

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE No. HAC 143 of 2021

THE STATE

-v-

TUPOU WAQABACA

Counsels: *Ms. Kantharia. B* - *for State*
 Mr. Navuni. W - *for Accused*

Date of Hearing: 03.02.2023

Date of Sentence: 17.02.2023

SENTENCE

1. **Mr. Tupou Waqabaca**, you were charged in this Court by the Prosecution for one count of Aggravated Robbery contrary to **Section 311 (1) (a)** of the **Crimes Act 2009**, as follows;

First Count

Statement of Offence

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

Particulars of Offence

Mr. Tupou Waqabaca, on the 19th day of July 2021 at Raiwaqa, in the Central Division, in the company of each other, stole \$210 cash from the taxi of **ANDREW ASHAL NARI** and immediately after stealing from **ANDREW ASHAL NARI** used force on him.

2. You pleaded guilty to the above count stipulated in the information filed by the Prosecution on 24/01/2023.
3. According to the summary of facts that were read to you in open court and admitted by you on 30/01/2023:

- On 9/7/21 AT ABOUT 6.20am, **Andrew Ashal Nair** (PW1) was driving his taxi along Grantham Road heading to Damodar City when an i-Taukei male and a female flagged his taxi.
- The i-taukei male and the female were standing on the side of the road in front of the Ministry of Agriculture building.
- The male was wearing a black long sleeve t-shirt and a $\frac{3}{4}$ white and brown shorts whereas the female was wearing a brown top on white skirt.
- As soon as PW1 pulled the taxi, only the i-taukei male, **Tupou Waqabaca** (A1), got into the front passenger seat of the taxi and told PW1 that they have to pick some cassava from the back of the Agriculture building.
- PW1 drove his taxi with A1 to the Agriculture Building which is located beside the Raiwaqa Total Service Station.
- As they reached the back of the Agriculture Building A1 asked PW1 to stop the taxi, as soon as the taxi stopped two other iTaukei chaps approached the taxi.
- The two i-taukei's who approached the taxi, one of them opened the front passenger door of the taxi whilst the other opened the driver's side of the door and tried to pull out the vehicle key.
- The one that opened the passenger door took the cash from the console box of the taxi whilst A1 who was sitting in the passenger seat of the taxi jumped onto PW1 in which A1's leg crossed over PW1's leg and due to this PW1's other leg that was on brake shifted to speed in which the vehicle started to move. PW1 tried to control the steering whilst A1 pulled the steering towards left, thus the taxi bumped the gate of Agriculture compound and went into the drain.
- When the taxi hit the gate an iron hit the windscreen of the taxi at the same time and this injured A1 who was over PW1. A1 was hit on the left side of the chest and at the same time A1 was wearing a black long sleeve t-shirt which got stuck in the iron rod and front passenger door.
- A1 then removed the t-shirt and got out of the window of the passenger door.
- PW1 picked a wheel brace at this time and tried to stop A1 from running away but A1 managed to flee with the other two i-Taukei boys.
- According to PW1 the total cash that was stolen was about \$180.00 notes and \$30.00 coins and this was the left over cash which he had counted after having fueled the vehicle.
- PW1 further stated that apart from the cash that was stolen he also had his saving box and a saving plastic container with his phone in the taxi which was not stolen.
- PW 1 was taken for medical examination and a report was prepared which notes injuries sustained by him.

- This incident was witnessed by several other witnesses, who provided statements to Police.
4. In comprehending with the gravity of the offence you have committed, I am mindful that the maximum sentence prescribed by law for Aggravated Robbery is 20 years' imprisonment.
 5. However, the tariff depends on the nature and circumstances of the robbery at issue. In the case of **The State v EPARAMA TAWAKE¹**, the **Supreme Court of Fiji** has updated the applicable tariff for Aggravated Robbery, by the below pronouncement:

“Once the court has identified the level of harm suffered by the victim, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they pleaded guilty or not guilty and irrespective of previous convictions.”

	ROBBERY (Offender alone and without a weapon)	AGGRAVATED ROBBERY (Offender either with another or with a weapon)	AGGRAVATED ROBBERY (Offender with another and with a weapon)
HIGH	<i>Starting point: 5 years imprisonment Sentencing Range: 3 – 7 years</i>	<i>Starting Point: 7 years imprisonment Sentencing Range: 5 – 9 years</i>	<i>Starting Point: 9 years imprisonment Sentencing Range: 6 – 12 years imprisonment</i>
MEDIUM	<i>Starting point: 3 years imprisonment Sentencing Range: 1 – 5 years</i>	<i>Starting Point: 5 years imprisonment Sentencing Range: 3 – 7 years imprisonment</i>	<i>Starting point: 7 years imprisonment Sentencing Range: 5 – 9 years imprisonment</i>
LOW	<i>Starting Point: 18 months imprisonment Sentencing Range: 6 months – 3 years.</i>	<i>Starting Point: 3 years imprisonment Sentencing Range: 1 – 5 years imprisonment</i>	<i>Starting point: 5 years imprisonment. Sentencing Range: 3 – 7 years imprisonment.</i>

6. In this matter, you have committed this offence with the assistance of several other individuals. Therefore, in assessing the objective seriousness of offending in this matter, I considered the maximum sentence prescribed for the offence, the degree of culpability, the manner in which you committed the offence and the harm caused to the complainant. I gave due cognizance to the sentencing guidelines stipulated in **Section 4** of the **Sentencing and Penalties Act 2009**. In the present matter, you have committed this offence on a taxi driver when he was proceeding with his

¹ CAV 0025 of 2019 [Court of Appeal No. AAU 0013 of 2017]

usual duties. Considering the circumstances of this case, **TUPOU WAQABACA**, I start your sentence with a starting point of 5 years imprisonment, i.e. in the medium-range of the applicable tariff.

7. On promulgating the above table for tariff for the offence of Robbery in the case of **The State v EPARAMA TAWAKE**², the Supreme Court has also ventured to identify aggravating and mitigating factors, as below:

“Having identified the initial starting point for sentence, the court must then decide where within the sentencing range the sentence should be, adjusting the starting point upwards for aggravating factors and downward for mitigating ones. What follows is not an exhaustive list of aggravating factors, but these may be common ones:

- *Significant planning*
- *Prolonged nature of the robbery*
- *Offence committed in darkness*
- *Particularly high value of the goods or sums targeted*
- *Victim is chosen because of their vulnerability (for example age, infirmity or disability) or the victim is perceived to be vulnerable*
- *Offender taking a leading role in the offence where it is committed with others*
- *Deadly nature of the weapon used where the offender has a weapon*
- *Restraint, detention or additional degradation of the victim, which is greater than is necessary to succeed in the robbery.*
- *Any steps taken by the offender to prevent the victim from reporting the robbery or assisting in any prosecution.*

Again, what follows is not an exhaustive list of mitigating factors, but these may be common ones:

- *No or only minimal force was used*
- *The offence was committed on the spur of the moment with little or no planning*
- *The offender committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure*
- *No relevant previous conviction*
- *Genuine remorse evidenced, for example by voluntary reparation of to the victim”*

8. In this matter, the robbery that was committed concentrating on a taxi driver. The operators of taxis provide an invaluable service to our country in many ways. In this regard, on one hand they provide a valuable day to day mode of transportation to the citizens of our country and on the other hand they provide the inextricable support service the tourist industry of our country, an industry that is the apical contributor to the economy of Fiji. In relation to robbery of taxi drivers, it is

² Ibid

pertinent to highlight the observations made by **His Lordship Justice Gerard Winter** in the case of **Vilikesa Koroivuata v State**³, as below:

“Violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport. Taxi drivers are particularly exposed to the risk of robbery. They are defenseless victims. The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment.”

9. Further, Prosecution informs this Court that you have pre-planned the commission of this robbery of this taxi driver with several others. For this end you have hired this taxi on the pretext of requiring services of the victim driver for a personal reason. In view of this pre-planning noticed in the commission of this robbery and committing this offense on a taxi driver carrying out his usual business, I increase your sentence by 1 year.
10. Further, in the commission of this offence, you have injured the victim taxi driver, where he had sustained injuries. The conduct of this nature involving harm to the victims cannot be ignored by Court. In addition, your *modus operandi* in the commission of this offence has caused significant damage to the vehicle of the victim. In considering the physical harm and the property damage, I increase your sentence by 1 more year.
11. In mitigation, the defense counsel has informed Court that you were just over 20 years of age at the time of commission of this offence. In consideration of your age, I notice that your rehabilitation chances are high. Therefore, I intend to consider your rehabilitation potential, which should be balanced with deterrence and community protection.
12. Further, your counsel inform this Court that you are a first and young offender and have maintained a good character before the involvement in this offence which should be given due credence. However, on this premise, I cannot grant your request to impose a non-custodial sentence in this case. I would like to highlight the sentiments of **Nawana J** in the case of **State v Tilalevu** [\[2010\] FJHC 258](#); HAC081.2010 (20 July 2010), where His Lordship said that;

³ HAA 064 of 2004

“I might add that the imposition of suspended terms on first offenders would infect the society with a situation - which I propose to invent as 'First Offender Syndrome' - where people would tempt to commit serious offences, once in life, under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule.”

13. If this Court is to give credence to this “Fist Offender” phenomena, Court will send a wrong signal to the citizenry of this Country, where Court would inform every citizen that they could commit a crime for the first time with minimum repercussions. We should remember that a crime is a crime, regardless whether it is the first crime of the offender or the 10th crime. Our civilizations have detested crimes from the very inception.
14. Further, your counsel has informed the court that you have entered an early guilty plea and that you regret your action on the day in question. Still further, Court recognizes that by pleading guilty to the charge you have saved court’s time and resources at a very early stage of the Court proceedings. For all these grounds in mitigation, you should receive a considerable discount in the sentence. In this regard, I give you a reduction of one third in your sentence.
15. The, prosecution brings to the attention of this Court that you have been in custody since your arrest on 12/07/2021 to date, amounting to 1 year and 2 months , which period should be deducted from your sentence separately.
16. Taking all these factors into consideration, I impose on you 3 years and 6 month imprisonment forthwith with an applicable non-parole period of 36 months under **Section 18 (1)** of the **Sentencing and Penalties Act of 2009** as the sentence for the count you are charged with.
17. You have thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read 'Thushara Kumara'.

Hon. Justice Dr. Thushara Kumara

At Suva

On this 17th day of February 2023

cc: *Office of the Director of Public Prosecutions*
Office of the Legal Aid Commission