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

CRIMINAL APPEAL NO. AAU 054 of 2018
[In the High Court at Suva Case No. HAC 267 of 2013]

BETWEEN : **PENI MATAIRAVULA alias PENI VEISAGAI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Ms. N. Mishra for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **05 September 2023**

Date of Judgment : **28 September 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been tried and convicted with two others in the Magistrates court in Nausori under extended jurisdiction on a single count of aggravated robbery of an Alcatel mobile phone value at $200.00, taxi meter valued at $300.00 and $40.00 cash all to the total value of $540.00 from Mahesh Chand, a taxi driver, contrary to section 311(1) of the Crimes Act, 2009 committed on 01 May, 2013 at Mokani, Bau Road, Nausori in the Central Division. The appellant had also been charged with resisting lawful arrest on 06 May 2013 but found not guilty and acquitted by the Magistrate.

[2] After trial, the learned Magistrate had found the appellant guilty as charged and the case had been remitted to the High Court for sentencing. The appellant had been sentenced on 18 May 2018 by the High Court to an imprisonment of 13 years with a non-parole period of 11 years which became 08 years and 01 month with a non-parole period of 06 years and 01 month after the discount for remand period of 04 years and 11 months.

[3] The appellant' application for leave to appeal his conviction was refused by a Judge of this court but he was given leave to appeal his sentence mainly on the learned High Court judge having applied the wrong tariff in sentencing the appellant which is the only ground of appeal urged before the Full Court as well.

[4] The brief summary of evidence as narrated in the High Court sentencing order is as follows.

> *'3. According to the evidence led before the Learned Magistrate you with two others instructed the second prosecution witness ("PW2") who was the driver of the taxi the three of you were travelling to drive to a relatively isolated area and one of you held a 'beer glass' underneath his throat. Then the one sitting in the front passenger seat took the said witness' mobile phone and his money. Thereafter, PW2 managed to run away from the three of you. This offence was committed in the night. PW2 had said in his evidence that he feared for his life given the manner and the circumstances under which he was threatened by the three of you. The taxi meter had been later recovered from one of the aforementioned accused who had pleaded guilty.*
>
> *4. The evidence in this case does not disclose how much money was stolen and the value of the phone that was stolen. The first prosecution witness ("PW1") who was the owner of the aforementioned taxi PW2 drove had testified that the meter that was stolen cost him $300. Even though the value of the property stolen does not form part of an element of the offence, it is relevant for the purpose of sentencing. This is something most prosecutors often overlook when they lead evidence in cases involving theft offences.'*

[5] The learned High Court judge had itemised in paragraphs 8 and 9 of the sentencing order the appellant's numerous previous convictions and stated as follows.

> *10. Your previous conviction report therefore bears testimony that you have formed a habit of committing the offence of robbery.*
>
> *11. Whereas you are sentenced for the offence of aggravated robbery in this case which is an offence of the nature described under section 10(c) of the*

Sentencing and Penalties Act; and having regard to your previous convictions for the offence of robbery committed inside Fiji, I am satisfied that you constitute a threat to the community. Therefore, by virtue of the provisions of section 11 of the Sentencing and Penalties Act, I hereby determine that you, Peni Matairavula is a habitual offender for the purposes of Part III of the said Act.

12. Accordingly, in determining the length of your sentence in this case, I shall regard the protection of the community from you as the principal purpose for which the sentence is imposed in terms of section 12 of the Sentencing and Penalties Act and I am mindful that in order to achieve that purpose I can impose a sentence longer than which is proportionate to the gravity of the offence by virtue of section 12(b) of the said Act.

13. The aforementioned provisions of section 12(b) of the Sentencing and Penalties Act justifies selecting of a higher starting point and accordingly, I would select 10 years imprisonment as the starting point of your sentence.'

[6] Thus, the High Court judge had satisfied himself with all the requirements for declaring the appellant as a habitual offender for the purposes of Part III of the Sentencing and Penalties Act and that decision is not challenged in this appeal. Thereafter, as permitted by section 12 (b) of the Sentencing and Penalties Act, the learned High Court judge had imposed a longer sentence which was not proportionate to the gravity of the offending and in doing so the judge had picked a higher starting point of 10 years.

[7] The higher starting point that the High Court judge had mentioned appears to be based on the sentencing tariff selected by the learned judge at paragraph 5.

*'5. The maximum sentence for the offence of aggravated robbery contrary to section 311(1) of the Crimes Act is 20 years imprisonment. The tariff for this offence is an imprisonment term between 8 to 16 years. [**Wallace Wise v The State**, Criminal Appeal No. CAV 0004 of 2015; (24 April 2015)]'*

[8] This is where the learned sentencing judge seems to have made a sentencing error. 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.

[9] The factual background of this case does not fit into the kind of situation considered in ***Wise.*** The Supreme Court said in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) that sentencing tariff in ***Wise*** was referring only to aggravated robberies involving home invasions but not to all cases of aggravated robberies and set new guidelines for aggravated robberies in the form of street mugging differing from the then existing sentencing tariff for street mugging set in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) of 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). However, the appellant's case is not simple street mugging as dealt with in ***Tawake*** but aggravated robbery of a taxi driver.

Aggravated robbery against providers of public services.

[10] Gounder J. examined several previous decisions and took a starting point of 06 years of imprisonment in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011 (15 May 2012) where the accused pleaded guilty to a charge of aggravated robbery in the form of a joint attack against three taxi drivers in the course of their employment contrary to section 311(1) (a) of the Crimes Act 2009. **State v Bola** [2018] FJHC 274; HAC 73 of 2018 (12 April 2018) followed the same line of thinking as in ***Ragici*** where 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…'*

[11] It appears from the discussion in ***Ragici*** and ***Bola*** that the High Court has for a long time considered the sentences for robbery of taxi drivers to be in a range from 4 to 10 years imprisonment depending on force used or threatened. Therefore, a Judge of the Court of Appeal, while analysing previous decision, held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)

> '*[17] 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.'*

[12] The past judicial decisions are awash with pronouncements that the taxi industry serves the community well by providing a cheap vital link in short and medium haul transport but violent and armed robberies of taxi drivers have become too frequent. Therefore, 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. Further, it had been said that 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.

[13] Nevertheless, it is clear that by taking a starting point of 10 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise,*** the learned High Court judge has acted upon a wrong principle.

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

> *'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.'*

[15] Therefore, the appellant should have been dealt with in accordance with the sentencing tariff for offences of aggravated robbery against providers of services of public nature. Having taken 10 years as the starting point based on ***Wise*** the sentencing judge had again taken the fact that the offences had been committed against a public service provider to enhance the sentence by 03 more years leading to double counting as well committing another sentencing error.

[16] In the meantime the Supreme Court set new guidelines in ***Tawake*** for aggravated robberies in the form of street mugging and subsequently the Court of Appeal had the occasion to consider ***Tawake*** in the contest of an aggravated robbery against a taxi driver in **Tabualumi v State** [2022] FJCA 41; AAU096.2016 (26 May 2022) where the following observations were made.

'[22] The Supreme Court accordingly set new guidelines for sentencing in cases of street mugging by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.

[23] In a significant move the Supreme Court identified <u>starting points</u> for three levels of harm i.e. high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed to the appropriate <u>sentencing range</u> for offences as previously used and stated that the sentencing court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.

[24] The Court advised the sentencers that they should, having identified the initial starting point for sentence, must then decide where within the sentencing range the sentence should be, adjusting the starting point upwards for aggravating factors and downward for mitigating ones some of which the Court identified but admitted that they were not exhaustive.

[25] (i) Significant planning (ii) prolonged nature of the robbery (iii) offence committed in darkness (iv) particularly high value of the goods or sums targeted (v) victim is chosen because of their vulnerability (for example, age, infirmity or disability) or the victim is perceived to be vulnerable (vi) offender taking a leading role in the offence where it is committed with others (vii) deadly nature of the weapon used where the offender has a weapon (viii) restraint, detention or additional degradation of the victim, which is greater than is necessary to succeed in the robbery and (ix) any steps taken by the offender to prevent the victim from reporting the robbery or assisting in any prosecution, would be such <u>non-exhaustive</u> aggravating features.

[26] On the mitigating factors the Court laid down (i) no or only minimal force was used (ii) the offence was committed on the spur of the moment with little or no planning (iii) the offender committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure (iv) no relevant previous convictions (v) genuine remorse evidenced, for example, by voluntary reparation to the victim (vi) youth or lack of maturity which affects the offender's culpability and (vii) any other relevant personal considerations (for example, the offender is the sole or primary carer of dependent relatives, or has a learning disability or a mental disorder which reduces their culpability, as possible but not all inclusive mitigating factors.

[29] The Supreme Court in <u>Tawake</u> also said that is no reason why the methodology proposed and applied therein should be limited to 'street

muggings' and hoped that in appropriate cases either party may urge the Court of Appeal for this methodology to be considered for sentencing for other offences.'

[17] As suggested by the Supreme Court in ***Tawake*** if one were to replicate sentencing methodology therein *mutatis mutandis* to offences of aggravated robbery against providers of services of public nature, the recalibrated sentencing table maintaining the relative differences in sentencing between the three categories (high, medium and low) while adjusting the starting points within the range of 04 to 10 years may be seen as follows.

Culpability / Harm	ROBBERY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED ROBBERY (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)	AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER AND WITH A WEAPON)
HIGH (CATEGORY 1)	*Starting Point:* 06 years *Sentencing Range:* 04–08 years	*Starting Point:* 08 years *Sentencing Range:* 06–10 years	*Starting Point:* 10 years *Sentencing Range:* 08–14 years
MEDIUM (CATEGORY 2)	*Starting Point:* 04 years *Sentencing Range:* 02–06 years	*Starting Point:* 06 years *Sentencing Range:* 04–08 years	*Starting Point:* 08 years *Sentencing Range:* 06–10 years
LOW (CATEGORY 3)	*Starting Point:* 02 years *Sentencing Range:* 01year – 03 years	*Starting Point:* 04 years *Sentencing Range:* 02–06 years	*Starting Point:* 06 years *Sentencing Range:* 04–08 years

[18] The appellant's offending may be considered medium (as opposed to high) in terms of harm and the culpability is of either second degree (the offending committed by two or more without a weapon) or the third degree (the offending committed by two or more with a weapon by holding a beer glass under the complainant's throat). Depending on whether it is second or third degree, the starting point is 06 or 08 years and the sentencing range could vary between 04-08 or 06-10 years. One also has to keep in mind that the appellant was declared a habitual offender by the High Court judge.

[19] Since this incident is objectively more serious in nature than simple 'street mugging' and it is in the form of an 'attack against taxi drivers', I am inclined to adopt the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] in dealing with this appeal. In doing so, I shall also consider the above table which mirrors the sentencing structure provided in ***Tawake*** for aggravated robbery against providers of public services.

[20] 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. 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 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.

[21] The appellant had submitted an affidavit stating *inter alia* that after being released on bail pending appeal he has been engaged in running a canteen, a piggery and fishing and participating in village activities. Thus, it also appears that the appellant has now settled down in life with his *de-facto* partner and taken considerable strides towards rehabilitation particularly after his release on bail.

[22] The appellant had served 05 years, 03 weeks and 06 days between his sentence and release upon bail pending appeal and spent in pre-trial remand 04 year and 09 months and 22 days. Thus, I think the total of 09 years, 09 months, 03 weeks and 06 days of incarceration the appellant has already spent is an appropriate sentence for the offending which he has already served. Thus, for all purposes and records, the appellant should be deemed to have served a sentence of 09 years and 09 months and 03 weeks and 06 days in respect of the offending in this case. Therefore, instead of passing another sentence warranted by law in substitution of the existing sentence at this stage, I would make an order to release the appellant forthwith which is just in all circumstances of the case.

Mataitoga, JA

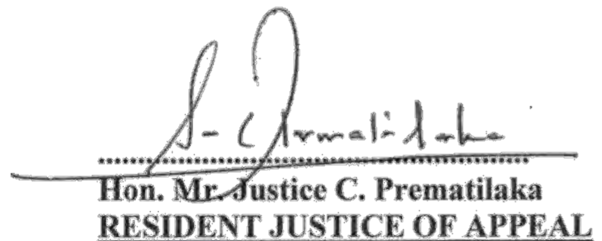
[23] I concur with your judgment.

Qetaki, JA

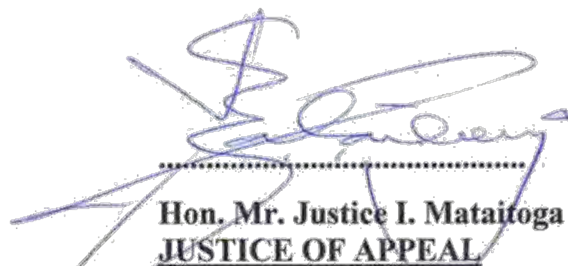
[24] I am in agreement with the judgment, its reasoning and the orders made.

Orders of Court:

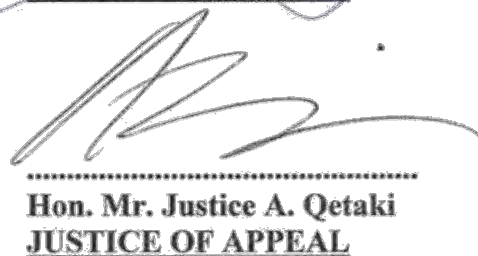
1. The appeal against sentence is allowed.
2. Quash the sentence of 13 years of imprisonment with a non-parole period of 11 years passed on the appellant by the High Court.
3. The appellant is deemed to have served a sentence of 09 years and 09 months and 03 weeks and 06 days.
4. The appellant is released forthwith.



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



Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL



Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL