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

CRIMINAL APPEAL NO. AAU 151 of 2017
[In the Magistrates Court Suva Case No. CF 1120 of 2016]

BETWEEN	**:**	**JOSEFA TAWAKE**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Bandara, JA** **Kulatunga, JA**
Counsel	**:**	**Appellant in person** **Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**08 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree with Bandara, JA that the ultimate sentence imposed on the Appellant is justified and appropriate to the gravity of the offence and therefore appeal should be dismissed.

Bandara, JA

[2] The appellant was jointly charged with another in the Magistrate's Court in Suva under extended jurisdiction on a single count of aggravated robbery, contrary to section 311 (1) (a) of the Crimes Act No. 44 of 2009 committed on the 01st July 2016 at Raiwaqa.

[3] The charge read as follows:

*"**Statement of Offence***

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

JOSEFA TAWAKE TAUYAVU, SELA VUNIAKASA RAYAWA*, in the company of another on the 1st July 2016 at Raiwaqa in the Central Division stole Australian dollars amounting to $3,870.00 Canadian dollars amounting to $400.00, Euro dollars amounting to $200.00, New Zealand dollars amounting to $650.00, US Dollars amounting to $1,880.00, Vanuatu dollars amounting to $1,000.00, Samoan dollars amounting to $5.00, and Fiji dollars amounting to $1,000.00, the property of* ***FEXCO PACIFIC FIJI LIMITED*** *and immediately before stealing used force on the said* ***RENUKA NARAYAN AND SURESH NARAYAN.****"*

[4] On the 01st July 2016 the appellant along with others gained access to Fexco Pacific Fiji Limited, located at Damodar City Complex, assaulted various staff members and fled with the tilt containing money in a variety of currencies.

[5] The Appellant pleaded guilty as charged.

[6] The Learned Magistrate having been satisfied that the plea of guilty of the Appellant was voluntary and unequivocal, had convicted him.

[7] In terms of section 311 (1) (a) of the Crimes Decree 2009 the maximum sentence prescribed for aggravated robbery is 20 years.

[8] On the 11th November 2016 the Learned Magistrate had sentenced the Appellant to an imprisonment of 08 years with a non-parole period of 06 years.

[9] The Appellant in person had sought enlargement of time to appeal against the sentence in September 2017.

[10] The sole ground of appeal urged by the Appellant before the Single Judge of Appeal is as follows:

> *"A**gainst sentence***
>
> (1) *'THAT the learned trial Judge erred in law and in fact when he failed to consider and give a separate discount for the Appellant being a first offender."*

[11] The Single Judge of the Court of Appeal had refused enlargement of time stating, "*Enlargement of time to appeal against sentence out of time is refused."*

[12] At the oral argument before the Full Court the Appellant in person advanced the following four grounds of appeal seeking enlargement of time.

> *'(1) THAT the learned trial Judge erred in law and in fact when he failed to consider and give a separate discount for the Appellant being a first offender.*
>
> *(2) THAT the Learned Magistrate erred in law and in fact by:*
>
> *(a) Acted upon a wrong principle;*
> *(b) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(c) Mistook the facts; and*
> *(d) Failed to take into account some relevant consideration.*
>
> *(3) That the Learned Magistrate erred in law and in fact by acted upon a wrong principle when he abuses its judicial discretionary power by fixing the non-parole of six (6 years) on my sentence of 8 years in the absence of the parole board which undermine the purpose of the parole system implemented laws defines in section 18 (6) of the Sentencing and Penalties Act.*
>
> *(4) That the Learned Magistrate erred in law and in fact by:*
>
> *(a) Acted upon a wrong principle.'*

[13] Considering the objective seriousness, the Learned Sentencing Magistrate had taken 10 years imprisonment as the starting point, which falls in line with **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) sentencing guidelines.

[14] Having considered aggravating factors the Learned Magistrate had added 4 years which enhanced the sentence up to 14 years.

[15] Having taken into consideration the mitigating factors, that the appellant was 20 years old, single, cooperated with the police, first offender and seeking forgiveness from the Court, the Magistrate had deducted 02 years which brought the sentence down to 12 years' imprisonment. Thereafter the Magistrate giving full credit to the Appellant's guilty plea had deducted 1/3 which made the sentence reach 08 years imprisonment. (The Magistrate has not deducted the remand period since he had considered it to be an insignificant period of time).

[16] The Appellant contends that the Learned Magistrate had failed to consider and give a separate discount for him for being a first offender. This contention is wholly erroneous.

[17] The Learned Magistrate in paragraph 9 of his Sentence Ruling stated the following:

> *"9. In her mitigation submission your counsel submitted that you are 20 years old, single, cooperated with the police, first offender and seeking forgiveness from the court. For these mitigating factors I deduct 02 years to reach 12 years imprisonment."*

[18] The above paragraph clearly shows that the Learned Magistrate had taken into account the fact that the Appellant was a first offender, as a mitigating factor to be included in the deductions meant for mitigation.

[19] The Appellant further raises an issue of double counting (without clarity) of aggravating features as the applied tariff subsumed aggravation.

[20] The Learned Magistrate may have erred in adding 04 years for aggravation where a starting point of 10 years perhaps subsumed some such aggravation. However, it is the ultimate sentence which is of significance, rather than indulging in seeking a pure mathematical result.

[21] The following submission made in the written submissions filed on behalf of the Director of Public Prosecutions, is noteworthy in this regard.

> *"…the humble appellant need only look at the sage Ruling of 30 September 2020 to understand that while the Leave observations quite accurately acknowledged that the Learned Sentencing Magistrate may have erred adding 04 years for aggravation where a starting point of 10 years perhaps subsumed some such aggravation, the humble appellant's offending was all too serious and* ***he was lucky to have received a mere 08 years*** *imprisonment for quite a calculated daylight commercial invasion aggravated robbery…"*

[22] Having regard to the facts and circumstances of the instant case it is evident, that a final sentence of 08 years with a non-parole term of 06 years of imprisonment is neither harsh no excessive.

[23] The Learned Magistrate had not proceeded to allow a discount for the Appellant's period of remand since he deemed it to have been insignificant.

[24] It is the complaint of the Appellant that the Learned Magistrate had abused his judicial discretionary powers *"by applying the case of* ***Wallace Wise v State****."*

[25] In the course of his Sentence Ruling the Magistrate had rightly given due consideration to principles set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where his lordship Chief Justice Anthony Gates observed that:

> *"We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more*

other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them."

[26] The Magistrate had also considered the principle set out in **Laisiasa Koroivuki v the State** [2013] FJCA 15; AAU0018.2010 (5 March 2013), where it has been observed that*:*

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[27] The Learned Magistrate has applied the tariff applicable to the aggravated robbery in the form of a home invasion in the night, with accompanying violence perpetrated on the inmates and similar offence and had taken the starting point as 10 years.

[28] As per the facts set out in the summary of facts (paragraph 31 below) it is clear that the instant aggravated robbery is as serious as a home invasion.

[29] It is further claimed by the appellant that the Learned Magistrate *"allowed extraneous or irrelevant matters",* when he allowed prosecution evidence which had not *"complied to the proceedings of the investigation defines in the principles of judges rules."*

[30] Paragraphs 11 and 12 of the Sentence Ruling indicate that in deducting the discount for his guilty plea the Learned Magistrate had taken guidance from the UK Plea Guidelines 2009, which are as follows:

> *"11. Further in UK Guilty Plea guidelines of 2007 it has been held that when an accused pleaded guilty at the first available opportunity the reduction is 1/3 and after a trial date is set 1/4 recommended. But when an accused pleaded guilty at the door of the court or after the trial has started he maybe entitle for only 1/10 discount.*

12. In this case giving full credit to your guilty plea I deduct 1/3 to reach 08 years imprisonment."

[31] As paragraph 2 of the Sentence Ruling clearly indicate that the Appellant had not only pleaded guilty to the charge but also **admitted the following summary of facts:**

> '*On the 1st July 2016 at around 5pm Steven Suresh Narayan (PW1) recalls that an i-taukei youth entered Fexco Pacific Fiji Limited based at Damodar City complex and asked what time Fexco Pacific Limited would close. A few seconds after the conversation, another i-taukei youth entered into the shop and grabbed PW1 from behind. He then pushed PW1 towards the counter and held him down. PW1 further stated that another i-taukei youth grabbed the tilt and exited the main door, the tilt that was taken by i-taukei youths contained foreign currencies.*
>
> *Renuka Narayan (PW2), operations manager for Fexco Pacific Fiji Limited. On the 1st July 2016 PW1 observed the accused and 2 other youths walk into Fexco Pacific Fiji Limited based at Damodar City complex. The tallest of the three walked towards PW2 grabbed hold of her neck, and held her head against the counter preventing her from making any other movements, further she was held in such a way that PW2 could not speak or scream. PW2 sustained injuries due to the force used by the assailant.*
>
> *PW2 further stated, that the smallest of the three jumped over the counter and got a hold of the tilt on top of the CPU and jumped out again. The tilt contained the following foreign currencies;*
>
> *1) Australian dollars amounting to $3870.00*
> *2) Canadian dollars amounting to $400.00*
> *3) Euro dollars amounting to $200.00*
> *4) New Zealand dollars amounting to $650.00*
> *5) US Dollars amounting to $1880.00*
> *6) Vanuatu dollars amounting to $1000.00*
> *7) Samoan dollars amounting to $5.00*
> *8) Fiji dollars amounting to $1000.00'*

[32] Hence a situation for the Learned Magistrate to take into consideration irrelevant extraneous matters in relation to the evidence found at the investigation level does not arise.

[33] We also note that the Appellant is serving past his non-parole term.

[34] The grounds of appeal on the sentence have no merit.

Kulatunga, JA

[35] I have read the draft judgment of Hon. Bandara, JA and I am in agreement with his reasons and orders as proposed.

Orders of the Court:

1. Appeal dismissed.
2. Enlargement of time refused.

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

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent