

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO. HAA 30 of 2023**

**LEBA TUILOMA**

**vs**

**STATE**

**Counsels:**     *Ms. Boseiwaqa K.*                     -             *for Appellant*  
                         *Mr. Naimila T.*                                     -             *for Respondent/State*

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**RULING**

1. The Appellant has filed this action in this Court pursuant to **Section 21 (1) (C)** of the **Court of Appeal Act 1949** in appealing a decision made by the Magistrate's Court of Suva in exercising extended jurisdiction in the case no 2106 of 2016.

**BACKGROUND**

2. The Appellant had been charged with one count of Aggravated Burglary contrary to section 311(1) (a) of the Crimes Act 2009, where the matter had been initiated and heard at the Suva Magistrates Court under extended jurisdiction.
3. As per the Suva Magistrates Court records the accused had pleaded guilty of her own free will. On this guilty plea, the Learned Magistrate had sentenced the accused to a term of imprisonment of 7 years and 10 months with a non-parole of 5 years.
4. Being dissatisfied with the decision of the learned Resident Magistrate the appellant had filed an untimely appeal against sentence passed where the appeal papers had been filed 3 years and 5 months after the challenged sentence was passed by the Learned Magistrate.

**Grounds of Appeal**

GROUND 1: The learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guidelines and applicable tariff for the offence [aggravated robbery] of this nature.

GROUND 2: The learned Magistrate erred in fact and in law in improperly imposing discounting for the mitigating factors to decrease the sentence.

### **Submissions of the Appellant**

5. As per the reasons for the long delay in filing action in this matter. The Appellant tenders the following reasons in the Affidavit filed by her in Court:
  - a. The Appellant alludes that she was self-represented during her case before the learned Magistrate and since she was a first offender, the Appellant did not possess the legal knowledge to fully comprehend the requirement and/or the consequences to file a timely appeal.
  - b. During prison visitation to the Suva Women's Correction Center by representatives of the Legal Aid Commission, she was advised that her sentence was lenient as per the guidelines given in the case of *Wise vs State [2015]*<sup>1</sup>. Thus, she decided not to pursue her appeal against the sentence.
  - c. Later, she learnt that a fellow inmate who was convicted for the same charge of Aggravated Robbery (with similar facts) had received a lesser sentence than hers and she was encouraged to file her Notice of Appeal against her sentence.
6. Appellant claims that the learned Magistrate had erred in law by not applying the true meaning of the Supreme Court decision in *Wise v State* and thereby erring in law by imposing and further sentencing the Appellant to 7 years 10 months with a non-parole period of 5 years.
7. It is the position of the Appellant that facts and the merits of the Appellant's case would be categorized as an offence of 'street mugging', where the tariff to offences of his nature is 18 months to 5 years imprisonment.
8. Appellant further submits that the learned sentencing Magistrate had failed to fully comprehend the mitigating factors submitted by the Appellant in reaching the final sentence.

### **Submissions of the Respondent**

9. Respondent submits that if the Appellant was to be sentenced according to the new tariff under *Eparama Tawake [2022]*<sup>2</sup>, for 'street mugging' type robberies, the following can be learned from the copy court record of the Suva Magistrates Court:
  - a. The level of harm was in the medium range as the Appellant with her co-accused had punched the forehead of the complainant and stole the complainant's mobile phone and handbag. The complainant was medically examined, and it was noted that her forehead was swollen and tender.

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<sup>1</sup> [2015] FJSC 7.

<sup>2</sup> [2022] FJSC 22.

- b. Once the level of harm is identified it is a matter of establishing what the corresponding starting point would be. The corresponding starting pint in this instance would be 5 years with a sentencing range of 3 – 7 years imprisonment.
10. Further, it is claimed by the Respondent that in this instance the learned Magistrate while referring to the decision of *Wise v State* began with a starting point of 12 years after considering culpability and nature of the offending and sentenced the appellant to 7 years and 10 months.
11. In this background, State submits that in consideration of the difference in nature of the offence of aggravated robbery taking place in the home of the complainant and street mugging, the learned Magistrate had acted wrongly in applying the tariff set out in *Wise v Tate*. The appropriate tariff that should have been referred to was that in *Raqauqau v State*, which is 18 months to 5 years.
12. In this light, the Respondent submits that in accordance with **Section 4(2)(b)** of the **Sentencing and Penalties Act 2009**, it would seem that the position should be that the most recent guideline judgment i.e., *Eparama Tawake* (supra-1) should be applied when dealing with similar matters as directed by the statute, as follows:

*“Sentencing Guidelines*

*4. (2). In sentencing offenders, a court must have regard to-*

*(b) current sentencing and the terms of any applicable guideline judgment;”*

### **Analysis and Determination of Court.**

13. In this matter, though there is an inordinate delay in the Appellant filing this application in this Court, in view of the State recognizing that there had been a perceptible error in the sentence passed by the Magistrate against the Appellant, in the interest of justice, this Court opted to hear this appeal.
14. In the light of the Respondent recognizing the excessiveness of the sentence in this matter and the Learned Magistrate picking up an erroneous starting point for the sentence, this Court perceives that a suitable sentence should be determined by this Court in line with the authority given to this Court by **Section 256 (2) (a)** of the **Criminal Procedure Act of 2009**.
15. In venturing to execute this task, this Court is reminded of the provisions of Section 4 (2) (b) of the Sentencing and Penalties Act of 2009, which instructs this Court to have due regard to any current sentencing guideline judgement. However, this Court is mindful that in applying current sentencing tariff to a previous sentence would require retrospective application of current tariff guidelines promulgated by the Supreme Court of Fiji.
16. With a view of obtaining directions of retrospective application of guideline judgements, this Court intend to seek guidance from the **Court of Appeal of New Zealand** from its pronouncement in the case of *Cheung v R [2021]*<sup>3</sup>, where it stated, as follows:

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<sup>3</sup> [2021] 3 NZLR 259

*“The retrospective application of guideline judgments to past conduct that has not yet resulted in a sentence ought to be uncontroversial, for several reasons:*

- (a) Guideline judgments do not vary the penalty for the offence, which is fixed by statute;*
- (b) There is no statutory or common law right to the benefit of a particular methodology or guideline;*
- (c) A sentencing guideline judgment often affects substance as well as process. Substantive change in the law introduces an interpretive presumption against retrospective application of legislation;*
- (d) Retrospective application of sentencing guidelines is not ordinarily unfair, as guidelines reflect evolving sentencing practice and are not intended to be prescriptive. Judges are expected to sentence by reference to the applicable statutory sentencing purposes, principles and factors. Judges may depart from the guidelines when necessary to fix a just sentence in a given case;*
- (e) The prospective-only application of a guideline judgment to sentences that have already been passed at the date of judgment ought also to be uncontroversial (as that reflects the scheme of the Criminal Procedure Act 2011).”*

17. Therefore, in determining the appropriate sentence, this Court intends to refer to the tariff guidelines for Aggravated Robbery stipulated by the **Supreme Court of Fiji** in the case of *The State v EPARAMA TAWAKE*<sup>4</sup>, as follows:

*“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.”*

	<b>ROBBERY</b> <i>(Offender alone and without a weapon)</i>	<b>AGGRAVATED ROBBERY</b> <i>(Offender either with another or with a weapon)</i>	<b>AGGRAVATED ROBBERY</b> <i>(Offender with another and with a weapon)</i>
<b>HIGH</b>	<i>Starting point: 5years 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>

<sup>4</sup> Supra, note 2.

<i>MEDIUM</i>	<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>
<i>LOW</i>	<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>

18. As submitted by the State, the starting point of the sentence in this matter should have been 5 years imprisonment. Thereafter, if this Court follows the same trajectory followed by the Learned Magistrate, the sentence will be increased by 3 years for the aggravating factor of causing injuries to the victim leading the term to 8 years. For the mitigating factors, as stated by the Learned Magistrate in his sentence, the term of the sentence could be reduced by 3 years, ending up with a sentence of 5 years.
19. Moreover, by the early guilty plea by the Appellant she had saved court’s time and resources at a very early stage of the Court proceedings. For this ground in mitigation, she should receive a considerable discount in the sentence. In this regard, this Court grants a reduction of one third in the sentence leading to an imprisonment of 40 months.
20. In addition, the Learned Magistrate had further reduced the sentence by 2 months due to the time spent in remand, which period will be reduced separately by this Court.
21. In considering all these attenuating factors, **LEBA TUILOMA**, your final sentence is hereby reduced to 38 months imprisonment with an applicable non-parole period of 32 months under **Section 18 (1)** of the **Sentencing and Penalties Act of 2009** as the sentence for the count you were charged with in this matter. However, if you have served this period in prison by now, this Court orders for the immediate release of the Appellant from prison.
22. You have thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Justice Dr. Thushara Kumarage

At Suva  
This 25<sup>th</sup> day of October 2023

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