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

**CRIMINAL APPEAL NO.AAU 110 of 2016**
**[In the Magistrates Court at Suva Case No. 639 of 2016]**

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| **BETWEEN** | **:** | **AKEAI RANUKA** |
| | | ***Appellant*** |
| **AND** | **:** | **STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, JA** |
| **Counsel** | **:** | **Appellant in person** |
| | : | **Ms. S. Kiran for the Respondent** |
| **Date of Hearing** | **:** | **26 May 2020** |
| **Date of Ruling** | **:** | **03 June 2020** |

# RULING

[1] The appellant had been arraigned in the Magistrates court of Suva exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed with another on 16 April 2016 regarding a white Alcatel Mobile Phone valued at $144, the property of Prashant Lal.

[2] The appellant had pleaded guilty and the learned Magistrate had convicted the appellant on his own plea of guilty. He had been sentenced on 05 August 2016 to 07 years and 08 months of imprisonments with a non-parole period of 05 years.

[3] The appellant being dissatisfied with the sentence had signed a timely notice of leave to appeal against sentence on 22 August 2016. He had preferred two additional grounds of appeal on 22 February 2018 (one of which was abandoned later). His written submissions had been received on 08 June 2018 and 17 Jun 2019. The respondent's written submissions had been tendered on 25 February 2020.

[4] 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 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against sentence as well.

[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 timely 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 against sentence***

***Sentence***

*'(1) 'The Sentencing Magistrate erred in law and in fact he failed to consider the mitigating factor and guilty plea separately. Failure to do so caused substantial miscarriage of justice.*

*(2) The Sentencing Magistrate erred in law when he failed to consider the sentencing, guideline under section 4(2)(i) i.e. the offender's previous character meaning good character.*

*(3) The Sentencing Magistrate erred when he failed to consider a similar offence of aggravated robbery before imposing a harsh sentence compared to the other sentence.*

*(4) That the non-parole enhances the sentence of imprisonment which is inconsistent with the remission law of the Prison Corrections Act 2006 under Section 27(2) including good behaviour.*

*(5) That the Sentencing Resident Magistrate failed to show leniency to first offenders as stated in the Sentencing and Penalties Decree in Section 4(1) (2).*

*(6) That the appellant's nature of offending cannot support the charge and sentence since the nature of offending falls into the category of 'street mugging' therefore the sentence is harsh and excessive.'*

[6] The summary of facts revels that when the complainant was walking along Fugala Street and Moala street junction two youths who were seen in a gang of drunken youths had approached him. The two had grabbed his hands from behind while the others had searched his pockets. One of them who had threatened the complainant to keep quite or face being punched had stolen the complainant's Alcatel mobile phone valued at $139.00. The complainant had reported the matter to the police quickly and when the police took the complainant around looking for the suspects, he had seen the appellant at a bus stop and upon his arrest the stolen mobile phone from the complainant had been recovered from him.

***06th ground of appeal***

[7] I shall deal with the last ground of appeal first. His argument is that the nature of his criminal act falls into the category of aggravated robberies commonly known as street mugging but the learned Magistrate had sentenced him according to the tariff set for aggravated robbery in the form of home invasion in the night.

[8] There is merit in the appellant's contention and therefore the learned trial judge could be said to have acted on a wrong principle in sentencing the appellant. 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.

[9] 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 dealing with in ***Wise.*** This is 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 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.*

[10] However, as opposed to ***Ragaugau*** a gang of drunken youth had been involved in this case and the appellant had been one of them who had stolen the mobile phone making it a more serious form of street mugging.

[11] **Tawake v State** [2019] FJCA 182; AAU0013 of 2017 (3 October 2019) and **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) are two decisions that have reiterated ***Ragaugau*** in the recent past but still imposed appropriate custodian sentences in the end.

***01st to 05th grounds of appeal***

[12] I have considered the first to fifth grounds of appeal and in my view they by themselves do not carry a reasonable prospect of success in appeal at this stage. In any event, when the Court of Appeal reviews the sentence according to appropriate sentencing tariff the rest of the issues can be addressed, if required at that stage.

[13] Whether the factors identified by the learned judge in paragraph 06 of the sentencing order some of which appear to coincide with the very features of 'street mugging' could be justified as aggravating factors is another question that may have to be addressed by the Full Court.

[14] Therefore, the sentencing error above highlighted offers a reasonable prospect for the appellant to succeed in appeal.

[15] 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