

**IN THE COURT OF APPEAL, FIJI**  
**On Appeal from the Magistrate's Court**

**CRIMINAL APPEAL NO.AAU 0052 of 2017**  
**[In the matter of an appeal from the  
decision of the Magistrate's Court of  
Fiji in Criminal Case CF 12/16]**

**BETWEEN** : **THE STATE**

*Appellant*

**AND** : **ALISI VAKARAU**

*Respondent*

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. R. Kumar for the Appellant  
Mr. K. Prasad for the Respondent**

**Date of Hearing** : **21 September 2018**

**Date of Ruling** : **04 October 2018**

**RULING**

- [1] The Appellant has sought leave to appeal against the sentence imposed on the Respondent who had been jointly charged along with a juvenile on a single count of aggravated robbery under section 311 (1) (a) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed at Nasinu in the Central Division by stealing 1x black Alcatel mobile phone valued at \$45.00 and \$35.00 in cash to the total value of \$80.00 which was the property of Mosese Rabarawa and immediately before stealing both accused had used force on the said Mosese Rabarawa.

- [2] The Respondent and the juvenile had admitted to the summary of facts tendered by the Appellant. They are narrated in the Punishment/Sentence Order of the Learned Magistrate dated 22 March 2017 as follows.

*'On the 25<sup>th</sup> day of June 2016, Mosese Rabarawa (complainant), 44 years old of Vunisaleka Settlement was walking along Omkar Road in Narere when he was approached by an itaukei woman wearing a white hoody who offered to have sex with him for money. The complainant agreed and offered \$15.00 to her for sex. The itaukei woman ran back to her friends to inform them of the complainant's intentions. She returned to the complainant with her friends and took \$15.00 from him. Her friends included the juvenile offenders and the accused person. The complainant asked the juvenile offender to return his money. The juvenile offender grabbed the complainant from behind and the accused offender along with three other itaukei women removed from his alcatel mobile phone valued at \$45.00 and \$35.00 cash. The complainant tried to free himself but couldn't do so.'*

- [3] The Respondent pleaded guilty and was convicted by the Learned Magistrate exercising extended jurisdiction on 22 March 2017 who had sentenced her to 03 years of imprisonment and after deducting the remand period, the Respondent had to serve a term of 02 years and 08 months imprisonment.
- [4] In the Notice of Appeal dated 10 April 2017, the Appellant had raised the following ground of appeal against the sentence imposed on the Respondent by the Learned Magistrate seeking leave to appeal.

*'That the aforesaid sentence was manifestly lenient having regards to the sentencing guidelines and applicable tariff for the offence of Aggravated Robbery.'*

- [5] It is clear that since the Appellant is appealing against the sentence, section 21(1)(c) of the Court of Appeal Act comes into play. Therefore, for the Appellant to appeal to the Court of Appeal against the sentence on the above ground of appeal, leave to appeal has to be first obtained and to do so, the test for granting leave to appeal he should be passed.

- [6] The basic purpose of requiring leave of the court is to ensure that unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quantity and quality of cases heard and determined on appeal. In **Coulter v R** [1988] HCA 3; (1988) 164 CLR 350 (11 February 1988) the High Court of Australia said

*'The jurisdiction which the court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation ... It is a preliminary procedure recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention.'*

- [7] Granting leave or not is not just a formality but requires an examination of the merits of the particular case. The legal test for granting leave should be able to balance, on the one hand, the rights and interests of the aggrieved person in being able to have a decision or judgment of the lower court reviewed by a higher court with, on the other hand, the problem of appellate courts being swamped with increasing numbers of unmeritorious appeals. It should be neither too stringent nor too liberal. Whilst the legal test should be able to exclude unmeritorious appeals, it should not also exclude meritorious appeals.
- [8] The applicable test for granting leave to appeal to the Full Court as established in **Chand v State** AAU0035 of 2007: 19 September 2008 [2008] FJCA 53 and regularly followed is articulated as follows.

*'To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal'.*

- [9] Therefore, the main task at the leave stage is to differentiate an arguable ground of appeal from a non-arguable ground of appeal. However, **Chand** does not state how to identify and distinguish an arguable ground from a non-arguable ground or what features would constitute an arguable ground. Ordinarily an arguable ground should mean a ground which is capable of being argued plausibly. It cannot be based on a mere argument for the sake of an argument. In other words, it should be reasonably arguable (**DeSilva v The Queen** [2015] VSCA 290 (5 November 2015)). The threshold for leave to appeal has also been described as having a 'sufficiently



arguable ground' (**Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988) or even having a 'real prospect of success' (**R v Miller** [2002] QCA 56 (1 March 2002)). 'No prospect of success' and 'reasonable prospect of success' too have been used as appropriate tests to decide the question of leave to appeal. In my view, if a ground of appeal is not at least reasonably arguable on merits then there is little point in the matter being allowed to reach the Full Court.

- [10] **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa described the test of reasonable prospects of success as the correct approach to decide whether leave to appeal by the High Court should have been granted or not as follows:

*'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)*

- [11] The test of reasonable prospects of success appears to provide the necessary tools to identify and distinguish an arguable ground from a non-arguable ground. It sets out the constituent elements of a reasonably arguable ground of appeal. I shall proceed to consider the Appellant's appeal accordingly.

- [12] In Kirikiti v State AAU005 of 2011: 3 December 2015 [2015] FJCA 150, case of street mugging the Court of Appeal remarked as follows and affirmed a sentence of 08 years and 06 months of imprisonment with a non-parole period of 07 years.

*'[34] The aggravated robbery in this case is of a street mugging type robbery where it was committed in a group against the complainant.*

*[35] Even though the appellant submits that there was no pre-plan to this incident going by the evidence in the case the learned Magistrate cannot be faulted for coming to the conclusion that there was a pre-plan to this robbery.*

*[36] The respondent has cited the following three cases;*

*"Lilo v State [2008] FJSC 36; CAV 0006.2007 (25 February 2008) the Supreme Court had agreed with the trial judge sentencing remarks who ordered a sentence of 5 years to be imposed against the petitioner for street mugging robberies. The sentence was further reduced to 4 ½ years after time spend in custody was deducted from the total sentence.*

*Raqauqau v State [2009]FJSC 2; CAV 0023.2008S (10 February 2009) the Supreme Court upheld a sentence of 4 years imposed by the High Court and dismissed the appeal against sentence by the petitioner for "street mugging robberies."*

*Caniogo v State [2013]FJCA 60; AAU 115.2011 (28 June 2013) A sentence of 3 years with a non-parole period of two years was upheld by higher courts and was not changed concerning "street mugging robberies".*

*However it has been submitted by the respondent that in these cases the appellants were initially charged with robbery with violence and the sentence imposed was in line in the tariff available to the magistrate before the offence of aggravated robbery came into existence in 2010. As such the said cases are not of much persuasive value.*

*[37] In the recent case of Wise v The State; [2015] FJSC 7; CAV 0004.2015(24th April 2015);*

*The Supreme Court considered a special leave to appeal, petition against the sentence of seven years for aggravated robbery. The petitioner in this case had pleaded guilty. There it was stated by Gates, CJ:*

*"[25] The matter does not end there. We believe that offence of this nature should fall within the range of 8 to 16 years imprisonment..."*



And also,

*"[27] It is our duty to make clear that this type of offences will be severely disapproved by the Courts and be met with appropriate heavy terms of imprisonment...."*

- [13] Calanchini P in **Singh v State** Criminal No. AAU15 and 16 of 2011: 26 October 2012 [2012] FJCA 71 which was concerned with *inter alia* robbery with violence under section 293 (1) (b) of the Penal Code said:

*'...there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started as the lower end of the range.'*

- [14] In **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 His Lordship the Chief Justice quoted the above passage from **Singh** and said:

*'Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour.'*

- [15] **Nabainivalu v State** Criminal Appeal CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 the Supreme Court once again confirmed that in the following words:

*'.....the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (Nawalu v State Cr. App. No.CAV0012 of 2012)'*

- [16] In **Mani v State** AAU0087 of 2013:14 September 2017 [2017] FJCA 119 which was a case of aggravated robbery with accompanying violence, the Court of Appeal acknowledged that the tariff was 10-16 years.

*'..... the tariff of 10-16 years for the offence of aggravated robbery as laid down in several judicial pronouncements (see Samuel Donald Singh v State Crim. AAU15 and 16 of 2011, Nawalu v State Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11, Nabainivalu v State Criminal Appeal CAV 027 of 2014 : 22 October 2015 [2015] FJSC 22....'*

- [17] Waisele v State AAU0081 of 2013: 30 November 2017 [2017] FJCA 136 which was also a case of aggravated robbery committed, armed with offensive weapons and violence inflicted, the Court of Appeal affirmed that the tariff was 10-16 years.
- [18] Therefore, it should be possible that the tariff for aggravated robbery be now taken as well established between 10-16 years irrespective of whether the offence comes under section 311(1) (a) or (b) which perhaps may be relevant to decide the starting point within the range. The starting point as held in Koroivuki v State AAU0018 of 2010: 05 March 2013 [2013] FJCA 15 as a matter of good practice should be picked from the lower or middle range of the tariff and in doing so the court must have regard to the objective seriousness of the offence. In my view, whether it is a single case of robbery, spate of robberies, armed with offensive weapons or violence is perpetrated or not etc. could be considered in the matter of arriving at the final sentence which could be lower or higher than the tariff in which event the Judge must give reasons.
- [19] However, following Wise v The State CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7, the Appellant had stated that the tariff for a single case of robbery is 08 -16 years of imprisonment. The Supreme Court said

*'We are concerned with a single case here and not a spate of robberies Livai Nawalu v The State CAV0012/2012 at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years' '..... for what was a home invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar. For circumstances such as these, rightly abhorrent to the law-abiding community, will compel courts to harden their hearts and to impose harsher sentences' 'We believe that offences of this nature should fall within the range of 8 - 16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.'*

- [20] The Respondent has stated that the tariff for Aggravated Robbery is 08-16 years and the Learned Magistrate had not sentenced the Respondent according to that tariff and therefore conceded that leave to appeal could be granted.



[21] The Learned Magistrate has stated in her Sentencing Order that

*'This court has not sentenced you according to the tariff for the offence of Aggravated Robbery which is between 8 to 14 years imprisonment as you are a first and young offender'*

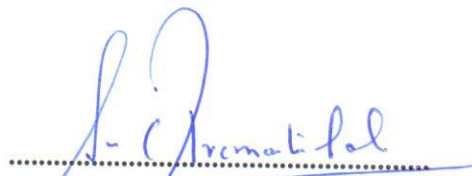
[22] Therefore there is consensus that this is a fit case to grant leave to appeal. Whether the tariff of 08 to 14 years should be applicable in the case of street mugging robberies as in the present case or whether it should be 10-16 as in other aggravated robberies is a matter to be decided by the Full Court. In any event, the sentence of 03 years imposed on the Respondent is far short of the lowest point of the tariff, be it 08 or 10 years.

[23] Thus, the Learned Magistrate has acted upon a wrong principle of sentencing. In my view, the error that had been committed by the Learned Magistrate is well within the guidelines for challenging a sentence stated in House v The King [1936] HCA 40; (1936) 55 CLR 499), Bae v State AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14.

[24] Therefore, I hold that the above ground of appeal against the sentence is reasonably arguable and leave to appeal should be granted.

[25] The Counsel for the Respondent informed this Court at hearing that the Respondent would finish serving her sentence on 01 January 2019 and therefore it is desirable that the hearing of the appeal before the Full Court be expedited, if possible, as the appeal is concerned with the legality of the sentence, for if the Full Court were to bring the sentence within the accepted tariff the Respondent would have to serve a longer period of imprisonment than imposed by the Learned Magistrate.



  
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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**