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

CRIMINAL APPEAL NO.AAU 0074 of 2018
[In the Magistrates Court at Lautoka Case No. 366 of 2018/EJ25 of 2018]

BETWEEN	:	**AKUILA TALEBULA**
	:	**SAILOSI BAWAQA**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**24 April 2020**
Date of Ruling	:	**29 April 2020**

RULING

[1] The appellants with another (Semi Raisevuniwai) had been charged in the Magistrates court of Lautoka exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed on 09 April 2018 by mugging the complainant of an iPhone valued at $2000.00 and a wallet containing $364.00.

[2] Both appellants had pleaded guilty and the learned Magistrate had convicted the appellant. They had been sentenced on 05 July 2018 to 07 years, 09 months and 02 weeks of imprisonment with a non-parole term of 04 years.

[3] The appellants being dissatisfied with the sentence had signed a timely notice of leave to appeal against sentence which had reached the Court of Appeal registry on 03 August 2018. Legal Aid Commission on 08 February 2019 had submitted an amended notice of appeal containing a single ground of appeal against sentence along with written submissions seeking leave to appeal. The respondent's written submissions had been tendered on 24 September 2019.

[4] The matter had been taken up for hearing on leave to appeal on 03 December 2019. However, due to the demise of Suresh Chandra RCJ the ruling could not be delivered. When the matter was called in court on 24 April 2020 both counsel agreed to have a ruling delivered by me on the written submissions already filed.

[5] 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 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with leave to appeal applications against sentence as well.

[6] 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 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.*

Ground of appeal

'THE Learned Magistrate failed to give sufficient discount to the guilty plea.'

[7] According to the summary of facts (as stated in the appellants' written submissions), the complainant had gone to a shop around 5.00 p.m. on the day of the incident and as he was coming out of it, the appellants and another had grabbed him and pinned him to the ground. His iPhone and the wallet had been removed and the appellants and their accomplice had fled the scene.

[8] The appellant's complaint is that the 12 months of discount given to the guilty plea and other mitigating factors by the learned trial judge is not sufficient. After deciding that the sentencing tariff applicable was 08-16 years as set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) the learned judge had started with 09 years of imprisonment and deducted 01 year for the guilty plea and the other mitigating factors. As the period of remand *i.e.* 10 weeks was further discounted the trial judge had arrived at the sentence of 07 years, 09 months and 02 weeks of imprisonment with a non-parole term of 04 years.

[9] The appellants rely on **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) to advance their argument. A discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was considered as the 'high water mark' in ***Ranima*** but it had not been regarded as an absolute benchmark in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015). The Supreme Court dealing with ***Ranima*** said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[10] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*

[11] Therefore, while it can be reasonably suspected that the learned trial judge may have failed to give a weightier discount deserved by the appellants for their possible earliest guilty plea, without the benefit of perusing the sentencing order (which neither party had submitted to court) I am unable to come to a definite finding on that score. However, I must state that the inadequacy of the discount for the guilty plea (*i.e.* the quantum) had got highlighted so prominently due to an even more fundamental error appearing to have been made by the trial judge as discussed below. Had the trial judge acted within the correct tariff regime even the discount of 01 year may have been justified.

[12] As pointed out by the State the learned trial judge had committed a more serious error in following the sentencing tariff set in ***Wise*** and thereby he could be said to have acted on a wrong sentencing principle paving the way for the appellate court's possible intervention in the matter of sentence.

[13] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 08 years as the starting point without being mindful that the 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.

[14] From the written submissions of the appellants it is difficult, if not impossible, to see how the factual background of this case fits into a similar scenario the court dealt with in ***Wise***. It appears to me that this is more of a case of street mugging where sentencing tariff had been recognized as 18 months to 05 years. In **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) the complainant, aged 18 years, after finishing off work was walking on a back road, when he was approached by the

two accused. One of them had grabbed the complainant from the back and held his hands, while the other punched him. They stole $71.00 in cash from the complainant and fled. The Court of Appeal remarked

> *'[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in* ***Basa v The State*** *Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.*
>
> *[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of* ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** *(the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:*
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> - ***The sentencing bracket was 18 months or 5 years****, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.*
> - *An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.*
> - *The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.*

[15] Therefore, the sentencing errors above discussed demonstrate a reasonable prospect for the appellants to succeed in appeal regarding their sentence.

[16] Accordingly, leave to appeal against sentence is allowed.

Order

1. Leave to appeal against sentence is allowed.

Hon. Mr Justice C. Prematilaka

JUSTICE OF APPEAL