

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

CRIMINAL APPEAL NO. AAU 97 of 2023
[In the High Court at Lautoka Case No. HAM 179 of 2022]
[In the Magistrates Court at Nadi Criminal case No.419 of 2013]

BETWEEN : **MAIKELI BALEINAGAGA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. J. Nasa for the Respondent**

Date of Hearing : **18 June 2024**

Date of Ruling : **19 June 2024**

RULING

Prematilaka, RJA

[1] Following a trial in absentia at Nadi Magistrates court the appellant had been convicted of robbery. The charge was as follows:

'Statement of Offence

ROBBERY: *Contrary to Section 310 (1) (a) (i) of the Crimes Act No. 2009.*

Particulars of Offence

MAIKELI BAAINAGAGA on the 20th day of April 2013 at Nadi in the Western Division robbed RITESH KUMAR of \$20.00 cash and a vehicle registration FP 232 valued at \$33,000.00, to the total value of \$33, 020.00, the property of RITESH KUMAR.'

[2] The learned Magistrate on 02 September 2019 had sentenced him to 08 years and 07 months of imprisonment with a non-parole period of 08 years.

[3] Following his arrest, the appellant had appealed to the High Court against conviction and sentence, 02 years out of time in HAA 01 of 2022. On 19 September 2022, his counsel from the Legal Aid Commission had sought the leave of court to withdraw the appeal. The application to withdraw the appeal had been granted and the appeal had been accordingly dismissed. Two days later on 21 September 2022, the appellant had made an application in person by way of a Notice of Reinstatement of Appeal and on 31 January 2023, he had filed an affidavit in support of the application for reinstating the appeal. The High Court on 11 October 2023¹ had dismissed his application for reinstatement of the appeal.

[4] The appellant's second-tier appeal before this court under section 22 of the Court of Appeal is against the decision of the High Court to dismiss his application for reinstatement of his original appeal. However, the appellant had also strongly argued in his grounds of appeal and written submissions that the sentence imposed on him by the Magistrate was harsh and excessive, for the robbery he was charged with was in the form of a street mugging and therefore *Tawake* guidelines should be applied and his sentence should be more lenient.

Scope under section 22 of the Court of Appeal Act

[5] The appellant's appeal to this court is against the High Court judgment delivered on 18 January 2022 in terms of section 22 of the Court of Appeal Act as a second tier appeal. In a second tier appeal, a conviction could be canvassed on a ground of appeal involving a question of law only [also see **Tabekusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. A sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].

[6] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is

¹ **Baleinagaga v State** [2023] FJHC 759; HAM179.2022 (11 October 2023)

vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005)).

- [7] What is important is not the label but the substance of the appeal point. This exercise is undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].
- [8] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)].
- [9] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and this court must give effect to that legislative intention.

[10] The appellant has urged the following grounds of appeal:

'Grounds of Appeal'

THAT the Learned Magistrate exercising the extended jurisdiction of the High Court erred in law and in fact when he did not undertake a proper analysis of evidence before the Court convicted the appellant giving rise to a grave miscarriage of justice.

Additional Grounds

- a. That in light with the decision and findings made by the ***Supreme Court of Fiji*** in the case of ***Eparama Tawake v State CAV 0025 of 2019*** the imposition of ***8year 7 month sentence for 'Street Mugging'*** Offence allegedly committed by the appellant is too harsh and excessive – hence the Learned Magistrate fell into error by failing to consider that the alleged offence committed by the appellant was one of Street Mugging justifying the (then) sentencing guideline set in the case of ***Raqauqau v The State [2008] FJCA 34 – 18 months to 5years*** imprisonment followed and applied by Justice Daniel Goundar in ***State v Vavunicoko [2018] FJHC 885*** and the Court of Appeal followed and applied it again in ***State v Koi [2018] FJCA 127***.
- b. That the Learned Sentencing Magistrate erred in law by choosing the ***8year starting point for Street Mugging Robbery'***, instead of a starting point from somewhere in between 18months to 5years.
- c. That the Learned Sentencing Magistrate erred in law and in principle when he at para 9 ***double counted the sentence by enhancing 12months for aggravating factors*** which aggravating factors were all part of the offence allegedly committed.
- d. That the Learned Sentencing Magistrate erred in law by failing to adopt and apply the ***correct tariff*** identified in ***Raqauqau*** (*supra*) for Street Mugging whilst sentencing the appellant.

[11] Although, the appellant had challenged his conviction as demonstrated in the first ground of appeal, he sought to abandon his appeal against conviction by filing a Form 3 on 15 March 2024. At the hearing, this court in terms of ***Masirewa*** guidelines (***Masirewa v State [2010] FJS 5 AV0014 of 2008S (17 August 2010)***) considered his application and allowed him to abandon his appeal against conviction.

[12] As far as his current appeal against the dismissal of his application for reinstatement of his original appeal is concerned, I see no question of law involved at all. The High Court judge had given adequate reasons for the dismissal. Therefore, technically his

present appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

[13] However, I am surprised that the respondent being an entity performing a quasi-judicial function, had not urged the High Court to still consider the propriety of the sentence imposed on the appellant in the light of *Tawake* guidelines formulated by the Supreme Court in **Tawake v State** [2022] FJSC; CAV 0025 OF 219 (28 April 2022), for *prime facie* his sentence is excessive and harsh in view of new sentencing guidelines. It also appears to me that the LAC had not advised the appellant correctly when it persuaded him to withdraw not only the conviction appeal but also the sentence appeal because even as the withdrawal of the entire appeal took place, the Supreme Court had already delivered *Tawake* sentencing guidelines on street mugging.

[14] The following facts have been revealed in the judgment of the Magistrate on 30 August 2019 where he convicted the appellant for robbery:

[5] *In analyzing the evidence in totality, the Prosecution witnesses respective testimony was coherent and corroborated each other well. They were having lunch in vehicle registration number FP 232 at Wailoaloa Beach, Nadi on the said day. At the time they were in a boyfriend and girlfriend relationship. It was around 12.30pm and the vehicle is owned by the complainant. Whilst having lunch, a Fijian man approached them and called on them to get off the van. The complainant was punched twice on his face by the Fijian man before the vehicle keys were taken and vehicle driven away. In describing how the offending was executed, PW1 said that they were inside the van and facing the front. They were both in the front seat. The Fijian man had approached them from behind and told PW2 to get off. The Fijian man then punched PW2, checked his pocket and took \$20.00. PW1 was then told to get off and the said Fijian man drove the van away. PW1 says that PW2 was scared and just gave into what the Fijian man wanted. PW1 later says that she could not shout for help for she was scared and didn't know what to do. They asked about the said Fijian man from some other Fijian man who were drinking nearby but they responded that they do not know him. PW1 and 2 then reported the incident to police. They were later told that the said Fijian man had driven the vehicle to Mulomulo and tumbled it.*

[15] Thus, it appears that while the appellant's offending is not one of run-of-the-mill street mugging cases, it has the hallmarks of an aggravated robbery in the form of

street mugging with more than usual aggravating features. Nevertheless, the harm caused to Ritesh Kumar and his girl-friend in the vehicle seems at worst medium in terms of *Tawake* sentencing guidelines where the maximum sentence would be 05 years' imprisonment.

[16] A judgment issuing sentencing guidelines applies to all sentencing that takes place after the date of the guideline judgment regardless of when the offending took place subject to (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 [see *Seru v State* [2023] FJCA 67; AAU115.2017 (25 May 2023); *State v Chand* [2023] FJCA 252; AAU75.2019 (29 November 2023); *Ratu v State* [2024] FJSC 10; CAV24.2022 (25 April 2024) & *Vuniwai v State* [2024] FJCA 100; AAU176.2019 (30 May 2024)] .


[17] Therefore, it appears that the legal basis for *Tawake* sentencing guidelines to be applied to the appellant's sentence appeal is satisfied in that he had filed the appeal in the High Court prior to *Tawake* guidelines were delivered and, the application of which would result in a more favourable outcome to the appellant.

[18] Thus, I am inclined to allow the appeal to proceed to the Full Court but only on the question of sentence.

Order of the Court:

1. Appeal (bearing No. AAU 97 of 2023) is allowed to proceed to the Full Court on the question of law whether the sentence is harsh and excessive in the light of *Tawake* sentencing guidelines.




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

Solicitors:

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