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

CRIMINAL APPEAL NO.AAU 020 of 2016
[In the High Court at Suva Case No. HAC 174 of 2014]

BETWEEN : **JEKESONI VULI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**
Bandara, JA
Hamza, JA

Counsel : **In Person for the Appellant**
: **Ms. S. Tivao for the Respondent**

Date of Hearing : **05 May 2021**

Date of Judgment : **18 June 2021**

JUDGMENT

Prematilaka, ARJA

[1] I have read in draft the judgment of Bandara, JA and agree that the appeal should be dismissed. However, I may add a few thoughts of my own on some issues raised by the

appellant. The underlying challenge to the conviction is primarily based on the issue of voluntariness of his cautioned interview.

Conviction appeal

[2] The appellant's conviction was based on the only item of evidence led against him *i.e.* his cautioned statement. It had been admitted after a *voir dire* inquiry. After his arrest, the appellant had been taken to Namaka police station and from there to Lautoka police station where his cautioned interview had commenced on 31 May 2014 and it had been concluded at Valelevu police station upon the appellant having been transferred there on 01 June 2014. The confessional statements in the cautioned interview had been made at Valelevu police station.

[3] The appellant had given evidence at the *voir dire* inquiry and alleged heavy assault upon him after his arrest. He had been first brought to Namaka police station on 30 May 2014 where the appellant had, however, not made any complaints to Inspector Taito Susau. He had alleged punching on his chest and head during the interview by the interviewing officer PC 3573 Daniele Turaga. It appears from the proceedings that the allegation of assault by the interviewing officer PC 3573 Daniele Turaga had not been even put to the witnessing officer DC 2561 Vonod Chand who too was present during the interview. Both interviewing officer and witnessing officer in their evidence had said that there was no duress or oppression of any form during the interview and they did not force the appellant to confess. The appellant had admitted under cross-examination that he did not make any complaint of assault, duress or oppression to the Magistrate or the High Court judge when he was produced in both courts. No medical evidence had been produced in support of any injuries to the appellant either.

[4] The trial judge in the *voir dire* ruling had guided himself according to the principles laid down in **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984) where the Court of Appeal held:

> *'It will be remembered that there are two matters each of which requires consideration in this area.* ***First,*** *it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as 'the flattery of hope or tyranny of fear.'* ***Second****, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment."*

[5] Going by the material available at the *voir dire* inquiry, I do not find that the trial judge had erred in his decision to admit the appellant's cautioned interview.

[6] The appellant had also questioned by way of an additional ground (second) the delivery of the *voir dire* ruling on the same day as the sentence was imposed. As my brother Bandara, JA had pointed out the decision on the *voir dire* inquiry had been pronounced by the trial judge at the end of it after hearing both counsel and the trial judge had informed both parties that detailed reasons would be given later. Therefore, there are no merits in this complaint.

[7] As for the appellant's complaint in his first additional ground of appeal that the police had acted in breach of the Constitution by holding him for more than 48 hours and obtaining his cautioned interview, it appears that he had been brought to Namaka police station at 21.30 hours on 30 May 2014 (Friday). The cautioned interview had commenced at 18.44 hours on 31 May 2014 (Saturday) at Lautoka police station, which had been suspended at 19.00 hours. The interview had recommenced at 10.31 hours on 01 June 2014 (Sunday) at Valelevu police station and completed at 15.25 hours. The appellant had been produced before Nasinu Magistrates court on 02 June 2014 (Monday). The police officers had explained the reason (31 May and 01 June being Saturday and Sunday) for the delay in bringing the appellant to court after 48 hours since his arrest. However, it appears that the cautioned interview had been completed within 48 hours of the arrest. Therefore, there was no Constitutional breach either in recording the cautioned interview or producing the appellant before court [(vide **Heinrich v State** [2019] FJCA 41; AAU0029.2017 (7 March 2019)]. There are merits in this ground of appeal as well.

[8] Thereafter, the appellant had kept the issue of voluntariness of his confessional statement live at the trial proper too. The same prosecution witnesses in addition to the complainant and the appellant had given evidence at the trial. The appellant challenges the directions in the summing-up on the approach to the cautioned statement which is at paragraphs 25-28 of the summing-up. Paragraph 27 is the most relevant:

> *'When considering the above evidence. I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.'*

[9] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal summarized the law relating to directions to the assessors on a confessional statement 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 (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.'*

[10] Having perused the summing-up and record of evidence at the trial proper, I cannot find anything new (*i.e.* what was not before court at the *voir dire* inquiry) which could have made the trial judge to change his mind contrary to his original view about the voluntariness of the appellant's cautioned interview or upon which he could have contemplated that there was a possibility that the confessional statement may not have been voluntary. Therefore, ***Noa Maya*** direction was not required in this case. The trial judge's directions at paragraph 27 are substantially in line with the principles of law set out in a number of judicial decisions as summarised in ***Tuilagi.*** Thus, there are no merits in the appellant's complaint.

[11] As stated by my brother Bandara, JA there was no question of the trial judge giving Turnbull directions in this case as the entire case against the appellant was based on his cautioned interview. In fact, the single Judge too has correctly held that the appellant's complaint under the second ground of appeal is misconceived as no evidence was adduced in identification.

[12] Regarding the appellant's grievance of the insufficiency of evidence to bring home the conviction under the third ground of appeal, it is clear that once the assessors and the trial judge accepted and relied upon the cautioned statement there was sufficient evidence to establish all elements of the offence the appellant was charged with beyond reasonable doubt. It is well settled in Fiji that an accused may be properly convicted on evidence consisting of an uncorroborated confession alone (vide **Kean v State** [2013] FJCA 117; AAU 95.2008 (13 November 2013) and **Kean v The State** [2015] FJSC 27; CAV 7 of 2015 (23 October 2015)].

[13] On the other hand I find that according to the complainant, acting in self-defense he had caused injuries to one of the intruders. The appellant had referred to that fact in his cautioned interview and identified the person so injured as Pita. This goes to the truthfulness of the appellant's account of what happened in the course of the robbery. Moreover, the complainant's evidence regarding the events in the night of the robbery and the appellant's narrative in the cautioned interview largely converge with each other.

[14] Therefore, there was circumstantial evidence that went to enhance the truthfulness and therefore, the weight to be placed on the appellant's confession. There is no merit in the third ground of appeal.

[15] As held by my brother Bandara, JA and the single Judge in the leave ruling I do not find any merits in the criticism under the fourth ground of appeal that the summing-up lacks fairness and balance.

Sentence appeal

[16] As for the first ground of appeal against sentence that the trial judge had committed 'double counting' as he had considered the use of crowbars and iron rods and threatening and abusing the victims as aggravating factors, I think it is misconceived.

[17] The appellant was charged with aggravated robbery under section 311(1) (a) of the Crimes Act 2009 which is about robbery in company. If during the course of robbery violent threats are made or excessive force is used, then those matters will constitute aggravating factors if such threats and force exceed what could be considered ordinarily as part and parcel of the robbery.

[18] The use of iron rods and crow bars constitutes an element of the offence under section 311(1) (b) being robbery armed with an offensive weapon. However the appellant had not been charged under section 311(1) (b) but under 311(1) (a) of the Crimes Act 2009.

[19] Therefore, the trial judge had not erred in considering both the use of crowbars and iron rods and threatening and abusing the victims as aggravating factors.

[20] The guidelines to be followed 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 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.*

[21] **Samuel Donald Singh v State** Crim. AAU15 and 16 of 2011 Calanchini P in the Court of Appeal said:

> *"...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."*

[22] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court once again 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. With this type of offending, personal mitigation of the kind raised by the Petitioner, that he is married and now has a small child, count for little.

[28] This approach and the tariff have been established in several cases: ***The State v Rokonabete*** *HAC 118/07;* ***The State v Rasaqio*** *[2010] FJHC, HAC155/2007,* ***Basa v The State*** *[2006] FJCA 23; AAU0024/05, 24th March 2006. It was decided that the English cases were to be followed rather than the New Zealand cases since the English penalties were closer to those in Fiji's legislation.'*

[23] The Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which is most relevant to the appellant's case said:

'[25] The matter does not end there. 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.'

[24] 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).

[25] Therefore, I do not find any sentencing error in the sentence imposed on the appellant by the learned trial judge and therefore no reasonable prospect of success in appeal against sentence. Given the nature and gravity of the offence, the term of imprisonment of 12 years with a non-parole term of 11 years cannot be termed as harsh and excessive and is within the accepted range of sentences.

[26] The appellant has also argued that the non-parole period is too close to the head sentence.

[27] The Supreme Court in **Tora v State** [2015] FJSC 23; CAV11 of 2015 (22 October 2015) 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."*

[28] In **Natini v State** [2015] FJCA 154; AAU102 of 2010 (3 December 2015) 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'.*

[29] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal at [114] stated (see also **Chirk King Yam v State** [2015] FJCA 23; AAU0095 of 2011 (27 February 2015) and **Kumova v The Queen** [2012] VSCA 212):

*'[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.'*

[30] 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 11 years (when the head sentence was 12 years) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 01 year 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.

[31] Corrections Service (Amendment) Act 2019 (22 November 2019) amended section 27 of the Corrections Service Act 2006 and Sentencing and Penalties Act 2009 significantly affecting some aspects of section 18 of the Sentencing and Penalties Act 2009, as follows:

Section 27 amended

2. Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—

"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with

section 18 of the Sentencing and Penalties Act 2009, ***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.***

(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.

(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".

Consequential amendment

3. The Sentencing and Penalties Act 2009 is amended by—

(a) in section 18—

(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and

(ii) deleting subsection (2); and

(b) deleting section 20(3).

[32] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019 (22 November 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 (*i.e.* the non-parole period) and irrespective of the remission 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 final/head sentence not taking into account or with no consideration to the non-parole period. Therefore, when there is a non-parole period included in a sentence, the earliest date of release of the prisoner for all practical purposes would be the date of completion of the non-parole period notwithstanding or even if he/she may be entitled to be released early upon remission of the sentence.

[33] Therefore, with the above statutory changes the time gap between the head sentence and the non-parole period does not affect the calculation of remission of one-third of the sentence.

[34] Therefore, there are no merits in both grounds of appeal against sentence and the appeal against sentence should be dismissed.

Bandara, JA

[35] The appellant was charged before the High Court of Suva with Aggravated Robbery contrary to Section 311 (1) (a) of the Crimes Act 2009. At the conclusion of the trial he was convicted and sentenced to 12 years imprisonment with a non-parole term of 11 years.

The count in the Amended Information upon which the appellant was found guilty read as follows:

First Count

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311 (1) (a) of the Crimes Decree No. 2009.

Particulars of Offence

JEKESONI VULI with others, in company of each other on the 1st day of May 2014 at Nasinu in the Central Division, stole 2 HP brand laptops valued at $6500.00, an I-Phone smartphone valued at $3800.00, 2 APPLE brand I-Pods valued at $4800.00, an APPLE brand I-Pod valued at $800.00, 2 APPLE brand I-Touch valued at $2000.00, 3 wrist watches valued at $1450.00, $1000 (FJD) cash, all to the total value of $31,350.00, the property of **SHANAL KAUSHIK PRASAD** and before such robbery used force on the said **SHANAL KAUSHIK PRASAD**.

Outcome of the trial before the High Court

[36] At the conclusion of the trial on the 12th February 2016, the assessors returned a majority opinion of guilty in respect of the amended count on the Amended Information.

[37] The learned High Court Judge concurring with the majority opinion of the assessors convicted the appellant on the 12 February 2016 and on the 4 March 2016 sentenced him to a 12 years imprisonment with a non-parole period of 11 years.

Initiation of the Appellate procedure

[38] The appellant filed a timely application for leave to appeal against conviction and sentence pursuant to Sections 21 (1)(b) and (1) (c) of the Court of Appeal Act. Later he filed an amended Petition of Appeal, setting out 4 grounds of appeal against conviction and 2 grounds of appeal against sentence.

They are as follows:

The grounds of appeal against conviction:

*"1. **THAT** the learned trial judge erred in law by relying on the confession made by the Appellant in the Caution Interview Statement yet not adequately and properly directing the assessors on convicting the Appellant on any other evidence apart from the confession.*

*2. **THAT** the learned trial Judge erred in law in not properly and adequately directing the assessors on the principle of Turnbull since the Identification of the "attackers" was disputed.*

*3. **THAT** the learned Trial Judge erred in law in causing the trial to miscarry in convicting the Appellant on insufficiency of evidence led by the Prosecution.*

*4. **THAT** the learned trial Judge caused the trial to miscarry when the Summing Up lacked fairness and balance."*

The grounds of appeal against sentence:

*"1. **THAT** the learned Sentencing Judge erred in law by enhancing the sentence in "double counting" after considering the Aggravating Features.*

*2. **THAT** the learned Sentencing Judge erred in law in choosing a non-parole period that is close to the head sentence (see Paula Tora)."*

[39] On 24th September 2018 the single judge of the Court of Appeal refused leave on all grounds of appeal against the conviction and sentence.

[40] On the 2nd October 2018 the appellant filed a letter seeking to renew his appeal against conviction to the full court of appeal.

[41] At the hearing before this full court the appellant indicated that he would proceed with the same grounds of appeal in his leave application against the conviction and sentence.

[42] The appellant had further filed additional grounds of appeal on 24th March 2020.

Factual Background

[43] The incident of robbery took place on 1st May 2014. The complainant (PW2 at the trial) lived in the house (where the incident took place) along with his parents and sister. Around 2.30 a.m the mother of the complainant came to him and said that thieves were breaking into the house. Thereupon the complainant had gone to the kitchen and grabbed two cane knives to defend himself and the family. Seven persons armed with crowbars and metal rods broke into the house through the main door by having broken its burglar grill.

[44] Seven thieves entered the complainant's house wearing three quarter pants, black T-shirts, masks and armed with crowbars and metal rods. The thieves demanded money and jewelries and ransacked the house and stole the assorted items to the total value of $31,

350.00 mentioned in the Amended Information. The complainant giving evidence had narrated how he confronted the thieves with a cane knife, in the following manner:

> "*Mr. Prasad: Okay, well they did manage to break in to my parent's bedroom but I held them off by trying to hit them with the knife.*
> *Judge: You hit some of them with the cane knife?*
> *Mr. Prasad: Yes, in the end they started running.*
> *Judge: No, no, you got a right to self defence but did you hit them with the cane knife?*
> *Mr. Prasad: Yes, but not in the bedroom.*
> *Judge: It's not my concern you fought back, did you hit some of them with the cane knife?*
> *Mr. Prasad: One of them.*
> *Judge: I hit one of them with the cane knife, alright."*

[45] After thieves fled the crime scene the complainant reported the matter to the police whereupon an investigation commenced.

[46] On 30th May 2014 the appellant was arrested at Nadi by the police. He was caution interviewed by the police on 31st May and 1st June 2014. In the caution interview the appellant admitted having being part of the group that attacked and stole the complainant's properties from his residence on 1st May 2014.

[47] At the trial proper the accused pleaded not guilty to the charge of aggravated robbery in the Amended Information.

[48] At the conclusion of the prosecution case when the appellant was called upon to make his defence, the appellant gave sworn evidence and totally denied having committed the aggravated robbery. He said, he knew nothing of the incident in question.

<u>In relation to the caution interview</u>

[49] The appellant acknowledged that he was caution interviewed by PC 3573 Daniele Turaga (PW3) (as witnessed by D/Corporal 2561 Vinod Chand, PW4) on 31st May and 1st June 2014, and the interview notes were tendered in evidence as Prosecution Exhibit number 1.

[50] The appellant further said in his evidence that PW3 and PW4 fabricated the alleged confession and the contents were not true. He alleged that PW3 and PW4 assaulted him during the interview.

[51] Ruling the appellant's caution interview statement as admissible evidence the learned High Court Judge stated in his reasoning:

> "*In this case, the dispute between the parties was familiar. The police caution interview officer (PW2) said the accused was given his right to counsel, his right to see his relatives and was given the standard rest and meal breaks. He was formally cautioned. He said, the accused co-operated with police and gave his statements voluntarily. The above were confirmed by the police witnessing officer (PW3). Both PW2 and PW3 said they did not assault, threaten or made false promises to the accused while he was in their custody.*
>
> *The accused on the other hand said, both PW2 and PW3 assaulted him during the interview. He said, they also swore at him and his mother. Because of the above, he admitted the offence. He said, he did not do so voluntarily.*
>
> *I have carefully considered the parties' version of events. I have listened very carefully to their evidence. After considering the authorities mentioned in paragraph 4 hereof, and after looking at all the facts, I have come to the conclusion that the accused gave his caution interview statements voluntarily and out of his own free will. I therefore ruled his caution interview statements as admissible evidence, and the same could be used in the trial proper, but its weight and value, are matters for the assessors to decide."*

Grounds of appeal against conviction

Ground One

[52] The learned High Court Judge having conducted the Voir Dire hearing on the 8th and 9th February 2016 made his ruling on the 9th of February 2016 admitting caution interview statement to be led in evidence stating;

> "*In giving my reasons abovementioned, I bear in mind what the Court of Appeal said in* ***Sisa Kalisoqo v Reginam*** *Criminal Appeal No, 52 of 1984, where their Lordships said "…****We have of recent times said that in giving a decision after a***

trial within a trial there are good reasons for the Judge to express himself with an economy of words.

The above were reasons for my ruling on 9 February 2016."

[53] In ***Noa Maya v The State***, *[2015]FJSC 30; CAV009 2015 (23 October 2015) where the Supreme Court stated at paragraph 19:*

> *There have been two schools of thought in the common law world about this topic in the context of trial by jury.* ***One is that jurors should be told that they should disregard the confession altogether if they are not sure that it was made voluntarily.*** *After all, what weight can be place at all on a confession which may have been made as a result of ill treatment or oppression, or which may have been induced by a promise of some kind, and which made the suspect confess when he might otherwise not have done so? He may have been confessing his guilt, not because he was guilty, but for example, because he wanted the ill-treatment to stop. The other school of thought takes as its starting point the fact that questions of admissibility of evidence are for the judge to decide, whereas the evaluation of such evidence as has been ruled admissible is for the jurors to make. If the judge is required to direct the jurors to disregard the confession if they are not sure that it was made voluntarily, that would be tantamount to the judge usurping the jurors' function of evaluating the evidence for themselves. On this school of thought, the appropriate direction is to tell the jurors that the weight which they should give to the confession is for them to decide…." (Emphasis added).*
>
> *Again at paragraph 23, their lordships stated:*
>
> ***" …Judges should for the time being therefore tell the assessors that even if they 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…"*** *(Emphasis added)*

The learned trial judge had directed the assessors adequately on the issue of caution interview analyzing both the prosecution and defence propositions. Paragraphs 24 and 27 of the Summing-up are relevant to note in this regard:

> "*To overcome the above, the prosecution relied on an alleged confession the accused allegedly made to the police on 31 May and 1 June 2014. You have heard PC 3573 Daniele Turaga (PW3) give evidence on how he caution interviewed the accused on 31 May 2014 at Lautoka Police Station. On 1 June 2014, he continued*

the caution interview at Valelevu Police Station at Nasinu near Suva. According to PW3, the accused was formally cautioned, he was given his right to counsel and the right to see his relatives, he was given the standard rest and meal breaks. According to PW3, the accused was asked a total of 97 questions and he gave 97 answers. The interview notes were tendered in evidence as Prosecution Exhibit No. 1. According to PW3, D/Corporal 2561 Vinod Chand (PW4) witnessed the interview. PW4 confirmed what PW3 said above, when he gave evidence. According to PW3 and PW4, the accused admitted in the interview that he was part of the group of men who committed "aggravated robbery" against the complainant and his family, at the material time – please refer to questions and answers 31 to 90 of Prosecution Exhibit No.1.

When considering the above evidence. I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you."

[54] The only evidence the prosecution had, linking the appellant to the crime was his caution interview and it is well settled law, that an accused person may be properly convicted on the basis of sole evidence of his voluntary confession.

[55] In **Hassan and two others V. Reginam** [1978] FJCA 18 Criminal Appeal 57 of 1977] this Court held citing earlier authorities. *"It is well established law that a man may be convicted even of murder, solely upon his confession." R.V. Sykes (1913) 8 Cr. App R 233. McKay v The King (1935) 54 CLR 1.*

Ground of appeal one is devoid of merit.

Ground Two

[56] There was no evidence before the trial court that any of the witnesses as identified the appellant. In ***RV Turnbull (1977) QB 224*** the English Court of Appeal laid down the principle that in a case of visual identification evidence the judge must give the jury a special warning of the danger of acting on such evidence and of the reasons for that danger.

[57] The Court further held that, "*a failure to follow these guidelines is likely to result in conviction being quashed and will do so if the judgment of this Court on all the evidence the verdict is either unsatisfactory or unsafe*."

[58] Turnbull direction puts visual identification into a special category, and in the present case there is no issue regarding visual identification of the perpetrator. This ground of appeal is misconceived, since Turnbull directions have no application to the instant case.

Ground of appeal two is devoid of merit.

Ground Three

[59] The evidence led by the prosecution is amply sufficient to come to a guilty verdict.

[60] In the judgment the learned High Court Judge states that:

> "*I find all the prosecution's witnesses as credible witnesses and I accept their evidence. I accept that the complainant (PW2) was attacked at the material time and his properties stolen. I accept the caution interview officers (PW3) and the witnessing officer's (PW4) evidence. I accept that the accused voluntarily gave his confession to the police at the material time and they were the truth."*
> *Given the above, I accept the majority view of the assessors and find the accused guilty as charged and I convict him accordingly."*

Appeal ground three is devoid of merits.

Ground Four

[61] This ground raises following issues in relation to the summing up claiming it lacks fairness and balance thereby causing the trial to miscarry. The first concern is that the learned trial judge should have directed the assessors on why the station officer at Nadi police station was allowed to give evidence during the Voir Dire and on the adminisbility of the caution interview. The admissions in a caution interview is a question of law that should be decided by the trial judge. The weight that should be attached to it the truthfulness and whether it was made voluntarily are factual matters for the assessors to decide at the trial. The directions given in the summing up at paragraph 25 – 28 properly deals with the issues. At the trial the counsel for the appellant had not objected to the witness at either the *Voir Dire* inquiry or the trial itself. It is absolutely noteworthy that the counsel for the appellant had not sought a re-direction.

[62] The second complaint urged under this ground of appeal is that the learned trial judge erred when he stated that the "*the defence's case was simple*." The defence claims that the appellant was not one of the intruders and that the admissions in the caution interview were either made under duress and therefore not voluntarily made or were fabricated by the police. Hence the defence's position was simple. It does not amount to an indication that the trial judge in any manner detracted from or diminished the position taken by the appellant.

[63] The learned trial judge had given clear and proper directions on the issue of weight to be attached to the confession in paragraphs 25 – 28. In "***R. V. Lawrence [1982] AC 510, 519,*** **Lord Hailsham** observed; *A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

In the present case the summing up in the overall is fair and balanced.

Appeal ground four is devoid of merit.

Appeal against sentence

Ground One

[64] In relation to this ground of appeal the grievance of the appellant is that the sentencing Court included as aggravating factors matters that were elements of the statutory offence of aggravated robbery. These include the use of crowbars and iron rods in the offending and also the fact that the victims were verbally threatened and abused.

[65] In the course of committing a robbery if violent threats are made or excessive force is used then these matters will obviously amount to aggravating factors. In ***Wallace Wise v The State*** [2015] FJSC 7; CAV 4 (24 April 2015), the Supreme Court observed that;

> "*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.*
>
> *Sentences will be enhanced where additional aggravating factors are also present. Examples would be:*
>
> *(i) offence committed during home invasion.*
> *(ii) in the middle of the night when victims might be at home asleep,*
> *(iii) carried out with premeditation, or some planning.*
> *(iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*
> *(v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*
> *(vi) Injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*
> *(vii) The victims frightened were elderly or vulnerable persons such as small children.*

> *It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders."*

[66] The established tariff for Aggravated Robbery is 8 – 16 years imprisonment. In the instant case the learned trial judge had started off with a sentence of 11 years imprisonment added 3 years for aggravating factors. The two years period the appellant spent in incarceration had been deducted. Accordingly the appellant was sentenced to an ultimate period of 12 years imprisonment which is within the middle range of tariff. This does not amount to double counting.

[67] The first aggravating factor is concerned with the safety of people in their homes whilst the second aggravating factor concerned with the factor that the family was asleep at home at the time the robbery took place.

[68] The fourth and fifth aggravating factors may seem akin to the elements of the offence. The use of iron rods and crow bars constitutes an element of the offence under Section 311 (1) (b) being robbery armed with an offensive weapon. However, the appellant had not been charged under section 311 (1) (b). In ***Maciu Koroicakau v State (FRCA No. CAV 0006 of 2005S; 4 May 2006)*** the Supreme Court observed that;

> "*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. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process."*

[69] In any event, in the circumstances of the case, it appears that the 12 years sentence is appropriate and in the sentencing process no prejudice has been caused to the accused. This ground of appeal lacks in merit. Enlargement of time refused.

Ground Two

[70] The grievance of the appellant in relation to this ground of appeal is that the non-parole term is too close to the head sentence. Non-parole term being 11 years is close to the head sentence.

[71] In terms of Section 18 (1) of the Sentencing and Penalties Act if an accused is to be imprisoned for life or for a term of two years or more, the court must fix a non-parole period. In terms of section 18 (4) any non-parole period fixed under this section must be at least 6 months less than the term of sentence.

[72] Accordingly the sentence of 12 years on the appellant with a non-parole period of 11 years is within the parameters of Section 18 of the Sentencing and Penalties Act.

Additional Grounds of Appeal

[73] Now I advert to the additional grounds of appeal filed by the appellant. The appellant's additional grounds of appeal are as follows:

1. "*THAT the learned trial judge erred in law in failing to consider when admitting the police interview statements, the unfairness of police investigation in obtaining confessional statements made 48 hours after the arrest whilst detained in police custody to be led in court as evidence."*

2. *THAT the learned trial judge erred in law in delivering the written ruling with reason in respect of the admissibility of the interview after sentencing."*

[74] The grievance of the appellant in relation to this ground of appeal is that he was in police custody for more than 48 hours.

[75] Article 13 of the Constitution of Fiji enshrines the right person who are arrested and detained. The said article of the constitution reads as follows:

"13 – (f) to be brought before a court as soon as reasonably possible, but in any case no later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter."

[76] Evidence relating to the arrest, detention of appellant and production before the Magistrate is as follows:

The appellant was arrested on the 31 May 2014 in Nadi and was taken to Namaka Police station, Nadi. On 31 May 2014 two Police Officers from Valelevu Police Station, Suva travelled to Nadi to take custody of the appellant. At Namaka Police Station these two officers commenced the caution interview of the appellant. The appellant was then brought to the Valelevu Police Station Suva. On 1st June 2014 police concluded the appellant's caution interview. On the 2nd June 2014 the appellant was produced in Nasinu Magistrates Court.

[77] In ***Heinrich v State*** [2019] FJCA 41; AAU 0029.2017 (7th March 2019) the Court of Appeal observed that;

> "*However, the High Court judgment in Dharmendra has not ruled out but left it open the possibility that for one or another justifiable reason or reasons, a person arrested may be produced even after the lapse of 48 hours of the arrest. This is the kind of situation envisaged under the third limb of Article 13 (1) (f) of the Constitution i.e. "if that is not reasonably possible, as soon as possible thereafter." Some examples where the third limb may come into play would be the unavailability of a court in some outer islands of Fiji or the prevalence of a state of emergency declared by the State etc. Needless to say, that there is no such instances. It is only logical to think that if a person who is arrested should mandatorily be brought before a court in less than 48 hours at all times without exception, the third limb of Article 13 (1) would be superfluous.*
>
> *Therefore, in my view, when there is a failure to bring a person arrested before a court as soon as reasonably possible or not later than 48 hours of the arrest (1) he should be produced as soon as possible thereafter and (2) the party bringing that person to court must place material to satisfy court that it was not reasonably possibly to comply with the first and second timelines and that he is being brought to court as soon as possible thereafter. This would be particularly required when there is an allegation that the detention is unlawful for non-compliance with Article*

13 (1) (f) of the Constitution. Such a course of action would also help demonstrate bone fides of the investigating officers. If an extension is sought for detention of the person beyond 48 hours who has been arrested but cannot be or not brought before court, ordinarily and unless it is impossible, the permission of court should be sought before the expiry of the 48 hour period. This would ensure that a person would not be held under detention beyond 48 hours without the knowledge and intervention of a judicial officer even when it is not reasonably possible to bring that person physically before court."

[78] It appears that the appellant had been detained beyond 48 hours due to the intervention of the weekend and, he, who was arrested on Friday had been produced on the ensuing Monday. The exception set out in the constitution stating "*…. or if that is not reasonably possible as soon as possible thereafter",* is clearly applicable here.

[79] The counsel for the appellant in the course of the trial at no point had taken this matter as an issue. This ground of appeal is devoid of merit. Enlargement of time is refused.

Additional Ground Two of the Appeal

[80] In relation to this ground of appeal the grievance of the appellant is that the learned trial judge did not give his written ruling at the conclusion of the Voir Dire. As the court proceedings reflect the learned trial judge has given his written ruling on the 4th March 2016.

[81] The following is revealed at page 169 of the trial court proceedings showing that the learned trial judge had given a written ruling:

Judge: Thank you. Just bear with me for a few minutes while I write my Ruling. This is my ruling. Ruling on a Trial within a Trial. I've heard three prosecution witnesses and the accused have his evidence. I rule that the accused caution interview statement as admissible evidence and it might be tendered at the trial proper but its acceptance or otherwise will be for the assessors. Detailed written reasons will be given later."-

Additional ground two of the appeal is devoid of merits. Enlargement of time is refused.

[82] Having regard to the above I hold that none of the grounds of appeal of both conviction and sentence given consideration above has merit. Appeal dismissed.

Hamza, JA

[83] I have read in draft the judgment of Bandara, JA and the concurring judgment of Prematilaka, ARJA. I agree that the appeal against conviction and sentence be dismissed.

Orders of the Court

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

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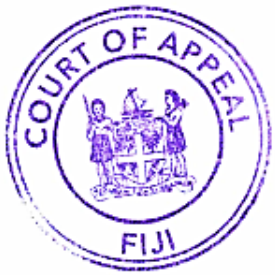
Hon. Mr. Justice Chandana Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL



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Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice Riyaz Hamza
JUSTICE OF APPEAL