

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 81 OF 2023**

**IN THE MATTER** of an Application for Leave to Appeal out of Time.

**AND IN THE MATTER** of an Appeal from the decision of the Magistrate's Court of Ba (Extended Jurisdiction), in Criminal Case No. CF 51 of 2016.

**BETWEEN:** SEMI RALULU

**FIRST APPELLANT**

**AND:** SAVENACA CAVA

**SECOND APPELLANT**

**AND:** RATU INOKE NAUARABOTA

**THIRD APPELLANT**

**AND:** STATE

**RESPONDENT**

**Counsel:** Ms. Losana Taukei for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants  
3<sup>rd</sup> Appellant Appeared in Person  
Ms. Saini Naibe for the Respondent

**Date of Hearing:** 27 September 2024

**Date of Judgment:** 17 October 2024

## **JUDGMENT**

- [1] This is an Application made by the Applicants/Appellants (hereinafter referred to as the Appellants) by way of separate Notices of Motion, seeking Leave to Appeal Out of Time against the sentence delivered by the Resident Magistrate, Magistrate's Court of Ba, in Criminal Case No. 51 of 2016, on 10 January 2018.
- [2] The Notices of Motion are supported by Affidavits in Support filed by the three Appellants.
- [3] The Resident Magistrate, Magistrate's Court of Ba, had been invested with extended jurisdiction to hear this matter, in terms of Section 4 (2) of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act). Therefore, this application was originally filed in the Court of Appeal.
- [4] However, pursuant to the decision of the Court of Appeal in *State v. (Shahadatt) Khan* [2023] FJCA 235; AAU139.2017 (24 February 2023); the Court of Appeal has referred this matter to the High Court to be dealt with according to law.
- [5] It is revealed when perusing the Case Record of the Magistrate's Court of Ba that the three Appellants, together with one Victor Joseph Low, were charged (by way of an Amended Charge filed on 21 September 2016) before the Magistrate's Court of Ba, with the following offence:

### **AMENDED CHARGE**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**VICTOR JOSEPH LOW, SAVENACA CAVA, SEMI RALULU and RATU INOKE NAUARABOTA**, in the company of each other, on the 19<sup>th</sup> day of

September 2015, at Ba, in the Western Division, stole the following items from **ARUN PRASAD**, which were in his possession at the time:

- (i) Cash worth \$740;
- (ii) 1 x white Nokia mobile phone valued at approximately \$200; and
- (iii) 1 x vehicle (taxi) with Registration No. LT 616 valued at approximately \$15,000;

all to a total value of approximately \$15,940 and at the time of stealing the said items **ARUN PRASAD** was physically assaulted.

- [6] To avoid any confusion, it must be highlighted that in the proceedings before the Magistrate's Court of Ba, the 1<sup>st</sup> Appellant was named as the 3<sup>rd</sup> Accused; the 2<sup>nd</sup> Appellant was named as the 2<sup>nd</sup> Accused; and the 3<sup>rd</sup> Appellant was named as the 4<sup>th</sup> Accused respectively. [The 1<sup>st</sup> Accused Victor Joseph Low, has not preferred an appeal].
- [7] On 13 December 2017, the three Appellants, together with Victor Joseph Low, had pleaded guilty to the charge. On 20 December 2017, the three Appellants, together with Victor Joseph Low, had admitted to the Summary of Facts filed by the State. The Court being satisfied that the guilty pleas were unequivocal had found the three Appellants, together with Victor Joseph Low, guilty of the charge and convicted them.
- [8] The Summary of Facts admitted by the three Appellants, and the 1<sup>st</sup> Accused Victor Joseph Low (As found at pages 36 and 37 of the Magistrate's Court Record), are as follows:

*In 2015, Arun Prasad, aged 56 years the, Taxi Driver ("the victim") drove a taxi with Registration No. LT 616 ("the taxi") to earn his living. On 19<sup>th</sup> September 2015, around 8.45 p.m. in the night, the victim was parked at Ba Town Central car park when he was approached by Savenaca Cava, aged 23 years then, Unemployed ("the 2<sup>nd</sup> defendant") and Semi Ralulu, aged 25 years then, Farmer ("the 3<sup>rd</sup> defendant"). The 2<sup>nd</sup> and 3<sup>rd</sup> defendant hired the victim to drive them towards FSC Road, Ba. On the way Victor Joseph Low, aged 19 years then, Student ("the 1<sup>st</sup> defendant") and Ratu Inoke Nauarabota, aged 23 years then, Student ("4<sup>th</sup> defendant") boarded the taxi.*

*When they reached Veisaru flat, the victim was asked to stop the taxi. Then the four defendants, whilst acting in concert, forcefully pulled the victim out of the driver's seat and placed him on the back seat. The 4<sup>th</sup> defendant then drove the taxi with the victim seated amidst the 1<sup>st</sup> and 3<sup>rd</sup> defendant on the back seat.*

*The defendants then assaulted the victim by punching him and took his Bank of Baroda ATM card. They made the victim divulge the PIN and drove back to Ba Town. Using the PIN, the defendants withdrew \$600 from the victim's bank account via ATM, without the victim's consent. They then placed a cloth over the victim's head and confined him in the boot of the taxi.*

*After this the defendants drove to Vatukoula and picked up Atelaite Waqanivere, aged 20 years, Unemployed ("PW2"), who was the 4<sup>th</sup> defendant's girlfriend. PW2 saw the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants seated in the taxi when she was talking to the 4<sup>th</sup> defendant. She boarded the taxi and they all left for Lautoka.*

*On the way they stopped at a shop to fuel the taxi. At that time PW2 noticed the 2<sup>nd</sup> and 3<sup>rd</sup> defendant open the boot of the taxi and take out the victim, whose head was covered. After fuelling the taxi, the victim was again put inside the taxi boot and everyone left for Lautoka. PW2 was dropped off at Shirley Park in Lautoka and the defendants drove the taxi to FSC compound in Lautoka, where they abandoned the taxi with the victim still inside the taxi boot.*

*After spending sometime in nightclubs in Lautoka, the four defendants again met up with PW2 and they all boarded another car. As the 4<sup>th</sup> defendant was driving the car, an argument ensued between him and PW2. Consequently, the 4<sup>th</sup> defendant lost control and the car ended up in Sabeto River (This 2<sup>nd</sup> incident involving a different car was judicially dealt with in Lautoka Criminal Case No. 621/2015, which was disposed of prior to this matter).*

*The victim managed to free himself and reported the incident to the police. Police investigations led to the apprehension of the four defendants, who in their respective caution interviews admitted to being jointly part of the robbery. Copies of their respective caution interviews are annexed.*

*Apart from withdrawing \$600 from the victim's bank account, the defendants had also stolen his white colored Nokia brand mobile phone worth approximately \$200; and his wallet containing approximately \$140 cash (FJD). The taxi was recovered by police and was undamaged however, none of the other items were recovered.*

*The victim was medically examined on 19/09/15 by Dr. Apenisa Waqatabu (“PW3”) and injuries such as bruises on the forehead and swollen left eye and nose were found on the victim. A copy of the victim’s medical report is annexed.*

*All four defendants were jointly charged with one count of ‘Aggravated Robbery’. On 13/12/2017, whilst being represented by counsel from Legal Aid Commission and being explained of all legal consequences of their decisions, all four defendants voluntarily pleaded ‘guilty’ to the said charge.*

*As per the State’s records, subject to the Court’s records, at the time of the offending, the 1<sup>st</sup> defendant had no previous convictions, however, the 2<sup>nd</sup> defendant had one active previous conviction for ‘Theft’ in 2011; the 3<sup>rd</sup> defendant had one active previous conviction for ‘Robbery’ in 2012; and the 4<sup>th</sup> defendant had three active previous convictions for ‘Burglary’ and ‘Theft’ in 2012 and 2016. Copies of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants’ previous convictions are annexed.*

*Currently, all four defendants are serving prisoners in Lautoka Criminal Case No. 621/2015, where the offence was committed right after the offending in this matter.*

- [9] On 10 January 2018, the Learned Magistrate pronounced his sentence. Accordingly, each of the three Appellants were sentenced to 9 ½ years imprisonment, with a non-parole period of 8 ½ years.
- [10] Aggrieved by this order, the three Appellants have filed this Application seeking Leave to Appeal Out of Time.
- [11] This matter was taken up for hearing before me on 27 September 2024. Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants; the 3<sup>rd</sup> Appellant (in person) and the Learned State Counsel were heard. All parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

#### **THE AFFIDAVITS IN SUPPORT FILED BY THE APPELLANTS**

- [12] The Notice of Motions to Appeal out of Time, are supported by Affidavits in Support filed by the three Appellants.
- [13] Therein, the Appellants depose that they have filed this appeal against sentence three years out of time. However, they still desire to appeal the sentence. The reasons provided for filing this appeal late was due to the fact that it took time to

seek help in drafting the grounds of appeal and due to miscommunication between themselves and the administration at the Correction Centre. They have since engaged the services of the Legal Aid Commission who have filed Amended Grounds of Appeal against sentence.

**PROPOSED GROUNDS OF APPEAL AGAINST THE SENTENCE OF THE RESIDENT MAGISTRATE, MAGISTRATE'S COURT OF BA**

[14] As per the Amended Petition of Appeal (which was filed in Court on 4 June 2024) following are the Grounds of Appeal against sentence proposed by the Appellants:

**GROUNDS OF APPEAL AGAINST SENTENCE**

- (i) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by his choice of a harsh and excessive starting point being 10 years without any reasonable explanation for the same.
- (ii) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by acting upon a wrong principle in using the case authority of ***Wallace Wise v State, Criminal Appeal No. CAC0004/2015.***
- (iii) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by acting upon a wrong principle in double counting in considering the aggravating factor that the offence was committed on the victim of a public service provider when it in fact forms the elements of offending.

**THE LAW**

[15] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

**[16]** Section 248 (1) of the Criminal Procedure Act provides that *“Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant’s lawyer, and (filed) within 28 days of the date of the decision appealed against.”*

**[17]** However, Section 248 (2) of the Criminal Procedure Act sets out that *“The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”*

**[18]** Section 248 (3) of the Criminal Procedure Act stipulates:

*“For the purposes of this section and without prejudice to its generality, “good cause” shall be deemed to include —*

*(a) a case where the appellant’s lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*

*(b) any case in which a question of law of unusual difficulty is involved;*

*(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;*

*(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."*

[19] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*"(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

#### **PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS**

[20] It has now been well established that there are several factors that an Appellate Court needs to take into consideration when dealing with such applications.

[21] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the



principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters. These factors are:

- (i) The reasons 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?

[22] In this case the three Appellants were found guilty and convicted of the single count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act), by the Learned Resident Magistrate, Magistrate's Court of Ba, on 20 December 2017. They were sentenced on 10 January 2018.

[23] In terms of Section 248 (1) of the Criminal Procedure Act, an appeal against this decision had to be filed within 28 days of the decision. Therefore, in this matter, the appealable period lapsed on or about 7 February 2018.

[24] This application was filed in the Fiji Court of Appeal only around March 2021. Thus, these proceedings have been instituted over 3 years after the appealable period had lapsed.

[25] In terms of Section 248 (2) of the Criminal Procedure Act it is stated that the Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this Section for filing of an appeal. Section 248 (3) of the Criminal Procedure Act broadly sets out as to what good cause shall deem to include.

[26] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), the Supreme Court has elaborated on the principles to be applied or considered by the Appellate Courts when

exercising its discretion in such matters. These include the reasons for the failure to file the appeal within time and length of the delay.

[27] The Appellants depose in their Affidavits that the reasons for the failure to file this appeal within time was due to the fact that it took time to seek help in drafting the grounds of appeal and due to miscommunication between themselves and the administration at the Correction Centre.

[28] However, in the instant case, the Appellants have filed this application over 3 years late. The length of delay is not reasonable and cannot be justified in any manner. Therefore, this Court cannot accept the reasons provided by the Appellant for the failure to file this appeal within time.

[29] However, in terms of the principles set out in *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), even where there has been substantial delay, nonetheless the Appellate Court has to consider whether there are grounds of appeal that will probably succeed. In other words, whether there is a ground of merit justifying this Court's consideration.

[30] Therefore, it is still necessary for this Court to go into the proposed Grounds of Appeal against sentence filed by the Appellants to determine this fact. Even the Learned State Counsel concedes that there may be merit in the Grounds of Appeal against sentence filed by the Appellants.

#### **APPEALS AGAINST SENTENCE**

[31] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"...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] HCA 40; [1936] 55 CLR 499)."*

[32] These principles were endorsed by the Fiji Supreme Court in **Naisua v. The State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"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] HCA 40; [1936] 55 CLR 499; and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration."*

[33] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant consideration.

[34] In **Sharma v. State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

*"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in*

*Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

*" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*

*[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*

*"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

*[41] The Supreme Court then observed in paragraph 51 that:*

*"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability \_ \_ \_."*

*[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.*

*.....*

*[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this*

*Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.”*

#### **THE GROUNDS OF APPEAL AGAINST SENTENCE**

[35] There are three Grounds of Appeal against sentence raised by the Appellants.

- (i) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by his choice of a harsh and excessive starting point being 10 years without any reasonable explanation for the same.
- (ii) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by acting upon a wrong principle in using the case authority of ***Wallace Wise v State, Criminal Appeal No. CAC0004/2015.***
- (iii) THAT the Learned Sentencing Magistrate erred in his sentencing discretion by acting upon a wrong principle in double counting in considering the aggravating factor that the offence was committed on the victim of a public service provider when it in fact forms the elements of offending.

[36] I find that the above three Grounds of Appeal against sentence are interconnected and can be addressed together.

[37] The offence of Aggravated Robbery in terms of Section 311 (1) of the Crimes Act carries a maximum penalty of 20 years imprisonment.

[38] The general tariff for the offence of Aggravated Robbery was held to be between 8 and 16 years imprisonment. This tariff was endorsed by the Supreme Court in ***Wallace Wise v. State*** [2015] FJSC 7; CAV 04 of 2015 (24 April 2015); where it was held:

*“.....We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.”*

- [39] However, in **State v. Josaia Warodo Vatunicoko** [2018] FJHC 885; HAC210.2018 (21 September 2018); His Lordship Justice Goundar summarised the various tariffs for the offence of Aggravated Robbery depending on the nature and circumstances of the robbery in the following manner:

*"[4] In assessing the objective seriousness of your offending, I am mindful that aggravated robbery in the company of others is punishable by 20 years' imprisonment. The tariff depends on the nature and circumstances of the robbery. The tariff is as follows:*

*Street mugging: 18 months to 5 years' imprisonment (**Raqaquau v. State** [2008] FJCA 34; AAU0100.2007 (4 August 2008).*

*Home invasion: 8 – 16 years' imprisonment (**Wise v. State** [2015] FJSC 7; CAV0004.2015 (24 April 2015).*

*A spate of robberies: 10 -16 years' imprisonment (**Nawalu v. State** [2013] FJSC 11; CAV0012.12 (28 August 2013)."*

- [40] In **State v. Waisiki Ragici & Others** [2012] FJHC 1082; HAC366, 367, 368.2011 (15 May 2012); His Lordship Justice Goundar said:

*"[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*

*[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*

*[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*

*[13] In **State v Kotobalavu & Ors** Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*

*"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non-custodial sentences, despite the youth or good prospects of the perpetrators...."*

*[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was):*

*"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instil in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[41] In ***State v. Esala Rabalolo*** [2019] FJHC 278; HAC429.2018 (29 March 2019); His Lordship Justice Aluthge, citing ***State v Tamani*** (*supra*) adopted the tariff of 4 to 10 years imprisonment for the robbery of a taxi driver.

[42] In the instant case, the Learned Resident Magistrate, Magistrate's Court of Ba, has adopted the tariff of 8 to 16 years imprisonment, for the offence of Aggravated Robbery, based on ***Wallace Wise v. State*** (*supra*). He has selected a starting point of 10 years imprisonment in respect of each Appellant.

[43] In determining the starting point within the said tariff, the Court of Appeal, in ***Laisiasa Koroivuki v. State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[44] The Learned Magistrate has not provided any reasons as to why he selected a starting point of 10 years imprisonment in respect of each Appellant.

[45] For the aggravating factors the Learned Magistrate had identified he has increased the sentence by further 5 years in respect of each Appellant. For the mitigating factors, including the time the Appellants had spent in custody, he has reduced 2 years. For the guilty plea he has reduced a further 3 ½ years, thereby coming to a final sentence of 9½ years imprisonment in respect of each Appellant.

[46] It is manifest that in selecting the tariff of 8 to 16 years imprisonment based on ***Wallace Wise v. State*** (*supra*), the Learned Magistrate had erred in his sentencing

discretion. The acceptable tariff for the Aggravated Robbery of transport providers, including taxi drivers, was 4 to 10 years imprisonment.

- [47] The current authority setting out the tariff for Aggravated Robbery is the Supreme Court decision in *State v. Tawake* [2022] FJSC 22; CAV 0025.2019 (28 April 2022). If the tariff set out in the said case is to be applied today, the circumstances of this case would fall under the Category of *Aggravated Robbery (Offender with Another)* with the level of harm being in the *High* Category, which is a sentencing range of 5 to 9 years imprisonment.
- [48] In the circumstances, I am of the opinion that the Grounds of Appeal against sentence have merit and that the sentence imposed by the Learned Resident Magistrate, Magistrate's Court of Ba should be reviewed. The Learned State Counsel too concedes that the sentence imposed by the Learned Resident Magistrate should be reviewed.
- [49] Accordingly, I consider the tariff of 4 to 10 years imprisonment for Aggravated Robbery as the applicable tariff in this case. Considering the nature and gravity of the offending I select a starting point of 5 years imprisonment in respect of each Appellant. For the aggravating factors (including the serious harm which was caused to the victim as a result of their violent actions), I increase the sentence by 5 years in respect of each Appellant. Now the sentence would be 10 years imprisonment in respect of each Appellant.
- [50] For their show of remorse, I deduct 1 year each from their term of imprisonment. Now the sentence would be 9 years imprisonment in respect of each Appellant. For their guilty plea, I reduce 3 years in respect of each Appellant. Now the sentence would be 6 years imprisonment in respect of each Appellant.
- [51] I am informed that the 1<sup>st</sup> Appellant had spent a period of one month in remand prior to his sentence. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had spent a period of four months in remand prior to their sentence. This period should be reduced from their sentence in terms of the provisions of Section 24 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act").



[52] Therefore, the final sentence in respect of the 1<sup>st</sup> Appellant would be 5 years and 11 months imprisonment. The final sentence in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants would be 5 years and 8 months imprisonment.

[53] The three Appellants were sentenced on 10 January 2018. Therefore, they have now served a total period of 6 years and 9 months imprisonment, which is more than the final sentence which is determined by this Court.

#### **FINAL ORDERS**

[54] In light of the above, the final orders of this Court are as follows:

1. Leave for enlargement of time to file Petition of Appeal is allowed.
2. The appeal against sentence is allowed.
3. The sentence passed by the Resident Magistrate, Magistrate's Court of Ba, on 10 January 2018 is quashed and the sentence as proposed above is substituted in its place, in respect of the three Appellants, to be effective from 10 January 2018.
4. Accordingly, all three Appellants are to be released immediately.
5. This is subject to the Appellants serving their full sentence in respect of any other case for which they may be currently serving.



At Lautoka

This 17<sup>th</sup> Day of October 2024

  
**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

**Solicitors for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants:**

**Solicitors for the 3<sup>rd</sup> Appellant:**

**Solicitors for the Respondent:**

**Office of the Legal Aid Commission, Lautoka.**

**3<sup>rd</sup> Appellant Appeared in Person.**

**Office of the Director of Public Prosecutions,  
Lautoka.**