IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
Exercising extended jurisdiction

CRIMINAL APPEAL NO. AAU 71 OF 2017
(High Court Criminal Case: HAC 245 of 2016)
(Magistrates Court No: 1099 of 2016 at Suva)

BETWEEN : **SAILASA QALIVERE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Mr T Lee for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **4 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read the draft judgment and conclusions. I agree with Nawana, JA.

Prematilaka JA

[2] I have read in draft judgment of Nawana, JA and I agree with the reasons and orders proposed.

Nawana JA

[3] The appellant stood charged before the Magistrate, Suva, for having committed the offence of *Aggravated Robbery* punishable under Section 311 (1) (a) of the Crimes Act, 2009 (Crimes Act).

[4] The learned Magistrate assumed jurisdiction as extended by the High Court in terms of Section 4 (2) of the Criminal Procedure Act, 2009.

[5] The charge was sequel to an alleged act of robbing the complainant-Umesh Chand on 03 July 2016. The properties robbed were: cash in an amount of $ 50.00; and, a Nokia Mobile Phone worth $ 90.00.

[6] The appellant tendered an unqualified plea of guilty and accepted the summary of facts as submitted by the prosecution. The learned Magistrate, having relied on ***Wallace Wise vs State*** [2015] FJSC 7; CAV0004.2015 (24 April 2015), applied the range of sentence as 8-16 years and imposed a term of eight year and six month-imprisonment on the appellant on 11 January 2017.

[7] The aggravated form of robbery, in terms of Section 311 (1) (a) of the Crimes Act, is based on the fact that the offence was committed whilst being in the company of another. The offence is constituted as follows:

> ***Aggravated robbery***
> *311. — (1) A person commits an indictable offence if he or she —*
> *(a) commits a robbery in company with one or more other persons; or*
> *(b) commits a robbery and, at the time of the robbery, has an offensive weapon with him or her.*
>
> *Penalty : Imprisonment for 20 years.*
> *(2) for the purposes of this [Act], an offence against sub-section (1) is to be known as the offence of aggravated robbery.*
>
> *(3) In this section:*
> *'offensive weapon' includes:*
> *(a) an article made or adapted for use for causing injury to; or, incapacitating, a person; or,*
> *(b) an article where the person who has the article intends, or threatens to use, the article to cause injury to, or to incapacitate, another person.*

[8] Summary of facts revealed that the appellant, who was in the company of another, had pursued the complainant from behind; forced to deliver cash in an amount of $ 50.00; and, a mobile telephone worth of $ 90.00; and, fled away. The incident took place around 2.00 a.m. on 03 July 2016 in the Capital City of Suva, when the complainant was returning from a nightclub to walk up to a transport facility. A prompt complaint to the nearby Totogo Police Station in the city resulted in the immediate arrest of the appellant.

[9] According to the transcript of the Magistrate's Court Record, there was no indication as to the recovery of robbed items. Proceedings against the other person was pending as at 11 January 2017, the date of the sentence, before the Magistrate.

[10] In mitigation of the sentence, following matters were urged before the learned Magistrate:

(i) *The appellant, aged 19, was pursuing studies at a secondary school;*
(ii) *The appellant was a first offender;*
(iii) *The appellant had been on remand from 03 July 2016;*
(iv) *The appellant had involved in the offence due to peer pressure; and,*
(v) *The appellant's very early guilty plea.*

[11] The learned Magistrate did not record any aggravating factors. There did not, however, appear to be further aggravation other than those found in the elements of the offence, which made the offence an aggravated form of robbery. In this instance, the commission of the offence, whilst being in the company of another, was the aggravated form of the offence of robbery in terms of Section 311 (1) (a) of the Crimes Act.

[12] The learned Magistrate, in his sentencing remarks, said that:

> *This offence had a maximum penalty of twenty year-imprisonment and the tariff was discussed in **Wallace Wise v the State**, where the Supreme Court dealt with an appeal from the Court of Appeal regarding a single case of aggravated robbery and not a series of offences. The tariff was fixed at 8-16 years.*
>
> *For the above reasons, the court adopts eleven years imprisonment as the starting point.*

[13] The learned Magistrate, having taken eleven years as the starting point, deducted one year each for the guilty plea and for the mitigation. He then reached at a term of nine years. The term was further reduced by setting-off six months for the appellant's remand period prior to the conviction. The ultimate sentence was fixed at eight years and six months. The learned Magistrate, having exercised his discretion in terms of Section 18 (2), as it stood then under the Sentencing and Penalties Act, 2009, did not fix a non-parole period, taking into consideration that the appellant was a young person of nineteen years of age.

[14] The appellant successfully got leave to appeal from the single Justice of Appeal in the exercise of the power of this court under Section 35 (1) of the Court of Appeal. The grounds urged were:

> *(i) That the earned Magistrate erred in law by imposing a sentence harsh and excessive without having regard to the sentencing guidelines and applicable tariff for the offence (aggravated robbery) of this nature;*
>
> *(ii) That the learned Magistrate erred in fact and law by allowing extraneous or irrelevant matters to guide or affect him when sentencing the appellant; and,*
>
> *(iii) That the learned Magistrate erred in fact and law in improperly discounting for the mitigating factors to decrease the sentence.*

[15] The learned single Justice of Appeal, in giving leave to appeal, distinguished facts in ***Wallace Wise*** (supra), which involved a home invasion as opposed to the facts in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (04 August 2008), where aggravated robbery was committed on a person on the street by two accused using low-level physical violence.

[16] Low threshold robbery, with or without less physical violence, is sometimes referred to as *street-mugging* informally in common parlance. The range of sentence for that type of offence was set at eighteen months to five years by the Fiji Court of Appeal in **Raqauqau'**s case (supra).

[17] The aggravating factors that were considered by the Supreme Court in ***Wallace Wise*** (supra), in setting the range of sentence of eight to sixteen years for aggravated robbery involving violent home invasion, were that:

> *(i) The offence was that of an organized gang robbery;*
> *(ii) Entry into the house around 2.30 a.m.;*
> *(iii) The use of deadly weapons to commit the offence;*
> *(iv) The victim was 62 years of age;*
> *(v) The victim was assaulted and had received injuries on the head, chest and on the eye-brow requiring treatment; and,*
> *(vi) The wife of the victim was also threatened at pre-dawn hours of the day and her jewelry were robbed.*

[18] There were no such facts in existence in this case.

[19] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted a upon wrong principle when he applied the tariff set for an entirely different category of cases to the facts of this case, which involved a low-threshold robbery committed on a street with no physical violence or weapons. When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into 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 an eventual unlawful sentence.

[20] Supreme Court of Fiji in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013) held that an appellate court would interfere with a sentence imposed by a trial court if it is shown that:

> *(i) That the learned judge acted upon a wrong principle;*
> *(ii) That the learned judge allowed extraneous or irrelevant matters;*
> *(ii) That the learned judge mistook facts; and,*
> *(iii) That the learned judge failed to take into account some relevant considerations.*

[21] I am convinced that the learned Magistrate was in error in dealing with the sentence of the appellant.

[22] This court in **Ilatia and Others v State** (AAU 119; 115 and 129 of 2015; 27 February 2020) made the following observations in the matters of sentencing, which, I think,

are worthy of reproducing in view of the serious sentencing errors made by the Magistrate. This court stated:

> *[30] […] it is a matter of essential importance to have a uniform approach in the deliberations of judges on matters of sentence in the same way they do have on the application of legal principles in the conduct of judicial proceedings.*
>
> *[31] The process of sentencing and its decision-making, however, seems to be a very complicated exercise of judicial functioning, which, more often than not, appears to be filled with inconsistencies or lack of uniformity. As a result, disparity of sentences is often seen, which certainly causes concern to accused-persons, who stand charged for the same offence in identical circumstances; and, also to the system of justice.*
>
> *[32] It is, indeed, a continuing effort all over the world to set a structured and easily understandable sentencing formula, at least at optimal levels, as the human mind hardly thinks the same although the matter, upon which learned judges have to rule on, is the same.*
>
> *[33] The concept of tariff that is hardened into the sentencing structure in Fiji seeks to ensure uniformity and consistency in sentencing. …*

[23] Justice Goundar's formulation in ***Laisiasa Koroivuki v State***; [2013] FJCA 15; AAU0018.2010 (05 March 2013), is, indeed, pertinent to note here, which underscores the importance of maintaining the uniformity of the sentences. It was stated:

> *[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*

[24] As a first step in ensuring uniformity, it is absolutely necessary for sentencing judges to be mindful of the correct sentencing range for the relevant offence before them, after making the required distinction although the heading of the offence bears some commonality.

[25] The learned Magistrate, in this case, erred in applying a very heavy sentencing formula applicable to another serious offence after taking into irrelevant circumstances of offending. In the circumstances, I find merit in all three grounds urged in support of this appeal.

[26] This court, in the exercise of its powers under Section 23 (3) of the Court of Appeal Act, should intervene and set-aside the sentence of eight and half year-sentence on the ground that the learned Magistrate had mistaken facts and acted on wrong principles. I would, accordingly, quash and set-aside the sentence dated 11 January 2017. I would, instead, impose a term of three year-imprisonment to have been operated from 11 January 2017. The appellant shall be entitled to an immediate release if that term is already completed.

Orders are:

(i) Sentence dated 11 January 2017 is quashed and set-aside;
(ii) A sentence of three year-imprisonment substituted in its place to have operated from 11 January 2017;
(iii) Appellant is to be released forthwith if a term of three year-imprisonment is already completed; and,
(iv) Appeal allowed.

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL