

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

**CRIMINAL APPEAL NO. AAU 049 of 2023**  
**[In the High Court at Lautoka Case No. HAC 44 of 2019]**

**BETWEEN** : **SUNIT VENKAT RAM**

**AND** : **THE STATE** *Appellant*  
*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Ms. L. Manulevu for the Appellant**  
: **Ms. S. Shameem for the Respondent**

**Date of Hearing** : **14 August 2024**

**Date of Ruling** : **15 August 2024**

## **RULING**

[1] The appellant, SUNIT VENKAT RAM had been charged with 03 others and found guilty in the High Court at Lautoka on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009. The charge is as follows:

### **'Statement of Offence**

**AGGRAVATED ROBBERY:** *Contrary to section 311 (1) (a) of the Crimes Act 2009.*

### **Particulars of Offence**

*Sunit Venkat Ram, Anusheel Ansal Chand, Devneel Dhiraj Ram and Akshay Nawal Raju on the 20<sup>th</sup> day of February, 2019 at Nadi in the Western Division, in the company of each other robbed Ratan Devi Chand of \$10,874.50 cash, \$5,000.00 of cash cheque and \$64,185.95 of dated cheques, all to the total value of \$80,060.45, the property of Yees Cold Storage.'*

- [2] On 25 October 2021 before the *voir dire* hearing could begin the appellant through his counsel had informed the court that he wished to change his plea from not guilty to guilty. When the information was put to him, he pleaded guilty to the above count in the presence of his counsel. Thereafter, he had admitted the summary of facts. The appellant was then found guilty as charged by a High Court Judge who sentenced him on 16 November 2021 to a period of 06 years', 07 months' and 15 days' imprisonment with a non-parole period of 05 years.
- [3] The appellant's appeal on sentence is untimely. 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).
- [4] The delay in the sentence appeal is 01 year, 06 months and 21 days which is very substantial, and his explanation blaming his trial counsel for the delay by the appellant is unacceptable in view of the length of the delay. However, I would still 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.
- [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].

[6] The summarised facts admitted by the appellant are as follows:

*‘On 20th February, 2019, the complainant Ratan Devi Chand left her office at about 2.30 pm for banking at ANZ Bank, Namaka. She was brought to the bank in the company vehicle driven by Rajendra Lal.*

*The banking was for Yees Cold Storage, where the complainant was working. She was dropped outside ANZ Bank, Namaka and as she was making her way into the bank the accused Sunit Venkat Ram came and grabbed the money bag from her hand and ran to a waiting getaway car. This bag contained cash of \$10,874.50, cash cheque of \$5,000.00 and dated cheques of \$64,185.95 all to the total value of \$80,060.45.*

*The complainant saw the accused run to the bus bay and get into the waiting getaway grey hybrid car. The bank security officer and another person tried to catch the accused by giving a chase but were not successful. Before the incident, the accused was seen standing near ANZ Bank, Namaka, and had been in communication with the other co-accused persons via call conferencing.*

*The matter was reported at the Namaka Police Station, upon investigation the CCTV footage clearly showed the accused crossing and running with the money bag towards the bus bay where he boarded the waiting car.*

*The accused was arrested and caution interviewed by DC 5103 Josaia wherein he admitted committing the offence of aggravated robbery with others. He informed the police officer that he and others had planned the robbery which was executed by him. During the scene reconstruction the accused had shown the place where he had thrown the stolen cheques which were recovered by the police.*

*Furthermore, the accused in his charge statement also admitted that he had robbed the complainant in front of the ANZ Bank, Namaka on the day in question.*

[7] The ground of appeal against sentence is as follows:

**Ground 1**

*THAT the sentence of 6 years, 7 months and 5 days imprisonment with a non-parole period of 5 years is harsh and excessive.*

**Ground 1**

[8] The gist of the ground of appeal is that the trial judge had failed to explain the basis of taking 06 years as the starting point, for he had specifically said that tariff set out in

**Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) could be applied as the incident was not similar to a night home invasion and the tariff for street mugging was 18 months to 05 years - **Raqaugau 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).

- [9] The trial judge was right in not applying ***Wise*** tariff but the problem is that he had not explained as to why he was not inclined to follow the then tariff of 18 months to 05 years for street mugging though he cannot be faulted for not strictly following that tariff due to the nature and objective seriousness of the offending. Although, the trial judge had not fallen into error in exercising his sentencing discretion by not using the tariff of 08-16 years of imprisonment based on ***Wise*** sentencing guidelines, he had still started the sentencing process at 06 years with no proper justification. The trial judge had correctly remarked that sentencing 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. The State had conceded that given the factual background, the appellant's offending was a lesser form of aggravated robbery loosely known as street mugging. However, in my view this is not the common and usual form of street mugging where the victim is not pre-determined and the robbery is not pre-planned. In this case the victim was already selected at the pre-planning stage and thus at the least it is a more aggravated and sophisticated form of street mugging.
- [10] At the time of sentencing the appellant, the tariff for '*street mugging*' was 18 months to 05 years which was the tariff that should have formed the basis for the sentencing judge and he was mindful of that tariff as well. As stated in ***Qalivere***, when the learned High Court judge adopted the wrong sentencing range that error had adversely affected 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 the disproportionately severe sentence.
- [11] The Supreme Court in the recent decision 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.

[12] Accordingly, the Supreme Court 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.

[13] 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.

[14] 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 caused to the complainant and therefore his sentence may start with 03 years of imprisonment with the sentencing range being 01-05 years on the assumption that this is an ordinary street mugging. *Tawake* It did not lay down any universal rule for application in all kinds of aggravated robbery but only for what is colloquially called “street mugging”. As the Supreme Court admitted in *Tawake* the offence of robbery can take many forms; They can range from someone coming up to you in the street and intimidating you into handing over your mobile phone and at the other end of the spectrum, you can have a gang of men armed with knives and baseball bats breaking into your home while you are asleep, tying you up and ransacking your home. The law recognizes that robbery is an offence with very different levels of

gravity, and it distinguishes between robbery and what it calls aggravated robbery. A person commits the offence of aggravated robbery either when they commit the robbery with someone else or when they commit the robbery and have an offensive weapon with them at the time.

- [15] Had the trial judge selected the starting point of 03 years instead of 06 years as he had done, the ultimate sentence would have been less than what the judge eventually imposed on the appellant. With the 03 years' increase for aggravating factors and 02 years discount for good character and mitigating factors factored into calculation by the trial judge, the head sentence would have been 04 years. With deduction of 03 months' for the guilty plea and 01 month and 15 days for pre-trial remand, the effective sentence would have been 03 years, 07 months and 15 days. This does not mean that the Court of Appeal should necessarily follow the same methodology and arrive at a sentence of 03 years, 07 months and 15 days.
- [16] 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)]. 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)]. It is for the full court to decide the proper sentence on the appellant given that this is an aggravated and sophisticated form of street mugging; whether they should go above 05 years and or still limit it within 05 years and impose an appropriate sentence.
- [17] A guideline judgement 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 guideline judgment is delivered*; and (b) the application of the guideline 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 applied in 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).

[18] Therefore, *Tawake* guidelines should be applied to the appellant's case as the application of *Tawake* may result in a more favourable outcome as far as his sentence is concerned. However, the appellant had appealed against his sentence only on 05 June 2023, well after *Tawake* guidelines on 28 April 2022. Therefore, on the basis of the principle adopted in Seru v State [2023] FJCA 67; AAU115.2017 (25 May 2023) & State v Chand [2023] FJCA 252; AAU75.2019 (29 November 2023) & Vunivesi v State [2024] FJCA 22; AAU0010.2018 (28 February 2024), *Tawake* guidelines cannot be applied to the appellant.

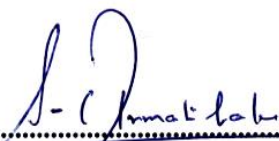
[19] Therefore, his sentence should be tested against the tariff for 'street mugging' of 18 months to 05 years. *Raqauqau* itself permits a sentence above 05 years for street mugging in an appropriate case. Still the trial judge's taking 06 years as the starting point appears to be an error in law and 07 years and 06 months imprisonment is well above the tariff then prevalent and no specific reasons have been given to justify that.

[20] Enlargement of time to appeal should be granted on the premise that the trial judge's error in applying the proper tariff had resulted in a seemingly harsh and excessive sentence on the appellant.

**Order of the Court:**

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



  
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**Hon. Mr. Justice C. Prematilaka**  
**RÉSIDENT JUSTICE OF APPEAL**

**Solicitors:**

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