IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 0013 of 2017
(Magistrate's Court No. 2143 of 2014)

BETWEEN : **EPARAMA TAWAKE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, JA**
Basnayake, JA
Almeida Guneratne, JA

Counsel : **Mr T Lee for the Appellant**
Mr A Jack fo rthe Respondent

Date of Hearing : **13 September, 2019**

Date of Judgment : **3 October, 2019**

JUDGMENT

Chandra, JA

[1] The Appellant with another was charged for committing Aggravated Robbery contrary to Section 311(a)(b) of the Crimes Act, 2009 and was tried before the Magistrate's Court exercising extended jurisdiction.

[2] After trial, the learned Magistrate convicted the Appellant and sentenced him on 6th January 2017 to 9 years and 6 months imprisonment with a non-parole period of 7 years.

[3] The Appellant filed a timely appeal against conviction and sentence on the following grounds:

> *"Against Conviction:*
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> *(i) That the learned Magistrate erred in law by convicting the appellant on a defective charge.*
> *(ii) That the learned Magistrate erred in law by trying and convicting the appellant as an adult when the appellant was a juvenile at the time of the offending.*
> *(iii) That the learned Trial Judge (sic) erred in law and fact in convicting the Appellant having regard to the totality of the evidence when the State's witness was incredible and inconsistent (sic) resulting in a substantial miscarriage of justice.*
>
> *Against Sentence:*
>
> *(i) That the learned Magistrate erred in law by sentencing the appellant as an adult when the appellant was a juvenile at the time of the offending.*
> *(ii) That the sentence was manifestly harsh and excessive and did not reflect the circumstances and facts of the case."*

[4] A single Judge of the Court of Appeal in his Ruling granted leave on ground (i) against conviction and ground (ii) against sentence, while refusing ground (iii) against conviction and dismissing grounds (ii) against conviction and ground (i) against sentence in terms of Section 35(2) of the Court of Appeal Act.

[5] The Appellant canvassed ground (i) against conviction and ground (ii) against sentence before the Full Court of the Court of Appeal.

Facts

[6] The complainant in his evidence stated that whilst he was going home at about 4.30 p.m. the Appellant with another person had called him and asked for money. When the complainant had said that he did not have any money, the Appellant had hit him with a knife and the other person had assaulted him with an iron rod. The complainant had known the Appellant as he was his neighbour. After assaulting the complainant the Appellant had taken $20 from him and run away. The complainant had thereafter lodged a complaint with Nabua Police and stated that he had been sent for a medical examination. There is no evidence to show that a medical report was filed. He had identified the Appellant in Court. The Appellant had been selling coconuts and had a knife with him. The Appellant gave evidence and had stated that he met the complainant that day and had asked him to come and sniff glue with him, had wanted to stab him and had injured himself with his knife. The Appellant under cross-examination admitted that he did not mention about the complainant bringing glue and trying to stab him.

[7] The learned Magistrate in the course of his judgment stated that it would have been desirable if the prosecution had relied on one limb in section 311 of the Crimes Act instead with both, but that he did not think the Appellant was prejudiced as a result. The learned Magistrate having considered the evidence of the complainant and the Appellant concluded that the prosecution had proved the charge beyond reasonable doubt and found the Appellant guilty and convicted him.

Consideration of the Appeal

[8] The first ground of appeal which is against conviction is on the basis that the charge against the Appellant was defective.

[9] The Appellant was charged for committing aggravated robbery contrary to section 311(1)(a)(b) of the Crimes Act, 2009. Section 311(1) provides:

> *"Section 311 - (1) A person commits an indictable offence if he or she-*
>
> *(a) Commits a robbery in company with one or more other persons; or*
> *(b) Commits a robbery and, at the time of the robbery, has an offensive weapon with him or her."*

[10] It was submitted on behalf of the Appellant that failure to file the proper charge did not permit the Appellant to be reasonably informed of the transaction alleged against him, which resulted in denying him the possibility of a full defence and a fair trial. That the Appellant was prejudiced and that a grave miscarriage of justice did occur. The charge was presented in the following manner:

STATEMENT OF OFFENCE

AGGRAVATED ROBBERY: *Contrary to section 311(1)(a)(b) of the Crimes Act No.44 of 2009.*

PARTICULARS OF OFFENCE

EPARAMA TAWAKE *with another, on the 12th day of December 2014 at Vatuwaqa in the Central Division, assaulted, robbed* ***KRISHANK SINGH,*** *of $20.00 cash and at the time of robbery had a knife (offensive weapon) with him.*

[11] In support of the submission, the decision in **Lal v State** [2018] FJCA 147; AAU154.2014 & AAU8.2015 (4 October 2018) was cited where the Court of Appeal while discussing the importance of filing the proper and clear information had stated that the accused should be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.

[12] The prosecution had combined both limbs in Section 311(1) in formulating the charge against the Appellant and in describing the particulars included the elements of limb (1)(a) in Section 311 by stating that the Appellant with another, and the elements of limb (1)(b) in Section 311 by stating that he had a knife with him.

[13] It was clear from the evidence of the complainant which was accepted by the learned Magistrate as being credible that the Appellant and another person robbed the complainant of $20 and that he had a knife when he did so with which he had attacked the complainant.

[14] Though it would have been desirable for the prosecution not to combine the two limbs in section 311(1) and rely on one limb as was commented upon by the learned Magistrate in his judgment, the evidence presented against the Appellant was clear and no prejudice was caused to the Appellant. The Appellant knew very well what the charge against him was, which was that he with another had robbed the complainant of $20 by using force with a weapon. The Appellant was charged with only one offence and there was no duplicity of offences as submitted by Counsel for the Respondent.

[15] In those circumstances, the conviction of the Appellant was not unreasonable as it was based on the evidence of the complainant which the learned Magistrate considered to be credible as against the evidence of the Appellant. Therefore this ground of appeal against conviction fails.

[16] The ground of appeal against sentence is that it is harsh and excessive and that it did not reflect the circumstances of the case.

[17] In an appeal against sentence the principles to be considered were laid down in **Naisua v. State** [2013] FJSC 14; CAV0010.2013 (20 November 2013). The Appellate courts will interfere with a sentence if it is demonstrated that the Sentencing 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 considerations.

[18] The learned Magistrate in his sentencing judgment followed the Supreme Court decision in **Wallace Wise v. State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and made use of the tariff set out therein which was 8 to 16 years.

[19] It was submitted on behalf of the Appellant that the learned Magistrate had acted on a wrong principle by following **Wise v. State**, as that case related to a situation of aggravated robbery where there was a home invasion and that in the present case, the circumstances were completely different and it was an error to follow the decision is Wallace Wise (Supra).

[20] In **Wallace v. Wise**, Gates P in dealing with sentencing of the Appellants stated:

> *"[25].....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."* (emphasis added)
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> *[26] Sentences will be enhanced where additional aggravating factors are also present. Examples would be:*
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> > *(i) offence committed during a home invasion.*
> > *(ii) in the middle of the night when victims might be at home asleep.*
> > *(iii) carried out with premeditation, or some planning.*
> > *(iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*
> > *(v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*
> > *(vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*
> > *(vii) the victims frightened were elderly or vulnerable persons such as small children.*
>
> *[27] It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders."*

[21] Considering the nature of the offence in **Wise v State** and the examples set out in the said judgment, the tariff set therein was to apply to instances of aggravated robbery which were regarding home invasions.

[22] It was further submitted on behalf of the Appellant that the case of the Appellant greatly differs from that of **Wise v State** and it does not warrant the application of the tariff set down in that case.

[23] Counsel for the Appellant cited the High Court decision in **State v Vatunicoko** [2018] FJHC 885; HAC210.2018 (21 September 2018), where Goundar J had stated:

> *"[4] In assessing the objective seriousness of your offending, I am mindful that aggravated robbery in the company of others is punishable by 20 years' imprisonment. The tariff depends on the nature and circumstances of the robbery. The tariff is as follows:*
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> *Street mugging: 18 months to 5 years' imprisonment (**Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008).*
>
> *Home invasion: 8 – 16 years' imprisonment (Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015).*
>
> *A spate of robberies: 10 -16 years' imprisonment (**Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013)."*

[24] In setting out a lower tariff for instances of Street Mugging the Court of Appeal decision in **Raqauqau v. State** [2008] FJCA 34.AAU0100.2007 (4 August 2008) was cited and adopted by Goundar J.

[25] In **Raqauqau** (Supra) the complainant, when walking on a back road in Nausori after finishing off work was approached by the Appellant and co-accused. The Appellant had grabbed the complainant from the back and held his hands, while the co-accused punched him. They stole $71.00 in cash from the complainant and fled. The Appellant was charged for committing Robbery with Violence contrary to Section 293(1)(b) of the Penal Code. The Appellant pleaded guilty. He was sentenced to 5 years imprisonment by the Magistrate's Court in Nausori. On appeal to the High Court, his appeal against conviction

was dismissed but his appeal against sentence was allowed by reducing the term of imprisonment from 5 years to 4 years. On appeal to the Court of Appeal, while dismissing the appeal against sentence, the Court stated:

> *"[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in* ***Basa v. The State*** *Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*
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> *[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of* ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** *(the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:*
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> - *The sentencing bracket was 18 months or 5 years, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.*
> - *An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.*
> - *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature."*

[26] In Fiji, under the Penal Code (now repealed), the offence of Robbery with Violence had a maximum penalty of life imprisonment. With the introduction of the Crimes Act, 2009, the offence is now referred to as Aggravated Robbery as set out in section 311 with a maximum penalty of 20 years imprisonment.

[27] Although there is no reference to an offence in terms of "*Street Mugging*" in Fiji, the reference to it by Goundar J in **Vatunicoko** (supra) encompasses an instance of aggravated robbery quite distinct from aggravated robbery involving home invasions as in **Wise v. State**. The present case presents a similar situation as in **Raqauqau** (Supra).

[28] In **Vatunicoko**, the victim was attacked at night time when he was asleep inside his stationary vehicle when the perpetrators who were drunk and ruthless had dragged the victim out of the vehicle and physically beaten when he had disclosed the location of his day's earnings. The Appellant who had assisted his accomplices but not attacked the victim, was sentenced to 5 years imprisonment with a non-parole period of 3 years when he entered an early guilty plea for which he got a reduction of one third of his sentence.

[29] In **State v Koi** [2016] FJCA127; AAU79.214 (24 August 2019), a custodial sentence had been given by the Magistrate. There the complainant's handbag had been forcibly taken by two accused persons when she was walking and returning home at about 8.00 p.m. after punching her and she had fallen on the road. Her handbag had a mobile phone, eye glasses, assorted cards and cash $60.00. The Accused had admitted committing the offence soon after they were arrested and the contents of the handbag except the cash was recovered.

[30] The State appealed against the sentence and the Court of Appeal imposed a sentence of 5 years imprisonment with a non-parole term of 3 years. The Court referred to the decision in **Raqauqau** (Supra).

[31] In the present case, the attack on the complainant was during the day when he was robbed of $20. The Appellant was sentenced after trial unlike in **Vatunicoko** (Supra) where the Accused pleaded guilty at an early stage. On a comparative basis the sentence handed out to the Appellant is excessive.

[32] In this case, the learned Magistrate on the basis of the tariff in **Wise** (Supra) adopted a starting point of 12 years when sentencing the Appellant and arrived at a sentence of 9 years and six months with a non parole period of 7 years. In considering the mitigating

factors the learned Magistrate had not considered the previous good character of the Appellant.

[33] The question that would arise is considering the circumstances of the case and the seriousness of the offence is it possible to move away from the tariff set in **Wallace Wise** (Supra) for aggravated robbery which was for a home invasion situation and adopt the tariff suggested in **Raqauqau** (Supra) and adopted in **Vatunicoko** (Supra) of 18 months to 5 years.

[34] The trend followed recently in the High Court (**State v Matagasau** [2019] FJHC 633; HAC17.2019 (28 June 2019); **State v Ketewai** [2019] FJHC 468; HAC210.2018 (21 May 2019) is to treat cases such as these where the incidents have taken place in the streets unlike in **Wallace Wise** (Supra) differently and adopt the approach in **Raqauqau** (Supra) where the tariff for instances of street mugging was set at 18 months to 5 years. However, it would be necessary to be mindful of the dicta in **Raqauqau** (Supra) that the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.

[35] The adoption of the tariff in **Wise** (Supra) does not seem to be appropriate to the present case as it does not come within the nature of a home invasion category of aggravated robbery and is a situation which would come within the type of street mugging cases. Considering the objective seriousness of the offending and the degree of culpability, the harm and loss caused to the complainant it would be appropriate to follow the sentencing pattern suggested for instances of street mugging.

[36] The sentence imposed on the Appellant by the learned Magistrate is excessive when compared to the decisions in **Raqauqau** (Supra), **Vatunicoko** (Supra) and is therefore set aside and a fresh sentence would be imposed on the Appellant.

[37] Acting in terms of section 23(4) of the Court of Appeal Act, 2012, and considering the circumstances in the present case a sentence of 3 years and 2 months with a non-parole period of 2 years and 2 months is imposed on the Appellant.

Basnayake, JA

[38] I agree with the reasons and the conclusions of Chandra, JA.

Almeida Guneratne, JA

[39] I have read in draft the judgment of Chandra JA and agree with the reasons and conclusions herein.

Orders of Court:

(i) The appeal against conviction is dismissed.

(ii) The appeal against sentence is allowed.

(iii) The sentence imposed by the learned Magistrate is set aside.

(iv) A sentence of 3 years and 2 months imprisonment with a non-parole term of 2 years and 2 months is imposed on the Appellant to be effective from 6th January 2017.

Hon. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL