# IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

**IOWANE RAISOKULA**

**Appellant**

**CASE NO: HAA. 24 of 2017**
[MC Suva, Crim. Case No. 441 of 2017]

**Vs.**

**STATE**

**Respondent**

| | | |
|---|---|---|
| **Counsel** | : | Ms. S. Prakash for State |
| | | Ms. W. Elo for Accused |
| **Hearing on** | : | 31st January 2018 |
| **Judgment on** | : | 02nd March 2018 |

## JUDGMENT

1. The appellant was convicted by the magistrate court for the offence of robbery under section 310(1)(b) of the Crimes Act 2009 ("Crimes Act") upon him pleading guilty to the charge and was sentenced on 09/08/17 to a term of 04 years imprisonment. The Leaned Magistrate decided to deduct 2 months in lieu of the time spent in remand and arrived at the sentence of 03 years 10 months. The non-parole period fixed was 02 years.

2. The charge reads thus;

*Statement of Offence*

**ROBBERY:** contrary to section 310(1)(b) of the Crimes Act 44 of 2009.

*Particulars of Offence*

**IOWANE RAISOKULA** on the 21st day of March, 2017, at Lami in the Central Division stole 1 x Samsung Galaxy J5 valued $799.00 from **Ruby Singh** and at the time of committing theft, he used force on the said **Ruby Singh**.

3. The appellant now assails his conviction and sentence on the following grounds;

***Appeal against Conviction:***

1. ***THE*** *Learned Magistrate erred in law and in fact when she convicted the Appellant for the offence of Robbery when there was no evidence to substantiate that at the time of committing the said offence (theft), the Appellant used force on the Complainant.*

***Appeal against Sentence:***

1. THE *Learned Magistrate erred in law by considering the wrong tariff/starting point when determining the Appellant's sentence.*
2. **THE** *Sentence imposed on the Appellant is harsh in the circumstances.*

***Appeal against the conviction***

4. This is a case where the appellant was convicted by the magistrate court on a plea of guilty.

5. Section 247 of the Criminal Procedure Act 2009 ("Criminal Procedure Act") reads thus;

*Limitation of appeal on plea of guilty and in petty cases*

247. No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

6. In the aforementioned section the lawgivers had stated without any ambiguity that an appeal against a conviction where the conviction is entered by a magistrate court on a plea of guilty shall not be allowed. The appellant relies on the long

standing practice of this court following the judgment in the case of ***Deo v Reginam*** [1976] FJLawRp 1; [1976] 22 FLR 1 (23 January 1976) to overcome the above statutory bar under section 247. In ***Deo v Reginam*** (supra) the court held thus;

> "So far as the appeal against conviction is concerned, section 290(1) of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such a plea by a magistrates' court, except as to the extent or legality of the sentence. However it is well established that an appeal against conviction can be entertained on a plea of guilty if it appears that upon the admitted facts the appellant could not in law have been convicted of the offence charge (R v Forde [1923] 2 KB. 400 at 403); and it is on this proposition that the appeal against conviction is founded."

7. It is pertinent to note that the conviction which was the subject matter in the case of ***R v Forde*** [1923] 2 KB. 400 cited in ***Deo v Reginam*** (supra) was not a conviction entered by a magistrate. It was a conviction entered by a recorder at the Central Criminal Court. Moreover, the judgment in ***Forde*** (supra) does not indicate that the court had to deal with a statutory bar akin to the provisions of the Criminal Procedure Code alluded to in the above paragraph in ***Deo v Reginam*** (supra). The provisions under section 247 of the Criminal Procedure Act is identical to the said provisions under the Criminal Procedure Code. In fact my reading of the judgment in ***Forde*** (supra) is that there was no statutory bar against appeals from the Central Criminal Court to the Court of Criminal Appeal.

8. In ***Forde*** (supra) where the court had to deal with the meaning and effect of section 1 and 2 of the Criminal Law Amendment Act of 1922, the court said;

> "The words of the statute cannot be construed, contrary to their meaning, as embracing cases merely because no good reason appears why those cases should be excluded. It is not the duty of the Court to make the law reasonable, but to expound it as it stands, according to the real sense of the words."

9. Given that the Court of Criminal Appeal had taken the above stand on interpretation of the law in ***Forde*** (supra), I am unable to agree with the notion that the said decision supports the contention that this court can override the provisions of section 247 of the Criminal Procedure Act which clearly provides that appeals against conviction on plea of guilty by the magistrate court shall not be allowed by creating an exception that has the effect of amending the said provisions.

10. As I have pointed out above, the conviction which the court dealt with in ***Forde*** (supra) was not one entered in the magistrate court. It is to be noted that the law relating to appeals from the magistrate court is not the same as the law on appeals against conviction on indictment.

11. Section 108 of the Magistrates' Courts Act 1980 of the United Kingdom in fact imposes a bar to appealing against conviction. However, in my view, the language used in section 108 of the Magistrates' Courts Act 1980 of the United Kingdom is not restrictive as that of section 247 of the Criminal Procedure Act. The said section 108 simply creates a right of appeal against sentence if the person convicted by the magistrate had pleaded guilty but does not expressly prohibit the allowing of appeals against conviction on plea of guilty.

12. Section 108 of the Magistrates' Courts Act 1980 of the United Kingdom reads thus;

    108 Right of appeal to the Crown Court.

    (1) A person convicted by a magistrates' court may appeal to the Crown Court—

        (a) if he pleaded guilty, against his sentence;

        (b) if he did not, against the conviction or sentence.

13. The other main difficulty as I see it, is the clear intention of the lawgivers to prohibit appeals on plea of guilty from the magistrates court being allowed demonstrated by stipulating the provisions under section 247 of the Criminal Procedure Act which came into force in 2009 notwithstanding the practice of this court to entertain such appeals against conviction following the decision in ***Deo v Reginam*** (supra) since 1976.

14. All in all, it is my opinion that there is a patent lack of jurisdiction for this court to entertain appeals against conviction entered by the magistrate court on a plea of guilty.

15. Nevertheless, I am also of the view that there should be a legal remedy for those who are convicted by the magistrate court on equivocal pleas of guilty. An equivocal guilty plea is a nullity and therefore the ensuing conviction cannot stand.

16. In my opinion, the proper course of action according to the existing law for a person convicted by a magistrate court on an equivocal plea to seek redress is to invoke the revisionary jurisdiction of the high court under section 260 of the Criminal Procedure Act. Given the provisions of section 262(5) of the said act which reads *"[w]here an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed"* it is manifestly clear that a person convicted on a plea of guilty by the magistrate court whose appeal against conviction cannot be allowed in terms of section 247 of the Criminal Procedure Act, can invoke the revisionary jurisdiction of the high court.

17. Since equivocality of a plea is usually challenged based on errors apparent on the face of the record and involves questions of legality, jurisdiction and/or procedural impropriety, such matters can in fact be properly dealt with under revisionary jurisdiction as opposed to appellate jurisdiction.

18. However, I am also in favour of amending the provisions of section 247 of the Criminal Procedure Act in order to allow appeals on equivocal pleas of guilty which of course is a matter for the legislature. On that note I also wish to highlight an issue which caught my attention. The short title for section 247 of the Criminal Procedure Act is *"Limitation of appeal on plea of guilty and in petty cases"*. Section 309 of the Criminal Procedure Code bears the same short title. However, no provision is found under section 247 of the Criminal Procedure Act in respect of 'petty cases' whereas subsections 2 and 3 of section 309 the Criminal Procedure Code makes

provisions in relation to cases that may be identified as 'petty cases'. Therefore, it stands to reason that either the provisions of section 247 of the Criminal Procedure Act or its short title needs to be amended for the purpose of completeness.

19. Coming back to the case at hand, in this appeal the counsel for the respondent does not raise any issue on the jurisdiction of this court. In fact the counsel for the respondent concedes to the ground of appeal against the conviction and also to grounds against the sentence. The written submissions filed on behalf of the state is titled "RESPONDENT'S SUBMISSIONS IN SUPPORT OF AN APPLICATION TO APPEAL AGAINST CONVICTION AND SENTENCE".

20. When there is a patent lack of jurisdiction, a court cannot deal with the matter even with the consent of the parties. However, given the discussion above, I consider it appropriate to deal with the appeal against the conviction on the basis of determining whether there are sufficient grounds for this court to invoke the revisionary jurisdiction under section 260 of the Criminal Procedure Act.

***Is the plea equivocal?***

21. On the ground of appeal against the conviction the counsel for the appellant argues that the plea of guilty entered by the appellant in the magistrate court is equivocal for the reason that the summary of facts do not support the elements of the offence of robbery.

22. The summary of facts reads thus;

- On the 21st of March 2017 at about 1.30pm at Vetaia Street,Lami **Ruby Singh (A-1), 34 years old, Warehouse Assistant, of Tokotoko Back Road, Navua** was walking towards her work place.
- On the above mentioned date and time, **Iowane Raisokula (B-1), 21 years, Casual Worker of Namosi Zone, Qauia Settlement, Lami** came from behind of (A-1) and forcefully grabbed her Samsung Galaxy J5

phone value[d] at $799.00 from her left hand and ran up along Vetaia Street.

- (A-1) reported the matter at the Lami Police Station.
- (B-1) was later arrested and taken to Lami Police Station on 31/03/2017.
- (B-1) was interviewed under caution and admitted stealing the phone from (A-1). (please refer to Q&A: 18-24).
- (B-1) was charged for **ROBBERY: Contrary to Section 310[1][a][i] of the Crime Act No. 44 of 2009.**
- Nil recovery made as (B-1) threw the phone away before jumping into the Qauia River.
- (B-1) is a known offender.
- (B-1) is appearing in custody at Suva Magistrate Court today 03/04/2017.

23. The contention of the counsel for the appellant is that the words "forcefully grabbed" is not sufficient to establish 'force' within the meaning of section 310(1)(b) of the Crimes Act.

24. Therefore, the main issue to be dealt with in order to decide whether the plea of guilty entered by the appellant was equivocal is whether 'forcefully grabbing the phone from the victim's left hand' as stated in the summary of facts in this case is sufficient to establish the element involving 'force' in the offence of robbery under section 310(1)(b) of the Crimes Act.

25. First of all, I consider it important to examine the elements of the offence under section 310(1)(b) of the Crimes Act. Section 310 reads thus;

*Robbery*

310. (1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and –

(a) immediately before committing theft, he or she –

(i) uses force on another person; or

(ii) threatens to use force then and there on another person –

with intent to commit theft or to escape from the scene; or

(b) at the time of committing theft, or immediately after committing theft, he or she–

(i) uses force on another person; or

(ii) threatens to use force then and there on another person–

with intent to commit theft or to escape from the scene.

26. Accordingly, the elements of the offence of robbery can be identified as;
    a) The accused;
    b) Committed the offence of theft;
    c) Used force or threatened to use force on another person with intent to commit theft or to escape from the scene either;
        i. immediately before committing theft [section 310(1)(a)]; or
        ii. at the time of committing theft; or immediately after committing theft [section 310(1)(b)].

27. The element that is disputed in this appeal is that the accused "used force on the victim at the time of committing theft with the intention of committing theft". The appellant does not dispute the fact that he committed the offence of theft. His contention is that the facts he admitted, to be precise the fact that he ". . . forcefully grabbed her Samsung Galaxy J5 phone value[d] at $799.00 from her left hand and ran . . ." does not establish that he 'used force on the victim'.

28. Since the committing of the offence of theft is a main element of the offence of robbery, it is useful to examine the elements of the offence of theft under section 291 of the Crimes Act. Section 291 of the Crimes Act reads thus;

"A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property."

29. Accordingly, the elements of the offence of theft can be identified as;
    a) The accused;
    b) dishonestly appropriated;
    c) property belonging to another;
    d) with the intention of permanently depriving the other of that property.

30. With the elements of theft discerned as provided above, the issue raised by the appellant can now be further simplified as "does the summary of facts demonstrate that the appellant used force on the victim at the time he appropriated the phone that belongs to the victim"

31. To answer the above question in the negative, the counsel for the appellant strongly relies on the case of ***RP v DPP*** [2012] EWHC 1657 and argues that there should be physical contact between the accused and the complainant in order to establish the offence of robbery and the summary of facts does not indicate whether there was such physical contact. The counsel also submitted that the summary of facts should have explained the degree and the type of force used.

32. In support of the application of the appellant as claimed, the counsel for the respondent relying on the case of ***Savou v State*** [2017] FJHC 954; HAA35.2017 (22 December 2017) submitted that the act of grabbing merely constitutes taking of the possession of the item stolen which is an element of stealing and nothing else.

33. In my view, the above argument of the counsel for the respondent has been adequately dealt with in the following paragraphs in ***RP*** (supra);

    4. . . .

    The simple question posed by the case is:

*"Were we correct to refuse a submission of no case to answer in respect of the allegation of robbery, on the basis that the act of snatching the cigarette from the complainant's hand, in the circumstances described, was sufficient to constitute 'force' for the purposes of Section 8 of the Theft Act 1968?"*

5. Under the law as it existed before the enactment of the Theft Act, the answer would unquestionably have been no. What the old law required was that greater force than was merely required to take an object was required to be applied before the offence became an offence of robbery. Section 8 of the Theft Act provides:

> *"(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force."*

6. As a matter of language, it is important to note that the statute requires the use of "force on any person" or putting "any person in fear of being then and there subjected to force". Although the old distinctions under the Larceny Act have gone, there remains a basic requirement for the commission of the offence that force is used on a person.

34. The definition of robbery under the Theft Act 1968 alluded to above is identical to the one under section 310 of the Crimes Act as far as the elements of the offence are concerned. In essence the Learned Judge in ***RP*** (supra) had said that the act of snatching the cigarette is sufficient to constitute 'force' for the purpose of section 8 of the Theft Act. I couldn't agree more. However, His Lordship had concerns whether that force can be regarded as force used on a person.

35. In fact, paragraph 7 of the said judgment further clarifies this point. The Learned Judge said in paragraph 7 thus;

7. Ms. Zeutler-Munro, for the appellants, accepts that the snatching of a handbag from a woman holding it on her shoulder or in her hand will ordinarily amount to robbery because by the very act of pulling on the handbag force will inevitably be applied to the person of the woman from whom the handbag is snatched. Her concession is a proper and inevitable one in the light of the case law as it has developed since the enactment of the Theft Act.

36. Therefore, in the light of the above discussion in the judgment in ***RP*** (supra) which I fully endorse as it is in line with the opinion I hold, the main argument brought forward by the counsel for the respondent in support of the appellant does not hold water.

37. Theft is dishonestly appropriating the property belonging to another with the intention of permanently depriving the other of the property. However, when committing the offence of theft of an item which is physically held by the victim, if force is used by the accused in order to remove the item from the possession of the victim and where that force used can be regarded as force used on the victim; that 'force' is capable of establishing 'force' within the meaning of the offence of robbery.

38. Now I would turn to examine the arguments raised by the counsel for the appellant. It is pertinent to note that in ***RP*** (supra) the court had to deal with a case where a lit cigarette was snatched from between the fingers of the victim. According to paragraph 3 of the said judgment the facts of the case were as follows;

"In their summary of the evidence, the court, which plainly accepted the evidence of Mrs. Gill as truthful and accurate, set out a little more of what she had said. She said that she had become aware of the three appellants, who walked past her and her husband and another man. They asked Mrs. Gill for a cigarette, to which she replied she did not have a spare one. She explained that

when asked for a cigarette she genuinely thought that the young woman asking was asking for a cigarette and that time no violence was used or threatened. It seems that immediately after she said that she did not have a spare one, one of the appellants, RP, snatched the cigarette that she had in her hand. It was obvious lit because the cigarette was then passed around and smoked by the appellants. She described asking for the cigarette back, stated that one of the appellants had shoved her and the others were talking about her to her face in insulting terms."

39. From the paragraphs of the said judgment I have reproduced above, especially paragraph 7, it is clear that the Learned Judge had no doubt that the act of removing the item in question from the possession of the victim is capable of constituting force within the meaning of the definition of the offence of robbery. But His Lordship had concerns whether that force can be regarded as forced used on the victim as I have noted above.

40. The Learned Judge said in paragraph 15 that;

". . . This case falls squarely on the side of pickpocketing and such like, in which there is no direct physical contact between thief and victim. It cannot be said that the minimal use of force required to remove a cigarette from between the fingers of a person suffices to amount to the use of force on the person. It cannot cause any pain unless, perhaps, the person resists strongly, in which case one would expect inevitably that there would be direct physical contact between the thief and victim as well. **The unexpected removal of a cigarette from between the fingers of a person is no more the use of force on that person than would be the removal of an item from her pocket**. This offence is properly categorised as simple theft." [Emphasis added]

41. The above paragraph clearly explains the reason the Learned Judge decided to conclude that the facts in the said case does not amount to robbery. His Lordship's concern was that the force that was used was minimal. It is pertinent to note that His Lordship did not conclude that the force was not used on the victim in the

given case. As noted in the paragraph I have highlighted, what was held was that the removal of the cigarette was "**no more the use of force on that person than would be the removal of an item from her pocket**".

42. I wish to reiterate that according to paragraph 7 of the judgment, the Learned Judge was satisfied that snatching a handbag from a woman holding it on her shoulder or in her hand amounts to robbery because the force used in the very act of pulling the handbag will inevitably be applied to the person of the women. Whether or not there was physical contact between the accused and the victim was irrelevant. It is pertinent to note that given the two scenarios discussed in the judgment in ***RP*** (supra) which I have referred to above, the facts of the instant case where a phone was grabbed when the victim was holding the phone is similar to the example in paragraph 7 where a handbag which a women was holding was snatched which according to the opinion of the Learned Judge would amount to robbery.

43. Having highlighted the above, I would end my discussion on the judgment in ***RP*** (supra) and turn to the law in Fiji. Given the provisions of section 310 of the Crimes Act it is manifestly clear that the degree/nature of force used is not an element and also does not form part of an element of the offence of robbery. Moreover, the definition provided in that section does not require evidence of physical contact between the accused and the victim. Indeed, the nature and the degree of force used would be a relevant consideration for sentencing but certainly not in considering whether the elements of the offence of robbery are proved.

44. In my view, 'use of force on the person' within the meaning of section 310(1)(b) is constituted if the question is 'whether force was used on the victim at the time of committing the offence of theft', when the victim perceives the force used by the accused to remove the item in question that is in the physical custody of the victim and the victim becomes aware of the removal of the item from his/her possession. Therefore, grabbing of a phone which the victim is holding in his/her hand clearly constitutes 'use of force on the person (victim)' for the purposes of section

310(1)(b) of the Crimes Act. It requires a certain amount of force in order to remove an item like a phone that is being held by a person in his/ her hand. When the phone is being removed from the hand of that person, the force used on the phone by the offender to remove it from the person's hand is inevitably applied on that person and the person perceives that force. In my view, evidence that the victim resisted in such a situation is not required to establish the offence of robbery, but certainly such evidence demonstrates an aggravating circumstance which is relevant for sentencing.

45. On the other hand, if an item held by the victim in his/ her pocket was removed by the offender without the victim's knowledge, that force the offender uses to remove the item from the pocket cannot be regarded as force used on that person. In such a situation, the offence of robbery is not constituted.

46. Given the above, I find that the evidence in the summary of facts to the effect that the appellant 'grabbed the victim's phone from her left hand and ran' is sufficient to establish that the appellant used force on the victim within the meaning of the definition of the offence of robbery under section 310(1)(b) of the Crimes Act. Therefore the summary of facts admitted by the appellant supports the offence to which the appellant entered a plea of guilty. The plea is unequivocal.

47. In the circumstances, I am not satisfied that the magistrate court case record bears evidence that the appellant's plea was equivocal for the reason that the summary of facts does not disclose the offence of robbery.

*Appeal against the sentence*

48. Before I deal with the grounds of appeal against the sentence, I wish to make one observation regarding the application of section 24 of the Sentencing and Penalties Act as I note that the Learned Magistrate had not followed the dicta in the case of ***Sowane v State*** [2016] FJSC 8; CAV0038.2015 (21 April 2016) in applying the said provisions.

49. After adjusting the sentence based on the aggravating factors and the mitigating factors and then giving a discount of 1/3 for the early guilty plea, the Learned Magistrate had declared that the sentence is 4 years imprisonment. Then the Learned Magistrate considered it appropriate to deduct 2 months in lieu of the 5 weeks and 6 days the appellant had spent in custody and again declared that the sentence is 3 years and 10 months. The non-parole period was fixed at 2 years.

50. Section 24 of the Sentencing and Penalties Act reads thus;

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

51. Though the short title of the section 24 above reads *'Time in custody before trial to be deducted'*, according to the provisions therein, the period of time the offender was held in custody shall be regarded as a period of imprisonment already served by the offender unless otherwise directed by the court. Therefore, it is plain that though the final effect of applying section 24 of the Sentencing and Penalties Act can be seen as a reduction of the sentence, the objective of the provisions of this section is to regard the time spent in custody as a period the offender had served, out of the period of imprisonment the offender is required to serve based on the sentence imposed on him by the court.

52. Considering the words used at the commencement of section 24, that is, *"If an offender* ***is sentenced*** *to a term of imprisonment"* I am of the view that the proper time to apply the provisions under this section is after the court had arrived at the final sentence.

53. One of the purposes of imposing a sentence is to 'deter offenders or other persons from committing offences of the same or similar nature' in terms of section 4 of the Sentencing and Penalties Act. Let us for example assume that the circumstances of the offending in a particular case warrants an imprisonment term of 5 years and the offender had spent $1^1/_2$ years in custody at the time of sentencing. If the court

declares $3^1/_2$ years as the final sentence after deducting the said time spent in custody, needless to say that that sentence which was ultimately declared will not have the desired deterrent effect. On the other hand, if the sentencer regard the $1^1/_2$ years period spent by the offender as having the effect of a mitigating factor and subsumed it with the other deductions before arriving at the final sentence, there is a likelihood that the sentencer may still reach 5 years as the final sentence. The latter situation deprives the offender of what can be regarded to a certain extent as an entitlement provided by law.

54. Therefore, it is necessary to apply the provisions of section 24 of the Sentencing Penalties Act after arriving at the final sentence not only for the reason that the language used in the said section requires the sentencer to do so given the aforementioned interpretation, but also because the failure to do so may give rise to the adverse consequences demonstrated above.

55. In my view, the time spent in custody should also be reflected in the non-parole period. Based on a strict interpretation of the Sentencing Penalties Act the non-parole period should be fixed before applying the provisions of section 24.

56. As I have already pointed out the words "is sentenced" are used in section 24. Now let us look at section 18(1) of the Sentencing Penalties Act. The section provides thus;

> 18.(1) Subject to sub-section (2), **when a court sentences** an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

57. Therefore, in my view, the non-parole period should be fixed along with the final sentence. If the period spent in custody is not regarded as time served in respect of the non-parole period but only against the head sentence, there may be situations where the non-parole period is more than the time remaining to be served. This is when the time spent in remand exceeds the difference between the head sentence and the non-parole period.

58. For the reason that the time spent in custody is regarded as a period of imprisonment already served it stands to reason that the same period should be regarded as a period served against the period fixed by the court which the offender is not eligible to be released on parole.

*First ground of appeal against sentence*

59. On the first ground of appeal against the sentence the appellant submits that the Learned Magistrate applied a wrong tariff.

60. In selecting the tariff, the Learned Magistrate had referred to the judgment of this court in the case of ***Rarawa v State*** [2015] FJHC 324; HAA05.2015 (30 April 2015) where His Lordship Justice Madigan pronounced a new tariff for the offence of robbery as stated in the caption of the said judgment. In paragraph 25 of the judgment Madigan J said this;

> [25] In summary the tariffs for robbery should be
>
> 1. Aggravated robbery: 10 – 16 years.
> 2. Robbery (but with concomitant violence): 8 – 14 years.
> 3. Robbery without violence: 2 – 7 years.

61. The Learned Magistrate had selected 8 years as the starting point of the sentence stating that the said starting point is selected taking into consideration the degree of force. Therefore, it is obvious that the Learned Magistrate had selected the tariff of 8 to 14 years which is identified in the above judgment for robbery with concomitant violence.

62. It is pertinent to note that the term 'violence' found in the aforementioned sentencing tariff or the category declared by Madigan J. is not found in the provisions under section 310 of the Crimes Act. In the recent case of ***Dibi V State*** [2018] FJHC 86; HAA96.2017 (19 February 2018) Madigan J had expressed an opinion to the effect that such categories that include words that are not reflected in the offence cannot stand in the light of the Supreme Court decision in

***Vakalalabure v The State*** [2006] FJSC 8; CAV0003U.2004S (15 June 2006). According to paragraph 15 of the judgment in ***Dibi*** (supra) this is what the Supreme Court had said in the aforementioned case which led Madigan J. to reach that conclusion;

> "it is a fundamental principle of our criminal law that a person must not be punished except for offences for which he has been convicted."

63. I was unable to find the exact sentence above in the judgment in ***Vakalalabure*** (supra). However at paragraph 57, the Supreme Court had said thus;

> " . . . However it is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation. It applies with special force where a prosecution for those uncharged matters would be time barred."

64. This principle the Supreme Court was referring to in the above dictum is further explained and discussed in paragraphs 58 to 62 in ***Vakalalabure*** (supra). In my view, the following extract from the case of The Queen v De Simoni [1981] HCA 31; (1981) 147 CLR 383 found in paragraph 59 of the judgment in ***Vakalalabure*** (supra) clearly and succinctly explains the relevant principle;

> " ... the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

65. Upon examining the context the Supreme Court pronounced what I have

reproduced in paragraph 63 above from ***Vakalalabure*** (supra), I find that the sentencing tariffs in the nature of the one that was set out by Madigan J. with regard to robbery with concomitant violence have not been discredited by the Supreme Court in the said judgment.

66. In fact, it is pertinent to note that in the case of ***Raj v State*** [2014] FJSC 12; CAV0003.2014 (20 August 2014) [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court endorsed an imprisonment term of 10 to 16 years as the tariff for the rape of a child whereas the offence of rape does not identify raping of a child victim as a different category of rape. Based on the evidence when it is established that the victim is a child being under the age of 18 years, the aforementioned sentencing tariff is applied by the sentencing court.

67. Coming back to the question whether the Learned Magistrate applied the wrong tariff, my answer to that question is in the affirmative. In my view, the facts established before the Learned Magistrate in the instant case does not justify the selecting of the higher tariff that is identified as the tariff for robbery with concomitant violence. I am inclined to hold the view that the Learned Magistrate fell into error for the reason that there is no clear guideline that specifies the degree and the nature of force that would constitute 'violence' in a case of robbery for the purpose of deciding whether a particular offending would come under the aforementioned tariff in question.

68. The sentencing courts before selecting the said tariff should be cautious to first satisfy that the offending involved violence based on the evidence in the case that would justify applying that tariff where the starting point of the sentence should be at least 8 years.

69. All in all, the first ground of appeal against sentence should be decided in favour of the appellant.

*Second ground of appeal against sentence*

70. The complaint raised on the second ground is that the sentence is harsh in the circumstances.

71. Given that the Learned Magistrate had applied a high tariff which is not appropriate in the circumstances of the offending as established by the facts, it is my view that the second ground of appeal should also be decided in the appellants favour and this court should sentence the appellant afresh.

72. Considering the facts of this case and in view of the decision in ***Rarawa*** (supra) the appropriate tariff is 2 to 7 years imprisonment. Accordingly, I would select 2 years as the starting point of the sentence. In view of the fact that the appellant selected a 34 year old female who was walking in Vetaia Street Lami around 1.30pm as the victim, the disrespect for the freedom of that lady to walk the streets without fear and the disrespect for the private property which the appellant has demonstrated by his conduct, I increase the sentence by 2 years. The attack was not only on that lady but was also on the society where the appellant had breached the peace.

73. Considering the fact that the appellant was a first offender I would deduct 1 year of the sentence. According to the case record, the appellant was produced in court on 03/04/17 but the plea was taken on 10/07/17 where he had pleaded guilty to the charge on the same day. The appellant had made clear admissions in the cautioned interview. Therefore, I would regard the guilty plea as an early guilty plea and that would warrant a one-third reduction. The appellant is accordingly sentenced to 2 years imprisonment with a non-parole period of 18 months in view of the provisions of section 18(1) of the Sentencing and Penalties Act. Given the fact that the offence of robbery is a prevalent offence and therefore with the view of protecting the community and deterring others from committing like offences, I do not consider it appropriate to suspend the sentence. I would hold that the time that should be considered as served should be 2 months in view of the time spent in custody.

74. Accordingly, the appellant is sentenced to an imprisonment term of 2 years with a non-parole period of 18 months. Considering the time spent in custody, time remaining to be served is as follows;

Head Sentence - 22 months

Non-parole period - 16 months.

75. Accordingly, the appellant's sentence imposed on 09/08/17 is set aside and substituted with the sentence as stated in paragraph 74 above.

**Orders of the Court;**

i.) Appeal against conviction is refused;

ii.) Appeal against the sentence is allowed;

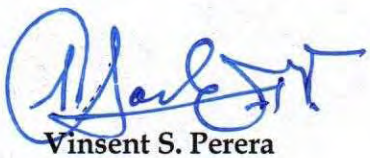
iii.) The sentence imposed on the appellant in the magistrate court of Suva criminal case no. 441 of 2017 is set aside;

iv.) The said sentence is substituted with an imprisonment term of 24 months with a non-parole period of 18 months.

Considering the time spent in custody, time remaining to be served is as follows;

Head Sentence - 22 months

Non-parole period - 16 months.

**Vinsent S. Perera**

**JUDGE**

**Solicitors:**

**Legal Aid Commission for the Appellant**

**Office of the Director of Public Prosecutions for the Respondent**