

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

**CRIMINAL APPEAL NO.AAU 0079 of 2018**  
**[Magistrates Court of Suva Case No. 1146 of 2011]**  
Under extended jurisdiction case No.67/2011

**BETWEEN** : **SAMUELA BABA**

**Appellant**

**AND** : **STATE**

**Respondent**

**Coram** : **Prematilaka, JA**

**Counsel** : **Appellant in person**  
: **Ms. S. Tivao for the Respondent**

**Date of Hearing** : **25 November 2020**

**Date of Ruling** : **26 November 2020**

**RULING**

[1] The appellant with others had been arraigned under extended jurisdiction in the Magistrates Court of Suva with two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 28 June 2011 at Nabua in the Central Division.

[2] According to the judgment the charges were as follows.

*‘For the first count it is alleged that on the 28<sup>th</sup> of June 2011 at Nabua, Samuela Baba and other stole a Nokia mobile phone valued at \$540, one black Coral mobile phone valued at \$100 and cash \$500 from suruj Narayan. The total value of the stolen items was \$1,050 and all items belonged to Suruj Narayan and immediately before stealing they used force on Suruj Narayan.*

*For the second count it is alleged that on the 28<sup>th</sup> of June 2011 at Nabua, Samuela Baba and others stole one blue ACER laptop valued at \$2,000 and a black Nokia mobile phone valued at \$70 from Kunal Krishan Gounder. The total value of the stolen items was \$2,110 and all items belonged to Kunal Krishan Gounder and immediately before stealing they used force on Kunal Krishan Gounder.'*

- [3] After a full hearing the learned Magistrate had on 26 February 2018 found the appellant guilty and convicted him of both charges. On 23 July 2018, he had been sentenced to an imprisonment of 07 years and 06 months each on the first and second counts to be served concurrently subject to a non-parole period of 05 years.
- [4] The appellant had timely appealed against conviction (03 grounds of appeal) and sentence (03 grounds of appeal) on 17 August 2018. He had tendered amended grounds of appeal containing three grounds of appeal only against conviction and written submissions on 06 January 2020 and 11 March 2020. The State had tendered written submissions on 18 February 2020 and 21 August 2020.
- [5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellants could appeal against conviction and sentence only with leave of court. The test for leave to appeal is 'reasonable prospect of success' (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, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.
- [6] 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.*

[7] The grounds of appeal submitted to this court by the appellant were as follows.

- 1) ***That** the Learned Magistrate erred in law and in fact by convicting the appellant on the low quality of identification made out against the appellant at the material time on the 28<sup>th</sup> of June 2011. The witnesses were shown photographic booklet of possible suspects before the appellant was taken to their residence for visual identification when no other persons was present during this process. Making this process of identification unlawful and unsafe to the guidelines of R.V. Turnbull. Therefore, this ground alone has merit because it caused a substantial miscarriage of justice not to respect the Turnbull guidelines for identification.*
- 2) ***That** the Learned Magistrate erred in law and in fact to convict the appellant since the alibi were intact. The alibi evidence rebutted the allegations of Aggravated Robbery as the appellant was not at the crime scene at the material time.*
- 3) ***That** the Learned Magistrate overlooked the legal maxim “Justice delayed is Justice denied” when the hearing was delayed and onto the judgment making the matter miscarry along the way to sentence.*
- 4) ***That** the Learned Trial Magistrate erred in law in failing to direct himself on the standard of proof required in order to convict.*
- 5) ***That** the Learned Trial Magistrate erred in law and in fact when he failed to warn or direct himself on the danger of convicting in reliance on the evidence of identification alone as required under the Turnbull guideline.*
- 6) ***That** the Learned Trial Magistrate erred in law and in fact in convicting me on this matter as the proper procedure or process of identification as laid down under the Turnbull guideline was not properly followed resulting in a substantial miscarriage of justice.*
- 7) ***That** the Learned Magistrate erred in law and in principle by sentencing the Appellant under the conditions of Section 18 of the Sentencing and Penalties Decree 2009 now an Act as there is no Parole Board*

*functioning under the law to meet and satisfy the legal requirements of the non-parole period before being eligible for parole.*

8) ***That*** *the Learned Sentencing Magistrate erred in law by taking irrelevant and extraneous matters into account for sentence since it is unsafe, unsatisfactory and unreliable to stand in all the circumstances of the case.*

9) ***That*** *the sentence of 7 years and 6 months is excessive and unlawful and even if not unlawful, it is wrong and unsafe to stand, citing the poor evidence by the prosecution case.*

[8] At the hearing into leave to appeal the appellant abandoned his grounds of appeal against conviction raised in the original leave to appeal application (*i.e.* the first three grounds of appeal) and relied only on the amended grounds of appeal (*i.e.* the fourth, fifth and sixth grounds of appeal) against conviction.

[9] A brief account of the evidence led by the prosecution as narrated by the Magistrate in the judgment is as follows.

*‘In summary the first two witnesses gave evidence that on the 28<sup>th</sup> of June 2011 at their home in Samabula they were robbed by a group of iTaukei men. The robbers were unmasked and the robbery happened in the daytime. They were tied up and robbed and once the robbers had left they then reported the matter to the police at Nabua.*

*A few days later a suspect was brought to their home and they identified him as one of the suspects. They both identified Samuela Baba as one of the robbers. They testified as to the items that were stolen from their home.*

*The third witness Setoki Taveta was a former policeman and he testified that he took the suspect that they arrested Samuela Baba to the victims’ home a few days after the robbery was reported. He also prepared a photographic booklet of possible suspects and took this to the victims as well.*

*The victims identified the suspect Samuela Baba as one of the suspects and also identified him from the photo booklet.*

***From the nature of the cross examination it appears that identification is going to be an issue in determining guilt in this case.’***

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

[10] The appellant’s argument is that the learned Magistrate had not directed himself on the standard of proof. However, upon a perusal of the judgment I find that the

Magistrate had stated in the judgment that the state had to bear the burden of establishing all elements of the offence the appellant was charged with and that he had found that the state had established the charges against the appellant beyond reasonable doubt. Thus, the Magistrate had been mindful not only of the standard of proof but also of the burden of proof.

[11] Accordingly, this ground of appeal has no merit and no reasonable prospect of success.

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

[12] The appellant's contention here is that the Magistrate had failed to warn himself of the identification evidence available in terms of Turnbull guidelines.

[13] The learned Magistrate had in fact considered the issue of identity as the main issue and advised himself specifically on Turnbull guidelines in the judgment. He had stated that the robbers were not masked inside the house and the complainants were not blindfolded and they had sufficient time and light to see the robbers (the robbery happened in the daytime). In the circumstances, the Magistrate had acted on the identification evidence of the complainants.

[14] Therefore, I do not see that there is any merit or reasonable prospect of success in the appellant's ground of appeal.

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

[15] The appellant argues that the photographic identification which incidentally was the foundation of the appellant's identification by the complainants had been infested with such irregularities so as to make it totally unreliable and therefore, the Magistrate should not have acted on it.

[16] Though not couched quite in this way in the ground of appeal, the appellant's submission at the hearing was on these lines. It is not clear from the judgment whether the police officer Setoki Taveta had taken the appellant to the crime scene to be identified by the complainants before or after they were shown a photographic booklet of possible suspects where the complainants had picked the appellant's photograph.

[17] The appellant based his submission on paragraphs 7 and 8 of the ‘Identification By Photographs’ available at Fiji Police Force Manual (FPM) which is appendix ‘A’ (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85.

[18] Paragraph 7 of FPM of states:

*‘Identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or if it is suspected that there is no chance of arresting him in the near future. A photographic identity parade of a person already in custody shall not be held.’*

[19] Paragraph 8 of FPM sets out in detail the procedure or the manner in which an identification parade by photograph should be conducted.

[20] The appellant’s main complaint is that when the police held the photographic identity parade at the crime scene with the participation of the complainants, he had been already arrested and in custody of the police at the police station. Thus, according to him the identification made at the said parade by the complainants should not be relied upon. He also argues that the police had not conducted the photographic identity parade as prescribed in paragraph 8.

[21] Making further submission on this point, the appellant stated that he was at the police station at 12.20 p.m. on 29 June 2011 according to the station diary whereas the photographic identity parade had been carried out at 3.30 p.m. on the same day. The station diary at Nabua police station and the statement of the police officer Setoki Taveta seem to support this contention. The authenticities of both documents are not contested by the respondent.

[22] Whether the photographic identity parade had been conducted as per the instructions in paragraph 8 of the FPM cannot be looked into at this stage without the complete appeal record.

[23] Therefore, had the appellant been arrested in respect of this offence prior to holding the identification parade by photograph, there was no need for a photographic identity parade as the police could have conducted a proper identification parade with the participation of real men which is dealt with under paragraph 1-6 of FPM.

[24] The state concedes that had the police in fact carried out the identification parade by photograph while holding the appellant under custody at the police station that may adversely affect and compromise the integrity of the parade itself and consequently the identification as the initial evidence on the identification of the appellant came from the photographic identity parade. However, the respondent maintains that the appellant was arrested after he was identified by the complainants at the said parade. The state submits that after his arrest, the appellant had been once again identified by the complainants when the police had taken him to the crime scene for reconstruction of the scene during the cautioned interview and thereafter in court.

[25] The Magistrate seems to have been mindful of the issues associated with the identification parade by photograph but disregarded them as not detracting from the identification evidence of the complainants. He had stated:

*'I find that even though the actions of the police in bringing the suspect to their house and also the photo booklets was not strictly in accordance with the police procedure for establishing identity- I find that this did not detract from the identification evidence given by the two victims at the trial'*

[26] While it is not possible to come to any definite conclusion arising from the above discussion regarding this ground of appeal in the absence of any more details as to what really transpired at the trial, coupled with the fact that even the judgment too is not very helpful to clear these doubts, I think it is best that the full court will examine the appellant's grievance regarding his alleged identification by the complainants with the assistance of the complete appeal record and pronounce upon the legal implications arising from possible breach of the Fiji Police Force Manual (FPM) in the sphere of identification of offenders at photographic identity parades.

[27] Although I cannot say that there is a reasonable prospect of success of the appellant's appeal on the 06<sup>th</sup> ground of appeal, I would grant leave to appeal against conviction to enable the full court to make some authoritative pronouncements or observations in regard to the above issue of importance in law for future guidance.

***07<sup>th</sup> ground of appeal (sentence)***

[28] The appellant argues that the Magistrate should not have fixed a non-parole period as there was no Parole Board in operation.

[29] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

*"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[30] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

*"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that **the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.**"*

*'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[31] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal stated

*'[114] The Court of Appeal guidelines in **Tora** and **Raogo** affirmed in **Bogidrau** by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[32] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 05 years (when the head sentence was 07 years and 06 months) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 02 years and 06 months between the final sentence and the non-parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period.

[33] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in operation in a sentence, the earliest date of release of a prisoner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[34] There is no merit or reasonable prospect of success on this ground of appeal.

***08<sup>th</sup> ground of appeal.***

[35] The appellant also argues that the Magistrate had taken irrelevant and extraneous matters into account in the matter of sentence but he had not demonstrated what those matters were. I do not think that the trial judge had made any sentencing error as alleged by the appellant.

[36] There is no merit or reasonable prospect of success on this ground of appeal.

***09<sup>th</sup> ground of appeal***

[37] The appellant's argument is that the sentence of 07 years and 06 months is excessive. The trial judge had applied the 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. The factual background in **Wise** was as follows.

*‘[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*

[6] *At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.*

[7] *The intruders got away with jewellery worth \$550 and \$150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'*

[38] There is no reason why similar robberies committed in the daytime should not be dealt with and offenders sentenced according to sentencing tariff set in Wise.

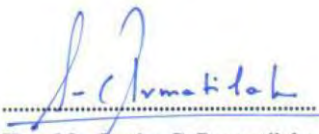
[39] The final sentence is even less than the lower end of the tariff and the appellant should consider himself lucky to have got away with such a lenient sentence. If the matter of sentence reaches the full court it could revisit the sentence in terms of section 23 (3) of the Court of Appeal Act to consider whether an enhanced sentence is more appropriate.

[40] There is no merit or reasonable prospect of success at all in this ground of appeal.

### Orders

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



  
Hon. Mr. Justice C. Prematilaka  
JUSTICE OF APPEAL