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

CRIMINAL APPEAL NO.AAU 0043 of 2018
[In the Magistrates' Court at Suva Case No. EJ22/15]

BETWEEN	:	**ISAIA LEDUA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**16 December 2020**
Date of Ruling	:	**22 December 2020**

RULING

[1] The appellant had been charged in the Magistrate's court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 25 February 2015 at Nabua in the Central Division.

[2] Upon conclusion of the trial, the learned Magistrate had convicted the appellant as charged in his judgment dated 15 December 2017 and sentenced him on 24 January 2018 to 07 years and 11 months of imprisonment with a non-parole term of 07 years and 04 months.

[3] The appellant being dissatisfied with the conviction and sentence had handed over an untimely petition of appeal on 23 March 2018 to the Fiji Correction Service which had reached the CA registry on 17 May 2018. The delay is about a month. He had submitted an application for bail pending appeal and amended grounds of appeal from time to time. The Legal Aid Commission on 11 July 2019 had submitted an application for extension time and the appellant's affidavit followed by amended grounds of appeal and written submissions on 07 October 2020. Bail pending appeal had not been pursued by the LAC. The respondent had filed its written submissions on 15 October 2020.

[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..... '*

Length of delay

[10] As already stated the delay is about 01 month and could be excused as the appeal had been submitted by the appellant in person.

[11] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 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.'*

[12] However, 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.'*

Reasons for the delay

[13] The appellant's excuse for the delay is that he had handed over his appeal to Suva Corrections in time but it had been misplaced and he had to submit a fresh appeal which was late. The appellant had not mentioned this position at all in the appeal he had handed over to Correction Service on 23 March 2018. Thus, the explanation for the delay is not credible.

Merits of the appeal

[14] In **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."*

[15] 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 delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[16] The grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows.

Conviction

'1. That the learned trial judge erred in law and in fact when he failed to direct himself in line with the Turnbul warning in terms of identification evidence.

2. That the learned trial judge erred in law and in fact in convicting the appellant after accepting evidence from the state when the same could not be relied upon to secure a conviction.

Sentence

3. That the learned trial judge erred in law and in fact in sentencing the appellant when adopting an incorrect tariff thus making his sentence harsh and excessive.

[17] The facts of the case as summarised by the Magistrate are as follows.

'3] The alleged robbery took place on 25/2/2015 at Nabua Service Station where the money of the cashier was robbed. According to Monika (PW4), an employee, an iTaukei man entered the shop at the service station at about 8.30 pm and jumped over the cashier's counter. She was at work inside the shop. He was wearing a black jacket. The witness further said that the iTaukei man pulled out a pinch bar from his jacket and pointed it at them. He took the money from the counter, jumped over again and left the shop...'

[18] The manager of the service station had confirmed that cash worth $2288.35 belonging to Pacific Energy Company had been lost.

01st ground of appeal

[19] The evidence of the appellant's identification was as follows. PW2, Tito Waqavou who had gone to the shop at the service station had seen the appellant entering the shop, jumping over the counter and taking cash from the cashier's till. After taking

money, the appellant had jumped over the counter again and left the shop. There had been enough light inside the shop and only a glass had separated the witness from the appellant. He had observed the appellant for about one minute. The witness had known the appellant and used to call him by his nickname Madula. Both had lived in the same area in Nabua three years before the appellant had left the area. The witness and the appellant used to play rugby every evening after school.

[20] PW3 who was an employee of the service station filling a vehicle on the day in question had seen a person wearing a jacket entering the shop and jumping over the counter. Having stopped filling, he had gone towards the shop and seen that person taking money from the cashier's cupboard. The lights inside the shop had been on and the intruder was holding a pinch bar in his hand. He had observed the offender 02 meters away and identified that person as the appellant known to him as Madula. He had known him for 10 years as the appellant was residing on the opposite side of the road where the witness resides. They used to hang around together for long periods of time.

[21] The appellant had not disputed the fact that that he was known as Madula. Neither had he denied that he was known to the above two witnesses. However, he had denied his involvement in the robbery.

[22] The learned Magistrate had considered the issue of identification of the appellant by PW2 and PW3, referred to and given his mind to Turnbull guidelines though he had not reproduced Turnbull judgment or its guidelines in his judgment. His reasoning is as follows.

> *'7]..... Both witnesses said that the lights were on inside the shop it was still doing business. Therefore, there should be sufficient light to identify a person. The distance was very short from the two witnesses. PW2 was prepared to buy something from the counter opened to outside. There was only a glass in between. PW3 was only 02 meters away. Both of these witnesses said that about the time they observed and thee has been nothing to disturb their observation. Moreover, the two witnesses knew the accused prior to the incident. Therefore, the prosecution has proved the identification of the accused beyond reasonable doubt.*

[23] Therefore, as far as PW2 and PW3 are concerned it was a case of recognition of a person they had known for years by his nickname and spent a lot of time with him. The fact that the appellant had been serving a prison sentence in between does not take away the credibility of their identification.

[24] The appellant had relied on **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) where the accused was primarily challenging first time dock identification on the basis that it is unsafe and unsatisfactory and reliance placed on the complainant's 'mistaken' dock identification by the High Court has caused a substantial and grave miscarriage of justice. However, the identification of the appellant was not based on first time dock identification but recognition of him by two witnesses who had known him for years. Therefore, the two-tiered test formulated in ***Korodrau*** need not be applied here.

[25] Therefore, this appeal ground has no real prospect of success at all.

02nd ground of appeal

[26] The appellant challenges the evidence of PW2 on the basis that he *i.e.* the appellant had been serving a sentence of 09 years of imprisonment since 2009 and therefore the witness could not have known him for three years before he left the area. The current incident had happened on 25 February 2015. Had the appellant been serving a 09 year term of imprisonment since 2009, he may possibly not have been out by 2015. Or, he may have been released after serving his sentence with the benefit of a 1/3 remission by 2015. However, he had admitted having been arrested for this incident while being with his girlfriend at Narere which means that he had been living in the community at or about the time of the robbery. Therefore, his assertion is open to suspicion and in any event it does not appear from the judgment that he had suggested this position as he has formulated for the appeal to PW2 and substantiated that with any material as to his previous imprisonment. In any event, the three year period of acquaintance with the appellant described by PW2's may not have been immediately before the incident.

[27] The appellant also criticises the identification evidence of PW3 on the basis that he had not seen the intruder's face from outside and not given any descriptions of the person he knew as Madula. Although PW3 had not seen the face when he was filing a vehicle he had clearly seen the appellant's face at close range when he observed him removing money. There was no need for him to give descriptions of the appellant who he had known for 10 years unless the appellant challenged him on that front.

[28] The appellant had not denied that PW2 and PW3 had known him before the incident.

[29] Therefore, there is no real prospect of success of this ground of appeal.

03rd ground of appeal (sentence)

[30] 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.*

[31] 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 the lower end of 08 years. He had not enhanced the sentence on account of any aggravating features and after the period of remand was taken into account the ultimate sentence had been 07 years and 11 months.

[32] The appellant had deemed the sentence to be harsh and excessive on the basis that the tariff was 18 months to 03 years.

[33] 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.'*

[34] It appears to me that the factual scenario in this case is much more serious than simple *'street mugging'* where sentencing tariff had been recognized as 18 months to 05 years and even more serious than *'Attacks against taxi drivers'* where the sentencing tariff is between 04 years to 10 years. However, it is somewhat less serious than *'home invasion in the night'* as espoused in ***Wise*** (08 to 16 years)

Street mugging

[35] 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.*

[36] 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

[37] 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

[38] 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(Lik), 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."*

[39] **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...'*

[40] 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.'*

[41] Therefore, picking 08 years as the starting point by the Magistrate based on ***Wise*** may demonstrate a sentencing error, without however having a real prospect for the appellants to succeed in appeal regarding his final sentence.

[42] However, I must add that this case or cases of similar facts and circumstances cannot and should never be treated only as 'street mugging' cases. Neither could they be equated to 'attacks against taxi drivers'. They are kind 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 are objectively and in general more serious and different in nature to 'street mugging' and 'attacks against taxi drivers' as the robbery takes place at or within a place where business serving the public 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 and put the safety of public in jeopardy.

[43] 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 well above 'street mugging' and even above 'attacks against taxi drivers' but below 'home invasions'. 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.

[44] 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.

[45] 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)].

[46] When the appellant's sentence of 07 years and 11 months is considered that given the facts of this case I am of the view that he has no real prospect of success in appeal as far as his sentence is concerned.

Prejudice to the respondent

[47] No specific prejudice had been pleaded by the respondent.

Order

1. Enlargement of time against conviction is refused
2. Enlargement of time against sentence is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL