IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates' Court]

CRIMINAL APPEAL NO.AAU 0108 of 2019
[In the Magistrates' Court at Suva Case No. 2106 of 2016]

BETWEEN	:	**LEBA BALE TUILOMA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**31 August 2020**
Date of Ruling	:	**01 September 2020**

RULING

[1] The appellant had been charged in the Magistrate's court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 26 December 2018 by mugging the complainant of a mobile phone valued at $840.00.

[2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant after being satisfied that her plea of guilty had been voluntary and unequivocal. The appellant had been sentenced on 17 February 2017 to 07 years and 10 months of imprisonment with a non-parole term of 05 years.

[3] The appellant being dissatisfied with the sentence had signed an untimely notice of leave to appeal against sentence on 19 March 2019. The delay is over 02 years. Legal Aid Commission on 31 August 2020 submitted an application for enlargement of time to appeal out of time against sentence along with written submissions. The respondent did not tender written submissions but made oral submissions at the leave to appeal hearing.

[4] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State: Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[5] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[6] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[7] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84: AAU0004.2011 (6 June 2019) the Court of Appeal said

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal filed out of time to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(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.*

[9] ***Grounds of appeal***

> *'1. That 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 of aggravated robbery of this nature'*
>
> *2. That the learned Magistrate erred in fact and law in improperly discounting for the mitigating factors to decrease the sentence.'*

[10] The summary of facts as stated in the sentencing order is as follows.

> *'The complainant in this matter is Maria Buresea, 23 years, Customer Service Officer of Newtown, Nasinu. The accused person is Leba Bale Tuiloma, 23 years, domestic duties of Raiwaqa, Suva.*
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> *On 26 December 2016 at about 4.30am, complainant was outside Vineyard Palace along Victoria Parade, Suva, waiting for a taxi. At that time she was talking to a friend on her black and yellow LG brand mobile phone.*
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> *While on the phone, the complainant noticed that she was surrounded by 3 Itaukei women. The accused person was one of the three women. The accused person in the company of two others, with intent to commit theft of the complainant's property, used force on her by punching her on her forehead and stole her mobile phone. The accused person's accomplice stole the*

complainant's handbag and ran away. The handbag contained the complainant's walled and $50 cash. The value of the mobile phone was $800. The total value of the complainant property was $840.

The complainant raised alarm about the robbery as the accused person was running away. Through the assistance of some of passer-by's the accused person was arrested.

A police patrol vehicle arrived and upon being briefed by the complainant, the accused person was questioned by the police about the mobile phone. The accused was found to be sitting on a flower bed beside the road. On being asked to stand up, it was found that the accused was sitting on the complainant's LG brand mobile phone.

The complainant's handbag was also recovered by passer-by's but its contents were not recovered. She positively identified both items as her property.'

01st ground of appeal

[11] As conceded by the State the learned trial judge had committed a fundamental error in following the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and thereby he could be said to have acted on a wrong sentencing principle paving the way for the appellate court's possible intervention in the matter of sentence.

[12] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in ***Wise*** and taken 12 years as the starting point without being mindful that the tariff in ***Wise*** was set in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. The factual background in ***Wise*** was as follows.

'[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.

[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'

[13] From the summary of facts it is difficult, if not impossible, to see how the factual background of this case fits into a similar scenario the Supreme Court dealt with in ***Wise***. It appears to me that this is more of a case of street mugging where sentencing tariff had been recognized as 18 months to 05 years.

[14] In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. One of them had grabbed the complainant from the back and held his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of Appeal remarked

'[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.*

[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:*

- ***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.*

[15] The sentencing tariff for street mugging was once again discussed by Nawana, JA as a member of the full court which I was part of in **Qalivere v State** [2020] FJCA 1: AAU71.2017 (27 February 2020) in the following terms

> *'[15] The learned single Justice of Appeal, in giving leave to appeal, distinguished facts in **Wallace Wise** (supra), which involved a home invasion as opposed to the facts in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (04 August 2008), where aggravated robbery was committed on a person on the street by two accused using low-level physical violence.*
>
> *[16] Low threshold robbery, with or without less physical violence, is sometimes referred to as street-mugging informally in common parlance. The range of sentence for that type of offence was set at eighteen months to five years by the Fiji Court of Appeal in **Raqauqau's** case (supra).*
>
> *'[19] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted a upon wrong principle when he applied the tariff set for an entirely different category of cases to the facts of this case, which involved a low-threshold robbery committed on a street with no physical violence or weapons. When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence.*

[16] Therefore, the sentencing error in taking 12 years as the starting point demonstrates a real prospect for the appellants to succeed in appeal regarding her sentence.

02nd ground of appeal

[17] The appellant argues that 03 years as the discount for mitigating factors is not sufficient and it should have been 04 years. There is no sentencing error in law here. It should be borne in mind that enhancing the sentence for aggravating factors and reducing the sentence for mitigating factors is inseparably interlinked with the starting point of the sentence. Those increases and deductions are proportionate to the starting point of the sentence without aggravating and mitigating features. Therefore, when

the correct sentencing tariff is applied to the facts of the appellant's case the enhancement and reduction would be decided accordingly. In that exercise the appellant may not get even 03 years as the discount for mitigating factors with the correct starting point under the appropriate tariff for street mugging.

[18] On the other hand more importantly 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 **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). 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 them 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 [**Sharma v State** [2015] FJCA 178: AAU48.2011 (3 December 2015)].

[19] Though not urged by either side in this appeal, I wish to point out an inaccurate view that had crept into the sentencing process. The learned Magistrate had given the appellant a 1/3 discount on account of the guilty plea simply following 'UK Guilty Plea Guidelines of 2017'. It should be kept in mind that in Fiji the decision as to what discount should be given to the guilty plea is governed by the decisions in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018).

[20] A discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was considered as the 'high water mark' in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as ***Mataunitoga***. The Supreme Court dealing with ***Ranima*** said in ***Aitcheson:***

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct*

approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'

[21] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*

[22] Therefore, the second ground of appeal does not have a real prospect of success.

[23] The delay in filing the appeal is very substantial and the reasons for the delay are not compellable as they appear to be all too common. The respondent would not be prejudiced as a result of extension of time. Yet, the merits of the first appeal ground outweigh the substantial delay and lack of compellable reasons for the delay.

Order

1. Enlargement of time to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka

JUSTICE OF APPEAL