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

CRIMINAL APPEAL NO.AAU 073 of 2020
[In the High Court at Suva Case No. HAC 267 of 2018]

BETWEEN : **PONIPATE BOKADI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

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

Date of Hearing : **29 October 2021**

Date of Ruling : **01 November 2021**

RULING

[1] The appellant stood indicted in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 23 June 2018 at Nasinu in the Central Division. Particulars of the offence read as follows:

'Count One

Statement of Offence

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

Particulars of Offence

PONIPATE BOKADI *with others on the 23rd day of June, 2018 at Nasinu in the Central Division, stole cash amounting to $600.00 being the property*

*of **IFEREIMI VASU** and immediately before stealing, used force on **IFEREIMI VASU**.'*

[2] The appellants had pleaded guilty to the charge on 14 August 2018. The High Court judge had been satisfied that he fully comprehended the legal effect of the plea of guilty and it was voluntary and free from any influence. He had admitted the summary of facts. The learned judge had convicted the appellant and sentenced him on 22 August 2018 to 10 years of imprisonment with a non-parole period of 08 years (effectively 09 years and 10 months with a non-parole period of 07 years and 10 months after the remand period was deducted).

[3] The appellant being dissatisfied with the sentence had signed an untimely notice of appeal against sentence on 27 July 2020 (which reached the CA registry on 13 August 2020) along with an application for extension of time and affidavit explaining the delay. He had filed further papers subsequently. The Legal Aid Commission on 27 October 2021 had submitted formal appeal papers for extension of time to appeal against sentence along with written submissions. The respondent had filed its written submissions on 28 October 2021.

[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 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?

[5] 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)].

[6] The delay of the appeal (over 01 year and 10 months) is very substantial. The appellant had stated that without all his material he found it difficult to draft appeal papers. However, in his first affidavit he had stated that his timely appeal was handed over to the Correction Centre on 11 September 2018 but they had failed to send it to the CA registry. In his second affidavit he had stated that his trial lawyer had promised to file an appeal but she had failed to do so. Thus, his explanations for the delay are inconsistent and cannot be accepted. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] 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.*

[8] ***Ground of appeal***

> ***'Ground 1 (sentence)***
>
> *That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principles resulting in a harsh sentence.*

01st ground of appeal

[9] 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 sentenced the appellant to 10 years of imprisonment. He had not gone through the usual process of picking a starting point and added none for aggravating factors and deducted none for mitigating factors. However, the judge had referred to objective seriousness, level of harm and culpability and early guilty plea and family circumstances (though of little mitigatory value).

[10] 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) 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.*
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> *[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.'*

[11] From the summary of facts (quoted below from the sentencing order) it is difficult to see how the factual background of this case fits into the factual scenario the Supreme Court encountered in ***Wise*****.**

3. *According to the summary of fact, which you admitted in open Court, that you with other accomplices, came behind the complainant, who was returning home from his morning walk, and assaulted him. The complainant had retaliated. While the complainant was retaliating, he had fallen down. The complainant managed to pull down one of the assailants while he was falling down. You and the accomplices then fled the scene. You and the accomplices had stolen the wallet of the complainant with cash $600 therein.*

[12] It appears to me that this is a kind of aggravated robbery called '***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)].

[13] The fact that this act of aggravated robbery had been committed in the early hours of the day while the 58 year old elderly complainant (a retiree) was alone on his way home after his morning walk, the fact that he was assaulted causing injuries to his eyes and the ankle and the fact that stolen money of $600.00 was not recovered may safely be treated as having the effect of increasing the seriousness of the crime warranting a higher sentence than an act of usual street mugging might attract. In addition, the appellant had had 08 previous convictions of which 07 were related to property crimes.

[14] It is clear from the appeals coming before this court that the so called '***street mugging'*** incidents have been consistently on the rise since 2008 when the tariff was decided as between 18 months and 05 years, of course, with flexibility to go above the upper limit depending on the seriousness. It is for the State to seek any revision of it, if required, in the current context.

[15] However, what is relevant to the appeal point taken up here is that the learned High Court judge had committed a sentencing error in following the sentencing tariff set in ***Wise*** and therefore, he had acted on a wrong sentencing principle warranting the appellate court's possible intervention in the matter of sentence.

[16] As the Court of Appeal remarked in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020), acting upon a wrong sentencing range could affect the whole sentencing process and eventually the ultimate sentence.

> *'[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.*

[17] Therefore, following the sentencing tariff set in **Wise v State** (supra) demonstrates a sentencing error by the High Court judge having a real prospect for the appellant to succeed in appeal regarding his sentence.

[18] However, it is for the full court to decide on the appropriate sentence. 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)].

Order

1. Enlargement of time to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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