

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

CRIMINAL APPEAL NO.AAU 141 of 2019
[In the Magistrates Court at Nasinu Case No. 388 of 2012]

BETWEEN : GABIRIELI TOMU CIKAITOGA

Appellant

AND : STATE

Respondent

Coram : Prematilaka, JA

Counsel : Ms. T. Kean for the Appellant
: Mr. R. Kumar for the Respondent

Date of Hearing : 07 July 2020

Date of Ruling : 08 July 2020

RULING

- [1] The appellant had been arraigned in the Magistrates court of Nasinu exercising extended jurisdiction on two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with three others.
- [2] The appellant had pleaded guilty to both charges and the learned Magistrate on 20 July 2016 had convicted him on his own plea and sentenced him on the same day to a sentence of 08 years of imprisonment with a non-parole period of 04 years.
- [3] The summary of facts is not before me and the learned Magistrate's sentencing order sets out the facts briefly as follows. On 18 March 2012 at about 12.45 p.m. the appellant and the other three had forcefully entered Comsol Moive Shop at Centerpoint, Nasinu and robbed Shivaz Hassan of his mobile phone valued at \$200.00. Whilst inside they had assaulted and locked Mohan Vishal Singh in the toilet

and stolen \$950.00 in cash, one Nokia N65 brand mobile phone valued at \$400.00 all to the value of \$1,350.00 from him.

[4] An untimely notice to appeal against sentence had been signed by the appellant on 06 November 2017 (received by the registry on 09 November 2017) against sentence. The Legal Aid Commission had filed an application for enlargement of time along with amended grounds of appeal against sentence and written submissions on 08 June 2020. The State had tendered its written submissions on 07 July 2020. The delay is about 01 year, 02 months and 02 weeks.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in Rasaku v State CAV0009, 0013 of 2009: 24 April 2013 [[2013] FJSC 4, Kumar v State: Sinu v State CAV0001 of 2009: 21 August 2012 [[2012] FJSC 17

[6] In Kumar the Supreme Court held

'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[7] Rasaku the Supreme Court further held

'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'

[8] Under the third and fourth factors in Kumar, test for enlargement of time now is **'real prospect of success'**. In Nasila v State [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

*[23] In my view, therefore the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see *R v Miller* [2002] QCA 56 (1 March 2002) on any of the grounds of appeal....*

[9] I would rather consider the third and fourth factors in *Kumar* first before looking at the other factors which will be considered in the end.

[10] Further guidelines to be followed when a sentence is challenged are given in *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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of *Kim Nam Bae's* case. **For a ground of appeal preferred out of time against sentence to be considered arguable there must be a real prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (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.*

Grounds of appeal

1. *THAT the Learned Sentencing Magistrate erred in principle by using the element of the offence as an aggravating factor therefore enhancing the Appellant's sentence.*
2. *THAT the Learned Magistrate had not given discount to the Appellant's previous good character.*
3. *THAT the Learned Magistrate erred in law by not considering the Appellant's time spent in remand.*

01st ground of appeal

- [11] The learned Magistrate had stated that the fact that the offence was committed in a group was an aggravating factor. In terms of section 311(1)(a) of the Crimes Act, 2009 one of the ways in which the offence of robbery becomes aggravating robbery is when the robbery is committed by a person in company with one or more other persons. Thus, in this instance the fact that the appellant had committed the robbery in company with three others had made him liable for the offence of aggravating robbery. Therefore, it cannot be counted as an aggravating factor, for it is part of the offence of aggravating robbery thus constituting a sentencing error. The issue is whether the addition of 03 years on account of aggravating factors which also included the fear instilled in the victims of the crime could be justified when the element of it having been committed in a group is excluded. Therefore, there appears to be a real prospect of success in appeal in respect of this ground of appeal.

02nd ground of appeal

- [12] Section 4(2)(i) of the Sentencing Penalties Act provides that the court must have regard to the previous character when sentencing an offender. In my understanding this is also referred to as 'being a first offender' in the sense that the appellant does not have previous convictions. It has received judicial interpretation and recognition in a number of decisions including Fifita v State [2010] FJCA 21; AAU0024.2009 (2 June 2010) where it was held

'[7] It is a recognized principle that where there is evidence of good character, that good character may operate to reduce the sentence which would otherwise have been imposed.'

- [13] The learned Magistrate had stated that he was taking into account the mitigation submitted by the counsel for the appellant and reducing 02 years for those unspecified mitigating factors. It is not clear without the mitigation submission what those factors were. They may or may not have included the appellant being a first offender.
- [14] The learned Magistrate had also reduced further 01 year on account of the guilty plea though it had not been tendered at the earliest possible opportunity. The appellant seems to argue that he may have been entitled to a 1/3 discount because of the guilty

plea. I do not agree; not in this case of aggravated robbery. This is not the current thinking of the law.

- [15] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J. had the occasion to comment on 1/3 discount for an early guilty plea as follows.

[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikalekelevesi v State [2008] FJCA11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.

[11] The weight that is given to a guilty plea depends on a number of factors.....

'Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed. That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown, that was the point of this Court's decision in Beavan at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor.'

[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.'

- [16] As argued by the appellant, a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was earlier considered as the 'high water mark' in **Ranima v State** [2015] FJCA17; AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015). The Supreme Court dealing with **Ranima** said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)

*'[15] The principle in **Ranima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Gounder J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In*

cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

- [17] What other migratory factors had been submitted by the counsel for the appellant could only be determined with the availability of the full appeal record.
- [18] The trial judge had applied the sentencing tariff of 08-14 years following State v Manoa [2010] FJCA 409; HAC 061 of 2010 (06 August 2010). However, it had been revisited in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the sentencing tariff was set at 08-16 years of imprisonment for aggravated robbery in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. I do not see why the same tariff should not apply to the current case involving an invasion of business premises in broad daylight with accompanying violence.
- [19] The learned Magistrate had taken the lowest point of 08 years as the starting point [even more leniently than advised in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) which suggested to take the lower or middle range of the tariff as the starting point] ending up with the final sentence of 08 years which is still at the lowest end of the tariff range and could be regarded as lenient.

03rd ground of appeal

- [20] The appellant complains that the learned Magistrate had not deducted the period of 03-04 months remand from the sentence. It is not clear whether the appellant had actually been in remand for a period of time and the learned Magistrate had included the period of remand in the deduction of 02 years for mitigating factors. Otherwise, there is no indication that the period of remand had been taken into account.
- [21] Any period of time during which an offender is held in custody prior to the trial shall be regarded as a period of imprisonment already served, unless otherwise ordered by court [vide section 24 of the Sentencing and Penalties Act, 2009]. It should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors (vide Koroitavalena v State [2014] FJCA 185; AAU0051 of 2010 (05 December 2014)). However, separate discounting of the

remand period does not involve any principle but done as a matter of practice and not as a matter of law (vide **Waisale v State** [2015] FJCA117; AAU0081 of 2013, AAU00129 of 2013, AAU0042 of 2014 (19 June 2015). These principles have been summarized in **Naisua v State** [2020] AAU 144 of 2019 (20 April 2020)].

- [22] In the circumstances, it is not possible to decide whether the learned Magistrate had not deducted the period of remand without the complete appeal record. However, I would like to place on record the pertinent observations made in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) on the sentencing process.

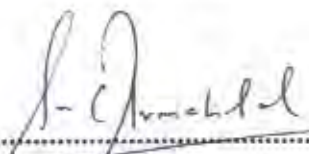
*'It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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.** Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.'*

- [23] As for the delay, it is substantial and the reason of ignorance of the appeal process for the delay is not acceptable. However, considering the merits as stated above the appellant should be allowed to canvass his appeal against sentence before the full court.

Order

1. Enlargement of time to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL