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

CRIMINAL APPEAL NO.AAU 054 of 2019
[In the Magistrates Court at Nasinu Case No. 145/15]
[High Court Case No.280/15]

BETWEEN	:	**STATE**	***Appellant***
AND	:	**LIVAI NASILIVATA** **TAITO DOA**	***Respondents***
Coram	:	**Prematilaka, JA**	
Counsel	: : :	**Ms. S. Tivao for the Appellant** **Ms. S. Ratu for the 01st Respondent** **02nd Respondent in person**	
Date of Hearing	:	**12 March 2021**	
Date of Ruling	:	**15 March 2021**	

RULING

[1] The appellant had been charged in the Magistrate's court of Nasinu exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act. 2009 committed on 22 August 2015 at Nasinu in the Central Division. The charge read as follows.

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section* ***313(1)(a)*** *of the Crimes Decree No. 44 of 2009.*

Particulars of the offence

> ***LIVAI NASILIVATA AND TAITO DOA*** *on the 22nd of August, 2015, at Nasinu in the Central Division, stole 1 x Vido Mobile phone valued at $99.00, the property of* ***SALVESH KUMAR.***

[2] The respondents had pleaded guilty to the information and the learned Magistrate had convicted the appellant as charged and sentenced him on 24 March October 2016 to 02 years of imprisonment suspended for 03 years.

[3] The state had filed a timely petition of appeal against sentence on 21 April 2017 followed up by written submissions on 09 April 2018. The Legal Aid Commission had filed written submissions on behalf of the 01st respondent on 05 June 2020. The state had served the petition of appeal on the 02nd respondent on 15 May 2017. Notice of mention had been served on the 02nd respondent on 16 June 2020 regarding the next mention date of 30 June 2020. The 02nd respondent was present in court on 30 June 2020 and indicated that he would represent himself and file written submissions. However, the 02nd respondent failed to appear in court on subsequent dates of 28 July 2020, 26 August 2020 and 21 October 2020. The state had served another notice of mention on 25 November 2020 for him to appear in court on 04 December 2020. Yet, he failed to appear in court on 04 December 2020. Notice of hearing had been served on the 02nd respondent on 22 December 2020 regarding the leave to appeal hearing date of 07 January 2021. Still the 02nd respondent was absent on the first date of hearing and the hearing was adjourned to 26 February 2021 where he was once again absent. The 01st respondent informed court that the 02nd respondent was now being held in Suva Remand center and a production order was dispatched to produce him in court on 05 March 2021 for the hearing. As the 02nd respondent was not produced 05 March 2021 the leave to appeal hearing was adjourned to 12 March 2021where he was produced in court. He indicated that he was ready to proceed with the hearing and made brief oral submissions. All other parties relied on their respective written submissions.

[4] In terms of section 21(2) (c) of the Court of Appeal Act, the state 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 ground of appeal against sentence urged on behalf of the appellant is as follows.

> *Ground* - *That the sentence passed by the Learned Trial Magistrate is manifestly lenient in all circumstances of the case.*

[7] The summary of facts admitted by the appellant is as follows.

> *'Shalvesh Kumar (PW1) and Sachin Salendra (PW2) on 22nd day of August, 2015 at Makoi, in the Central Division were walking towards Rami Sami.*

Along the way PW1 received a phone call and whilst talking on the phone, Livai Nasilivata (A1) and another approached PW1 and PW2 and tapped PW1's mobile phone out of his hand causing it to fall on the road. PW1 attempted to grab the phone however A1 and another person kicked PW1 on his right shoulder and hit PW1 on his face. A1 and another person then took PW1's mobile and walked towards Hanson Supermarket. A1 and another dishonestly appropriated (stole) – 1 x Vido mobile phone white in colour valued at $99.00. The mobile phone was later recovered by Police. A1 made admissions to the offence in his record of interview at Q & A 10 to 18. The accused person is a first offender.

Ground of appeal

[8] The Learned Magistrate 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 but picked the starting point at 04 years. He found no aggravating features and deducted 01 year for mitigating factors and another year for the early guilty plea reducing the sentence to 02 years. The respondents were supposed to have been in remand for 10 weeks but the Magistrate had not deducted that period from the sentence. Finally, the learned Magistrate had suspended the sentence of 02 years for 03 years.

[9] The state does not challenge the sentence of 02 years but joins issue with the sentence being suspended for 03 years.

[10] The sentencing 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.*
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> *[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.'

[11] It appears to me that the factual scenario in this case constitutes an act of *'street mugging'* where sentencing tariff had been recognized as 18 months to 05 years and cannot be equated with an act of aggravated robbery involving *'home invasion'*.

[12] In **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. One of them had grabbed the complainant from the back and held his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of Appeal remarked

'[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in ***Basa v The State*** *Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*

[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** *(the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:*

- ***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.*

[13] The sentencing tariff for street mugging was once again discussed in **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) where the complainant was going home at about 4.30 p.m. when the appellant with another person had called him and asked for money and when told that he had no money, the appellant had hit him with a knife and the other had assaulted him with an iron rod. After assaulting the complainant the appellant had taken $20 from him and run away. The Court of Appeal having discussed ***Raqauqau*** and other decisions said as follows.

> *'[35] The adoption of the tariff in **Wise** (Supra) does not seem to be appropriate to the present case as it does not come within the nature of a home invasion category of aggravated robbery and is a situation which would come within the type of street mugging cases. Considering the objective seriousness of the offending and the degree of culpability, the harm and loss caused to the complainant it would be appropriate to follow the sentencing pattern suggested for instances of street mugging.'*

[14] Again the Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) dealt with a case of street mugging in the following terms.

> *'[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] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted upon wrong principle when he applied the tariff set for an entirely different category of cases to the facts of this case, which involved a low-threshold robbery committed on a street with no physical violence or weapons. 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.

[15] Therefore, following the sentencing guidelines set in ***Wise*** by the Magistrate was erroneous and then picking 04 years as the starting point without adducing any reasons was not even in compliance with ***Wise*** tariff guidelines.

[16] The learned Magistrate should have applied the sentencing tariff for *'street mugging'* of 18 months to 05 years in the matter of sentence of the respondents. However, though the learned Magistrate had chosen the wrong sentencing tariff, he had ended up with a sentence of 02 years in the range of sentences for aggravated robberies in the form of street mugging.

[17] 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)].

[18] Therefore, the state does not canvass the head sentence of 02 years. Although a little too low on the scale the head sentence of 02 years is within the sentencing tariff for 'street mugging'. The challenge by the state is to the decision of the learned Magistrate to suspend it for 03 years.

[19] In **State v Khan** [2019] FJCA 181; AAU139.2017 (3 October 2019) Calanchini PA said of suspended sentences currently applicable as follows.

"[5] The power of the court to suspend a sentence of imprisonment is found in section 26(1) of the Sentencing and Penalties Act 2009 (the Sentencing Act) which states:

> *"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances."*

"[6] The discretion to impose a suspended is wide in its terms and there are no further guidelines in the section to assist a court to determine under what circumstances it may be appropriate to suspend a sentence. The only assistance that is provided in the legislation is section 26(2) which states that:

> *"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceedings for more than one offence:-*
>
> *"(a) Does not exceed 3 years in the case of the High Court; or (b) Does not exceed 2 years in the case of the Magistrates Court.*

[20] Since the ultimate sentence was 02 years of imprisonment, undoubtedly the learned Magistrate had the statutory authority to suspend it. However, when a statute confers discretionary power on a judge, that discretion must be exercised in an open and transparent manner accompanied by tangible reasons. The exercise of the discretion should be capable of withstanding an objective scrutiny by the appellate court.

[21] The learned Magistrate had not given any specific reasons as to why he was satisfied that it was appropriate to suspend the sentence in the circumstances. In fact the learned Magistrate had not even given his mind to section 26(1) of the Sentencing and Penalties Act, 2009 in suspending the sentence of 02 years for 03 years. The Magistrate had also not been mindful of the observations in **Raqaugau v State** (supra) where it was held that irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offences characterised by threat of violence, use of weapons to intimidate or actual perpetration of violence in the course of robbery unless there are exceptional circumstances not to impose a custodial sentence. No such exceptional circumstances had been set out by the learned Magistrate in this case either.

[22] The appellate courts have taken the view that in the matter of sentence appeals it would not necessarily interfere merely because there is a perceived inadequacy in the sentence unless it is manifestly lenient as to warrant its intervention (see **Drotini v The State** AAU0001 of 2005S:24 March 2006 [2006] FJCA 26 and **State v Din** [2019] FJCA 200; AAU41.2012 (3 October 2019) and the quantum of the sentence alone can rarely be a ground for an intervention in appeal (see **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 and **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019)]. Similarly the appellate courts would not interfere with a sentence because it is at a high level but not so excessive as to justify its reduction [vide **Buli v State** [2001] FJLawRp 43; [2001] 1 FLR 202 (24 May 2001].

[23] Given the fact that the respondents had employed violence against the complainant in committing the robbery, in the absence of any exceptional circumstances, the learned Magistrate should not have suspended the sentence of 02 years of imprisonment. This is clearly a sentencing error. The suspension of the 02 year custodial sentence for 03 years had made the whole sentence manifestly lenient as to warrant the intervention by the appellate court.

[24] Therefore, there is clearly a reasonable prospect of success in this appeal against the suspension of the 02 year custodial sentence for 03 years by the learned Magistrate and I am inclined to allow leave to appeal on the ground of appeal urged by the state.

[25] However, I would like to place on record that though the full court also would be inclined to allow the appeal as a matter of principle, the court would be unlikely to enforce the custodial sentence of 02 years (sans the suspension) against the respondents at this stage, particularly given the lapse of time since the respondents were sentenced in March 2017 and the fact that period of suspension of the sentence is now over. Therefore, it is left to the state to decide whether it still wants to pursue the appeal before the full court.

Order

1. Leave to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL