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

**CRIMINAL APPEAL NO.AAU 080 of 2017**
**[In the Magistrates Court of Suva Case No. 1724 of 2016]**
**[EJ 123/2016]**

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| **BETWEEN** | **:** | **SAMUELA TUIBEQA VUNIWAWA** |
| | | ***Appellant*** |
| **AND** | **:** | **STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, ARJA** |
| **Counsel** | **:** | **Appellant in person** |
| | **:** | **Mr. M. Vosawale for the Respondent** |
| **Date of Hearing** | **:** | **10 September 2021** |
| **Date of Ruling** | **:** | **17 September 2021** |

# RULING

[1] The appellant had been arraigned in the Magistrates Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with two others on 29 October 2016 at Suva regarding property belonging to Anit Ram.

[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***

> ***SAMUELA TUIBEQA VUNIWAWA with two others*** *on the 29thh day of September 2016 at Samabulla, Suva in the Central Division robbed one ANIT RAM and stole 1 Lenovo Mobile Phone valued at $500.00 ,cash $80.00 ,all to the total value of $580.00 , the property of ANIT RAM and before the robbery used force on ANIT RAM.'*

[3] After trial, delivering his judgment on 05 May 2017 the learned Magistrate found the appellant guilty of the charge of aggravated robbery. The appellant had been sentenced on the same day to 10 years of imprisonment with a non-parole period of 08 years.

[4] The appellant being dissatisfied with the conviction had in person signed a timely application for leave to appeal against conviction on 15 May 2017 and his solicitors had then filed an amended notice of appeal against conviction on 02 June 2017. Skeleton submissions had been filed on behalf of the appellant on 09 August 2019. The respondent's written submissions had been tendered on 02 June 2020.

[5] This Court delivered a ruling into the appellant's appeal against conviction on 25 June 2020 and refused leave to appeal. However, the court made certain observations on the propriety of the sentence imposed on the appellant.

[6] Thereafter, the appellant has sought an extension of time to appeal against sentence out of time by filing *inter alia* grounds of appeal along with an affidavit on 05 March 2021. In his affidavit the appellant has attempted to explain the delay and made submissions on the merits of the sentence grounds as well.

[7] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time 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?

[8] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[9] The delay of the sentence appeal (being about 03 years and 09 months late) is very substantial. The appellant has attributed the delay to his misunderstanding that once he appealed against conviction (in person) the Court of Appeal will consider the sentence as well. According to him, his appellate counsel too had not advised him to appeal against sentence. He had decided to appeal after one of his inmates having read the conviction ruling advised him of the remarks therein relating to the sentence and also he realised that some fellow prisoners had received lighter sentences for similar offences. However, he has not explained why he still waited from 25 June 2020 (the date of conviction ruling) to 05 March 2021 (date of enlargement of time application) which delay by itself is substantial. Thus, I do not consider his explanation as acceptable particularly for the delay from 25 June 2020 to 05 March 2021 (over 08 months). Nevertheless, I would see whether there is a real prospect of success for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[10] 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.*

[11] ***Grounds of appeal against sentence:***

***Ground 1:***

*THAT the Learned Magistrate erred in law and in fact in applying the wrong principle of sentencing by taking a starting point of 9 years following sentence tariff guidelines for Aggravated Robberies involving home invasion set out in Wise v State (2015) FJSC 7; CAV 0004.2015 (24 April 2015). Instead the learned trial judge should have followed the sentencing guidelines set for cases involving public service such as taxi, bus, or van drivers.*

***Ground 2:***

*THAT the Learned Magistrate erred in law and in fact at paragraph 6 of its sentence judgments date 5th May 2017 by proceeding to consider the appellants sentence to be consistent with the tariff of Wise v State when the tariff for the type of offending I was convicted of being aggravated robbery against providers of service of public nature including taxi, bus, and van drivers is 4 years and 10 years of imprisonment as was set by full court of appeal in Usa v State (2020) FJCA 52 AAU 81.2016 (15 May 2020).*

***Ground 3:***

*THAT in all circumstances of the case the sentence of 10 years with a non-parole period fixed at 8 years is manifestly excessive.*

***Ground 4:***

*THAT the sentence imposed on your appellant is harsh and excessive in light of the non-parole term being set too close to the head sentence.*

[12] The evidence of the case as summarised by the learned Magistrate is as follows:

*'3. PW1 was Anit Ram a taxi driver by profession and said the accused and 2 others hired his taxi from base at Namadi height and went to Tikaram place. The accused was sitting in the front passenger seat. It was 4.45 pm and in Tikaram place they said they were looking for a home. The accused took a wallet and was trying to pay when the person behind also said he would also pay. Suddenly the witness saw one in front with a knife and he grabbed with him. He said he would kill the driver. One from behind came and pulled him from the taxi and another one tried to drive the car. The witness turned off the car and kicked the car key away. They took the phone (MFI-1) and $80.00 was missing after that. PW1 got injuries and*

*after going to the hospital he came to the police station. The police found the wallet in front passenger seat and later found the mobile. The police showed him the ID of the accused (MFI-3) and his wallet (MFI-4). PW1 also identified the accused in the court.*

4. *In cross-examination the witness said the accused was sitting next to him and he noticed the face. There was no obstruction. In re-examination PW1 said the police officer gave the ID card and through that he identified the accused and could have identified in an ID parade too if given the opportunity. The wallet found in the car was not his.*

9. *PW6 was Adi Senibiya who was in possession of the phone. After refreshing the memory she first said on 29/09/2016 around 7pm whilst she was preparing the dinner a person gave the phone. After a break she said it was given by Tui ,the accused who was present in the court. In cross-examination by the accused she said she does not know Tui, but when asked by this court she said she knows him previously from the town.*

10. *PW7 was WDC Lice who was the investigating officer. She complied the docket and marked the phone, wallet and ID and the medical report as PE4, PE5 and PE6 respectively. In cross-examination the witness said she found the wallet and the Id from the car when it was brought to the station on the same date.*

11. *For the defence the accused gave evidence. He said for an earlier case in Nadi the police seized his wallet and Id and the police did not return them. When he was in aunty place the police came and arrested him. They said they found his wallet in the taxi. In cross-examination the accused denied giving the phone to PW6.*

***01st, 02nd and 03rd grounds of appeal***

[13] It is clear from the sentencing order that the learned Magistrate 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 10 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 scenario in this case does not fit into the kind of situation the Supreme Court dealt with in ***Wise*.** Neither is this a case of simple street mugging as identified in **Raqauqau 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 and took a starting point of 06 years of imprisonment.

> *'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*
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> *[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).*
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> *[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:*
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> > *"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):*
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> > *"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] I said in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'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 by quoting from **Koroivuata v The State** [2004] FJHC 139; HAA0064.2004 (20 August 2004) as follows:

> *'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. Taxi drivers are particularly exposed to the risk of robbery. They are defenseless victims. 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.'*

[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 resulting in the sentence of 10 years of imprisonment imposed on the appellant. 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 against sentence.

***04th ground of appeal***

[21] The complaint against non-parole period has no merits as there is a gap of 02 years between the head sentence and the non-parole threshold. In any event, once the full court decides the appropriate sentence it is a matter for the court to decide the non-parole period as well.

[22] The approach taken by the appellate court 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)]. The sentence of 10 years of imprisonment is at the very end the tariff for cases involving providers of public transport such as taxi, bus or van drivers.

[23] When a sentence is reviewed on appeal, 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). Thus, since there is a sentencing error based on the application of the wrong tariff, it is for the full court to decide what the sentence that fits the crime given the facts of the case and the applicable tariff of 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.

**Order**

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


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