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

CRIMINAL APPEAL NO.AAU 107 of 2019
[In the High Court at Lautoka Case No. HAC 194/2018]

BETWEEN : **ALIPATE RAVUNICAGI CAWI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

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

Date of Hearing : **08 January 2021**

Date of Ruling : **11 January 2021**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 and another count of driving motor vehicle without being a holder of a valid driving license contrary to section 56(3)(a), (6) and 114 of the Land Transport Act of 1998 committed on 17 October 2018 at Lautoka in the Western Division. Particulars of the offences were as follows.

'Count One
Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

ALIPATE RAVUNICAGI CAWI and SAIRUSI LENA, *on the 17th day of October, 2018 at Lautoka in the Western Division robbed SATISH CHANDRA of his cash of $250.00 and 1 x mobile phone valued at $500.00 and immediately before such robbery used personal violence on the said SATISH CHANDRA.*

Count Two

Statement of Offence

DRIVING MOTOR VEHICLE WITHOUT BEING A HOLDER OF A VALID DRIVING LICENSE*: Contrary to Section 56 (3) (a), (6) and 114 of the Land Transport Act of 1998.*

Particulars of Offence

ALIPATE RAVUNICAGI CAWI and SAIRUSI LENA*, on the 17th day of October, 2018 at Lautoka in the Western Division, drove a motor vehicle registration number LT 992 on Qalitu Road without being a holder of a valid driving licence.*

[2] The appellant had pleaded guilty on 20 December 2018 in the presence of his counsel and on 28 February 2019 he had admitted the summary of facts presented by the prosecution. The High Court judge, having been satisfied that the appellant had entered an unequivocal plea of guilty on his free will with the fully understanding of the nature of the charges and consequences of pleading guilty and that the summary of facts had satisfied all the elements of both offences, had convicted the appellant and sentenced him on 27 March 2019 to an aggregate sentence of 08 years and 06 months and 25 days of imprisonment with a non-parole term of 07 ½ years.

[3] The appellant being dissatisfied with the sentence had handed over a timely appeal canvassing the sentence on 01 April 2019. The Legal Aid Commission on 21 September 2020 had submitted amended grounds of appeal against sentence and written submissions. The respondent had filed its written submissions on 04 November 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 **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 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 sole ground of appeal against sentence urged on behalf of the appellant is as follows.

> *'1. The learned sentencing judge may have fallen into an error in law by imposing a sentence harsh and excessive without having regard to the sentencing guidelines and applicable tariff for the offence (aggravated robbery) of this nature..*

[7] The summary of facts as reproduced by the High Court judge is as follows.

> *'The complainant in this matter is SATISH CHANDRA (PW1), 60 years old, Taxi Driver of Vuda back Road, Lautoka.*

The accused in this matter is ALIPATE RAVUNICAGI CAWI, 28 years old, Cane cutter of Manumanu, Mataso, Ra.

On the 17th of October 2018 at about 3pm, PW1 was driving a taxi registration number LT 992 which was parked in front of BSP Bank at Tukani Street, Lautoka.

Whilst parked in front of the bank he noticed the accused with another iTaukei man. They boarded his taxi and told him to take them to Qalitu. PW1 agreed to take them and the accused sat in the front passenger seat while the other man sat at the back. PW1 switched the taxi meter on and drove them to Qalitu. Whilst entering Qalitu Road about half kilometre inside the accused asked PW1 to turn into a feeder road. PW1 turned into the feeder road and as they were travelling for a few meters in, the accused told PW1 to get out of the car. PW1 parked the car and the man sitting behind them got off and dragged PW1 out of the car and into the back seat. The accused then sat in the driver's seat and drove the car. PW1 lay in between the front and back seats and the other man sat on his back. PW 1 yelled and both men told him to keep shut or else they will kill him. The accused drove the car for a while and after that he switched with the second man. The accused tied PW1's hands when PW1 was trying to look up, the accused kept pushing his head down. After 30 minutes the car stopped and the accused with another grabbed the money inside the counsel box which was about $40.00 worth of coins, PW1's wallet containing $210.00 and mobile phone. Before leaving PW1, both men threw the car keys and left PW1 behind. PW1 then got up, untied himself and searched for the key. PW 1 then found the key and drove to the Police Station to report the matter.

01st ground of appeal

[8] The Learned High Court judge 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 ½ years considering it as the lower range of the tariff. He had enhanced the sentence on account of the aggravating features by 04 years. The judge had reduced the sentence by 03 years for the early guilty plea and 06 months for mitigation. After discounting the remand period the final sentence had been fixed at 8 ½ years and 25 days.

[9] The appellant argues that the starting point of 08 ½ years used by the trial judge 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 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] The summary of facts 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; 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...'*

[13] I 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 08 ½ years as the starting point by the High Court judge based on ***Wise*** may demonstrate a sentencing error which resulted in the current sentence

[16] However, there were many aggravating factors the trial judge had not considered. He had only considered the fact that it was an attack on a taxi driver as the aggravating feature. The appellant and his co-accused had robbed the taxi itself making it more than an attack or robbery on the taxi driver. They held the complainant hostage for about 30 minutes inside his own vehicle confining him to the space between the front and back seats with his hands tied after dragging him out of the taxi. They drove the vehicle during that time and also threatened the complainant with death if he was to raise cries and kept pushing his head down. Finally after robbing the complainant they threw the car key away. 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 02 previous convictions (and one of them for a similar offence) 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 for other prospective offenders.

[18] Though the sentence of 08 ½ years and 25 days is still within the sentencing tariff for *'Attack against taxi drivers'* had the trial judge considered the correct tariff the ultimate sentence may not have been as long as 08 ½ years and 25 days even going through the same sentencing process the trial judge had adopted.

[19] 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)].

[20] Without necessarily concluding that the appellant has a reasonable prospect of success in appeal on this ground of appeal, in all the circumstances of this case including the sentencing error of wrong tariff being applied, I am inclined to grant leave to appeal against sentence so that the full court could decide on the appropriateness of the ultimate sentence based on all the factors above discussed.

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka

JUSTICE OF APPEAL