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

CRIMINAL APPEAL NO.AAU 105 of 2020
[In the High Court at Lautoka Case No. HAC 35 of 2014]

BETWEEN	:	**LAITIA NALAWA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**12 October 2023**
Date of Ruling	:	**13 October 2023**

RULING

[1] The appellant had been charged with his co-accused and convicted in the Magistrates court at Rakiraki and transferred to the High Court at Lautoka for sentencing for aggravated robbery by committing home invasion. The charges are as follows.

'Statement of Offence

Aggravated Robbery: contrary to section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Pita Natekuru, Laitia Nalawa and Jale Fatiaki on 24th day of February, 2014 at Volivoli, Rakiraki in the Western Division, dishonestly appropriated (stole) $1,040 cash, 2 x apple brand I-Pads valued at $800 each, 1 x Samsung S4 mobile Phone valued at $900, ½ bottle Vodka and 5 bottles of wine valued at $165, 1 x Nikon Brand Binoculars valued at $300 all to the total value of $4, 005 and being the property of Trevor Perrin and prior to stealing the said items Pita Natekuru, Laitia Nalawa and Jale Fatiaki used force on Trevor Perrin.

[2] The appellant had pleaded guilty to the sole count and admitted the summary of facts. The trial judge had convicted the appellant accordingly and sentenced him on 28 July 2020 to an aggregate sentence of 09 years of imprisonment with a non-parole period of 06 years.

[3] The appellant had lodged in person a timely appeal against conviction and sentence.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 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) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry 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 [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] Further guidelines to be followed 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].

[6] The trial judge had recorded the summary of facts in the sentencing order as follows.

> *'THAT Trevor Perrin, aged 71 years, Retired ("the complainant") and Dianne Perrin, aged 63 years, Retired ("the wife") are married to each other. They reside at Volivoli Circular Road, Rakiraki. Their house consist of 2 master bedrooms, 1 living room, 1 kitchen 1 office room and 1 set toilet & bathroom (" the dwelling house").*

Pita Natekuru, aged 20 years Farmer ("the 1st Accused"), Laitia Nalawa also known as Ilaitia Nalawa, aged 30 years, Farmer ("the 2nd Accused") and Jale Fatiaki, aged 31 years, ("the 3rd Accused") are from Naboutolu Village, Rakiraki. All three accused had already planned to steal from the complainant's dwelling house.

Complainants:

On February 2014, sometime between 8pm and 10.15pm, when the complainant and his wife were sleeping in their bedroom, all 3 accused entered the dwelling house through the office room window by cutting the mosquito screen netting and them removing 3 louver blades. The 3 accused then went into the bedroom where the complainant and his wife were sleeping. According to the complainant, one of the accused pressed the mouth of the wife and another tried to tie the hands of the complainant and his wife were sleeping. According to the complainant, one of the accused pressed the mouth of the wife and another tried to tie the hands of the complainant behind his back. Then one of the accused punched the complainant while demanding for money.

All 3 Accused then stole the following items from the dwelling house.

$1,040 cash,

2 x apple brand I-Pads valued at $800 each,

1 x Samsung S4 mobile Phone valued at $900,

½ bottle Vodka and 5 bottles of wine valued at $165, and

1 x Nikon Brand Binoculars valued at $300,

All to the total value of $4, 005 and the property of the complainant.

After stealing the above items the 2nd Accused told the complainant to open the back door of the dwelling house and all three accused fled.

The matter was reported to Rakiraki Police Station. During investigations, the police received information that someone was trying to sell an I-Pad in Rakiraki town. A follow up on this lead resulted in the arrest of the 3 accuse. The police also recovered the 2 x Apple brand I-Pads and 1 x Nikon brand Binoculars, all to total worth of $1, 900.

All 3 Accused were cautioned, interviewed during which they admitted to stealing from the complainant's dwelling house. They said the following in their respective interview:

The 1st Accused Q 25 admitted that they planned the break in. At Q 29 and Q 30 he admitted to entering the dwelling house. At Q 32 he admitted that he held the wife's hands. At Q 38 he admitted to stealing a black Lap Top (a copy of cautioned interview of the 1st Accused attached).

The 2nd Accused at Q 24 and Q 25 admitted to being part of the break-in plan. At Q 33 he admitted to cutting the mosquito screen netting and removing the

louver blades and at Q 37 he admitted to entering the dwelling house. At Q 46, he admitted to stealing I-Pad and alcohol (copy of cautioned interview of the 2nd Accused attached).

The 3rd Accused at Q 18 and Q 19 admitted to knowing about the plan to break-in. At Q 27 he admitted to entering into the swelling house. At Q 29 he admitted that he tried to tie the complainant's hands. At Q 33 he admitted to stealing an I-Pad (copy of cautioned interview of the 3rd Accused attached).

All 3 Accused were charged with one count of "Aggravated Burglary" and 1 count of "Theft" each but later it was amended to 1 count of "Aggravated Robbery" each for all.

All 3 Accused have pleaded guilty to the one count of "Aggravated Robbery" respectively.

Sentence appeal

[7] The ground of appeal urged by the appellant against sentence has two aspects; one is the correctness of him being declared a habitual offender and the other is the consequential order to run the head sentence consecutive to the appellant's existing sentence.

[8] It appears that the appellant had been sentenced for 09 years and 06 months of imprisonment in HAC 34 of 2014 by the High Court at Lautoka on 07 August 2018 for another instance of aggravated robbery of home invasion nature and rape committed on 10 March 2014. Thus, when he was sentenced in the current case on 28 July 2020 (offence committed on 24 February 2014), the appellant had served about 02 years of the previous sentence and when his current sentence of 09 years was made consecutive, he was effectively required to serve 16 ½ years of imprisonment since 28 July 2020.

[9] The sentencing tariff for aggravated robbery in the nature of home invasions in the night is 08 to 16 years of imprisonment as per **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). Thus, the total sentence is just outside the tariff but the main question is whether it is proportionate to the offending.

[10] The legal basis which enabled the trial judge to have made the appellant's current sentence consecutive to his previous sentence in HAC 34 of 2014 is section 10 read with section 11 of the sentencing and Penalties Act, 2009. *The trial judge had stated*

that the appellant had previous convictions falling within section 10 and he constituted a threat to the community. Thus, though he had given only the example of HAC 34 of 2014 it could be cautiously assumed that the appellant's previous *convictions* were of a like nature and the trial judge had been satisfied that he posed a threat to the community. The trial judge had accordingly considered all relevant matters under section 11 in determining the appellant as a habitual offender (see **Suguturaga v State** [2014] FJCA 206; AAU0084.2010 (5 December 2014).

[11] However, unfortunately, since the trial judge had not set out all previous convictions and this court at this stage does not have the benefit of the appellant's previous conviction record, it is not possible to assess what other previous convictions for offences of like nature relevant in terms of Rehabilitation of Offenders (Irrelevant Convictions) Act 1997, if any, were considered by the trial judge. If the only previous conviction was in HAC 34 of 2014, there is a question whether the trial judge was right in declaring the appellant as a habitual offender as a trial judge would not declare an accused a habitual offender based on a single previous conviction because section 11(1)(b) requires the judge to have regard to the offender's previous ***convictions***.

[12] However, the trial judge had not departed from the proportionality principle in sentence and acted under section 12 of the sentencing and Penalties Act, 2009 in imposing a longer or disproportionate sentence to the gravity of the offending which he could have done in this instance (see **Vura v State** [2023] FJCA 191; AAU012.2017 (28 September 2023) for a detailed discussion on section 10, 11, 12 and 22 of the sentencing and Penalties Act, 2009).

[13] Instead, the trial judge had acted under section 22 (of the sentencing and Penalties Act, 2009 in making the current sentence consecutive to the appellant's previous sentence deviating from the default position of concurrency as the appellant had already been declared a habitual offender. While this is totally legal (but subject to the question whether declaration of the appellant as a habitual offender was right) the next question is whether the trial judge had given his mind to the proportionality principle in acting under section 22 which was still relevant.

[14] The proportionality principle emphasizes that the punishment for a particular crime should be proportionate to the seriousness of that specific offense. In other words, the punishment should fit the crime. This principle ensures that sentences are not unduly harsh or lenient, and it aims to strike a balance between the severity of the crime and the punishment imposed (see ***Vura***).

[15] Thus, in making the appellant's total sentence 16 ½ years, there is a reasonable apprehension that the trial judge might have committed a couple of sentencing errors namely declaring the appellant a habitual offender and making the current sentence of 9 years consecutive to the previous sentence of 9 ½ years. The trial judge could have imposed a longer sentence within the accepted tariff of 08-16 years for the current offending and made it run concurrently with the previous sentence or he could have made the current sentence of 09 years partly consecutive to the previous sentence in order to make sure that the total sentence does not have a crushing effect on the appellant. However, none of this means that the gravity of the appellant's offending should be treated lightly. It is as serious as it could get in the circumstances of the offending and the appellant deserves a fitting sentence.

[16] In the above circumstance, in deciding the proper course of action, I would adopt the following approach. 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 the appellate court in an appeal against sentence 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)]. Therefore, I am inclined to allow leave to appeal against sentence.

Conviction appeal

[17] The gist of the appellant's complaint rests on possible 'equivocal plea'.

[18] The appellant had initially pleaded guilty on 14 May 2014 but withdrawn the guilty plea later. Thereafter, once again in the eve of the trial, represented by counsel he had pleaded guilty on 22 November 2018. The appellant had accepted the summary of facts and he was sentenced on 28 July 2020. Thus, there had been ample time for the appellant to change his mind if he so wished until the court sentenced him. The trial judge had satisfied himself that the appellant's guilty plea was unequivocal and made having fully understood the consequences.

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

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

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

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

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

> *'[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing*

*an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.'*

[22] I cannot see any hint of equivocation on the record as far as the appellant's guilty plea is concerned. His arguments based on equivocal plea is an afterthought.

Orders

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

COURT OF APPEAL FIJI

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