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

CRIMINAL APPEAL NO. AAU 135 of 2016
[In the Magistrates Court at Lautoka Case No. 484 of 2012]

BETWEEN	:	**VILIAME ROCATIKEDA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**23 April 2020**
Date of Ruling	:	**29 April 2020**

RULING

[1] The appellant with another had been arraigned 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 31 August 2012 regarding a Nokia mobile phone valued at $100 and cash of $60.00 the property of Zahid Anish Ali.

[2] After trial, the Learned Magistrate had convicted the appellant and acquitted the co-accused on 21 August 2016. The appellant had been sentenced on 23 August 2016 to 08 years of imprisonments with a non-parole period of 06 years.

[3] The appellant being dissatisfied with the conviction and sentence had signed a timely notice of leave to appeal against both conviction and sentence on 14 September 2016. He had submitted amended grounds against conviction on 22 December 2016. Legal Aid Commission on 21 March 2019 had submitted an amended notice of appeal containing two grounds of appeal; one each against conviction and sentence along with written submissions. The respondent's written submissions had been tendered on 28 March 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 23 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.*

Grounds of appeal

Conviction

> *'The learned trial Magistrate erred in law and in fact in delivering a verdict that is unreasonable and cannot be supported by the totality of evidence'*

Sentence

> *'The learned sentencing judge erred in law and in fact when he enhanced the sentence with the aggravating factors which were already subsumed as an element of the offence.'*

[7] The robbery in the case appears to involve a complainant who had been a taxi driver. No other circumstances can be gathered from the material available to me.

Ground of appeal against conviction

[8] The argument of the appellant is that the verdict is inconsistent in that the learned Magistrate had acquitted the co-accused and it is unreasonable and cannot be supported by the evidence.

[9] According to the judgment, the appellant who was the first accused in the Magistrates court had punched the complainant and gone back to his house. The co-accused who was the second accused had grabbed the complainant's neck from the back. There does not appear to have been unequivocal evidence as to which one of the accused had grabbed the mobile phone from the complainant. Not that it matters when the evidence had revealed that the two accused had participated in the robbery as stated by the trial judge but the acquittal of one of them cannot then be explained. There does not seem to have been any evidence of the loss of $60 by the complainant in the same transaction either. Each of the accused had implicated the other as to who took away the mobile phone from the complainant in their cautioned interviews led in evidence by the prosecution.

[10] The reasons given by the learned Magistrate for acquitting the co-accused while convicting the appellant were that

(i) There was no evidence that the co-accused had taken the complainant's phone away which is contrary to his own assertion that '.... *The court is satisfied beyond reasonable doubt that they took the complainant's mobile phone. It is immaterial whom (sic) took the phone'*

(ii) The appellant had been evasive in his evidence while his co-accused had been honest and straightforward.

(iii) The co-accused had disclosed in his cautioned interview that it was the appellant who had taken away the mobile phone from the complainant. (the appellant on the other hand in his cautioned interview had implicated the co-accused as the person who took away the phone from the complainant)

(iv) There was insufficient evidence to find the co-accused guilty.

[11] If the learned trial judge had been satisfied beyond reasonable doubt, as he claimed, that both the appellant and the co-accused had robbed the complainant of his mobile phone there was no way that he could have acquitted the co-accused purely on his demeanour in court and convicted the appellant.

[12] Further, the learned Magistrate had erred in law in relying on the confession of the co-accused as a piece of evidence against the appellant in order to convict him.

[13] The learned Magistrate should have either convicted or acquitted both accused on the evidence available. The two verdicts cannot stand together and they cannot be reconciled on any rational or logical basis. It appears that the two verdicts are unreasonable and affront to logic and common sense suggesting a compromise of the trial judge's duty [vide **Balemaira v State** [2013] FJSC 17 CAV0008 of 2013 (6 December 2013 and **Vulaca v State** [2013] FJSC 16; CAV0005.2011 (21 November 2013].

[14] In the circumstances, the ground of appeal against conviction has a reasonable prospect of success and leave to appeal should be granted.

Ground of appeal against sentence

[15] The appellant's complaint is that some aggravating features highlighted by the learned trial judge were already part of the elements of the offence. The attention of this court has been drawn to paragraph 04 of the sentencing order where the Magistrate had said *'You have used physical force, threatened and caused psychological effect on the victim'* and treated them as aggravating factors. He had added 03 years for those factors and the fact that the appellant had been under the influence of liquor.

[16] Considering the elements of the offence of aggravated robbery set out in section 311 (1)(a) of the Crimes Act, 2009 read with those of the offence of robbery in section 310 (1), it is clear that the appellant's complaint is well founded, at least in so far as the reference to threatened or actual physical force is concerned.

[17] However, there is perhaps an even more compelling reason as to why the learned trial judge could be said to have acted on a wrong principle. 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. 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.

[18] From the impugned judgment and the sentencing order of the learned Magistrate I cannot see how the factual background of this case fits into a similar scenario the court was confronted with in ***Wise***. It appears to me that this is more of a case of street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where 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 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:*

- ***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.*

[19] Therefore, the sentencing errors above highlighted offer a reasonable prospect for the appellant to succeed in appeal.

[20] Accordingly, leave to appeal against conviction and sentence is allowed.

Order

1. Leave to appeal against conviction and sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL