

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

CRIMINAL APPEAL NO.AAU 121 of 2018
[High Court at Suva Criminal Case No. HAC 161 of 2018]

BETWEEN

: SAILOSI VIRIKIBAU VUNIDAKUA

Appellant

AND

: STATE

Respondent

Coram

: Prematilaka, JA

Counsel

**: Mr. M. Fesaitu for the Appellant
: Ms. E. Rice for the Respondent**

Date of Hearing

: 19 January 2021

Date of Ruling

: 20 January 2021

RULING

- [1] The appellant had been indicted in the High Court on a single count of robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with another on 20 April 2016 at Nabua in the Central Division. The charge against the appellant was as follows,

**Statement of Offence*

AGGRAVATED ROBBERY: *Contrary to section 311(1)(a) of the Crime Act 2009*

Particulars of Offence

SAILOSI VIRIKIBAU VUNIDAKUA in the company of another on the 20th day of April 2016, at Nabua in the Central Division, in the company of each other

robbed NACANIELI YALIMAITOGA KUMKEE of 1x Maxpo Angle grinder valued at \$ 85.00, 1x Bosch Grinder valued at \$848.00 and 1x Cigweld Welding Plant valued at \$1400.00, all to the value of \$2373.00 the property of Quality Power Engineering System Ltd.

- [2] After the summing-up, the assessors had expressed a majority opinion against the appellant on 30 August 2018 and the learned High Court judge had found him guilty in his judgment delivered on 31 August 2018. The appellant was sentenced on 28 September 2018 to an imprisonment of 09 years, 06 months and 20 days with a non-parole period of 07 years, 06 months and 20 days.
- [3] The appellant had tendered an appeal in person against conviction and sentence on 09 November 2018 which was out of time by about 12 days but could be considered timely. The Legal Aid Commission had filed amended grounds of appeal and written submission on 14 October 2020. The state had responded by its written submissions on 30 October 2020.
- [4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see Caucu v State AAU0029 of 2016; 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016; 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017; 4 October 2018 [2018] FJCA 173 and Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015; 06 June 2019 [2019] FJCA87.
- [5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide 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 timely preferred against sentence to be considered arguable there must be a reasonable 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.*

[6] Grounds of appeal urged by the appellant are as follows.

Against conviction

- Ground 1 - *THAT the learned Trial Judge may have fallen into an error in fact and law by providing an inadequate and improper direction during the Summing Up on the issue identification.*
- Ground 2 - *THAT the learned Trial Judge may have fallen into an error in fact and law when directing the assessor at paragraph 25(g) of Summing Up since this raised issues on the credibility and reliability of the complainant therefore the learned Trial Judge ought to have impressed upon the assessors the fact that the items did not belong to the complainant.*
- Ground 3 - *THAT the learned Trial Judge may have fallen into an error in law and fact to convict the Appellant without independently considering and assessing the totality of the evidence regarding the credibility and reliability of the State witnesses.*

Against Sentence

- Ground 1 - *THAT the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence of aggravated robbery of this nature.*

[7] The evidence against the appellant could be summarised as follows. The complainant had wanted to pawn his tools of trade mentioned in the information to raise money and gone to a scrap dealer but the latter had refused to accept them. He had met a boy named Livai there who had taken him to another person who too had refused to take the items. Thereafter, both had met another person whom he came to know as Sailosi (i.e. the appellant) in the conversation. Both Sailosi and Livai had agreed to show the complainant a place to pawn his items. Livai had led the party while Sailosi had followed the complainant when they were walking along a narrow path in between houses. While walking the appellant had punched the complainant from behind and he had fallen down and while the complainant was lying he had been punched and kicked by the appellant who had pulled a knife and threatened the complainant not to

follow him. The appellant had walked away with the complainant's bag containing the two grinders while Livei had run away with the bag containing the welding plant.

- [8] The complainant had managed to find Livei's house with the help of neighbours but Livei had not yet returned home. Livei had come home in the early hours of the 20th morning and when inquired about the tools he had said that they were taken from him by the police. The complainant had gone to Nabua police station in search of his tools and while he was talking to PW2, police officer Deven Suami he had seen through a door opened by another officer the appellant in handcuffs inside the police station. He had immediately identified the appellant, pointed at him and told PW2 *'That's the Sailosi who robbed me'*.
- [9] The police had taken the appellant out to recover the lost articles and recovered the bag with two grinders on being shown by the appellant which were marked PE1 and PE2 and identified by the complainant and PW2.
- [10] The complainant had been medically examined on 20 April 2018 around noon and was found to have suffered injuries resulted from punching and kicking thus being consistent with the history given by the complainant.
- [11] The appellant had given evidence and summoned another witness. The appellant had admitted that he had been arrested around 4.00-5.00 a.m. on the 20th and kept at the police station where he had been identified by the complainant by pointing at him but at the instance of PW2. He had conceded that the two grinders had been recovered by the police upon being shown by him. According to the appellant he had been drinking grog with DW2, Sakiusa from around 8.00-9.00 p.m. in the previous night till he was arrested by the police. While he was at the grog session Livei had come and sold him two grinders for \$30.00 but he had not brought them but only told him where they were.
- [12] According to DW2, Sakiusa Bolea the appellant had come to his house around 9.00 p.m. on 19 April 2018 went away around 9.30 p.m. He had again come back around 10.00 p.m. and left around midnight never to return. When he was arrested and

brought to the police station at about 8.00 am on the 20th he had seen the appellant there.

01st grounds of appeal

- [13] The appellant complains that the direction on identification of the appellant was inadequate in that the trial judge should have directed the assessors that the complainant saw him handcuffed inside Nabua police station. He further argues that he had been prejudiced by lack of a proper identification process. He relies on Nalave v State [2019] FJSC 27; CCAV0001 of 2019 (01 November 2019).
- [14] In almost all criminal trials dock identification takes place as a matter of formality unless the accused is tried in absentia. Appellate courts have been concerned not with dock identifications *per se* but with first time dock identifications *i.e.* where the accused is identified for the first time in the dock after the offence was committed without having a previous formal method of identification by way of a photographic identification or identification parade.
- [15] In Nalave the facts and circumstances were different as partly revealed from paragraph 32.

[32]To have the petitioners identified by a dock identification at all when identity was in issue was a material irregularity but for that evidence to emerge and be laid before the trial judge and assessors without them knowing that the identifying witness had seen the two women in the custody of police officers at the club during a reconstruction of the crime is additionally troubling, for an identification in such circumstances is also tainted by its highly suggestive setting. In the event, what was presented to the 2013 trial court was an identification by the guard on the day he testified which, as far as that court knew – unless the court had drawn an impermissible conclusion from the reference in one of the interview records that there had been an identity parade – was the first time since 2004, apart from a sighting at court the previous year, that the witness had been asked to identify the two women who had drawn his suspicion on the night of the killing. And it was a dock identification.

- [16] It is in the specific facts and circumstances of Nalave that the decision therein and particularly paragraph [37] relied upon by the appellant has to be understood *vis-à-vis* a first time dock identification.
- [17] However, in this case there was a clear identification of the appellant by the complainant at the crime scene and it was a mere accident that he saw him at the police station where he immediately pointed at him and recognised him as Sailosi who had robbed him just a few hours ago. There was no prompting by the police or suggestive setting for the complainant to identify the appellant. In addition the recovery of two grinders by the police on being shown by the appellant, which he conceded, adds credibility to the identification by the complainant.
- [18] In those circumstances, there would have no purpose of holding an identification parade or even a photographic identification.
- [19] On a complaint of the irregularity of a first time dock identification the following test was formulated in Korodrau v State [2019] FJCA 193; AAU090,2014 (3 October 2019) following Naicker v State CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and Saukelea v State [2018] FJCA 204; AAU0076,2015 (29 November 2018)

**[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23 (1) of the Court of Appeal Act would apply and appeal would be dismissed*

- [20] Even on the application of the above test, ignoring the dock identification there was sufficient evidence on which the assessors could express the opinion that the appellant was guilty and the judge would have convicted the appellant, even if there had been no dock identification of him.
- [21] The trial judge had directed the assessors to the evidence available against the appellant including his having been pointed at by the appellant at the police station at paragraphs 25-29 and the appellant's case from paragraphs 32 and 33 of the summing-up but not even referred to dock identification as an item of evidence to be relied upon by the assessors. Thus, the assessors had brought a verdict of guilty on the rest of the evidence. He had clearly warned the assessors on Turnbull rules at paragraph 37 and given very fair directions on the defence evidence at paragraphs 38-40.
- [22] Therefore, I do not think that the first ground of appeal has a reasonable prospect of success.

02nd ground of appeal

- [23] The appellant argues that the trial judge should have directed the assessors that the robbed items did not belong to the complainant in the course of his directions in paragraph 25(g) of the summing-up.
- [24] This argument is based on the assumption that those items in fact did not belong to the complainant but to Quality Power Engineering Ltd. It is difficult to understand why the prosecution had mentioned that in the information. The complainant on his part had rejected the suggestion to that effect by the appellant under cross-examination. Once rejected that remained a suggestion and did not become evidence. The fact is that there was no evidence that the lost items in fact belonged to the said company and the complainant was attempting to pawn someone else's property. Therefore, there was no factual basis for the trial judge to have informed the assessors that those items belonged to the company named in the information.

- [25] In any event, as stated by the trial judge the ownership of the robbed items did not matter as they were in the complainant's possession at the time the appellant and the other accused took them away from him or appropriated them.
- [26] The appellant's position that Līvai came and sold the two grinders to him was not corroborated by the DW2 Sakiusa Bolea with whom the appellant claimed to have had grog throughout the night. Thus, the main thrust of the appellant's defence was cut across by DW2. In the circumstances the trial judge's directions at paragraph 35 (read with paragraphs 6-12) on the assessment of credibility and reliability of witnesses for both sides were adequate.
- [27] Therefore, the second ground of appeal has no reasonable prospect of success.

03rd ground of appeal

- [28] One of the complaints of the appellant is that Līvai had been allowed to get off scot-free when he was clearly an accomplice. However, the state has submitted that Līvai had been dealt with separately as he was a juvenile at the time of committing the offence.
- [29] The rest of the appellant's argument on the dock identification had been dealt with under the first ground of appeal. Regarding his suggestion that the trial judge had not adequately analysed the evidence in the judgment other than his analysis or comments in the summing-up, one needs to remember the trial judge's obligation when agreeing with the assessors.
- [30] In **Wainioima v State** [2020] FJCA 159; AAU0142.2017 (10 September 2020) having examined several past decisions I concluded

[19] What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts

to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.

[20] a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard given to the assessors by the trial judge.

[21] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judges of facts. The judge is the sole judge of facts in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide Rokonabete v State [2006] FJCA 85; AAU0048.2005S (22 March 2006), Noa Maya v. The State [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and Rokopeta v State [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[31] Therefore, there is no reasonable prospect of success in the third ground of appeal.

04th ground of appeal (sentence)

[32] The appellant argues that the trial judge had applied the wrong sentencing tariff of 08-16 years of imprisonment set in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 08 years as the starting point. The tariff in Wise was set 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.

[33] The factual background of this case may not exactly fit into the kind of situation court was confronted with in Wise. Neither is this a case of simple street mugging as identified in Raqauqau v State [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery

labelled as ‘street mugging’ at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present. Nor does it appear to be similar to offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers where the settled range of sentencing tariff is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [vide Usa v State [2020] FJCA 52; AAU81.2016 (15 May 2020)].

- [34] There does not appear to be a settled range of sentences for the kind of aggravated robbery the appellant had committed against the complainant. Therefore, the trial judge cannot be unduly criticised for taking a starting point of 08 years based on Wise and ending up with the ultimate sentence of 09 years, 06 months and 20 days with a no-parole period of 07 years, 06 months and 20 days.
- [35] The Court of Appeal held 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.”

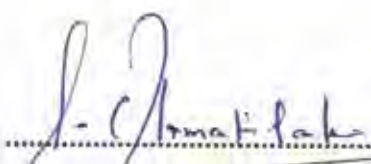
- [36] However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)].

- [37] It appears to me that a sentence of less than the lower end of tariff for home invasions (i.e. less the 08 years) would have been appropriate in the case of the appellant so as the sentence to be proportionate to the gravity of the offence in the light of existing sentencing tariff regimes for different kinds of aggravated robbery.
- [38] Nevertheless, whether the ultimate sentence of 09 years, 06 months and 20 days imposed on the appellant is justified or not should be decided by the full court in view of the possible sentencing error of applying Wise tariff. If so, the full court would decide what the ultimate sentence should be exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act after a full hearing.
- [39] For the above reasons, though I cannot affirmatively say that the appellant has a reasonable prospect of success I tend to grant leave to appeal against sentence.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.




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