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

**CRIMINAL APPEAL NO. AAU 95 of 2022**
**[In the High Court at Suva Case No. HAC 288 of 2021]**

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| **BETWEEN** | **:** | **ISOA WAQA** |
| | | ***Appellant*** |
| **AND** | **:** | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, RJA** |
| **Counsel** | **:** | **Appellant in person** |
| | **:** | **Ms. S. Shameem for the Respondent** |
| **Date of Hearing** | **:** | **02 January 2024** |
| **Date of Ruling** | **:** | **04 January 2024** |

# RULING

[1] The appellant had been charged with others and convicted at Suva High Court for aggravated robbery described as follows.

'***Statement of Offence***

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

***Particulars of Offence***

***ISOA WAQA*** *with others on the 11th day of December, 2021 at Davula Road, Nasinu, in the Central Division, in the company of each other stole $ 80 cash from* ***RUSIATE TURAGABECI*** *and immediately before stealing from* ***RUSIATE TURAGABECI****, used force on him.*

[2] After trial, the trial judge had convicted the appellant and sentenced him in absentia on 22 August 2022 to a sentence of 05 years and 10 months of imprisonment with a non-parole period of 04 years.

[3] The appellant had lodged in person a timely appeal against conviction and sentence.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[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 trial judge had recorded the summary of facts in the sentencing order as follows.

> *1. The facts of the case briefly are that on 11th day of December 2021, at around 8:30 pm, the complainant and his wife arrived at the canteen at Duvula to buy some snacks for their children. As they were approaching the canteen, they saw the offender, who was known to the victim, having drinks (alcohol) with a group of men. They called out victim's name and solicited money from the victim. The victim ignored their request and proceeded to the canteen with his wife.*

*2. The offender, who appeared heavily drunk, followed them into the canteen and punched the victim in his face. The victim fell to the ground. When the victim was still lying down, the group of boys, who were drinking with the offender, arrived at the canteen. They started attacking the victim while his wife was shouting for help. One of the attackers kicked the victim's leg and punched in his stomach. They took $80/- from the victim's pocket and the attempt to grab the hand bag was thwarted. The gang fled the scene.*

[7] The grounds of appeal urged by the appellant against conviction and sentence are as follows.

***'Conviction***

***Ground 1***

*THAT the Learned Trial Judge erred in law and in fact when he relied on the prosecution evidence to convict the appellant and not properly analysing the totality of the evidence.*

***Ground 2***

*THAT the Learned Trial Judge erred in law and in fact when he relied on dock identification evidence to convict the appellant that has caused a serious miscarriage of justice.*

***Ground 3***

*THAT the Honourable Judge erred in law and in fact when he relied on the conflicting evidence given by PW1 (Rusiate Turagabeci) and PW2 (Adite Manalulu) to find the appellant guilty.*

***Ground 4***

*THAT the Learned Trial Judge erred in law and in fact when he took the appellant's failure to dispute that the boys drinking with the appellant next to Duvula canteen robbed the complainant as an admission that the boys that robbed the complainant were the same boys drinking with the appellant.*

***Ground 5***

*THAT the Honourable Judge erred in law and in fact when making assumption and conjectures without any supporting evidence in two vital statements in his Judgment – paragraph 35 and 36.*

***Sentence***

***Ground 6***

*THAT the appellant also seeks leave of the Court of Appeal to appeal his sentence being harsh and excessive.*

***Ground 7***

*THAT the Honourable Judge erred in fact when identifying the aggravating features in this case and this a gross miscarriage of justice was done.*

***Ground 8***

*THAT the Honourable Judge erred in fact when he stated in paragraph 18 of the sentence that 'in view of the past criminal record and the age, the chances of the offender rehabilitation is minimal'.*

***Ground 9***

*THAT the Honourable Judge erred in law and in fact when he declared the appellant a habitual offender after having regard to the appellant's previous convictions of similar nature as given in paragraph 20 of the sentence.*

***Ground 1***

[8] This ground lacks any specific details as to what matters the learned judge had failed to analyze in the course of the judgment. The ground of appeal is vague and general.

***Ground 2***

[9] The identity of the appellant was not established by any dock identification but by the evidence of PW1 and PW2 who had known the appellant before. In any event, the appellant admitted under oath that he was at the crime scene at the time of the commission of the offence and having assaulted PW1.

***Ground 3***

[10] PW2's evidence reveals that prior to the robbery, the appellant and others in the group demanded money from PW1 and the latter refused the request. Thereafter, the appellant had assaulted PW1 and then his group had robbed him. The appellant in his own evidence admitted that he was part of the drinking group and after PW1 was robbed, the rest ran away and he stayed back. Since the appellant had been charged under joint enterprise, it did not matter who exactly robbed PW1.

***Ground 4***

[11] The appellant's initial stance had been a denial. However, whilst giving evidence he admitted to being part of the drinking group which robbed PW1. He then tried to argue that though he was part of the group and hit PW1, he was not involved in the robbery. Given the basis of liability imposed on him based on joint enterprise, his lack of involvement in the act of robbery itself would not exonerate him from the robbery.

***Ground 5***

[12] The appellant's complaint seems to be aimed at the following reasoning in the judgment where the judge had explained his seemingly 'innocent' actions. I do not think there is anything wrong with the judge's logical explanation of the appellant's behavior.

> *'35. Although the accused vehemently denied that he intended to rob the complainant, and took a great effort to disassociate himself with the group of boys who had eventually stolen money from the complainant, the facts proved otherwise. He was drinking at the Chinese Shop with the boys who eventually stole the money from the complainant. When the complainant and his wife were arriving at the canteen, some of the boys in that drinking group demanded money from the complainant. Soon after that, the accused entered the Davula Canteen and punched the complainant in his face. In a few seconds, the others followed in and stole the money from the complainant. Despite accused's denial in participation, it is abundantly clear that he was the one who laid the ground work for the scheme that culminated in the robbery.*
>
> *36.The accused argued that he too should have run away with the others without remaining at the Duvula Canteen if he had intended to rob the complainant. According to his own admission, he was in fact not arrested near the Canteen but at a shortcut, a place 10 meters away from Duvula Centeen. In view of strong undeniable identification by Adite, his former neighbor, he must have thought it futile for him to run away from the scene and more advantageous for him to assume responsibility only for the assault and deny the responsibility for robbery as he did in his defence.*

***Ground 6 and 7 (sentence)***

[13] In view of *Tawake* guidelines (**State v Tawake** [2022] FJSC 22; CAV0025 of 2019 (28 April 2022) dealing with street mugging cases (though this was not strictly or exactly a

street mugging case), the appellant's ultimate sentence cannot be considered harsh or excessive.

[14] The trial judge had not manufactured any aggravating features other then what the evidence had revealed.

***Ground 8 and 9***

[15] The trial judge had extensively analyzed the provisions of the Sentencing and Penalties Act and declared the appellant a habitual offender but had declined to impose a sentence longer than proportionate to the gravity of the offence. I see no merit in these grounds of appeal. The Court of Appeal also had the occasion to revisit these provisions recently in **Vura v State** [2023] FJCA 191; AAU012.2017 (28 September 2023).

[16] 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. 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)].

**Orders**

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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