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

CRIMINAL APPEAL NO.AAU 139 of 2018
[Magistrates' Court at Suva Criminal Case No. CF 1566 of 2012]

BETWEEN	**:**	**SAILOMA VODO**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	**:**	**26 August 2021**
Date of Ruling	**:**	**27 August 2021**

RULING

[1] The appellant had been tried in the Magistrates court at Suva under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009. The charge against the appellant was as follows:

Statement of Offence (a)

AGGRAVATED ROBBERY*: Contrary to Section 311 (1)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence (b)

SAILOMA VODO with others*, on the 10th day of November 2012 at Suva in the Central Division, robbed one* ***ARVIND CHAND*** *of $490.00 cash, 1 x Nokia Mobile Phone valued at $199.00 and 1 x Gold chain valued at $300.00, 1 x New Balance canvas valued at $169.00 all to the total value of $1158.00,*

and at the time committing the robbery, threatened to use force on the said ***ARVIND CHAND.***

[2] After trial, the learned Magistrate found the appellant guilty in her judgment dated 12 September 2018. The appellant was sentenced on 31 October 2018 to an imprisonment of 10 years (the effective serving period being 09 years and 11 months) with a non-parole period of 09 years.

[3] The appellant had signed his appeal against conviction and sentence within time though he had not specified any grounds of appeal against sentence. Legal Aid Commission appearing for the appellant had subsequently filed an amended notice of appeal against conviction and sentence along with written submissions on 27 January 2021. The state had tendered its written submissions on 09 February 2021.

[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 test for leave to appeal is **'reasonable prospect of success'** (see **Caucau 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), **Chaudhry 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.

[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] The grounds of appeal urged by the appellant are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Magistrate erred in fact and in law when she failed to independently assess the truthfulness of the record of interview aside from the voir dire inquiry finding as such prejudicing the Appellant.*
>
> ***Sentence***
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and fact when he sentenced the Appellant to a sentence that is harsh and excessive.'*

[7] The Magistrate had set out the prosecution evidence led at the trial as follows:

> *'**PW1 Arvind Chand** gave evidence that he resided at 53 Shalimar Street. He recalled 10.11.12, he was at home and having a party with Shiu Chand, Imran and Sanjay. He could not recall the name of the girl. He went to his room to get money and saw 3 boys in the room with the face covered. His brother was outside speaking on the phone. He was punched in the face and stomach. He fell on top of the friend and his girlfriend sleeping in the room. The men took the wallet with $450 cash with cards and another $40 from the pocket. He could not see the face of the people as a knife was held to his face. They also took the mobile phone and new balance canvas. He saw 4 people running up the stairs towards the road. His friends were on the road and got robbed of the chain and phone as well. He reported the matter to Police at 5am. He went to Raiwaqa Police Station at 9.30am on 10.11.12 and identified the canvas, phone, gold chain as belonging to him. His chain was broken at one place and he had tied it with cotton.*
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> *There was no cross examination.*

> ***PW2 DC Josaia*** *gave evidence that he had been in the force for 13 years and was based in Raiwaqa Police Station in November 2012. He conducted the caution interview of Sailoma Vodo, the Accused. The suspect was given all rights and signed on the statement. He could not recall if there was a witnessing officer present. He did not threaten the Accused in the interview nor did he use any force or assault the Accused. There was no complaint by the Accused about the manner in which the interview was conducted. He recognised the Accused being the person sitting in the Accused Box.*
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> *In cross examination he stated that he could not recall if there was a witnessing officer present at the interview. There was no other person present at the interview. He did not agree that the Accused was assaulted prior to the interview. He did not assault the Accused prior to and during the interview. The Accused was given breaks but was not recorded in the interview. He denied that the Accused was not given the interview to read. He denied that the admissions were made up as Accused was assaulted. His responsibility was to record the answers and not to forcefully retrieve information, whatever the Accused said, it was noted in the interview.*
>
> *Upon re-examination he confirmed that no witnessing officer was present at the interview as there were a number of cases at the station and did not have enough people to have witnessing officer present. He agreed that he did not record the breaks given during the course of the interview. The interview was read back to the Accused.'*

[8] The appellant had opted to remain silent and not called any witnesses at the trial.

01st ground of appeal

[9] The appellant's complaint is that the trial Magistrate had failed to independently assess the truthfulness of the cautioned interview in addition to the *voir dire* finding.

[10] It appears that the main issue at the trial was the identity of the appellant. The complainant had not identified the robbers and therefore, the main item of evidence that connected the appellant with the robbery was his cautioned interview. The appellant is not challenging the admissibility of his confessional statement in appeal.

[11] The appellant had challenged the cautioned interviews at the *voir dire* inquiry but the learned Magistrate had ruled it admissible. No fresh evidence had transpired during the trial, particularly with the appellant opting to remain silent and not calling any

witnesses regarding the issue of voluntariness. All suggestions put to PW2 DC Josaia, who had recorded the cautioned interview, affecting the issue of voluntariness had been denied by the witness and therefore, there was no new evidence that could cast any doubt on voluntariness before court. Thus, there was no obligation on the part of the trial Magistrate to undertake a second probe into the question of voluntariness *vis-à-vis* the admissibility of the cautioned interview in the judgment. In any event, the Magistrate having heard all the evidence had firmly remained of the view that the confession was voluntary [see **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017)].

[12] In **Tuilagi v State** (supra) the Court of Appeal said analyzing previous decisions including **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30, **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.

> *'The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows:*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the confession (vide **Volau**).*
>
> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*
>
> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the **confession** if*

*they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) *However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[13] The appellants' complaint is that the magistrate had not undertaken an analysis on the truthfulness of the cautioned interview which goes to the weight to be attached to the admissions therein. This has to be considered in the light of the appellant's position *vis-à-vis* the cautioned interview, the contents of the cautioned interview itself and other circumstantial evidence, if any.

[14] The appellant had complained to court on his first appearance that he was forced to admit to the offending but not made any allegation of assault: nor understandably sought a medical examination. At the *voir dire* inquiry he had alleged assault preceding and during the recording of the interview and being denied of allied rights. However, his *voir dire* grounds had not alleged any assault preceding and during the recording of the interview and denial of his rights. The appellant had been considered an incredible witness in the *voir dire* ruling. The Magistrate had adverted to these aspects in the judgment. In the circumstances, the Magistrate had entertained no doubt of the truthfulness of what the appellant had stated in the cautioned interview by stating that his identity had been proved beyond reasonable doubt *'having read the cautioned interview in its entirety'.*

[15] The question is that the counsel for the appellant has not demonstrated what matters would have shown or at least cast a reasonable doubt on the truthfulness of what the appellant had confessed to the police.

[16] The respondent's counsel has stated in the written submissions that after the recording of the cautioned interview the appellant had accompanied the police to the crime scene and demonstrated how he and his accomplices had carried out the robbery. In addition, shortly after the robbery a woman had been seen by the owner carrying an amplifier from a car broken into by the robbers on their way out of the complainant's house and when stopped by the police she had told the police that it had been given to her by the appellant to sell. The police had traced the address provided by the woman and located the appellant and other stolen items which had been identified by the complainant. This seems to constitute recent possession evidence against the appellant.

[17] However, rather surprisingly the judgment has not referred to these items of evidence. Nevertheless, in the absence of any explanation on his part this circumstantial evidence would not only independently connect the appellant with the robbery but would show the truthfulness of his cautioned interview.

[18] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal (sentence)

[19] The complaint against sentence is that it is harsh and excessive.

[20] This is clearly a home invasion in the night. The Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) declared sentencing tariff for the offence of aggravated robbery as 08 to 16 years of imprisonment. The tariff in ***Wise*** was set in a similar situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.

[21] The learned magistrate had correctly guided herself by ***Wise*****.** She had picked the lower end of the tariff as the starting point and added 03 years for aggravating factors and reduced 01 year for 'mitigating factors' ending up with the head sentence of 10

years which is still at the lower range of the tariff. There is no sentencing error in the sentencing process.

[22] However, the Magistrate had then discounted 12 months and 16 days of remand period (taken as 13 months) from 10 years but erroneously calculated the remaining active sentence as 09 years and 11 months whereas it should have been 08 years and 11 months.

[23] The state has correctly argued that the sentence of 09 years and 11 months is still not harsh and excessive given the gravity of the planned invasion of the complainant's home through his bedroom in the early hours of the day by the group masked and armed with a dangerous weapon (a knife) which was *inter alia* held to the victim's throat, who was also knocked down by the punches delivered by the offenders and whose house was damaged in the process of committing the robbery.

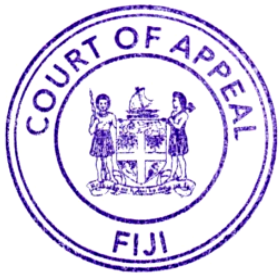
[24] It appears that the appellant had 11 previous convictions and 06 of them were active at the time of sentencing.

[25] Therefore, it begs the question whether the sentence imposed on the appellant fits the gravity of crime and whether the full court should revisit the propriety of the sentence which appears to be unduly lenient. In the process, the court may also rectify the arithmetical error referred to earlier.

[26] Therefore, I grant leave to appeal against sentence.

Orders

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



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