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

CRIMINAL APPEAL NO. AAU 073 of 2020
[In the High Court at Suva Case No. HAC 267 of 2018]

BETWEEN	**:**	**PONIPATE BOKADI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Clark, JA** **Winter, JA**
Counsel	**:**	**Ms. S. Daunivesi for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**08 November 2024**
Date of Judgment	**:**	**28 November 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant was 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 committed by stealing cash amounting to $600.00, being the property of Ifereimi Vasu and immediately before stealing, used force on Ifereimi Vasu on 23 June 2018 at Nasinu in the Central Division.

[2] Upon the appellant's plea of guilty to the charge and his having admitted the summary of facts, the learned High Court Judge had convicted the appellant and sentenced him on 22 August 2018 to 10 years of imprisonment with a non-parole period of 08 years

(effectively 09 years and 10 months with a non-parole period of 07 years and 10 months after the remand period of 02 months was deducted)[1].

[3] On 01 November 2021, a single judge of this court allowed extension of time to appeal against sentence[2]. The appellant was subsequently released on bail pending appeal on 15 July 2022[3].

[4] The sole ground of appeal on which enlargement of time to appeal was allowed is as follows.

> ***'Ground 1 (sentence)***
>
> *That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principles resulting in a harsh sentence*

Relevant law

[5] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows.

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'*

[6] ***Bae*** was adopted by the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499.

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[1] **State v Bokadi** - Sentence [2018] FJHC 770; HAC267.2018 (22 August 2018)
[2] **Bokadi v State** [2021] FJCA 191; AAU073.2020 (1 November 2021)
[3] **Bokadi v State** [2022] FJCA 78; AAU073.2020 (15 July 2022)

Summary of facts

[7] The appellant's written submissions helpfully sets out the summary of facts admitted by the appellant on 14 August 2018 as follows.

> *'On the 23rd of June, 2018, at around 5:45 am, while the complainant was returning home from his morning walk, he was assaulted and robbed by the Accused person in the company of others.*
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> *Whilst the complainant was walking on the footpath along Velau Drive, Kinoya, he heard 3 iTaukei Fijian youths running behind him. As the complainant turned to see who they were, he was attacked by the Accused person and others.*
>
> *The Accused person with others punched the complainant and the complainant retaliated. The complainant slipped, causing him to fall down. As the complainant fell, he also pulled down one of the iTaukei youths with him. The Accused with others then fled the scene. The Complainant checked his pockets and realized that his wallet containing $600 cash was stolen. The injuries received by the complainant comprised of bruising around his right eye with 1cm laceration below the right lower eyelid and lacerations behind his left ankle on the lateral surface which was actively bleeding.*
>
> *The complainant reported the matter to Valelevu Police Station. He positively identify the Accused involved in the offence which led to the arrest of the Accused person. The Accused person was interviewed under caution on 24th June 2018 and subsequently charged for Aggravated Robbery contrary to Section 311 (1)(a) of the Crimes Act 2009. The Accused admitted to the offence in his caution interview. The Accused also has multiple previous convictions.'*
> *(emphasis added)*

[8] Enlargement of time to appeal was granted on the premise that the trial judge had fallen into error in exercising his sentencing discretion by using the wrong tariff of 08-16 years of imprisonment based on ***Wise*** sentencing guidelines [**Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015)] resulting in a harsh and excessive sentence on the appellant. 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 whereas the appellant's offending was a lesser form of aggravated robbery commonly known as street mugging. From the summary of facts it is difficult to see how the factual background of this case fits into the factual scenario the Supreme Court encountered in ***Wise*****.** This is clearly a case of street mugging and not a home invasion in the night.

[9] At the time of sentencing the appellant, the tariff for '*street mugging'* was 18 months to 05 years[4] which was the tariff that should have been adopted by the sentencing judge. As stated in ***Qalivere***, when the learned High Court judge adopted the wrong sentencing range that error could adversely affect 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 disproportionally severe sentence.

[10] The Supreme Court in the subsequent 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.

[11] Accordingly, in ***Tawake*** 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.

[12] 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.

[4] **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)

[13] The trial judge had set out aggravating and mitigating circumstances as follows.

> *5. This is a case of robbing of an individual, using violence force, while he was walking along a public road. Crimes of this nature are prevalent, and have created insecurity and vulnerability in the society. Aggravated robbery is the worst and serious form of property crime in this jurisdiction, which carries a maximum penalty of twenty years imprisonment. Therefore, I find this is a serious offence.*
>
> *6. In view of the seriousness of this offence, it is my opinion that such offenders must be dealt with severe and harsh punishment. Therefore, the purpose of this sentence is founded on the principle of deterrence and protection of community.*
>
> *7. You have approached the complainant from behind and assaulted him with your other accomplices. Accordingly, it appears that you and your accomplices assaulted him when he was not in a position to properly protect and defend himself. The complainant is a 58 years old, elderly retired person. The complainant had sustained injuries to his eye and the ankle. You have found the complainant was walking back home after his morning walk in the early morning, and then executed this crime. You have stolen substantive amount of money from the complainant. In view of these facts, I find the level of harm and the levels of culpability in this crime are substantially high.*
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> *8. You have pleaded guilty at the first available opportunity. Moreover, you have admitted that you committed this crime in your caution interview and maintained that position until you pleaded guilty, which demonstrates your remorse and repent in committing this crime. Therefore, you are entitled for a substantial discount for your early plea of guilty and remorse*

[14] The trial judge had also said that he considered the appellant's family circumstances *i.e.* he was 27 years old married person with one child at the time of committing the offending. However, the trial judge had not set out any starting point or assigned any values to aggravating and mitigating circumstances but declared the head sentence to be 10 years by adopting instinctive synthesis method and tariff in ***Wise***. The judge had also recorded that the appellant had eight (8) previous convictions seven (7) of which were related to property crimes but he had not declared him as a habitual offender.

[15] While there may not be any serious disagreement over those sentiments expressed by the trial judge on aggravation and mitigation, where he erred in sentencing was the adoption of the wrong tariff of 08-16 years which resulted in the current sentence whereas he should have sentenced the appellant according to the then existing tariff of

18 months to 05 years for street mugging. If the judge so desired, he certainly had the option of imposing a sentience outside the tariff to be over 05 years by giving good reasons and justifying it (see para [128] in **Vuniwai v State** [2024] FJCA 100; AAU 176 of 2019 (30 May 2024) and **State v Chand** [2023] FJCA 252; AAU 75 of 2019 (29 November 2023).

[16] However, since there is a guideline judgment now before us for street mugging in ***Tawake*** this court cannot simply apply the then existing tariff of 18 months to 05 years ignoring ***Tawake*** in determining this appeal. The applicable principle is that a guideline judgment applies to all sentencing that takes place after the date of the guideline judgment 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 favorable outcome to the appellant[5].

[17] In my view, in terms of ***Tawake*** the appellant's offending under section 311 of the Crimes Act, 2009 (*i.e.* offender without a weapon but with another) should be considered to be medium in terms of level of harm caused to the complainant and therefore his sentence may start with 05 years of imprisonment with the sentencing range being 03-07 years. Therefore, the application of ***Tawake*** guidelines to the appellant by this court is possible and indeed necessary as it would result in a more favorable outcome to the appellant and he had appealed against sentence prior to ***Tawake***.

[18] Therefore, with a starting point of 05 years and a given range for the head sentence being 03-07 years, according to ***Tawake***, after considering aggravating and mitigating factors, appropriate discounts should then be given for guilty plea and pre-trial remand. The appellant had admitted his involvement in the first instance itself which he had maintained till his guilty plea. He, therefore, deserves a substantial reduction

[5] **Zhang v R** [2019] NZCA 507 adopted in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023), **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023) and **Ratu v State** [2024] FJSC 10; CAV 24 of 2022 (25 April 2024)

for the early guilty plea. The trial judge had accorded 02 months' discount for the appellant's pre-trial remand.

[19] The appellant had already served for 04 years and 21 days by the time he secured bail pending appeal. When his offending is considered under the medium harm category as per ***Tawake*** guidelines, also considering factors on aggravation and mitigation, and appropriate discount for early guilty plea and period of remand prior to trial, the appellant may not warrant a sentence longer than the total period he had already spent in incarceration. The appellant's conduct during the post-bail period appears to be free of blemish as stated by the appellant in his affidavit dated 12 November 2024 and confirmed by Turaga Ni Koro of Vunaniu Village Serua in his letter of the same date. The appellant is supposed to be supporting his wife and son by being engaged in farming and is an active member of the village social life. Therefore, this court considers the total period of incarceration of 04 years and 21 days as a fitting sentence for the appellant's offending.

Clark, JA

[20] I agree with the judgment of his Lordship Prematilaka, RJA and the orders.

Winter, JA

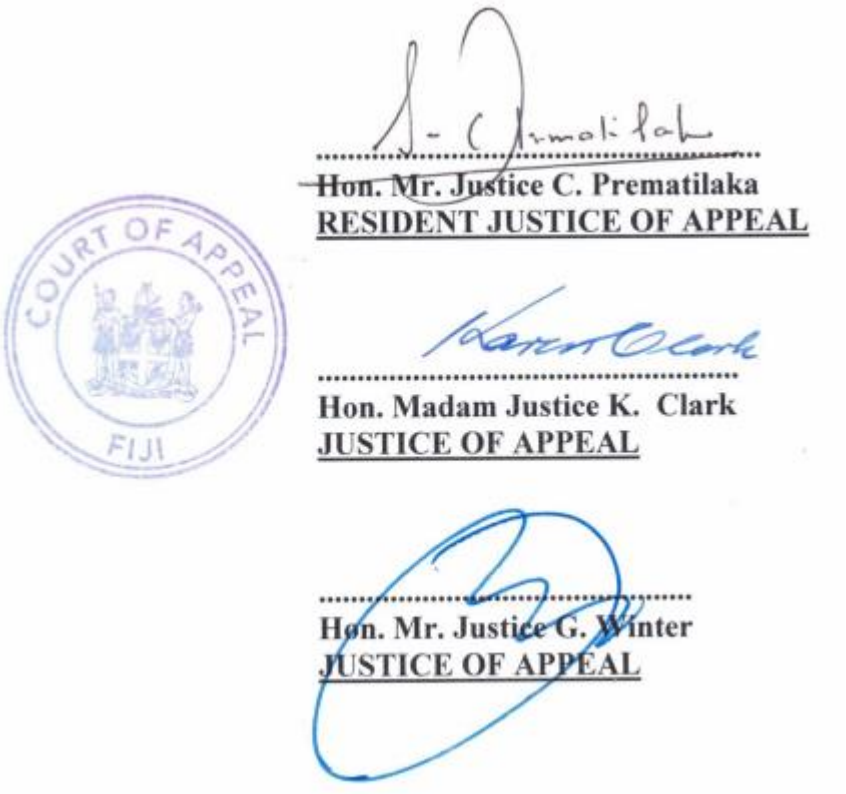
[21] I completely agree with the judgment of Prematilaka, RJA.

Orders of the court are:

1. Appeal against sentence is allowed.

2. Appellant's sentence of 10 years imprisonment with a non-parole period of 08 years (actual sentencing period is nine (9) years and ten (10) months of imprisonment with seven (7) years and ten (10) months of non-parole period) imposed on 22 August 2018 is set aside.

3. Appellant is released forthwith.



Solicitors:

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