

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE MAGISTRATES COURT**  
*Exercising extended jurisdiction*

**CRIMINAL APPEAL AAU 13 OF 2017**  
(Magistrates Court No. 2143 of 2014 at Suva)

**BETWEEN** : **EPARAMA TAWAKE**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr T Lee with Ms M Ratidara for the Appellant**  
**Mr S Vodokisolomone for the Respondent**

**Date of Hearing** : **20 and 27 November 2018**

**Date of Ruling** : **18 December 2018**

**RULING**

[1] Following a trial in the Magistrates Court at Suva exercising extended jurisdiction the appellant was convicted on one count of aggravated robbery. On 6 January 2017 the appellant was sentenced to 9 years 6 months imprisonment with a non-parole term of 7 years.

[2] This is his timely application for leave to appeal against conviction and sentence pursuant to section 21(1)(b) and (1)(c) of the Court of Appeal Act 1949 (the Act). Section 35 (1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (Naisua -v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] The grounds of appeal are set out in an amended notice of appeal filed on 16 July 2018. The grounds of appeal against conviction are:

“(i) *That the learned Magistrate erred in law by convicting the appellant on a defective charge.*

(ii) *That the learned Magistrate erred in law by trying and convicting the appellant as an adult when the appellant was juvenile at the time of the offending.*

(iii) *That the learned Trial Judge (sic) erred in law and fact in convicting the Appellant having regard to the totality of the evidence when the State’s witness was incredible (sic) resulting in a substantial miscarriage of justice.”*

[4] The grounds of appeal against sentence are:

“(i) *That the learned Magistrate erred in law by sentencing the appellant as an adult when the appellant was a juvenile at the time of the offending.*

(ii) *That the sentence was manifestly harsh and excessive and did not reflect the circumstances and facts of the case.”*

[5] The first ground of appeal against conviction alleges that the charge was defective. The ground raises a question of law only. Leave is not required under section 21(1)(a) of the Act. In his judgment delivered on 22 December 2016 in paragraph 1 the learned Magistrate stated:

*“The accused is charged with one count of aggravated robbery contrary to section 311(1)(a) (b) of the Crimes Decree No.44 of 2009. The particulars of the offence are ‘Eparama Tawake with another on 12 December 2014 at Vatuwaga \_ \_ \_ assaulted, robbed Krisank Singh of \$20.00 cash and at the time of the robbery had a knife (offensive weapon) with him’.”*

- [6] The charge and particulars as drafted are duplicitous. Under section 311(1) of the Crimes Act 2009 (formerly the Crimes Decree) two separate offences are created. Section 311(1)(a) is aggravated robbery in the form of robbery in company. Section 311(1) (b) is robbery with an offensive weapon. The charge is defective and it is arguable that an injustice has occurred as a result. The ground is neither frivolous nor vexatious.
- [7] As for ground 2, it was conceded by the appellant’s Counsel that the appellant was an adult offender at the time of offending when the respondent produced a copy of the appellant’s birth certificate. The appellant was born on 25 November 1994 and the offence was committed on 12 December 2014. This ground is dismissed under section 35(2) of the Act as being frivolous and vexatious.
- [8] Ground 3 claims lack of credibility on the part of the complainant. However in the written judgment the learned Magistrate has summarised the evidence of both the complainant and the appellant. He has given reasons why the Court preferred and accepted the evidence of the complainant. This ground is not arguable.
- [9] As for the sentence appeal, the appeal is dismissed on ground one for the same reason for dismissing the conviction appeal on ground 2.
- [10] As for the second ground, although there was an assault with a knife, there was no evidence of any physical injury to the complainant. The amount involved was only \$20.00. It is also arguable that the principles set out in Wise –v- The State [2015] FJSC 7; CAV 4 of 2015, 24 April 2015 for a night time home invasion form of aggravated robbery were not applicable for sentencing in this case. Leave to appeal sentence is granted.

Orders:

1. *Ground 1 against conviction may proceed to the Court of Appeal.*
2. *Appeal against conviction on ground (II) is dismissed under section 35(2) of the Court of Appeal Act.*
3. *Leave to appeal against conviction on ground (III) is refused.*
4. *Leave to appeal against sentence on ground (II) is granted.*
5. *Appeal against sentence on ground (I) is dismissed under section 35(2) of the Court of Appeal Act.*



*W. Calanchini*  
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Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**