

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

CRIMINAL APPEAL NO.AAU 81 of 2016
[In the Magistrates Court at Suva Case No. 1246 of 2015]

BETWEEN : JEKOPE USA

Appellant

AND : STATE

Respondent

Coram : Prematilaka, JA

Counsel : Ms. S. Ratu for the Appellant
: Ms. S. Tivao for the Respondent

Date of Hearing : 12 May 2020

Date of Ruling : 15 May 2020

RULING

- [1] The appellant with another had been charged in the Magistrates court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree, 2009 committed on 05 July 2015 upon a wallet valued at FJD \$5.00 and cash of FJD \$85.00, the property of Mohommed Ifzaal Khan at Suva in the Central Division.
- [2] After trial, the Learned Magistrate had convicted the appellant on 27 June 2016. The appellant had been sentenced on 04 July 2016 to 10 years of imprisonments with a non-parole period of 08 years.

[3] The appellant being dissatisfied with the conviction had sought leave to appeal by himself within time on 27 June 2016. Legal Aid Commission on 20 March 2019 had submitted an amended notice of appeal against conviction. After written submissions had been tendered by both parties, the single Judge ruling had been delivered on 25 September 2019 refusing leave to appeal against conviction but the then President of the Court of Appeal Calanchini, J had made certain observations in the ruling on the propriety of the sentence. They are as follows.

'[9] However the present case was a day time robbery of a taxi driver by two offenders who were unarmed. Although there was one punch in the stomach delivered by the appellant, the learned Magistrate in his judgment at paragraph 2 noted that the complainant stated that he did not receive any injuries and that the stolen wallet contained \$80.00.

[10] Under those circumstances the more appropriate sentencing guidelines may be found in the decisions of Goundar J in State –v- Ragici [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 and State –v- Bola [2018] FJHC 274; HAC 73 of 2018, 12 April 2018.

[4] The appellant had filed an application to renew his appeal against conviction before the Full Court and filed another application by himself for leave to appeal against sentence on 09 October 2019. Thereafter, the Legal Aid Commission had tendered an amended notice of appeal against sentence along with the appellant's affidavit seeking leave to appeal out of time and written submissions on 13 December 2019.

[5] 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

[6] 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?*

[7] **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.'

[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 belated ground of appeal 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

Sentence

'The Learned Trial Magistrate erred in law and in fact when he sentenced the appellant using the wrong principle resulting in a harsh sentence.'

[9] The learned Magistrate had summarized the evidence in the judgment as follows.

'PWI was Mohommed Ifzaal Khan the complainant in this case. He is working as a taxi driver and on 05/07/2015 around 10am took a job from Cunningham to Nailuva Road. There were 2 passengers and they told him to enter to Raisara Road. The front passenger was bit short, wearing black jacket and ¾ pants and the other passenger was wearing white t-shirt. As soon as PWI

entered Raisara Road, they asked him to stop. Then the front passenger punched him in his stomach and took his wallet. The one in behind held him. The wallet contained money, FNPF card and driving license. The front passenger got off, came and wanted to have his mobile. When the other one got off also, PW1 drove away in front and contacted other taxi drivers through RT communication and they also came to the scene. Then they started searching for the robbers and whilst he was going along Grantham Road, he saw them again in ground opposite Garden city. At that time distance was not far (same as the witness box to FBC building) and only 45-50 minutes elapsed from the robbery. There was no obstruction and through a friend he called the police. When the police arrived, he told them about the robbers and the police managed to arrest one wearing the black jacket. The other one got away. In the police post also he recognized the person. The complainant saw him in the taxi and when he came to take the mobile. The person was medium height with, broad lips with a beard and the witness also said that person who he picked on that day is in the court wearing a red T-shirt. The complainant did not receive injuries and the wallet contained \$80.00 cash.

Length of the delay

- [10] The appellant's appeal is 03 years and 04 months out of time which is by any standards very substantial and cannot be condoned.

Reason for the delay

- [11] The appellant has stated in his affidavit that he decided to appeal against the sentence after the leave ruling on his conviction was delivered in September 2019. He appeared to have had legal representation at least since March 2017 and I am surprised that the appellant had not received legal advice until the single judge ruling on conviction that his sentence may be riddled with a substantial sentencing error and should be appealed against.

Merits of the appeal

- [12] Under the third and fourth factors in *Kumar*, **test for enlargement of time now is 'real prospect of success'**. In *Nasila v State* [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

*[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

- [13] 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.
- [14] 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.
- [15] Then came **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused persons 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 HAC43/1(Ltk), 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 *Manoa* 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."

[16] **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...'

[17] Therefore, 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.

[18] The learned trial judge had correctly identified the seriousness of the offence committed by the appellant as follows

'Taxi drivers are providing a valuable service to the public in this country and they need to be protected. Therefore main purposes of this sentence are to denounce your behavior and to deter future offenders'

[19] 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.

[20] Therefore, the sentencing error above highlighted offers a real prospect for the appellant to succeed in appeal.

Prejudice to the respondent.

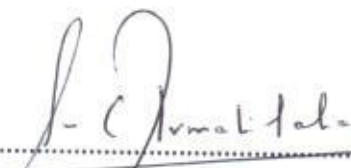
[21] The respondent has not argued that there would be any prejudice to the State if enlargement of time is allowed.

[22] Accordingly, enlargement of time against sentence is allowed.

Order

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




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Hon. Mr Justice C. Prematilaka
JUSTICE OF APPEAL