

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

CRIMINAL APPEAL NO.AAU 089 of 2020
[In the Magistrates Court at Tavua Case No. 106 - 2013/EIR 03-2013]
[High Court Case No. HAC 190 of 2019]

BETWEEN : **AMITESH RAM**

AND : **STATE** ***Appellant***
Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. S. Waqainabete for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **23 December 2022**

Date of Ruling : **29 December 2022**

RULING

[1] The appellant with others had been arraigned in the Magistrates' court at Tavua exercising extended jurisdiction with on one count of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009. It was alleged that the appellant together with others on 16 May 2013 at Tavua stole a car radio valued at \$1,200, subwoofer valued at \$500, amplifier valued at \$350, sliding door valued at \$450, 2 side mirror valued at \$80, spoiler valued at \$150, battery valued at \$240, a spanner valued at \$25, bullet twitter valued at \$85, 4 mags with tyres valued at \$1,600, front light valued at \$450, van key valued at \$50, 5 car mats valued at \$30, gold chain valued at \$400, car wiper valued at \$60, Alcatel mobile phone valued at \$139, gold ring valued at \$300, turbo timer valued at \$70, rear light valued at \$100, all to the total value of \$6,499 the property of Subash Chand and immediately before stealing they used force on the said Subash Chand.

- [2] The matter proceeded to hearing and the prosecution had called three witnesses and the appellant too had given evidence. At the end of the trial, the appellant was found guilty and convicted as charged. The case had been referred to the High Court in accordance with section 190 of the Criminal Procedure Act for sentencing. On 31 January 2020, a sentence of 11 years, 07 months and 14 days imprisonment with a non-parole period of 09 years was meted out to the appellant by the High Court.
- [3] The appellant's appeal against conviction and sentence is timely. In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success' [see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].
- [4] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[5] The High Court judge had set out the brief facts as follows:

a. On 16th May, 2013 in Lautoka at about 9.30pm whilst the victim was waiting for a carrier job the accused and two others boarded the carrier of the victim, the accused told the victim to drive to Ba for the wedding of one of his friend's.

b. On the way the accused told the victim to go into a feeder road past the Raviravi Police Post. Here the victim was told to stop the carrier whereby everyone got out. The accused and his friends were making phone calls to ascertain the address where they were going to, at this time the victim told the accused for them to go to the Raviravi Police Post to ask for directions.

c. The victim went back to his vehicle followed by the accused. The accused sat in the front passenger seat grabbed the victim by his neck and punched him on his head. The accused told the victim to get out of the van, at this time another person came and pulled the victim to the back seat where the victim was made to lie on the floor.

d. The accused searched the victim's pockets and took out everything including the victim's money. The victim's t-shirt was removed and he was blind folded. The van was then driven to an unknown place and parked near the sea where the victim's hands were tied with a seat belt that had been cut off from the vehicle.

e. The victim heard his van being stripped and it took them about 10 to 15 minutes to do so. After the accused and the others left, the victim managed to free himself and sought help from people who lived nearby.

f. The matter was reported to the police upon investigation some of the stolen items were recovered by the police the accused was arrested caution interviewed and charged.

[6] The grounds of appeal of the appellant are as follows.

'Conviction:

Ground One

THAT the Learned Magistrate erred in law and in fact when he did not consider in his judgment the serious doubt that arose from the fact that there was no medical report and the non-production of seat belt that was alleged to have been used against the complainant to prove the allegation in relation to the force use against him.

Ground Two

THAT the Learned Magistrate erred in law and in fact when he did not independently assess the totality of the evidence that when properly done would

conclude that the charge could not be supported by the evidence led by the prosecution.

Sentence

Ground Three

THAT the Learned Sentencing Judge erred in law and in fact when he gave a sentence that was outside of the accepted tariff to the appellant.

01st ground of appeal

[7] The appellant's argument is that the complainant was a willing participant in stripping the vehicle of the items mentioned in the charge for the purpose of claiming indemnity from the insurer. His contention that the complainant had not produced a medical report showing injuries and the failure on the part of the prosecution to produce the seat belt with which the complainant's hands were allegedly tied, was because of the above reason.

[8] However, the complainant had explained that he only had a slight headache and he took some tablets and there was nothing serious requiring him to seek medical attention. Thus, there could not have been a medical certificate anyway. With regard to the seat belt, a police officer (PW3) had stated that it was taken as an exhibit but did not know where it was and could not say whether a photograph of it was taken.

[9] It does not appear in evidence that the complainant had made a claim to an insurer following the robbery or why he decided to complain of a robbery eventually if the incident was a joint exercise. Therefore, there is no credibility to that line of defense. Further, if the robbery was staged to create the basis for an insurance claim, it is difficult to explain why the robbers had stolen several valuable items from the complainant himself.

02nd ground of appeal

[10] The foundation for this ground of appeal is that the prosecution had not produced the recovered items or at least photographs of them physically in court. Some of the

recovered items appear to have been released to the complainant later. Some stolen articles had never been recovered; no photographs had been produced at the trial.

- [11] The Magistrate had considered in detail the appellant's evidence at paragraphs 175 - 185 of the judgment. He had accepted the evidence of the complainant for the reasons set out at paragraphs 186-196 despite highlighting the shortcomings in the investigation and the prosecution case at paragraphs 197-203. Coupled with the appellant's confession which is not being challenged in this appeal, there is no basis to conclude at this stage without trial transcripts that there is a reasonable prospect of success of the appellant's appeal on the basis that the conviction is unreasonable or cannot be supported having regard to the evidence.

03rd ground of appeal (sentence)


- [12] 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. However, 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 whereas this case is more akin to a robbery of a taxi driver and the sentencing tariff for robberies of public service providers should have been adopted.
- [13] 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 [vide **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012, **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 & **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].
- [14] Therefore, the appellant deserves to be given leave to appeal against sentence on the High Court judge's application of the wrong tariff and ending up with the ultimate sentence of 11 years, 07 months and 14 days. The full court may decide what the appropriate sentence should be upon hearing the appeal.

[15] 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 (vide **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).

Orders:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL