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

CRIMINAL APPEAL NO.AAU 151 of 2017
[Magistrates Court of Suva Case No. 1120 of 2016]

BETWEEN : **JOSEFA TAWAKE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **29 September 2020**

Date of Ruling : **30 September 2020**

RULING

[1] The appellant had been charged with another in the Magistrates' court in Suva under extended jurisdiction on a single count of aggravated robbery committed on the 01 July 2016 contrary to section 311(1)(a) of the Crimes Act, 2009.

[2] The appellant had pleaded guilty to the charge and admitted the summary of facts. The learned Magistrate, having been satisfied that the plea was voluntary and unequivocal had convicted him as charged and sentenced the appellant on 11 November 2016 to an imprisonment of 08 years with a non-parole period of 06 years.

[3] The appellant in person had sought enlargement of time to appeal against sentence on 27 September 2017 with amended grounds of appeal and an affidavit. Subsequently, the Legal Aid Commission had tendered an amended notice of appeal, the appellant's affidavit and written submissions on 30 June 2020. The State had tendered its written submissions on 27 July 2020.

[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. This is relevant to the appellant's sentence appeal.

[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] 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 untimely preferred against sentence 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.*

Ground of appeal

[8] The sole ground of appeal urged by the appellant is as follows.

> ***Against sentence***
>
> (1) *'THAT the learned trial Judge erred in law and in fact when he failed to consider and give a separate discount for the Appellant being a first offender.*

[9] The summary of facts read as follows.

> '*On the 1st July 2016 at around 5pm Steven Suresh Narayan (PW1) recalls that an i-taukei youth entered Fexco Pacific Fiji Limited based at Damodar City complex and asked what time Fexco Pacific Limited would close. A few seconds after the conversation, another i-taukei youth entered into the shop and grabbed PW1 from behind. He then pushed PW1 towards the counter and held him down. PW1 further stated that another i-taukei youth grabbed the tilt and exited the main door, the tilt that was taken by i-taukei youths contained foreign currencies.*
>
> *Renuka Narayan (PW2), operations manager for Fexco Pacific Fiji Limited. On the 1st July 2016 PW1 observed the accused and 2 other youths walk into Fexco Pacific Fiji Limited based at Damodar City complex. The tallest of the three walked towards PW2 grabbed hold of her neck, and held her head against the counter preventing her from making any other movements, further she was held in such a way that PW2 could not speak or scream. PW2 sustained injuries due to the force used by the assailant.*
>
> *PW2 further stated, that the smallest of the three jumped over the counter and got a hold of the tilt on top of the CPU and jumped out again. The tilt contained the following foreign currencies;*
>
> *1) Australian dollars amounting to $3870.00*
>
> *2) Canadian dollars amounting to $400.00*

3) Euro dollars amounting to $200.00

4) New Zealand dollars amounting to $650.00

5) US Dollars amounting to $1880.00

6) Vanuatu dollars amounting to $1000.00

7) Samoan dollars amounting to $5.00

8) Fiji dollars amounting to $1000.00

[10] The maximum sentence for aggravated robbery under section 311(1)(a) of the Crime Decree, 2009 is 20 years. The tariff applicable to the aggravated robbery in the form of a home innovation in the night with accompanying violence perpetrated on the inmates was set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) as 08-16 years of imprisonment.

[11] Considering the facts revealed in the summary of facts, I do not see any reason why the sentencing tariff in ***Wise*** should not apply to the present case. In some ways the aggravated robbery committed by the appellant with a group is more serious than a home invasion.

[12] The appellant's specific complaint is that the learned Magistrate had not given a separate discount for him being a first offender. In the sentencing order, the Magistrate having followed ***Wise*** had stated as follows.

> *7. Considering the objective seriousness, I select 10 years imprisonment as the starting point for your sentence.*
>
> *8. According to your caution statement it was shown this offence was well planned. Further substantial amount of monies including foreign currencies were stolen. Converting the amounts to Fijian currencies based on the time of the incident, plus the Fijian currencies shows nearly $13,000.00 was stolen by you and others from the shop. One of the witnesses was injured from the assault as confirmed from the medical report submitted by the prosecution. I consider these as aggravating factors in this case and add 04 years to reach 14 years imprisonment.*
>
> *9. In her mitigation submission your counsel submitted that you are 20 years old, single, cooperated with the police,* ***first offender*** *and seeking forgiveness from the court. For these mitigating factors I deduct 02 years to reach 12 years imprisonment.*

*10. It has been a practice by a sentencing court to consider guilty plea separately and give an appropriate discount (**Naikelekevesi v The State** Criminal Appeal No AAU 0061 of 2007).*

11. Further in UK Guilty Plea guidelines of 2007 it has been held that when an accused pleaded guilty at the first available opportunity the reduction is 1/3 and after a trial date is set 1/4 recommended. But when an accused pleaded guilty at the door of the court or after the trial has started he maybe entitle for only 1/10 discount.

12. In this case giving full credit to your guilty plea I deduct 1/3 to reach 08 years imprisonment.

13. Section 24 of the Sentencing and Penalties Decree stipulates that the remand period has to be considered as the period of imprisonment an accused already served. But you were remanded for only insignificant time period and I am not going to consider that in this case.

14. Aggravated Robbery seems to be a prevalent crime in this country at the moment .Hence the courts have a responsibility to send a clear message to the public that this kind of offence, whether committed on a 'soft' target such as individuals or a 'substantial' target such as a service station or shop, is likely to be visited with a stern and fitting custodial sentence.

*15. **JOSEFA TAWAKE,** you are sentenced to 08 years imprisonment for the offence of Aggravated Robbery contrary to section 311(1) of the Crimes Decree with a non- parole period of 06 years.*

[13] The Magistrate had picked 10 years to start with considering the 'objective seriousness' of the offence following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). Perhaps, in the process the Magistrate may have erred in adding 04 years for aggravating factors some of which appear to have been subsumed in the starting point of 10 years although it is not ascertainable what aggravating factors going to 'objective seriousness' the Magistrate had actually considered in picking the starting point. This is because all the aggravating factors seem to relate to the offending and not the offender. On the other hand, the appellant had received a full 1/3 discount for his guilty plea which he perhaps did not deserve considering the gravity of the offence charged. For example in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court cited paragraph [18] in ***Mataunitoga*** and stated it was a more flexible approach towards an early guilty plea and said:

> '*[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.'*

[14] Though, the Magistrate had given only 02 years of discount for all mitigating factors including the appellant having been a first time offender, it is clear that the ultimate sentence is at the lower end of the sentencing tariff for aggravated robbery and it could never be lower than that in the circumstances of this case.

[15] 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).

[16] Thus, there is no merit in the appellant's complaint. It should not be forgotten that in any event the full court has the power to revisit the sentence including its adequacy under section 23(3) of the Court of Appeal Act, if it comes up before it for determination.

[17] That said, however, by way of some general observations, I may mention regarding the appellant's appeal point that in **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J had the occasion to observe as follows.

> *'[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In **Naikelekelevesi State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea*

should be discounted separately from other mitigating factors present in the case.

[18] I may also highlight a few other aspects of sentencing for guidance of the trial judges. Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[19] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[20] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[21] The Supreme Court in ***Kumar*** identified another instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[22] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the

difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[23] The methodology commonly followed by judges in Fiji which is the two-tiered process that emanated from the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows.

> (i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence *i.e.* objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.
>
> (ii) Then the judge applies the aggravating features of the offender *i.e.* all the subjective circumstances of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, (*i.e*. a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (tier two).

[24] However, in following the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way not to fall into this error is to indicate what aggravating factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[25] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) is very instructive in this regard.

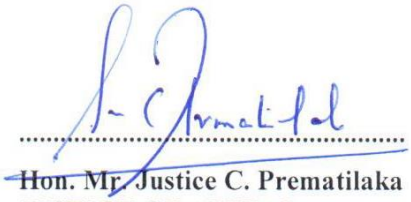
> *'[48] The Sentencing and Penalties Decree does not provide any specific guideline as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.*
>
> *[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.*
>
> *[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.*
>
> *[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.'*

Other considerations for extension of time.

[26] The delay in the appellant's appeal is substantial and the reasons are common grounds urged routinely by the appellants filing appeals out of time. However, an extension of time would not prejudice the respondent.

Orders

1. Enlargement of time to appeal against sentence out of time is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL