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

CRIMINAL APPEAL NO.AAU 032 of 2016
[In the Magistrates Court at Lautoka Case No. HAC 388 of 2015)

BETWEEN	**:**	**BAINIVALU TUIMATAVESI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Temo, JA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. J. Fatiaki for the Respondent**
Date of Hearing	**:**	**06 May 2021**
Date of Judgment	**:**	**03 June 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been convicted on his plea of guilty in the Magistrates Court at Lautoka exercising extended jurisdiction on one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009, one count of theft contrary to section 291(1) of the Crimes Act, 2009, one count of abduction with intent to confine person contrary to section 281 of the Crimes Act, 2009, one count of driving a motor vehicle without a driving licence contrary to section 56(3)(a)(6) and 114 of the Land Transport Act and one count of driving a motor vehicle not covered under the third

party risk contrary to section 4 of the Motor Vehicle Third Party Insurance Act, committed on 10 June 2015 at Lautoka in the Western Division.

[2] In addition, the appellant together with one Lemeki Tupati was convicted on his plea of guilty on another count of escaping from lawful custody contrary to section 196 of the Crimes Act, 2009.

[3] The appellant had pleaded guilty on 21 September 2015 and the Magistrate on his plea had convicted the appellant of all charges on 01 February 2016 after admitting the summary of facts. On 21 March 2016 the Magistrate had proceeded to sentence the appellant as follows:

> *'(i) A*ggravated *robbery* *: 10 years of imprisonment. (09 years of non-parole)*
>
> *(ii) Theft* *: 02 years of imprisonment.*
>
> *(iii) Abduction with intent to confine person* *:10 months of imprisonment*
>
> *(iv) Driving a motor vehicle without a driving licence* *:$200.00 fine and 20 days imprisonment*
>
> *(v) Driving a motor vehicle not covered under a third party risk* *:$200.00 fine and 20 days imprisonment*
>
> *(vi) Escaping from lawful custody* *: 06 months of imprisonment.*

[4] The matter was first mentioned on 12 June 2015 at Lautoka Magistrates court, the case was transferred to the High Court in terms of section 191 of the Criminal Procedure Act. On 06 August 2015, the High Court again transferred the case back to the Magistrates court pursuant to section 4(2) of the Criminal Procedure Act to try and hear the case.

[5] On 13 August 2015 when the case was mentioned at Lautoka Magistrates court the charges had been read and explained to the appellant in the presence of his counsel

from the Legal Aid Commission and the appellant had understood the same. Disclosures had been served on the same day on the appellant's counsel.

[6] On 15 September 2015 the appellant was represented by counsel for the Legal Aid Commission and the appellant pleaded guilty to all the charges. The case was called thereafter on 03 November 2015 and 01 December 2015 for the summary of facts to be submitted. On 01 February 2016, summary of facts had been submitted and the appellant had admitted the summary of facts.

[7] The appellant had earlier withdrawn from the Legal Aid Commission on 03 November 2015 and his written mitigation had been filed on 01 December 2015.

[8] After the appellant's admission of summary of facts on 01 February 2016 the case had been mentioned on 26 February 2016 and he had been sentenced on 21 March 2016.

[9] The appellant had tendered a timely application for leave to appeal against conviction and sentence. The grounds of appeal against conviction urged before the single Judge were:

> *"That the guilty plea was equivocal in that:-*
>
> *(i) the guilty plea was taken without any legal advice and assistance;*
> *(ii) the lack of knowledge to understand the consequences of pleading guilty;*
> *(iii) the guilty plea was not voluntarily made or given."*

[10] The grounds of appeal placed before the single Judge against sentence were:

> *"(i) That the learned sentencing Magistrate erred in law to enhance the sentence by 5 years to reflect aggravating features;*
>
> *(ii) That the learned sentencing Magistrate erred in law by discounting the sentence by one third for the early guilty plea;*
>
> *(iii) That the learned sentencing Magistrate erred in law in choosing a non-parole period that is close to the head sentence."*

[11] Leave to appeal against conviction was granted in order for the full court to examine the appeal record in relation to the conviction appeal. Leave to appeal against sentence on grounds 01 and 02 only was granted by the single Judge. The appeal against sentence on ground 3 was dismissed under section 35(2) of the Act.

[12] The summary of facts presented by the prosecution and admitted by the appellant are as follows:

> *'On the 10th of June 2015 the first accused, Lemeki Tupali and the second accused Bainivalu Tuimatavesi were serving their separate term at the Natabua Corrections Centre. Both were housed in Dorm No.5B*
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> *It was at about 1.15pm, the Duty Officer, SGT Major Mosese Nakavulevu received information that the two accused persons were planning to escape so he quickly called for a head count. Upon checking, he found that both the accused persons were missing. Upon further checking, it was discovered that a part of the fence behind 6B was damaged and through the damaged fence both accused had escaped.*
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> *Around 9.30am on 10th June 2015, the victim, Nilesh Kumar (PW1) supervisor of Auto Mart Yard was preparing wages for his staff when accused 2 and another entered the office and assaulted him on his face and head and then took the car keys of his company vehicle, a maroon pajero registration number DU 544 and started it. They then tied his hands and legs, gagged his mouth and covered his face before putting him between the front and the back seat of the vehicle. Accused 2 driving whilst the other sat on PW1's head.*
>
> *PW1 was later dumped at Nasoso Runaway where he was able to until himself and with the help of some of the workers nearby, he reported the matter at Namaka Police Station and then was taken to the Nadi Hospital before being transferred to ICU Lautoka Hospital. Accused 2 and another were able to get away with the vehicle. The vehicle was valued $45,000.00.*
>
> *Later he found the following items missing:*
>
> - *2 phone – 1 Alcatel valued $299.00 and 1 Nokia $150.00*
> - *Wallet*
> - *Other company documents and keys*
>
> *From Nasoso, accused 2 and another went to Namotomoto village where they picked Reapi Taburere (PW3) in a maroon pajero and went towards Denarau after picking Makereta Biau (PW4).*
>
> *Around the same, DC Edward Bibi (PW5), DC Leone (PW6), PC Akariva and Sgt Atu received informed on RT about the vehicle. They saw the vehicle*

registration number DU 544 near Ratu Navula School. PW 5 went to the vehicle and opened the door where he saw accused 2 sitting in the driver's seat and another in the front passengers seat with some other people in the back seat but as soon as accused 2 saw police he reversed the vehicle, damaging the vehicle on his rear and drove towards Nadi town, Nawaka, Solovi and Nausori Highland with the police chasing them.

The village headman of Bukuya Village was informed of the vehicle coming towards their village and to erect a road block. The vehicle did arrive in Bukuya Village where accused 2 and another were arrested by the village headman and the villages after a confrontation and later when police arrived, accused 2 and another were handed over to them.

Accused 1 was interviewed under caution where he voluntarily admitted that he had planned with accused 2 to escape from Prison. He did not attend breakfast at 7am instead went to the back removed the blocks from the fence and escaped.

Accused 2 was interviewed under caution where he voluntarily admitted that he escaped from Natabua Prison with accused 1. He followed the creek to Auto Mart Yard fence where he with another planned to steal a vehicle. They went in and stole a vehicle after assaulting and tying the hands and legs of the owner of the vehicle and then kept him in the vehicle. He admitted driving the vehicle to Nadi and dumping the man on the roadside before picking his wife from Namotomoto. They returned towards Denarau after having their bath when police approached them but when the police opened the door of the vehicle, he reversed the vehicle and took off towards Nawaka, hospital Rd, Mulomulo road then towards Nausori Highland road where they were arrested by some villages who assaulted him. Later when police arrived, they were arrested and brought to the police station. Moreover, he admitted he does not have a valid driving license hence not covered under the 3rd party policy.

Both accused have convictions.'

01st ground of appeal

[13] The complaint that the guilty plea was taken without legal advice and assistance is baseless as demonstrated in the timeline of the case. The appellant was represented by the counsel from the Legal Aid Commission when he pleaded guilty on his own free will on 21 September 2015 after charges being read, explained and understood by the appellant and disclosures being served on him on 13 August 2015. He on his own volition dispensed with legal assistance only on 03 November 2015. Therefore, he must have received legal advice in the matter of the plea of guilty.

[14] In **Vaqewa v State** [2016] FJSC 12; CAV0016.2015 (22 April 2016) the Supreme Court remarked:

> *'[28] In waiving rights to counsel or in rejecting advice from Magistrates or judges to apply for Legal Aid, or in simply doing nothing about legal representation, petitioners do not thereby create a ground of appeal for later arguing that they have been done an injustice and been deprived of counsel….. '*

[15] The Supreme Court in **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) also had usefully referred to the role of the defense counsel and the trial judge *vis-à-vis* a guilty plea in the matter of a plea as follows:

> *'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client…….'*

[16] The appellant's other complaints can be considered under 'equivocal pleas'. He opted to represent himself only on 03 November 2015 by which time he had pleaded guilty represented by counsel. He had not changed his mind until the sentence was meted out on 21 March 2016. During the period that lapsed in between he had filed written mitigation and admitted the summary of facts.

[17] The Magistrate had clearly mentioned in the sentence order dated 21 March 2016 that the appellant pleaded guilty voluntarily and he was satisfied that he plea was unequivocal. The Magistrate had also mentioned that the appellant had admitted the summary of facts freely.

[18] Therefore, the allegation that he lacked knowledge to understand the consequences of pleading guilty and it was not voluntarily made is without any foundation.

[19] **Nalave v State** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) the Court of Appeal held:

> *'[23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Rex v Golathan** (1915) 84 L.J.K.B 758, **R v Griffiths** (1932) 23 Cr. App. R. 153, **R v. Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy** [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).'*

[20] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter as follows:

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).*

[21] In **Samy v State** [2012] FJCA 3; AAU0019.2007 (30 January 2012) the Court of Appeal quoted from 20th Edition of Blackstone at paragraph [56] as follows:

> *'**D12.96 Defence Counsel** - It is the duty of counsel to advise his client on the strength of the evidence and the advantages of a guilty plea as regards sentencing (see, e.g., **Herbert** (1991) 94 Cr App R 233 and **Cain** [1976] QB 496). Such advice may, if necessary, be given in forceful terms (**Peace** [1976] Crim LR 119).*
>
> *Where an accused is so advised and thereafter pleads guilty reluctantly, his plea is not ipso facto to be treated as involuntary (ibid). It will be involuntary only if the advice was so very forceful as to take away his free choice.'*

[22] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

[23] In **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009) the Court of Appeal stated:

> *'[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*
>
> *[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal.'*

[24] Having examined the record, I do not find any evidence of equivocation. The appellant has not discharged the onus that fell upon him to establish facts upon which the validity of a guilty plea was challenged.

[25] This ground of appeal has no merits.

Grounds of appeal on sentence

[26] Calanchini P stated in **Singh v State** Criminal No. AAU15 and 16 of 2011: 26 October 2012 [2012] FJCA 71 concerning *inter alia* robbery with violence under section 293 (1) (b) of the Penal Code:

> *'....there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started as the lower end of the range.'*

[27] In **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 His Lordship the Chief Justice quoted the above passage from ***Singh*** and said:

> *'[27] So far as the head sentence is concerned, the court finds 13 years to be within the range set by recent authority for serious violent crime such as robbery with violence. Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour.'*

[28] In **Wise v The State** CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7 the Supreme Court said:

> *'We are concerned with a single case here and not a spate of robberies Livai Nawalu v The State CAV0012/2012 at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years' '..... for what was a home invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar. For circumstances such as these, rightly abhorrent to the law-abiding community, will compel courts to harden their hearts and to impose harsher sentences' 'We believe that offences of this nature should fall within the range of 8 - 16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.'*

[29] **Nabainivalu v State** Criminal Appeal CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 the Supreme Court once again confirmed that in the following words:

> *'.....the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (**Nawalu v State** Cr. App. No.CAV0012 of 2012)'*

[30] In **Mani v State** AAU0087 of 2013:14 September 2017 [2017] FJCA 119 which was a case of aggravated robbery with accompanying violence, the Court of Appeal acknowledged that the tariff was 10-16 years:

> *'..... the tariff of 10-16 years for the offence of aggravated robbery as laid down in several judicial pronouncements (see Samuel Donald Singh v State Crim. AAU15 and 16 of 2011, Nawalu v State Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11, Nabainivalu v State Criminal Appeal CAV 027 of 2014 : 22 October 2015 [2015] FJSC 22....'*

[31] **Waisele v State** AAU0081 of 2013: 30 November 2017 [2017] FJCA 136 which was also a case of aggravated robbery committed, armed with offensive weapons and violence inflicted, the Court of Appeal affirmed that the tariff was 10-16 years.

[32] Though, the facts and circumstances in the appellant's case are not exactly the same as in the above decisions they provide a very useful insight into the evolving thinking of the appellate courts over a period of nearly a decade on appropriate sentences in cases of robbery with violence under the Penal Code and ever increasing aggravated robbery cases under the Crimes Act, 2009.

[33] Therefore, as far as the final sentence of 10 years is concerned, I do not find any sentencing error in the starting point of 10 years or enhancing of the sentence by 05 years for aggravating features as argued by the appellant.

[34] Secondly, the appellant complains that the Magistrate had failed to give one third discount to his early guilty plea. The Magistrate did give a discount of 03 years for the early guilty plea.

[35] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J had the occasion to observe 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 **Naikelekelevesi State** [2008] FJCA 11; 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……..*
>
> *[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.'*

[36] Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) suggested that a discount for the early guilty plea should be considered last after aggravating and mitigating factors are considered and identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'.

> *'Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.'*

[37] However, it is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of *ratio decidendi* of the decision. Thus, those sentiments cannot be regarded as authoritative or binding on the matter of discount for early guilty pleas.

[38] In my view, more accurate view was expressed in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) where Goundar J held:

*'[18] In considering the weight of a guilty plea, **sentencing courts are encouraged** to give a separate consideration and quantification to the guilty plea (**as a matter of practice and not principle**), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.'*

[39] In **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court cited paragraph [18] in ***Mataunitoga*** and stated it was a more flexible approach towards an early guilty plea:

'*[15] The principle in **Rainima** 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 Goundar 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.'*

[40] 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."

[41] Therefore, in my view, the current judicial thinking that has developed progressively over the years is that it is a not a *sine qua none* for a sentencing judge to give a separate or one third discount for an early guilty plea though it should be accorded some discount depending on the circumstances of each case with even no discount for an inevitable and totally belated plea. As a matter of good practice the sentencing judges are encouraged to accord a separate discount for an early guilty plea but not doing so *ipso facto* would not constitute an error of law as long as it had been taken into account as part of mitigating factors and given an appropriate overall discount.

[42] Therefore, it cannot be said that the Magistrate had committed an error in principle in awarding a deduction of 03 years for the guilty plea.

[43] 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. Recognizing 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. 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).

[44] Given the nature and gravity of the offences, the term of imprisonment of 10 with a non-parole term of 09 years cannot be termed as harsh and excessive and is within the accepted range of sentences. Therefore, there are no merits in appeal against sentence.

Bandara, JA

[45] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Temo, JA

[46] I have read the draft judgment of His Lordship Mr. Justice Prematilaka, JA, and I agree with his reasons and conclusions.

Orders

1. Appeal against conviction dismissed.
2. Appeal against sentence dismissed.

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Hon. Mr. Justice C. Prematilaka

ACTING RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL