

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL NO. AAU 081 OF 2019**  
**On Appeal from the Magistrate Court Extended Jurisdiction Case No. 1246 of 2015**

**BETWEEN** : **JEKOPE USA**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Gamalath, JA**  
**Prematilaka, JA**  
**Dayaratne, JA**

**Counsel** : **Mrs S. Tivao for the Appellant**  
**Ms S. Ratu for the Respondent**

**Date of Hearing** : **03 May, 2022**

**Date of Judgment** : **26 May, 2022**

## JUDGMENT

Gamalath, JA

- [1] The learned Magistrate at Suva, exercising the extended jurisdiction of the High Court, convicted the appellant for having committed the offence of Aggravated Robbery, contrary to Section 311(1) of the Crimes (Decree) Act No. 44 of 2009; the particulars of the offence had been that the appellant with another, on 5<sup>th</sup> of July 2015 at Raisara Road at Suva, robbed Mohammed Ifzal Khan, of his wallet valued at \$5.00 and cash valued at \$80.00 all to the total value of \$85.00.
- [2] The victim Mohammed Ifzal Khan is a taxi driver, and was working on 5 July 2015. Around 10.00am the appellant and another person hired his car to travel from Cunningham to Nailuva Road. As they approached Nailuva Road, the passengers wanted them to be driven towards Raisara Road, where he was asked to stop the taxi. No sooner had he stopped the taxi than the appellant punched him in his stomach, whilst the other passenger seated in the back, held him tightly by his neck. The appellant took away from Mohammed his wallet, the money and also make attempts to take away his mobile phone without success. After their accomplishments the appellant and the other passenger walked away leaving the victim at the scene.

Mohammed immediately informed his colleagues, who started to look around for the culprits and spotted the appellant walking towards Raiwai housing, and having been alerted the police arrived at the place and arrested the appellant. Up until now the other culprit is yet to be arrested.

### The Conviction and Sentence

- [3] Based on the evidence of the complainant, Mohammed, the learned Magistrate convicted the appellant on 27 June 2016 and sentenced him to 10 years imprisonment with a non-parole period of 8 years.

### The Appeal

- [4] Before this Court, the appellant is only canvassing the sentence of imprisonment on the basis that it is harsh, excessive and disproportionate to the comparatively low level of

aggression exerted on the victim while the offence was being committed. In giving his reasons for the impugned sentence of imprisonment the learned Magistrate had referred to the oft quoted *Wallace Wise* [2015] FJSC 7; CAV0004.2015 (24 April 2015), and the contention of the learned counsel for the appellant, as I understand is, that the list of factual circumstances referred to in *Wise* as those that could be considered as additional aggravating factors are [see para 26 of *Wise*] applicable only in cases of night invasion of dwelling houses and as such the reference to *Wise* as the basis for determining the quantum of the sentence is an illegality that deserves rectification by the Court of Appeal.

For the purpose of clarity those factual circumstances referred to in *Wise* are as follows:

*“[26] Sentences will be enhanced where additional aggravating factors are also present. Examples would be:*

- (i) offence committed during a home invasion.*
- (ii) in the middle of the night when victims might be at home asleep.*
- (iii) carried out with premeditation, or some planning.*
- (iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*
- (v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*
- (vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*
- (vii) the victims frightened were elderly or vulnerable persons such as small children.”* (emphasis is mine)

- [5] I find it rather difficult to agree with the contention. As can be seen, although *Wise* had been based on a grave case of night invasion of a dwelling house, if one examines the itemized additional aggravating factual circumstances referred to therein, one cannot rationally argue that the list of additional aggravating factors identified in *Wise* only represents examples of circumstances that are applicable in the instances of “night home invasions to commit aggravated robbery” alone. By the justifiable extension of its rationality, certain items in the list must be possible to be applied universally to attribute a complexion of severity to other cases of aggravated robbery as well, irrespective of the significance of the time factor and the locus of the crime upon which the Supreme Court built up the conceptual structure, not necessarily as a principle of law to be followed in its



strict sense, but as a matter relating to a factual matrix that has a direct relevance to the abhorrence to the rising numbers of the grave crime of invading homes in the night to rob the hapless and helpless inmates, whose protection through the judicial intervention has been viewed as a *sine quo non* for the stability in the contemporary societal context. (to make the position clearer I have placed above an emphasis on some of the items listed in *Wise*).

- [6] As such, if we are to be guided by *Wise* in deciding on the range of imprisonment based on aggravating factors that would reflect the gravity of the attendant circumstances of numerous cases of robbery of the taxi drivers, I hold the view that some of the items referred to in *Wise* as additional aggravating factual circumstances could be made use of for that purpose with equal force as it would be used in a case of night invasion of a dwelling house to commit robbery. As much as there should be clear condemnation of the crimes of robbery of dwelling houses in the night, the offences such as robbing a taxi driver who is engaged in a lawful, noble livelihood of providing transport to the general public of society should also attract condemnation with the sanctions that a judicial body can impose justifiably. To make the matter explicit one only needs to be creative in a judicial sense by adopting the additional aggravating factors laid down in *Wise* with the modifications that they warrant to meet the requirements to suit the situation. The counsel informed the Court that as a precautionary measure of granting protection from being vulnerable at the hands of feigned passengers who resort to violence in robbing the taxi drivers, they are exempted from wearing the seat belts lest that the belts be used to strangle them in the course of committing robbery. The dicta as contained in *Koroivuata v. The State* [2004] FJHC 139; HAA0064.2004 (20<sup>th</sup> August 2004) recognizing the gravity of the scourge had stated that

*“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. Taxi drivers are particularly exposed to the risk of robbery. They are defenceless victims. The risk of personal harm they take everyday 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”.*

- [7] The State invites this Court to embark on the exercise of laying down guiding principles that could be used for the purpose of accurately quantifying the sentences related to cases of robbery of distinct nature so that the issue of disparity can be averted, while attaining the required uniformity in sentencing on cases of similar characteristics. In my opinion the facts relating to this case does not warrant an exercise of such nature, particularly in view of the fact that as each case revolves around its own facts and circumstances, an exercise of such nature has to be scrupulously considered lest that that may compound the somewhat of a confusion already in existence.
- [8] Reverting to the instant appeal, on the issue of the impugned sentence, I am more concerned about another issue of a fundamental nature that is to do with the exercise of extended jurisdiction under which the learned magistrate operated in conducting the proceedings in the trial of this appeal. As already pointed out in imposing the sentence of 10 years the learned Magistrate was clearly persuaded by the dicta of *Wise*, when he quoted *Wise* in paragraph 4 of the sentencing decision (p.41 of the court record) stating that “We believe that offences of this nature should fall within the range of 8-16 years imprisonment”. The learned counsel for the State brought to our attention a very recent judgment of the Supreme Court in which it was decided that “the cases of this nature” as referred to in *Wise* should be understood as referring to cases of “aggravated robbery committed by invading houses in the night” and as such is inapplicable to the case in hand based on facts relating to robbing a taxi driver. [see *The State v. Eparama Tawake*, in the Supreme Court of Fiji, Criminal Petition No. CAV 0025 of 2019, (Court of Appeal No AAU 0013 of 2017)]. What I gathered from the submissions of both counsel is that in light of the above decision the period of 10 years imposed on the appellant is unsupportable.
- [9] I am in agreement with the submission of the counsel. Be that as it may, reverting back to my earlier reference on the fundamental issue of the exercise of extended jurisdiction by the learned magistrate in the instant appeal, is that he had lost sight of the fact that the sentence of 10 years handed down was the maximum punishment that is permissible by law, whenever he is functioning as a trial magistrate exercising his jurisdiction. (see section 7(1)(a) of the Criminal Procedure Act 2009, Cap 021A).



- [10] In relation to the instant appeal the issue that deserves an answer is whether the degree of aggression exerted on the victim taxi driver by the appellant assisted by the accomplice warrants the imposition of the maximum sentence of imprisonment permitted by law against the appellant? The learned Magistrate seems to have lost sight of that consideration and that in my view is tantamount to an error in imposing the present sentence and as such it is needed to be rectified.
- [11] According to the Counsel for the appellant he was sentenced to a total of 10 years imprisonment with a 8 year parole on 4 July 2016. Out of the total 10 years period of imprisonment the appellant would have served a jail term of 5 years 10 months and 27 days by 1<sup>st</sup> June 2022. The Court has verified this fact from the Corrections Authority who confirmed the information. He seems to have been maintaining an unblemished record as that nothing to dispute that fact had been brought to our attention. The level of aggression on the victim in this appeal, did not extend to cover certain selected applicable grave issues itemized in *Wise* and as such the 5 years 10 months and 27 days period of imprisonment could be considered as sufficient penance for the error that he had committed in this case.
- [12] In the light of such, the sentence of imprisonment is reduced from 10 years to 5 years 10 months and 27 days and on the appeal against the sentence is allowed accordingly and he shall be freed from prison on 1<sup>st</sup> June, 2022.

**Prematilaka, JA**

- [13] I have read in draft the judgment of Gamalath, JA and agree with orders proposed.

**Dayaratne, JA**


- [14] I have read the judgment of Gamalath, JA and agree with the reasoning and the conclusion arrived at by Gamalath, JA.

**Order of the Court**

1. The Sentence of imprisonment is reduced from 10 years to 5 years 10 months and 27 days.
2. The appellant to be freed from imprisonment from 1<sup>st</sup> June, 2022.
3. Appeal against sentence allowed.



**Hon. Justice S. Gamalath**  
**JUSTICE OF APPEAL**



**Hon. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**



**Hon. Justice V. Dayaratne**  
**JUSTICE OF APPEAL**