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

**CRIMINAL APPEAL NO.AAU 46 of 2019**
**[In the High Court at Suva Case No. HAC 117 of 2018]**

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| **BETWEEN** | : | **LOTE WAISALE** |
| | | ***Appellant*** |
| **AND** | : | **STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, ARJA** |
| **Counsel** | : | **Mr. S. Waqainabete for the Appellant** |
| | : | **Ms. P. Madanavosa for the Respondent** |
| **Date of Hearing** | : | **03 September 2021** |
| **Date of Ruling** | : | **10 September 2021** |

# RULING

[1] The appellant had been charged with another (01st accused and appellant in AAU 0033 of 2019) in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 11 March 2018 at Nasinu in the Central Division.

[2] The information read as follows:

***Statement of Offence***

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

***Particulars of Offence***

> ***EMOSI BALEDROKADROKA*** *and* ***LOTE WAISALE*** *on the 11th day of March, 2018 at Nasinu in the Central Division, in the company of each other, robbed* ***NILESH CHAND*** *of $40.00 cash and an Alcatel mobile phone valued at $79.00 all to the total value of $119.00, the property of* ***NILESH CHAND****.*

[3] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted and sentenced him on 28 March 2019 to 09 years of imprisonment with a non-parole period of 07 years (actual serving period being 08 years and 09 months with a non-parole period of 06 years and 09 months after deducting the period of remand).

[4] The appellant's appeal lodged by him in person against conviction had been timely (02 April 2019). The Legal Aid Commission had filed an amended notice of appeal against conviction and an application for enlargement of time to appeal against sentence along with written submissions on 12 January 2021. The state had filed written submission quite belatedly on 02 September 2021. Both counsel participated at the oral hearing *via* Skype.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time 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?

[7] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[8] The delay of the appeal against sentence (being over 01 year and 08 ½ months late) is substantial. The appellant has attributed the delay to his initial decision to accept the sentence as being lenient on aggravated robbery. Then, the counsel from LAC had advised him that the sentence may be contrary to sentencing tariff for street mugging and the appellant says that if he had known it he would have appealed against sentence as well. Thus, his explanation for the delay is acceptable as he had appealed against conviction within time. Therefore, I would see whether there is a real prospect of success for the belated sentence ground in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time.

[9] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

[10] The trial judge had summarized the facts of the case in the sentencing order as follows:

> 2. *It was proved during the course of the hearing, that two of you have grabbed the complainant and dragged him to the nearby car-wash, when the complainant was walking down to his home in the evening of 11th of March 2018. The time was around 8.00 p.m. to 8.30 p.m. Having dragged him to the car-wash, one of you have punched him on his face and then tried to strangle him. Other one then took the money and mobile phone of the complainant and left the scene. You both have committed this offence in company of each other. Therefore, each one of your culpability and degree of responsibility for inflicting of violence and robbing the complainant are same.*

[11] The main contention of the defence had been that witness Vasemaca (PW2) had mistaken in her recognition of the two offenders as the appellant and the co-accused. Therefore, the case against the two appellants had mainly depended on the correctness of the recognitions of the robbers by Vasemaca.

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

> ***Conviction***
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> ***Ground 1***
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> *THAT the Learned Trial Judge may have fallen into an error in law and fact at Summing Up in not cautioning the assessors the dangers of dock identification and/or recognition absent of any prior identification parade thus causing a substantial miscarriage of justice.*

***Ground 2***

*THAT the Learned Trial Judge may have fallen into an error in law and fact in not directing the assessors to be cautious of the evidence provided by the prosecution witnesses namely Vasemaca Lewatubekoro and Unaisi Nakalevu for their motive in implicating the Appellant.*

***Ground 3***

*THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the Appellant without considering and assessing independently the totality of the evidence regarding the issue identification and/or recognition thus causing a substantial miscarriage of justice.*

***Ground 4***

*THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the Appellant without considering and assessing independently the totality of the evidence regarding the motive by the prosecution witness namely Vasemaca Lewatubekoro and Unaisi Nakalevu to implicate the Appellant thus causing a substantial miscarriage of justice.*

***Sentence***

***Ground 1***

*THAT the Learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regarding to the sentencing guideline and applicable tariff for the offence of aggravated robbery of this nature.*

***01st and 03rd grounds of appeal***

[13] It is convenient to consider both appeal grounds together. They are concerned with lack of caution to the assessors on dock identification in the absence of identification parade and the trial judge not having independently considered the issue of identification of the appellant.

[14] The main thrust of the above argument is based on the assumption that there was no identification of the appellant at the crime scene by any of the witnesses and therefore there should have been an identification parade and because there was no ID parade dock identification should not have permitted and at least the assessors should have been cautioned.

[15] I think the whole basis of the above argument is misconceived. The complainant could not identify the offenders at the time of the commission of the offence. However, PW2 Vasemaca Lewatubekoro did identify the appellant and his co-accused before and while they were committing the offending. The trial judge had summarised her identification evidence at paragraph 22- 25 of the summing-up. Her evidence is circumstantially supported by PW3's evidence at paragraph 27.

[16] The appellant was known to PW2 as they both grew up together since their childhood in the same neighbourhood and she used to see the co-accused and the appellant almost every day in the same neighbourhood where the appellant usually hangs around. On this day, she saw the complainant walking towards the direction where the appellant and the co-accused were sitting under the mango tree a little while ago and even cracking a joke at her when she walked past them. Little later she saw the co-accused and the appellant got hold of the complainant and dragging him to the side of the car-wash. She also saw the co-accused holding the complainant on his waist and the appellant squeezing his mouth. At the same time, a car came along the road and the light of the car directed straight to the car-wash. With the light of the car, PW2 saw the faces of the co-accused and the appellant while they were dragging Nilesh to the car-wash. The light of the car lasted a minute or two.

[17] Thus, it is clear that PW2 had recognised the appellant and his co-accused who were well-known to her as the offenders. Hers was not a first time dock identification. Therefore, there was no need for an ID parade or a warning by the trial judge on first time dock identification. All what was required was a Turnbull guideline which the trial judge had done at paragraph 57 of the summing-up against the defence position of mistaken identification. The trial judge had addressed the assessors at length on the aspect of identification of the appellant and his co-accused by PW2 at paragraphs 55-58.

[18] The trial judge in the judgment had considered the two contentious matters raised by the defence on PW2's recognition of the offenders:

> 8. *Mr. Nilesh Chand in his evidence explained the physical descriptions of the two robbers which match the physical descriptions of the two accused*

*given by Vasemaca in her evidence. Apart from the colour of the t-shirt that the second accused was dressed in, her description of the colour and the nature of the clothings that the two accused were dressed in matches with the description given by Nilesh. Nilesh said that one robber was dressed in red vest and a short and other one was dressed in a grey colour t-shirt and a short. Vasemaca in her evidence said that Emosi was dressed in a red colour vest and a short and Lote was dressed in grey colour t-shirt and a short. She has stated in the statement made to the police the same description of the colour and nature of the clothing apart from the colour of the second accused's t-shirt. Hence, I do not find this inconstancy is fundamentally affecting the credibility of the evidence given by Vasemaca.*

[19] Therefore, there is no reasonable prospect of success in this ground of appeal.

***02nd and 04th grounds of appeal***

[20] Both grounds would be considered together. The appellants' counsel joins issue with the failure of the trial judge to direct the assessors to be cautious of the evidence of PW2 and PW3 for their motive to implicate the appellant in the offending.

[21] PW2 Vasemaca Lewatubekoro was an eye-witness to the robbery. PW2 is the daughter of PW3. The basis of the appellant's contention is that PW2's brother and PW3's son Eremasi Koroi had been arrested in connection with the robbery and these two witnesses had made statements to the police after two days of the incident implicating the appellant in order to save Eremasi who had been released after their statements.

[22] The problem with this ground of appeal is that there is no indication at all in the summing-up or the judgment that the defence had impeached the credibility of PW2 and PW3 on the basis that they had a sinister motive to falsely implicate the appellant. To that extent the appellant's counsel is taking up an appeal point not canvassed at the trial. The defence had been conducted on the basis of mistaken identity.

[23] There is no presumption that whenever a witness has some interest in the matter [for example mother (witness) - daughter (victim) in the case of a child rape] or some alleged sinister motive, he or she should be deemed to be an unreliable witness or a

witness with an interest and if a witness has an interest or some alleged sinister motive his or her evidence would always be tainted [see **Anthony v State** [2016] FJCA 62; AAU0027.2012 (27 May 2016)]. More often than not you do not find totally disinterested or independent witnesses to an offending. The necessity for a warning depends on the facts and circumstances of each and every case given how the defence had met the prosecution case.

[24] In the circumstances of this case, I do not think that the trial judge must have informed as a matter of legal obligation (as opposed to 'he might have') the assessors that the evidence of PW2 and PW3 may have been tainted by an improper motive and warned against relying on their testimonies. The trial judge had himself decided in the judgment that:

> *11. Making her statement to the police after her brother was arrested in connection of this matter, does not establish anything to discredit the evidence of Vasemaca.*

[25] Further, in as much as PW2 is the sister of Eremasi, co-accused is also one her cousins and the appellant had been growing up together with her in the neighbourhood. Therefore, the assumption that somehow or other PW2 falsely implicated the appellant and the co-accused to save her brother Eremasi is farfetched. It is extremely unlikely that PW2 falsely implicated the appellant and the co-accused with whom she shared a close acquaintance and the family relationship respectively simply to save her brother. What is more plausible is that because the appellant and co-accused were either well-known to PW2 or related to her, she initially did not want to inform the police of their involvement in the offending despite having seen it. However, when the police arrested her own brother for the offending on suspicion she would have decided to disclose what she actually saw to the police.

[26] Therefore, I do not think that there is a reasonable prospect of success in this ground of appeal.

***05th ground of appeal (sentence)***

[27] The appellant's counsel argues that the sentence imposed is harsh and excessive because the trial judge had applied the wrong tariff in the sentencing process.

[28] The trial judge had not followed the sentencing tariff for 'street mugging' namely 18 months to 05 years of imprisonment as expressed in **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 applied the tariff set by the Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) for the offence of aggravated robbery in the form of home invasion in the night (*i.e.* 08 to 16 years of imprisonment).

[29] In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where more than one offender were involved the Court of Appeal set out broader circumstances where the upper limit of 05 years for street mugging may not be appropriate and could be further increased:

- *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.*

[30] 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 of this case does not fit into the kind of scenario before the Supreme Court in ***Wise*** but it accords more with some form of street mugging where the complainant had however suffered injuries at the hands of the assailants. The appellant's record had revealed 03 previous convictions.

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

> *'[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.*
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> *[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).*
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> *'[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.'*

[32] The error of principle in applying ***Wise*** or departure from the settled and usual tariff applicable for street mugging without assigning any reasons therefor by the sentencing judge requires intervention by the full court that could then decide what the appropriate sentence should be as 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)].

[33] When the appellant's sentence of 09 years of imprisonment with a non-parole period of 07 years (actual serving period being 08 years and 09 months with a non-parole

period of 06 years and 09 months after deducting the period of remand) is considered, given the facts of this case, I am of the view that he has a reasonable prospect of success in sentence appeal. However, the final sentence is a matter for the full court to decide.

**Orders**

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.


**Hon. Mr. Justice C. Prematilaka**
**ACTING RESIDENT JUSTICE OF APPEAL**