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

CRIMINAL APPEAL NO.AAU 136 of 2017
[In the Magistrates Court at Nausori Case No. 394 of 2017]
[High Court Case No.207/2017]

BETWEEN	:	**EMOSI MOLIVEITAVI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**12 February 2021**
Date of Ruling	:	**15 February 2021**

RULING

[1] The appellant with another had been arraigned in the Magistrates' court of Nausori exercising extended jurisdiction charged with one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on 25 June 2017.

[2] The appellant had pleaded guilty to the charge preferred and the Magistrate had been satisfied that the appellant had pleaded guilty voluntarily and unequivocally after full understanding the consequences of the guilty plea. The appellant had admitted the summary of facts submitted by the prosecution and the learned Magistrate had convicted the appellant and sentenced him on 28 August 2017 to imprisonment of 08 years and 11 months with a non-parole period of 06 years.

[3] The appellant had appealed his sentence within appealable time on 12 September 2017. He had filed another notice of appeal after about 01 year, 06 months and 01 week containing grounds of appeal against conviction on 05 April 2019. However, the appellant had not sought enlargement of time to appeal against conviction or explained the delay in an affidavit. State had tendered its written submissions on 11 February 2020.

[4] In terms of section 21(1) (b) and c) of the Court of Appeal Act, the appellant could appeal against conviction and 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 untimely preferred against sentence 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.*

[6] The appellant's grounds of appeal are as follows.

'**Conviction**

Ground 1

THAT the Police had erred in law an in fact in not reconstruction the case to determine the truth of the fact.

Ground 2

THAT the Learned Resident Magistrate had erred in law and in fact considering the lacked of adequate assessment of the case that lead to the early equivocal guilty plea of the appellant because he was not represented.

Ground 3

THAT the Learned Resident Magistrate had erred in law and in fact for not directing the prosecution and the police to assess the case properly because the appellant had asserted that he was not a principal offender or initiator of a crime.

Ground 4

THAT the Learned Resident Magistrate had erred in law and in fact by not authenticate the valued of items stolen and the cash which was all part of the complainant's estimation.

Ground 5

THAT the Learned Resident Magistrate had erred in law and in fact by wrongly assessed the evidence in giving weight to the conversion of the complaint's story in which he assumed that it was a planned act of crime.

Ground 6

THAT the Learned Resident Magistrate had erred in law and in fact for not considering the appellant's state of mind on the relevant time because of intoxication given that he was only following orders to take the phone.

Sentence

Ground 1

THAT the Learned Resident Magistrate had erred in law and in fact in imposing a very harsh sentence which lacking the consideration of full application of the provisions of the sentencing and penalties decree.

Ground 2

THAT the Learned Resident Magistrate had erred in law and in fact in wrongly calculating his sentence which should be 7 years 11 months imprisonment with non-parole period of 6 years.

Ground 3

THAT the Learned Resident Magistrate had erred in law and in fact in imposing a non-parole period too close to the head sentence which limit the chance of rehabilitation.

Ground 4

THAT the Learned Resident Magistrate had erred in law and in fact in failing to consider the items was recovered and choose to put a high starting point.

Ground 5

THAT the Sentence was too harsh and excessive compared to similar offence with large sum of money stolen, large amounts of valuable items not recovered and serious injuries sustained but less sentence was imposed.

Ground 6

THAT the Learned Resident Magistrate had erred in law and in fact by imposing a sentence to the appellant using guidelines ***"hence in my view the public interest demand a harsh sentence in this case to denounce the behavior of accused"...****which is irrelevant to the nature of the offence where he was not a principle offender.*

[7] The appellant's conviction appeal is out of time by more than 01 year and 06 months and he had not sought an enlargement of time to appeal against conviction as per rules 35(3) and 40 of the Court of Appeal Rules. Therefore, the appellant could not legally exercise the right of appeal against conviction in terms of section 26 of the Court of Appeal Act without obtaining an enlargement of time. Thus, there is no valid appeal against conviction before this court. In any event the grounds of appeal urged against conviction are frivolous and vexatious given that the appellant had tendered an unqualified plea of guilt. In the circumstances, the appellant's belated appeal against conviction is dismissed under section 35(2) of the Court of Appeal Act.

[8] The appellant's 01st, 02nd, 04th, 05th and 06th grounds of appeal could be treated together where the gist of his complaint is that the sentence is harsh and excessive.

[9] The summary of facts recorded by the learned Magistrate in the sentencing order dated 28 August 2017 is as follows.

"On the 25th day of June, between 12.00am and 1.00am, at Bautikina, Amitab Singh (PW-1), 34 years, Driver of Naulu, Nakasi was robbed by one Jonecani Qilisaivalu (Accused-1), 22 years, unemployed of Kasavu Village and Emosi Moliveitavi (Accused-2), 25 years, Security Officer of Kasavu Village. In the process of robbery the following items were taken: $280.00 cash, Samsung J3 mobile phone valued at $500.00, Alcatel mobile phone valued at $69.00, pompom valued at $5.00 and a belt valued at $5.00.

On the above mentioned date and time, (PW-1) was driving in Nausori town when (Accused-1) and (Accused-2) stopped (PW-1) and asked (PW-1) if (PW-1) could drop them at Bautikina (PW-1) agreed and took both (Accused-2) to Bautikina. Once half way in the Bautikina bypass (PW-1) was told to stop. (Accused-1) then got off the taxi came around to the driver's side and pulled out the keys. (PW-1) was then punched, tied up and dragged in to the bushes by (Accused-1) and (Accused-2) and was tied to a tree. The vehicle registration number IN 869 was driven off by the (Accused-1) and abandoned a few meters from the scene where (PW-1) was tied. The above mentioned were taken from (PW-1).

(PW-1) was able to free himself and reported the matter to police. After intensive investigations the identify of (Accused-1) and (Accused-2) came to light. (Accused-1) and (Accused-2) were then checked at their homes but was not found. (Accused-1) then surrendered himself to police custody.

Both (Accused) were interviewed under caution in which they admitted to the offence. (Accused-1) in Q32 to Q39 of his interview and (Accused-2) were then charged for the offence of Aggravated Robbery contrary to Section 311 of the Crimes Act number 44 of 2009 and will be appearing in custody at the Nausori Magistrates Court on the 6th day of July 2017."

[10] It is clear from the sentencing order that the trial judge had simply applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 12 years as the starting point. 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.

[11] The factual background of this case does not fit into the kind of situation court was confronted with in ***Wise.*** Neither is this a case of simple street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as 'street mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present.

[12] The decision 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).*
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> *[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."*

[13] **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...'

[14] Therefore, having examined those previous decisions, 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.'*

[15] However, by taking a starting point of 12 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise***, the learned Magistrate has acted upon a wrong tariff. Instead the learned trial judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers.

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

> *'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, the appellant should have been dealt with in accordance with the sentencing tariff for offences of aggravated robbery against providers of services of public nature.

[18] Having taken 12 years as the starting point based on ***Wise*** the Magistrate had taken the fact that the offences had been committed against a public service provider to enhance the sentence by another 03 years.

[19] However, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warrant a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender, if any) and if the

starting point is taken at the lower end then an appropriate increase in the sentence for all aggravating features (offending and offender) is warranted. In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any. [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[20] Another aspect relevant to the appellant's complaint is that the decision in **R v Henry** (unreported, NSW Court of Criminal Appeal, 12 May 1999) has established that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated (Jurisic:220-22 1; Henry). Therefore, the sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure (vide ***Jurisic*** (1998) 45 NSWLR 209, 220-221; ***Henry*** and **R v De Havilland** (1983) 5 Cr App R 109, 114).

[21] The state has argued that despite the error in being guided by ***Wise*** guidelines the Magistrate had ended up with a head sentence within the tariff for aggravated robbery against providers of services of public nature including taxi, bus and van drivers and therefore, the ultimate sentence is justified. However, the mere fact that the head sentence is within the sentencing tariff by itself does not mean that the sentence fits the crime. In my view, the sentence of 08 years and 11 months of imprisonment though within the tariff for aggravated robbery against providers of services of public nature is still disproportionate to the gravity of the offending.

[22] 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 [**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)].

[23] However, the error of principle in applying the wrong tariff or departure from the applicable tariff without assigning any reasons therefor by the Magistrate require intervention by the full court that could then decide what the appropriate sentence should be.

[24] Therefore, there is a reasonable prospect of success in the appeal against sentence on the basis of the wrong tariff being applied.

03rd ground of appeal

[25] In **Singh v State** [2016] FJCA 126; AAU009.2013 (30 September 2016) the Court of Appeal remarked

> *'.....that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.'*

[26] **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> *"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.***"
>
> *'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[27] I have dealt with a similar complaint comprehensively in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020) where I followed **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) and stated

'[38] Therefore, I hold that the gap of 01 years between the final sentence and the non-parole period cannot be said to violate any statutory provisions or is obnoxious to the judicial pronouncements on the need to impose a non-parole period. The 01 year gap in this case is not too close to the head sentence and justified given the facts and circumstances of the case against the appellant.'

[28] In any event, the non-parole period would be fixed by the full court when the matter of sentence is reviewed in appeal. Therefore, at this stage there is no reasonable prospect of success of this ground of appeal.

Order

1. Leave to appeal against sentence is allowed.
2. The appeal against conviction is dismissed in terms of Section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL