IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Criminal Petition No. CAV0007 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU0068 of 2015; High Court No. HAC 147 of 2013]

BETWEEN : **TEVITA GONEVOU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court

Counsel : **Mr. I. Ralovo for the Petitioner**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **04 April 2023**

Date of Judgment : **27 April 2023**

JUDGMENT

Gates, J:

[1] I have had the advantage of reading Lokur J's judgment in draft. I agree with it and its reasoning and concur with the orders.

Keith, J:

[2] I also agree with the judgment of Lokur J. There is nothing I can usefully add.

Lokur, J:

Background facts

[3] The Petitioner, along with two others, was charged with one count of aggravated robbery and sentenced for an offence under section 311(1) (a) of the Crimes Act, 2009 (now Crimes Decree, 2009). Upon conviction, they were sentenced to varying periods of imprisonment.

[4] The particulars of the offence read:

> *"Tevita Gonevou, Joeli Soaqali and Petero Yuivakalea on the 2nd day of April 2013 at Pacific Harbour in the Central Division, stole $45,281.57 cash from Chandreshwaran Gounder"*

[5] The Petitioner (and others) pleaded not guilty, leading to a trial. By a judgment and order dated 24 April 2015, the learned Trial Court convicted all accused. Subsequently, the Trial Court sentenced the Petitioner, by an order dated 29 May 2015 to 12 years imprisonment with a non-parole period of 10 years.

Court of Appeal proceedings

[6] Feeling aggrieved, the Petitioner filed before the Court of Appeal, on or about 23 June 2015, a notice of appeal against the conviction urging four grounds which included his grievance against the sentence. Significantly, in the submissions dated 10 January 2017 filed before the learned Single Judge hearing the leave application, the Petitioner did not urge any ground against the sentence.

[7] Later, on 02 May 2018 the Petitioner preferred an application to abandon his appeal against the sentence. The President of the Court of Appeal took up the notice of appeal for consideration as well the application for abandonment. In his Ruling delivered on 28 September 2018, the President refused leave to appeal against the conviction and ordered listing the application to abandon the appeal before the Court of Appeal.

[8] Thereafter on or about 04 October 2018, the Petitioner filed an application before the Full Court to renew his appeal against conviction. Much later, on 04 February 2020, the Petitioner (through learned counsel) filed an *"Amended Notice of Renewal"* urging only one ground against conviction, namely:

> *"THE Learned Trial Judge erred in law and in fact when he failed to direct the assessors in regards to the inherent weaknesses of the prosecution case."*

[9] Again, the Petitioner did not canvass any ground against the sentence awarded to him or even advert to the sentence awarded. On the same day, that is, 04 February 2020, the Court of Appeal took up the Petitioner's appeal against conviction and his application for abandonment of the appeal against the sentence awarded.

[10] During the hearing held on 04 February 2020, the Court of Appeal specifically inquired of the Petitioner about his application for abandonment. This was in accordance with the guidelines set out by this Court in ***Masirewa v. State*** *[2010] FJSC 5* and by the Court of Appeal in ***Mani v. State*** *[2017] FJCA 119*. His learned counsel stated that the Petitioner had submitted, the same day, Form 3 under Rule 39 of the Court of Appeal Rules (filed on record) that he does not desire to prosecute the sentence appeal and that he applies to abandon the same. The Petitioner confirmed to the Court that he had filed the application voluntarily; that he had received legal advice and wished to abandon the appeal; that he was aware that he would not be able to prosecute his appeal against the sentence once the application is allowed and his appeal dismissed. The reason given by the Petitioner for abandoning the appeal was that he had already served about half the sentence. Accordingly, on a consideration of the submissions advanced, the Court allowed the application for abandonment and the appeal against the sentence stood dismissed by the judgment and order dated 27 February 2020.

[11] With regard to sole ground against conviction, it may be recalled that this was considered by the President in the leave Ruling and held unarguable since it was not *"sufficiently particularized".* Anticipating the difficulty that learned counsel may face before the Full Court, she prepared and filed written submissions on 04 February 2020 *"renewing his appeal against conviction on one of the four grounds of appeal urged*

when he came before the single Justice of Appeal." The written submission particularized the ground, which the Court duly considered. However, prior to that, the Court observed, after considering several decisions that:

> "*… in an appeal to the Court of Appeal from the High Court in its original or appellate jurisdiction, the notice of appeal or the notice of application for leave to appeal should precisely specify the grounds, be they on mixed questions of fact and law or questions of law only, not I general terms but in sufficiently particularized terms so as to enable the Court of Appeal and the Respondent to understand what is at issue without having to undertake an arduous voyage of discovery. I think the drafters of grounds of appeal should be mindful if this mandatory requirement all the time*."

[12] I endorse the view expressed by the Court of Appeal and add that sufficient particularization is essential in appeals before this Court as well. Unfortunately, before this Court, learned counsel for the Petitioner has not accepted the sage advice of the Court of Appeal and has filed the same ground of appeal without any particularization.

[13] Be that as it may, the Court of Appeal considered the Petitioner's grievance as mentioned in the written submissions of 04 February 2020 and highlighted by his learned counsel. By a judgment and order dated 27 February 2020 the Court of Appeal dismissed the appeal against conviction and confirmed the conviction and sentence of the Petitioner.

[14] From a reading of the written submissions and the judgment of the Full Court, it appears that learned counsel for the Petitioner highlighted two *"weaknesses"* in the case of the prosecution. They were: (i) the Trial Court had erroneously accepted the identification evidence regarding the Petitioner in paragraph [6] of his judgment as being of *'high quality'* overlooking that the Petitioner came to the crime scene after the robbery as a Good Samaritan to assist the complainant; (ii) no identification parade was held as far as the Petitioner is concerned and his dock identification was not an effective substitute.

[15] The Court correctly noted that the *'high quality'* identification in paragraph [6] of the judgment related to the identification of the other two accused and not the Petitioner. Therefore, the submission of the Petitioner was misconceived in this regard. As far as the presence of the Petitioner at the crime scene is concerned, it was noted that this was not in dispute. In dispute was whether the Petitioner took part in the robbery. That question was answered in the affirmative based on the evidence on record, the caution interview and the confessional statements. There was no challenge to this aspect of the judgment.

[16] With regard to the dock identification, the Court held there was no need to have an identification parade in this case since the Petitioner was known to the complainant for about 16 years. This being so dock identification (not challenged by the Petitioner) was quite adequate. It did not prejudice the Petitioner in any manner whatsoever. Moreover, dock identification was not the only material on record to bring home the guilt of the Petitioner; there was other evidence on record including the caution interview.

[17] For the above reasons, the Court of Appeal dismissed the appeal against conviction filed by the Petitioner and allowed his application for abandonment of the appeal against the sentence.

Proceedings before this Court

[18] The Petitioner preferred an application for special leave to appeal in this Court on or about 11 March 2020. In the appeal filed under section 7(2) of the Supreme Court Act, 1998 the Petitioner urged five grounds. The first ground is the same as urged before the learned Single Judge and the Full Court in the Court of Appeal. The remaining four grounds are quite different from the grounds earlier urged and none of them pertain to the quantum of sentence.

[19] The Petitioner has now filed written submissions in this Court on or about 23 March 2023 raising five grounds, the first ground being consistently the same. The remaining four grounds are a new set of grounds bearing little or no resemblance to the grounds

raised earlier. There is a ground urged regarding the sentence awarded, a ground specifically abandoned earlier and now sought to be resurrected.

[20] To further complicate matters, the Petitioner filed supplementary written submissions in this Court on or about 04 April 2023. On this occasion, the Petitioner has urged four grounds with the first ground being common to earlier submissions. The Petitioner has urged two other grounds which again, have little or no resemblance to earlier grounds urged. The remaining ground relates to the quantum of sentence awarded.

[21] In oral submissions before this Court, learned counsel broadly proclaimed the innocence of the Petitioner but concentrated more on the sentence awarded.

Discussion on conviction

[22] With regard to the ground relating the identification of the Petitioner and his role in the crime, it has elaborately been dealt with by the Court of Appeal and it is not necessary to repeat the reasons for rejection of the ground. While it is true that an identification parade is usually necessary and dock identification should be discouraged. (see Archbold 2020 *"The identification of a defendant for the first time in the dock is an undesirable practice…."* and later *"… permitting a dock identification was not per se incompatible with a right to a fair trial"*. Section 14-59). In the facts of this case, it was not at all necessary to have an identification parade. The complainant and the Petitioner were not strangers. Admittedly, the complainant knew the Petitioner quite well over a period of about 16 years, with the Petitioner acknowledging that he worked in that vicinity during this period. Identification of the Petitioner was not an issue at all. Dock identification, on the facts and in the circumstances of this case, did not prejudice the Petitioner in any manner whatsoever, nor could absence of dock identification be described as objectionable or incompatible with a fair trial.

[23] The Petitioner contends that he was not involved in the robbery but in fact rushed to aid the complainant after he had been robbed and even tried to take him to a hospital. The evidence in this regard was the caution interview and the confession of the

Petitioner. This was followed by a careful summing up by the Trial Judge. The view of the assessors pointed to the guilt of the Petitioner beyond a reasonable doubt. Accordingly, the Trial Judge convicted the Petitioner and the Court of Appeal upheld the conviction. I see no error in the view taken.

[24] The multiplicity of grounds urged by the Petitioner at different stages of the proceedings in cannot be appreciated. The Petitioner, from the stage of hearing in the Court of Appeal pursued only one ground which has continued in this Court as well, though without particularization. Additional and varied grounds have been urged in the written submissions filed by the Petitioner, none of which were before the Court of Appeal. As such, the Court of Appeal had no occasion to consider those grounds and this Court does not, obviously, have the conclusions of the Court of Appeal on those grounds. This also places the prosecution at a disadvantage, not precisely knowing the grievance of the Petitioner. Effectively, through his written submissions, the Petitioner is attempting to convert this Court into a Court of Appeal, which is clearly impermissible. The grounds urged by the Petitioner in his written submissions at different stages in the proceedings cannot be taken notice of, for this unfairly handicaps the prosecution as well as this Court which does not have the benefit of the opinion of the Court of Appeal.

[25] The conviction of the Petitioner does not raise any question of general importance warranting grant of special leave to appeal.

Discussion on sentence

[26] On the issue of sentence awarded, I grant leave to appeal to the Petitioner.

[27] The Petitioner referred to and relied on ***State v. Tawake*** *[2022] FJSC 22*, to categorize his case as one of aggravated robbery in the form of 'street mugging' providing for a different starting point of consideration for sentencing. The Trial Court referred to and relied on ***Wise v. State*** *[2015] FJSC 7*, which dealt with aggravated robbery in the form of home invasion providing for a higher starting point for sentencing. According to the Petitioner, the starting point of his sentence is governed by ***Tawake*** and not by ***Wise*** and the Trial Judge fell in error in this regard. It

is important to note that the decision in ***Tawake*** was rendered by this Court a couple of years after (on 28 April 2022) the Petitioner abandoned his appeal against the sentence and after the disposal of his appeal against conviction by the Court of Appeal.

[28] Three questions, therefore, arise: First, whether the Petitioner can be permitted to resurrect his grievance with regard to the sentence awarded to him? Second, whether the Petitioner can be denied the benefit of the decision of this Court in ***Tawake***? Third, if the second question is answered in the affirmative, what is the appropriate order that should be passed by this Court?

Can an abandoned appeal be resurrected?

[29] The Petitioner had several occasions to urge grounds of appeal against the sentence awarded to him, but he chose not to do so. On the contrary, the Petitioner specifically moved for abandonment of his appeal against the sentence. The question of abandonment of the appeal against the sentence was specifically put to the Petitioner by the Court of Appeal in accordance with the guidelines laid down by this Court in ***Masirewa*** and by the Court of Appeal in ***Mani***. The Petitioner affirmed and confirmed his intention to abandon the appeal against the sentence which was then dismissed.

[30] For considering the first question, I have regard to the view expressed in ***Baba v. State*** *[2022] FJSC 20* that a notice abandoning an appeal is irrevocable unless it is treated as a nullity under limited circumstances. This Court held:

> *"[3] It sometimes happens that an appellant wishes to abandon an appeal. The court will usually let him do that……. But the court always tries to make sure that abandoning his appeal is what the appellant really wants to do. It does not do that on paper. A hearing takes place to enable the court to satisfy itself that the appellant has received legal advice, that the appellant knows the implications of abandoning his appeal, and that the appellant was not pressurized in any way to do something he did not want to do. It is only when the court is satisfied about all that that it will allow the appellant to abandon the appeal. The order the court makes is to dismiss the appeal on its abandonment by the appellant.*

> *[4] More rarely, an appellant has a further change of mind. The appellant wants to resurrect an appeal which he has previously abandoned. The court will not usually allow that. A notice abandoning an appeal is irrevocable, unless that notice can be treated as a nullity. It has been said that it will only be a nullity if the appellant's "mind does not go with the notice", and that will depend on the circumstances of each case:* ***R v. Smith*** *[2003] EWCA Civ 1044: [2014] 2 Cr App R 1. For example, if an appellant abandons his appeal as a result of receiving incorrect legal advice, that may mean that his mind did not go with the notice, but the advice has to have been positively wrong. It is not sufficient for the advice to have been expressed in the form of an opinion on a difficult point, with which some may agree but others may not."*

[31] There is no doubt that the Court of Appeal took all necessary precautions as indicated above, including following the guidelines in ***Masirewa*** and ***Mani***. The Court was undoubtedly satisfied that abandonment of the appeal against sentence was positively intended by the Petitioner on competent legal advice. But, this Court left a window open to a litigant such as the Petitioner, namely, that the litigant acted on legal advice that was positively wrong. Was the legal advice given to the Petitioner positively wrong? I am of the opinion that it was.

[32] In ***Wise***, this Court dealt with the starting point of consideration in the context of aggravated robbery and home invasion, with home invasion being a specie in the genus of aggravated robbery. It did not lay down any universal rule for application in all kinds of aggravated robbery. The application of law in ***Wise*** was, therefore, limited. This Court did not have occasion to deal with another specie of aggravated robbery, namely, 'street mugging'. That occasion arose in ***Tawake*** and this Court distinguished aggravated robbery in the form of home invasion from aggravated robbery in the form of 'street mugging. This distinction always existed, but was highlighted in ***Tawake***. Drawing on this distinction, this Court laid down a different starting point for consideration in cases of street mugging. The case of the Petitioner is not one of a home invasion, but of aggravated robbery in the nature of *'street mugging'*. This distinction was overlooked by learned counsel advising the Petitioner and therefore, the Petitioner's 'mind did not go with the notice abandoning his appeal against the sentence'.

[33] Learned counsel for the Petitioner cannot be faulted for the incorrect legal advice. The reason is that, as pointed out in paragraphs [16] and [17] of ***Tawake***, some judges also took the view that the principle laid down in ***Wise*** applied to cases of aggravated robbery involving home invasions, while other judges held that applied to all cases of aggravated robbery, even those not involving home invasion. Indeed, the case advanced by the prosecution was that ***Wise*** applied to all cases of aggravated robbery, home invasion or not. The Court of Appeal also took the view that ***Wise*** applied to all cases of aggravated robbery, home invasion or not. This view was incorrect. It is worth repeating that the *ratio decidendi* in ***Wise*** related only to aggravated robbery involving home invasion and was not of universal application to all cases of aggravated robbery, including street mugging. In view of this, it could be said quite plainly that the Petitioner's application for abandonment of the appeal against sentence was based on incorrect legal advice and was a nullity, taking it out of the grip of ***Baba***.

[34] Way back in 1940, the Privy Council in ***Societe Belge de Banque S.A. v. Rao Girdhari Lal Chaudhary*** AIR 1940 PC 90 held that an admission on a point of law cannot bind a court which cannot be precluded from deciding the rights of the parties on a true view of the law. Indeed, incorrect legal advice (though inadvertent) given by learned counsel to the Petitioner certainly cannot bind him particularly in a matter of personal liberty.

[35] Interestingly, the Office of the Director of Public Prosecutions furnished a chart to this Court in ***Tawake*** of nine cases of 'street muggings' in which there was considerable disparity in sentencing due to a misreading of ***Wise***. This Court took notice of the chart and the disparity pointed out. The judgment of this Court in ***Tawake*** clarified the law and removed the disparity and thereby corrected the error committed by the courts in applying ***Wise*** in cases (such as the present) in which it should not have been applied. For these reasons, I answer the first question in the affirmative and permit the Petitioner to resurrect his grievance with regard to the sentence awarded to him.

<u>Can the Petitioner be denied the benefit of Tawake?</u>

[36] As far as the second question is concerned, it must be appreciated that personal liberty is one of the most precious rights recognized in the Bill of Rights in our Constitution. Section 6(2) of the Constitution obliges this Court, as a sentinel on the *qui vive* to respect, protect, promote and fulfil the rights and freedoms recognized in Chapter 2 of the Constitution.

[37] It is quite clear from the discussion above that the Petitioner has been deprived, perhaps to some extent, of his personal liberty due to a misapplication of the law. This error needs to be rectified and the only way to do so is to grant to the Petitioner of the law in ***Tawake***. He certainly cannot be denied the benefit of the law. In this context, it must be made clear that it is not as if ***Tawake*** is being applied retroactively. The distinction between home invasion as a specie of aggravated robbery and street mugging as another specie of aggravated robbery always existed – it was only clarified and brought to the fore in ***Tawake***. This does not make the application of the law in ***Tawake*** retrospective in nature. It is only a recognition of the law as it always existed. Therefore, to answer the second question, it is made clear that the Petitioner cannot be denied the benefit of the law as recognized and declared in ***Tawake***.

<u>Order that should be passed by this Court</u>

[38] The answer to the third question lies in Section 7 of the Supreme Court Act, 1998. This section confers vast powers on this Court to make such orders as the circumstances of the case require and grant leave to appeal should substantial and grave injustice otherwise occur. Section 7 (1) and section 7 (2) of the Supreme Court Act are relevant in this regard and they read:

> *"<u>Section 7 (1)</u>:*
>
> *In exercising its jurisdiction under section 98 of the Constitution of the Republic of Fiji with respect to leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –*
>
> *(a) refuse to grant leave to appeal;*

(b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
(c) grant leave and allow the appeal and make such other orders as the circumstances of the case require.

Section 7 (2):

In relation to a criminal matter, the Supreme Court must not grant leave to appeal unless –

(a) a question of general legal importance is involved;
(b) a substantial question of principle affecting the administration of criminal justice is involved; or
(c) substantial and grave injustice may otherwise occur."

[39] In the present case, the Petitioner has been awarded a sentence harsher than he should have been given. It is the duty of this Court, as a sentinel on the *qui vive*, to ensure that the Petitioner does not suffer substantial and grave injustice by getting a higher sentence than necessary in a matter of his personal liberty. This Court is also empowered to make such orders as the circumstances of the case require. I am of the opinion that the present case is one such where this Court should exercise the extraordinary powers accorded to it under our Constitution.

[40] Consequently, the sentence awarded to the Petitioner deserves to be revisited. Leave to appeal to the Petitioner is granted but limited to the sentence awarded to him by the learned Trial Court.

[41] The practice followed by this Court and the Court of Appeal is to modify the sentence in an appropriate case, depending on the facts and circumstances. This case does not warrant a different approach. The Petitioner was sentenced under section 311(1)(a) of the Crimes Act, that is, aggravated robbery in company with one or more persons. As has been noticed, the case was one of 'street mugging' and as noted in ***Tawake***, *"street muggings can take many forms. There will be different degrees of culpability and different levels of harm"*. Therefore, while laying down sentencing guidelines in cases of aggravated robbery, this Court adopted, at the instance of the State in ***Tawake***, a modified version of Definitive Guideline on Robbery issued by the

Sentencing Council in England as could be applied to Fiji. While doing so, this Court recognized that the question of culpability (as laid down in England) would not apply since section 311 of the Crimes Act classifies the nature of the offence. However, the degree of harm caused to the victim is important. Considering that, this Court laid down guidelines in paragraphs [26] to [29] in ***Tawake***.

[42] The *'Agreed Facts'* indicate that the victim was beaten on the head with a piece of rock 4 (four) times, that is, repeatedly. The medical report available on record shows that the injuries on the head of the victim were:

> "*A 12 cm laceration over right parieto-temporal area 1.5 cm deep.*
> *A T-shaped wound over left parieto-temporal area 10 cm x 15 cm (illegible) with macerated centre. About 1.5 cm deep.*
> *All wound actively bleeding. He was mud-stained all over.*"

It would appear that the harm to the victim would fall in the high category. None of the offenders had an offensive weapon with them which suggests that the mugging, though planned was not intended to be with violence. Section 311(1)(b) of the Crimes Act postulates the possession of an offensive weapon at the time of the aggravated robbery, a weapon that might or might be used at that time. That a stone was used against the victim due to his resistance and that stone caused medium category injuries can, at best, be described as a happenstance or an accident of fate. It is for this reason that the Petitioner was sentenced under section 311(1)(a) of the Crimes Act.

[43] The case of the Petitioner would thus fall in the category aggravated robbery (offender either with another or with a weapon) with "*Starting point*: 7 years imprisonment. *Sentencing range*: 5-9 years imprisonment" as laid down in ***Tawake***. I have taken into consideration the illustrative aggravating and mitigating factors mentioned in ***Tawake***, including the period spent by the Petitioner in custody. I have also noted the aggravating and mitigating factors mentioned by the Trial Judge and am of the opinion that 9 years imprisonment would be the appropriate sentence taking into account that the victim was injured, though coincidentally. The non-parole period is fixed as 7 years.

[44] Accordingly, the sentence awarded to the Petitioner is now modified from 12 years imprisonment with a non-parole period of 10 years awarded by the High Court to 9 years imprisonment with a non-parole period of 7 years.

[45] In my view, in all fairness, the Office of the Director of Public Prosecutions should revisit other cases of *"street muggings"* and move the High Court in appropriate cases to revisit the sentence awarded so that the right to equality (not mathematical equality) and benefit of the law recognized by Section 26 of our Constitution are not denied to the convicts and they are not subjected to a harsher punishment than warranted by law.

The Orders of the Court:

1. Special leave to appeal against conviction is refused.
2. The judgment and order of the Court of Appeal dated 27 February 2022 as regards the conviction of the Petitioner is affirmed.
3. Leave to reopen and revisit the sentence awarded to the Petitioner is granted.
4. The sentence awarded to the Petitioner is modified to 9 years imprisonment with a non-parole period of 7 years.

.....
Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

.....
Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT

.....
Hon. Mr. Justice Madan B. Lokur
JUDGE OF THE SUPREME COURT

Solicitors:

Raikanikoda Lawyers for the Petitioner
Office for the Director of Public Prosecutions for the Respondent