, she already knew. The accused is the person she thought she saw. If he had been placed on a parade, she would have been identifying him as that relative, not checking the accuracy of her original recognition of him. More than that, it would appear likely that an identification parade could be prejudicial in such a case because it could be seen as strengthening the initial identification when it is, in fact, no more than an identification of a person on the parade that she already knew and would be looking for.*

> *[20] Equally the identification in the dock was no more than identifying the accused as the person she knows as a relative. It added nothing to the original recognition which, as we have said, was the identification the assessors needed to consider against the Turnbull warnings.*

[12] In **France v The Queen** [2012] UKPC 28 it was held that the dangers inherent in dock identification may not be present where the witness says *'the person whom I have already identified to the police as the person who committed the crime is the person who stands in the dock'.*

[13] Therefore, what the assessors had to consider was not the reliability of dock identification but the reliability of the original identification (not once but twice) on the day of the incident against Turnbull warnings which the trial judge had given.

[14] In **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, the Court of Appeal (majority) did not disapprove the exercise of discretion to allow dock identification because *inter alia* the witness had seen the suspect twice before under good lighting and there had been eight defendants in the dock.

[15] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (03 October 2019), the Court of Appeal dealt with a similar complaint in the case of a first time dock identification where the learned trial Judge had not warned the assessors of the dock identification but given Turnbull directions on identification to the assessors. The appellant had been with the complainant for about 02 hours and also due to the availability of other evidence the conviction was upheld. In **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 the Supreme Court formulated what appears to be a two tier test to be applied in the face of a complaint on first time dock identification. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors *could* express the opinion that he was guilty, and on which the judge *could* find him guilty. Secondly, whether the judge *would* have convicted the appellant, had there been no dock identification of him. In ***Korodrau*** the Court of Appeal elaborated on ***Naicker*** tests as follows

> *'In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course,*

if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.'

[16] The tests formulated in ***Naicker*** and ***Korodrau*** on first time dock identifications need not be invoked in this case. However, the learned trial judge had treated the situation as a first time dock identification and despite it not being a 'fleeting glimpse' given Turnbull warnings and stated as follows

'31. You have heard that the complainant and Sione in their evidence said that they have never seen the accused before this incident. The complainant and Sione identified the accused in open court. That was the first time they identified the accused after this crime took place. The police had not conducted a proper identification parade. DC Pelasio in his evidence said that the police did not conduct an identification parade because the complainant and Sione identified the accused at the scene of the crime.

32. When you consider the evidence of identification given by the Complainant and Sione, you need to exercise a special caution, specially the evidence of dock identification. It is because, the experience tells us, that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past make mistakes, even a number of witnesses making the same identification. You must not find the accused guilty to this offence, unless you are sure that the identification made by the complainant and Sione was accurate. In making that judgment you need to look carefully at the circumstances in which it was made and at any other evidence in the case which may support it.

36. You should examine carefully the circumstances in which the complainant and Sione made identification. How long did they have the person they say was the accused under observation? At what distance? In what light? Did anything interfere with the observation?

37. Likewise, you have to take into consideration the evidence given by DC Pelasio. According to his evidence, he knew the accused as he had seen him almost every day in Nabua. Having recognized the accused, DC Pelasio had called the accused by his name. The accused then looked at him and ran away.

[17] In **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) the Court of Appeal stated:

*'[43] In **Mills & Others v The Queen** (1995 CLR 884 and TLR 1/3/95) the Privy Council emphatically rejected the mechanical approach to the Judge's task of summing up stating that*

> *'R v Turnbull was not a Statute and did not require an incantation of a formula - the Judge did not need to cast his directions in a set form of words'.*
>
> *'All that was required of him was that he should comply with the sense and spirit of the guidance in Turnbull'.*

'[46] Then, in giving the Turnbull direction the judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include the length of time the accused was observed by the witness, the distance the witness was from the accused, the state of the light (visibility), obstructions blocking the witness's view, whether the accused had been known or seen before, any other reason for the witness to remember who he saw, the length of time elapsed between the original observation and the subsequent identification to the police or identifying the accused at an identification parade, errors or discrepancies between the first description of the accused seen given by the witness to the police and the actual appearance of the accused.

[18] Having considered the above directions of the learned trial judge on dock identification and his own consideration of the same issue of identification in paragraphs 8-12 of the judgment and in the light of the judicial pronouncements quoted above, I am of the view that the appellant's grounds of appeal 2-4 have no reasonable prospect of success. No serious challenge could be mounted on the trial judge having exercised his discretion and allowed the dock identification and his directions to the assessors on the original identification of the appellant.

5th ,6th, 8th and 9th grounds of appeal

[19] The learned trial judge had drawn the attention of the assessors to the evidence of the prosecution witnesses in paragraphs 16-26 and again under analysis of evidence in paragraphs 30-35 of the summing-up. The only issue highlighted in paragraph 25 is that the complainant had apparently written a letter to withdraw the complaint on the basis that he had mistakenly identified the appellant. However, at the trial the complainant had explained that he had written that letter as he was threatened by the appellant with violence at the hands of his 'boys' when he met the appellant in prison where the

complainant was in remand and therefore, denied that he had voluntarily written the letter.

[20] The appellant takes up another issue regarding the credibility of the complainant and Sione on the premise that they had failed to mention that it was a man dressed in a red t-shirt who had committed the robbery with two others in their police statements. I do not find from the summing-up or the judgment any such omission having been brought up during the trial. The basis of cross-examination had been that it was not the appellant who was dressed in red and robbed the complainant which all prosecution witnesses had denied. In any event, the learned trial judge had amply dealt with how to evaluate any inconsistency in evidence and the credibility of witnesses in the summing-up, particularly in paragraphs 38 and 39.

[21] As for the defense evidence, the learned trial judge had addressed the assessors fully in paragraphs 27-29 of the summing-up and it appears that the appellant's position had been that he was in the vicinity of the crime and saw a man dressed in a red t-shirt robbing the complainant along with a person called Sakaraia who had come to him to buy marijuana. The learned trial judge had asked the assessors specifically to consider the appellant's position in paragraphs 30 and 43-46. In the judgment the learned trial judge had adverted to the appellant's position in paragraphs 6.

[22] Accordingly, 5th , 6th, 8th and 9th grounds of appeal have no reasonable prospect of success.

07th ground of appeal

[23] Under this appeal ground, the appellant complains about the evidence of DC Pelaiso who had stated that the appellant was known to him and used to see him almost every day in Nabua. The learned trial judge had been mindful of any possible adverse effect that this evidence may have had about the appellant's bad character in the minds of the assessors by directing them as follows in the summing.

> *'41. You have heard the evidence that the accused is known to the police. DC Pelasio in his evidence said that he knows the accused as he is a known person. He has raided the house of the accused previously. These evidences of the previous character of the accused has been given in evidence in order to*

establish that DC Pelasio knew the accused and recognized him as the man in the red t-shirt.

42. What is the relevance of the accused's previous character in this case? It is only relevant in order to determine the credibility and reliability of the evidence of identification given by DC Pelasio. You must not assume that the accused is guilty or that he is not telling the truth because he has previous bad character. His previous character is not relevant at all to the likelihood of his having committed this offence. You must not allow these evidence of previous character of the accused to affect your judgment.'

[24] This ground of appeal has no merit.

10th ground of appeal

[25] The appellant complains of an inadequacy of directions given by the learned trial judge on his evidence on clothing he was wearing at the time of the commission of the offence.

[26] The learned trial judge had said in the summing-up:

'28.According to the evidence given by the accused, one Sakaraia and another man came to see him at his work place in the morning of 7th of September 2016. They wanted to get marijuana. The accused then took them to one of his friends' house near Happy Garden Restaurant. That friend of him used to sell Marijuana. The accused saw Sakaraia and other man were talking to a man, whom he later came to know as the complainant of this matter. At the same time, another youth who was dressed in a red t-shirt came and joined Sakaraia and the other youth. The accused then saw three of them robbed the complainant. The accused said that he was dressed in a black t-shirt and a cap and not in a red t-shirt. He further said that he should have been called as a witness, but police fabricated him to this crime.

29.The wife of the accused in her evidence stated that the Police came and searched the house for a red t-shirt. She further said that the accused was dressed in a black t-shirt on the 7th of September 2017. Mr. Keresoni in his evidence said that he heard that the police officer and the complainant were discussing to incriminate the accused to this offence, when he was taken to record his caution interview.

[27] I do not see much merit in this ground of appeal.

11th ground of appeal

[28] The appellant argues that the trial judge had failed to specify as to why he had rejected the evidence of the defence in the judgment.

[29] The appellant's complaint entails a wrong assumption that in every case a trial judge has to pen elaborate reasons in agreeing with the opinion of the assessors in what is commonly called the 'judgment' as if the judge considers whole case anew quite independent of the assessors. The law does not impose such an obligation on a trial judge in agreeing with the assessors. Section 237(4) does not apply to the situation at hand in this case. Section 237(3) and (5) do apply. I made the following observations in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure Act which I reiterated in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020) and in **Valevesi v State** AAU 039/2016 (22 June 2020)

> *'[9] A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use). In fact, it was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal*
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> > *'[4] The grounds of appeal against conviction are yet again another example of the scatter gun approach to drafting an appeal notice……. Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under **section 237(3) of the Criminal Procedure Act** 2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[30] In my view the learned trial judge has adequately considered all the evidence in the judgment and stated as follows

> *'12. Having considered the evidence of identification, I am satisfied that the complainant, Sione and DC Pelasio have correctly and accurately identified the accused as the person who was dressed in a red t-shirt and robbed the complainant with two other accomplices.*
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> *13. According to the evidence given by the accused, he went to buy marijuana with Sakaraia and another man. They came to meet the accused at his work place. They then went to buy marijuana. I do not accept the evidence given by the accused as true or may be true. Moreover, I do not find the evidence given by the defence has created any reasonable doubt about the prosecution case.*
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> *14. In view of these reasons, I do not find any cogent reasons to disregard the unanimous opinion of guilt given by the three assessors.'*

[31] There is no merit in this ground of appeal.

12th ground of appeal

[32] The appellant argues that the learned trial judge had not taken the fact that he was the sole breadwinner of the family caring for the dependents. It has been held that in fact personal circumstances or financial embarrassments to the family of an accused need not be regarded as migratory factors. However, the learned trial judge had taken his being the sole breadwinner of the family as a mitigating factor and reduced 01 year in paragraphs 8 and 9 of the sentencing order.

[33] There is no merit in this ground of appeal.

13th and 14th ground of appeal

[34] It is convenient to consider both grounds together. The contention of the appellant is that his case was a case of 'street mugging' where the sentencing tariff was between 18 months to 05 years and the learned judge had committed a sentencing error by taking the tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) resulting in a harsh and excessive sentence.

[35] Given the facts of the case the learned trial judge had acted on a wrong principle. 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.

[36] In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused and one of them had grabbed the complainant from the back and held his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of remarked

> *'[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in* ***Basa v The State*** *Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*
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> *[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of* ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** *(the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said 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, and further where the maximum penalty was life imprisonment:*
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> - ***The sentencing bracket was 18 months or 5 years****, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.*
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> - *An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.*
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> - *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.*

[37] The sentencing tariff for street mugging was once again discussed by Nawana, JA as a member of the Full Court which I was part of in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) in the following terms: (See **Tawake v The State** AAU0013 of 2017 (03 October 2019) [2019] FJCA 182 also).

> *'[15] The learned single Justice of Appeal, in giving leave to appeal, distinguished facts in **Wallace Wise** (supra), which involved a home invasion as opposed to the facts in **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (04 August 2008), where aggravated robbery was committed on a person on the street by two accused using low-level physical violence.*
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> *[16] Low threshold robbery, with or without less physical violence, is sometimes referred to as street-mugging informally in common parlance. The range of sentence for that type of offence was set at eighteen months to five years by the Fiji Court of Appeal in **Ragaugau's** case (supra).*
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> *'[19] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted a upon wrong principle when he applied the tariff set for an entirely different category of cases to the facts of this case, which involved a low-threshold robbery committed on a street with no physical violence or weapons. When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence.*

[38] Considering that the sentencing tariff of 18 months to five years (of course with the possibility of the higher end going up further due to aggravating factors) was set for street mugging as far back as in 2008, if a review of the tariff for this type of aggravating robberies known as street mugging is needed in the current circumstances, it is up to the State to take it up before the Full Court in an appropriate case.

[39] Therefore, the sentencing error above highlighted offers a reasonable prospect for the appellant to succeed in appeal.

[40] Accordingly, leave to appeal against sentence is allowed.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL