

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

CRIMINAL APPEAL NO.AAU 150 of 2019
[In the Magistrates Court at Suva Case No. 595 of 2017]

BETWEEN : **JOSEFATA VALESASA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. T. Lee for the Appellant**
: **Mr. E. Samisoni for the Respondent**

Date of Hearing : **20 May 2020**

Date of Ruling : **22 May 2020**

RULING

- [1] The appellant had been arraigned 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 with others on 07 June 2017 by stealing a 1 x white Samsung mobile phone valued at \$600 from Worachart Thong Don Fane by using force immediately before robbery.
- [2] The appellant pleaded guilty and the learned Magistrate had convicted the appellant on his own plea of guilty on 13 September 2019. He had been sentenced on the same day to 06 years and 07 months of imprisonments with a non-parole period of 04 years.

- [3] The appellant being dissatisfied with the sentence had signed a timely notice to appeal against sentence on 30 September 2019 though it had been submitted to Suva Correction Centre on 21 October 2019. Legal Aid Commission on 25 March 2020 had submitted an amended notice of appeal containing a single ground of appeal against sentence. The written submission on behalf of the appellant was submitted on the date of hearing into leave to appeal. The state counsel appearing for the respondent indicated to court that he would not file written submissions in opposition as the appellant's appeal seems to have merits. Accordingly, hearing was concluded on 20 May 2020.
- [4] 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). This threshold is the same with leave to appeal applications against sentence as well.
- [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 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.*

Ground of appeal

Sentence

'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 [aggravated robbery] of this nature.'

- [6] The summary of evidence had revealed that when the complainant who had got off from a bus, was walking home the appellant had followed him, overpowered and pinned him to the ground. The other three accomplices had come and assisted the appellant to hold the complainant to the ground. Seeing the melee, when a passerby came to the complainant's help all four had grabbed his shopping bag containing *inter alia* his mobile phone and fled the scene. The appellant had started running chased by two people and a third person, a police officer, who saw the appellant running away had pursued and caught him at the bus stop and handed him over to the police station. The robbed Samsung mobile phone had been found in the possession of the appellant.
- [7] The appellant argues that the offence of which he was convicted on his plea of guilty was one of 'street mugging' and it was wrong for the learned Magistrate to have applied the tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). Given the facts of the case this seems a compelling reason as to why the learned trial judge could be said to have acted on a wrong principle. 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.
- [8] However, the trial judge had applied even a higher sentencing tariff of 10-16 years of imprisonment. Calanchini P stated in **Singh v State** Criminal No. AAU15 and 16 of 2011; 26 October 2012 [2012] FJCA 71 which was concerned with *inter alia* robbery with violence under section 293 (1) (b) of the Penal Code:

'...there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started at the lower end of the range.'

- [9] In **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 His Lordship the Chief Justice quoted the above passage from **Singh** and said:

'Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour.'

- [10] In **Wise v The State** CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7 the Supreme Court said

'We are concerned with a single case here and not a spate of robberies Lival Nawalu v The State CAV0012/2012 at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years.

'..... for what was a home invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar. For circumstances such as these, rightly abhorrent to the law-abiding community, will compel courts to harden their hearts and to impose harsher sentences'

'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.'

- [11] **Nabainivalu v State** Criminal Appeal CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 the Supreme Court once again confirmed that in the following words:

'.....the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (Nawalu v State Cr. App. No,CAV0012 of 2012)'

- [12] In **Mani v State** AAU0087 of 2013:14 September 2017 [2017] FJCA 119 which was a case of aggravated robbery with accompanying violence, the Court of Appeal acknowledged that the tariff was 10-16 years.

'..... the tariff of 10-16 years for the offence of aggravated robbery as laid down in several judicial pronouncements (see Samuel Donald Singh v State Crim. AAU15 and 16 of 2011, Nawalu v State Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11, Nabainivalu v State Criminal Appeal CAV 027 of 2014 : 22 October 2015 [2015] FJSC 22....'

[13] **Waisele v State** AAU0081 of 2013: 30 November 2017 [2017] FJCA 136 which was also a case of aggravated robbery committed, armed with offensive weapons and violence inflicted, the Court of Appeal affirmed that the tariff was 10-16 years.

[14] Having considered all the above decisions I said in the leave to appeal ruling in **State v Vakarau** [2018] FJCA 173; AAU0052.2017 (4 October 2018) which appears to be more a street mugging case than other forms of aggravated robberies as follows

'[18] Therefore, it should be possible that the tariff for aggravated robbery be now taken as well established between 10-16 years irrespective of whether the offence comes under section 311(1) (a) or (b) which perhaps may be relevant to decide the starting point within the range.In my view, whether it is a single case of robbery, spate of robberies, armed with offensive weapons or violence is perpetrated or not etc. could be considered in the matter of arriving at the final sentence which could be lower or higher than the tariff in which event the Judge must give reasons.

'[22] Therefore there is consensus that this is a fit case to grant leave to appeal. Whether the tariff of 08 to 14 years should be applicable in the case of street mugging robberies as in the present case or whether it should be 10-16 as in other aggravated robberies is a matter to be decided by the Full Court. In any event, the sentence of 03 years imposed on the Respondent is far short of the lowest point of the tariff, be it 08 or 10 years.'

[15] It is clear that neither the counsel for the State nor the counsel for the respondent had cited before me the decision in **Ragaugau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused and 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 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) (Lobban, 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.*

[16] Even the counsel for the respondent in Vakarau appears to have agreed with State's position that the sentencing tariff was between 08-16 years.

'[20] The Respondent has stated that the tariff for Aggravated Robbery is 08-16 years and the Learned Magistrate had not sentenced the Respondent according to that tariff and therefore conceded that leave to appeal could be granted.'

'[22] Therefore there is consensus that this is a fit case to grant leave to appeal...'

[17] Therefore, the above views expressed by me in Vakarau should be understood in the said background and considered as provisional pending the Full Court decision. Unfortunately, the learned Magistrate had erroneously thought that I had stated that for street mugging too the sentencing tariff should be between 10-16 years and taken 10 years as the starting point.

[18] The sentencing tariff of 08-16 years is applicable to a home invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar (as in Wise) while the higher sentencing tariff of 10-16 is applicable to a spate of robberies with more or less the same aggravating features associated with home invasions in the night (as in Nawalu). The sentencing tariff for street mugging generally is between 18 months and 05 years but the upper limit can go up further if the one more or all (the list is not exhaustive) aggravating features mentioned in Raqauqau are present.

[19] 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 upon a 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.

[20] Considering that the sentencing tariff of 18 months to five years (of course with the possibility of the higher end going up further due to aggravating factors) was set for street mugging as far back as in 2008, if a review of the tariff for this type of aggravating robberies known as street mugging is needed in the current circumstances, it is up to the State to take it up before the Full Court in an appropriate case.


[21] Therefore, the sentencing error above highlighted offer a reasonable prospect for the appellant to succeed in appeal.

[22] Accordingly, leave to appeal against sentence is allowed.

Order

1. Leave to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL