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

CRIMINAL APPEAL NO. AAU 096 of 2016
[High Court No. HAC 316 of 2014]
(In the Magistrates Court at Nasinu No. 1456/2014]

BETWEEN	:	**MANOA TABUALUMI**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Gamalath, JA**
	:	**Prematilaka, JA**
	:	**Dayaratne, JA**
Counsel	:	**Mr. N. Tuifagalele for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**05 May 2022**
Date of Judgment	:	**26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have been intrigued by the question as to the selection of an appropriate sentence that commensurate to the gravity of the offence as reflected in a charge and the reason for this is directly referable to the level of discretion that a sentencing judge may exercise within the pale of statutory demarcations and the guidance coming from various periodical judicial pronouncements.

Even in relation to the instant appeal, in deciding on the appropriate sentence of imprisonment, the discussion embarked on by Prematilaka J evokes in my mind the same question. As we know, in relation to the aggravating circumstance, apart from the inbuilt provisions of the statutory law, [for example sec. 311 of the Crime Act 2001(Cap017A) that defines what are the elements that constitute the offence of Aggravated Robbery] there are numerous judicial guidance that operates as precedent in deciding on a sentence of imprisonment. Such considerations operate as the basic norms that are to be followed in quantifying an appropriate final sentence. In other words the whole exercise of the complex affair of selecting a final decision on a sentence has to be carried out within the basic structures in built in to such exercise. The prescribed aggravating and mitigating factors play a pivotal role in that exercise.

[2] However, in the exercise of the sentencing powers within the parameters as discussed above, how would a sentencing judge be able to use the judicial discretion is the question that intrigues me constantly. This is closely related to the judicial evaluation of basic material of a case, namely the evidence; the facts and circumstances, the brick and mortar of a case, which differs in every aspect from one case to the other. As it is common ground that each case revolves around its own facts and circumstances and no case is identical to the other in so far as the human behavioral aspects are concerned.

A sentencing judge is placed on the onerous task of making a correct judgment mainly based on the evidence of each case by taking into account the differing nuances uniquely applicable to each case. This is a discretionary power that is needed to be carried out objectively and without being arbitrary. The pathway that is traversed until it reaches its finality should be reflected in the sentencing decisions.

[3] In my opinion this exercise should be free of the influence coming through the overbearing rules or regulations that impose, in a rigid sense, a degree of restriction on the exercise of judicial discretion in dealing with the facts relating to a case. There should be expressed free flow of thoughts untrammeled by restrictions of any sort in the exercise of judicial discretion in deciding on the level of culpability *vis a vis* the totality of evidence upon

which the primary decision making should be carried out in sentencing. The operation of the rules, the regulations and the guiding principles are secondary to the initial exercise.

[4] I wish to emphasis that the exercise of the judicial discretion is one of the prime most factors in sentencing and it is, as I see it, carries a great significance in a case. As stated in his observations in the *Rule of Law* by Lord Chief Justice (ex) of England and Wales Tom Bingham, on "*Law and discretion", Chapter 4, ps.53,54* ;

> *"It is widely (and rightly) regarded as important that judges should enjoy a measure of discretion when passing sentence on convicted criminals, since if they are obliged to impose a prescribed penalty for a given offence they are unable to take account of the difference between one offence and another and between one offender and another. This makes for injustice, since offences vary widely in gravity, even with offences of the same description, and the circumstances of individual offenders are almost infinitely various. Parliament generally recognizes the value of such a discretion, and usually lays down a maximum penalty but only rarely a fixed or minimum penalty. It is also, however, a source of injustice if severity of a criminal sentence is dictated by judicial prejudice predilection, or whimsy (as in a case reported a number of years ago when a judge told a defendant convicted of a reasonably serious crime that he would ordinarily send him to prison, but would not because it was the judge's birthday). It would also be unjust if the severity of sentencing varied unduly in different parts of the country, a sentencing postcode lottery.*
>
> *Current arrangements generally preserve the judge's sentencing discretion, but constrain it in three ways. First, sentencing guidelines and decisions are promulgated which indicate the appropriate range of sentence for different offences, identifying factors which may aggravate of mitigate the offence. Secondly, a defendant sentenced in the Crown Court can seek to appeal against his sentence, and if the Court of Appeal considers the sentence significantly too severe on the particular facts in the light of the guidelines and earlier decisions it will reduce it to an appropriate level. Thirdly, the Attorney General can seek leave to refer a sentence to the Court of Appeal as unduly lenient. Occasional cases had arisen in which public opinion was, rightly, outraged by the inadequacy of sentences passed on convicted defendants, against which the prosecution could unto appeal, and this relatively new power was introduced to allow the Court of Appeal, at the instance of the Attorney General, to increase an unduly lenient sentence to an appropriate level. But public and political comment are not a sure guide. Some will recall the public outcry and criticism by*

> *the Home Secretary of a sentence imposed in June 2006 on a child kidnapper and abuser named Craig Sweeney. The Attorney General considered the Home Secretary's intervention unhelpful, and did not refer the sentence to the court as unduly lenient. The experienced judge who imposed the sentence had acted in loyal compliance with the scale laid down by the guidelines and earlier decisions.*
>
> *The rule of law does not require that official or judicial decision makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."*

[5] In that context, the guiding principles as prescribed by the guideline judgments have to be considered as providing tools to reach at conclusions which are just in all circumstances, supplemented with sound reasoning. They are to be used without compromising on the discretionary power a sentencing judge is required to assert. I find the reflection of this idea in the broad based overarching guidelines as laid down in the following sentencing guidelines of the UK;

"Taken from Sentencing Guidelines Council Guideline Overarching Principles: Seriousness.

> *The lists below bring together the most important aggravating and mitigating features with potential application to more than one offence or class of offences. They include some factors which are integral features of certain offences; in such cases, the presence of the aggravating factor is already reflected in the penalty for the offence and cannot be used as justification for increasing the sentence further. The lists are not intended to be comprehensive and the factors are not listed in any particular order of priority. If two or more of the factors listed describe the same feature care needs to be taken to avoid "double counting".*

Aggravating factors

Factors indicating higher culpability:

- *offence committed whilst on bail for other offences;*
- *failure to respond to previous sentences;*
- *offence was racially or religiously aggravated;*
- *offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation);*
- *offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability);*

- *previous conviction(s), particularly where a pattern of repeat offending is disclosed;*
- *planning of an offence;*
- *an intention to commit more serious harm than actually resulted from the offence;*
- *offenders operating in groups or gangs;*
- *'professional' offending;*
- *commission of the offence for financial gain (where this is not inherent in the offence itself);*
- *high level of profit from the offence;*
- *an attempt to conceal or dispose of evidence;*
- *failure to respond to warnings or concerns expressed by others about the offender's behavior;*
- *offence committed whilst on license;*
- *offence motivated by hostility towards a minority group, or a member or members of it;*
- *deliberate targeting of vulnerable victim(s);*
- *commission of an offence while under the influence of alcohol or drugs;*
- *use of a weapon to frighten or injure victim;*
- *deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence;*
- *abuse of power;*
- *abuse of a position of trust.*

Factors indicating a more than usually serious degree of harm:

- *multiple victims;*
- *an especially serious physical or psychological effect on the victim, even if unintended;*
- *a sustained assault or repeated assaults on the same victim;*
- *victim is particularly vulnerable;*
- *location of the offence (for example, in an isolated place);*
- *offence is committed against those working in the public sector or providing a service to the public;*
- *presence of others for example, relatives, especially children or partner of the victim;*
- *additional degradation of the victim (for example, taking photographs of a victim as part of a sexual offence);*
- *in property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (for example, where the theft of equipment causes serious disruption to a victim's life or business).*

Mitigating factors

Factors indicating lower culpability:

- *a greater degree of provocation than normally expected;*

- *mental illness or disability;*
- *youth or age, where it affects the responsibility of the individual defendant;*
- *the fact that the offender played only a minor role in the offence.*

Offender mitigation

- *genuine remorse;*
- *admissions to police in interview;*
- *ready co-operation with authorities."*

[6] In the exercise of the discretionary powers in deciding on what would constitute aggravating circumstances and what would become factors of mitigation, a judge is free to draw from several guidelines depending on their either the universal application or uniqueness that is possible to be utilized in arriving at a conclusion that is justifiable in all circumstances. A case in point is in **Wise v. State** [2015] FJSC 7 ; CAV 0004 .2015 (24 April 2015). If one examines the list of aggravating circumstances laid down in it as relating to aggravated robbery, by the use of judicial discretion a sentencing judge, must be able to draw certain listed factors to be utilized even in cases which are not aggravated robbery of houses in the night. This is a flexibility possible in sentencing where the use of discretion plays a pivotal role.

[7] The other issue on which Prematilaka J had directed his attention is a matter of jurisdiction. It is common ground that, as it stands ,the appeals from the magistrates' courts acting under extended jurisdiction , by passing the High Court, straight finds their way in to the Court of Appeal , which Prematilaka J perceives as contributing to the already over- loaded work load of the Court of Appeal. However, the appeals coming to the Court of Appeal from the magistracy are in accordance with the Rules and the Rules permit this exercise under law.

[8] Any change to the existing structure has to be by a legislative intervention. If a person aggrieved by a decision of the magistrates' court exercising the invested jurisdiction is allowed to first challenge the decision in the High Court, then in the Court of Appeal and finally in the Supreme Court, he will have the advantage of seeking the intervention at three levels whereas it will not be available to a person who can only invoke the jurisdiction of

the Court of Appeal and thereafter in the Supreme Court on the basis of seeking leave. It in effect is a three tire situation as against a two tire situation and as such it goes contrary to the constitutional right of equality between persons placed in the similar position meaning aggrieved parties of a decision of an original court, be it the High Court or a magistrate's court exercising extended jurisdiction.

[9] Therefore, any change to the existing structure has to be after a careful consideration of all aspects involved in the exercise lets that that would become confusing at the end.

[10] Subject to these observations I agree with the conclusion of Prematilaka J.

Prematilaka, JA

[11] The appellant and his co-offender had been charged in the Magistrate's court at Nasinu exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 15 November 2014 at Kubukawa Road, Laqere, Nasinu in the Central Division.

[12] The appellant and his co-offender had pleaded guilty voluntarily on 27 April 2016 and admitted the summary of facts filed on 07 June 2015. The learned Magistrate had convicted them and sentenced both of them on 06 May 2016 to 08 years of imprisonment with a non-parole term of 05 years.

[13] The appellant had appealed only against sentence and the single judge had allowed leave to appeal against sentence on the grounds that there may have been error in the discount given for the early guilty plea and the learned Magistrate also may have erred in sentencing the appellant treating the incident similar to a night time group invasion of a home while occupants are asleep.

[14] The summary of facts is as follows.

'SUMMARY OF FACTS

The complainant in this matter is Atesh Prasad, 25 years of Nakasi, taxi driver of LT 7331.The first accused is Manoa Tabualumi also known as Manoa Tabualumi Turaga, 20 years of Naibuluvatu Settlement, Kalabu, unemployed. The second accused is Taniela Qionimacawa, 18 years, of Naibuluvatu Settlement, unemployed.

AGGRAVATED ROBBERY

On 15 November 2014, at about 3.50am, the complainant picked both accused and two other unknown men itaukei men from Laqere and conveyed them to Nakasi, Tovata and back to Laqere. When the complainant dropped them back at Laqere, three men got off the taxi while one of the men from the back seat, grabbed the complainant's neck from behind. The accused persons stole his wallet $100 cash from the complainant's pocket. In the process the complainant was punched several times on his face, head and back. The accused persons also stole another $100 from a box in the complainant's taxi. Both accused persons then fled the scene. The complainant sought assistance from the Laqere Checkpoint.

The matter was reported at the Nasinu Police Station.

CAUTION INTERVIEW AND CHARGE

The first accused was interviewed under caution on 22 November 2014 at the Nasinu Police Station. Under caution, the first accused said he drank alcohol and was drunk. He was with the second accused and two others. He sat on the front passenger seat of the complainant's taxi while the second accused and two others sat at the back seat. He said the taxi was hired for a joy ride to Nakasi and back to Laqere. At Laqere, the first accused grabbed the complainant while the second accused and his another searched the complainant's pockets.

The second accused was interviewed under caution on 21 November 2015 at the Nasinu Police Station. Under caution, he said that he met the first accused and two others at Laqere Bridge. They hired the taxi for a joy ride to Nakasi. At Nakasi, the first accused changed his seat and sat at the back passenger seat. When the first accused grabbed the complainant's neck, second accused then punched the complainant's face and fled the scene.

Both accused were then formally charged with one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree 2009.

Dated this 7th of June 2015'

Ground of appeal

[15] Though not specifically mentioned in the sentencing decision it is clear that by picking 08 years as the starting point calling it 'at the bottom of the tariff' the learned Magistrate had followed the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment. He had enhanced the sentence on account of aggravating features by 03 years and given discounts of 02 year for mitigating features and another 01 year for the early guilty plea ending up with the head sentence of 08 years.

[16] The main focus of the appellants' counsel's argument is that the learned Magistrate had committed a sentencing error in following the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) because the appellant's case was not a home invasion in the night but an attack on a taxi driver and therefore, the Magistrate had acted on a wrong sentencing principle requiring the appellate court's intervention in the matter of sentence.

[17] The trial judge had applied the sentencing tariff of 08-16 years of imprisonment set in ***Wise*** and taken 08 years as the starting point without being mindful that the tariff in ***Wise*** was set in a situation where the offenders had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. The factual background in ***Wise*** was as follows.

> '*[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*
> *[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.*
> *[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'*

[18] From the summary of facts, it is difficult to see how the factual background of this case fits into a similar scenario the Supreme Court dealt with in ***Wise*****.** Courts have followed different sentencing tariffs based on severity of the offending though all are aggravated robberies in terms of the Crimes Act, 2009 carrying a maximum sentence of 20 years of imprisonment. Examples are 'street mugging' (18 months to 05 years), 'attack against taxi drivers' (04 to 10 years) and 'night home invasions with violence inflicted by a group of men armed with weapons' (08 to 16 years of imprisonment) and similar kind of 'spate of robberies' (10 – 16 years).

[19] In ***Wise*** the Supreme Court laid down some examples of aggravating features namely that the offence committed (i) during a home invasion. (ii) in the middle of the night when victims might be at home asleep (iii) carried out with premeditation, or some planning (iv) with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked and (v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way (vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye and (vii) the victims frightened were elderly or vulnerable persons such as small children.

Tariff for street mugging

[20] The Court of Appeal in **Singh v State** [2022] FJCA 28; AAU0049.2017 (3 March 2022) considered in detail the historical development of sentencing in cases known as street mugging under the Penal Code and Crimes Act, 2009 and adopted the tariff of 18 months to 05 years of imprisonment following **Raqauqau v State** [2008] FJCA 34; AAU0100 of 2007 (4 August 2008) and **Qalivere v State** [2020] FJCA 1; AAU71 of 2017 (27 February 2020).

[21] However, the Supreme Court in the recent decision in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) discussing the topic of sentencing for 'street muggings' particularly ***Raqauqau*** remarked that the sentencing range of 18 months' to 05 years' imprisonment, with no other guidance, can itself give rise to the risk of an undesirable

disparity in sentencing and a more nuanced approach was necessary. In doing so, the Court stated that sentencing tariff in ***Wise*** was referring only to aggravated robberies involving home invasions but not to all cases of aggravated robberies as argued by the State.

[22] The Supreme Court accordingly set new guidelines for sentencing in cases of street mugging by adopting the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England and adapted them to suit the needs of Fiji based on level of harm suffered by the victim. The Court also stated that there is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence depending on which of the forms of aggravated robbery the offence takes.

[23] In a significant move the Supreme Court identified starting points for three levels of harm *i.e.* high (serious physical or psychological harm or both to the victim), medium (harm falls between high and low) and low (no or only minimal physical or psychological harm to the victim) as opposed to the appropriate sentencing range for offences as previously used and stated that the sentencing court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range adding that the starting point will apply to all offenders whether they plead guilty or not and irrespective of previous convictions.

[24] The Court advised the sentencers that they should, having identified the initial starting point for sentence, must then decide where within the sentencing range the sentence should be, adjusting the starting point upwards for aggravating factors and downward for mitigating ones some of which the Court identified but admitted that they were not exhaustive.

[25] (i) Significant planning (ii) prolonged nature of the robbery (iii) offence committed in darkness (iv) particularly high value of the goods or sums targeted (v) victim is chosen because of their vulnerability (for example, age, infirmity or disability) or the victim is perceived to be vulnerable (vi) offender taking a leading role in the offence where it is committed with others (vii) deadly nature of the weapon used where the offender has a

weapon (viii) restraint, detention or additional degradation of the victim, which is greater than is necessary to succeed in the robbery and (ix) any steps taken by the offender to prevent the victim from reporting the robbery or assisting in any prosecution, would be such non-exhaustive aggravating features.

[26] On the mitigating factors the Court laid down (i) no or only minimal force was used (ii) the offence was committed on the spur of the moment with little or no planning (iii) the offender committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure (iv) no relevant previous convictions (v) genuine remorse evidenced, for example, by voluntary reparation to the victim (vi) youth or lack of maturity which affects the offender's culpability and (vii) any other relevant personal considerations (for example, the offender is the sole or primary carer of dependent relatives, or has a learning disability or a mental disorder which reduces their culpability, as possible but not all inclusive mitigating factors.

[27] In a case where the accused masked and armed with knives, a pinch bar, and bottles raided a supermarket and robbed cash from cashiers and other valuables from some customers, the High Court also had identified some aggravated and mitigating factors *i.e.* (i) the degree of force used or threatened (ii) the degree of injury to the victim or the nature of and duration of threats (iii) whether a weapon is involved in the use or threat of force (iv) whether it is group offending (v) the role as the ringleader (vi) whether the victims are vulnerable such as elderly people and persons providing public transport (vii) the value of items taken and (viii) whether the offence was committed whilst the offender was on bail have been identified as aggravating features. (i) timely guilty plea (ii) clear evidence of remorse (iii) ready co-operation with the police (iv) response to previous sentences (v) first offence of violence (vi) voluntary return of property taken (vii) playing a minor part, and (viii) lack of planning have been counted as mitigating circumstances [see **State v Rokonabete** [2008] FJHC 226; HAC118.2007 (15 September 2008)]. Needless to say, that these are also not part of an exhaustive list.

[28] Thus, on the perusal of the aggravating and mitigating factors identified by courts from time to time it is clear that there are unsurprisingly common factors in all forms of aggravated robbery cases and that they would only be a guidepost to a sentencing court but their application to a particular offender would depend on the facts and circumstances of his or her case. Not all of them would apply to every case and there can come up aggravating and mitigating factors not identified before in any given case. The sentencing courts should be flexible enough to recognize and apply them accordingly.

[29] The Supreme Court in ***Tawake*** also said that is no reason why the methodology proposed and applied therein should be limited to 'street muggings' and hoped that in appropriate cases either party may urge the Court of Appeal for this methodology to be considered for sentencing for other offences.

[30] The present appeal is one such case. It does not involve an incident of 'street mugging' but concerns an attack on a taxi driver. However, may be due to lack of time since the pronouncement in ***Tawake*** where according to the state counsel the State had hoped to obtain guidelines for sentencing in all forms of aggravated robberies, there was no application in terms of the procedure laid down in Sentencing and Penalties Act for a guideline judgment for aggravated robberies in the form of attacks on public service providers before this court based on ***Tawake***. Neither party was ready to assist court by proper submissions to achieve such an outcome either.

[31] Therefore, this court is ill-equipped without any assistance from either party to decide on the appellant's sentence appeal by using the methodology laid down in ***Tawake*** by the Supreme Court for 'street mugging' because in order to apply those guidelines this court should first set starting points depending on the level of harm for aggravated robberies in the form of attacks on public service providers. In the circumstances, this court decided to approach the task of considering the appellant's sentence appeal based on tariff for attacks on public service providers amounting to aggravated robberies namely 04-10 years of imprisonment hitherto followed by courts with reasonable consistency.

Attacks against taxi drivers

[32] The decision in **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment, Gounder J. examined the previous decisions as follows and took a starting point of 06 years of imprisonment.

> *'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*
>
> *[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*
>
> *[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*
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> *[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*
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> > *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*
>
> *[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was):*
>
> > *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[33] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Raqici*** and Gounder J. stated

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea…'*

[34] It was held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'[17] it appears that 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.'*

[35] Therefore, picking 08 years as the starting point by the Magistrate following tariff established in ***Wise*** demonstrates a sentencing error. However, I must hasten to add that this case or cases of similar nature cannot and should not be treated only as simple 'street mugging' cases. The complainant was attacked while performing a vital service for the public as a driver of a taxi at about 3.50 am when not many taxi drivers would have been around. The appellant and his co-offenders numbering four had got him to convey them from Nakasi to Laqere and back in a joy ride before violently robbing him. The appellant played a leading role by grabbing the complainant while the others reached for his pockets and a box in the taxi depriving him of $200. That must have been all his earnings for a few days. However, the appellant and his co-offenders were not armed and they had used low–medium level of violence (no serious physical or psychological harm) by punching on his face head and back. The complainant had suffered no injuries. The appellant, 24 years at the time of the commission of the offence and a first offender, had pleaded guilty early in the proceedings.

[36] As far as this appeal is concerned, it is clear that this incident is objectively more serious in nature than simple 'street mugging' and it is in the form of 'attacks against taxi drivers'. I am inclined to adopt the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015]

FJCA 178; AAU48.2011 (3 December 2015)] in dealing with this appeal. In doing so, I shall be guided by the sentencing tariff of 04-10 years of imprisonment.

[37] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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. 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. However, the mere fact that a sentence is within the accepted range does not necessarily mean that it fits the crime.

[38] When a sentence is challenged in appeal the guidelines are whether the trial judge (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 [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].

[39] As I have already held, the learned Magistrate had erred in applying the sentencing tariff in ***Wise***. In the meantime the appellant had served 05 years and 05 months when he was released on bail pending appeal by this court on 20 October 2021 primarily on the premise that his appeal may not reach the full court in the near future. But it did. He has not breached any of the bail condition since then. In the circumstances, I think 05 years and 05 months of imprisonment may have served the purposes of sentencing in this case though it should not be taken as a benchmark for future sentences. In the circumstances, I do not think that he should be made to suffer any further incarceration at this stage. Although, the sentencing tariff is 04-10 years, 08 years of imprisonment seems excessive in proportionate to the crime committed given all the circumstances of the case.

[40] In view of my decision on the sentence I need not consider whether the discount of 01 year for the guilty plea is justified or not except to say for the purpose of completion that in Fiji the decision as to what discount should be given to the guilty plea is governed by the decisions in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) and there is no entitlement for an automatic 1/3 discount for early guilty pleas.

[41] Before parting with this appeal, I think it appropriate to express my views on a matter vitally important to the Court of Appeal raised by the Supreme Court in ***Tawake*** where the Supreme Court commented on what the correct forum would be to hear an appeal when the Magistrate court exercises extended jurisdiction.

> *'[33] There was one topic, unrelated to the issues raised on the appeal, which we drew the parties' attention to. Tawake was tried in the magistrates' court acting under its extended jurisdiction. At first blush, any appeal against his conviction or sentence should have been made to the High Court, not the Court of Appeal. We have not addressed the question of the venue for Tawake's appeal any further as understandably neither party were in a position to address us on the topic. But we flag the issue up now in case it arises again. If such appeals are regularly being made to the Court of Appeal, the Court of Appeal needs to address the question as to whether that is appropriate.'(emphasis mine)*

[42] This is an important issue as far as the Court of Appeal is concerned in as much as a substantial number of appeals are filed in the Court of Appeal every year against convictions and sentences entered in the Magistrates court exercising extended jurisdiction and those appeals consume a considerable time and resources of the full court as well as the single judge of the Court of Appeal. Such appeals, most of which are against sentence, could be dealt with by a judge of the High Court sitting alone and need not exhaust the precious time of the full court of the Court of Appeal and that space could otherwise be devoted to more substantive and long-awaited appeals from the High Court.

[43] One view is that when the Magistrates court exercises jurisdiction invested in it by the High Court by virtue of section 4(2) of the Criminal Procedure Act, 2009 ('extended jurisdiction' as opposed to its original jurisdiction) to try an offence, which, in the absence of such extension of jurisdiction, would be beyond the Magistrate's jurisdiction, the Magistrates' court is deemed to exercise original jurisdiction of the High Court (subject, of course to the limitation of powers of sentencing) and therefore, the right of appeal as provided in section 21 of the Court of Appeal Act to appeal to the Court of Appeal is available against a conviction, sentence or acquittal by the Magistrates court. Therefore, if the proceedings before a Magistrate against an accused under extended jurisdiction are deemed to be flowing from the original jurisdiction of the High Court pursuant to section 4(2) of the Criminal Procedure Act, 2009, the proper forum to invoke the appellate jurisdiction is the Court of Appeal. This view is, of course, based on a legal fiction.

[44] If not, only a second-tier appeal to the Court of Appeal on a question of law only against conviction or against an unlawful or erroneous sentence is available against a decision of the High Court made in its appellate jurisdiction. Thus, the existence of a decision of the High Court given in the exercise of its appellate jurisdiction is a condition precedent or a *sine qua non* to invoke and cloth the Court of Appeal with jurisdiction under section 22(1) of the Court of Appeal Act. In other words, there is no direct appeal to the Court of Appeal from the Magistrates court whether it exercise original jurisdiction or extended jurisdiction. It is only against the decision of the High Court made in the exercise of its appellate jurisdiction that the next appeal *i.e.* the second tier appeal is available to the Court of Appeal subject, of course, to the limitations imposed by section 22 of the Court of Appeal Act.

[45] The argument to the contrary, with considerable merits, is that in terms of section 99(3), (4) and (5) of the Constitution of the Republic of Fiji, the Court of Appeal has jurisdiction to hear and determine appeals only from the High Court as prescribed by the Constitution and other written law such as section 21 of the Court of Appeal Act which allows the Court of Appeal to hear appeals from convictions, acquittals, sentences or orders refusing bail pending trail by the High Court and not the Magistrates court. Further, section 100(5), (6)

and (7) of the Constitution specifying appellate jurisdiction of the High Court, support the above contention. Therefore, the argument goes that there cannot be a direct appeal to the Court of Appeal against the judgment, sentence or order of a Magistrates court whether given in its original jurisdiction or extended jurisdiction.

[46] If this second line of argument is adopted, all appeals from the Magistrates Court against judgments and orders made in its original and extended jurisdiction will have to be heard in the High Court as the court of first appeal and only a second tier appeal could be lodged in the Court of Appeal in terms of section 22 of the Court of Appeal Act upon a decision of the High Court made in its appellate or supervisory jurisdiction.

[47] I expressed my provisional view on the latter as follows in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020)

> *'[25] This thinking appeals to me as it could do away with the artificially created direct appeal to the Court of Appeal from any judgment, sentence or order given in the Magistrates Court. Such a direct right of appeal to the Court of Appeal is unsanctioned by any provision of the Constitution or any other written law. It also sits in harmony with purposive interpretation of section 21 and 22 of the Court of Appeal Act and section 246 of the Criminal Procedure Act, 2009. However, for this proposition to apply it has to be based on the premise that when the Magistrates Court exercises extended jurisdiction it does not exercise the original jurisdiction of the High Court but its own jurisdiction, for the High Court cannot entertain appeals from its own judgments, sentences or orders or exercise supervisory jurisdiction over such judgments, sentences or orders.'*

[48] However, this judgment is neither the place nor is it the proper the time to decide on this important question of law regarding the correct forum for appeals from Magistrates' court exercising extended jurisdiction. Nevertheless, I encourage parties to address this court on this aspect more fully in a suitable case so that a ruling or judgment could be handed down with the benefit of full arguments in the future.

[49] The sentence appeal of the appellant should be allowed and he should be released from imprisonment immediately upon the pronouncement of this judgment.

Dayaratne, JA

[50] I have read the judgment in draft of Prematilaka, JA. I agree with his decision to allow the sentence appeal and the reasons cited thereon.

Orders

(1) Appellant's appeal against sentence is allowed.

(2) Appellant is to be released from imprisonment forthwith upon the pronouncement of this judgment.

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

.....
Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL