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

CRIMINAL APPEAL NO.AAU 101 of 2016
[In the Magistrates Court at Nasinu Case No. 388 of 2012]

BETWEEN	**:**	**JOSAIA CATI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**08 September 2022**
Date of Judgment	**:**	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant along with his co-appellant in AAU 159 of 2017, Gabirieli Tomu Cikaitoga had been arraigned in the Magistrates court of Nasinu exercising extended jurisdiction on two counts of aggravated robbery committed with three others contrary to section 311(1)(a) of the Crimes Act, 2009.

[2] The appellant had pleaded guilty to all charges on 02 May 2016 and the learned Magistrate had convicted him on his own plea and sentenced him on 14 July 2016 to a sentence of 08 years of imprisonment with a non-parole period of 05 years.

[3] The summary of facts is not part of the appeal brief and the learned Magistrate's sentencing order sets out the facts briefly as follows. On 18 March 2012 at about 12.45 p.m. the appellant, co-appellant and the other three had forcefully entered Comsol Moive Shop at Centerpoint, Nasinu and robbed Shivaz Hassan of his mobile phone valued at $200.00. Whilst inside they had assaulted and locked Mohan Vishal Singh in the toilet and stolen $950.00 in cash, one Nokia N65 brand mobile phone valued at $400.00 all to the value of $1,350.00 from him.

[4] The appellant's appeal against sentence had been timely and his co-appellant's appeal had been out of time. However, the single judge had allowed the appellant leave to appeal and his co-appellant enlargement of time to appeal against sentence.

[5] At the hearing, the co-appellant in AAU 159 of 2017, Gabirieli Tomu Cikaitoga through his counsel Ms. Kean from the Legal Aid Commission expressed his desire to abandon his appeal and tendered to court From 3 signed by him. After inquiring Gabirieli Tomu Cikaitoga of matters according to the guidelines provided in **Masirewa v State** [2010] FJSC 5; CAV0014.2008S (17 August 2010), the court is satisfied that his application to abandon the appeal was made voluntarily, deliberately, intentionally and without mistake with the full knowledge of the consequences of the withdrawal. Thus, Gabirieli Tomu Cikaitoga's application to abandon his appeal is allowed and appeal bearing No. AAU 159 of 2017 is accordingly dismissed.

[6] Guidelines to be applied when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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)].

[7] The appellant urged the following grounds of appeal against sentence:

1. *THAT the learned sentencing Magistrate erred in law and in fact when he failed to give adequate and proper discount for the early guilty plea.*

2. *THAT the learned Magistrate erred in law and in fact when he failed to sentence the appellant on the first occasion which was in 2012 when the appellant pleaded guilty breaching section 221 of the Criminal Procedure Decree, 2009.*

3. *THAT the Learned Magistrate erred in law and in fact when he did not guide himself according to the sentencing guidelines in regard to section 4(2)(f)(g)(j) of the Sentencing Penalties Decree, 2009*

4. *THAT the learned Magistrate failed to give the appellant an opportunity to be heard on the issue of non-parole and therefore prejudiced the appellant to respond to the manner of sentencing meted out by the sentencing court.*

5. *THAT the sentence is completely harsh and excessive in all circumstances of the case.*

01st ground of appeal

[8] The learned Magistrate had reduced 01 year on account of the guilty plea though it had not been tendered at the earliest possible opportunity. The appellant had been first produced in the Magistrates court on 21 March 2012 and after several appearances he had pleaded guilty on 28 May 2014. Summary of facts had been read on 02 May 2016. He had been sentenced on 14 July 2016.

[9] The appellant seems to argue that he may have been entitled to a 1/3 discount because of the guilty plea. I do not agree; not in this case of aggravated robbery. This is not the current thinking of the law.

[10] As far back as in 2012, it had been said that as a matter of principle the courts in Fiji generally give reduction in sentences for offenders who plead guilty. However, the weight that is given to a guilty plea depends on a number of factors [see **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012)]. A guilty plea should be discounted separately from other mitigating factors in the case [see **Naikelekelevesi v State** [2008] FJCA 11; AAU0061 of 2007 (27 June 2008].

[11] A discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was considered as the 'high water mark' in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) where it was held:

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

[12] The Supreme Court dealing with ***Ranima*** said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) that the principle in ***Rainima*** must be considered with more flexibility as ***Mataunitoga*** indicates. The Court further said that the overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably. Finally, in ***Aitcheson,*** an extremely distressing case of multiple acts of child rape by the biological father on his daughters for a number of years, the Supreme Court discounted only 02 years for the early guilty plea to bring the sentence down to 18 years from 20 years before deciding upon the head sentence of 17 years and 9 months imprisonment.

[13] Thus, the appellant plea not being an early guilty plea did not deserve a discount more than one year.

02nd ground of appeal

[14] The appellant complains that the learned trial judge had failed to sentence him on the first occasion in 2012 when he pleaded guilty breaching section 221 of the Criminal Procedure Decree, 2009. However, section 221 is applicable to trials before the High Court and not the Magistrates court.

[15] It appears from the appeal record that the appellant pleaded guilty on 28 May 2014, summary of facts had been read on 02 May 2016 and he had been sentenced on 14 July 2016. There is no indication at all in the record or the sentencing order that the appellant had pleaded guilty in 2012. However, there has been a delay of over 02 years since the plea of guilty to sentencing.

[16] If the hearing that determined the guilt of an accused is fair, delay is a matter to be taken into account in the sentence [vide **Boolell v. The State** (Mauritius) [2006] UKPC 46 (16 October 2006)]. Every person charged with an offence has the right to have the trial begin and concluded without unreasonable delay (vide section 14(2)(g) of the Constitution of the Republic of Fiji). In my view, this also encompasses the right to be sentenced without unreasonable delay. It has also been held that it is implicit in the terms of section 206(2) of the repealed Criminal Procedure Code [now section 174(2) of the Criminal Procedure Act, 2009] that if an accused pleads guilty, the court must convict and sentence without delay, unless there is sufficient cause not to do so. An accused has a right to be sentenced without unreasonable delay and such an unreasonable delay in sentencing should be appropriately remedied by giving consideration to the delay when deciding an appropriate sentence provided the primary cause of delay is systematic and not attributable to the accused himself. What is unreasonable delay depends on a number of factors such as the length of the delay, waiver of time periods, the reasons for the delay, actions of the accused, actions of the prosecution and limits on institutional resources? This list is not exhaustive and other factors can be relevant depending on the circumstances of each case [see **Nacagi v State** [2009] FJHC 171; HAM023.2009 (21 August 2009) and **Singh v State** [2010] FJHC 6; HAM095.2009 (19 January 2010)]. Therefore, weight of the discount to be given in the sentence for any unreasonable delay is a mater to be decided by the sentencing court depending on the circumstances of each and every case.

[17] From a perusal of the Magistrates court record it appears that the appellant had been twice absent from court during the relevant period of time and warrants had been issued. However, the greater share of the blame for the delay is on the part of court and to a lesser extent on the prosecution. Delay was not intentional but systematic.

[18] Therefore, an appropriate discount should have been reflected in the sentence of the appellant due to the delay of over 02 years from the guilty plea to the sentence. However, the learned Magistrate had not afforded any such reduction.

03rd ground of appeal

[19] The trial judge had applied the sentencing tariff of 08-14 years following **State v Manoa** [2010] FJCA 409: HAC 061 of 2010 (06 August 2010). However, it had already been revisited in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the sentencing tariff was set at 08-16 years of imprisonment in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. I do not see why the same tariff after taking into case-specific considerations into account should not apply to a case involving an invasion of business premises in broad daylight with accompanying violence.

[20] The learned Magistrate had taken 08 years as the starting point ending up with the final sentence of 08 years which is still at the lowest end of the tariff range.

[21] The learned Magistrate had also considered guidance given in **State v Rokonabete** [2008] FJHC 226: HAC 118 of 2007 (15 September 2008) on matters to be considered when assessing the seriousness for any type of robbery. He had stated that he was taking into account the mitigation submitted by the counsel for the appellant and reducing 02 years for those mitigating factors most of which, if not all, were personal circumstances that could not have been properly considered as mitigating factors thereby affording the appellant a discount he probably did not deserve. The learned Magistrate had also reduced further 01 year on account of the guilty plea though it had not been tendered at the earliest possible opportunity. The appellant was not a first offender having had three previous convictions including one of robbery with violence thus not being entitled to any discount on account of previous good character.

[22] Therefore, the learned Magistrate cannot be said to have not guided himself according to the sentencing guidelines set out in section 4(2)(f),(g) and (j) of the Sentencing Penalties Act, 2009.

04th ground of appeal

[23] The appellant argues that he was not given an opportunity to be heard on fixing the non-parole period and had he been given such an opportunity he could have persuaded the learned Magistrate not to have imposed a non-parole period in terms of then section 18(2) of the Sentencing and Penalties Act, 2009.

[24] Section 18(1) of the Sentencing and Penalties Act, 2009 mandates a non-parole period to be fixed when the sentence is more than 02 years with no discretion to the sentencing judge. The non-parole period so fixed must be at least 06 months less than the term of the sentence [see section 18(4)]. In terms of the now repealed section 18(2), considering the nature of the offence or the past history of the appellant, the Magistrate had the discretion not to impose a non-parole period [section 18(2) now stands repealed by Corrections Service (Amendment) Act 2019]. However, the Magistrate did not act on section 18(2) but imposed a rather generous non-parole period of 05 years as against the head sentence of 08 years.

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

> "*While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case***."
>
> '*.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[26] The Magistrate had sentenced the appellant to a sentence of 08 years of imprisonment with a non-parole period of 05 years which is legal, more than fair and reasonable. The purpose of fixing a non-parole is given in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 and **Raogo v The State** CAV 003 of 2010: 19 August 2010 referring to 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."*

[27] There is nothing to indicate that the learned Magistrate had prevented the appellant's counsel from making any submission on the question of imposing a non-parole period. His counsel had indeed made submission on the sentence. There was no legal requirement to afford another separate opportunity for the appellant to make submission on whether to impose or not to impose a non-parole period. It should have been part of mitigating submissions. The nature of the offence and the past history of the appellant certainly did not justify acting under then section 18(2) of the Sentencing and Penalties Act, 2009. In fact, the appellant had got a rather lenient non-parole period.

05th ground of appeal

[28] The learned Magistrate had stated that the fact that the offence was committed in a group was an aggravating factor. It terms of section 311(1)(a) of the Crimes Act, 2009 one of the ways in which the offence of robbery becomes aggravated is when it is committed by a person in company with one or more other persons. Thus, in this instance the fact that the appellant had committed the robbery in company with others had made him liable for the offence of aggravated robbery. The question is whether it can be counted as an aggravating factor, for it is part of the offence of aggravated robbery under section 311(1)(a).

[29] In my view, when the charge is under section 311(1)(b) where the robbery takes the aggravated form due to the presence of an offensive weapon or weapons it is quite legitimate to take group offending as an aggravated feature [for example **State v Rokonabete** [2008] FJHC 226; HAC118.2007 (15 September 2008) where the accused masked and armed with knives, a pinch bar, and bottles raided a supermarket and robbed cash from cashiers and other valuables from some customers] to enhance the sentence. Similarly, when the charge is under section 311(1)(a) for aggravated robbery due to committing the robbery in the company with one or more persons, the presence of an offensive weapon or weapons could be considered as an aggravating factor.

[30] What is needed under section 311(1)(a) is the presence of one more person other than the accused for the robbery to take the aggravated form and only a single offensive weapon to constitute aggravated robbery under section 311(1)(b). Therefore, in my view the presence of a group of offenders (*i.e*. more than two) and having more than one offensive weapon and any other matters associated with group offending and possessing or using offensive weapons could be considered as aggravating features under sections 311(1)(a) and 311(1)(b) respectively. However, the weight to be attached to these aggravating circumstances would vary depending on the facts of each and every case. These will include the roles played by each group member and the nature of weapons, how they were used and who used them etc.

[31] The next issue to be considered is whether the addition of 03 years on account of aggravating factors which also included the fear instilled in the victims of the crime, planning and the premises being a business establishment could be justified when the element of it having been committed in a group is excluded. In my view, the rest of aggravating factors have been legitimately taken into account in increasing the sentence by 03 years. There are other aggravating features not considered by the Magistrate. For example the inmates had been assaulted and locked inside a toilet. Clearly there had been premeditation and planning of this robbery (see **Manoa Tabualumi v The State** AAU 096 of 2016 (26 May 2022) for a detailed discussion of some of the common aggravating factors judicially recognised).

[32] 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). 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).

[33] Given all the circumstances of this case I do not think that 03 years imprisonment added for aggravating features is unjustified though he had received a discount of 02 years for personal circumstances which he did not deserve. Reduction of 01 year for late guilty plea cannot be called into question. Thus, even if some discount had been given for the delay in sentencing it would not have altered the ultimate sentence. In my view, the ultimate sentence of 08 years with 05 years of non-parole period is not harsh and excessive.

[34] Therefore, none of the appeal grounds succeed and the appeal should stand dismissed.

Gamalath, J

[35] I agree with the draft judgment of Prematilaka, RJA.

Bandara, J

[36] I have read in draft the judgment of Prematilaka, RJA and concur with the reasons and proposed order therein.

Orders of the Court:

1. Application to abandon appeal bearing No. AAU 159 of 2017 is allowed and appeal is dismissed.
2. Appeal against sentence in AAU 101 of 2016 is dismissed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL