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

CRIMINAL APPEAL NO. AAU 032 of 2024
[In the High Court at Suva Case No. HAC 185 of 2023]

BETWEEN	:	**ARTHUR SAMUEL LOCKINGTON**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. T. Varinava for the Appellant**
	:	**Ms. S. Semisi for the Respondent**
Date of Hearing	:	**15 August 2024**
Date of Ruling	:	**16 August 2024**

RULING

[1] The appellant had been charged in the High Court at Suva on a single count of attempted aggravated robbery contrary to sections 44(1) and 311(1) (a) of the Crimes Act, 2009. The charge is as follows:

*'**Statement of Offence***

***ATTEMPTED AGGRAVATED ROBBERY:** contrary to Sections 44(1) and 311(1)(a) of the Crimes Act, 2009.*

Particulars of Offence

***ARTHUR SAMUEL LOCKINGTON** with another on the 28th day of May, 2023 at Lami, in the Central Division, in the company of each other, unlawfully attempted to steal a mobile phone and a handbag from **VIVINA SERUVONO** and immediately before stealing from **VIVINA SERUVONO,** used force on her.'*

[2] On 21 July 2023 the appellant had pleaded guilty. He had admitted the summary of facts and antecedent report containing two prior convictions. Having convicted the appellant, the learned High Court judge had sentenced him on 02 May 2024 to a period of 02 years', 02 months' and 14 days' imprisonment with a non-parole period of 16 months.

[3] The appellant's appeal on sentence is untimely. 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).

[4] The delay in the sentence appeal is 11 days which is not substantial, and his explanation for having changed his mind belatedly to appeal, for the delay is unacceptable. However, I would still 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.

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The summarised facts admitted by the appellant are as follows:

> *2. Having finished work on 28 May 2023 at about 6.30pm, the complainant Vivina Seruvono (PW1) then proceeded to the bus stop to await a bus going towards Navua. While waiting at the bus stop for about 30 minutes, four I-Taukei boys walked passed her going in the direction*

towards Lami town and uttered something to the complainant which the complainant did not understand. The complainant then called her husband via her mobile phone and noticed one of the four I-Taukei boys namely Paula Williams (PW2) approaching the bus stop and sat next to her. A few minutes later the Accused and another approached the complainant and pulled her handbag while the other boy pulled her mobile phone causing the complainant to scream seeking the assistance of the Novotel security guard namely Vakacegu who was close by. The Accused and accomplice then released the complainant's handbag and mobile phone and ran towards Kalekana Settlement. The complainant and security guard Vakacegu then confronted Paula Williams (PW2) for being an accomplice and then took PW2 to the Novotel security booth where they called the police to report the matter. PW2 was later taken to the Lami Police Station and assisted the police in identifying the Accused as a perpetrator of the attempted aggravated robbery. The Accused was then arrested on 2 June 2023, voluntarily admitted the allegation in his caution interview statement, and formally charged the same day.

[7] The ground of appeal against sentence is as follows:

> ***Ground 1***
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> ***THAT*** *the Learned Trial Judge erred in law and in fact by not considering the time spent in remand from the 21st July 2023 to the 2nd May 2024 as time served pursuant to section 24 of the Sentencing and Penalties Act 2009.*

[8] If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, *unless a court otherwise orders,* be regarded by the court as a period of imprisonment already served by the offender.[1]

[9] In **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) the Supreme Court said that in the past, within mitigating factors was often included the period spent on remand by the offender in custody awaiting his trial. However, the court suggested that alternatively the sentencing judicial officers could proceed to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors and initially without regard to the period spent in custody, state the sentence for the particular offending and then proceed to set out the actual or

[1] Section 24 of the Sentencing and Penalties Act

effective sentence to be served, after deducting the period of prior custody referred to in section 24 of the Sentencing and Penalties Act. The court added that the burden of having regard to the remand period is on the sentencing court and section 24 does not demand a precious calculation. The Supreme Court lauded this method as having the advantages of simplicity and clarity, and making order as to the actual minimum period to be served as part of the sentencing order of the court. This will ensure that the interpretation and calculation is not left to Corrections Service and the court recommended this method as the proper way to give effect to section 24.

[10] The trial judge had correctly applied ***Tawake*** tariff (**State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) for the appellant's conviction for attempted aggravated robbery in the form of street mugging and commenced the starting point at 03 years. The Supreme Court in ***Tawake*** 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) 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.

[11] I think the judge had correctly considered the appellant's offending for attempted aggravated robbery (*i.e.* offender without a weapon but with another) to be low in terms of level of harm caused to the complainant and therefore his sentence could start with 03 years of imprisonment with the sentencing range being 01-05 years. The trial judge had then correctly adjusted the starting point for aggravation and mitigation and arrived at the sentence of 3 ½ years. Thereafter, as prescribed by ***Tawake*** guidelines, the judge had reduced the sentence further by 01 year and 02 months for the guilty plea and another period of 01 month and 16 days for the time spend in remand. He had thus arrived at the actual or effective sentence of 02 years, 02 months and 14 days. So far, there is nothing wrong with the methodology adopted by the trial judge.

[12] However, the appellant's complaint is that the trial judge had failed to reduce his period of remand from 21 July 2023 to 02 May 2024 from the initial calculation of 3 ½ years. The state has conceded that the appellant was in remand for 09 months and 11 days since his admission of guilt on 21 July 2023 to the date of sentence on 02 May 2024. The trial judge had not made any '*unless'* order under section 24 of the Sentencing and Penalties Act as to why he did not consider this period of remand as a period of imprisonment already served by the appellant. It could be due to a genuine inadvertence on his part or because the judge could not account for the unexplained delay of 09 months and 11 days taken from the date of the guilty plea to the date of sentence which under normal circumstances is obviously unacceptable. However, whatever the reason may be, the appellant has a legitimate grievance in this regard and the trial judge has committed a sentencing error and the appellant is entitled to enlargement of time on this point of appeal.

[13] The ultimate sentence of 02 years, 02 months and 14 days is on the lower side of the tariff and even if the period of 09 months and 11 days of remand is considered as part of the sentence the appellant already served in prison, still the appellant will have served only a total of 02 years, 11 months and 25 days in the end, which is still within ***Tawake*** tariff guidelines of 1-5 years which, in my view, may not be harsh and excessive or disproportionate to the gravity of the offending. However, it is a matter for the Full Court to decide because when a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)].

[14] The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case 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)].

Order of the Court:

1. Enlargement of time to appeal against sentence is allowed.

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

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent