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

CRIMINAL APPEAL NO. AAU 138 of 2020
[High Court at Lautoka Case No. 107 of 2019]

BETWEEN

: TALICA RAKANACE

Appellant

AND : STATE

Respondent

Coram : Prematilaka, RJA

Counsel : Ms. S. Prakash for the Appellant
: Mr. R. Kumar for the Respondent

Date of Hearing : 30 June 2023

Date of Ruling : 30 June 2023

RULING

[1] The appellant had been convicted with another in the High Court at Lautoka on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 on 22 June 2019 at Lautoka in the Western Division. The charge read as follows:

> *'**Statement of offence***
>
> ***AGGRAVATED ROBBERY**: Contrary to section 311 (1) (a) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***TEVITA TUICIKOBIA and TALICA RAKANACE** on the 22nd day of June 2019, at Lautoka in the Western Division robbed **AJMAT ALI** of $200.00 cash and a Samsung J1 mobile phone valued at $129.00 and immediately before such robbery used personal violence on the said **AJMAT ALI.**'*

[2] Upon the appellant's plea of guilty, the learned High Court judge had found him guilty as charged and sentenced him on 24 February 2020 to an imprisonment of 07 years and 10 months with a non-parole period of 06 years.

[3] The appellant in person had appealed against sentence out of time. Subsequently, he through the Legal Aid Commission had tendered an application for extension of time to appeal against sentence on the following ground of appeal:

> *'**Ground 1***
>
> *THAT the Learned Judge erred in principle when sentencing the appellant by referring to an incorrect tariff from Wise v State CAV 0004 of 2015, resulting in the sentence being harsh and excessive.'*

[4] 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? (vide **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).

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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)].

[6] The delay is over 06-07 months which is substantial. The appellant has stated that he initially did not want to appeal against sentence but later changed his mind to do so and accordingly his reasons for the delay are not convincing. His initial appeal papers

have the date 10 September 2020 but received by the CA Registry on 28 October 2020. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[7] The High Court judge had reproduced the summary of facts agreed to by the appellant as follows in the sentencing order:

> *2. ……..The brief facts are as follows:*
>
> *3. On 22nd June, 2019 at about 1.30 am the victim had parked his taxi along Tukani Street, Lautoka waiting for the next passenger when he saw the second accused calling him. The victim drove to where the accused was standing, after the taxi stopped the accused got into the front passenger seat while Miliakere (PW2) and the first accused got into the back seat.*
>
> *4. The second accused told the victim to take them to Field 40 Tramline. At the tramline she told the victim to enter the feeder road, after a while she told the victim to stop the taxi. When the taxi stopped the first accused who was sitting in the back seat forcefully grabbed the victim's neck, placed a knife to the victim's mouth and told him to stay quiet while the second accused searched the taxi and stole;*
>
> *(a) Cash of $200.00;*
>
> *(b) Taxi keys; and*
>
> *(c) Samsung mobile phone valued at $129.00.*

01st Ground of Appeal

[8] The summary of facts clearly suggests that this is a case of robbery of a taxi driver. The appellant's ground of appeal against sentence is based on the submission that the learned High Court judge had made a sentencing error by adopting the sentencing tariff of 08-16 years meant for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature) set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) when the already settled range of sentencing

tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers was 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [see **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].

[9] The trial judge had taken 08 years as the starting point and added 05 years for aggravating factors including the fact that the offending was against a taxi driver when the established tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers was 04 years to 10 years of imprisonment. The fact that the offending is against a taxi driver is included in the tariff of 4-10 years.

[10] However, by taking a starting point of 08 years following the sentencing tariff guidelines for aggravated robberies involving night home invasions set out in ***Wise,*** the learned High Court judge had acted upon a wrong principle. Instead the learned sentencing judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers namely 4-10 years of imprisonment. When the sentencer choses 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 [vide **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)]. It also appears to be an error that having taken 08 years as the starting point wrongly based on ***Wise*** the sentencing judge had taken as one of the factors that the offences had been committed against a public service provider to enhance the sentence by 05 more years. It is due to the discounts for early guilty plea (03 years), the appellant's previous good character (1 ½ years) and remand period of 08 months that the ultimate sentence became 07 years and 10 months.

[11] If one were to replicate sentencing methodology set out in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) *mutatis mutandis* to the facts of this case, the appellant's offending may be considered medium (as opposed to high) in terms of harm and the culpability is of third degree (the offending committed by two or more

with a weapon). In this situation, the starting point is 07 years and sentencing range is between 9-10 years only if the offending was mere street mugging. But, this is a case of aggravated robbery against a public service provider which is more serious than street mugging. Thus, the ultimate sentence appears to be justified; not excessive or harsh. However, given the sentencing error of applying the wrong tariff the appellant is entitled to have his sentence re-examined by the full court.

[12] 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 the appellate court in an appeal against sentence 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)].

[13] 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).

Order of the Court:

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

COURT OF APPEAL FIJI

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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent