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

CRIMINAL APPEAL NO.AAU 156 of 2017
[Magistrates Court of Nasinu Case No. 535 of 2017]

BETWEEN : **TOMASI MAE**
JONE LUTUMAILAGI

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the first Appellant**
Ms. S. Ratu for the second Appellant
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **30 September 2020**

Date of Ruling : **01 October 2020**

RULING

[1] The appellants and another had been tried in the Magistrates' court in Nasinu under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on the 22 May, 2017 at Nasinu in the Central Division. The charge of aggravated robbery against the appellant read as follows.

*'**Count***

Statement of Offence(a)

AGGRAVATED ROBBERY : Contrary to Section 313 (1) (a) of the Crimes Act 2009

Particulars of Offence (b)

> ***TOMASI MAE AND JONE LUTUMAILAGI*** *and another on the 22nd day of May 2017 at Nasinu in the Central Division robbed one* ***ALVIND NAIR*** *and stole $20.00 the property of* ***ALVIND NAIR*** *and before such robbery used force on the said* ***ALVIND NAIR.***

[2] The appellants had pleaded voluntarily to the charge and admitted the summary of facts. The learned Magistrate had convicted them accordingly and sentenced on 16 October 2017 to an imprisonment of 08 years with a non-parole period of 03 years.

[3] The appellants in person had signed a timely notice of appeal/ application for leave to appeal against conviction and sentence on 06 November 2017. Another notice of appeal/ application for leave to appeal against conviction and sentence had been tendered by the 01st appellant on 20 February 2018. The Legal Aid Commission had filed amended grounds of appeal and written submissions only against sentence on 22 June 2020 and 29 June 2020 in respect of the 02nd and 01st appellants respectively. The State had tendered its written submissions on 09 July 2020.

[4] In terms of section 21(1) and (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The**

State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(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.*

Grounds of appeal

[6] The grounds of appeal urged by the appellants are as follows.

> ***01st appellant***
>
> *'1. That the learned trial Judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.*
>
> *2. That the learned trial judge erred in law and in fact when he failed to discount the appellant's time in remand.*
>
> ***02nd appellant***
>
> *3. The learned Sentencing Magistrate erred in principle in imposing a harsher and excessive sentence in consideration of higher starting point and the nature of the offending.'*

[7] The brief summary of evidence as narrated in the High Court sentencing order is as follows.

> '*On 23rd May 2017 at Nasinu in the Central Division, Alvind Nair, a taxi driver by profession was driving vehicle registration number LT5455 at around 2.55am. The complainant picked up three passengers from Rajendra Food Town supermarket at Valelevu. The complainants dropped of the three passengers at Maqbool Road near shortcut to Nadawa.*
>
> *When the taxi came to a stop the two passengers seated at the back began to punch the complainant's head while the passenger seated in front started punching the complainants face took the monies from the vehicle. The amount taken was about $20.00.'*

Two of the accused were apprehended and produced in Court. The State also tendered in the complainant's medical report which stated that the complainant suffered injuries such as a laceration on his right lip and a swelling below his left eye."

01st and 03rd grounds of appeal

[8] In **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

> *'[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 instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[9] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea…'*

[10] Therefore, I held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[11] The learned Magistrate had identified the correct sentencing tariff for offences of aggravated robbery against providers of services of public nature as between 4-10 years. He had picked 09 years towards the higher end of the tariff to start with and added 02 more years for the aggravated features including the fact that the victim was a public service provider and a more general fact of the appellants' criminal act having instilled fear into the community. He had deducted 02 years for mitigating factors including the young age (01st appellant and 02nd appellant being of 21 years and 19 years of age respectively) and further 01 year for the early guilty plea arriving at the final sentence of 08 years.

[12] I doubt whether the facts of this case warranted picking the starting point towards the higher end the tariff of 4-10 years. In any event, the Magistrate may have taken into consideration many, if not all aggravating features, unwittingly though, in starting the sentencing process at 09 years, for no other reason had been given in that regard. However, the fact that the victim was a public service provider was already part of the tariff of 4-10 years and should not have been counted again as a separate aggravating factor to increase the sentence. Instilling fear in the community in this instance seems a far too general consideration.

[13] However, the likelihood of existing or prospective public service providers being discouraged to undertake these vital services or abandon them altogether as a result of this kind of attacks regularly staged against taxi drivers is a legitimate and serious concern and could be taken as part of aggravating features of the offence (not the offender) in picking the starting point. Similarly, the fact that the victim had suffered injuries at the hand of the assailants too makes the offence more serious in like instances.

[14] Nerveless, the Magistrate seems to have committed a sentencing error of double counting in this instance by taking aggravating circumstances into consideration twice and also considering the very basis of the tariff of 4-10 years as an aggravating feature again in enhancing the sentence.

[15] However, I am convinced that the objective seriousness of the offending (not the offender) in this case definitely warrant a higher starting point in the range of 04-10 years (to be increased for aggravating features of the offender, if any) and if the starting point is taken at the lower end then a substantial increase in the sentence for all aggravating features (offending and offender) is warranted. In either of the above scenarios, the appellants would have the benefit of mitigating factors, if any. [see **Naikelekelevesi v State**[2008] FJCA 11; AAU0061.2007 (27 June 2008), **Qurai v State**[2015] FJSC 15; CAV24.2014 (20 August 2015) and **Koroivuki v State**[2013] FJCA 15; AAU0018 of 2010 (05 March 2013)].

[16] The appellants have been young offenders. However, in cases of attacks against taxi drivers and other public service providers, the youthfulness of the offenders has not been met with much favour. The sentiments expressed by the Magistrate in paragraph 17 of the sentencing order are on these lines and cannot be faulted.

[17] For example in **State v Fong** [2005] FJHC 722; HAC010.2004S (3 March 2005) Gates J. (as he then was) said

> *'[11] Much has been said of attacks on taxi drivers. The court has concluded that the need for harsh deterrent sentences to protect taxi drivers, and the transport facility they provide for the public, far outweighs the personal mitigating circumstances of unthinking or alienated young men…'*

[18] On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[19] However, in my view the error of double counting by the sentencing judge which may have contributed to the ultimate sentence of 08 years requires to be re-examined by the full court that could then decide either to affirm the existing sentence or if not, what the appropriate sentence should be.

[20] I may also highlight a few other aspects of sentencing for guidance of the trial judges in the light of concerns expressed by the Supreme Court in the recent part. Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[21] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[22] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features

of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[23] The Supreme Court in ***Kumar*** identified another instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[24] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[25] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows.

> (i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence *i.e.* objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.

(ii) Then the judge applies the aggravating features of the offender *i.e.* all the subjective circumstances of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, (*i.e*. a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (tier two).

[26] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to that is to follow the two-tiered approach diligently as stated above**.** In this regard, it is always helpful for the sentencing judges to indicate what aggravating factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[27] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) is very instructive in this regard.

> *'[48] The Sentencing and Penalties Decree does not provide any specific guideline 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.*
>
> *[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate 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. This is the methodology adopted by the High Court in this case.*
>
> *[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the*

enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

02nd ground of appeal

[28] There is nothing to indicate in the sentencing order that the 01st appellant had been in remand for a month. In any event, when the full court considers the ultimate sentence the period of remand, if any, could also be considered.

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL