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

CRIMINAL APPEAL NO.AAU 17 of 2018
[In the Magistrates' Court at Lautoka Case No. 263 of 2011]

BETWEEN	:	**SALOTE UDITE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. T. Kean for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**03 November 2020**
Date of Ruling	:	**04 November 2020**

RULING

[1] The appellant had been charged with another 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 21 April 2011 at Lautoka in the Western Division.

[2] The appellants had pleaded guilty to the charge on his free will and admitted the summary of facts which the learned Magistrate had deemed to be sufficient to prove the charge. The learned Magistrate had convicted the appellant and sentenced him on 29 December 2017 to 07 years and 09 months and 07 days of imprisonment with a non-parole term of 02 years.

[3] The appellant being dissatisfied with sentence had signed a timely notice of appeal on 22 January 2018 to the High Court registry. That notice of appeal appears to have been treated as a timely appeal filed in the CA registry. Legal Aid Commission on 03 August 2020 had submitted an amended notice of appeal against sentence along with written submissions. The respondent had filed its written submissions on 17 August 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] ***Grounds of appeal***

> *'1. That the learned sentencing magistrate erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.*
>
> *2. The leaned sentencing magistrate erred in principle in stating that an aggravating factor was that there was more than one person, when it was an element of the offence.'*

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

> *'According to summary of facts on 21st April 2011 at Vitoga Parade the complainant was heading towards Vatamai and you with another got into the taxi which he was travelling. After getting inside you held the complainant by his hand and took his wallet and other one bit him on his right shoulder. Victim managed to free himself and jumped out of the taxi and injured himself. Matter was reported to the Lautoka Police station and later on, you were arrested and interviewed under caution and charged accordingly.'*

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 10 years. He had enhanced the sentence on account of aggravating features by 03 years 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 09 months and 07 days.

[9] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 10 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.'

[10] From the summary of facts it is difficult to see how the factual background of this case fits into a factual scenario the Supreme Court encountered in ***Wise.*** It appears to me that this is a situation somewhat similar but more serious than mere ***street mugging'*** where the sentencing tariff is 18 months to 05 years [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)] but less serious than '***aggravated robbery against providers of services of public nature including taxi, bus and van drivers***' where the sentencing tariff is between 04 to 10 years of imprisonment [vide **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011 (15 May 2012), **State v Bola** [2018] FJHC 274; HAC 73 of 2018 (12 April 2018) and **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)]. The appellant and the other had attacked and robbed a passenger who was in the same taxi but not the taxi driver. Therefore, this act of aggravated robbery may safely be treated as an aggravated form of street mugging warranting a higher sentence than an act of usual street mugging would attract.

[11] Therefore, the learned Magistrate appears to have committed a sentencing error in following the sentencing tariff set in ***Wise*** 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.

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

> *'[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.*

[13] Therefore, following the sentencing tariff set in **Wise v State** and picking 10 years as the starting point by the Magistrate demonstrates a sentencing error having a reasonable prospect for the appellant to succeed in appeal regarding her sentence.

[14] The state has argued that the ultimate sentence of 07 years 09 months and 07 days is still within the tariff for aggravated robbery against providers of services of public nature including taxi, bus and van drivers *i.e.* 04 years to 10 years of imprisonment and therefore it is not excessive. As stated earlier this is not a direct attack and robbery of a taxi driver although it had happened inside a moving taxi. The target of the aggravated robbery was not the taxi driver but a passenger. In any event the fact that a final sentence is within a given tariff does not necessarily mean that it is the appropriate sentence that fits the crime, particularly when the sentencing judge had been guided by the wrong sentencing tariff. Therefore, it is for the full court to decide on the appropriate sentence being mindful of the applicable tariff.

02nd ground of appeal

[15] The Magistrate had taken the facts that more than one person was involved in the robbery, it was carried with premeditation and the perpetrators having caused the complainant to jump out of the vehicle in to account as aggravating factors to enhance the sentence. The appellant's contention is that the fact that more than one person was involved in the robbery should not have been considered as an aggravating factor as it was part of the offence.

[16] The appellant had been charged under section 311(1)(a) on the basis that the offence of robbery was committed by her in company with one or more other persons. That is how it became an aggravated robbery. Therefore, the same fact cannot be once again considered as an aggravating factor to enhance the sentence. It amounts to another form of double counting as the sentencing tariff for an offence is deemed to have taken into account all elements of the offence.

[17] The Supreme Court recognised this kind of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself (vide **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018)]

[18] I remarked in **Cikaitoga v State** [2020] FJCA 99; AAU141.2019 (8 July 2020) on a similar appeal ground as follows.

> *'[11] The learned Magistrate had stated that the fact that the offence was committed in a group was an aggravating factor. It terms of section 311(1)(a) of the Crimes Act, 2009 one of the ways in which the offence of robbery becomes aggravating robbery is when the robbery is committed by a person in company with one or more other persons. Thus, in this instance the fact that the appellant had committed the robbery in company with three others had made him liable for the offence of aggravating robbery. Therefore, it cannot be counted as an aggravating factor, for it is part of the offence of aggravating robbery thus constituting a sentencing error.'*

[19] On the other hand, 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)].

[20] 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 despite the fact that she had pleaded guilty after 06 years. It is not clear how it was treated as the first opportunity the appellant had to tender the guilty plea. Thus, the appellant had got a favorable reduction which she did not deserve.

[21] 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 even for early guilty pleas.

[22] 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.'*

[23] 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