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

CRIMINAL APPEAL NO.AAU 0147of 2017
[Magistrates Court of Suva Case No. 986 of 2017]

BETWEEN	:	**JOJI DONU**
	:	**APISAI ROKOTUIVUNA ROSERUTABUA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the 01st Appellant**
	:	**Ms. S. Nasedra for the 02nd Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**21 October 2020**
Date of Ruling	:	**22 October 2020**

RULING

[1] The appellants had been arraigned in the Magistrates' court of Suva under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 09 July 2017 at Suva in the Central Division. The particulars of the offence were as follows.

'***Statement of Offence (a)***

> ***AGGRAVATED ROBBERY:*** *Contrary to Section 311(1)(a) of the Crimes Act Number 44 of 2009*

Particulars of Offence (b)

> ***JOJI DONU*** *and* ***APISAI ROKOTUIVUNA ROSERUTABUA*** *on the 9th day of July, 2017 at Suva in the Central Division robbed Nitesh Navlin Chandra of a U3 Alcatel Mobile Phone valued at $100 and $40 cash all to the total value*

of $140.00 and at the time of such robbery did use personal violence on the said Nitesh Navlin Chandra.

[2] The appellants had pleaded guilty and the learned Magistrate having been satisfied that they pleaded voluntarily and unequivocally had convicted and sentenced them on 26 September 2017 to an imprisonment of 07 years, 11 months and 10 days of imprisonment with a non-parole period of 06 years.

[3] The appellant in person had appealed against conviction within time on 25 October 2017 (signed on 10 October 2017). However, both appellants had filed an application to abandon the appeal against conviction in Form 3 on 04 April 2019. Thereafter Legal Aid Commission had filed an amended notice of appeal, 01st appellant's affidavit seeking an extension of time to appeal against sentence, application for bail pending appeal and written submissions on 19 June 2020. LAC had also tendered an amended notice of appeal, 02nd appellant's affidavit seeking an extension of time to appeal against sentence and written submissions on 19 June 2020. The State had tendered separate written submissions in respect of both appellants on 02 October 2020. Therefore, there is a delay of over 02 years and 06 months in the proposed appeals against sentence.

[4] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[5] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[6] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[7] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> *'(a) ....*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.*
>
> *(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'*

[8] Sundaresh Menon JC also observed

> *'27.......... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'*

[9] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a* ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal......'*

[10] 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.*

Law on bail pending appeal.

[11] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

> *'[5] There is also before the Court an application for* ***bail pending appeal*** *pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant* ***bail pending appeal*** *may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
>
> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
>
> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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>> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>>
>> *(a) the likelihood of success in the appeal;*
>>
>> *(b) the likely time before the appeal hearing;*
>>
>> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*
>
> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*
>
> *"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of*

imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

*[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

*[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

*"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*[31] It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[12] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[13] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[14] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> '*It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).*'

[15] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[16] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[17] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].......All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... ."*

[18] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji ___ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[19] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[20] 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 practical purpose or result.

[21] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them, then he cannot obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would 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'.

Grounds of appeal against sentence

[22] The grounds of appeal urged by the appellants are as follows.

<u>01st appellant</u>

Ground 1- 'THE final sentence imposed on the Appellant is harsh and excessive given the name of the offending in that

> *(i) The learned sentencing Magistrate had applied the wrong tariff;*
>
> *(ii) Selecting the starting point outside the applicable tariff;*
>
> *(iii) Enhancing the sentence with an element of the offending and part of the sentencing tariff as aggravating factors.*

Ground 2 - *THE Learned Sentencing Magistrate had not given sufficient discount to the Appellant's previous good character.*

Ground 3 - *THE Learned Sentencing Magistrate had not given sufficient discount to the guilty plea.*

02nd appellant

(1) Thant the learned trial Judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.

[23] The brief summary of facts as narrated in the learned Magistrate's sentencing order is as follows.

> *'The summary of facts indicate that on Sunday 9th July 2017 at around 0430 hours, the Accused robbed one Nitesh Navlin Prasad along Victoria Parade outside the corner of Fexco Pacific Western Union office, Suva. The Accused used force and grabbed the complainant and stole on Alcatel phone and $40 cash. Roserutabua strangled the complainant. She followed the Accused who ran towards ANZ main branch and alerted the Police Officers who were on patrol and the Accused were arrested in front of Totogo Police Station. In the station both Accused were identified by the complainant and Losalini. Both Accused admitted being at the scene but denied the offence.*

Length of Delay

[24] As already pointed out the delay is over 02 years and 06 months which is very substantial.

[25] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused.'*

[26] Faced with a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application'*

[27] I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

[28] Therefore, delay alone is sufficient to defeat the appellants' appeal if that is the only consideration.

Reasons for the delay

[29] The 01st appellant states in his affidavit that he had filed an appeal against conviction as he was not satisfied with his sentence. While this stance is completely illogical, he has now sought to abandon his conviction appeal. There was no reason why he could not file an appeal against sentence if he was dissatisfied with it in the first instance. The 02nd appellant has stated that he could not file an appeal against sentence without the benefit all the papers and a private counsel. However, he had managed to file a timely appeal against conviction in person which he has now applied to abandon. In any event both appellants had the benefit of counsel at the Magistrates court. Therefore, these are not acceptable explanations at all for the belated appeals against sentence.

Merits of the appeal

[30] Both appellants complain of the wrong tariff adopted by the learned Magistrate which according to them, had contributed to a harsh and excessive sentence. The 01st appellant had also criticised the sentence on the basis that no discounts had been given for the guilty plea and being first time offenders. He had also complained that the

elements of the offence or part of the offence had been considered as aggravating factors.

[31] In the **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[32] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the substantial delay and want of an acceptable explanation, still the prospects of their appeals would warrant granting enlargement of time.

[33] 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 08 years following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). He had added 06 months for the aggravating features and deducted 06 months for mitigating features arriving at the ultimate sentence of 08 years.

[34] The trial judge had applied the sentencing tariff set in ***Wise*** and taken 08 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.

[35] The factual background of this case does not fit into the kind of situation the Supreme Court considered in ***Wise***. This is a case of street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal had set the tariff for the kind of cases of aggravated robbery labelled as 'street mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years

might not be appropriate, if certain aggravating factors identified in the judgment are present.

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

[37] Instead of picking a starting point of 08 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***<u>Wise</u>***, the learned Magistrate should have followed the sentencing guidelines set for cases of street mugging.

<u>Street mugging</u>

[38] In **<u>Ragauqau v State</u>** [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 <u>Penal Code</u> 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.*

[39] 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 ***Raqauqau*** 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*

[40] 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.

[41] The Court of Appeal held in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) that

'19……………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.'

[42] Therefore, it is clear that the learned Magistrate had applied a wrong tariff in taking 08 years as the starting point ending up with the final sentence of 08 years which is, of course, outside the sentencing range of 18 months to 05 years for street mugging subject to the qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified in ***Raqauqau*** are present.

[43] It appears that the fact that force was used had been wrongly considered as an aggravating factor because it was part of the offence of robbery which became aggravated robbery as it had been committed in the company of another. However, the Magistrate cannot be faulted in considering the time of the offence *i.e.* around 4.30 a.m. as an aggravating factor. There appears to have been some planning as well, for the appellants could not be expected to be around the locality of the offence in normal circumstances at the relevant time of the day. On the other hand, there is nothing to indicate whether the appellants were first time offenders and they had pleaded guilty in the first available opportunity.

[44] However, I think that the objective seriousness of this kind of offending (not the offender) and prevalence of similar offences warrant a higher starting point in the range of 18 months to 05 years (to be increased for aggravating features of the offenders, if any) and if the starting point is taken at the lower end then a substantial increase in the sentence is warranted for all aggravating features (offending and offender). In either of the above scenarios, the appellants would have the benefit of mitigating factors [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[45] Nevertheless, 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 [**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)].

[46] However, the error of principle in applying the wrong tariff by the sentencing judge justifies intervention by the full court that could then decide what the appropriate sentence should be. This sentencing error as a ground of appeal has a real prospect of success in appeal.

Prejudice to the respondent

[47] No prejudice would be caused to the respondent by an enlargement of time.

Bail pending appeal

[48] However, the 01st appellant's grounds of appeal against sentence cannot be said to have a 'very high likelihood of success' to consider bail pending appeal as the sentence is still a matter for the full court to decide in the future. It is not for the

single judge on an application for bail pending appeal to delve into the actual merits of the appeal which is the function of the full court after hearing full argument and with the advantage of having the original court record before it [see **Tiritiri v State** (supra) and **Simon John Macartney v. The State** (supra)]

[49] The 01st appellant has not submitted any other exceptional circumstances in the form of personal circumstances such as extreme age and frailty or serious medical condition for this Court to consider his bail pending appeal application favourably.

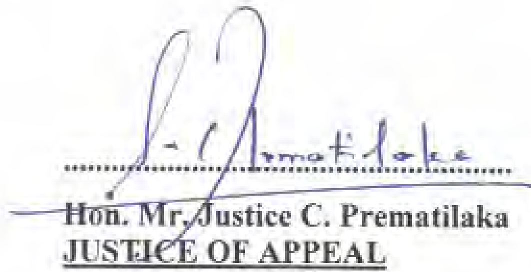
[50] In addition, in the absence of a 'very high likelihood of success' and any other exceptional circumstances the other two factors in section 17(3) of the Bail Act are not directly relevant and need not be considered and the substantial delay and highly improbable explanation for the delay in tendering the appeal in time would further adversely affect the 01st appellant's chances of bail pending appeal, for granting of bail pending appeal is a matter for the exercise of the court's discretion.

[51] A court of law would not normally exercise its discretion in favour of a party that has slept over his rights. The law assists those that are vigilant with their rights, and not those that sleep thereupon (*vigilantibus non dormientibus jura subveniunt*). Therefore, the 01st appellant cannot base his application for bail pending on the basis that he had already served 03 years by September 2020 as he cannot benefit from his own fault (*nullus commondum capere protest de injuria sua propria*) namely waiting for 02 years and 06 months to file an appeal against sentence. Had he filed a timely appeal it would have been heard by now and no need for bail pending appeal would have arisen.

[52] In any event, there is still nearly 02 years to go before the 01st appellant would reach the higher end of the sentencing tariff for street mugging *i.e.* 05 years and at this stage the full court hearing his substantive appeal at any time before that cannot be ruled out.

Orders

1. Enlargement of time to appeal against sentence is granted for 01st and 02nd appellants.
2. 01st appellant's bail pending appeal application is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL