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

CRIMINAL APPEAL NO.AAU 100 of 2019
[In the Magistrates' Court at Taveuni Case No. 288/12]

BETWEEN	:	**OSEA KOLI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**01 February 2021**
Date of Ruling	:	**02 February 2021**

RULING

[1] The appellant had been charged in the Magistrate's court of Taveuni exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 15 December 2012 at Naiyalamudu , Taveuni in the Northern Division. The information read as follows.

> *'AGGRAVATED ROBBERY: contrary to section 311(1)(a) of the Crimes Decree Number 44 of 2009*
>
> *Particulars of Offence OSEA KOLI and SITIVENI VESIKULA on 15th day of December, 2012 at Naiyalamudu, Taveuni in the Northern Division, robbed off 75.00 from Samuela Wailevu.*

[2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant as charged and sentenced him on 21 October 2016 to 07 years and 10 months of imprisonment with a non-parole term of 05 years.

[3] The appellant had filed an untimely notice of appeal only against sentence on 25 June 2019. The delay is about 02 years and 07 months. The Legal Aid Commission had filed a notice of motion seeking enlargement of time to appeal out of time against sentence, the appellant's affidavit, amended grounds of appeal and written submissions on 14 October 2020. The respondent had filed its written submissions on 13 November 2020.

[4] 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

[5] 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?*

[6] ***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.'*

[7] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

'(a).....

(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) 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.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[8] Sundaresh Menon JC also observed

'27..... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[9] 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..... '*

Length of delay

[10] As already stated the delay is about 02 years and 07 months and very substantial. However, the respondent had pointed out that the appellant's appeal in person had been filed in the High Court of Labasa under HAA 009 of 2018 and it had been dismissed for lack of jurisdiction on 03/04 April 2018 but the High Court judge had advised the appellant to file his appeal in the correct forum. Thus, it appears that the appellant had in deed filed an appeal in the year 2018, belatedly though, prior to 03/04 April 2018. The delay, therefore, appears to be much less but is still substantial.

[11] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

[12] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

Reasons for the delay

[13] The appellant's (who had been unrepresented in the Magistrates court) excuse for the delay is that he had been unaware of legal implications of failure to file a timely appeal and that he had been held in Taveuni Correctional Centre in the island after being sentenced by court and had limited access to lawyers. His attempt to communicate with LAC also did not yield a response from its Labasa Office. Therefore, finally he had to file his appeal in person out of time.

Merits of the appeal

[14] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[15] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the substantial delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[16] The ground of appeal against sentence urged on behalf of the appellant is as follows.

Sentence

Ground 1 — *That the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence (aggravated robbery) of this nature.*

[17] The summary of facts admitted by the appellant revealed the follows:

- *At about 8pm on the 15th of December, 2012, the complainant was on his way to Wairiki when the incident occurred.*

- *He had just passed Naiyaladamu when the Accused and another iTaukei man approached him. He noticed that one of these two iTaukei man was the Accused. The two approached the complainant and asked if he could give them $10.00.*

- *He replied by saying that he had no money. All of a sudden, the Accused and another surrounded him and the Accused punched him on his face and he fell. The other iTaukei man began kicking the complainant on his ribs. He then heard the Accused tell the other man to go and get a knife. Upon hearing this, he took off his t-shirt and ran as fast as he could. Before the complainant could run away, the Accused managed to steal $75.00 that was inside his wallet.*

- *The complainant then saw a Police vehicle where he was later conveyed to the hospital for medical examination. He has sustained injuries as a result of this incident.*

01st ground of appeal

[18] 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 filed out of time 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

[19] The Learned Magistrate had applied the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment and picked the starting point at 09 years and 06 months. He had not enhanced the sentence on account of any aggravating features and after allowing a discount of 01 year and 06 months for mitigating factors and the period of remand was taken into account the ultimate sentence had been 07 years and 10 months.

[20] The appellant had deemed the sentence to be harsh and excessive on the basis that the appropriate tariff was 18 months to 03 years and the Magistrate had applied the wrong tariff.

[21] The sentencing 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 in ***Wise*** was as follows.

'[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.

[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'

[22] It appears to me that the factual scenario in this case constitutes an act of *'street mugging'* where sentencing tariff had been recognized as 18 months to 05 years and cannot be equated with an act of aggravated robbery involving *'home invasion'*.

[23] In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the two accused. 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 Appeal 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) (Lobhan, 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.*

[24] The sentencing tariff for street mugging was once again discussed in **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) where the complainant was going home at about 4.30 p.m. when the appellant with another person had called him and asked for money and when told that he had no money, the appellant had hit him with a knife and the other had assaulted him with an iron rod. After assaulting the complainant the appellant had taken $20 from him and run away. The Court of Appeal having discussed ***Raqauqau*** and other decisions said as follows.

> *'[35] The adoption of the tariff in **Wise** (Supra) does not seem to be appropriate to the present case as it does not come within the nature of a home invasion category of aggravated robbery and is a situation which would come within the type of street mugging cases. Considering the objective seriousness of the offending and the degree of culpability, the harm and loss caused to the complainant it would be appropriate to follow the sentencing pattern suggested for instances of street mugging*

[25] Again the Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) dealt with a case of street mugging 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 a upon 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.

[26] Therefore, picking 09 years and 06 months as the starting point by the Magistrate based on ***Wise*** may demonstrate a sentencing error having a real prospect for the appellants to succeed in appeal regarding his final sentence. It is the starting point of 09 years and 06 months based on ***Wise*** that had led to the current sentence which appears to be harsh and excessive for the act of 'street mugging' the appellant was convicted.

[27] 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)].

[28] When the appellant's sentence of 07 years and 10 months is considered, given the facts of this case I am of the view that he may have a real prospect of success in appeal as far as his sentence is concerned though some degree of violence had been inflicted on the complainant leading to a laceration of 04 cm long and 02 cm deep

below the left eye. However, it is the full court that has to consider and decide what the appropriate sentence should be in terms of section 23 (3) of the Court of Appeal Act.

Prejudice to the respondent

[29] No specific prejudice would be caused to the respondent by the enlargement of time.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka

JUSTICE OF APPEAL