

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

CRIMINAL APPEAL NO. AAU 035 of 2023

BETWEEN : **FILIKESA ROKODINADINA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
: **Ms. Semisi, K for the Respondent**

Date of Hearing : **3 September 2024**

Date of Ruling : **29 October 2024**

RULING

1. The appellant [Filikesa Rokodinadina] was charge with three counts of Aggravated Robbery, contrary to section 311 (10(b) of the Crimes Act 2009. After a trial in the High Court at Suva, he was found guilty of all the three charges and was accordingly convicted on 12 February 2023. He was sentenced to an aggregate sentence of seven years and six months imprisonment with a non-parole period of five years six months on 24 February 2024.
2. The appellant filed a Notice of Motion for Leave to Appeal dated 22 March 2023. The Notice of Appeal is against both conviction and sentence. This appeal is timely.

Grounds of Appeal

3. The appellant file his grounds of appeal against conviction and sentence as follows:

Against Conviction

- i) Trial of the Appellant in absentia, an error of law
- ii) Defective Charge and error of law and fact
- iii) Fabricated and manipulated evidence, error of law and fact

Against Sentence

- iv) The sentence is harsh for a first offender

Relevant Law & Legal Principles

4. Under section 21(1)(a) of the Court of Appeal Act the appellant may appeal to the full court on any grounds involving questions of law only. For grounds of appeal involving question of law and facts, the appellant need leaves of the court to appeal to the full court for those, under section 21(1)(b) of the Court of Appeal Act.

5. For section 21(b), the test for allowing leave is if the grounds submitted have reasonable prospect of success on appeal: **Caucu v State [2018] FJCA 171 and Saudrugu v State [2019] FJCA 87.**

Assessment of Grounds of Appeal

6. The first ground of appeal against conviction alleged by the appellant is that his trial in absentia by the trial judge was an error of law.

7. I merely point out the following, in noting that leave is not require for this ground of appeal.

- i) The right of the accused person under section 14(2) (h) of the Constitution is a positive right requiring his physical presence in court. Mere inconvenience of the court process may not be easily used to remove the need to have an accused person at his trial. The one exception

is if he consents for the trial to proceed without him. There was no evidence before the court that the appellant had chosen not to attend;

- ii) The circumstances narrated by the trial judge in paragraphs 3 to 5 of the judgement, highlights the inconvenience of the court, without addressing difficulties of the accused persons in the circumstances of the appellant found himself in.
8. In granting leave on this ground to go forward, the full court will be able to fully explore the legal principles that should govern trial in absentia in Fiji.
 9. The second ground of appeal against conviction, alleges that the charge is defective in that he the claim of the appellant based on his claim that at the time of the robbery he as alone and not armed as claim in the particulars of the offense.
 10. The evidence of PW1 Ms. Mishra and PW2 PC Tamani confirms both that the appellant had a knife in his hand at the time of the robbery and when he ran out PC Tamani was the first police officer that tackled him and the appellant had a knife in his hand.
 11. This ground of appeal has no merit. Leave to appeal refused.
 12. The third ground against conviction claims fabrication and manipulation of evidence. This ground of appeal was not detailed in the appellant's written submission filed in court. This ground is frivolous and have no merit.

Sentence – Ground of Appeal

13. The appellant only ground is that the sentence of 8 years is harsh for a first offender. Applying the test in *Kim Nam Bae v State* [1999] FJCA 29, the sentence applied the incorrect sentence guideline, which resulted in a harsh sentence. The sentence was 7 years 6 months with a non-parole of 5 years and 6 months.

14. The trial judge relied on **Wallace Wise v State [2012] FJSC 7; CAV 004 of 2015)** and not **State v Tawake [2022] FJSC 22** which provided the latest guideline judgement for aggravated robbery cases.

“[26] Once the court has identified the level of harm suffered by the victim, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they pleaded guilty or not guilty and irrespective of previous convictions:

	<i>ROBBERY (OFFENDER ALONE AND WITHOUT A WEAPON)</i>	<i>AGGRAVATED ROBBERY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)</i>	<i>AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)</i>
<i>HIGH</i>	<i>Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment</i>	<i>Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment</i>	<i>Starting point: 9 years imprisonment Sentencing range: 6-12 years imprisonment</i>
<i>MEDIUM</i>	<i>Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment</i>	<i>Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment</i>	<i>Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment</i>
<i>LOW</i>	<i>Starting point: 18 months imprisonment Sentencing range: 6 months-3 years imprisonment</i>	<i>Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment</i>	<i>Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment</i>

[27] Having identified the initial starting point for sentence, the court 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.”

15. From the above schedule the starting point of the sentence based on the facts of this case should be in medium range of the Aggravated Robbery with a Weapon, a starting point of 5 years and not 8 years which the trial judge picked using the **Wise**. For the aggravating factors identified by the trial judge, the 3 years is added and deduct 3 years for the mitigating factor, thus resulting in a 5 years imprisonment as aggregate sentence.
16. In setting out the above, it is to show that the trial judge’s use of the **Wise** (supra) guideline was incorrect, when the **Tawake** (supra) guideline should have been followed, thus causing a harsh sentence in this case. Leave to appeal against sentence is granted.

ORDERS:

1. No leave is required for ground 1 because it involves a question of law only.
2. Leave to appeal is refused against ground 2 and 3.
3. Leave to appeal against sentence is granted.



Hon Justice Isikeli Maitoga
Acting President

