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

CRIMINAL APPEAL NO.AAU 0033 of 2019
[In the High Court at Suva Case No. HAC 117 of 2018]

BETWEEN	:	**EMOSI BALEDROKADROKA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**03 September 2021**
Date of Ruling	:	**10 September 2021**

RULING

[1] The appellant had been charged with another (02nd accused and appellant in AAU 46 of 2019) 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 11 March 2018 at Nasinu 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

EMOSI BALEDROKADROKA *and* ***LOTE WAISALE*** *on the 11th day of March, 2018 at Nasinu in the Central Division, in the company of each other,*

*robbed **NILESH CHAND** of $40.00 cash and an Alcatel mobile phone valued at $79.00 all to the total value of $119.00, the property of **NILESH CHAND**.*

[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 and sentenced him on 28 March 2019 to 09 years of imprisonment with a non-parole period of 07 years (actual serving period being 08 years and 06 months with a non-parole period of 06 years and 06 months after deducting the period of remand).

[4] The appellant's appeal lodged by him in person against conviction and sentence had been timely (11 April 2019). The Legal Aid Commission had filed an amended notice of appeal and written submissions on 01 February 2021. The state had filed written submission quite belatedly on 03 September 2021. Both counsel participated at the oral hearing *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 trial judge had summarized the facts of the case in the sentencing order as follows:

> 2. *It was proved during the course of the hearing, that two of you have grabbed the complainant and dragged him to the nearby car-wash, when the complainant was walking down to his home in the evening of 11th of March 2018. The time was around 8.00 p.m. to 8.30 p.m. Having dragged him to the car-wash, one of you have punched him on his face and then tried to strangle him. Other one then took the money and mobile phone of the complainant and left the scene. You both have committed this offence in company of each other. Therefore, each one of your culpability and degree of responsibility for inflicting of violence and robbing the complainant are same.*

[8] The main contention of the defence had been that witness Vasemaca (PW2) had mistaken in her recognition of the two offenders as the appellant and the co-accused. Therefore, the case against the two appellants had mainly depended on the correctness of the recognitions of the robbers by Vasemaca.

[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***
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> *THAT the Learned Trial Judge erred in law and fact when he failed to warn the assessors and himself of the danger in accepting the evidence of PW2 and PW3 Vasemaca Lewatubekoro and Unaisi Nakalevu and ultimately causing the conviction to be unsafe.*

Ground 2

THAT the Learned Trial Judge erred in law and fact when he permitted evidence of subsequent behavior of the accused which amounted to speculative evidence which caused a grave miscarriage of justice and prejudiced the Appellant.

Sentence

Ground 3

THAT the Learned Sentencing Judge erred in law and in fact when he sentenced the Appellant using the wrong sentencing principle resulting in an imprisonment term that was harsh and excessive.

01st ground of appeal

[10] The counsel for the appellant contends that the trial judge had failed to warn the assessors and himself of the danger of accepting the evidence of PW2 Vasemaca Lewatubekoro and PW3 Unaisi Nakalevu.

[11] PW2 Vasemaca Lewatubekoro was an eye-witness to the robbery. PW2 is the daughter of PW3. The basis of the appellant's contention is that PW2's brother and PW3's son Eremasi Koroi had been arrested in connection with the robbery and these two witnesses had made statements to the police after two days of the incident implicating the appellant in order to save Eremasi who had been released after their statements. Thus, the counsel argues that they were interested witnesses as per **Ram v State** [2015] FJCA 131; AAU0087 of 2010] and their evidence may have been tainted by an improper motive and the warning against relying on their testimonies was therefore required as held in **Mydaliar v State** [2008] FJSC 25; CAV0001 of 2007].

[12] The problem with this ground of appeal is that there is no indication at all in the summing-up or the judgment that the defence had impeached the credibility of PW2 and PW3 on the basis that they were interested witnesses or they had a sinister motive to falsely implicate the appellant. To that extent the appellant's counsel is taking up

an appeal point not canvassed at the trial. The defence had been conducted on the basis of mistaken identity.

[13] There is no presumption that whenever a witness has some interest in the matter [for example mother (witness) - daughter (victim) in the case of a child rape] or some alleged sinister motive, he or she should be deemed to be an unreliable witness or a witness with an interest and if a witness has an interest or some alleged sinister motive his or her evidence would always be tainted [see **Anthony v State** [2016] FJCA 62; AAU0027.2012 (27 May 2016)]. More often than not you do not find totally disinterested or independent witnesses to an offending. The necessity for a warning depends on the facts and circumstances of each and every case given how the defence had met the prosecution case.

[14] In the circumstances of this case, I do not think that the trial judge must have informed as a matter of legal obligation (as opposed to 'he might have') the assessors that the evidence of PW2 and PW3 may have been tainted by an improper motive and warned against relying on their testimonies. The trial judge had himself decided in the judgment that:

> *11. Making her statement to the police after her brother was arrested in connection of this matter, does not establish anything to discredit the evidence of Vasemaca.*

[15] Further, in as much as PW2 is the sister of Eremasi, the appellant is also one her cousins and the co-accused had been growing up together with her in the neighbourhood. Therefore, the assumption that somehow or other PW2 falsely implicated the appellant and the co-accused to save her brother Eremasi is farfetched. It is extremely unlikely that PW2 falsely implicated the appellant and the co-accused with whom she shared the family relationship and a close acquaintance respectively simply to save her brother. What is more plausible is that because the appellant and co-accused were either related or well-known to PW2, she initially did not want to inform the police of their involvement in the offending despite having seen it.

However, when the police arrested her own brother for the offending on suspicion she would have decided to disclose what she actually saw to the police.

[16] Therefore, I do not think that there is a reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[17] The contention on 'speculative evidence' is based on paragraph 64 of the summing-up:

> *'64. You may recall that Vasemaca said in her evidence that two relatives of the first accused approached her on the 9th and 11th of March 2019 and requested her not to give evidence against the first accused. However, during the cross examination, she said that it was only the relatives and not the first accused who approached her.'*

[18] This is not speculative evidence in the first place. The facts in **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) are different and **Rokete** is not applicable here.

[19] In any event, the trial judge had put this item of evidence in the correct perspective so as not to unduly prejudice the appellant at paragraph 65 of the summing-up:

> '*65. This form of evidence is referred to as evidence of subsequent behaviour of the accused. If you accept and conclude that the first accused was involved in sending the two relatives to Vasemaca, then you can take that into consideration. However, it is not a direct evidence that can establish that the accused had committed the offence as alleged. You are allowed to take this evidence into your consideration when you consider the whole of the evidence presented during the trial. However, you must be mindful that such behaviour of the accused only cannot make him guilty for this offence. He may have some other reasons to act like this. You have to take into consideration all of these circumstances when you consider the evidence of subsequent behaviour of the accused.'*

[20] Therefore, there is no merit in this ground of appeal.

03rd ground of appeal (sentence)

[21] The appellant's counsel argues that the sentence imposed is harsh and excessive because the trial judge had applied the wrong tariff in the sentencing process.

[22] 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) but applied the tariff set by the Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) for the offence of aggravated robbery in the form of home invasion in the night (*i.e.* 08 to 16 years of imprisonment).

[23] 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 for street mugging may not be appropriate and could be further increased:

- *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.*

[24] 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. The factual background of this case does not fit into the kind of scenario before the Supreme Court in ***Wise*** but it accords more with some form of street mugging where the complainant had however suffered injuries at the hands of the assailants. The appellant's record had revealed 03 previous convictions.

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

> *'[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.*
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> *[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).*
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> *'[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.'*

[26] The error of principle in applying ***Wise*** or departure from the settled and usual tariff applicable for street mugging without assigning any reasons therefor by the sentencing judge requires intervention by the full court that could then decide what the appropriate sentence should be as 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)].

[27] When the appellant's sentence of 09 years of imprisonment with a non-parole period of 07 years (actual serving period being 08 years and 06 months with a non-parole

period of 06 years and 06 months after deducting the period of remand) is considered, given the facts of this case, I am of the view that he has a reasonable prospect of success in sentence appeal. However, the final sentence is a matter for the full court to decide.

Orders

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

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