IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 73 of 2023

BETWEEN	:	**DHARMEND PRASAD**
		APPELLANT
A N D	:	**THE STATE**
		RESPONDENT

Counsel	:	Mr. J. Cakau for the Appellant.
	:	Ms. S. Naibe for the Respondent.
Date of Submissions	:	10 April, 2024
Date of Hearing	:	10 April, 2024
Date of Judgment	:	12 April, 2024

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged for one count of robbery contrary to section 310 (1) (a) (i) of the Crimes Act 2009 at Magistrate's Court, Ba. It was alleged that the appellant on 26th day of March, 2019 at Sarava, Ba in the Western Division stole a white Toyota Prius Hybrid Taxi Registration number LT

8672, the property of Reenal Vishal Ratnam and immediately before stealing, used force on the said Reenal Vishal Ratnam.

2. The appellant appeared in the Magistrate's Court and he elected Magistrate's Court trial when the amended charge was put to the appellant he pleaded not guilty. After numerous adjournments the trial proper began on 15th July, 2022. The prosecution called two witnesses and the accused exercised his right to remain silent.

3. On 22nd September, 2023 the appellant was found guilty as charged and he was convicted accordingly. After hearing mitigation on 6th October, 2023 the appellant was sentenced to 8 years imprisonment with a non-parole period of 5 years.

4. The brief summary of facts was as follows:

   a) The complainant is a taxi driver who owned a Toyota Hybrid 1.5 litre taxi registration no. LT 8672. On 26th March, 2019 after 9pm the complainant went in his taxi to pick a passenger at Sarava, Ba. When the complainant parked his car at the location provided by the passenger the appellant came and confronted the complainant. When the complainant told him his purpose the appellant said that the passenger was not there.

   b) Before the complainant moved his car the appellant drove his car and stopped it at his driveway. The appellant left his car and came to the complainant's car leaned on the passenger side and started talking to the complainant for about 2 to 3 minutes. The complainant was able to see the appellant from the lights of both the vehicles and the lights from a nearby house.

c) Shortly after, the appellant came to the driver's side where the complainant was sitting and he started punching the complainant on his eyes, nose and jaws. Furthermore, the appellant opened the car door and pulled the complainant out of the car and started kicking the complainant on his legs. According to the complainant by this time he started to bleed since he was assaulted for about 15 minutes.

d) Thereafter the appellant got in the complainant's car and drove away, the complainant ran towards the road seeking assistance from members of the public. The matter was reported to the police upon investigation the appellant was arrested, caution interviewed and charged.

APPEAL TO THE HIGH COURT

5. The appellant being aggrieved by the conviction and sentence filed a timely appeal in this court. The grounds of appeal are as follows:

APPEAL AGAINST CONVICTION

5.1 That the learned trial Magistrate erred in law and fact when she failed to properly consider the absence of evidence of intention in satisfying the requirement of robbery as required by law, the failure of which led to a judgment that was unsafe and unsatisfactory and amounts to a miscarriage of justice.

5.2 That the learned trial Magistrate erred in fact and law in not properly addressing the issues of identification of the accused by the complainant in his evidence led at the trial by the Prosecution whereby there was no other means of identification to support dock identification by the complainant, which led to a judgment that was unsafe and unsatisfactory and amounts to miscarriage of justice.

5.3 That the learned trial judge erred in fact and law in not properly addressing the inconsistent evidence led at trial by the complainant and second prosecution witness in particular the manner in which the assault took place and where, which is absent in the judgment and such absence resulted in a unsafe judgment.

APPEAL AGAINST SENTENCE

a) The sentence is manifestly excessive.

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

GROUND ONE

That the learned trial Magistrate erred in law and fact when she failed to properly consider the absence of evidence of intention in satisfying the requirement of robbery as required by law, the failure of which led to a judgment that was unsafe and unsatisfactory and amounts to a miscarriage of justice.

7. The appellant's counsel argued that the prosecution had only proved the physical element of the offence of robbery but not the mental element of intention. There was no evidence that the appellant's intention was to steal or drive away the complainant's car. Counsel further submitted that the prosecution by failing to prove intention on the part of the appellant had failed to prove that the appellant had used force to steal the complainant's car.

8. The appellant was charged under section 310 (1) (a) (i) of the Crimes Act which states as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and –

(a) immediately before committing theft, he or she-

(i) Uses force on another person; or...

with intent to commit theft...

9. The learned Magistrate at paragraphs 14 and 22 of her judgment had succinctly outlined the elements of the offence and how she had come to the conclusion about the guilt of the appellant. In respect of intention section 19 (1) of the Crimes Act states:

"A person has intention with respect to conduct if he or she means to engage in that conduct."

In this case the conduct of the appellant is obvious he was seen by the two prosecution witnesses to have assaulted the complainant and then driving away the taxi. The conduct of the appellant was taken into consideration on the totality of the evidence adduced. Furthermore, intention can be decided by considering what the accused did, by looking at his actions before, at the time of, and after the act. There is no error made by the learned Magistrate.

9. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

That the learned trial Magistrate erred in fact and law in not properly addressing the issues of identification of the accused by the complainant in his evidence led at the trial by the Prosecution whereby there was no other means of identification to support dock identification by the complainant, which led to a judgment that was unsafe and unsatisfactory and amounts to miscarriage of justice.

10. Counsel submitted that the learned Magistrate failed to consider that apart from dock identification there was no other prior means of identification such as identification parade. The complainant did not know the accused and had not seen him before and as such dock identification should not have been allowed. Counsel relied on the observations made by the Court of Appeal in *Peni Lotawa vs. The State, criminal appeal no. AAU 0091 of 2011 (05 December, 2014)* at paragraph 7 as follows:

[7] Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness -- the person to be identified is sitting in the dock. The Privy Council has examined the merits and demerits of such identification in the case of ***Holland v. HM Advocate****(The Times June 1, 2005) where it was held that such an identification was not per se incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the Judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects. It has been decided now in a line of English cases that it should be refused by a trial Judge except in situations where the accused has refused to participate in a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.*

11. Finally, counsel submitted that the investigation carried out by the police was procedurally flawed, prejudiced and detrimental to the interest of justice. The appellant was deprived of the opportunity to participate in an identification parade. The evidence of the second witness although of some assistance should have been tested by the Turnbull guidelines.

12. There is no dispute that the complainant did not know the appellant. The learned Magistrate had concisely elaborated on the identification evidence by both the prosecution witnesses at paragraphs 19 and 20 of her judgment as follows:

19. There is no dispute that the accused was at the scene of the offence at the time of the offence, there is also evidence pertaining to that from both PW1 and PW2 and there was no cross examination by defence to have caused a discredit of that evidence. PW1 was firm in his evidence in court of what had happened to him on the night of 26/3/2019 at Sarava, Ba. He recalled quite clearly what had occurred. He recalled speaking with the accused for 2 – 3 minutes prior to his assault, he had spoken to the accused and informed him that he was there to pick the girl who had called him. Shortly after that the accused then parked his vehicle, got off and came for PW1 and punched him while he was still sitting in his vehicle and thereafter pulled him out of the car and punched him again and then drove PW1's car and drove off. That account is further cemented also by PW2 who confirmed that she had used the services of PW1 when hiring his taxi that night. She had also observed the assault by the accused on PW1 when PW1 was still inside his vehicle and also the accused pulling PW1 out of his car and the accused driving off with PW1's vehicle. Much of the cross examination of both the witnesses did not cause any substantial discrediting of their evidence and much of the cross examination was towards peripheral issues of which both witnesses maintained the pertinent accounts of their evidence to which satisfies the elements of this offending.

20. Both PW1 and PW2 confirmed of the accused being present on that night of 26/3/2019 at Sarava, Ba and both confirmed that the accused had driven off with PW1's vehicle and PW1 had in his evidence confirmed that he had not given the accused any such permission to do that. Both PW1 and PW2 also confirmed of the assault on PW 1 by the accused whilst he

was still sitting inside his vehicle and also after he was pulled out and both confirmed of the accused taking control of PW1's vehicle and then after driving off. I have considered the identification by both PW1 and PW2 and I find the same to not have been hindered or obstructed in anyway and I find that both had made proper identification of the accused on the day of the offending and identified him to [be] the same person in court during the trial.

13. The appellant takes issue with the dock identification and the identification evidence of both the prosecution witnesses. The defence counsel did not take any objection when the complainant was asked to identify the appellant in court. In respect of the Turnbull guidelines the evidence before the court was in compliance with the guidelines which gave the court the opportunity to rely on the evidence adduced. The evidence of the complainant in respect of his identification of the appellant is as follows:

Pages 46 and 47 of the copy record

45. Q Any source of light at that place?
A Light was on.

48. Q Distance between you and this person who was talking to you?
A I was sitting on driver's seat – he was on other side – passenger door leaning and talking to me.

53. Q And then what happened?
A Then he got off his car and came to me and then he started punching me on my face.

54. Q Where were you when this person was punching your face?
A Sitting in my car.

55. Q You know how long he punched you?
A He used his hand.

56. Q Which place on your face he punched?
A Under eyes on nose – my nose broken – on my jaw and on my head.

57. Q What happened after punching you?

A He opened my door pulled me out and put me on the ground.

58. Q After that what did he do?
A After that he assaulted me again - he uses his leg.

59. Q What happened then?
A On my legs, eyes and jaws and ribs.

60. Q And then?
A This person took my vehicle away.

Cross examination of the complainant Pages 50 and 51 of the copy record

12. Q Where was Indian lady when accused was there?
A Indian lady a bit far away.

14. Q So this is the 2nd time you see the accused?
A Yes he was parked before me, he drove first and I followed him and he stopped his vehicle and I stopped.

17. Q When accused assaulting you how long did you observe?
A Don't know actual time – roughly 15 mins.

18. Q Does the permit belong to you the vehicle you took?
A Yes, that is my permit.

19. Q I'taukei she called you to come then come, coming between Lautoka to Ba you called the girl again?
A I called the girl but no one picked the call.

20. Q You said you conversed with accused 2 - 3 minutes?
A Yes at his house communicated for 2 - 3 minutes with accused. When picked her I'taukei girl.

14. The second prosecution witness Raijeli Lomani who knew the appellant told the court the following:

Pages 57 and 58 of the copy record

13. Q Then what did you do after seeing them drinking?
A Then I was there and they drink then I asked Dharmend to use his phone to call our taxi driver to take us.

14. Q *And then?*
    A *Then I called Vishal and Vishal came to park at other house – only 2 houses there. On our way to Vishal – before reaching Vishal I saw Dharmend reverse his car towards us. Then we hid in the sugarcane field.*

15. Q *And after that?*
    A *Then Dharmend left and saw taxi parked there – then we walked quietly and hid under one mango tree. Then heard them speaking in Hindi and heard Dharmend asked Vishal who he is coming to pick and then I saw Dharmend punched Vishal.*

16. Q *Where were you hiding and where you saw them – can show in court?*
    A *About 50m away from where we were standing.*

17. Q *And then what you do?*
    A *We were afraid.*

18. Q *Where was Mr. Vishal when he was assaulted?*
    A *Inside his car.*

19. Q *And then?*
    A *Vishal was bleeding.*

20. Q *Where did Vishal go then?*
    A *Then I picked my daughter and went to the main road to look for transport.*

21. Q *Where did Vishal go?*
    A *Then Vishal came to the main road and Dharmend also came to the main road and he took his key and took his car.*

22. Q *Who took key?*
    A *Dharmend took Vishal's car keys.*

23. Q *And then what did you do?*
    A *Then he hid in one store.*

24. Q *Where did Dharmend took key?*
    A *He drove Vishal's car..*

25. Q *What was colour of Vishal's car?*
    A *White*

26. Q *What is the maker of the car?*
    A *I don't know.*

27. *Q How long have you known Dharmend?*
A A few months but not long.

28. *Q How you came to know Mr. Dharmend?*
A By facebook.

29. *Q How many times you have met with Mr. Dharmend before this incident?*
A 3 times.

30. *Q If you see him again – can recognize?*
A Yes.

31. *Q Is he present in court today?*
A Yes.

32. *Q Can you point where he is sitting in court room?*
A Points at accused – ID made.

Cross examination page 58

1 *Q Not only 3x we've met, we have meeting since 2018?*
A In 2018 I was in Nadonumai, I disagree.

2 *Q We didn't meet on facebook a friend gave your # - that is how we know each other?*
A We met on Facebook – he add me as a friend and then messaged me.

3 *Q It was dark – how can you see from 50m away?*
A The place where we were hiding – a house was nearby and there was light from that house and his car was parked near Vishal – his car and Vishal's car facing each other and lights on. That what I saw – I saw Vishal also yelling for help.

4 *Q Toyota Prius Hybrid key remote control – so not possible for key to be taken?*
A He just pushed Vishal out of the car and he drove – but not sure how he took the key from Vishal.

15. Taking into account the evidence of both the prosecution witnesses I am convinced that there was enough evidence before the court that it was the appellant and no one else. Evidence of Raijieli also puts the appellant at the

scene which supports the evidence of the complainant in respect of what had happened. The evidence of identification of the accused is overwhelmingly obvious from the evidence adduced by the prosecution.

16. This ground of appeal is dismissed due to lack of merits.

GROUND THREE

That the learned trial judge erred in fact and law in not properly addressing the inconsistent evidence led at trial by the complainant and second prosecution witness in particular the manner in which the assault took place and where, which is absent in the judgment and such absence resulted in a unsafe judgment.

17. Counsel submitted that there were significant inconsistencies between the evidence of the complainant and the second prosecution witness such as the number of punches thrown, place where the appellant took the car keys and so on. The complainant said the appellant after assaulting him took the car keys and drove his car away (Q.62 of the evidence) Raijieli said after the assault she went to the main road and then the complainant came followed by the appellant where the appellant took the car keys and drove the complainant's car (Q. 20 and 21 of the evidence).

18. Counsel further stated that there was no confirmation of the injuries sustained by the complainant since no medical report was tendered by the prosecution.

19. At paragraph 19 line 12 of the judgment the learned Magistrate made a pertinent comment about the credibility of the prosecution witnesses in the following words:

"Much of the cross examination of both of the witnesses did not cause any substantial discrediting of their evidence and much of the cross examination was towards peripheral issues of which both witnesses maintained the pertinent accounts of their evidence to which satisfies the elements of this offending."

20. The inconsistencies between the prosecution witnesses did not touch on the elements of the offence. Even the inconsistencies brought up during the cross examination of the complainant with his evidence in court and his police statement were not significant to adversely affect the credibility of this witness. The important point to note is that there was credible and reliable evidence in respect of all the elements of the offence which the learned Magistrate accepted.

21. It does not matter how many punches were thrown by the accused as long as the witnesses narrated the assault which is the force used and the driving away of the taxi by the appellant which is what both the prosecution witnesses told the court. Moreover, there was no need for any medical report to be tendered by the complainant one of the elements of the offence was the use of force on the complainant by the accused and there was evidence to this effect given by both the prosecution witnesses.

22. As mentioned by the learned Magistrate the inconsistencies were on peripheral issues which did not affect the basic version of the complainant's evidence.

23. The Court of Appeal in *Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.2011 (2 October 2015)* had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in ***Bharwada Bhoginbhai Hirjibhai v State of Gujarat*** *(supra):*

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"

24. This ground of appeal is also dismissed due to lack of merits.

SUBSTANTIAL MISCARRIAGE OF JUSTICE

25. The appellant's counsel argued in the majority of his grounds of appeal that there was a substantial miscarriage of justice caused to the appellant unfortunately, he did not point to the test which this court should take into account. The test is that the appellate court had to be satisfied on the evidence adduced and the application of law that the only conclusion reached would have been one of guilt.

26. The Court of Appeal in *Munendra vs. The State, criminal appeal no. AAU 0023 of 2018, 25 May, 2023* from paragraphs 40 to 42 stated the above in the following words:

[40] The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of

the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see ***R. v. Haddy*** *[1944] K. B. 442; 29 Cr. App. R. 182;* ***Stirland v D. P. P.*** *[1944] A.C. 315; 30 Cr. App. R. 40;* ***R. v. Farid*** *30 Cr. App. R 168)].*

[41] The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.

[42] The Court of Appeal in ***Aziz v State*** *[2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:*
'[55] .....if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

[56] This test has been adopted and applied by the Court of Appeal in Fiji in ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** *[1955] NZLR 711 at page 713:*
"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57] .....when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*
"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

27. I have perused the copy record and read through the evidence I am satisfied that upon the analysis of the evidence adduced the only verdict is the guilt of the appellant.

APPEAL AGAINST SENTENCE

28. The appellant's counsel relied upon the following ground of appeal against sentence:

a) The sentence is manifestly excessive.

LAW

29. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

30. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"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] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(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."

31. Counsel submitted that the custodial term of 8 years and non-parole of 5 years was excessive in comparison with the case of *State vs. Karim Begg and another, criminal action no. HAC 14 of 2020 (6 December, 2022)* in which after trial on a charge of aggravated robbery the accused persons were sentenced to 3 years, 10 months and 2 weeks with a non-parole period of 2 years, 10 months and 2 weeks. Counsel stated that aggravated robbery was much more serious than robbery.

32. The maximum sentence for robbery is 15 years imprisonment. Although not argued by the appellant's counsel it is obvious to me that the learned Magistrate did not direct her mind to the accepted tariff in respect of robbery on a public service provider. Since the complainant was a taxi driver the accepted tariff from robbery to aggravated robbery upon such a complainant is an imprisonment term between 4 to 10 years imprisonment see *Peni Matairavula v State [2023] FJCA 192; AAU054.2018 (28 September 2023)* and *Alipate Ravuniagi Cawi vs. The State, FJCA 262; AAU 107.2019*

(29 November, 2023). The learned Magistrate fell in error when she took a tariff range of 8 to 14 years imprisonment which is wrong in principle.

33. To arrive at a decision whether the error in principle by the learned Magistrate had led to an excessive sentence this court is guided by the decision of the Supreme Court in *State vs. Eparama Tawake [2022] FJSC 22, CAV 0025 of 2019 (28 April, 2022)* from paragraphs 23 to 30:

[23] The State suggests that the best way for the Court to achieve consistency in sentencing for "street muggings" is to adopt the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England. That Guideline (as with the case of other definitive guidelines issued by the Sentencing Council) classifies cases of robbery by reference to two important factors: the degree of the offender's culpability and the level of harm suffered by the offender's complainant. There are three degrees of culpability and three levels of harm. The Guideline identifies a sentencing range for each class of case, and a starting point within that range.

[24] The English guideline covers three different types of robbery: "home invasions", professionally planned commercial robberies, and street and less sophisticated commercial robberies. Our focus in this case is on the last type. Even then, though, the English framework would require some refinement in Fiji, because in England there is a single offence of robbery, whereas Fiji has two offences of robbery: robbery contrary to section 310 of the Crimes Act and aggravated robbery contrary to section 311 of the Crimes Act. Moreover, as we have seen, the offence of aggravated robbery takes two forms: where the offender "was in company with one or more other persons" at the time of the robbery, and where the offender "has an offensive weapon with him or her" at the time of the robbery. Such guidance as we give has to reflect these differences.

[25] For my part, I think that this framework, suitably adapted to meet the needs of Fiji, should be adopted. There is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence, and if the offence is one of aggravated robbery, which of the forms of aggravated robbery the offence took. When it comes to the level of harm suffered by the complainant, there should be three different levels. The harm should be characterized as high in those cases where serious physical or psychological harm (or both) has been suffered by the complainant. The harm should be characterized as low in those cases where no or only minimal physical or psychological harm was suffered by the complainant. The harm should be characterized as medium in those cases in which, in the judge's opinion, the harm falls between high and low.

[26] Once the court has identified the level of harm suffered by the complainant, 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	*Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment*	*Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment*	*Starting point: 9 years imprisonment Sentencing range: 6-12 years imprisonment*
MEDIUM	*Starting point: 3 years imprisonment Sentencing*	*Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment*	*Starting point: 7 years imprisonment Sentencing range: 5-9 years*

	range: 1-5 years imprisonment		*imprisonment*
LOW	*Starting point: 18 months imprisonment Sentencing range: 6 months-3 years imprisonment*	*Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment*	*Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment*

[27] 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*
- *Complainant is chosen because of their vulnerability (for example, age, infirmity or disability), or the complainant 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 complainant, which is greater than is necessary to succeed in the robbery*
- *Any steps taken by the offender to prevent the complainant from reporting the robbery or assisting in any prosecution*

[28] 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 convictions*
- *Genuine remorse evidenced, for example, by voluntary reparation to the complainant*
- *Youth or lack of maturity which affects the offender's culpability*
- *Any other relevant personal considerations (for example, the offender is the sole or primary carer of dependent relatives, or has a learning disability or a mental disorder which reduces their culpability)*

[29] Having decided on the appropriate sentence in this way, the Court should then reduce the sentence by such amount as is appropriate – first for a plea of guilty and then for the time the offender spent in custody on remand awaiting trial and sentence. If judges take these steps in the order I have identified, it is to be hoped that sentences will be more likely to fit the crime, and that undesirable disparities in sentences will be avoided.

[30] This methodology is new to Fiji. In the recent past the higher courts have usually only identified the appropriate sentencing range for offences. They have only infrequently in recent times assisted judges by identifying where in the sentencing range the judge should start. That has caused difficulties identified by the Supreme Court on a number of occasions: see, for example, Seninolokula v The State [2018] FJSC 5 at paras 19 and 20 and Kumar v The State [2018] FJSC 30 at paras 55-58. If this methodology is used, that problem is avoided. Indeed, there is, in my opinion, no reason why this methodology should be limited to "street muggings", and it may be that thought will be given in the appropriate quarters to find cases to bring to the

Court of Appeal for this methodology to be considered for sentencing for other offences.

34. The Court of Appeal in *Matairavula's* case (supra) from paragraphs 17 to 20 whilst accepting the Supreme Court sentencing methodology has also given its views on the starting point and sentencing range for robbery, and aggravated robbery as follows:

[17] As suggested by the Supreme Court in Tawake if one were to replicate sentencing methodology therein mutatis mutandis to offences of aggravated robbery against providers of services of public nature, the recalibrated sentencing table maintaining the relative differences in sentencing between the three categories (high, medium and low) while adjusting the starting points within the range of 04 to 10 years may be seen as follows.

Culpability *Harm*	*ROBBERY (OFFENDER ALONE AND WITHOUT A WEAPON)*	*AGGRAVATED ROBBERY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)*	*AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)*
HIGH (CATEGORY 1)	*Starting Point: 06 years* *Sentencing Range: 04–08 years*	*Starting Point: 08 years* *Sentencing Range: 06–10 years*	*Starting Point: 10 years* *Sentencing Range: 08–14 years*
MEDIUM (CATEGORY 2)	*Starting Point: 04 years* *Sentencing Range: 02–06 years*	*Starting Point: 06 years* *Sentencing Range: 04–08 years*	*Starting Point: 08 years* *Sentencing Range: 06–10 years*

LOW (CATEGORY 3)	*Starting Point: 02 years Sentencing Range: 01year – 03 years*	*Starting Point: 04 years Sentencing Range: 02–06 years*	*Starting Point: 06 years Sentencing Range: 04–08 years*

[18] The appellant's offending may be considered medium (as opposed to high) in terms of harm and the culpability is of either second degree (the offending committed by two or more without a weapon) or the third degree (the offending committed by two or more with a weapon by holding a beer glass under the complainant's throat). Depending on whether it is second or third degree, the starting point is 06 or 08 years and the sentencing range could vary between 04-08 or 06-10 years. One also has to keep in mind that the appellant was declared a habitual offender by the High Court judge.

[19] Since this incident is objectively more serious in nature than simple 'street mugging' and it is in the form of an 'attack against taxi drivers', I am inclined to adopt the approach suggested by the Supreme Court in Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)] in dealing with this appeal. In doing so, I shall also consider the above table which mirrors the sentencing structure provided in Tawake for aggravated robbery against providers of public services.

[20] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by the appellate court 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.

35. Comparing the sentencing methodology of the Supreme Court and the Court of Appeal and the accepted tariff of 4 to 10 years imprisonment the facts of the case fall under medium category of culpability and harm.

36. In the interest of justice and in accordance with section 256 (2), (a) of the Criminal Procedure Act the sentence of the appellant is quashed and set aside. The appellant is sentenced afresh, the aggravating and mitigating factors are as follows:

AGGRAVATING FACTORS

1). Attacking the complainant in the night;
2). Prevalence of the offending;
3). No aggression by the complainant;
4). Left the complainant in a state of distress;
5). Complainant was vulnerable and helpless;
6). The appellant took advantage of the situation that the complainant was alone.

MITIGATING FACTORS

1). Accused is 47 years of age;
2). Single parent wife now deceased;
3). Has a daughter in year 1;
4). Works as a motor mechanic earns $550.00 per week;
5). Sole bread winner of the family;
6). Also looks after elderly parents;
7). Promises not to reoffend.

37. Bearing in mind the objective seriousness of the offence committed I take 4 years imprisonment (lower range of the scale) as the starting point of the sentence. The sentence is increased for the aggravating factors, and reduced for the other mitigation but not for good character due to the appellant's previous conviction.

38. I also note that the accused had not been in remand for this matter hence no further reduction will be given. The final sentence of imprisonment for one count of robbery against the complainant is 5 years imprisonment.

39. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the complainant compels me to state that the purpose of this 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.

40. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 4 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case. This court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.

41. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State AAU0063.2011 (27 February 2015)* at paragraph 2 where Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release.

Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

42. The Supreme Court in accepting the above principle in *Akuila Navuda v The State [2023] FJSC 45; CAV0013.2022 (26 October 2023)*] stated the following:

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

43. The appeal against sentence is allowed.

ORDERS

1. The appeal against conviction is dismissed;

2. The appeal against sentence is allowed;

3. The appellant is sentenced to 5 years imprisonment with effect from 6th October, 2023 with a non-parole period of 4 years;

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

HIGH COURT OF FIJI

At Lautoka
12 April, 2024

Solicitors
Messrs Vosarogo Lawyers, Suva for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.