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

CRIMINAL APPEAL NO.AAU 095 of 2020
[In the High Court at Lautoka Case No. HAC 160 of 2019]

BETWEEN : **ATAMA ROKOVURAI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **29 November 2021**

Date of Ruling : **30 November 2021**

RULING

[1] The appellant had been charged along with a juvenile co-accused in the High Court at Lautoka on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 03 September 2019 at Lautoka in the Western Division.

[2] The information read as follows:

'**ONE COUNT**

Statement of offence

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

Particulars of Offence

> **ATAMA ROKOVURAI** and **N.R** on the 3rd day of September, 2019 at Lautoka in the Western Division, robbed **TOMOHIRO YAMASHITA** of 1 x laptop (Apple brand) valued at $2,000.00, 1 x iPhone valued at $2,000.00, 1 x pair of earphones valued at $100.00 and $80.00 cash, all to the total value of $4,180.00.'

[3] The appellant had pleaded guilty to the charge on 21 February 2020 in the presence of his counsel. The summary of facts were explained to him and he accepted the same on 15 June 2020. The learned High Court judge convicted and sentenced him on 29 June 2020 to 07 years' imprisonment with a non-parole period of 05 years.

[4] The appellant's appeal lodged by him in person against sentence is out of time (18 August 2020) but within 03 months after the lapse of the appealable period. Therefore, his appeal could be treated as timely. The state had filed written submissions on 26 November 2921.

[5] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against 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] 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.*

[7] The trial judge had summarized the facts as follows:

> *3. The brief facts were as follows:*
>
> *On 3rd September, 2019 at about 12.10am the victim was walking along Thompson Crescent Road, Lautoka when he realized someone was following him. The victim walked past the Lautoka Hospital and he saw this person in front of him.*
>
> *4. All of a sudden the victim saw another person riding a bicycle come in front of him and punched him on his right eye and face several times. The victim fell down. The victim's black bag was taken by the assailants. The bag contained the following items:*
>
> *- 1 x silver Apple laptop valued at $2,000.00;*
> *- 1 x black iPhone valued at $2,000.00;*
> *- Earphones valued at $100.00;*
> *- Cash $80.00.*
> *All to the total value of $4,180.00*

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

> ***Sentence***
>
> ***Ground 1***
>
> *THAT the Learned Sentencing Judge erred in law when his Lordship's Sentencing reflected disparity on the sentencing base (starting point) between the appellant and co-accused in that the appellant starting point was no longer that co-accused.*
>
> ***Ground 2***
>
> *THAT the Learned Sentencing Judge erred in law in giving different deduction of sentence between the appellant and co-accused to reflect the early guilty plea.*

Ground 3

THAT the Learned Sentencing Judge erred in law in failing to give an adequate and proper discount of one third of the sentence to reflect the early guilty plea.

Ground 4

THAT the Learned Judge erred in law in breaching the parity principle of sentencing co-accused in that the appellant received a longer sentence of 7 years with a non-parole period of 5 years compared to the suspended sentence imposed on co-accused a severed and disproportionate disparity in the circumstances of the case and to the circumstances of the appellant.

01st and 04th grounds of appeal

[9] The appellant complains against the apparent disparity of the sentences imposed on his co-accused and himself. The co-accused received an imprisonment of 02 years suspended for 03 years as sentence whereas the appellant was sentenced to 07 years of imprisonment.

[10] The reason for the alleged disparity is amply explained in the sentencing order by the trial judge from paragraphs 22-34. The co-accused was a juvenile of 15 years at the time the offence was committed and could have been given only a maximum sentence of 02 years in terms of the Juveniles Act and the judge had the discretion to suspend it under the Sentencing and Penalties Act whereas the appellant was 18 years of age and was an adult. His sentence did not attract the provisions of Juveniles Act. Hence, the rational disparity in the sentence.

[11] Thus, there is no merit in these two grounds of appeal.

02nd and 03rd grounds of appeal

[12] The appellant complains that the trial judge had failed to give 1/3 discount for the early guilty plea and he and his co-accused were given different discounts.

[13] No law says that a first time offender is entitled to one-third reduction in sentence (vide **Balangao v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012). 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 (vide **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) which was approved in **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (02 November 2018)]. Therefore, remarks by Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) that a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity is the 'high water mark' should be read subject to the current view expressed above and ***Ranima*** is no longer the binding authority.

[14] Thus, the trial judge made no sentencing error by not affording the appellant 1/3 reduction in the sentence on account of his guilty plea or allowing a different discount to the co-accused who was a juvenile of 15 years as opposed to the 18 years' old appellant.

[15] Thus, there is no merit in these two grounds of appeal.

[16] However, there is an important appeal point arising from the sentencing tariff used by the trial judge for aggravated robbery though the appellant had not taken it up as a ground of appeal.

[17] The trial judge had not followed the long-established 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). Nor had he applied the sentencing tariff set by the Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the tariff for the offence of aggravated robbery in the form of night-time home invasions was declared as 08 to 16 years of imprisonment.

[18] Instead, the trial judge had followed a tariff of 05 years to 13 years of imprisonment following **State v Bulavou** - Sentence [2019] FJHC 1034; HAC252.2018 (29 October 2019). However, this court has already granted leave to appeal against the sentencing order and particularly the new tariff introduced by the High Court judge in **State v Bulavou** (supra) in the single judge ruling in **Bulavou v State** [2021] FJCA 121; AAU0151.2019 (6 August 2021). This aspect of sentencing has been extensively discussed in the said ruling and it is not proposed to repeat it here.

[19] In **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) I highlighted some problems arising out of a single judge of the High Court changing the tariff unilaterally.

> *'[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may inter alia be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.*
>
> *[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.*
>
> *[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition*

the doctrine of stare decisis requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.'

[20] I think it would not be inapt to repeat my remarks in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Jeremaia v State** [2020] FJCA 259; AAU030.2019 (23 December 2020) on the adverse consequences of this dual system of sentencing tariff for aggravated burglary practised in courts which are equally relevant to this case of aggravated robbery as well.

> *'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'*

[21] Therefore, until the Court of Appeal or the Supreme Court considers this issue more fully it is advisable for all Judges and Magistrates to follow the well-established tariff of 18 months to 05 years for aggravated robbery in form of *'street mugging'* being mindful and comfortable that a sentence even above the upper limit of 05 years can be meted out within the parameters highlighted in **Raqauqau v State** (supra) in more serious circumstances and appropriate cases.

[22] Coming back to the present case, the trial judge in keeping with the tariff of 05-13 years of imprisonment he adopted, had taken 06 years as the starting point and added 04 years for aggravating factors and reduced 1 ½ years for the appellant being a first offender and another 1 ½ years for the early guilty plea making the final sentence of 07 years.

[23] 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)].

[24] When the appellant's sentence of 07 years is considered given the facts of this case, I am of the view that he has a reasonable prospect of success in appeal. However, the final sentence is a matter for the full court to decide. In addition, there are a few matters of law to be clarified by the full court in appeal regarding the new sentencing tariff followed by the trial judge.

[25] Therefore, I am inclined to grant leave to appeal against sentence based only on this aspect of the sentence.

Order

1. Leave to appeal against sentence is allowed.

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