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

CRIMINAL APPEAL NO.AAU 056 of 2020
[In the High Court at Suva Case No. HAC 299 of 2018]

BETWEEN	:	**JAMES ASHWIN RAJ**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**05 June 2023**
Date of Ruling	:	**12 June 2023**

RULING

[1] The appellant stood indicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009.

[2] The assessors unanimously opined that the appellant was guilty as charged and the High Court Judge had concurred with them and convicted the appellant accordingly. He was sentenced on 31 January 2020 to 04 years of imprisonment with a non-parole period of 03 years. The trial judge had adopted the instinctive synthesis method.

[3] The appellant's appeal against conviction and sentence is out of time by two months but it could be considered timely as he had filed the appeal in person.

[4] In terms of section 21(1) (a) and (b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of**

success' [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[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 appellant confirmed to this court on 01 September 2022 that he would only rely on the single ground of appeal against conviction filed on 19 August 22 and one ground of appeal against sentence both of which have been set out in his bail pending appeal application as well. Thus, the grounds of appeal urged are as follows:

Ground 1 (conviction)

THAT the finding of guilty by the trial judge is preserve and unreasonable

Ground 2 (sentence)

THAT the Learned Trial Judge erred in law and in fact when he failed to properly discount for the remand period pursuant to section 24 of the Sentencing and Penalties Act of 2009 whereby the appellant was remanded from 19 July 2018 to 31 January 2020 but the judge failed by giving only a discount of 09 months and 14 days.

[7] The facts of the case as set out in the sentencing order and the summing-up respectively suggest that this is a case of street mugging. They are as follows:

> *'[2] The victim is an adult male. He is a hairdresser by profession. He was walking down to his home with a friend after a night out in the early hours of 3 February 2018 when you approached him for a roll of cigarette with three other boys. While the boys distracted the victim's friend, you snatched the victim's mobile phone and bag containing $30.00 cash from his hand and ran off. Both you and the victim are from the same neighborhood. He considered you as his friend. He was shocked by your actions.*
>
> *[16] The only witness for the prosecution is the complainant, Josaia Vusuya. His evidence is that in the early hours of 3 February 2018, after clubbing in Suva he took a ride to his home in Narere in a minivan with a friend he met in a club. He got off the minivan and while he was walking along Omkar Road with his friend, a vehicle stopped. He recognized Ashwin (referring to the Accused) – his childhood friend from the neighbourhood for more than 20 years and whose vehicle he had regularly used as his mode of transport. The complainant asked for a ride but the Accused responded saying he had people sitting at the back seat. The complainant said the Accused switched on the light inside the vehicle and that is how he recognized him and saw three Itaukei boys sitting at the back seat of the vehicle. After that conversation the complainant turned around to walk away when the Accused reversed his vehicle and got off with the three boys and approached him for a roll while the other boys started bothering the complainant's friend and took his belongings. The complainant took out a roll and gave it to the Accused. At that point the Accused pulled the complainant's bag and mobile phone from his hand, got on his vehicle with the boys and fled the scene.'*

Ground 1

[8] The appellant's arguments revolves around the alleged lack of proof of elements necessary for aggravated robbery (*i.e.* the offender in company of others or he having an offensive weapon) and absence of independent source of identification.

[9] The complainant, Josaia Vusuya who knew the appellant for over 20 years as a neighbor had recognized the appellant who even engaged in a brief conversation with the complainant, with the aid of the light inside the vehicle. Soon thereafter, the appellant had got off the vehicle and walked up to the complainant to ask for a roll of cigarette and the later had obliged. At that point the appellant pulled the

complainant's bag and mobile phone from his hand, got on his vehicle with the others and fled the scene.

[10] The trial judge had more out of abundance of caution given the assessors ***Turnbull*** warnings as well with regard to the recognition /identification and addressed them on the issue of identification at paragraphs 16-19 of the summing-up with which he had directed himself in the judgment.

[11] In any event, identification had not been a contentious issue at the trial which is being raised for the first time in appeal. Not even redirections had been sought on the issue of identification. Justice L'Heureux-Dubé in the Supreme Court of Canada in **R v. Brown** [1993] 2 SCR 918, 1993 CanLii 114 (SCC) [quoted with approval in **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016)] said on raising new arguments on appeal as follows:

> *'Per L'Heureux-Dubé J. (dissenting): Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue, including a Charter[1] challenge, for the first time on appeal: first, there must be a sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and third, the court must be satisfied that no miscarriage of justice will result. In this case there has been no change in the substantive offence, the issue was not raised at trial, with the result that the record necessary for appellate review of the issue is unavailable, and there has been no denial of justice to the accused. The Court of Appeal therefore properly concluded that no appeal on this new issue should be entertained. (emphasis added)*

[12] Justice L'Heureux-Dubé went on to elaborate this point further as follows:

> *'Courts have long frowned on the practice of raising new arguments on appeal. The concerns are twofold: first, prejudice to the other side caused by the lack of*

1 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)

opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue: see Brown v. Dean, [1910] A.C. 373 (H.L.), and Perka v. The Queen, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232.

In addition, the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.'

[13] The issue of identification does not fall in to any of the exceptions highlighted above. In any event, I see no merits in this ground of appeal.

02nd ground appeal

[14] The appellant submits that he was in remand from 19 July 2018 to 31 January 2020 but the trial judge had discounted only 09 months and 14 days. There is no material to suggest that the appellant's remand period for *this* offending was from 19 July 2018 to 31 January 2020. The State does not accept that fact either.

[15] At the time of sentencing, the sentencing tariff for '*street mugging'* was 18 months to 05 years [vide **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), **Tawake v State** [2019] FJCA 182; AAU0013.2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020)].

[16] The Supreme Court in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for 'street muggings' particularly ***Raqauqau*** remarked that the sentencing range of 18 months' to 05 years' imprisonment, with no other guidance, can itself give rise to the risk of an undesirable disparity in sentencing and a more nuanced approach was necessary.

[17] 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.

[18] The Supreme Court identified starting points 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 only the appropriate sentencing range 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.

[19] According to one school of thought on retrospective operation of a guideline judgment, it applies to all sentencing that takes place after that date regardless of when the offending took place, however, it only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant [vide **Zhang v R** [2019] NZCA 507 by the Court of Appeal of New Zealand as referred to in **Jone Seru v The State** AAU 115 of 2017 (25 May 2023)].

[20] In my view the appellant's offending under section 311 of the Crimes Act, 2009 (*i.e.* offender without a weapon but with another) may be considered to be low in terms of level of harm and therefore his sentence may start with 03 years of imprisonment with the sentencing range being 01 to 05 years. Even if ***Tawake*** guidelines are applied to the appellant's case it may not result in a more favourable outcome as far as his sentence (04 years) is concerned, for *inter alia* the trial judge had rightfully declared the appellant as a habitual offender under section 12 of the Sentencing and Penalties

Act which permits the court to determine the length of the sentence by having regard to the protection of the community as the principal purpose for which the sentence is imposed and in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence. In any event, even after applying section 12 the Sentencing and Penalties Act, the sentence remains within the permissible range [see **Sharma v State** [2015] FJCA 178; AAU 48 of 2011 (03 December 2015)] set out in ***Tawake***.

[21] Therefore, I am not inclined to grant leave to appeal against conviction or sentence.

Law on bail pending appeal

[22] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[23] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[24] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[25] The appellant does not have any prospect of success on his conviction and sentence appeal, leave aside a very high likelihood of success and therefore, section 17(3) (b) and (c) need not be considered in favour of the appellant. No exceptional circumstances have been shown either. Overall, the appellant's application for bail has no merits.

[26] Therefore, I am not inclined to allow the appellant's application for bail pending appeal.

Orders of the Court:

1. Leave to appeal against conviction and sentence refused.
2. Bail pending appeal application is dismissed.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent