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

CRIMINAL APPEAL NO. AAU 052 OF 2024
[Lautoka High Court: HAC 182 of 2023]

BETWEEN : **JOSHUA CECIL EMMANUEL TUINIVONO**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Mr S. Prakash for the Appellant
Mr E. Samisoni for the Respondent

Date of Hearing : 5 August, 2025

Date of Ruling : 26 August, 2025

RULING

(A). Background

[1] This is an appeal against sentence given on 24 July 2024 in the High Court at Lautoka. The Appellant with another person were charged with one count Aggravated Robbery contrary to section 311(1) (a) of the Crimes Act 2009. On 7th June 2024 the Appellant (in the presence of his counsel) pleaded guilty to the offence of Aggravated Robbery as charged. On 14th June 2024, the Appellant with the co-accused, (in the presence of their counsel) admitted the summary of facts read and explained to them in their preferred language.

[2] In sentencing the Appellant, the learned trial Judge after discussing the sentencing principles, and the aggravating and mitigating factors, stated:

"In summary the first accused Mr. Tuinivono is sentenced to 5 years and 6 months imprisonment which will be served consecutively to the sentence of 1 year and 4 months in HAC 174 of 2023 (24 June 2024). This means Mr. Tuinivono will serve 6 years and 10 months imprisonment with a non-parole period of 5 years and 10 months to be served before the accused is eligible for parole."

[3] The Appellant filed a timely appeal against sentence on 26 July 2024.

(B). Summary of Facts

[4] *On 30th September 2023 at around 10:30pm, the victim was driving his taxi registration number LK1164 in Lautoka City. Upon reaching Naviti Street traffic lights, he stopped his car. At this time both the accused persons and another boarded the taxi and told the victim to take them to Naikabula, Lautoka. Whilst on their way, one of the accused persons who was seated at the back behind the driver's seat, held the victim's neck, choked him and told him to stop the taxi. The victim did as he was told both the accused persons pulled the victim out of the taxi and took him to the back seat.*

The first accused drove the taxi to Abaca and whilst on their way, the second accused punched the victim on his stomach and face. Upon reaching Abaca, both the accused persons parked the taxi at an isolated area.

The second accused pulled the victim out of the taxi, cut the seat belt and tied him to a nearby tree with the seat belt. They also tied and covered the victim's mouth with a t-shirt. Both the accused persons and another went away with the following items:

(i) 1x Samsung galaxy A13 mobile phone valued at $480.00
(ii) 1x Black Nokia button mobile phone valued at $45.00
(iii) Canvas blue in colour valued at $18.00
(iv) Cash amounting to $100.00
(v) Taxi registration number LK1164 valued at $18,000.00
Total - $18,643.00

(C). Grounds of Appeal

[5] The Grounds of appeal are set out below:

(a) The learned sentencing Judge erred in law and in fact when he sentenced the Appellant to 5 years 6 months to be served consecutively to HAC 174/2023.

(b) The sentencing Judge erred in law and fact when he did not deduct my remand period as he stated it was already deducted in HAC 174/2023 as I was arrested around the same time for both matters.

(c) That the learned sentencing Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into account relevant matters.

(d) That the Appellant's sentence is being manifestly harsh and excessive and wrong in principle in the circumstances of the case.

(D). The Law

[6] A person who is convicted on a trial may appeal to the Court of Appeal pursuant to section 21 of the Court of Appeal Act.

[7] Section 35(1) (a) and (b) of the Court of Appeal Act.empowers the Court to give leave to appeal to the Court and to extend the time within which notice of appeal or of an application for leave to appeal may be given.

[8] The test for granting leave to the Court of Appeal as established in **Chand v State** [2008] FJCA 53, is for the Appellant *"to demonstrate arguable grounds"* of appeal. In **Caucau v State** [2018] FJCA 171, it was endorsed that the test of "*reasonable prospect of success*" could be employed to differentiate arguable grounds from non-arguable grounds at the leave stage of appeal.

[9] The guidelines to be followed when a sentence is challenged on appeal were outlined in **Kim Nam Bae v The State** [1999] FJCA 29 as follows:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

(E). High Court - Sentencing (per Sunil Sharma J)

[10] The learned sentencing Judge affirmed that the maximum penalty for Aggravated Robbery is 20 years imprisonment. The acceptable tariff for the offence against public service providers such as taxi, bus, and van drivers is from 4 years to 10 years **Usa v State**, Criminal Appeal AAU81 of 2016 (15 May, 2020). (Paragraph 9)

[11] **Eparama Tawake v State** CAV0025 of 2019(28 April, 2022) had provided guidance in regards to the appropriate sentence in Aggravated Robbery offences based on: the degree of the offender's culpability, and the level of harm suffered by the victim - paragraph 10. The Supreme Court gave a tariff of a sentence between 3 to 7 years for Aggravated Robbery with another person under Medium Harm Category, where the facts are similar to this case. This is a case of Aggravated Robbery on a public service provider for which specific tariff applies - paragraph 11.

[12] The learned sentencing Judge set out the aggravating factors as: Planning, Victim was unsuspecting and vulnerable, Breach of trust and Prevalence of the offence - paragraph 12.

[13] 4 years imprisonment was selected (Lower range of the tariff) as the starting point. 4 years was added for the aggravating factors raising the interim sentence to 8 years imprisonment - paragraph 13. The learned sentencing Judge noted that Tuinivono had two previous convictions for similar offending and did not give him any discount for good character. His sentence was reduced by 1 year 6 months for mitigation, bringing his sentence to 6 years 6 months paragraph 14.

[14] For the Guilty plea and remorse, the sentence was reduced by 1 year. The head sentence for the first accused Mr. Tuinivono is 5 years 6 months imprisonment - paragraph 19. The sentencing Judge continued as follows:

> *"20. As for the remand period of Mr. Tuinivono he does not get the benefit of any reduction since he has already received a reduction of 8 months for his remand period in HAC 174 of 2023 (24 June,2024). The accused cannot get a double reduction. The final sentence for the first accused is 5 years and 6 months imprisonment.*
>
> *21. I have taken into account that Mr. Tuinivono is a young offender (was 23 years at the time), pleaded guilty at the earliest opportunity, has shown some remorse, cooperated with the police and he takes responsibility for his actions. I have also taken into account the fact that he is currently serving 1 year 4 months imprisonment. The offence committed is serious which shows blatant disregard for public service providers. In my considered judgment a concurrent sentence will be too lenient and to have some deterrence in sentencing bearing in mind the tariff in place this term of imprisonment will be served consecutively to the sentence of 1 year and 4 months in HAC 174/2023 (24 June,2024). This means Mr. Tuinivono will serve 6 years and 10 months imprisonment."*

[15] For the fixing of the non-parole period of sentence, the learned sentencing Judge considered section 18(1) of the Sentencing and Penalties Act (as amended), and the purpose and principles established in: **Paula Tora The State** AAU0063.2011 (27 February 2015) (per Calanchini), and in **Akuila Navuda v The State** [2023] FJSC 45; CAV013.2022 (26 October 2023), before imposing 5 years and 10 months imprisonment as a non-parole period – paragraphs 22, 23, 24 and 25).

[16] The learned sentencing Judge, considered section 4(1) of the Sentencing and Penalties Act, and emphasized that the purpose of the sentence in this case is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.

(F). Appellant's Case

[17] **Ground (a):** The Appellant submits that the learned sentencing Judge is mistaken in imposing a consecutive sentence and not a concurrent sentence pursuant to section 22(1) of the Sentencing and Penalties Act. Section 22(1) states that:

> *"22(1) Subject to subsection (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment."*

[18] That the exceptions in subsection (2) of section 22 are not applicable to this case.

[19] **Ground (b):** The Appellant submits that section 24 of the Sentencing and Penalties Act 2009 applies. The section states:

> *"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, may be regarded as a period of imprisonment already served by the offender."*

[20] The Appellant submits: He was arrested on 8th October 2023. He was first charged and prosecuted for Aggravated Robbery committed on 4 October 2023 under HAC 174 of 2023. Thereafter he was charged for Aggravated Robbery committed on 30 September 2023 under HAC 182 of 2023 (this current matter). The Appellant was remanded for 8 months. Since HAC 174 of 2023 was dealt with faster in court than the current matter (HAC 182 of 2023), the learned Judge in HAC 174 of 2023 appropriately deducted the 8 months remand period.

[21] However, in this case, the sentencing Judge, in paragraph 20 of sentencing would not give any benefit of the remand period, for the reason that it was already accounted for in HAC 174 of 2023. The Appellant submits that the learned sentencing Judge ought to have considered the remand period for this current matter as well by dividing 8 months remand period or making the sentence concurrent with HAC 174 of 2023.

[22] **Ground (c):** The Appellant submits that in HAC 174 of 2023 the Appellant was considered a first offender. However in paragraph 14 of sentencing, the learned Judge noted, that the Appellant had 2 previous convictions for similar offending. No declaration was made that the Appellant was a habitual offender. That the sentencing Judge was incorrect in considering that the Appellant had 2 previous convictions of similar offending, as the offence in HAC 174 of 2023 had occurred after the current matter, even though HAC 174 of 2023 concluded before this current matter. Furthermore, the Appellant was arrested for this current matter first.

[23] The Appellant further submits:

> *"32……that this current matter is his first offending and he ought to have received discount for good character. He was remorseful and pleaded guilty early….he played a minimal role only by driving the taxi and did not play any other part in the offending, such as assaulting and tying the complainant.*
>
> *33. ……that the learned sentencing Judge failed to take into account his minimal role in the offending and that he was a first offender at the time of offence. The Appellant also submits that the learned sentencing Judge took into account irrelevant factors by determining that he has 2 previous convictions for similar offending."*

[24] **Ground (d):** The Appellant submits that the learned sentencing Judge failed to consider section 15(3) of the Sentencing and Penalties Act 2009 which was applied in **State Prosecution v Tilalevu** [2010] FJHC 258, and **State v Fong** [2005] FJHC 722. The sentence would not have been harsh and excessive if the section were applied in this case also.

(G). Respondents Case

Grounds (a), (c) and (d)

[25] The Respondent accepts that the learned trial Judge made the sentence operate consecutively to the sentence given in HAC 174 of 2023. The Respondent submits

that this was a departure from section 22 (concurrent sentence) of the Sentencing and Penalties Act 2009. The reason for the concurrent sentence (paragraph 21 Sentence) being that a concurrent term would be too lenient.

[26] The Respondent submits that while it may have been permissible for the learned sentencing Judge to sentence the Appellant consecutively for a spate of robberies, this is not such a case. HAC 182 (this case) had occurred earlier on 30 September 2023, prior the the subsequent offending in HAC 174 of 2023 which occurred on 4 October 2023.

[27] The Respondent submits that chronologically, considering HAC 182 of 2023 after HAC 174 of 2023 is not really a spate of offending. The learned sentencing Judge failed to consider relevant offending timelines and may arguably have leaned towards deterrence on a somewhat mistaken belief.

[28] The Appellant had shown remorse in both cases.

[29] The Respondent submits that there is no analysis by the learned sentencing Judge that he had considered the totality of the Appellant's consecutive sentence and whether the final term would possibly have a crushing effect on him where the final sentence in HAC 182 0f 2023 may arguably be said to be harsh and excessive in result.

[30] The Respondent submits that there is strong merit under the above grounds to permit the Appellant's sentence to be reviewed by the Full Court.

Ground (b)

[31] The Respondent submits that as far as time discount for time in remand, there was no error when the learned sentencing Judge was mindful that in HAC 174 of 2023, the Appellant had been given a full 8 months discount for time in remand. Having been arrested on 8 October 2023.

[32] The Appellant or any person to be sentenced for multiple cases, cannot receive repeated discounts for time in remand once the same has already been discounted. To do so would amount to double counting. This ground does not have substance.

[33] The Respondent submits that leave to appeal sentence ought to be allowed for grounds 1, 3 and 4 only.

(H). Analysis

[34] The Appellant argues that the learned sentencing Judge was mistaken by sentencing him to 5 years 6 months to be served concurrently to HAC 174 of 2023; did not deduct my remand period as it was already deducted in HAC 174 of 2023; by taking irrelevant matters into consideration when sentencing the Appellant and not taking account of relevant matters, and that the sentence is harsh and excessive.

Ground (a)

[35] The imposition of the consecutive sentence in this case (HAC 182 of 2023) is not consistent with section 21(1) of the Sentencing and Penalties Act 2009, which require that, every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently. That is the rule, that the sentence be concurrent, unless directed by the court. Subsection 21(1) is subject to subsection (2)(a) to (e). The facts and circumstances of this case is outside the ambit of the exceptions specified in subsection 21 (2) (a) to (e) especially (c) thereof as the Appellant is not a habitual offender under Part 3 the said Act. Thus, the imposition of the consecutive sentence on the Appellant is a mistake. This ground is arguable.

Ground (b)

[36] When considering whether the Appellant should have received a discount for the 8 months which is the period of time during which the Appellant was held in custody prior to the trial, the learned sentencing Judge had said that:

> *"20. As for the remand period of Mr Tuinivono he does not get the benefit of any reduction since he has already received a reduction of 8 months for his remand period in HAC 174 of 2023 (24 June,2024). The accused cannot get a double reduction. The final sentence for the first accused is 5 years and 6 months imprisonment."*

[37] Section 24 of the Sentencing and Penalties Act 2009, has been applied in favour of the Appellant in sentencing in HAC 174 of 2023, and the accused cannot get a double reduction. The learned sentencing Judge was not mistaken in this regard. This ground is not arguable.

Ground (c)

[38] The learned sentencing Judge was mistaken when he stated in paragraph 14 that the Appellant has two previous convictions for similar offending. As such the Appellant does not get any discount for good character. The facts reveal that the offending in case HAC 182 of 2023 (this case) occurred first, and the offending in HAC 174 of 2023 occurred subsequently, however, the Appellant was sentenced first for HAC 174 of 2023 and received a discount for the 8 months in which the Appellant was in custody from the date of arrest to the date of conviction. Since the period of remand has already been discounted in HAC 174 of 2023, there can be another discount for HAC 182 of 2023. The learned sentencing Judge appear to have misunderstood the chronology of events in the two cases and the implications. This ground is arguable.

Ground (d)

[39] The observations made above in relation to grounds (a) and (c) are also applicable to this ground. The learned trial Judge accepted (paragraph 17) that the Appellant have shown some remorse, and had pleaded guilty at the earliest opportunity, and is a young offender. However, he observed that the offence committed is serious which shows a blatant disregard for public service providers, and in his considered judgment a concurrent sentence will be too lenient and to have some deterrence in sentencing bearing in mind the tariff in place this term of imprisonment will be served consecutively to the sentence of 1 year and 4 months in HAC 174 of 2023 (24 June, 2024). Which means that the Appellant will serve 6 years and 10 months imprisonment.

[40] The purpose of the sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case, and to deter offenders and other persons from committing offences of the same or similar nature – see section 4(1) of the

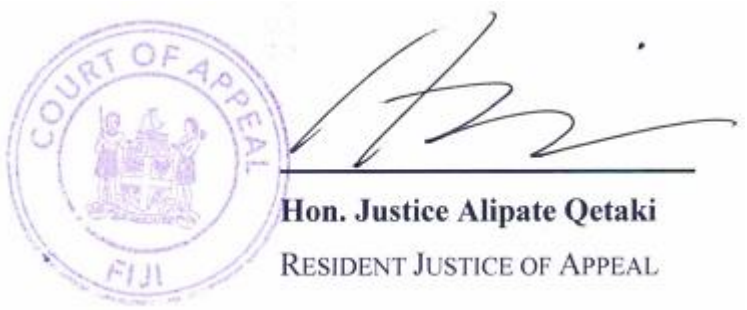
Sentencing and Penalties Act 2009.If the sentence is harsh and excessive could section 15(3) be applied in this case?

[41] In view of the above, and section 22(1) and (2), the sentence can be reviewed by the Full Court, bearing in mind the approach of appellate Courts in reviewing sentence: see **Korocakau v State** [2006] FJSC 5, and **Sharma v State** FJCA 178. This ground is arguable.

Order of Court

1. *Appellant's application for leave to appeal against sentence is allowed in respect of grounds (a), (c) and (d).*

2. *Appellant's application for leave to appeal against sentence in respect of ground (b) is not allowed.*



Solicitors

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