

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

**CRIMINAL APPEAL NO.AAU 109 of 2020**  
**[In the High Court at Suva Case No. HAC 221 of 2019]**

**BETWEEN** : **ILISAVANI TAMANISAVE**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Ms. E. R. V. Samisoni for the Respondent**

**Date of Hearing** : **06 June 2023**

**Date of Ruling** : **07 June 2023**

## **RULING**

[1] The appellant stood indicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009. The charge read as follows:

### **'Statement of Offence**

**AGGRAVATED ROBBERY:** *Contrary to Section 311 (1) (a) of the Crimes Act, 2009.*

### **Particulars of Offence**

***ILISAVANI TAMANISAVE with others on the 4<sup>th</sup> day of June, 2019 at Nasinu in the Central Division, in the company of each other, stole a bag containing a Samsung mobile phone charger and a pair of sunglasses from RONEEL PRAKASH and immediately before stealing from RONEEL PRAKASH, used force on him.'***

- [2] The assessors unanimously opined that the appellant was guilty as charged and the High Court Judge had concurred with them and convicted the appellant accordingly. He was sentenced on 21 February 2020 to 06 years of imprisonment with a non-parole period of 05 years (effectively 05 years, 06 months and 14 days with a non-parole period of 04 years, 06 months and 14 days after the remand period was deducted).
- [3] The appellant has sought extension of time to appeal against conviction and sentence belatedly. He had filed Form 3 (26 October 2022) seeking to abandon his conviction appeal and the court following the guidelines in **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) allowed his application and accordingly the appeal against conviction is deemed to have been dismissed in terms of Rule 39 of the Court of Appeal Rules.
- [4] The appellant's appeal against conviction is out of time by almost 05 months. 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).
- [5] The delay is substantial. The appellant has not given any reasons for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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] The grounds of appeal urged against the sentence are as follows:

**Ground 1**

*THAT the Learned Trial Judge erred in law and in fact by imposing a sentence deem harsh and excessive with having no regards to sentencing guidelines and applicable tariff for the offence of "street mugging" of this matter.*

### **Ground 2**

*THAT the Learned Trial Judge erred in law and in fact by fail to assess, analyse and compare the facts of the case before imposing a sentence which is improper against the appellant.*

### **Ground 3**

*THAT the Learned Trial Judge failed to consider the appellants character being a first offender and the items was recovered but he gave a sentence which is too harsh and excessive.*

### **Ground 1**

[7] The facts of the case as set out in the sentencing order suggest that this is a case of street mugging. They are as follows:

2. *Briefly, the accused with two others attacked the victim who was on his way home after work and stole the bag the victim was carrying which contained a Samsung mobile phone charger, a pair of sunglasses and a bunch of keys. While the two accomplices grabbed the victim from behind and put him down, the accused tried to grab the said bag from the victim. When the victim held onto the bag, the accused punched the victim on his chest a few times which caused the victim to let go of the bag. The accused was caught with the said stolen bag soon after the robbery.*

[8] At the time of sentencing, the sentencing tariff for ‘street mugging’ was 18 months to 05 years [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)] which should have been adopted by the sentencing judge.

[9] However, the learned High Court judge had followed **State v Bulavou** [2019] FJHC 877; HAC 28 f 2018 (10 September 2019) and started with 05 years and after adjusting for aggravating and mitigating factors and pre-trial remand period, ended up with the sentence of 05 years, 06 months and 14 days with a non-parole period of 04 years, 06 months and 14 days.

[10] The Supreme Court in the recent decision in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for ‘street

muggings' particularly *Raqauqau* remarked that the sentencing range of 18 months' to 05 years' imprisonment, with no other guidance, can itself give rise to the risk of an undesirable disparity in sentencing and a more nuanced approach was necessary.

[11] The Supreme Court accordingly set new guidelines for sentencing in cases of street mugging by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.

[12] The Supreme Court identified starting points for three levels of harm *i.e.* high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed to only the appropriate sentencing range for offences as previously used and stated that the sentencing court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.

[13] In my provisional view the appellant's offending under section 311 of the Crimes Act, 2009 (*i.e.* offender without a weapon but with another) may be considered to be low in terms of level of harm and therefore his sentence may start with 03 years of imprisonment with the sentencing range being 01 to 05 years. This is, of course, subject to the decision of the full court after the hearing of the appeal.

[14] Therefore, had the trial judge started with 03 years instead of 05 years the ultimate sentence would have been lower than what the appellant has received now.

[15] A guideline judgement applies to all sentencing that takes place after that date regardless of when the offending took place, however, it only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an

appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant [vide **Zhang v R** [2019] NZCA 507 by the Court of Appeal of New Zealand as referred to in **Jone Seru v The State** AAU 115 of 2017 (25 May 2023)]. If this principle is adopted, *Tawake* guidelines may be applied to the appellant's case as the application of *Tawake* may result in a more favourable outcome as far as his sentence is concerned.

[16] Therefore, I am inclined to grant extension of time to appeal against sentence.

**02<sup>nd</sup> ground of appeal**

[17] The trial judge had taken into account all the relevant facts of the case in the matter of sentence. This complaint has no merits.

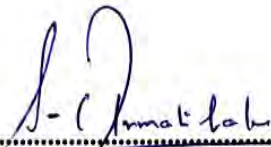
**03<sup>rd</sup> ground of appeal**

[18] The trial judge had indeed considered the appellant's character as a first offender and the fact that robbed items had been recovered. This ground too has no merits.

**Orders of the Court:**

1. Appeal against conviction is deemed to have been dismissed in terms of Rule 39 of the Court of Appeal Rules.
2. Enlargements of time to appeal against sentence is allowed only on the first ground of appeal.



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

**Solicitors:**

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