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

CRIMINAL APPEAL NO. AAU 156 of 2016
[In the Magistrate Court Case No. CF 1157 of 2015]

BETWEEN	:	**TAITO RAWAQA**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	:	**Ms. S. Ratu for the Appellant** **Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**02 November 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

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

Gamalath, JA

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

Nawana, JA

[3] This is an appeal from an order of the Magistrate's Court, Suva, in the exercise of its extended jurisdiction in terms of Section 4 (2) of the Criminal Procedure Act, 2009.

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

[5] 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 by the appellant 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."*

[6] The charge, in light of the above penal section, was sequel to an act of snatching-away of a bag from the possession of the complainant, Ms. Katy Chang, on her way to attend a church service in Suva, by the appellant around 6.00 p.m. on 12 July 2016.

The bag had contained the belongings of Ms. Chang to the value of $ 207.00. The appellant was in the company of another although the complainant had been accosted only by the appellant.

[7] The appellant pleaded guilty to the charge on the first available opportunity and accepted the summary of facts as submitted by the prosecution.

[8] The learned Magistrate, in deciding on the sentence, relied on **State v Nadavulevu** [2015] FJHC 651; HAC 046.2015S (10 September 2015), and adopted:

> *"Aggravated Robbery is a serious offence and it carries a maximum penalty of 20 year-imprisonment (Section 311 (a1) of the Crimes Act, 2009). The tariff for a spate of robberies is a sentence between 10-16 years imprisonment: Nawalu v State, Criminal Appeal Case No CAV 0012 of 2012, Supreme Court of Fiji. The tariff for a single case of robbery with violence is 8 to 16 years imprisonment; Wallace Wise v the State, Criminal Appeal Case No CAV 0004 of 2015, Supreme Court if Fiji. The actual sentence will depend on the aggravating and mitigating factors."*

[9] Moreover, the learned Magistrate, in selecting the starting point of the sentence, relied on **Koroivuki v State** [2013] FJCA 15; AAU0018.2020 (5 March 2013) where it was held:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked-up from the lower or middle range of the tariff. After adjusting for mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[10] The learned Magistrate, who was seemingly reliant on above decisions, picked-up a term of 9 years and 6 months as the starting point of the sentence for the offence that the appellant had committed; and, took notice of the facts that the appellant was a young offender and that he had pleaded guilty to the charge on the first available opportunity.

[11] The learned Magistrate, while observing that there were no aggravating factors, reduced the sentence by 1 year and 6 months in order to discount the mitigating factors mentioned above.

[12] The ultimate sentence reached by the learned Magistrate was a term of 8 year-imprisonment. After reducing further 3 months in consideration of the period spent in remand, the appellant was sentenced to an operative term of 7 years and 9 months with a non-parole period of 5 years.

[13] 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.

[14] The appellant sought leave to appeal from the Court of Appeal stating that the sentence was harsh and excessive and asserted that the learned Magistrate had acted wrongfully in applying sentencing principles. In the circumstances, the appellant successfully got leave to appeal from the single Justice of Appeal against the sentence 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 and in fact when he convicted the Appellant for the offence of aggravated robbery when the summary of facts do not substantiate the element of force that pertains to the charge, therefore, questioning the equivocality of the plea; and,*
>
> *(ii) That the learned Magistrate erred in principle when he did not separately deduct the early guilty plea of the appellant.*
>
> *(iii) That the learned Magistrate erred in fact and law in improperly discounting for the mitigating factors to decrease the sentence."*

[15] Learned counsel for the state rightly conceded that the learned Magistrate was error in imposing the sentence of 7 years and 9 months with a non-parole period of 5 years for the offence in this case.

[16] In dealing with the appeal of the appellant in regard to the imposition of a lawful sentence, it is of paramount importance to consider the judicial precedents in correct contexts. In **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015), a home invasion was involved in committing the offence of aggravated robbery, while in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008), aggravated robbery was committed on a person on a street by two accused using low-level physical violence.

[17] Low threshold robbery without physical violence on a street is similar in context to the summary of facts of this case. 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).

[18] The aggravating factors in ***Wallace Wise*** (supra), which were considered by the Supreme Court 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."*

[19] Facts of ***Wallace Wise***, it is clear, stand in quite contradistinction to the facts of this case; and, they could not and should not have been called in aid to decide upon the right sentence in the circumstances of this case.

[20] Upon a consideration of the matters, as set-out above, I am of the view that the learned Magistrate had acted upon wrong principle when he applied the tariff set for

an entirely different category of cases to the facts of this case, which involved only 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 as well as the mitigating factors and so forth, resulting in an eventual unlawful sentence.

[21] 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;*
> *(iii) That the learned judge mistook facts; and,*
> *(vii) That the learned judge failed to take into account some relevant considerations."*

[22] I am convinced that the learned Magistrate was in error in dealing with the sentence of the appellant warranting the intervention of this court in the exercise of its powers of appeal.

[23] This court in **Nadavulevu v State** [2020] FJCA 14; AAU119.2015, 115.2015, 129.2015 (27 February 2020) made following observations on 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.*
> *..."*

[24] His Lordship Justice Goundar's formulation in ***Koroivuki v State***; [2013] FJCA 15; AAU0018.2010 (5 March 2013), is, indeed, pertinent to note here, which underscores the importance of maintaining the uniformity of 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."*

[25] 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.

[26] The learned Magistrate, in this case, erred in applying a very heavy sentencing formula applicable to another category of aggravated robbery after taking into account irrelevant circumstances of offending. In the circumstances, I find merit in the two grounds urged in support of this appeal.

[27] In **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022), the Supreme Court, having laid down guidelines in relation to the sentences to be imposed in cases of aggravated robbery after taking into account the degree of aggravation in each case, held that:

> *"... many aggravated robberies, not involving home invasions, do not justify a starting point in the 8-16 years' imprisonment sentencing range identified in Wise. Street muggings in which no*

> *injuries were caused but which amounted to aggravated robberies because there was more than one offender or because the offender had a weapon will rarely, if ever, justify a starting point of at least 8 years' imprisonment, let alone one higher up the range. That strongly suggests that whatever aggravated robberies were intended to be covered by Wise, Wise was not intended to apply to street muggings."*

[28] The legal position, as stated by the Supreme Court, is now clear in determining the right sentence having regard to the degree of aggravation in each case. Facts of this case only represent a low degree aggravation triggered only with the remote involvement of an accomplice, for which, the Supreme Court set the guideline for a range of sentence between 1-5 years and the starting point to be at 3 years.

[29] This court, in the exercise of its powers under Section 23 (3) of the Court of Appeal Act, should intervene in this case and set-aside the 7 year and 9 month-sentence on the ground of its illegality for the reasons set-out above. I would, accordingly, quash and set-aside the sentence dated 16 September 2016. I would, instead, impose a term of three year-imprisonment to have been operated from the date of the sentence.

Orders of the Court:

(i) Appeal allowed.

(ii) Sentence dated 16 September 2016 is quashed and set-aside; and

(iii) Appellant to be released forthwith or not later than 25 November 2022.

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL