

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

CRIMINAL APPEAL NO.AAU 0056 of 2018
[In the Magistrates' Court at Lautoka Case No. 300/2018]

BETWEEN : **MANASA VULA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **21 December 2020**

Date of Ruling : **22 December 2020**

RULING

- [1] The appellant 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 01 January 2018.
- [2] The appellant had pleaded guilty and upon his own plea he had been convicted and sentenced on 29 May 2018 to 07 years and 10 months of imprisonment with a non-parole term of 04 years.
- [3] The appellant being dissatisfied with the sentence had handed over a timely application canvassing the sentence on 20 June 2018. The Legal Aid Commission on 24 August 2020 had submitted amended grounds of appeal against sentence and written submissions on 26 August 2020. The respondent had filed its written submissions on 26 October 2020.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant 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 Waqasaga 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 timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

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

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

1. *The learned sentencing Magistrate erred in law and in principle when selecting 9 years as a starting point for the sentence taking into consideration that this was robbery against a provider of service.*

2. *The learned sentencing Magistrate erred in principle when he failed to give sufficient weight to an early guilty plea.'*

- [7] The facts of the case as summarised by the Magistrate are as follows:

'3. On the 1st January 2018 at about 1 am the Complainant was in town in his vehicle Reg. No. CY 597. He was stopped by you and some other at Yasawa Street and requested the Complainant to take them to buy some beer. When the Complainant refused you and the others forced yourselves inside the vehicle. Then the Complainant was told to go to Navutu and whilst driving along Natabua flats the Complainant was told to turn into FEA road. Later you and the others assaulted the Complainant and robbed his phone valued at \$50, \$50 cash and his vehicle valued at \$9,100. The Complainant had received injuries as per the medical report. The matter was reported to the police and vehicle was later found abandoned at Abaca road. Upon investigation you were arrested and charged for aggravated robbery. You admitted the summary of facts and were convicted 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 09 years. He had not enhanced the sentence on account of any aggravating features. He had considered several personal circumstances as mitigating factors which the appellant did not deserve and for those 'mitigating' factors and the early guilty plea the Magistrate had given a discount of 12 months and after reducing 02 months for the remand period the ultimate sentence had become 07 years and 10 months. The Magistrate in consideration of the aspect of rehabilitation despite the appellant's 05 previous convictions had imposed a non-parole period of 04 years.
- [9] The appellant argues that the starting point of 09 years used by the Magistrate was wrong as this was an aggravated robbery against a taxi driver. 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 Nasimu 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] The facts highlighted by the Magistrate shows that what had happened was an 'Attack against taxi drivers' where the sentencing tariff is between 04 to 10 years. It is less serious than 'home invasion in the night' as espoused in Wise (08 to 16 years)

Attacks against taxi drivers

- [11] 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."

- [12] **State v Bola** [2018] FJHC 274; IIAC 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...'

- [13] 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.'

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

'[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:

- [15] Therefore, picking 09 years as the starting point by the Magistrate based on **Wise** may demonstrate a sentencing error, without however having a reasonable prospect for the appellant to succeed in appeal regarding his final sentence as discussed below.

- [16] There were many aggravating factors the Magistrate had not considered. In the first place the appellant and his accomplices had got inside the taxi against the refusal of the complainant to carry them. It was a forcible entry. The group had assaulted the

complainant causing injuries to him. They had robbed the taxi itself making it more than an attack or robbery on the taxi driver. The abandonment of the vehicle unattended exposing it to mischief is also an aggravating factor. Therefore, the objective seriousness of this particular aggravated robbery could have justified a higher starting point of the sentencing tariff between 04 years to 10 years for *'Attack against taxi drivers'*. If the starting point was taken at the lower end the aggravating features would have justified a substantial increase of the sentence.

- [17] The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. The appellant's criminal history of 05 previous convictions for robbery warrants deterrence to be treated as a main consideration in deciding the length of the sentence imposed to safeguard the public and the providers of public services from his propensities to engage in similar crimes and other prospective offenders.
- [18] As already pointed out the appellant had been afforded an undeserving leniency on account of personal circumstances and had been given an equally undeserving and unusually short non-parole period. The sentence of 07 years and 10 months is still within the sentencing tariff for *'Attack against taxi drivers'*.
- [19] Given all the circumstances stated above I am not inclined to think that the appellant has a reasonable prospect of success in appeal though the Magistrate may have made an error in picking the starting point at 09 years.

02nd ground of appeal

- [20] The appellant complains that the Magistrate had failed to give sufficient weight to the early guilty plea. The appellant should be deemed to have received a discount of 12 months in lieu of the early guilty plea as other personal circumstances did not deserve any discount though they are tagged along with the guilty plea.
- [21] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J had the occasion to observe as follows.

[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikelekelevesi State [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.

[11] The weight that is given to a guilty plea depends on a number of factors.....

[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.

- [22] Madigan J in Ranima v State [2015] FJCA17; AAU0022 of 2012 (27 February 2015) suggested that a discount for the early guilty plea should be considered last after aggravating and mitigating factors are considered and identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'. However, it is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of *ratio decidendi* of the decision.

'Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.'

- [23] In Mataunitoga v State [2015] FJCA 70; AAU125 of 2013 (28 May 2015) 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.'

- [24] In Aitcheson v State [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court cited paragraph [18] in Mataunitoga and stated it was a more flexible approach towards an early guilty plea.

[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.**

- [25] In terms of section 4(2)(f) of the Sentencing and Penalties Act 2009, the sentencing court is to have regard to:

“whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so.”

- [26] In **Naucusou v State** [2020] FJCA 74; AAU101.2019 (9 June 2020) I made the following remarks on a similar argument to that of the appellant taking into consideration the development of the law in the past which should include the Sentencing and Penalties Act, 2009 and I can only repeat the same sentiments here as well.

[19] The current judicial thinking that has developed progressively over the years is that it is not a sine qua none for a sentencing judge to give a separate discount for an early guilty plea though it should be accorded some discount depending on the circumstances of each case with even no discount for an inevitable and totally belated plea. As a matter of good practice the sentencing judges may do so but not showing a separate discount for the early guilty plea ipso facto does not constitute an error of law as long as it had been taken into account as a mitigating factor.

- [27] Therefore, it cannot be said that the Magistrate had committed an error in principle in awarding a deduction of 12 months for the guilty plea.

- [28] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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

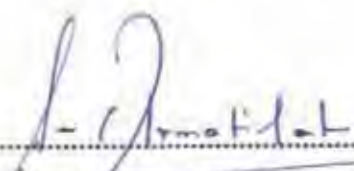
reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U,2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to 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)].

- [29] Therefore, in all the circumstances of this case I do not think that the appellant has a reasonable prospect of success in appeal on this ground of appeal too.

Order

1. Leave to appeal against sentence is refused.





Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL