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

CRIMINAL APPEAL NO. AAU0035 OF 2019
[Suva Criminal Action No. HAC 430 of 2016]

BETWEEN : **MOAPE ROKORAICEBE**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Appellant in person**
Ms S. Shameem for the Respondent

Date of Hearing : **3 November, 2023**

Date of Judgment : **29 November, 2023**

JUDGMENT

Prematilaka, RJA

[1] I am in agreement with the outcome proposed by Qetaki, JA.

Qetaki, JA

[2] The appellant (second accused in the High Court) had been indicted with another (first accused in the High Court and appellant in AAU 035 of 2019) of the High Court in Suva on one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act 2009; one count of abduction contrary to section 282(a) of the Crimes Act 2009 and one count of damaging property contrary to section 369(1) Crimes Act of 2009 committed on 24th November 2016, at Kasavu, Nausori in the Central Division.

[3] Following the Summing Up on 13 March 2019, the assessors expressed a unanimous opinion of guilty against the appellant on all counts. The learned trial judge on the same day had agreed with the assessors and convicted the appellant on all counts. He was sentenced on 14 March 2019 to 12 years, 5 years and 18 months of imprisonment for the three charges respectively, all to run concurrently with a non-parole period of 10 years.

[4] On 9 April 2009, the appellant sought leave to appeal under section 21(1) of the Court of Appeal Act against both conviction and sentence, where he urged 7 grounds of appeal against conviction, and 2 grounds of appeal against sentence. On the conviction appeal, the learned single judge allowed grounds 1, 2 and 6 and denied grounds 3, 4, 5 and 7. Ground 1 of the sentence appeal was allowed while ground 2 was disallowed.

[5] The grounds of appeal in this Court are as follows:

Conviction Grounds:

Ground 1

That the learned trial judge erred in law and in fact when he failed to properly consider and analyse the facts and relevant consideration of section 14 (2) (h) (i) of the Constitution of the Appellant to be tried in absentia, depriving the right enshrined in section 15(1) of the Constitution.

Ground 2

That the learned trial judge erred in Law and fact when he failed to consider the provision provided under section 171(1) (a) of the Criminal Procedure Act 2009 considering the fact that the Appellant was charged with the indictable offence by the High Court failure to consider the same has caused a substantial miscarriage of justice.

Ground 3

That the learned trial judge erred in law and in fact when he failed to exercise the provision of section 171(2) of the Criminal Procedure Act 2009 requires the presence of the accused.

Sentence Grounds

Ground 1

That the sentence of 12 years with a non-parole period of 10 years is harsh and excessive considering all the circumstances.

The Law

[6] Any appeal against conviction and sentence to this Court may be made with leave of Court, pursuant to section 21(1)(b) and (c) of the Court of Appeal Act. The test for leave to appeal against both conviction and sentence is ***"reasonable prospect of success",*** as established through case law: **Caucau v State** [2018] FJCA 171; AAU0029.2016 (4 October 2018); **Navuki v State** [2018] FJCA 172; AAU0038.2016 (4 October 2018); **State v Vakarau** [2018] FJCA 173; AAU0052.2017 (4 October 2018); **Sadrugu v State** [2019] FJCA 87; AAU0057.2015 (6 June 2019) and others.

[7] When a sentence is challenged the test is not whether it is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles outlined in the case **Kim Nam Bae v State** AAU0015 of 2011 [1999] FJCA 21; (26/02/1999 , namely, that the 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 consideration.

[8] Section 23 (3) of the Court of Appeal Act provides:

> *"On 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 thereof as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

[9] **Facts** - The Sentencing order by the learned trial judge is summerised herein, based on evidence produced at the trial:

> *"2. The brief facts of the case were as follows. On 24 November 2006, the complainant Anil Kumar (PW1) was 59 years old. He was married with three children in their twenties. He earns his living by driving a taxi, registration number LT 7127.He also owned the taxi. While working on early morning on 24 November 2016 (Thursday), he picked up Asesela Naureure (Accused No. 1) at Gordon Street, Suva at about 6:30am.Accused No.1 asked him to go to Fiji National University (FNU) Tamavua to pick up Moape Rokoricebe (Accused No. 2).Mr Kumar complied and drove to FNU Tamavua.*
>
> *3. At FNU Tamavua Mr Kumar picked up Moape Rokoricebe (Accused No.2).Both accused sat in the back seat and requested to be taken to Kasavu Nausori. Mr Kumar took the two to Kasavu Nausori. At Kasavu Moape, asked Mr Kumar to take them to Tailevu Mr Kumar passed two villages and was asked to stop at a breadfruit tree thereafter. Moape then pulled mr Kumar out of the taxi and took the car key. Asesela then tried to attack Mr Kumar with a screw driver. Mr Kumar defended himself and, Asesela repeatedly punched him in the mouth, where he lost some teeth. Later the two accused abducted Mr Kumar to Korovou Town.*

> 4. *At Korovou Town Asesela took over from Moape, in driving the taxi. Moape drove the same from Tailevu. Asesela drove to Rakiraki.They had an accident at Wairuku Rakiraki, where the taxi was severely damaged. The two accused fled the crime scene. Mr Kumar, who was knocked unconscious, was later taken to Rakiraki Hospital. The matter was reported to police.An investigation was carried out. The two accused were later charged for aggravated robbery, abduction and damaging property. They have been tried and convicted of the above offence in the High Court."*

Full Court of Appeal

[10] **Appellant's case: Conviction ground:**

The appellant had filed his written submissions. He also made oral submissions at the hearing. On the conviction grounds, he stated that, his unavailability to attend his trial was due unforeseen circumstances, that is circumstances beyond his control. Even prior to the pre-trial conference took place (2nd March 2018), he was held at Suva Remand Center. He had no knowledge nor was he aware of the trial date on 7th – 12 March 2019. He was held at remand center in Suva for the offence on Case File 305/18 when the matter was set for pre-trial conference.

[11] The appellant submitted that he was a serving prisoner for burglary and theft during the period the bench warrant was issued on 26 October 2017. The warrant remained unexecuted till trial and sentence occurred. His absences were all beyond his control. His trial in absentia has prejudicially affected his right to a fair trial. The appellant requested a retrial to be ordered. He referred to his rights under section 14 (2) (h) (i) of Constitution, and submitted that that the trial judge exercised his discretion to the detriment of the appellant. The learned trial judge did not act fairly and was not assisted by the by Counsel for prosecution in relation to the constitutional requirements. The appellant contends that his right has been violated and he did not have a fair trial.

Respondent's case: Conviction ground

[12] The respondent submitted that the appeal against conviction should be dismissed based on a number of reasons, including, that:

(i) The appellant was well aware of his case for he had been appearing since 8.12.16 to 26. 10. 17.

(ii) On 19. 05.17, the appellant had informed the Court that he was serving a sentence and would be released on 18.09.17. He last appeared in Court on 26.10.2017. The trial had been fixed on 31.07.17 in the presence of the appellant for the dates 18-22 June 2018 (see pages 299-303 of Court Record).

(iii) On 09.02.18 appellant was not in Court and a bench warrant was issued (page 303 Court Record). Appellant was not in remand on that date.

(iv) Legal Aid Counsel had informed Court that they had been informed that appellant preferred not to come to Court (see page 304 Court Record).

(v) On 23.03.18 application for trial in absentia was granted. Trial dates were vacated. New trial date to be fixed when appellant is found (see page 305 of Court Record). The appellant was not in custody on these dates.

(vi) The matter was called on following dates: 04.06.18; 28.06.18; 06.07.18, 27.07.18 and 31.08.18 where appellant continued to be on the run. Bench Warrant was still current.

(vii) On 19.09.18 new trial dates were set for 4th - 8th March 2019, matter was called again on 04.02.19, the appellant was still on bench warrant.

(viii) On 04.03.19, trial commenced in absentia. Appellant had been on bench warrant for over 1 year.

(ix) At paragraph (10) of its written submissions, the prosecution states: "*In the State's respectful submission that despite being remanded during the initial trial date , he had a whole year to find out about the cases, next date and be present in Court; either from the Court Registry or his Counsel at the Legal Aid Commission. Mr Rokoraicebe's failure to enquire and attend Court proves nothing more than what his Counsel had informed the High Court-that he prefers not to come to Court……..Mr Rokoraicebe's actions of non-appearance for over an year confirms what he had informed his Counsel. Interestingly, not one but two Counsels from the Legal Aid Commission confirmed this information (see pages 304-305 of Court Records).*"

[13] **Sentence appeal**

On the sentence grounds the appellant contended that the sentence is harsh and excessive. In his written submission he added that the learned trial judge erred when he did not carefully or thoroughly take into proper consideration/account of the appellant's total remand period which he claimed amounted to 14 months. No reason was given on his failure to compute the amount.

[14] The State acknowledged that the appellant was granted leave to appeal his sentence on the basis that the learned trial judge had fallen into sentencing error by picking 12 years as the starting point in line with the tariff set in **Wise v Sate** [2015] FJSC 7; CAV0004.2015 (24 April 2015), which is 8 to 16 years of imprisonment. He picked a starting point of 12 years. It proposed that the guideline set in **State v Tawake** [2022] FJSC 22; CAV 025.2019 (28April 2022) for assessing the aggravating factors. (Paragraphs 19-20 submission). This was a case of aggravated robbery against a public service vehicle driver. The settled range of sentencing tariff for the offence of Aggravated Robbery against taxi drivers was 4 years to 10 years imprisonment, subject to aggravating factors: **Usa v State** [2020]FJCA 52; AAU81.2016 (15 May 2020).

Discussion

[15] The appellant's contention is that his rights under section 14 (2) (h) (i) of the Constitution was violated when the learned trial judge exercised his discretion for the appellant to be tried in absentia. Section 14 (2) (h) (i) states:

"(2) Every person charged with an offence has the right-

(h) to be present when being tried, unless-

(i) the court is satisfied that the person has been served with a summon or similar process requiring his or her attendance at the trial, and he has chosen not to attend, or..."

[16] There are two pre-requisites to complying with the constitutional provision, firstly, the accused must be served with a summons or similar process requiring his attendance at the trial, and secondly, despite the summons or similar process the accused should have chosen not to attend the trial, or in other words, the appellant had chosen to waive his right to be present at the trial. Needless to say that unless the Court is satisfied that both these preconditions are satisfied the right guaranteed by section 14(2) (h) (i) cannot be taken away and the accused cannot be tried in his absence in the High Court.

[17] The appellant filed his written submissions, and also made oral submissions at the hearing of the appeal as set out in paragraphs [10] and [11]. The appellant was a serving prisoner for burglary and theft during the bench warrant was issued. On 26 October the bench warrant remained unexecuted till the trial and sentencing occurred. His absence were well beyond his control, and the trial in absentia has prejudicial affected his right to fair trial.

[18] On the other hand, the scenario appears different from the State's perspective. In its written submissions, it had outlined the circumstances leading to the application for the trial in absentia of the appellant, and to the exercise of the learned trial judge's discretion in favour of holding the appellant's trial in absentia, as set out in paragraphs [12] above.

[19] In Summing Up, the learned trial Judge, on the matter of trial in absentia, stated:

"C. <u>Trial in Absentia for Accused No.2</u>

7. *You will notice from the beginning of the trial on 7 March 2019 that Moape Rokoricebe (Accused No.2) was not present in the dock in court. The last time he appeared IN COURT WAS ON 26 October 2017.He was represented by Legal Aid lawyers. He had not attended court ever since. On 23 March 2018, the prosecution applied for Accused No.2 to be tried*

in absentia, pursuant to section 14(2) (h)(i) of the 2013 Constitution. The court granted the prosecution's application and allowed Accused No. 2 to be tried in absentia………………

8 ……………………………………………………

9. *On March 2018, in a pre-trial conference, counsel for Accused No.2 advised the court that Accused No.2 told her by phone that he is aware of the case, but preferred not to come to court. A bench warrant had been issued against him, and the same has been pending as of today.*

10. *However, as assessors and judges of fact, you cannot hold his non-attendance at the trial to his disadvantage. You cannot view his non-attendance negatively. Despite his non-attendance, he still has the right to fair trial. The burden is still on the prosecution to prove his guilt beyond reasonable doubt, and that stays with them from the start to the end of the trial. The accused does not have to prove anything, at all. In fact, he is entitled to remain silent, as he has chosen in this case by not attending trial, and require the prosecution his guilt beyond reasonable doubt. The burden of proof is not on the accused."*

[20] Accused No.2 was also mentioned in the Judgment of the learned trial Judge at paragraphs 9 and 10 thereof, as follows:

"9. *As for accused No.2, I accept the prosecution's circumstantial evidence against him, as outlined in my summing up. I accept the evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7.In my view, Accused No.2 assisted Accused No.1 in offending against Mr Kumar. On the principle of joint enterprise, I find both Accused No.1 and AccusedNo.2 guilty on count No.1,2 and 3.*

10. *Given the above, I entirely agree with the 3 assessor's opinion and I find both Accused No.1 and Accused No.2 on count 1, 2 and 3.I convict them accordingly on those counts."*

[21] At the hearing, the appellant, on being questioned by the Court on the reasons why he was not communicating with his Counsel at the Legal Aid Commission, and on why he had shown a lack of interest in updating himself on the progress of his criminal case, in which he has been alleged to have committed serious offences against the complainant, a taxi driver, the appellant stated that he was expecting his Counsel, the prosecution and the police to come and see him at his home. He was at his home with his family.

[22] In considering the account of the accused and the prosecution, it is evident that the accused was correct to some extent, in that for some time, he was in custody at the Suva Remand Center, and as such, during that period, he had no control of his movements. However, that accounts for only a small part of his absence from appearing in Court. I accept the submissions from the State that his absence was in a way deliberate, and that is supported by the information from the appellant's Counsel, that the appellant preferred not to attend Court. On the basis of the appellant's continuous absence, the prosecution made an application for the appellant to be tried in absentia. In exercise of his discretion, under section 14(2) (h) (i) of the Constitution, the application was approved by the learned trial Judge for the appellant to be so tried. He has no justifiable reason to complain now.

[23] Ground 1 against conviction is dismissed. Grounds 2 and 3 are also dismissed as section 171 of the Criminal Procedure Code/Act do not apply to this matter, the section is relevant to Procedures in Trials before Magistrates Courts in Part [13] of the Code/Act.

Whether the appellant's sentence was harsh and excessive?

[24] The appellant was sentenced to 12 years with a non-parole period of 10 years. He was granted leave to appeal against his sentence on the basis that the learned trial judge had fallen into a sentencing error by picking 12 years as the starting point as per the tariff set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015).A sentencing error occurred. This case is distinguishable from **Wise** (supra) where the accused has been engaged in home invasion in the night while accompanying violence perpetrated on the inmates in committing the robbery. Whereas, this is a case of aggravated robbery against a public service vehicle driver.

[25] The correct sentencing tariff for the offence of aggravated robbery against taxi drivers was settled in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020) at 4 years to 10 years imprisonment, subject to aggravating and mitigating factors , and it held:

> *"17……….it appears that the settled range of sentencing tariff of offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices."*

[26] The sentence of 12 years is outside the sentencing tariff for "*attack against taxi drivers*." The objective seriousness of this particular aggravated robbery could have justified a higher starting point of the sentencing tariff between 4 years to 10 years imprisonment. If the starting point was taken at the lower end the aggravating features would have justified a very substantial increase of the sentence. The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies justified a very substantial increase of the sentence. Deterrence should be the main consideration in deciding the length of sentence imposed to safeguard the public and the providers of public services from the propensities to engage in similar crimes and with other prospective offenders.

[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 State** [2006] FJCA 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing direction has miscarried the appellate courts do not rely on the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the caser 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). The appeal against sentence is allowed.

Conclusion

[28] Appeal against conviction is dismissed. On appeal against sentence, given the above, and the sentencing tariff of 4 years to 10 years imprisonment for attacks against taxi drivers, and the fact that an error in sentencing occurred, the appellant's appeal against his sentence of 12 years imprisonment with a non-parole period of 10 years (passed by the learned trial judge) is quashed: **Matairavula v State** [2023] FJCA 92; AAU54.2018 (28

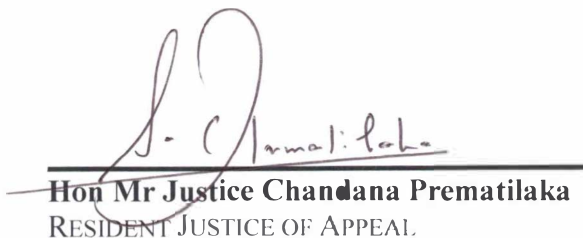
September 2023). I sentence the appellant pursuant to section 23(3) of the Court of Appeal Act to 11 years imprisonment with a non-parole period of 9 years.

Andrews, JA

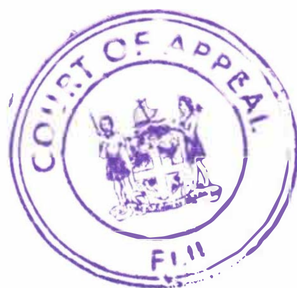
[29] I have read and agree with the judgment of his Honour Qetaki JA.

Orders of Court:

1. *Appeal against conviction dismissed.*
2. *Conviction affirmed.*
3. *Appeal against sentence allowed.*
4. *Sentence of 12 years imprisonment with non-parole period of 10 years quashed.*
5. *Appellant sentenced to 11 years imprisonment with a non-parole period of 9 years imprisonment with effect from 14 March 2019.*



Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Madam Justice Pamela Andrews
JUSTICE OF APPEAL