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

CRIMINAL APPEAL NO. AAU0046 OF 2019
[In the High Court at Suva Case No. HAC 117 of 2018]

BETWEEN : **LOTE WAISELE**

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 orders proposed by Qetaki, JA.

Mataitoga, JA

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

Qetaki, JA

Background

[3] The appellant is appealing a decision of the High Court at Suva after he was convicted and sentenced with another (1st accused and appellant in AAU No.0033 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,2009.*
>
> *Particulars of Offence*
>
> ***EMOSI BALEDROKADROKA*** *and* ***LOTE WAISALE*** *on the 11th day of March 2011 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] At the conclusion of a three (3) day trial from 11th to 13th March 2019. The learned trial judge, having concurred with the unanimous guilty opinion of the assessors, convicted the appellant on the 15th day of March 2019.

[6] On 28th March 2019, the learned trial judge then sentenced the appellant to 8 years and 9 months, with a non-parole period of 06 years and 9 months.

Leave Stage

[7] The appellant being aggrieved by the decision of the learned trial judge personally lodged a timely appeal against conviction on 2 April 2019. The Legal Aid Commission had subsequently filed an Amended Notice of Appeal against Conviction and An Application for Enlargement of Time to Appeal against Sentence along with written submissions on 12 January 2021. The State had filed its written submissions on 2 September 2021.Both parties participated through counsel at the oral hearing *via* Skype.

[8] At leave stage five (5) grounds of appeal (4 grounds against conviction and 1 ground against sentence) were advanced, as follows:

Grounds against Conviction

Ground 1

That the learned trial judge may have fallen into an error in law and fact at Summing Up in not cautioning the assessors the dangers of dock identification and/or recognition absent of any prior identification parade thus causing a substantial miscarriage of justice.

Ground 2

That the learned trial judge may have fallen into an error in law and in fact in not directing the assessors to be cautious of the evidence provided by the prosecution witnesses namely Vasemaca Lewatubekoro and Unaisi Nakalevu for their motive in implicating the appellant.

Ground 3

That the learned trial judge may have fallen into an error in law and fact to convict the appellant without considering and assessing independently the totality of the evidence regarding the issue of identification and/or recognition thus causing a substantial miscarriage of justice.

Ground 4

That the learned trial judge may have fallen into an error in law and fact to convict the appellant without considering and assessing independently the totality of the evidence regarding the motive by the prosecution witness namely Vaseva Lewatubekoro and Unaisi Nakalevu to implicate the appellant thus causing a substantial miscarriage of justice.

Ground Against Sentence

That the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence of aggravated robbery of this nature.

[9] On the application for enlargement of time to appeal against sentence, the learned trial judge having considered the explanation as to the causes of delay and the legal principles applicable to the application, accepted the appellant's explanation (pages 9-11 of Ruling), and proceeded to consider the merits of the grounds and their prospects of success.

[10] The learned single judge dealt with Grounds 1 and 3 against conviction together. They were concerned with the learned trial judge not cautioning the assessors on dock identification without holding an identification parade, and the trial judge not having independently considered the issue of identification. The argument is based on the assumption that there was no identification of the appellant at the crime scene by any of the witnesses and therefore there should have been an identification parade and because there was no ID parade, dock identification should not have been permitted and at least the assessors should have been cautioned.

[11] Grounds 2 and 4 (on conviction) were similarly considered together by the learned single judge. In these the appellant's counsel joins issue with the failure of the trial judge to direct the assessors to be cautious of the evidence of PW 2, Unaisi Nakalevu and PW 3, Vasermaca Lewatubekoro, for their motive to implicate the applicant in the offending.

[12] For the reasons stated in the Ruling, the learned trial judge refused the appellant's application for leave against conviction on the basis that in his view, they have no reasonable prospect of success in a conviction appeal. He allowed the appellant's application for leave to appeal against sentence on the basis that in his view, the ground has reasonable prospect for success in sentence appeal, however the final sentence if for the full court to decide.

Court of Appel -Full Bench

[13] The appellant filed the Appellant's Renewal Application to Appeal against Conviction on 15 September 2021. The new grounds are not similar to, although related to the grounds at leave stage. Two grounds are asserted against conviction:

Ground 1:

That the learned judge erred in law and in fact in not considering the considerable inconsistency in the account of PW 1 Nilesh and PW 2 Vasemaca in relation to the clothes that the perpetrators wore at the material time that could amount to an honest but mistaken identity.

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 is 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 (Vasemaca) are at pages 259-267 of the Record of the High Court.

Ground 2:

That the learned Appeal judges erred in law and in fact when they did not properly consider the ulterior motive of PW 2 Vasemaca and PW 3 Unaisi given their very close relationship with Eremasi Koroi who had been arrested as a suspect in connection with this case who happened to be their brother and son respectively.

The error in identification of witnesses commented on above, is repeated in this ground. It is a matter of concern.

[14] The ground against sentence was allowed by the single judge, there being reasonable prospect of success in a sentence appeal, although the final sentence is a matter for the full court.

Against Sentence

Ground 1

That the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to sentencing guideline and applicable tariff for the offence of aggravated robbery of this nature.

I note that the Sentencing was by a High Court Judge and not a Magistrate. There is an error which is of concern given the difference in the respective jurisdictions under which a Magistrate and a Judge work under.

[15] **Facts:** The learned trial judge had summerised 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 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 than 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."*

[16] By letter dated 17 March 2023 to the Registrar, Court of Appeal, the Legal Aid Commission (per Mr Seremaia Waqainabete) indicated that reliance will be placed on submissions made at the leave stage contained at pages 28 to 44 of the appeal record for the hearing of the appeal before the Full Court of Appeal. The respondent filed its

Consolidated Submissions on 28 August 2023, and also relied on its submission made at the leave stage.

[17] The central issues in this appeal relate to issues of identification, the appellant challenging the learned trial judge's reliance on the evidence of Nilesh Chand, PW 1 and PW 3, Vasemaca as inconsistent and should not be relied upon. Additionally, it is alleged that Vasemaca and PW 2 Unaisi Nakalevu, have an interest/ motive in implicating the appellant. Also, the complaint by the appellant that the sentence was harsh and excessive.

The Law

[18] Section 23 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 may 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."*

Discussion

[19] **Grounds 1 and 2 against conviction**. The appellant alleges that the learned trial judge erred in law and in fact in not considering the "*considerable inconsistencies*" in the

evidence of PW 1 (Nilesh Chand) and PW 2 (corrected to PW 3), (Vasemaca) in the clothes that the perpetrators wore at the material time that would amount to an honest and mistaken identity. It is challenging the recognition of the appellant and his co-accused by both PW 1 and PW 2 (corrected to PW 3 Vasemaca), especially the latter as the case against the appellant mainly depended on the correctness of the recognition of the robbers.

[20] In considering these grounds, I am mindful that the defense has been that the appellant and the co-accused denied being at the crime scene at the material time and that Vasemaca (PW 3) may have mistakenly identified the two robbers as the two accused.

[21] The appellant has also raised an issue which was dismissed at the leave stage that, of the trial judge not having independently considered the identification of the appellant. The thrust of that argument/submission is that there was no identification of the appellant at the crime scene by any of the witnesses and therefore there should have been an identification parade, and because there was no identification parade, the dock identification should not have been permitted, without the assessors having been cautioned as to the risks associated with that type of identification.

[22] Contrary to the appellant's contentions, the Summing Up by the learned trial judge had adequately covered the appellant's concern –See pages 100-102 of the Record of the High Court of Fiji, at pages 100-102, and specifically paragraphs 55, 56,57,58,59 and 60 of the Summing Up under the heading "*Evidence of Prosecution*"

[23] Subsequent to that, the learned trial judge had considered and addressed the contentious matter raised by the defence on PW 1 and PW 3's (Vasemaca) recognition of the appellant and the co-accused, including the clothing of each of the accused in the judgment at pages 105 to 109 of the Record of the High Court, as follows:

> *"7. The learned Counsel for the second accused examined Vasemaca about the inconsistent nature between her evidence and the statement given to the police in relation to the colour of the t-shirt that the second accused was wearing that evening. Vasemaca had stated in her statement to the police, that the second accused was dressed in a blue colour t-shirt. However, she said in court that it*

was like a grey colour. According to her evidence she had seen Emosi and Lote few minutes before the incident took place. They were seated under a mango tree when she walked down to the canteen. Emosi had made a joke at her. She has known the two accused since Emosi is one of her cousins and Lote had been grown up together with her in the neighbourhood. There she knew the two accused when she saw them under the mango tree.

8. *Mr. Nitesh Chand in his evidence explained the physical descriptions of the two robbers which match the physical descriptions of the two accused given by Vasemaca in her evidence. Apart from the colour of the t-shirt that the second accused was dressed in, her description of the colour and the nature of the clothings that the two accused were dressed in matches with the description given by Nilesh. Nilesh said that one robber was dressed in red vest and a short and other one was dressed in a grey colour t-shirt and a short. Vasemaca in her evidence said that Emosi was dressed in a red colour vest and a short and Lote was dressed in grey colour t-shirt. She had stated in the statement made to the police the same description of the colour and nature of the clothing apart from the colour of the second accused's t-shirt. Hence, I do not find this inconsistency is fundamentally affecting the credibility of the evidence given by Vasemaca.*

9. *Moreover, the learned counsel for the defence in their closing addresses urged that Nilesh never said that Vasemaca had called him by his name and waived at him while he was walking along the road. Having closely considered the evidence given by Vasemaca, I do not find that she had stated that Nilesh responded to her call and waved her back. Therefore, the inconsistency has no adverse effect to the credibility and reliability of the evidence of Vasemaca.*

10. *Vasemaca explained that Emosi was holding Nilesh from his waist and Lote was squeezing the mouth of Nilesh when they dragged Nilesh to the car wash. Nilesh in his evidence did not specifically explain the details of the dragging just said that he was dragged across to the car-wash. Then he felt down and the robber in the red vest punched him twice on his face. The same person then tried to strangle him. The other robber who was dressed in grey colour t-shirt took his money, mobile phone and the key of the taxi. It is obvious that a person cannot see everything in details when he is suddenly encountered with such an assault in the night. I find the evidence of Vasemaca and Nilesh are actually consistent with each other in respect of the main issues of this incident. She has seen the robbers were punching Nilesh. This incident took place in the dark. The light of the car did not last more than a minute or two. Even though the place was dark, Vasemaca knew the two robbers as Emosi and Lote as she had been observing* them since she met them under the mango tree until this incident took place."

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

12. ***In view of these reasons, I accept the evidence of Vasemaca and Nilesh as reliable and credible evidence. I accordingly accept their evidence as true evidence."***

[24] I have also taken the opportunity to consider the evidence adduced at the trial by Nilesh and Vasemaca, as well as the other evidence by the prosecution witnesses. There are no inconsistencies in evidence of PW 1 and PW 3 (Vasemaca), except as pointed out by the learned trial judge. Those inconsistencies, do not go to the heart of the matter. They are negligible or insignificant to cause or raise doubt on the identification of the accused. The defence has always been that the appellant was not at the crime scene on the day Nilesh was attacked and robbed. Vasemaca's evidence on the appellant's identity was not faulted. The ground fails as it lacks merit. There is no miscarriage of justice as a result.

[25] The appellant, in Ground 2 of the appeal takes issue with the failure of the trial Magistrate (substitute to trial Judge) to direct the assessors to be cautious of the evidence of PW 2 and PW 3 for their motive to implicate the appellant in the offending.

[26] The contention is also that the learned trial judge had failed to warn the assessors and himself of the danger of accepting the evidence of PW 3 (the daughter of PW 2) and PW 2 (the mother of PW 3), who are main witnesses for the prosecution, allegedly due to their interest in protecting one Eremasi under the cover of their close family ties being a brother to PW 3, and son of PW 2.

[27] It was Eremasi who was initially arrested and detained by the police as suspect in this mugging incident, and who was released by the police after PW 2 and PW 3 had made statements to the police on what they knew and saw which implicated the appellant and his co-accused leading to their arrest.

[28] There are inherent difficulties in advancing this ground of appeal. Firstly, there are no indications in the summing up and judgment of the learned trial judge that the defence

raised the issue of credibility of PW 2's and PW 3's evidences at the trial. PW 2 (corrected to PW 3) is actually an eye witness to the incidents complained of by PW 1, Nilesh Chand.

[29] If this was important to the defence, the defence was at liberty to draw the learned trial judge's 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 and is an afterthought. The defence had been conducted on the basis of mistaken identity. That the accused was not at the crime scene at the material time when Nilesh was attacked and robbed.

[30] 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.

[31] With regard to the evidence of Vasemaca, 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 on connection of this matter, does not establish anything to discredit the evidence of Vasemaca."

[32] The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions on their view of the facts. Ultimately, what matters is whether the trial judge is satisfied with the evidence of the prosecution witnesses (vide **Rokonabete v The State** [2006] FJCA 85; AAU0048.2005S (22 March 2006); **Naisua v State** [2016] FJCA *24; AAU0088.2011; AAU0096.2011; AAU0057.2011 (26 February 2016).*

[33] It needs to be repeated that the appellant is known to both PW 2 and PW 3 years before this incident leading to the complaint occurred as adduced in their evidence at the trial. In as much as Eremasi is PW 3's sister, the appellant had been growing up with her in the neighborhood, and the co-accused is PW 3's cousin.

[34] On this issue, the learned single judge observed that, the assumption that somehow or other PW 2 falsely implicated the appellant and the co-accused to save her brother Eremasi is far-fetched, and is unlikely under the circumstances. It is unlikely Vasemaca would falsely implicate the appellant and co-accused with whom she shared a close acquaintance and the family relationship respectively simply to save her brother.

[35] What is more plausible is that because the appellant and co-accused were either well known to Vasemaca or related to her, she did not want to initially 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.

[36] I hold that Ground 2 fails as it lacks merit. There is no miscarriage of justice as a result.

[37] **Ground against sentence**. The appellant argues that the sentence imposed is harsh and excessive because the learned trial Magistrate (corrected to judge), had applied the wrong tariff. The trial judge had not followed the sentencing tariff for street – mugging.

[39] The learned trial judge applied the tariff in **Wise v State** [2015] FJSC 7; CAV0004.2015 (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.

[40] The factual background and circumstances of this case are different from that in **Wise's** case that was before the Supreme Court. This case accords more with some form of street mugging where the complainant had suffered injuries at the hands of the assailants.

[41] The learned trial judge took into account a wrong principle i.e. he did not take into account the accepted tariff for street mugging types of robberies, at the time of offending. The learned single judge had sufficiently dealt with this ground at the leave stage.

[42] There has been some development in the *"sentencing guideline"* for street mugging. Some seven months after the Ruling, on 28 April 2022, the Supreme Court pronounced a Guideline judgment in **The State v Eparama Tawake** [2022] FJSC 22; Criminal Petition No. CAV 0025 of 2019, which adopted the methodology of the Sentencing Council of England for robbery. This Guideline Judgment was not available at the sentencing in this case, and the question of "*retrospectivity*" in its application must be considered.

[43] Section 4(2)(b) of the Sentencing and Penalties Act 2009 seems to suggest that **Eparama Tawake** (supra) should apply to this case The case does not make any pronouncement on the issue of retrospectivity of its application, and if any condition is to attach. Some direction was made in the recent decision of **Jone Seru v The State** [2023] FJCA 67; Criminal Appeal No.AAU115 of 2017, where this 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 judgment would be more favorable to the appellant.

[44] In 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 test. As to the second test, a closer examination of the form of the offending to determine whether the new guideline judgment would be more favorable to the appellant is required.

[45] The steps are set out in paragraphs [25] and [26] of the Guideline Judgment 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 reelected in the nature of the offence, and if his 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 the 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 pleaded guilty or not guilty and irrespective of previous convictions……."

[46] For the First Step in this case, the learned trial judge in summing up had explained the manner of assaults that the complainant suffered which included being:

(i) Grabbed;
(ii) Dragged across the road;
(iii) Punched twice on the face;
(iv) Strangled, and
(v) Bleeding from his head.

[47] 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 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 have enjoyed a more favorable outcome under the new guideline judgment, as such retrospectivity should apply.

[48] Taking all the considerations into account and in the exercise of the powers conferred on this Court by section 23(3) of the Court of Appeal Act, the existing sentence is quashed The appellant is sentenced of 6 years and 9 months imprisonment, with a non-parole period of 4 years and 9 months effective from 28 March 2019.

Conclusion

[49] The appellant's appeal against conviction is disallowed 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 as there has been an error/ mistake, the learned judge applying the wrong sentencing principle/guideline.

[50] The appellant's sentence is set aside and new sentence of 6 years 9 months with non-parole of 4 years effective from 28 March 2019.

Orders of the Court:

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

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL