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

CRIMINAL APPEAL NO.AAU 007 of 2020
[High Court at Suva Case No. HAC 148 of 2018]

BETWEEN

: JOSEPH CHRISTOPHER

Appellant

AND : STATE

Respondent

Coram : Prematilaka, RJA

Counsel : Appellant in person
: Ms. B. Kantharia for the Respondent

Date of Hearing : 15 August 2023

Date of Ruling : 16 August 2023

RULING

[1] The appellant had been convicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 on 17 April 2016 at Namena Road, Nabua in the Central Division. The charge read as follows.

Statement of Offence

Aggravated Robbery: contrary to section 311(1)(b) of the Crimes Act 2009.

Particulars of Offence

JOSEPH CHRISTOPHER *also known as* ***JOSEPH CHRISTOPHER TAUKEI*** *on the 17th day of 2016 at Namena Road, Nabua in the Central Division robbed* ***DUSHYANT NARAYAN SINGH*** *of $3,400.00 cash, the property of* ***DUSHYANT NARAYAN SINGH***

[2] After the assessors' majority opinion of guilty, the learned High Court judge had convicted him as charged and sentenced the appellant on 19 September 2018 to an

imprisonment of 09 years, 06 months and 20 days with a non-parole period of 07 years, 06 months and 20 days 10 years.

[3] The appellant in person had untimely appealed against conviction and sentence. 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? (vide **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).

[4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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)].

[5] The delay is about 01 year, 02 months which is substantial. The appellant has stated that he lacked sufficient legal knowledge but had tendered his appeal to the Suva Correction Centre on 02 November 2018 which had failed to lodge it in the CA Registry. I cannot find any material to substantiate such an eventuality in the appeal record. 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.

[6] Prosecution case was based primarily on the evidence of the complainant, Mr. Dushyant Narayan Singh. According to him, the appellant after pulling and stabbing him grabbed his wallet containing $3400.00 and ran away. The appellant was unknown to him before but on the day of the incident i.e. 17 November 2016, the

appellant had been with him for more than 6 hours from 1 o'clock in the afternoon until the incident took place around 8 o'clock in the evening. Therefore, the witness had enough opportunities of identifying the appellant when he committed the offending.

[7] Witness Meena Kumari had seen the appellant coming into her house and getting seated on the sofa in her living room, together with the complainant at around 7 o'clock in the evening of 17 November 2016. The appellant was known to the witness and the witness was also known to the appellant as confirmed in the appellant's evidence. Praveen Kumar, who also had known the appellant before, had confirmed seeing the appellant together with the complainant on the evening of the particular day at Meena Kumari's place. Dr. P. Maharaj had stated that on examination the complainant he found two incision injuries, one on the right palm and the other on the left arm amongst other injuries.

[8] The appellant while giving evidence had taken up an *alibi* and called two witnesses in support thereof.

[9] The appellant urged the following grounds of appeal against conviction and sentence at the leave to appeal hearing.

> *'**Conviction:***
>
> ***Ground 1***
>
> *THAT I was been assaulted during the interview and I made my statement in my interview that why I was assaulted during the interview in regards to this case. I denied all the allegations.*
>
> ***Ground 2***
>
> *THAT the trial Judge upon asking the complainant how did he come to know me, the complainant said that the officers came to my house and showed a photo telling me that this Joseph Christopher and not Yusuf.*
>
> ***Ground 3***
>
> *THAT the Judge denied the applicant request in bringing investigating officer for cross examination in trial.*
>
> ***Ground 4***
>
> *THAT the Judge fail to consider the (medical report) inconsistency in the medical report and the statement of the complainant.*

Ground 5

THAT the trial Judge fail to consider the alibi witness namely Joey Krishna. Request by the applicant and was refused by the trial Judge.

Ground 6

THAT the trial Judge upon closing of the case the state had withdrawn the medical report. The DPP withdraw the report and they were only relying on the identification of the applicant.

Ground 7

THAT the trial Judge fail to consider the inconsistency in the victim's impact statement.

Ground 8

THAT the trial Judge in his judgment para 16 stated that the majority of accessors had obviously rejected the denial of the accused on the count "It was a question of believing whom".

Ground 9

THAT the charge is defective.

Sentence:

Ground 10

THAT the trial Judge fail to consider the applicant's written mitigation.

Ground 11

THAT the trial Judge sentenced the applicant using the wrong guideline.

01st ground of appeal

[10] This ground of appeal is frivolous in as much as the prosecution had not led in evidence or relied upon his cautioned interview to secure the conviction.

02nd ground of appeal

[11] The appellant seems to challenge the 'first time dock identification'. It appears from the evidence of the complainant (PW1) that he and the appellant had been together for a considerable time looking for vehicles for PW1 to buy one and both had been dropped off at the place of Meena Kumari (PW2) around 7.00am where they remained till about 8.00 pm. Finally, when PW1 was about to open the gate having

come out of the house to leave, the appellant had allegedly pulled him and attacked him with a knife and robbed him of his wallet containing $3400/-. However, it transpired that PW1 had initially identified the attacker by the name of Joseph but later as Yusuf. According to him, he had later come to know the name of the culprit as Joseph Christopher. There had not been a police ID parade. The appellant's suggestion to PW1 that the police had shown one photograph to him and told PW1 that it was Joseph Christopher, was not apparently accepted by PW1. Yet, there is no reference to this suggestion and rejection in the summing-up or the judgment.

[12] On the other hand, PW2 had seen PW1 and the appellant who was known by the name of Junior together at her house around 7.00 pm. After a while both walked out and PW1 had come screaming that he had been stabbed and robbed. PW3 (Praveen Kumar), a tenant of PW2 had seen PW1 and the appellant who was wearing a black cap seated on the sofa and talking to each other around 7.00 pm. He had known the appellant, Joseph Christopher as he had been previously introduced to him by one of his friends. As PW3 was coming out after a shower, he heard a scream and seen a person wearing a black cap running towards the back of the house. PW1 had said that he was stabbed and robbed by the appellant. The medical evidence had confirmed that PW1 had two incision injuries on the palm and the arm.

[13] The trial judge had administered Turnbull directions at paragraph 38 of the summing-up and considered the identification of the appellant at paragraphs 17 & 18 of the judgment and he had also referred to the inconsistencies highlighted regarding the name of the perpetrator PW1 had first mentioned to the police, as to where the cut injuries were (between PW1's evidence and medical evidence), the seating arrangements in the vehicle where the appellant and PW1 travelled at paragraph 4 & 39 of the summing-up. In fact the appellant had admitted under oath that he had gone to where the offence took place a few times before and knew Meena Kumari (PW2).

[14] In the light of this totality of evidence, I do not think that there is a real prospect of success on this appeal ground, for the identity of the appellant had been well established by multiple witnesses all of whom could not have got it wrong. The absence of a Police ID parade or so called the first time dock identification (for PW2

and PW3 it was not a first time dock identification but the recognition of a known person) by PW1 cannot materially alter this position.

03rd ground of appeal

[15] I have no material before me to substantiate the appellant's allegation that he was not permitted by the trial judge to call the investigating officer. In any event, the summing-up and the judgment do not suggest that the evidence of the investigating officer would have been crucial for the determination of guilt or otherwise of the appellant.

04th ground of appeal

[16] The trial judge had indeed highlighted the discrepancy between PW1's evidence as to where he was injured by the appellant (left palm and right shoulder) and that of the doctor (PW4) (the right palm and left arm) to the assessors at paragraph 39 of the summing-up and explained the same to himself at paragraph 17 of the judgment. He also directed the assessors as to how they should approach inconsistencies and discrepancies at paragraph 8-10 which appear contain a reasonable explanation in the light of the fact that PW1 immediately complained to PW2 and PW3 that he was stabbed by the appellant and on the same day the medical examination found injuries on him caused by a sharp weapon.

[17] The Court of Appeal said in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)

> *[14] ……No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
>
> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human*

being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.

05th ground of appeal

[18] From the summing-up what could be gathered is that the appellant had listed Joshlyn Krishna, the wife of Praveen Kumar (PW3) whom the appellant had said he did not know as an alibi witness (see paragraph 32 of the summing-up). However, there is nothing to indicate that the trial judge had refused to summon Joshlyn Krishna as requested by the appellant. Had Joshlyn Krishna been present at the crime scene as claimed by the appellant, she could not have supported his alibi that he was elsewhere at that time of the robbery. Nevertheless, the trial judge had addressed the assessors on the appellant's alibi evidence at paragraphs 32-34, 40 and 42 of the summing-up. The trial judge similar to the majority of assessors had not believed the appellant's alibi.

06th ground of appeal

[19] There does not appear to be any merit in the appellant's complaint that the prosecution withdrew the medical report at the stage of the closing address. The prosecution as well as the trial judge treated the medical report (PE1) as an item of evidence throughout the trial [see paragraphs 28(b) and 29 of the summing-up].

07th ground of appeal

[20] Victim impact statement is relevant only with regard to the sentence and not to the conviction. This ground is frivolous.

08th ground of appeal

[21] The appellant has committed the not so uncommon error of selecting a sentence or two of the summing-up for criticism. What the trial judge had said at paragraph 16 of the judgment is that the majority of assessors has rejected his denial in the form of his alibi because they had believed the prosecution witnesses as opposed to defence witnesses. Given the detections at paragraph 42 of the summing-up, the majority of assessors had not obviously thought that the defence version at least might be true. It

is clear that having rejected the appellant's narrative the majority of assessors have thought that the prosecution had proved its case beyond reasonable doubt.

09th ground of appeal

[22] The appellant contends that the particulars of the charge contained in the information had not specified that at the time of the robbery, the appellant had an offensive weapon with him. However, the charge mentions section 311(1)(b) of the Crimes Act. As opposed to the charge in the High Court, the charge preferred in the magistrates' court had specified that at the time of stealing the appellant used an offensive weapon namely a kitchen knife on the complainant.

[23] What makes a robbery an aggravated robbery is if it is committed by the accused in company with one or more other persons [311(1)(a)] or he commits the robbery and, at the time of the robbery, has an offensive weapon with him [311(1)(b)]. There is no allegation that the appellant committed this robbery in company with one or more other persons. Therefore, the only way in which the robbery could become an aggravated robbery was if at the time of the robbery, the appellant had an offensive weapon with him. Thus, the prosecution should have given particulars as to how the robbery of the complainant became an aggravated robbery.

[24] However, the critical question to answer is whether the appellant was misled in his defence by this omission or lapse on the part of the DPP or put in another way the main consideration in situations where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet (See **Veiyagavi v State** [2021] FJCA 183; AAU105.2015 (29 April 2021) at [43] to [51]). I have no doubt that the appellant knew the particulars of the charge very well and not in any way misled in his defence by the omission. This is clear from his cross-examination and submissions before this court. In any event, his defence was an alibi which was independent of the manner in which the aggravated robbery was committed. Even if the missing particulars had been included, his defence would still have been an alibi. No objection whatsoever had been raised at any stage of the proceedings based on a defective charge except for his bail pending appeal application in this court.

10th ground of appeal (sentence)

[25] Contrary to the appellant's assertion, the appellant does not seem to have filed any submissions in mitigation (see the sentencing order).

11th ground of appeal (sentence)

[26] The trial judge had applied sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which is between 08-16 years for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature). However, the overall picture that emerges from the facts and attendant circumstances is not that of a home invasion. The offending is somewhat akin to street mugging but has taken a more aggravated form and the ultimate sentence should reflect the gravity of the offending. Sentence must fit the crime.

[27] 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)]. Thus, I would leave it to the full court to consider what the appropriate sentence is.

[28] However, given the fact that the appellant had used a knife and caused injuries to the complainant while committing the robbery, his sentence as per **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) guidelines, might fall into the category of 3-7 years with a starting point of 05 years. However, his offending is not exactly an act of simple street mugging. In involves an enclosed premises.

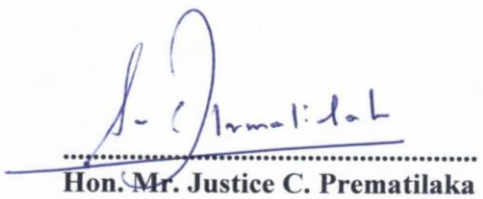
[29] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of

success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result. The other two factors are the likely time before the appeal hearing and the proportion of the original sentence which will have been served by the appellant when the appeal is heard.

[30] Although, the appellant has some 'likelihood of success' in his sentence appeal, I cannot say that the other two factors need necessarily be answered in the appellant's favour at this stage. His application looks somewhat premature at this point of time. However, at an appropriate time in the future he may lodge a fresh application for bail pending appeal if his appeal is not taken by the full court by then.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed on the 11th ground of appeal.
3. Bail pending appeal is refused.



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