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

CRIMINAL APPEAL NO.AAU 0107 of 2018
[High Court of Suva Criminal Case No. HAC 212 of 2018]

BETWEEN	:	**NIKOTIMO KOROVOU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. I. Ramanu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**29 March 2021**
Date of Ruling	:	**30 March 2021**

RULING

[1] The appellant had been indicted in the High Court on one count of aggravated robbery committed with others on 18 May, 2018 at Suva in the Central Division contrary to section 311(1)(a) of the Crimes Act, 2009.

"*Count 1*
Statement of Offence

Aggravated Robbery: Contrary to section 311(1)(a)of the Crimes Decree No.44 of 2009.

Particulars of Offence

Nikotimo Korovou with others on the 18th day of May, 2018 at Suva in the Central Division, robbed SAMAN KUMAR MENDI of his wallet containing Driving License, ANZ ATM card and $160.00 cash all to the total value of $160.00, the property of SAMAN KUMAR MENDI.

[2] After trial, the assessors had expressed a unanimous opinion of guilty against the appellant on 04 October 2018 and the learned High Court judge had agreed with the assessors and convicted him of the count as charged in his judgment delivered on the same day. The appellant was sentenced on 17 October 2018 to imprisonment of 10 years and 07 months with a non-parole period of 08 years and 07 months.

[3] The appellant had submitted an appeal within time only against conviction on 16 November 2018. He had tendered an application for bail pending appeal on 25 June 2019 along with written submissions. The State had filed written submissions on 05 May 2020. The appellant's solicitors had filed an affidavit from the appellant on 11 March 2020 and further submissions on bail pending appeal on 29 May 2020.

[4] The hearing into the appellant's applications for leave to appeal against conviction and bail pending appeal were heard on 02 June 2020 and the ruling was delivered on 10 June 2020 refusing leave to appeal and bail pending appeal. However, in the course of the ruling this court pointed out that there is a sentencing error in the sentence imposed by the High Court as it had acted on the inappropriate sentencing tariff based on **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015.

[5] Thereafter, the appellant had tendered summons seeking an extension of time to appeal against sentence along with his affidavit on 12 October 2020. Notice of appeal and another affidavit explaining the delay had been filed on 22 December 2020. His written submissions had been tendered on 07 January 2021. The state had filed written submissions on 22 January 2021.

[6] 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

[7] 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?

[8] ***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.'*

[9] 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.'*

[10] 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.'*

[11] 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

[12] The delay is about 02 years and very substantial.

[13] 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.'*

[14] 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

[15] The appellant's excuse for the delay in his affidavit is that he had engaged MIQ Lawyers only for conviction appeal and after the ruling of this court on 10 June 2020 indicating a sentencing error he had decided to appeal against sentence as well. It is clear that both MIQ lawyers and the appellant had been alerted to the sentencing error only as a result of the said ruling of this court. Since this court had already indicated that there is an error of the sentence I would treat this explanation as acceptable.

Merits of the appeal

[16] 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."*

[17] 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 delay and in the light of the explanation, the prospects of his appeal would warrant granting enlargement of time.

[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 untimely preferred against sentence to be considered arguable**

there must be a <u>real prospect of its success</u> 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 trial judge had summarized the prosecution evidence as follows in the summing-up.

> *'16. The prosecution alleges that the accused together with the two others came behind the complainant and strangled him while he was walking along the Victoria parade in the night of 18th of May 2018. One of them squeezed his neck, while other one twisted his hand. The third person had put a cloth inside his mouth. The complainant had started to scream, asking for help. Then the three assailants took the wallet of the complainant and pushed him away. They then walked across the road. According to the complainant, this incidence lasted only two to three minutes. The complainant had then seen that one of the assailants was caught by some people who were at the other side of the road. The complainant had then approached them. One of the people, who caught the suspect, had asked the complainant whether the wallet that was found in the possession of the suspect belonged to him. That person was in a civilian dress. The complainant later came to know that he was a police officer. You may recall that the complainant explained in his evidence about the colour of his wallet and the items that were inside it.*

Grounds of appeal

[20] The grounds of appeal urged by the appellant against sentence are as follows.

> *'(1) That the sentencing tariff of 08 to 16 years should only apply to more serious offences like home invasion and not street type of offences like this.*
>
> *(2) That the sentence is quite excessive given the circumstances of the offending.*

[21] It is convenient to consider both grounds of appeal together. The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in **<u>Wise v State</u>** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 12 years as the starting point ending up with the final sentence of 11 years. The tariff in ***<u>Wise</u>*** 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.

[22] 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.'*

[23] The learned trial judge had stated in the sentencing order:

> *2. It was proved at the conclusion of the hearing that you together with two other accomplices came from behind the complainant and assaulted him when he was walking alone the Victoria Parade in the night of the 18th of May 2018. One of you have strangulated his neck, while another had twisted his hand. The third one had put a cloth into his mouth. After that, you and your two accomplices had robbed his wallet which contained $160 and assorted cards.'*

[24] Therefore, it is clear that the facts of the appellant's case reveal a more a serious form of 'street mugging' as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) [see **Tawake v State** [2019] FJCA 182; AAU0013 of 2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)] than a home invasion involved in ***Wise***.

[25] 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.*

[26] 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*

[27] 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.*

[28] Therefore, there is clearly a sentencing error relating to the wrong sentencing tariff applied by the trial judge and over which the appeal against sentence has a real prospect of success in appeal. However, without speculating on the appropriate sentence it looks to me that the appellant deserves a deterrent sentence according to the tariff set in ***Raqauqau*** because it had been carried out by a group of offenders, violence used and the frequent prevalence of offences of this nature in the city.

[29] 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).

[30] In the circumstances, I am inclined to allow extension of time to appeal against sentence on both grounds of appeal. However, it is for the full court to decide the appropriate sentence in terms of section 23(3) of the Court of Appeal Act, 2009.

Prejudice to the respondent.

[31] No prejudice would be caused to the respondent by an extension 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