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

CRIMINAL APPEAL NO.AAU 0108 of 2019
[In the Magistrates' Court at Lautoka Case No. 829 of 2016]

BETWEEN	:	1) **MALAKAI ROKORAYAU NAVUGONA**
	:	2) **TANIELA MATAI**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**19 October 2020**
Date of Ruling	:	**20 October 2020**

RULING

[1] The appellants had been charged in the Magistrate's court of Lautoka exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 18 September 2016 at Municipal Market, Lautoka.

[2] The appellants had pleaded guilty voluntarily and admitted the summary of facts which the learned Magistrate had considered sufficient to prove the elements of the offence. The learned Magistrate had convicted the appellants and sentenced on 28 July 2017 to 07 years and 10 months and 22 days of imprisonment with a non-parole term of 04 years.

[3] The appellant being dissatisfied with the conviction and sentence had tendered a timely notice of leave to appeal on 28 August 2017 to the High Court registry. That notice of appeal appears to have been treated as a timely appeal filed in the CA registry. However, the grounds of appeal were only on the sentence. Legal Aid Commission on 19 June 2020 had submitted an amended notice of appeal only against sentence along with written submissions. The respondent had filed its written submissions on 09 July 2020.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellants could appeal against sentence only with leave of court. 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, **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) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[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 filed out of time to be considered arguable there must be a real 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] ***Ground of appeal***

> *'1. That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.*

[7] The summary of facts as stated in the sentencing order is as follows.

> *'According to summary of facts on 18th September 2016 at about 4.45 pm at Municipal Market, Lautoka, complainant was selling jewelries where you approached and stated you need to buy some jewelry. Taniel Matai you pointed at the jewelries you wanted to buy and when complainant stood up and went to give them Mamakai; you grabbed her gold chain (Mangala Sutra) causing the complainant to fall down on the ground and ran away while Taniel walked away towards Lautoka city mall. Matter was reported to the Lautoka Police Station and later on information received , both of you were arrested and interviewed under caution where you admitted the allegation.'*

01st ground of appeal

[8] The Learned Magistrate had applied the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment and picked the starting point at 13 years. He had not enhanced the sentence on account of any aggravating features but given discounts of 01 year for mitigating features and another 1/3 of the sentence (04 years) due to the early guilty plea ending up with the head sentence of 08 years. After the period of remand was taken into account the ultimate sentence had been 07 years and 10 months and 22 days.

[9] The learned Magistrate seemed to have committed a sentencing error in following the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and therefore, he could be said to have acted on a wrong sentencing principle requiring appellate court's possible intervention in the matter of sentence.

[10] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in ***Wise*** and taken 13 years as the starting point without being mindful that 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. The factual background in ***Wise*** was as follows.

'[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.

[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'

[11] From the summary of facts it is difficult to see how the factual background of this case fits into a similar scenario the Supreme Court dealt with in ***Wise***. It appears to me that this is a situation between 'street mugging' where sentencing tariff had been recognized as 18 months to 05 years and 'home invasion' as espoused in ***Wise*** (08 to 16 years) going somewhat parallel to 'attacks against taxi drivers' where the sentencing tariff is between 04 to 10 years of imprisonment.

Street mugging

[12] In **Raqauqau v State** [2008] FJCA 34: AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. 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 Appeal 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.*

[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:*

- ***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'.*

- *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.*

- *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.*

[13] The sentencing tariff for street mugging was once again discussed in **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) where the complainant was going home at about 4.30 p.m. when the appellant with another person had called him and asked for money and when told that he had no money, the appellant had hit him with a knife and the other had assaulted him with an iron rod. After assaulting the complainant the appellant had taken $20 from him and run away. The Court of Appeal having discussed ***Ragaugau*** and other decisions said as follows.

'[35] The adoption of the tariff in ***Wise*** *(Supra) does not seem to be appropriate to the present case as it does not come within the nature of a home invasion category of aggravated robbery and is a situation which would come within the type of street mugging cases. Considering the objective seriousness of the offending and the degree of culpability, the harm and loss caused to the complainant it would be appropriate to follow the sentencing pattern suggested for instances of street mugging*

[14] Again the Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) dealt with a case of street mugging in the following terms.

> *'[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 **Raqauqau 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.*
>
> *[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 **Raqauqau's** case (supra).*
>
> *'[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.*

Attacks against taxi drivers

[15] The decision in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

> *'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*
>
> *[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*
>
> *[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*

*[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*

> *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*

*[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was):*

> *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[16] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea...'*

[17] It was held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[18] Therefore, the picking 13 years as the starting point by the Magistrate demonstrates a sentencing error having a reasonable prospect for the appellants to succeed in appeal regarding their sentence.

[19] However, I must hasten to add that this case or cases of similar facts and circumstances cannot and should not be treated only as 'street mugging' cases. Neither could they be equated to 'attacks against taxi drivers' though they resemble the later in some respects. They are more of unsophisticated robberies within commercial premises or targeting commercial goods or money ('shop mugging') committed by a group or a person armed with an offensive weapon with a low level of actual or threat of force, violence, coercion, intimidation, physical or psychological harm to persons. They may objectively and in general be more serious and different in nature to 'street mugging' and 'attacks against taxi drivers' as the robbery takes place at or within a place occupied by the victim where a business is carried out potentially having a detrimental effect on the business; it interferes with the livelihood of the complainant and others working in the business.

[20] Therefore, in my view, the present case is more a case of an unsophisticated aggravated robbery within commercial premises or targeting commercial goods or money ('shop mugging') and appropriate sentence for aggravated robberies with those characteristics at first blush appears to fall possibly between 'street mugging' and 'home invasions' running somewhat parallel to 'attacks against taxi drivers'. However, the more sophisticated of such aggravated robberies with high level of actual or threat of force, violence, coercion, intimidation, physical or psychological harm to persons and detrimental impact on the businesses would make them similar to 'home invasions' and sentenced accordingly.

[21] Therefore, it would be advisable for the state to seek guidelines as to the sentencing tariff for unsophisticated and sophisticated aggravated robberies within commercial premises or targeting commercial goods or money ('shop mugging') from the Court of Appeal in this appeal for future guidance of sentencing judges and Magistrates.

[22] On the other hand, I am conscious of the fact that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the

sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[23] Therefore, the full court may consider what the appropriate rage of sentences for unsophisticated and sophisticated aggravated robberies within commercial premises or targeting commercial goods or money ('shop mugging') and what the ultimate sentence should be as far as the appellants are concerned.

[24] Though not urged by either side in this appeal, I wish to point out an inaccurate view that had crept into the sentencing process. The learned Magistrate had given the appellant an automatic 1/3 discount only because the appellants had pleaded guilty at the earliest opportunity. It should be kept in mind that in Fiji the decision as to what discount should be given to the guilty plea is governed by the decisions in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) and there is no entitlement for an automatic 1/3 discount for early guilty pleas.

[25] A discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was once considered as the 'high water mark' in **Ranima v State** [2015] FJCA17; AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as ***Mataunitoga***. The Supreme Court dealing with ***Ranima*** said in ***Aitcheson:***

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[26] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*

Order

1. Leave to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka

JUSTICE OF APPEAL