

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 107 OF 2023
High Court No. HAA 43 of 2023

BETWEEN : **SEMI RALULU**
SAVENACA CAVA
RATU INOKE NAURABOTA

Appellants

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in persons**
Mr S. Seruvatu [ODPP] for Respondent

Date of Hearing : **11 March, 2024**

Date of Ruling : **21 March, 2024**

RULING

1. The three appellants agreed that Ratu Inoke Naurabota will make submissions for them at this hearing.

2. The appellants are appealing against sentence only. This is a second-tier appeal from the Magistrate Court.
3. All the appellants were charged in the Magistrate's Court at Lautoka for one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act, 2009, one count of theft contrary to section 291 (1) (a) of the Crimes Act, 2009 and wrongful confinement contrary to section 286 of the Crimes Act and appellant three was charged with an additional count of dangerous driving contrary to section 98 (1) and 144 of the Land Transport Act 1998 committed on 20th September, 2015.
4. The summary of facts admitted by all the appellants are as follows:

“On the 20th of September 2015, accused 1 Victor Joseph Low, accused 3 – Semi Ralulu and Accused 4 – Savenaca Cava boarded PW1’s vehicle from Yasawa Street and asked him to take them to the corner shop. Upon arriving at the corner shop Accused 2 – Ratu Inoke Naurabota also got into the car. They had been drinking beer at Hunters Inn Nite Club prior to this. Accused 2 bought beer and then they told PW1 to take them to Adam Street; upon reaching Adam Police Post, he was told to toot the horn. After that he was told to turn back towards Tavakubu Road.

As they reached the junction of Tavakubu Road and Golf Course Road, PW1 was told to stop and at that time the one sitting on the back held him by the neck whilst others assaulted him. He was then gagged and tied and kept in between the seats, facing the floor of the car. Whilst he lay on there, he was burnt with cigarettes on his right hand and back.

The four accused persons then drove to Namaka to After Dark Nite Club. Whilst in Namaka, they met Atelaite Waqanivere (PW2), defacto partner of accused 2, Vilimaina Tuivucirua (PW3) and Milika Masei (PW4) who also got into the car. PW2 knew accused 1, 3 and 4 through accused 2 as he had introduced them to her as his friends. Inside the car Accused 2, Ratu Inoke was driving. Accused 4 Savenaca Cava sat in the front passenger seat whilst Accused 3, Semi Ralulu sat in the boot of the car where PW1 was also kept at this time still gagged and tied. Along the way, PW2 and Accused 2 started arguing when the vehicle veered of the road and landed in Sabeto River. PW2 got injured from the accident and was seen by a doctor later who noted a 2cm x 3cm laceration on the left elbow.”
5. All the appellants pleaded guilty to the charges in the Magistrate's Court and admitted the summary of facts read to them. The learned Magistrate upon being satisfied that the appellants had entered an unequivocal plea on their freewill and the summary of facts read also satisfied all the elements of the offences charged convicted all of them. After

considering mitigation on 6th June, 2017 all the appellants were sentenced to 7 years and 10 months imprisonment with a non-parole period of 6 years.

6. The appellants being aggrieved by the sentence rely on the following ground of appeal against sentence. The High Court judge reviewed the sentencing approach in the Magistrate Court and after considering various caselaw concluded that the sentence was not harsh or excessive.

Ground of Appeal

7. The ground of appeal before the High Court and now before this court is the same:

“That the learned Magistrate erred in his sentencing discretion by his choice of the incorrect tariff for aggravated robbery resulting in harsh and excessive sentence.”

8. In support of their submission, the appellants raise the following at the Leave to Appeal hearing:

- (i) The car they robbed was not a taxi or another PSV but a private car. The High Court judge did mention that one of the factors taken as an aggravating factor was that they robbed a “service Vehicle’ when it was not.
- (ii) Failure to follow the sentencing guideline for Aggravated Robbery set out by the Supreme Court in **State v. Tawake** [2022] FJSC 22 (CAV No: 0025/2019) – i.e. applying the wrong principle in law to sentencing was fatal to the High Court’s approach to sentencing appeal before it.
- (iii) The appellant’s have raised a point of constitutional law, namely, that section 98(6) of the Fiji Constitution, which states **decision of the Supreme Court binds all courts in Fiji**, in this case the High Court Judge said “*In fairness to the appellants I do not wish to adopt the above sentencing range,*” in reference to the supreme court decision in **Tawake** (supra).

9. The principles when an appellate court may interfere with a sentence on appeal was outlined by the Court of Appeal in **Kim Nam Bae v State** [1999] FJCA 21. The errors are:

- (i) Allowed wrong principles – by not following Tawake Sentence Guideline there was an error of law

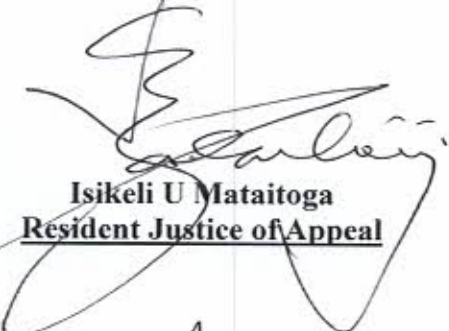
- (ii) –
- (iii) High Court Judge supported sentence on wrong facts – treating the robbery as being perpetrated on the driver of a public service vehicle [PSV], when it was not a PSV but a private vehicle.

10. On the principle enunciated in **Kim Nam Bae**, the sentence should have been reviewed to ensure no miscarriage of justice have been caused the sentence passed against the appellants.
11. At this point, it is evident that the failure of the High Court Judge in not following the guideline decision in Tawake is an error of law which needs to be considered by the full court.
12. The respondents relied on two Court of Appeal Judgements, namely, **Matairavula v State** [2023] FJCA 192 and **Suguturaga v State** [2023] FJCA 84 to argue that this was an appeal pursuant to section 22 of the Court of Appeal Act, being a second-tier appeal from the High Court decision. The first appeal was against the decision of the Magistrates Court. In that regard, the appeal can only be on matters of law. I agree.
13. The court noted that the respondents did not discuss the **Tawake** decision at all in their submission. I find this irregular because it appears that the respondent adopts a selective approach to decisions that support their arguments but avoiding those that do not or do not reconcile with what they would like to argue.
14. In light of the analysis above, there is reasonable prospect of success in this appeal against sentence by the appellants. I would allow leave to appeal against sentence.

ORDERS:

1. Leave to appeal against sentence allowed.




Isikeli U Maitaitoga
Resident Justice of Appeal