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

CRIMINAL APPEALS NO.AAU 113 of 2015
[In the High Court at Suva Case No. HAC 115 of 2013S)

BETWEEN	:	**JALESI BATIMUDRAMUDRA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA** **Bandara, JA** **Hamza, JA**
Counsel	:	**Mr. M. Fesaitu for Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**03 May 2021**
Date of Judgment	:	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been charged with another in the High Court at Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and one count of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 03 March 2013 at Lot 61 Mead Road, Tamavua in the Central Division.

[2] Following a trial the assessors had returned unanimous opinions of guilty against the appellant. The learned trial Judge had agreed with the opinions of the assessors and convicted the appellant accordingly. The appellant had been sentenced on 03 July 2015

to consecutive terms of 03 years and 08 months imprisonment on each count with the final sentence being 07 years and 04 months with a non-parole term of 06 years.

[3] The appellant had filed an untimely application for leave to appeal against conviction and sentence followed by further grounds of appeal supported by an application for enlargement of time. Finally, the Legal Aid Commission had filed an amended notice of appeal against conviction and sentence.

[4] The grounds of appeal considered by the single Judge at the leave to appeal stage are as follows:

> *'Against Conviction:*
>
> 1. *The conviction entered on the charge of aggravated burglary cannot be supported by the totality of the evidence.*
> 2. *The conviction entered on the charge of theft cannot be supported by the totality of the evidence.*
> 3. *The Appellant is prejudiced by the learned trial judge informing the assessors in the summing up that a prima facia case was found against him, at the end of the prosecution case, wherein he was put to his defense.*
> 4. *The leaned trial judge erred in law and in fact in not adequately directing the assessors on the weight to be attached to the confession contained in the caution interview.*
> 5. *The learned trial Judge failed to direct the assessors on the doctrine of recent possession.*
> 6. *The learned trial judge in the voir dire ruling did not carry out an adequate assessment in holding that the confession in the caution interview is admissible to the extent that:*
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> *(a) The learned trial judge has a discretion to exclude the confession even if he found the confession to be voluntarily made;*
> *(b) The learned trial Judge failed to exercise such discretion.*
>
> *Against Sentence:*
>
> 1. *The final sentence imposed is harsh and excessive in the circumstances.*

[5] The single Judge in his ruling dated 12 April 2019 had granted leave to appeal against conviction only on conviction ground 03 and on the single sentence ground. The Legal Aid Commission is pursuing those two grounds of appeal where leave was

granted and four other grounds where leave was refused before the full court and has filed written submissions accordingly.

[6] The state is relying on its written submissions filed at the leave to appeal stage and as directed by this court at the hearing of the appeal, it has now tendered written submissions on the fourth reframed ground of appeal on 05 May 2021. The counsel for the appellant had filed written submission on all grounds for the full court hearing.

[7] Thus, at the hearing of the appeal this court heard both counsel on five grounds of appeal against conviction and one ground of appeal against sentence. Those grounds are as follows:

> *'**Conviction***
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> 1. *The Learned Trial Judge erred in law and in fact in the voir dire ruling by wrongly assessing the evidence resulting in not carrying out an adequate assessment of the evidence when admitting the caution and charge interview statements into evidence.*
> 2. *The Learned Trial Judge failed to direct the assessors on the doctrine of recent possession.*
> 3. *The conviction entered on the charge of aggravated burglary is not supported by the totality of the evidence.*
> 4. *The conviction entered on the charge of theft is not supported by the totality of the evidence.*
> 5. *The Appellant is prejudiced by the Learned Trial Judge informing the assessors in the Summing Up a prima facia case was found against him, at the end of prosecution case, wherein he was put to his defence.*
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> ***Sentence***
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> 1. *The final sentence is harsh and excessive in the circumstances.'*

[8] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA; 171AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and

Waqasaqa v State [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Facts in brief

[9] On or about 03 March 2013, the appellant and another had met at Salato Road, Namadi Heights and decided to walk to Mead Road to break into a house. They had walked to Mead Road and picked the complainant's house located at Lot 61, Mead Road, Tamavua to break into in the early hours after midnight. They had walked up the complainant's driveway, scaled a cement wall and jumped into the compound. They had checked around the complainant's house to see if anyone was at home and found the complainant's house empty.

[10] The appellant had walked to the complainant's front door, removed three louver blades from the window and broken into the house. The co-accused also had entered the house. Both of them had then ransacked the house and stolen the items mentioned in Count No. 2 of the information.

[11] Upon the police carrying out an investigation some of the complainants' stolen properties had been recovered from the appellant's house. He had been caution interviewed by police on 06 March 2013 where he had admitted breaking into the complainants' house at the material time, and stealing some of the complainants' properties.

[12] At the trial the appellant had remained silent and not called any witnesses. However, at the *voir dire* inquiry he had alleged that the caution interview statement and charge statement had been forced out of him by the police and therefore not given voluntarily. Nevertheless, the trial judge on 03 July 2015 had ruled the appellant's cautioned interview and charge statement to have been given voluntarily and

admissible. The prosecution had led the cautioned interview statement in evidence at the trial proper.

01st ground of appeal

[13] The appellant's complaint is that the trial judge had not carried out an adequate assessment of the evidence when admitting the cautioned and charge statements into evidence at the *voir dire*. The challenge to the admissibility of the cautioned and charge statements appears to arise mainly due to the brief *voir dire* ruling by the trial judge coupled with the fact that the station diary and cell diary at Samabula police station was not available to the parties at the time of the *voir dire* inquiry.

[14] According to the *voir dire* proceedings, the appellant had surrendered to Nabua police station on 05 March 2013 through DC 3641 Taniela Tubuna who was known to him in response to a bench warrant in respect of another case. He had made no allegation of assault against DC 3641 Taniela. The appellant had been taken to Samabula police station where on 06 March 2013 DC 3476 Sakulu Colati had recorded the cautioned interview and the only allegation made against him was one of fabrication but no allegation of threats or assaults was made. DC 3722 Munilesh Gounder had charged the appellant at Samabula police station on 07 Match 2013 and no allegations of any sort were made against him. Neither DC 3476 Sakulu Colati nor DC 3722 Munilesh Gounder had been questioned about the missing station diary and cell diary at Samabula police station and their significance to the appellant's case during the cross-examination.

[15] The appellant in his evidence had alleged that at 5.00 a.m. on 06 March 2013 5-6 police officers in civilian clothes including DC Davonu came to the cell at Nabua police station, threatened, assaulted and punched him several times on his mouth, head and the back. The same officers less than 10 in number had come again at 9.00 a.m. and taken him to the interrogation room and threatened to remove the clothes and rub chilies on him. They had also landed hard and soft punches and assaulted him on the mouth, chest, and head and kicked on the back. After being taken to Samabula police station on the same day he had been once again assaulted until produced in

court on 07 March 2013. Under cross-examination the appellant had stated that he was bleeding from his nose and mouth. He also had alleged that during the cautioned interview he had been assaulted from the beginning till the end for over 03 hours by police officers including the interviewing officer.

[16] The appellant had been produced before Suva Magistrates' court on 08 March 2013 but he had not complained of any threats or assault to the Magistrate because he was 'under depression' at that time. He had thereafter been produced before the High Court on 22 March 2013 but he had not made any complaint to the High Court judge either. The appellant had not requested to be medically examined at any stage. His only complaint had allegedly been made to an officer at Samabula police station when he was brought there from Nabua police station and he assumes that a record of his complaint may have been made to that effect in the Station Diary and Cell Book which forms the central plank of the appellant's argument under this ground of appeal.

[17] DC 4630 Manasa Bainimarama had explained at the *voir dire* inquiry that the said Station Diary and Cell Book of Samabula police station had been handed over to an officer from the office of the DPP in respect of another case in the Magistrates' court regarding another accused for the purpose of a *voir dire* inquiry and kept in the custody of court and as a result they were not available for the appellant's *voir dire* inquiry.

[18] The appellant's counsel has submitted that the appellant had been in possession of the said Station Diary and Cell Book of Samabula police station at the trial stage prior to the cross-examination of the interviewing officer, DC 3476 Sakulu Colati. Due to the non-availability of the trial proceedings after DC 3476 Sakulu Colati commenced his evidence under cross-examination it cannot be ascertained whether the witness had been confronted with any entries on the Station Diary and Cell Book of Samabula police station. However, it is clear from the summing-up that the appellant had not given evidence and produced the same at the trial. The summing-up does not show that the appellant had elicited any evidence relating to his alleged complaint of threats and assaults to an officer from Samabula police station as allegedly recorded in the

Station Diary and Cell Book either from DC 3476 Sakulu Colati or from DC 3722 Munilesh Gounder who was the investigating officer.

[19] Therefore, there is no evidence as to whether the Station Diary and Cell Book had recorded any complaint of threats or assaults by the police officers allegedly made by the appellant to a police officer of Indian origin at Samabula police station. The fact that the appellant had refrained from producing the Station Diary and Cell Book when they were available to him at the trial stage suggests that if produced they may have been unfavorable to him.

[20] Therefore, there was no basis for the trial judge to have analyzed the alleged entry in the Station Diary and Cell Book of Samabula police station because it was non-existent at the stage of the *voir dire* inquiry. On the basis of the evidence placed by the prosecution the appellant had given his statement under caution voluntarily. His conduct of not making any complaint to the Magistrate and the High Court judge of any threats and assaults coupled with lack of any medical evidence to support what was alleged to have a fierce attack and his failure to even suggest to the police witnesses of such brutality at the *voir dire* inquiry make the appellant's position that he did not make the cautioned interview voluntarily but under oppression totally untenable.

[21] In the circumstances, the trial judge had correctly applied the decision in **Ganga Ram & Shiu Charan v R** [Criminal Appeal No.AAU0046 of 1983 (13 July 1984)] to the facts before him with an economy of words. The Court of Appeal in ***Ganga Ram*** set down the basic principles upon which an admission would be admitted into evidence after a *voir dire* inquiry as follows:

> *"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."

[22] The Supreme Court in **Lesi v State** [2018] FJSC 23; CAV0016 of 2018 (01 November 2018) where it was held following **Wallace v. R** [1997] Cr App R 396 that there was no obligation on the judge to give reasons for his ruling and disagreed with the complaint that the judge should have given reasons. The Supreme Court said:

> *'[59] In Fiji, it has been the practice in trials before the High Court where there have been voir dire inquiries, for the trial judge to give a ruling with an **economy of words .**This is mainly to avoid situations at the trial which follows any bias on the part of the trial Judge.'*
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> *'[60] The Privy Council in Wallace v. R [1997] 1 Cr App R 396 stated that there is no rule of general application that a judge should give reasons for any procedural ruling made in the course of a trial within a trial. There may be circumstances where it would be unwise to give reasons which the accused would conclude that he would not be believed on the general issue if he chose to give evidence.'*
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> *'[62] The ruling on the voir dire inquiry of the learned trial though economically worded was sufficiently reasoned out. His directions to the Assessors in his summing up regarding the confessions has been adequate and therefore the contention of the 2nd Petitioner as well as the 1st Petitioner based on their confessions being inadmissible is without merit...."*
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> *'[85] But the complaint proceeds on the assumption that the judge should have given reasons for his ruling. The judge himself cited what O'Regan JA had said in Kalisoqo v Reginam (Criminal Appeal No 52 of 1984) at p 9, namely 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"**. But giving one's reasons economically is different from not giving any reasons at all, and so one needs to look elsewhere for the answer. It is not hard to find. The issue was addressed head on by the Privy Council in Wallace and Fuller v Reginam [1997] 1 Cr App R 396, to which Chandra J has referred. In that case the judge gave no reasons for finding that the statements under caution were admissible, beyond stating that he found them to be voluntary, and it was contended in the Privy Council that a judge should always express his reasons for any procedural ruling given during a trial. The Privy Council rejected that contention, saying that it all depended on the particular circumstances of the case. Good practice may require a reasoned ruling, for example, where the judge was deciding a question of law so that his reasoning could be reviewed on appeal, or where the judge was deciding a mixed question of law and fact so that the law*

could be put in context, or where the judge was exercising a discretion in circumstances in which the existence of the discretion was in issue.'(emphasis added)'

[23] In **Kacivakawalu v State** [2018] FJCA 202; AAU0053.2015 (29 November 2018) the Court of Appeal dealt with a similar complaint and examined the evidence available to the trial judge at the *voir dire* inquiry, just as I have proceeded to do in this case, and stated as follows:

'[41] In my view there cannot be a set formula for setting out reasons in a voir dire ruling. It varies from case to case depending on the facts and circumstances of each case. Too much analysis in the ruling at the voir dire stage would leave the prosecution or the defence, as the case may be, with the impression that they would not be believed on the general issue at the trial proper. On the other hand if the ruling is devoid of a discussion on the crucial issues placed before court at the voir dire inquiry it may leave the parties with doubts of the rationality and transparency of the judicial process and expectations of a fair hearing. The trial judge has to strike a healthy balance between these two ends.

'[43] In addition, I have independently analysed this aspect of the matter and given anxious consideration to the Appellant's complaint in detail. I am satisfied that the Trial Judge was correct in his decision to admit the Appellant's caution interview as the prosecution had proved beyond reasonable doubt of its voluntariness. Therefore, I reject the first ground of appeal.'

[24] Therefore, there is no basis to reverse the trial judge's ruling at the *voir dire* inquiry as to the admissibility of the appellant's cautioned interview and charge statement as I am not satisfied that the trial judge had completely wrongly assessed the evidence or failed to apply the correct principles of law (vide **Tuilagi v State** [2018] FJSC 3; CAV0013 of 2017 (26 April 2018)]. In all the circumstances discussed above and the relevant law applicable I see no reasonable prospect of success or merits in the appellant's complaint under the first ground of appeal and leave to appeal is therefore refused.

02nd ground of appeal

[25] The appellant argues that the trial judge had not discussed the doctrine of recent possession with regard to the evidence of recovery of some of the stolen items from his residence where he had handed them over to the police on 06 March 2013. The recovered items and the search list were produced at the trial by the prosecution. According to the summing-up the investigating officer DC 3722 Munilesh Gounder had confirmed in his evidence that the complainants had come to the police station and identified the items as theirs.

[26] The trial judge had discussed this item of evidence under 'circumstantial evidence' but not specifically directed the assessors under 'recent possession' evidence which is one strand of circumstantial evidence. I shall now examine the recovery of stolen items from the appellant's possession in this instance to see whether it would constitute an independent item of circumstantial evidence against him as 'recent possession' evidence so that it alone would be sufficient even without any other evidence to implicate him in the two offences.

[27] The *'doctrine of recent possession'* may be applied in appropriate cases [see **David Kio v R** [Unreported Criminal Appeal Case No. 11 of 1977; Davis CJ; at page 3]. In **Trainer v R** (1906) 4 CLR 126 Griffith CJ explained the '*doctrine of recent possession*' at page 132:

> *'It is a well-known rule that recent possession of stolen property is evidence either that the person in possession of it stole the property or received it knowing it to have been stolen according to the circumstances of the case.'*
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> *Prima facie the presumption is that he stole it himself, but if the circumstances are such as to show it to be impossible that he stole it, it may be inferred that he received it knowing that someone else had stolen it.' (emphasis added)'*

[28] **R v Langmead** (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:

> *'I do not agree ... that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'*

[29] Dickson C.J. and McIntyre, Le Dain and La Forest JJ. said in **R v Kowlyk** [1988] 2 SCR 59:

> *'The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of its truth."*

[30] In **Beumazi Ndoro Chaila -** Appellant **and Republic** - Respondent [2016] eKLR the Court of Appeal at Mombasa (Kenya) summarized the following principles relating to 'recent possession':

> *'……The inference is drawn from possession of recently stolen property rather than recently taking possession of stolen property.*
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> *However, before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters: **i**. That the accused was in possession of the property; **ii**. That the property was positively identified by the complainant; **iii**. That the property was recently stolen; **iv**. That the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; **v.** That there are no co-existing circumstances, which point to any other person as having been in possession and;*
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> *The doctrine being a rebuttal presumption of facts is rebuttable with an accused being called upon to offer an explanation, which if he fails to do an inference is drawn that he either stole or is guilty receiver.*

In proving possession, the prosecution must establish that the accused had possession of the property in question, i.e. had custody of or control over that property and intended to have custody or exercise control over it. The fact that a third party has physical possession of the property does not mean it could not have been possessed by the accused. In this regard, the prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time.

Again, the term "recent" *depends, as already stated, on the nature of the property. Frequently circulated property such as bank notes remain* "recently stolen" *for a shorter period than less frequently traded objects like cars, books, clothes, electronic appliances etc.'*

[31] In **Timo v State** [2019] FJSC 1; CAV0022.2018 (25 April 2019):

'[17] …….Indeed, this was a classic example of the application of that strand of circumstantial evidence commonly called "recent possession". In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is untrue, the court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. And if the property had been stolen in a burglary or a robbery, the court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the robbery in which the property was stolen: see, for example, Blackstone's Criminal Practice 2016, paras F.63-F.64, and applied in Fiji in Wainiqolo v The State [2006] FJCA 49 and Rokodreu v The State [2018] FJCA 209.'

[32] The appellant had surrendered the items stolen from the complainants' house to the police team led by Mr. Jona Davonu which were in his room in his residence on the day after the theft and burglary. The complainants had identified the items at the police station as property belonging to them and stolen from their house as confirmed by the seemingly unchallenged evidence of the investigating officer DC 3722 Munilesh Gounder. A clear nexus had been established between the items recovered from the appellant's possession and those stolen from the complainants' house [see **Baleilevuka v State** [2019] FJCA 209; AAU58 of 2015 (03 October 2019)]. The appellant's unsubstantiated suggestion to Mr. Jona Davonu that they had been planted

by the police had been rejected and the appellant had not explained in any other way how the stolen property came into his recent possession at the trial. In the circumstances any reasonable assessors or a trial judge would infer looking at all the relevant circumstances that the appellant not only stole the property in question and was a party to its theft but he also took part in the burglary in which the property was stolen. This inference is possible even without any other evidence to connect the appellant with the two offences.

[33] Therefore, the trial judge's failure to address the assessors specifically on 'recent possession' had not caused any miscarriage of justice and in any event no substantial miscarriage of justice. Consequently, this ground of appeal has no reasonable prospect of success in appeal and therefore, leave to appeal should be refused.

03rd and 04th ground of appeal

[34] The appellant's counsel argues that the verdicts of guilty are not supported by the totality of evidence against the appellant. The evidence against the appellant consists of his cautioned interview and recent possession of stolen property belonging to the complainants.

[35] I have already held that the appellant's confession on his involvement in both theft and aggravated burglary had been duly admitted in evidence. The appellant's counsel has admitted that the cautioned interview is sufficient to prove joint enterprise of committing theft and aggravated burglary. I have also held that recent possession evidence alone is sufficient to establish both charges against the appellant.

[36] In the circumstances, these grounds of appeal have no reasonable prospect of success and merits. Leave to appeal is thus refused.

05th ground of appeal

[37] The argument on behalf of the appellant is that the trial judge's use of the phrase in the summing-up that '.. *prime facie case had been found against the appellant..'* had been prejudicial to him looked at it from the point of the assessors.

[38] In **Raqio v State** [2017] FJCA 82; AAU0061A.2015 (23 June 2017) the Court of Appeal dealt with a similar complaint as follows:

> *'[6] In paragraph 25 of the summing up, the learned trial judge informed the assessors that a prima facie case was found against the appellant at the end of the prosecution's case while directing on the options that were available to the appellant after that ruling was made. Counsel for the appellant submits that the disclosure of the no case to answer ruling to the assessors was wholly in appropriate and prejudicial to the appellant. A similar disclosure of the no case to answer ruling was made to the jury by the trial judge in the English case of R v Smith and Doe 85 Cr App R 197 CA. In that case, Watkins LJ said at p 200:*
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> > *The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they think the judge's view is sufficient indication that the evidence is strong enough for that purpose.'*

[39] However, in **R v Smith and Doe** 85 Cr App R 197 CA Watkins LJ also said as follows implying that miscarriage of justice had not occurred by disclosing the trial judge's decision to the jury:

> *'That, however, would not in the circumstances of this case, be a reason standing by itself, having regard to the other directions given to the jury on identification, for declaring that these verdicts are unsafe and unsatisfactory.'*

[40] ***Raqio*** and ***Smith and Doe*** have to be considered in the background of settled law in Fiji that the verdict, that is, the decision to convict or acquit in a case is always that of the judge [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26

August 2016]. Assessors only give an opinion which the trial judge may or may not accept [vide section 237 (2) of the Criminal Procedure Act now amended by Criminal Procedure (Amendment) Act 2021/Act No.02 of 2021]. The observations of Watkins LJ in ***Smith and Doe*** are strictly applicable to a system of jury whose members are the ultimate judges of facts as in the UK but in Fiji it is the trial Judge who is the ultimate authority on facts and law and the assessors only express non-binding opinions.

[41] On the other hand as already discussed above there was ample evidence to support the opinions of the assessors on the guilty verdict and therefore, the trial judge's impugned words on *'prima facie case being found'* could not have swayed the assessors' opinion or the trial judge's own finding of guilty. However, as I have said before I would repeat that trial judges should avoid similar statements in their addresses to the assessors, for they serve no purpose at all.

[42] Therefore, I hold that there are no merits as far as this ground is concerned.

01st ground of appeal (sentence)

[43] The appellant argues that the final sentence is harsh and excessive. The guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 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.

[44] The appellant's complaint against sentence is based on two grounds. Firstly, the decision of the trial judge to have declared him as a habitual offender which enabled the judge to make the sentences of 03 years and 08 months consecutive and secondly, higher starting point taken in arriving at the final sentence.

[45] The factual basis used by the trial judge in the sentencing order to classify the appellant as a habitual offender pursuant to sections 10(c) and 11(1) of the Sentencing and Penalties Act, 2009 is that the appellant had been convicted on a burglary charge on 28 May 2013 in Suva Magistrates court and sentenced to 12 months imprisonment suspended for 02 years.

[46] Section 10 of the Sentencing and Penalties Act states:

> *"This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for –*
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> *(a) a sexual offence;*
> *(b) offences involving violence;*
> *(c) offences involving robbery or housebreaking;*
> *(d) a serious drug offence; or*
> *(e) an arson offence."*

[47] Section 11 of the Sentencing and Penalties Act states:

> *"(1) A judge may determine that an offender is a habitual offender for the purposes of this Part –*
>
> *(a) When sentencing the offender for an offence or offences of the nature described in section 10;*
>
> *(b) Having regard to the offender's previous convictions for offences of a like nature committed inside or outside Fiji; and*
>
> *(c) If the court is satisfied that the offender constitutes a threat to the community.*

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence. "

[48] Also relevant is section 12 of the Sentencing and Penalties Decree which states:

"Where any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court, in determining the length of the sentence –

(a) shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence."

[49] In **Suguturaga v State** [2014] FJCA 206; AAU0084.2010 (5 December 2014) the Court of Appeal has dealt with a similar issue where the trial judge had classified the appellant as a habitual offender which was reversed by the Court of Appeal.

[50] In ***Suguturaga*** Goundar J. said on the process of declaring an accused as a habitual offender as follows:

*'[14] In my judgment, there are two prerequisites for an exercise of discretion to declare an offender a habitual offender under section 11(1) of the Sentencing and Penalties Decree. The **first prerequisite** is that the offender is convicted of an offence of a nature that is prescribed under section 10. If the first prerequisite is met, then the **second prerequisite** is that the sentencing court having regard to the offender's previous convictions for offences of similar nature must be satisfied that the offender constitutes a threat to the community. If the sentencing court is so satisfied, then a sentence that is longer than that which is proportionate to the gravity of the offence can be imposed under section 12 for the purpose of protecting the community. Section 12 has clearly created an exception to the proportionality principle in sentence. The exception allows for the use of previous convictions as an aggravating factor to enhance the offender's sentence in order to protect the community. The constitutionality of section 12 is open for arguments. I express no opinion on that issue in this appeal.'*

[51] It is clear from paragraph 09 of the sentencing order that the learned trial judge had only considered one previous conviction of burglary in classifying the appellant as a habitual offender**.** Thus, the trial judge had not been mindful of the words '…*offender's previous convictions for offences...'* in section 11(1)(b) requiring more than one previous conviction. Although the requirement in sections 10(c) may be satisfied in this case, the prerequisite under section 11 (1)(b) is not satisfied. Most importantly, the trial judge had not satisfied himself that the appellant constituted a threat to the community as required in section 11(1)(c) which is a mandatory requirement. Therefore, the learned judge had erred in declaring the appellant to be a habitual offender.

[52] On the other hand, even assuming for the sake of argument that the trial judge had correctly treated the appellant as a habitual offender**,** in terms of section 12(a) of the Sentencing and Penalties Act the trial judge in imposing a sentence shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed and may (*i.e.* in his discretion) impose a sentence longer than that which is proportionate to the gravity of the offence as an exception to the proportionality principle in sentence.

[53] Whether section 12 of the Sentencing and Penalties Act permits a trial judge to depart from 'one transaction rule' when it comes to sentencing habitual offenders is another issue because section 12 allows the judge to impose a longer sentence disproportionate to the offence. Can the judge do it by making sentences consecutive? Or should the judge not impose a longer sentence on each of the offences and make them run concurrently? The answer lies in section 22(2) (c) of the Sentencing and Penalties Act which states that the default position of concurrency of every term of imprisonment set out in section 22(1) does not apply on a habitual offender under Part III. Therefore, in respect of a habitual offender the sentencing judge has the option of acting under section 12 or 22(2)(c) of the Sentencing and Penalties Decree. In the former the judge would be departing from *'proportionality'* principle in sentence and in the latter from *'one transaction rule'*.

[54] ***Suguturaga*** goes onto describe 'one transaction rule' as follows:

> *[16] The appellant's contention under this ground is that the partially consecutive sentence that the learned High Court judge imposed breached the one transaction rule. The one transaction rule as it applies to sentencing was explained by the Supreme Court in* ***Wong Kam Hong v The State,*** *(unreported Criminal Appeal No. CAV0002 of 2003S; 23 October 2003) at p6:*
>
> > *"The "one-transaction rule" can be stated simply. Where two or more offences are committed in the course of a "single transaction", all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive. The underlying principle is that all the offences taken together constitute a single invasion of the same legally protected interests".*

[55] The learned trial judge has made the appellant's sentences for the two offences committed in the same transaction consecutive rather than concurrent thereby lengthening the total sentence to 07 years and 06 months which otherwise would have been only 03 years and 08 months running concurrently.

[56] When the appellant was sentenced the sentencing tariff for aggravated burglary was considered to be 18 months to 03 years of imprisonment [For e.g. see **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) and **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)] and for theft the sentencing tariff was considered to be between 02 months and 03 years depending on the circumstances. The sentencing range may vary in the circumstances such as (i) for a first offence of simple theft between 2 and 9 months (ii) any subsequent offence at least 9 months (iii) theft of large sums of money and thefts in breach of trust, whether first offence or not up to three years (iv) planned thefts will attract greater sentences than opportunistic thefts (see for example **Ratusili v State** [2012] FJHC 1249; HAA011.2012 (1 August 2012).

[57] The trial judge had clearly picked the starting point at the highest point of the range for both offences *i.e.* 03 years and added 03 more years for aggravating features. Instead of deducting the remand period of 02 years and 04 months from the final sentence the trial judge had considered that as a mitigating factor.

[58] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'. The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018):

> *[57] Two words of caution. First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*

[59] In other words if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[60] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[61] This court is faced with exactly the same dilemma in this appeal. It is not clear what factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated. The concern is whether any one or more of the aggravating factors named by the trial judge had influenced the starting point of 03 years towards the higher range of the tariff. If so, 03 year increase on account of the same factors may have caused double counting.

[62] If a trial judge is not sure as to what factors he has considered and cannot set them down to show why he starts with a sentence in the middle or higher rage of the tariff, it is safe (at least in order to avoid a complaint of double counting) to pick the starting point at the lower end of the tariff and goes through the process of arriving at the final sentence balancing aggravating and mitigating factors etc. unless the trial judge strictly follows the two-tiered approach articulated in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) where the sentencing judge first considers the *objective* circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the *subjective* circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed.

[63] If not, it is open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors as stated by the Supreme Court in ***Qurai*** (supra). The Supreme Court said in **Nadan v State** (supra) **t**hat in many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.

[64] 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). 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).

[65] As discussed above, there appears to be sentencing errors in the form of treating the appellant as a habitual offender and potential double counting leading to the final sentence of 07 years and 04 months. The appellant had been in remand for 02 years and 04 months prior to his sentence. Therefore, the appeal against sentence should be allowed. Given the fact that the appellant has served over 05 years and 10 months imprisonment since 03 July 2015 and considering all the facts and circumstances of the case I think the appellant has already served a sentence that fits the crimes. Accordingly, his current sentence of 07 years and 04 months is quashed and a sentence running from 03 July 2015 to 27 May 2021 is passed in substitution therefore and as a result the appellant should be released forthwith.

Bandara, JA

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

Hamza, JA

[67] I have read in draft form the judgment of Prematilaka, JA and I agree with his reasons and conclusions.

Orders

1. Appeal against conviction is dismissed.
2. Appeal against sentence is allowed and the sentence passed is quashed.
3. Appellant should be released forthwith.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R. Hamza
JUSTICE OF APPEAL