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

CRIMINAL APPEAL NO.AAU 0148 of 2017
[In the Magistrates Court at Lautoka Case No. 621 of 2015]

BETWEEN	:	**SEMI RALULU** **SAVENACA CAVA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**17 September 2020**
Date of Ruling	:	**18 September 2020**

RULING

[1] The appellants with two others had been arraigned in the Magistrates' court of Lautoka exercising extended jurisdiction charged with one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009, one count of theft contrary to section 291 (1) (a) of the Crimes Act, 2009 and wrongful confinement contrary to section 286 of the Crimes Act, 2009 committed on 20 September 2015. One of the four accused (not the appellants) had been also charged with dangerous driving contrary to section 98(1) and 114 of the Land Transport Act.

[2] The appellants had pleaded guilty to all the charges preferred and having been satisfied that the appellants had pleaded guilty on their own free will, the pleas had been unequivocal and the appellants had admitted the summary of facts, the learned Magistrate had convicted them on 06 June 2017 and sentenced both of them on the same day to imprisonment of 07 years and 10 months with a non-parole period of 06 years.

[3] The appellants being dissatisfied had purportedly filed an appeal against conviction and sentence on 12 June 2017 and tendered further grounds of appeal on 13 September 2017. Legal Aid Commission on 20 March 2019 had submitted an amended notice of appeal only against sentence along with written submissions. The state had filed its written submissions on 16 July 2020.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[5] 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 timely ground of appeal against sentence to be considered arguable there must**

be a reasonable 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.*

[6] ***Ground of appeal***

> ***Sentence***
>
> *'That the learned Magistrate erred in his sentencing discretion by his choice of the incorrect tariff for aggravated robbery.'*

[7] The summary of facts recorded by the learned Magistrate in the sentencing order dated 6 June 2017 is as follows.

> *"On the 20th of September 2015, Accused 1 – Victor Joseph Low, Accused 3 – Sami Ralulu and Accused 4 – Savenaca Cava board PW1's vehicle from Yasawa Street and asked him to take them to the corner shop. Upon arriving at the corner shop Accused 2 – Ratu Inoke Nauarabota also got into the car. They had been drinking beer at Hunters Inn Niteclub prior to this. Accused 2 brought beer and then they told PW1 to take them to Adam Street; upon reaching Adam Police Post, he was told to toot the horn. After that he was told to turn back towards Tavakubu Road.*
>
> *As they reached the junction of Tavakubu Road and Gold Course Road, PW1 was told to stop and at that time the one sitting on the back held him by the neck whilst the others assaulted him. He was then gagged and tied and kept in between the seats, facing the floor of the car. Whilst he lay on there, he was burnt with cigarettes on his right hand and back.*
>
> *The four accused persons then drove to Namaka to After Dark Nite Club. Whilst in Namaka, they met Atelaite Waqanivere (PW2), defector partner of Accused 2, Vilimaina Tuivucirua (PW 3) and Milika Masei (PW 4) who also got into the car. PW2 knew accused 1, 3 and 4 through Accused 2 as he had introduced them to her as his friends. Inside the car, Accused 2, Rau Inoke was driving; Accused 4 Savenaca Cava sat in the front passenger seat whilst Accused 3, Semi Ralulu sat in the boot of the car where PW 1 was also kept at this time still gagged and tied. Along the way, PW 2 and Accused 2 started arguing when the vehicle veered off the road and landed in Sabeto River. PW 2 got injured from the accident and was seen by a Doctor later who noted a 2 cm x 3 cm laceration on the left elbow.*

PW1 remained in the car until the vehicle landed in Sabeto River. He was pulled out by Semi Ralulu after which they all ran away.

The accused persons (except Semi Ralulu) and PW2, PW 3 and PW4 walked to University of Fiji and then hired a van from Saweni Top Shopping Centre; PW2, PW3 and PW4 went to Banaras whilst Accused 1, 2 and 4 went to one Nasalo's place in Saweni to drink beer. Accused 3 left for Tavua.

PW1 sought help from a passerby and was taken to Lomolomo Police Post and then later came to Lautoka Police Station and lodged a complaint.

PW1 was seen by a Doctor who noted that he had received injuries on his face and other parts of the body. In addition to the car, $650.00 cash was taken from him; also stolen was his one touch Alcatel phone valued $70.00, 1 i-phone valued $1000.00 and a Kontiki Finance Payment Book".

[8] It is clear from the sentencing order that the trial judge had simply applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 09 years as the starting point. 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.

[9] The factual background of this case does not fit into the kind of situation court was confronted with in ***Wise***. Neither is this a case of simple street mugging as identified in **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as 'street mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present.

[10] The decision in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.

*[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*

*[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*

*[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/11(Lik), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manou** HAC 061.2010, said at p6:*

> *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*

*[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was).*

> *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[11] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea...'

[12] Therefore, I held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[13] However, by taking a starting point of 09 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise***, the learned Magistrate has acted upon a wrong principle. Instead the learned trial judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers.

[14] The Court of Appeal held in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) that

> *'19.....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.'*

[15] Further, the appellants' counsel submitted that there was nothing affirmatively stated in the summary of facts to indicate that the victim was a taxi driver providing a public service as mentioned by the Magistrate in the sentencing order. However, both parties in the written submissions had acted on the basis that the victim was a taxi driver and it is clear from the totality of the summary of facts admitted by the appellants that the victim was a taxi driver and the property involved was the taxi operated by him. In any event, in my view, what matters is not whether the victim and/or the vehicle had been registered with the relevant authorities such as the Land Transport Authority to provide public services such as a taxi, bus or van service but at the time of the commission of the offence the victim was for all purposes and intent acting in the capacity of a provider of a services of public nature.

[16] Therefore, I have no doubt that the appellants should have been dealt with in accordance with the sentencing tariff for offences of aggravated robbery against providers of services of public nature.

[17] The counsel for the appellant also submitted that having taken 09 years as the starting point based on ***Wise*** the Magistrate should not have taken the fact that the offences had been committed against a public service provider to enhance the sentence. He also contended that the appellants had not deliberately dumped the taxi in a river but it had veered off the road and landed in a river and therefore that too should not have been considered as an aggravating factor to enhance the sentence. There is some merit in these submissions.

[18] However, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warrant a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender, if any) and if the starting point is taken at the lower end then a substantial increase in the sentence for all aggravating features (offending and offender). In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any. [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[19] Another aspect relevant to the appellants' complaint is that the decision in **R v Henry** (unreported, NSW Court of Criminal Appeal, 12 May 1999) has established that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated (Jurisic:220-22 l; Henry). Therefore, the sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure (vide ***Jurisic*** (1998) 45 NSWLR 209, 220-221; ***Henry*** and **R v De Havilland** (1983) 5 Cr App R 109, 114)

[20] The state counsel argued that despite the error in being guided by ***Wise*** guidelines the Magistrate had ended up with a head sentence within the tariff for aggravated robbery against providers of services of public nature including taxi, bus and van drivers and therefore, the ultimate sentence is justified.

[21] 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 [**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)].

[22] However, the error of principle in applying the wrong tariff or departure from the applicable tariff without assigning any reasons therefor by the Magistrate require intervention by the full court that could then decide either to affirm the existing sentence or what the appropriate sentence should be.

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL