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

CRIMINAL APPEAL NO. AAU 141 of 2017
[In the Magistrates Court at Nausori Case No. CF 393/2017]

BETWEEN	**:**	**SAMUELA MOCE**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Bandara, JA** **Kulatunga, JA**
Counsel	**:**	**Mr. S. Waqanibete for the Appellant** **Dr. A. Jack for the Respondent**
Date of Hearing	**:**	**06 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read on draft the judgment of Kulatunga, JA and agree his reasons thereof and order proposed.

Bandara, JA

[2] I have read the judgment of Kulatunga, JA in draft and agree with his reasons and proposed orders.

Kulatunga, JA

Introduction

[3] The Appellant was charged in the Magistrate's court of Nausori exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on the18th of June 2017.

[4] The appellant upon pleading guilty was convicted on his own plea and then sentenced on 28th of August 2017 for 08 years and 11 months imprisonment with a non-parole period of 06 years.

[5] The appellant being dissatisfied with the sentence has preferred this timely appeal against the sentence on 27th of September 2017. The Legal Aid Commission on 19 June 2020 had submitted amended grounds of appeal against sentence and written submissions on 26 August 2020. The respondent had filed its written submissions on 17 July 2020. The Appeal against the sentence was on the following **ground of appeal.**

> *'That the learned trial judge erred in law and in fact when he sentenced the Appellant using the wrong principle resulting in a harsh sentence.'*

[6] The facts were that on the 18th day of June, between 12.00 am and 2.00am, the victim Nafiz Hassan a 24 year old taxi driver was at Nausori town when the Appellant along with another have requested that they be taken to Naduruloulou and when the taxi reached the destination they have wanted to proceed to Waidra and then to Kings Road pass Kasavu. At which place the other person (1st Accused) had got off the taxi came around to the driver's side and pulled the driver out of the vehicle, punched him and having made him sit in the taxi had driven the taxi around. Then both of them have left the vehicle taking the mobile phone valued at $720 of the taxi driver. The driver had then driven to the police station and reported the matter. After intensive investigations the Appellant and the other were apprehended and both them admitted to the offence when interviewed under caution.

The Impugned Sentence

[7] In crafting the sentence the Learned Magistrate has adopted and applied the sentencing tariff of 08 to 16 years of imprisonment as set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and picked 12 years as the starting point. He then added 03 years for the aggravating factors and deducted 03 years as for mitigating factors and arrived at the head sentence of 12 years imprisonment. Then having said, *full credit of 1/3 reduction of the sentence due to the 'early guilty plea' will be given*, arrived at 09 years imprisonment. After the period of remand was deducted the ultimate sentence determined was 08 years and 11 months imprisonment.

[8] As evident from the summary of facts this case is one of aggravated robbery of a taxi driver for which the sentencing tariff is 04 to 10 years imprisonment as set by **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011 (15 May 2012), **State v Bola** [2018] FJHC 274; 3 of 2018 (018 (12 April 2018) and **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020). Thus the trial judge has fallen in to serious error by a applying the tariff of 08-16 years of imprisonment as set by **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which was for home invasion type aggravated robberies with violence committed at night. That being so the Magistrate has picked 12 years as the starting point.

[9] It was opined by the Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020), that;

> *'[19] .....When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; consideration of the aggravating and mitigating factors and so forth, resulting in an eventual unlawful sentence.'*

[10] The learned Magistrate by following the sentencing tariff as set in ***Wise*** had undoubtedly committed a sentencing error of acting on a wrong sentencing principle. The trial judge has selected 12 years the mid-range of the tariff of 08-16 years instead

of the tariff of 4-10 years of which the mid-range would have been a 6-year starting point. There is a significant and appreciable difference of 6 years to the detriment of the Appellant. When the starting point is so erred it goes without saying that all that is based on and follows such an erroneous premise including the end result will necessarily be affected.

[11] It was submitted on behalf of the Respondent that the final sentence of 08 years and 11 months imprisonment is within the tariff of 04-10 years. Certainly, numerically that is so but that by itself will not necessarily mean or be that the appellant had received a sentence that befit the crime in accordance with the prevailing sentencing regime**.**

[12] *"Tariff"* or *"sentencing ranges"* is one of the two quantitative sentencing guidelines of which the other is the "*starting point"*. Tariff or sentencing ranges, generally represent and depict a summary of the case law that reflects the minimum and maximum sentences imposed by trial judges in the past. These are navigational tools that provide structure and guidance in sentencing to ensure uniformity and parity in sentencing and prevent disparity, while leaving sentencing judges space and flexibility to arrive at proportional sentences upon considering mitigating and aggravating factors (*R. v. Smith*, 2019 SKCA 100, 382 C.C.C. (3d) 455, at para. 126). Thus, when the learned Magistrate chose the wrong sentencing range, it necessarily results in an eventual unlawful sentence.

[13] At the outset the learned Magistrate has picked the wrong tariff of ***Wise***. Then picks12 years at a starting point. The maximum sentence a Magistrate can lawfully pass is 10 years imprisonment for single count and a maximum of 14 years on two counts made consecutive to each other [Section 7 (1) and (2) of the Criminal Procedure Act]. Picking a starting point above the maximum 10-year statutory limit by itself is not lawful and is erroneous. It is beyond a Magistrate's powers of sentencing. This limitation applies even when jurisdiction is invested on a Magistrate to try an indictable offence.

[14] The Magistrate had been invested with jurisdiction to try the indictable offence of aggravated robbery by virtue of Section 4 (2) of the Criminal Procedure Act of 2009. On the one hand the maximum sentence prescribed for this offence by Section 311 of the Crimes Act is 20 years. On the other hand the tariff erroneously applied is 8 to 16 years ***(Wise)***. However the power of sentencing in the exercise of such invested jurisdiction is circumscribed and limited by virtue of section 4(3) of the CPA to the magistrate's maximum limit of 10 years imprisonment which reads thus:

> ***4(3)*** *A Magistrate hearing a case in accordance with an order made under subsection (2) may not impose a sentence in excess of the sentencing powers of the Magistrate as provided for under this Act.*

[15] The resulting position is that when a Magistrate is invested with the jurisdiction to try an indictable offence by virtue of Section 4 (2) of the Criminal Procedure Act the powers of sentence is limited by Section 4 (3). In such circumstances if the Magistrate proceeds to sentence it is not desirable to pick a starting point beyond its jurisdiction and if the circumstances call for a higher sentence, then the Magistrate should act under Section 190 of the Criminal Procedure Act and transfer such case to the High Court for sentencing. Section 190(1) of the CPA reads thus:

> ***190(1)*** *Where—*
>
> *(a) a person over the age of 18 years is convicted by a Magistrate for an offence; and*
>
> *(b the Magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the Magistrate has power to impose,*
>
> *The Magistrate may, by order, transfer the person to the High Court for sentencing.*

[16] The Respondent too concedes that the wrong tariff has been applied. However, it was argued that as the final sentence is within the applicable tariff of 4 to 10 years it is lawful and appropriate in the circumstances of this offending. The learned Magistrate in the first instance has adopted the wrong tariff and secondly in calculating and

granting the discount for the early guilty plea has made a mathematical error. Further, the learned Magistrate has picked a starting point beyond jurisdiction to the detriment of the Appellant. The cumulative effect is that the 9-year sentence imposed does not befit the offending *vis-à-vis* the sentencing guidelines applicable to this offending and case and has resulted in an eventual unlawful sentence.

[17] An Appellate court is required to intervene if the trial judge has erred in principle in a way that impacted the sentence or if the sentence was demonstrably unfit. Thus firstly this court must consider the fitness of the sentence appealed against and if the sentence is demonstrably unfit then it is empowered to intervene and vary the sentence. Secondly it is also to ensure that sentencing courts state the law and guidelines correctly and apply them consistently. This Court's intervention in this matter is therefore appropriate. In ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), the Supreme Court held that:

> "*It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v. The King [1936] HCA 40; [1936] 55 CLR 499; and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors: (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*."

Conclusion

[18] This is a fit matter to allow the appeal against sentence as in my opinion, a different sentence should have been imposed. In determining what different sentence should have been imposed in this case, I will not attempt to predict the sentence which the sentencing judge would have imposed if the correct tariff was applied. Rather this court will make its own assessment of the sentence which is commensurate with the seriousness of the appellant's offence of aggravated robbery.

[19] The maximum penalty prescribed by section 311 of the Crimes Act may be 20 years' imprisonment but the maximum the Magistrate could have imposed for a single count of aggravated robbery is 10 years' imprisonment. The circumstances of this offending are described above. This was an aggravated robbery of a taxi driver who was virtually held hostage in his own vehicle and driven around and also punched no doubt by the other offender. The Appellant was acting together and it was a joint enterprise. In the said circumstances it certainly would have had a psychological effect on the victim. This would bring it to the upper end of the range of seriousness for an offence of that kind.

[20] As for aggravating circumstances the value of the items taken from the victim the phone was not unusually high but it was not recovered. This was committed in the night when the victim was vulnerable with some premeditation and planning. As for mitigating circumstances, the appellant did not have any previous convictions and was 20 years of age thus a young first offender. The lead role appears to have been played by the other joint offender but it was a joint enterprise. Of course, personal and general deterrence remain a significant sentencing consideration in cases of this kind.

[21] The appellant's plea of guilt was entered at the first available opportunity. He had admitted the same in his interview under caution. In all the circumstances, he was not caught red handed so to say. Thus, he is entitled to almost the full benefit of the 1/3rd discount of the sentence for the early guilty plea made at the first reasonable opportunity in respect of offence. The appellant had been in remand only for one month.

[22] Having regard to all of the circumstances (including those personal to the appellant) I am satisfied that the seriousness of the offence is such that terms of immediate imprisonment is appropriate. In my view, the sentence which is commensurate with the seriousness of the offence is a head sentence of 8 years' immediate imprisonment with a discount of 2 years and 6 months for the early guilty plea and deduction of 1 month for the time spent in remand. The final sentence will thus be 5 years and 5 months with a non-parole period of 3 years and 5 months taking account of time already spent in custody.

[23] As the Appellant has already served of 5 years, 5 months and 16 days of his sentence which is 15 days more than the final sentence ordered by this court, it is hereby directed that the Appellant be released forthwith as he has now served the total sentence. The Appeal against the sentence is allowed to that extent and the sentence is varied accordingly.

Orders of the Court:

1. Appeal against the sentence is allowed.
2. Sentence passed in the Magistrates Court on 28th August, 2017 is quashed and a sentence of 05 years and 05 months is passed in substitution to run from 28th August, 2017.
3. The Appellant to be released immediately.

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

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

Solicitors

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent