

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

CRIMINAL APPEAL NO. AAU 024 of 2022
[In the High Court at Lautoka Case No. HAC 44 of 2019]

BETWEEN : **ANUSHEEL ANSAL CHAND**

AND : **THE STATE** *Appellant*
Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. J. Nasa for the Respondent**

Date of Hearing : **11 March 2024**

Date of Ruling : **12 March 2024**

RULING

[1] The appellant, ANUSHEEL ANSAL CHAND had been charged with 03 others and found guilty in the High Court at Lautoka on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009. The charge is as follows:

'Statement of Offence

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

Particulars of Offence

Sunit Venkat Ram, Anusheel Ansal Chand, Devneel Dhiraj Ram and Akshay Nawal Raju on the 20th day of February, 2019 at Nadi in the Western Division, in the company of each other robbed Ratan Devi Chand of \$10,874.50 cash, \$5,000.00 of cash cheque and \$64,185.95 of dated cheques, all to the total value of \$80,060.45, the property of Yees Cold Storage.'

- [2] After trial, the appellant was found guilty as charged by a High Court Judge alone who sentenced him on 03 December 2021 to a period of 07 years' & 04 months' imprisonment with a non-parole period of 06 years.
- [3] The appellant's appeal on conviction is timely but his appeal against sentence is out of time by 01 year and 07 months. However, he filed a Form 3 on 27 June 2023 to abandon his appeal against conviction which was duly considered by a single judge of the court in line with **Marisewa v The State** [2010] JFSC 5; CAV 14 of 2008 (17 August 2010) guidelines and allowed it on the same day.
- [4] 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 in the sentence appeal is 01 year and 07 months which is very substantial, and there is no acceptable explanation for the delay by the appellant, for he had filed his appeal in a timely manner against conviction. 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.
- [6] 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].

[7] The facts could be summarised as follows:

‘On 20 February, 2019, the complainant Ratan Devi Chand left her office at about 2.30 pm for banking at ANZ Bank, Namaka. She was brought to the bank in the company vehicle driven by Rajendra Lal. The banking was for Yees Cold Storage, where the complainant was working. She was dropped outside ANZ Bank, Namaka and as she was making her way into the bank the 01st accused Sunit Venkat Ram came and grabbed the money bag from her hand and ran to a waiting getaway car. This bag contained cash of \$10,874.50, cash cheque of \$5,000.00 and dated cheques of \$64,185.95 all to the total value of \$80,060.45. The complainant saw the 01st accused run to the bus bay and get into the waiting getaway grey hybrid car. The bank security officer and another person tried to catch the 01st accused by giving a chase but were not successful. Before the incident, the 01st accused was seen standing near ANZ Bank, Namaka, and had been in communication with the other co-accused persons via call conferencing. The matter was reported at the Namaka Police Station, upon investigation the CCTV footage clearly showed the 01st accused crossing and running with the money bag towards the bus bay where he boarded the waiting car.

The second and the third accused persons (the appellant) were on the lookout when the robbery was taking place. The getaway car was driven by the fourth accused who drove the first accused away, some people tried to catch the first accused but were not successful. All the accused persons had planned to rob the victim that afternoon and they were communicating with each other via call conferencing.

After leaving the crime scene all the accused persons met and shared the stolen cash of \$10,874.50. The matter was reported to the Namaka Police Station, upon investigation the accused persons were arrested, caution interviewed and charged.’

[8] The grounds of appeal against sentence are as follows:

Sentence:

Ground 1:

THAT the Learned Trial Judge erred in law and fact in passing the sentence of imprisonment which was disproportionately severe punishment contrary to section 11 (1) and 26 of the 2013 Constitution of Fiji.

Ground 2:

THAT the appellant strongly submits his application of appeal against the sentence relying on the new guidelines set in *Eparama Tawake and Tevita Gonevou* in the recent judgment of the Supreme Court of Fiji in CAV 0025/2019.

Ground 3:

THAT the appellant strongly submits that the sentence of 7 years and 4 months is unlawful and if not unlawful it is excessive based on the recent judgment of Eparama Tawake and Tevita Gonevou.

Grounds of Appeal:

Ground 1:

It is submitted that the Learned Trial Judge took irrelevant factors into consideration and acted on a wrong principle in calculating the sentences of the appellant.

Ground 2:

THAT the Learned Trial Judge erred in principle in falling into an error of double counting whereby he took the tariff of 6 years as the starting point considering the objectives and seriousness of the offenses and later adding another 3 years as an aggravating feature.

Ground 3:

It is submitted that the Learned Trial Judge erred in law and principle when he considered the change of aggravated robbery and imposing a harsh and excessive sentences.

Ground 4:

THAT the sentences is harsh and excessive and wrong in principle affecting the criminal justice system.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact in passing the sentence of imprisonment which was disproportionately severe punishment contrary to section (11)(1) and as of the 2013 Constitution of Fiji.

Grounds of Appeal 2 and 3

- [9] Only the grounds of appeal 2 and 3 need to be considered as the complaints in the rest of grounds would be automatically resolved with the resolution of the 02nd and 03rd grounds of appeal.

- [10] Although, the trial judge had not 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)], he had still started the sentencing process at 06 years with no proper justification. The trial judge had correctly remarked that 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. The State had conceded that given the factual background, the appellant's offending was a lesser form of aggravated robbery commonly known as street mugging. However, in my view this is not the common form of street mugging where the victim is not pre-determined. In this case the victim was already selected at the pre-planning stage thus it is a more aggravated form of street mugging.
- [11] 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 and he was mindful of that tariff as well. 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 disproportionately severe sentence.
- [12] 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.
- [13] 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.

- [14] 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.
- [15] 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 in terms of level of harm caused to the complainant and therefore his sentence may start with 03 years of imprisonment with the sentencing range being 01-05 years.
- [16] Therefore, had the trial judge selected the starting point of 03 years instead of 06 years as he had done, the ultimate sentence would have been less than what the judge eventually imposed on the appellant. With the 03 years' increase for aggravating factors and 01 ½ years discount for mitigating factors factored into calculation by the trial judge, the head sentence would have been 04 ½ years. With two months deduction for pre-trial remand, the effective sentence would have been 04 years and 04 months.
- [17] 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.

[18] However, the appellant had appealed against his sentence only on 07 June 2023, well after *Tawake* guidelines on 28 April 2022. Therefore, on the basis of the principle adopted in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) & **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023) & **Vunivesi v State** [2024] FJCA 22; AAU0010.2018 (28 February 2024), *Tawake* guidelines cannot be applied to the appellant.

[19] Therefore, his sentence should be tested against the tariff for '*street mugging*' of 18 months to 05 years set in **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). Still the trial judge's taking 06 years as the starting point appears to be an error in law and 07 years and 06 months imprisonment is well above the tariff then prevalent and no specific reasons have been given to justify that.

[20] Leave to appeal should be granted on the premise that the trial judge's error in applying the proper tariff had resulting in a seemingly harsh and excessive sentence on the appellant.


[21] 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)]. It is for the full court to decide the proper sentence on the appellant given that

this is an aggravated form of street mugging; whether they should go above 05 years and or still limit it within 05 years and impose an appropriate sentence.

Order of the Court:

1. Leave to appeal against sentence is allowed.




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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