

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

**CRIMINAL APPEAL NO. AAU 043 of 2021**  
**[High Court at Suva Case No. HAC 347 OF 2019]**

**BETWEEN**

**: LEMEKI TUPALI**

**Appellant**

**AND**

**: STATE**

**Respondent**

**Coram**

**: Prematilaka, RJA**

**Counsel**

**: Appellant in person**  
**: Ms. B. Kantharia for the Respondent**

**Date of Hearing**

**: 21 August 2023**

**Date of Ruling**

**: 22 August 2023**

**RULING**

[1] The appellant had been convicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 on 29 September at Pacific Harbour in the Central Division. The charge read as follows.

***Statement of Offence***

**AGGRAVATED ROBBERY:** *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

***Particulars of Offence***

***LEMEKI TUPALI & VEIQARAVI LUTU TATATAU on the 29<sup>th</sup> day of September, 2019 at Pacific Harbour in the Central Division, in the company of each other stole 1x MacBook mini laptop (silver in colour). 1x I-phone 6 plus (gold in colour) with cover, 1x gold ring, 1x MacBook laptop (silver in colour), 1x I-phone 6 (pink in colour) with black leather case, 1x Samsung brand mobile phone and \$450 cash from MANON HUFFER BOIVERT and at the time of stealing from MANON HUFFER BOIVERT, used force on her.***

- [2] The appellant represented by his counsel had pleaded guilty and accepted the summary of facts. Accordingly, having been satisfied that the appellant had fully comprehended the legal effect of the guilty plea and the plea was voluntary and free from influence, the trial judge had proceeded to convict him of aggravated robbery and sentenced him on 06 November 2020 to an imprisonment of 10 years with a non-parole period of 08 years (effectively 09 years with a non-parole period of 07 years after discounting the remand period).
- [3] The appellant's appeal, though about 03 months out of time, could be regarded as timely as he had lodged it in person.
- [4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499 & **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].
- [5] The summary of facts as recorded by the trial judge in the sentencing order are as follows.
- ‘3. *You and another accomplice entered the complainant's house at about 5.29 p.m. on the 29th of September 2019. The complainant was alone at home as her mother went somewhere. She was a 19 years old Student. The complainant started to shout at you and your accomplices when she saw the two intruders. One of you had then run to the complainant, and the other one had got hold of her mobile phone. You had covered her mouth and then grabbed her by the neck and pushed her down. You then tied her face with a t-shirt.*
4. *You asked the complainant not to shout. Both of you then dragged her to her room. You then tied her hands and legs with her clothes to the bed. One of you was very aggressive, asking her where the money is. You had spent about 15 minutes at the house and stole the items, as stated in the particulars of the offence. Two of you had gained entry into the home through the window of the bedroom of the complainant.*’
- [6] The appellant urged the following grounds of appeal against conviction and sentence at the leave to appeal hearing.

**Conviction:**

**Ground 1**

*THAT the pleaded charge is defective.*

**Sentence**

**Ground 2**

*THAT the learned sentencing Judge erred in fact when at para 9 of the sentencing order, he found that the level of harm in this offence was “significantly high” and that the appellant “used a substantial amount of physical force” as the facts of the case and the complainants medical report do not support such a finding.*

**Ground 3**

*THAT the learned sentencing Judge erred in fact and in law when, at para 11 of the sentencing order, he found the bruises on the complainant’s arms to be an aggravating factor, as these injuries were very minor and indicated minimal force.*

**Ground 4**

*THAT the learned sentencing Judge erred in fact and in law when at para 12 of the sentencing order, he found that the appellant’s family and personal circumstances had no migratory value.*

**Ground 5**

*THAT the learned sentencing Judge erred in fact and in law when he failed to take into consideration that the majority of the stolen items were recovered as this was a relevant mitigating factor.*

**Ground 6**

*THAT the learned sentencing Judge erred in fact and in law when at para 15 of the sentencing order he deducted only two years for the appellant’s early guilty plea as the accepted practice is to deduct between  $\frac{1}{4}$  to  $\frac{1}{3}$  of the sentence.*

**Ground 7**

*THAT the learned sentencing Judge erred in fact and in law when at para 8 of the sentencing order he took into consideration that “this horrific experience would stay in [the complainant’s] mind for an extended”, as there was no evidential basis for the statement and it was merely the personal opinion of the Judge.*

### ***01<sup>st</sup> ground of appeal***

- [7] The appellant has not substantiated the complaint in this ground of appeal. I do not see any defect in the information. It is in compliance with section 58 of the Criminal Procedure Act, 2009.

### ***02<sup>nd</sup> ground of appeal***

- [8] The appellant takes exception to the trial judge's reference '*You had used a substantial amount of physical force on the complainant*' and '*Accordingly, I find the level of harm and culpability in this offence is significantly high*'.
- [9] The facts reveal that the appellant and the co-accused had covered the complainant's mouth and then grabbed her by the neck and pushed her down. They had then tied her face with a t-shirt and asked the complainant not to shout. Both of them then dragged her to her room, and tied her hands and legs with her clothes to the bed.
- [10] In his cautioned interview which was part of the detailed amended summary of facts perused by me (the trial judge's sentencing order contains a very brief summary of facts) shows that it was he who grabbed the complainant by her neck, covered her mouth and took her to a room where he tied her to a bed after her mouth, hands and legs were tied. Her mouth was tied with a t-shirt to prevent her from shouting.
- [11] The medical report which was also part of the amended summary of facts shows that the complainant was slightly shaken and had bruises on bilateral arms and tenderness at anterior neck upon palpation.
- [12] Given the above facts coupled with the fact that the complainant was 19 years and was alone at home at the time of invasion and were rescued only by her friend, there was nothing objectionable to the impugned comments of the trial judge. Medical report while being helpful is not determinative of the level of harm and culpability which have to be gathered from the totality of facts.

### ***03<sup>rd</sup> ground of appeal***

- [13] The injuries found on the complainant though not serious by themselves were properly regarded by the trial judge as aggravating factors. It was a mere coincidence that because the complainant was overpowered and made to surrender there was no need for more violence to be perpetrated on her to subdue her. Lack of serious injuries on the complainant cannot be attributed to any kindness on the part of the invaders.

### ***04<sup>th</sup> ground of appeal***

- [14] It was held that the accused's responsibility for his 5 year old son and 53 year old mother was in reality of little mitigatory value in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). The fact that appellant was a 55 year old married person with no children and he reached class 6 education were considered to be having an insignificant impact as mitigating factors [see **Rainima v State** [2015] FJCA 17; AAU0022.2012 (27 February 2015)]. Though both cases involved child rape, there is no reason not to apply the same principle in respect of aggravated robberies in the form of home invasions. Thus, the learned trial judge's comment that the appellant's family and personal circumstances were of no mitigatory value is not an error.

### ***05<sup>th</sup> ground of appeal***

- [15] There is no accepted practice of giving a pre-determined discount of a particular percentage for the guilty plea in Fiji. Sentencing 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 arriving at a sentence that fits the crime. In terms of section 4(2)(f) of the Sentencing and Penalties Act 2009, the sentencing court is to have regard to "*whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so.*" The Sentencing and Penalties Act has left it to the decision of the sentencing court to give an appropriate weight to a guilty plea when sentencing an offender (**Khan v The State** [2014] FJCA 92; AAU 105/2011 (2 June 2014))

[16] 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 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 (**Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (02 November 2018)). The practice (not a principle) is for sentencing courts to give a separate consideration and quantification to the guilty plea but not a pre-determined percentage in every case (**Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015)). The remarks by Madigan J in ***Rainima*** were not part of the main judgment and cannot be considered as part of *ratio decidendi* of the decision.

[17] The discount of two (2) year for the appellant's early plea of guilty is devoid of any sentencing error in this case.

#### ***06<sup>th</sup> ground of appeal***

[18] The summary of facts reveal a case where a young girl staying alone in the house was traumatised by the acts of the appellant and his co-accused. There is no need for evidence to conclude that '*the horrific experience would stay in her mind for an extended period*' as did by the trial judge. That evidence would have come into the open had the appellant opted to go to trial instead of pleading guilty.

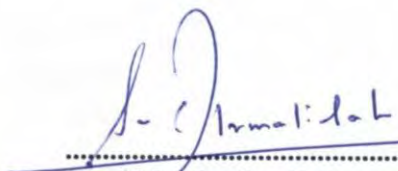
[19] The trial judge had correctly applied sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which is between 08-16 years for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature). The case reveals many a features highlighted as aggravating factors in ***Wise***.

[20] The appellant should consider himself somewhat lucky to have received his current sentence. With twenty-one (21) previous convictions against him, the appellant may run the risk of the full court enhancing the sentence if his appeal is taken before the full court.

## **Orders**

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



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