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

CRIMINAL APPEAL NO. AAU 0010 of 2018
[In the High Court at Suva Case No. HAC 335 of 2016]

BETWEEN	:	**SAULA VUNIVESI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, RJA** **Qetaki, JA**
Counsel	:	**Appellant in person**
	:	**Mr. M. Vosawale and Ms. B. Kanthiaria for the Respondent**
Date of Hearing	:	**05 February 2024**
Date of Judgment	:	**28 February 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been 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 committed with others on 07 September 2016 at Suva on property of Ronald Rohitesh to the total value of $400.

[2] The assessors expressed a unanimous opinion of guilty against the appellant of having committed aggravated robbery. The learned High Court Judge agreed with the assessors and convicted the appellant accordingly. The appellant was sentenced on 27

October 2017 to 13 years and 04 months of imprisonment with a non-parole period of 11 years and 04 months.

[3] On 29 June 2020, a single judge of this court allowed leave to appeal only against sentence but refused leave to appeal against conviction[1]. The appellant did not renew his appeal against conviction. He was subsequently released on bail pending appeal on 20 August 2021[2].

Facts in brief

[4] On the day of the incident, the appellant together with two others had robbed the complainant when he was coming out of a shop. The complainant had gone to one of his friend's place, where he drank two glasses of beer with one Sione. He then went to a shop beside the Happy Garden Restaurant to buy cigarettes. It was about midday. When he was coming out of the shop, the appellant and two of his accomplices came towards him where two of them grabbed the complainant from behind and the appellant punched him on his face. The appellant took the mobile phone and money from the complainant's trouser pocket. While the appellant was fleeing the scene of the crime, one of the accomplices had tried to attack the complainant and his friend Sione who were chasing after the appellant, with a broken beer bottle. The appellant had later fought with the complainant, when the complainant approached him with DC Pelasio and escaped from the scene.

Relevant law

[5] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows:

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)?*

1 **Vunivesi v State** [2020] FJCA 112; AAU0010.2018 (29 June 2020)
2. **Vunivesi v State** [2021] FJCA 241; AAU0010.2018 (20 August 2021)

> *It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'*

[6] ***Bae*** was adopted by the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499.

[7] Leave to appeal was granted on the premise that the trial judge had fallen into error in exercising his sentencing discretion by using the wrong tariff of 08-16 years of imprisonment based on ***Wise*** sentencing guidelines [**Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015)] resulting in a harsh and excessive sentence on the appellant. Sentencing tariff in ***Wise*** was set in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery whereas the appellant's offending was a lesser form of aggravated robbery commonly known as street mugging.

[8] At the time of sentencing the appellant, the 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 was the tariff that should have been adopted by the sentencing judge. As stated in ***Qalivere***, when the learned High Court judge adopted the wrong sentencing range that error had adversely affected every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in the disproportionally severe sentence.

[9] 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.

[10] Accordingly, the Supreme Court 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.

[11] 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.

[12] In my 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 or medium in terms of level of harm caused to the complainant and therefore his sentence may start with 03 or 05 years of imprisonment with the sentencing range being 01-05 years or 03-07 years as the case may be.

[13] Therefore, had the trial judge selected the starting point of 03 or 05 years instead of 13 years as he had done, the ultimate sentence would have been much less than what the judge eventually imposed on the appellant. With the 02 years' increase for aggravating factors and 01 year discount for mitigating factors factored into calculation by the trial judge, the head sentence would have been either 04 or 06 years. Though, the trial judge had stated that the appellant had 41 previous

convictions, he had not declared him as a habitual offender possibly because those convictions had been entered more than 10 years prior to the current conviction.

[14] 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 guideline judgment is delivered; and (b) the application of the guideline 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 applied in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) & **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)]. Therefore, ***Tawake*** guidelines should 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.

[15] The appellant has already served 03 years, 09 months and 24 days before being released on bail by this court. He had been in pre-trial remand for 08 months. Thus, altogether, the appellant had been in incarceration for 04 years, 05 months and 24 days. Though it is more likely that the appellant's offending is in low harm category, even if his offending is considered under the medium harm category as per ***Tawake*** guidelines, the facts of this case may not warrant a sentence longer than the total period the appellant has spent in incarceration. The appellant's conduct during the post-bail period appears to be free of blemish as confirmed by the respondent and the Church Minister of Toga Methodist Church Circuit and he is now said to be engaged in a gainful livelihood as a farmer. Therefore, this court considers the total period of incarceration of 04 years, 05 months and 24 days as a fitting sentence for the appellant's offending.

Mataitoga, RJA

[16] I have read the judgment of Prematilaka, RJA and I concur with the reasons and the conclusion.

Qetaki, JA

[17] I have considered the judgment in draft and I agree with it, the reasoning and the orders.

Orders of the Court:

1. Appeal against sentence is allowed.
2. Appellant's sentence of 13 years and 04 months of imprisonment with a non-parole period of 11 years and 04 months is set aside.
3. Appellant is released forthwith.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

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