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

CRIMINAL APPEAL NO. AAU0033 OF 2019
[In the High Court at Suva Case No. HAC 117 of 2018]

BETWEEN : **EMOSI BALEDROKADROKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Mr S. Waqainabete for the Appellant**
Mr E. Samisoni for the Respondent

Date of Hearing : **11th September, 2023**

Date of Judgment : **28th September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree with the proposed orders of Qetaki, JA.

Mataitoga, JA

[2] I concur with the reasons and conclusions of Qetaki, JA.

Qetaki, JA

Background

[3] The appellant is appealing against conviction and sentence against the decision of the High Court at Suva after he was charged with another (2nd accused and appellant on AAU 46 of 2019) on a single count of aggravated robbery contrary to section 311 (1)(a) of the Crimes Act,2009 committed on 11 March 2018 at Nasinu, Central Division.

[4] The information read as follows:

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311(1)(a) of the Crimes Act 2019.

Particulars of Offence

EMOSI BALEDROKADRTOKA and LOTE WAISALE on the 11th day of March 2018 at Nasinu in the Central Division, in the company of each other, robbed NILESH CHAND of $40 .00 Cash and an Alcatel mobile phone valued at $79.00 all to the total value of &119.00 the property of NILESH CHAND.

[5] After the summing up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court Judge had agreed with the assessors' opinion, convicted and sentenced him on 28 March 2019 to 9 years of imprisonment with a non-parole periods of 7 years (actual serving period being 8 years and 6 months with a non-parole period of 6 years 6 months after deducting the period of remand).

Leave Stage

[6] The appellant being aggrieved by the decision of the learned trial Judge lodged a timely appeal against conviction and sentence on 11 April 2019. Subsequently the Legal Aid Commission had filed an amended notice of appeal and written submissions on 1 February 2021.The State had filed written submissions on 3 February 2021 .The hearing of the leave application was by skype and before a single Judge. For the reasons given in a Ruling dated 10 September 2021 the leave to appeal against conviction was refused, while the leave to appeal against sentence was allowed.

[7] The Grounds asserted at the leave stage against conviction were renewed for the consideration of the Full Court. For the reasons stated in the Ruling, the learned trial judge refused the application for leave against conviction on the basis that in his view, the grounds have no reasonable prospects of success in a conviction appeal. He allowed leave to appeal against sentence on the basis that in his view, the ground has reasonable prospect for success in a sentence appeal, however, the final sentence is for the full court to decide.

The Law

[8] Section 23 of the Court of Appeal Act states-

"(1) The Court of Appeal-

(a) On any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice….

(b) …….

Provided that the Court notwithstanding that they are of opinion that the point raised in the appeal against conviction……might be decided in favour of the

appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.

(2)……

(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."

[9] The test for leave to appeal against sentence is not whether the sentence is wrong in law but whether the grounds of appeal are arguable points under the four principles set out in the case **Kim Nam Bae v The State,** [1999] FJCA 21; AAU0015.98s (26 February 1999). The four guidelines are: whether the learned sentencing judge:

(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 considerations.

Court of Appeal-Full Bench

[10] **Appellant's Grounds of appeal-** The appellant filed a Renewal Notice of Appeal against Conviction which was dated 4th October 2021.The grounds are:

"Ground 1

That the learned trial Judge erred in law and fact when he failed to warn assessors and himself of the danger in accepting the evidence of PW 2 and PW 3-Vasemaca Lewatubekoro and Unaisi Nakalevu and ultimately causing the conviction to be unsafe.

(I note from the Record of the High Court that PW 2 is Unaisi Nakalevu who is, according to evidence, Vasemaca's mother. Vasemaca is PW 3. This an error in identification of witness's evidence which confuses the Court.PW 2's evidence are at pages 253-259 of the Record of the High Court. PW 3's evidence are at pages 259-267

Ground 2

That the learned trial Judge erred in law and fact when he permitted evidence of subsequent behavior of the accused which amounted to speculative evidence which caused a grave miscarriage of justice and prejudiced the appellant."

[11] The appellant's ground of appeal against sentence (Ground 3 of Appeal) as allowed by the single Judge is:

"Ground 3

That the learned Sentencing Judge erred in law and in fact when he sentenced the appellant using the wrong sentencing principle resulting in an imprisonment term that was harsh and excessive."

[12] **Facts**: The learned trial Judge had summarized the facts of the case in the sentencing order as follows:

"*It was proved during the cause of the hearing, that the two of you have grabbed the complainant and dragged him to the nearby car-wash, when the complainant was walking to his home in the evening of 11th of March 2018.The time was around 8.00pm to 8. 30pm.Having dragged him to the car-wash, one of you have punched him on his face and then tried to strangle him. Other one then took the money and mobile phone of the complainant and left the scene. You have both committed this offence in company of each other. Therefore, each of your culpability and degree of responsibility for inflicting of violence and robbing the complainant are the same."*

[13] By letter dated 17 March 2023 to the Registrar, Court of Appeal, the Legal Aid Commission (as per Mr Seremaia K Waqainabete) indicated the appellant's reliance will be placed on submissions made at the leave stage contained at pages 68 to 78 of the appeal record for the hearing of the appeal before the Full Court of Appeal.

[14] In support of Ground 1, it was submitted that:

(a) The prosecution had relied heavily on the evidence of PW2 (Vasemaca Lewatubekoro) and PW3 (Unaisi Nakalevu). PW2 was the eye witness to the alleged offending with PW1 (Nilesh Chand) who was not able to positively identify the perpetrators who allegedly robbed him on 11th March 2018. Reliance was also placed by the prosecution on PW3's evidence. The Summing Up bears this out;

(b) A reading of paragraph of the Summing Up clearly reveals that there is improper motive on the part of PW 2 and PW 3 in the giving of their statement to the police on account of their brother/son also being arrested for this case;

(c) The statement was recorded two days after the alleged incident and coincided with the lodging of the complaint by PW 1(see page 6 of Summing Up (top paragraph;

(d) It begs the question as to why PW 2 and PW 3's complaint was lodged two days after, given that PW 2 had witnessed the incident and had time to report the matter earlier than 13 March;

(e) At page 4, paragraph 11 of judgment the learned judge did not find any issue with above, stating it did not discredit evidence of PW 2 (Vasemaca Lewatubekoro);

(f) In view of (d) above, the learned Judge should have given a warning to the assessors or himself, rather than simply stating the above, without fully analyzing that piece of evidence given it was crucial to the State's case;

(g) The fact that the learned Judge had made an entry pertaining to this in his judgment indicates that he had drawn his mind on it which makes it all the more important to have had a warning attached to the evidence of PW 2 and PW 3.

[15] The appellant cited the case **Mudaliar v State** FJSC 25; CAV 0001.2007 relevant to accomplice evidence, and also discussed warnings that should accompany witnesses' evidence that may be tainted by "*improper motive*". The following paragraphs from the case were quoted to support the appellant's contention:

> *"70. The trial judge did remind the assessors that Abihikesh had been granted immunity from prosecution. He told them that this related to his possibly having been implicate in the abortion itself. What he failed to do was to explain to the assessors precisely why Abikesh's evidenc4 may be tainted by an improper motive. That is a fundamental aspect of any accomplice warning, but it applies with equal force to those cases in which, though technically an accomplice warning is not required, a warning closely analogous thereto should be given.*
>
> *71. The matter is dealt with at some length in Archibald Criminal Pleading Evidence and Practice 2007 at paragraph 4.404n. In R v Beck 1 WLR 461 Ackner LJ giving the judgment of the Court of Appeal referred to "the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an "improper motive". Beck had been repeatedly applied in England."*

[16] In **Ram v State** [2012] FJCA 50; AAU0087.2010 was also cited in support when "*witnesses with an interest* "are identified. That is a witnesses whose evidence should be considered with caution. Since PW 2 and PW 3 are witnesses of such a character in that the giving of their statement made allowance for the release of their brother/son from being charged and prosecuted for offending. This argument seems to suggest that PW 2 and PW 3 gave the evidence in order to obtain some benefit or protect an interest to which they were personally and closely associated with, in this case the release of their brother and son, Eremasi from police custody.

[17] This ground of appeal contends that the trial judge had failed to warn the assessors and himself on the danger of accepting the evidence of Vasemaca Lewatubekoro and Unaisi Nakalevu. Vasemaca was an eye witness to the incidents complained of by PW 1. There is no indication at all in the summing up or the judgment that the defence had raised the issue of credibility of Unaisi's or Vasemaca's evidence. If this was important, the defence was at liberty to draw the learned trial judges' attention to the fact that these witnesses

were "*interested*" and they had a sinister motive to falsely implicate the appellant. In brief, the point was not taken up at the trial and is an afterthought.

[18] The necessity for a warning the assessors is dependent on the facts and circumstances of each and every case given how the defence had met the prosecution case. Also, there is no presumption that whenever a witness has an interest in a matter, he or she should be deemed to be an unreliable witness with an interest and if a witness has an interest or some alleged sinister motive his or her evidence would always be tainted (see **Anthony v State** [2016] FJCA 62; AAU0027.2012 (27 May 2016). The case of a mother being a witness in a child rape case in which her daughter is the victim, is an illustration/example in point.

[19] In the circumstances of this case, the learned trial judge had decided that:

> *"11. Making her statement to the police after her brother was arrested in connection of this matter, does not establish anything to discredit the evidence of Vasemaca."*

[20] Perhaps it needs to be emphasized that the appellant, Vasemaca and the co-accused had grown up together in the neighborhood. The appellant is in fact a cousin of Vasemaca. There is a relationship linking them to each other. As the learned single judge observed:

> *"15. ……. Therefore, the assumption that somehow or other PW 2 falsely implicated the appellant and the co-accused to save her brother Eremasi is farfetched. It is extremely unlikely that PW 2 falsely implicated the appellant and the co accused with whom she shared the family relationship and a close acquaintance respectively simply to save her brother. What is more plausible is that because the appellant and co-accused were either related or well known to PW 2, she initially did not want to inform the police of their involvement in the offending despite having seen it. However, when the police arrested her own brother for the offending on suspicion, she would have decided to disclose what she actually saw to the police."*

[21] Ground 1 of the appeal fails. There is no miscarriage of justice as a result.

[22] Ground 2 is based on what is termed as "*speculative evidence*" which is dealt with in the Summing up at page 103 of Record, and paragraphs 64 and 65 of (page 17) of the Summing Up). The appellant's reliance on **Rokete v State** [2019] FJCA 49, appear to be misconceived as the facts in that case is different, the case does not apply here. The learned trial judge had placed the idea of speculative evidence alleged into proper perspective in paragraph 65 of the Summing Up also:

> *"64. You may recall that Vasmaca said in her evidence that two relatives of the first accused approached her on the 9th and 11th of March 2019 and requested her not to give evidence against the first accused. However, during cross-examination, she said it that was only the relatives and not the first accused who approached her.*
>
> *65. This form of evidence is known as evidence of subsequent behavior of the accused. If you accept and conclude that the first accused was involved in sending the two relatives to Vasemaca, then you can take that into consideration. However, it is not direct evidence that can establish that the accused had committed the offence as alleged. You are allowed to take this evidence into your consideration when you consider the whole of the evidence presented during the trial. However, you must be mindful that such behavior of the accused only cannot make him guilty for this offence. He may have some other reasons to act like this. You have to take into consideration all of these circumstances when you consider the evidence of subsequent behavior of the accused."*

[23] Ground 2 of the appeal fails. There is no miscarriage of justice as a result.

[24] **Appeal Against Sentence** - On Ground 3, the appellant argues that the sentence imposed by the learned trial judge is harsh and excessive because he had applied the wrong tariff. The trial judge had not followed the sentencing tariff of street mugging, and the application alleges that the complainant was walking down to his home in the evening as such could fall within the range of sentencing offences of "*street mugging*" and the sentencing tariff used by the sentencing judge was wrong. It is argued that the sentence imposed is harsh and excessive because the trial judge had applied the wrong principle and sentencing process.

[25] The learned trial judge applied the tariff in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015(24 April 2015) for the offence of aggravated robbery in the form of home invasion in the night, with accompanying violence perpetrated on the inmates in committing the robbery, that is 8 to 16 years of imprisonment.

[26] The factual background of this case is different from the circumstances before the Supreme Court in **Wise** (supra). This case accords more with some form of street mugging where the complainant had suffered injuries at the hands of the assailants. The appellant has 3 previous convictions recorded against his name.

[27] The learned trial judge did not apply the tariff set for street mugging cases, namely 18 moths to 5 years of imprisonment set in **Raqauqau v State** [2008] FJCA 34; AAU0100.2017 (4 August 2008) and as expressed in **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020). With respect to **Raqauqau** (supra), the learned single judge stated in his Ruling at the leave stage that:

> *"[23] …… the Court of appeal set out broader circumstances where the upper limit of 5 years for street mugging may not be appropriate and could be further increased:*
>
> *The sentencing bracket was 18 months or years, but the upper limit of 5 years might not be appropriate "**if the offence are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if a particular 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."*

[28] In **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020), this Court held that:

> *"[15] The learned single Justice of Appeal, in giving leave to appeal, distinguishes facts in **Wallace Wise** (supra) which involved a home invasion as opposed to the facts in **Raqauqau v State**……where **aggravated robbery** was committed on a person on the street by two accused using low-level physical violence.*
>
> *[16] Low threshold robbery with or without less physical violence, is sometimes referred to as street-mugging informally in common parlance. The range of penalty for that type of offence was set at 18 months to five years by the Fiji Court of Appeal in **Raqauqau** case (supra)..*
>
> *[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."*

[29] It is established from the authorities that the learned trial judge was in error in applying **Wise** or in departing from the principles and tariff applicable to street mugging without giving reasons for so doing. In reviewing a sentence on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered: **Koroivuki v The State** [2006] FJSC 5; CAV 0006U.2005S (4 May 2006). This Court, in determining whether the sentencing discretion has miscarried, must assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, that the sentence imposed is within the permissible range: **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[30] There has been some development in the sentencing guidelines for street mugging after the appellant was sentenced. After approximately seven months from the Ruling of the learned single judge, on 28 April 2022, the Supreme Court established a Guideline Judgment in **The State v Eparama Tawake** [2022] FJSC 22; CAV0025 of 2019 which adopted the methodology of the Sentencing Council of England. This guideline was not available at the time of sentencing in this case, and the question of "*retrospectivity*" in its application in this case has to be considered.

[31] Section 4(2) (b) of the Sentencing and Penalties Act 2009 applies in this case which states: *"4(2) In sentencing offenders a court must have regard to-…….(b) current sentencing practice and the terms of any applicable guideline judgment;"…*The case does not give any guide on the "retrospectivity of its application. Some direction was made in the recent decision of this Court in **Jone Seru v The State** [2023] FJCA 67, No. AAU115 of 2017 where the Court illustrated some guide on the approach to be taken at paragraph 47 of the judgment when dealing with retrospectivity by applying a two-pronged test, in the absence of any guiding authority by the Supreme Court. Firstly, it must be ascertained whether or not the appellant had filed his appeal against sentence before the date of the judgment is delivered (that is guideline judgment).Secondly, whether or not the application of the new guideline judgement would be favorable to the appellant?

[32] The steps are set out in paragraphs [25] and [26] of the Guideline Judgment in Tawake is as follows:

> *"[25] For my part, I think that this framework, suitably adapted to meet the needs of Fiji, should be adopted. There is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence, and if the offence is one of aggravated robbery, which of the forms of aggravated robbery the offence took. When it comes to the level of harm suffered by the victim, there should be three different levels. The harm should be characterized as high in those cases where serious physical or psychological harm (or both) has been suffered by the victim. The harm should be characterized as low in those cases where no or only minimal physical or psychological harm was suffered by the victim. The harm should be characterized as medium in those cases in which, in the judge's opinion, the harm falls between high and low.*
>
> *[26] Once Court has identified the level of harm suffered by the victim, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous convictions….."*

[33] Applying the test to this case, the appellant filed a timely appeal against conviction on 2nd April 2019.The Legal Aid Commission filed an application for enlargement of time to appeal against sentence on 12 January 2021.This case satisfies the first aspect of the test

and as to the second, whether or not the application of the new guideline judgment would be more favorable to the appellant, requires a closer examination of the forms of offending.

[34] Considering steps set out above (paragraph [32], and applying such to this case, the learned trial judge in summing up had explained he manner of assaults the complainant suffered which include being:

(i) Grabbed;

(ii) Dragged across the road;

(iii) Punched twice on the face;

(iv) Strangled, and

(v) Bleeding from his head.

[35] Having considered the guide, I agree with the respondent that these assaults on the complainant should be classified as being of "*medium*" harm. The corresponding tariff from the Table in the Sentencing Guideline would then be a starting point of 5 years with a sentencing range between 3-7 years. It is also evident that, the appellant would enjoy a more favorable outcome under the new guideline judgment. As such, retrospectivity should apply in this case.

[36] Considering the sentencing principles outlined, and in exercise of the powers of this Court under section 23(3) of the Court of Appeal Act, the existing sentence passed by the learned trial judge is hereby quashed. The appellant is sentenced to 6 years and 9 months imprisonment with a no-parole period of 4 years and 9 months, effective from 28 March 2019.

Conclusion

[37] The appellant's appeal against conviction is disallowed. I am satisfied that under all the circumstances, the verdict cannot be set aside on any of the grounds specified under section 23(1)(a) of the Court of Appeal Act. The appeal against sentence is allowed there

being an error/mistake, the learned judge applying the wrong sentencing principles and guideline.

Orders of the Court:

1. *Appeal against conviction is refused.*
2. *Appeal against sentence is allowed.*
3. *Current sentence of 8 years and 6 months with a non-parole period of 6 years and 6 months is quashed.*
4. *Appellant is sentenced to 6 years and 9 months imprisonment with a non-parole period of 4 years and 9 months, effective from 28 March 2019.*

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI