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

CRIMINAL APPEAL NO.AAU 151 of 2019
[In the High Court at Suva at Suva Case No. HAC 28 of 2018]

BETWEEN : **SOKOWASA BULAVOU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **03 August 2021**

Date of Ruling : **06 August 2021**

RULING

[1] The appellant had been charged in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 14 January 2018 at Suva in the Central Division.

[2] The information read as follows:

'Statement of Offence'

AGGRAVATED ROBBERY: *contrary to section 311 (1) (a) of the Crimes Act 2009.*

'Particulars of Offence'

> ***SOKOWASA BULAVOU*** *with others, on the 14th of January, 2018, at Suva, in the Central Division, robbed one* ***ALVEEN HARAK*** *of his 1 x Samsung J2 black in color mobile phone valued at $299.00 and a wallet containing $186.00 in cash, Wespac ATM Card, FNPF Joint Card, FNU ID Card, Voters ID Card, E-Ticketing card, all to the total value of $485.00 and at the time of such robbery used personal violence on the said* ***ALVEEN HARAK.***

[3] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him for aggravated robbery and sentenced him on 10 September 2019 to 09 years of imprisonment with a non-parole period of 07 years (remaining 07 years, 04 months and 03 days of imprisonment with a non-parole period of 05 years, 04 months and 03 days after deducting the period of remand).

[4] The appellant's appeal lodged by him in person against conviction and sentence had been timely (23 September 2019). The Legal Aid Commission had filed an amended notice of appeal and written submissions on 09 November 2020. The state too had filed written submission on 19 January 2021. The appellant in person had tendered an application for bail pending appeal on 16 April 2021. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or via Skype.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-

arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

[7] The appellant's counsel had summarized the cases for the prosecution and defense as follows:

> *'7. In summary of the evidence for the Respondent's case as revealed from the summing up, is that the complainant's account to the incident was that he was robbed of his wallet and mobile phone near bad dog cafe at 4.30am on 14th of January, 2018. He did not see who had taken his items but he had seen four boys behind him. He then saw the person who police arrested had thrown a phone away which he later identified to be his. The account of the complainant's friend (PW2) is that he with the complainant and another co-worker were on their way to Mac Donald's to have breakfast after coming out of the night club. He was walking in front whilst the complainant and the co-worker were walking behind. As he looked back he saw the complainant on the ground with four boys surrounding him. He saw a person crossing the road holding a phone. The account of the police officer PC 4918 Jone Masirewa (PW3) is that he saw four individuals robbing the complainant and he had managed to catch a person who had taken the wallet and phone, which he later came to know the person who is the Appellant. The evidence of police officer Pauliasi Sicinilawa (PW4) is that he arrested the Appellant who threw a phone which the complainant confirmed to be his mobile phone.*
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> *8. The account of the Appellant is that he was on his way alone to catch a taxi after leaving signal night club when he saw an Indian man sitting down with two of his friends standing around. He picked the person up whom the person pointed towards Temptation night club. He saw a*

police officer arrest a person with a beard and upon passing he felt something touch his shoulder. He later realised that it was a phone which did not belong to him which he then threw away. He later came to know when he was at the police station that the phone belonged to the complainant.

[8] The respondent's counsel had summarised the prosecution case as follows:

> *'3.2 Briefly, the Prosecution had called 04 witnesses (the victim, a civilian bystander and 02 Police Officers) while the Appellant had given evidence on his own behalf. Following trial, the Prosecution managed to prove beyond reasonable doubt that at around 0430 hours on 14 January 2018, the Appellant together with 03 others had tackled the victim, Alveen Harak, from behind whilst the victim was walking along behind Bad Dog Cafe in Suva with 02 friends after having drinks with his said friends at a nightclub. While the victim was falling down due to the said tackle, the Appellant had stolen the victim's Samsung J2 mobile phone and his wallet from his pockets. The Appellant was arrested across the road from the crime scene shortly after participating in the aggravated robbery by patrolling Police Officers and at the time of his said arrest, the Appellant had the victim's said stolen mobile phone in his possession which he had thrown away but which was quickly recovered by the Police and immediately identified by the victim as having been the same mobile phone which had been recently stolen from him.'*

[9] The grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows:

> *'**Conviction***
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> ***Ground 1***
>
> *THAT the Learned Trial Judge had erred in law and in facts having not adequately directed the assessors on how to approach previous inconsistent statements.*
>
> ***Ground 2***
>
> *That the Learned Trial Judge erred in law and in fact having not warned the assessors and himself on the evidence of uncharged acts led at the trial.*

Ground 3

That the Learned Trial Judge had not properly and independently assessed the evidence of recent possession to have convicted the appellant which the verdict is unreasonable and not supported by the totality of the evidence.

Sentence

Ground 1

That the final sentence imposed on the appellant is harsh and excessive in that;

i) The Learned Trial Judge erred in law and principle to have not considered the appropriate sentencing tariff; and
ii) The Learned Trial judge had erred in principle to have double counted by considering aggravating factors that are reflected in the seriousness objectiveness of the offending and the elements of the offending.

[10] The evidence against the appellant as summarised by the High Court judge in the judgment is as follows:

7. Now the question is whether the accused participated in committing this offence.

8. I am not satisfied that the prosecution had led sufficient evidence regarding the circumstances under which PW2 and PW3 identified the accused as the person who took the mobile phone or both the mobile phone and the wallet from the complainant in line with the Turnbull Guidelines. Therefore, I would not rely on that evidence on identification.

9. According to the first and the second witnesses, the person who took (stole) the complainant's phone crossed the road with the phone and that person was arrested by a police officer on the other side of the road. This person threw the phone and it was recovered by another police officer. This phone which was thrown by the person and subsequently recovered, was identified by the complainant as his phone.

10. The accused himself admitted that he had the possession of a phone when he crossed the road though according to him, he did not realise it was a phone until he crossed the road. He admitted throwing the phone, but according to him, it was because he realised that it was not his phone. Fact remains that, based on the accused's own admission he was in possession of the phone stolen from the complainant, soon after it was stolen. The accused's explanation that he accidently grabbed it from a person who was being searched by PW3 without realising that it is a

phone owing to him being drunk at that time is highly improbable and it is not a reasonable explanation.

11. Based on these facts it is manifestly clear that the phone stolen from the complainant was found in the possession of the accused within a very short interval.

12. Therefore, in view of the doctrine of recent possession it could be inferred that the accused stole the said mobile phone from the complainant and accordingly, the accused participated in committing the offence of aggravated robbery.

13. I am satisfied that the inconsistencies that surfaced during the trial do not affect the said conclusion which is essentially based on the doctrine of recent possession.

01st ground of appeal

[11] The counsel for the appellant contends that the trial judge had not adequately directed the assessors on how to approach previous inconsistent statements at paragraph 4 of the summing-up in the light of guidelines given in **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012) and that paragraphs 8 and 9 of the summing-up are not on previous inconsistent statements but inconsistencies *per se*. However, a reading of paragraphs 8-10 along with paragraph 4 makes it clear that the trial judge was in fact dealing with inconsistencies with previous statements. In any event, the appellant's counsel had not shown what previous inconsistent statements of the prosecution witnesses the trial judge had failed to direct the assessors on and what effect they could have had on the overall credibility of the witnesses.

[12] The Court of Appeal very recently dealt with a similar complaint in **Ram v State** [2021] FJCA; AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the weight to be attached to any inconsistency or omission depends on the facts and

circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

[13] However, most importantly, the trial judge had not relied on the evidence of PW2 and PW3 for identification and the complainant had not anyway identified the perpetrator but the trial judge had totally relied on 'recent possession' to convict the appellant. Therefore, the alleged inadequate directions had no effect on the conviction by the trial judge who was the ultimate decider of facts and law.

[14] In **Fraser v State** [2021] FJCA; AAU 128.2014 (5 May 2021) the Court of Appeal reiterated the role of the trial judge in Fiji:

> *'[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].'*

[15] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[16] The appellant's counsel argues that the trial judge had not warned the assessors on the evidence of uncharged act. The so called uncharged act was the resistance to arrest as per paragraphs 33 and 41 of the summing-up.

[17] As pointed out by the respondent the appellant had not resisted arrest but attempted to run away which evidence could have been led as an item of evidence, circumstance or subsequent conduct influenced by the fact in issue. **Vesikula v State** [2018] FJCA 176; AAU 70 of 2014 (23 October 2018) has no application to the facts of this case.

The evidence of resisting arrest was in relation to another suspect and not the appellant. The probative value of 'attempting to run away' outweighed prejudicial value, if any.

[18] In any event, no redirections were sought by the trial counsel. Therefore, the appellant is not even entitled to raise this point in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)] without cogent reasons.

[19] Therefore, there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[20] The counsel for the appellant challenges the evidence of 'recent possession' and submits that the verdict is unreasonable and cannot be supported by evidence.

[21] The trial judge had addressed the assessors on recent possession at paragraphs 28-30 and 57 of the summing-up. He had directed himself on evidence relating to recent possession at paragraphs 5-13 of the judgment in an exhaustive manner although when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but he may follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Fraser v State** (supra)].

[22] The Court of Appeal recently dealt with 'recent possession' in **Boila v State** [2021] FJCA; AAU 049.2015 (4 May 2021) and considered several past decisions. Before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters: (**i**) the accused was in possession of the property (**ii**) the property was positively identified by the complainant (**iii**) the property was recently stolen (**iv**) the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances

of the case, recent **(v)** there are no co-existing circumstances, which point to any other person as having been in possession. Upon proof of the unexplained possession of recently stolen property, the trier of fact may-but not must-draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence such as burglary or robbery [see also **Timo v State** [2019] FJSC 1; CAV0022 of 2018 (25 April 2019)]. The prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time.

[23] When the principles expressed in **Boila v State** (supra) are applied to the present case the assessors and the trial judge were entitled to draw the inference that the appellant was the perpetrator of the aggravated robbery based on the doctrine of recent possession. It was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[24] Therefore, there is no reasonable prospect of success in this ground of appeal.

01st ground of appeal (sentence)

[25] The appellant's counsel argues that the sentence imposed is harsh and excessive because the trial judge had not considered the appropriate tariff and also committed 'double counting' in the sentencing process.

[26] The trial judge had not followed the sentencing tariff for 'street mugging' namely 18 months to 05 years of imprisonment as expressed in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) on the basis that Crimes Act does not include an offence by the

term 'street mugging', the Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) declared only one tariff for the offence of aggravated robbery (*i.e.* 08 to 16 years of imprisonment) and it is not logical to have a trial against an accused for aggravated robbery in the High Court and upon convicting that accused for aggravated robbery, to sentence him based on a tariff much lower than that for the lesser offence of robbery.

[27] At the same time, the trial judge had not followed the tariff for aggravated robbery (*i.e.* 08 to 16 years of imprisonment) established in ***Wise*** (supra) by the Supreme Court either on the basis that the starting point of (at least) 08 years that a sentencer should select when applying the tariff of 08 to 16 years established in ***Wise*** (supra) may not be appropriate in all cases where the offence of aggravated robbery is committed. The judge had further explained that in cases where aggravated robbery is committed by stealing items like mobile phones, sunglasses, wallets and hand bags carried by the victim in the streets or in public places where the offence is rather opportunistic and less sophisticated, the starting point to be selected in view of the said tariff appears to be dissonant with the objective seriousness of the offence.

[28] However, the trial judge had still held that 18 months to 05 years tariff is appropriate to sentence offenders who are convicted of opportunistic and less sophisticated robberies where the victims walking on the streets or in public places are robbed by a single offender and such cases are to be called *'street or less sophisticated robberies'*.

[29] The trial judge had then proposed that a tariff of 05 years to 13 years of imprisonment should be applied when sentencing an offender who is convicted of aggravated robbery where the offence of robbery is committed in the same manner (*i.e.* opportunistic and less sophisticated robberies where the victims walking on the streets or in public places are robbed) except for the fact that that the offence is regarded as aggravated (robbery) according to law due to the fact that it is committed with the use of an offensive weapon or by more than one person.

[30] Thus, it appears that the trial judge had ultimately agreed with the tariff of 18 months to 05 years hitherto followed by courts for *'street mugging'* under a different label *'street or less sophisticated robberies'* when committed by a single offender but had adopted a higher tariff of 05-13 years of imprisonment when *'street mugging'* or *'street or less sophisticated robberies'* are committed using offensive weapons or by a group.

[31] In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where more than one offender were involved the Court of Appeal set out broader circumstances where the upper limit of 05 years may not be appropriate:

- *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.*

[32] Therefore, the trial judge's concerns could easily have been accommodated within the general tariff for 'street mugging' with sentences above the upper limit being permitted in more serious circumstances as highlighted in **Raqauqau v State** (supra). At the same time Crimes Act does not set out a separate offence not only by the name of *'street mugging'* but also by the name of *'street or less sophisticated robberies'*, though the trial judge had adopted a separate tariff for the latter different from ***Wise***. 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 and therefore the Supreme Court, understandably, did not have to discuss or disagree with the existing tariff for 'street mugging' set in **Raqauqau v State** (supra). ***Wise*** was not meant to apply to *'street mugging'* or *'street or less sophisticated robberies'* and the Supreme Court did not declare a single

tariff for all manners and forms of aggravated robbery. For simple *'street mugging'* or *'street or less sophisticated robberies'* as the High Court judge had called it, the proper forum appears to be the Magistrates court as its sentencing powers are adequate to deal with such offenders. The fact that such a trial happens to take place in the High Court is not a justifiable reason to adopt a separate sentencing tariff for such offences different from the established tariff.

[33] Similarly, settled range of sentencing for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers has been set at 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices (**State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012, **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 and **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020). The tariff in ***Wise*** did not alter this too.

[34] More importantly, in **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) I highlighted some problems arising out of a single judge of the High Court changing an existing tariff or declaring a new tariff unilaterally:

> *'[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may inter alia be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.*
>
> *[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid*

Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.

[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition the doctrine of stare decisis requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.'

[35] I think it would not be inapt to repeat my remarks in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Jeremaia v State** [2020] FJCA 259; AAU030.2019 (23 December 2020) on the adverse consequences of the dual system of sentencing tariff for aggravated burglary practised in courts which are equally relevant to this case of aggravated robbery as well:

'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'

[36] Thus, if the DPP is of the view that there is a need to revisit the existing tariff of 18 months to 05 years for aggravated robbery in form of *'street mugging'*, perhaps *inter alia* due to the increase in the number of cases of such incidents in the community and

the need to protect the public by having a sentencing regime with more deterrence than the current tariff, the DPP could take steps to seek new guidelines from the Court of Appeal or the Supreme Court at the earliest opportunity because when an existing and long-established sentencing regime is changed by a single judge unilaterally, only to be followed not by all but by a few other Judges and Magistrates, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice. Even more worryingly the trial judge had adopted the new tariff of 05-13 years for what he called *'street or less sophisticated robberies'* committed by a group or using weapons without adhering to the mandatory provisions in sections 6, 7 and 8 of the Sentencing and Penalties Act.

[37] Therefore, until the Court of Appeal or the Supreme Court considers this issue more fully it is advisable for all Judges and Magistrates to follow the well-established tariff of 18 months to 05 years for aggravated robbery in form of *'street mugging'* being mindful and taking comfort in the fact that a sentence even above the upper limit of 05 years can be meted out within the parameters highlighted in **Raqauqau v State** (supra) in more serious circumstances and appropriate cases.

[38] Coming back to the present case, the trial judge in keeping with the tariff of 05-13 years of imprisonment he adopted, had taken 05 years as the starting point and added 04 years for aggravating factors which are almost similar to those stated in **Raqauqau v State** (supra) making the final sentence of 09 years.

[39] The allegation of double counting seems to be levelled only against the trial judge having taken the fact that the offending had been committed by a group of four on the basis that the appellant had been charged under section 311(1)(a) of the Crimes Act as he had committed the robbery in company with one or more other persons. Even if that aspect is excluded as an element of the offence, the other aggravating factors warrant an increase in the sentence.

[40] Given the appellant's several previous convictions as set out by the trial judge for similar offences, considerations such as protection of the community, deterring offenders or other persons from committing offences of the same or similar nature and

denouncement of the commission of such offences by the court and the community, play a vital role in the sentencing process. However, I am not convinced that the punishment meted out to the appellant in the end is just in all the circumstances of this case and it is, in my view, mainly due to the tariff of 05-13 years adopted and applied by the trial judge.

[41] On the other hand, I am conscious of the fact that 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)].

[42] When the appellant's sentence of 09 years (it became 07 years, 04 months and 03 days as the appellant had already been in remand for 01 year, 07 months and 27 days) is considered, given the facts of this case I am of the view that he has a reasonable prospect of success in appeal. However, the final sentence is a matter for the full court to decide. In addition, there are a few important matters of law, as highlighted above, to be clarified by the full court in appeal particularly regarding the legal validity of the new sentencing tariff adopted by the trial judge. Therefore, I am inclined to grant leave to appeal against sentence.

Bail pending appeal

[43] This court has set down in a number of decisions (for e.g. **Lal v State** [2021] FJCA 29; AAU015.2018 (5 February 2021) the law relating to bail pending appeal as follows:

[32] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[33] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

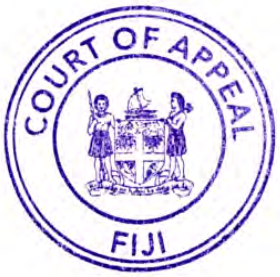
[34] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal , the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[44] Although it may be possible that the appellant has a reasonable prospect of success in his appeal against the final sentence, I cannot say that he can definitely reach the requirement of 'very high likelihood of success'. He has not shown other exceptional circumstances either. Further, he has not served even 02 years into his custodial sentence and at this stage it cannot be said that he will have served the full term or a substantial portion of his prison sentence before this appeal reaches the full court.

[45] Therefore, I decline to allow his application for bail pending appeal.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.
3. Bail pending appeal is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL