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

CRIMINAL APPEAL NO.AAU 10 of 2021
[In the High Court at Suva Case No. HAC 348 of 2019]

BETWEEN : **ISOA VONU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **02 March 2023**

Date of Ruling : **03 March 2023**

RULING

[1] The appellant had been charged with 02 others in the High Court at Suva on a single count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act 2009 committed on 04 September 2019 at Nakasi in the Central Division in the company of each other by stealing $1800.00 cash and 1x Samsung J2 mobile-phone from Sanjay Narayan Sharma.

[2] After trial, the appellant had been found guilty by the unanimous opinion of the assessors. The learned High Court judge had agreed, convicted the appellant as charged and sentenced him on 16 October 2020 to 09 years of imprisonment with a non-parole term of 07 years.

[3] The appellant initially appealed only against conviction and though the appeal was 03 months out of time it could be excused as he had appealed in person. However, his sentence appeal is late by 01 year and 06 months and the appellant will have to obtain enlargement of time to appeal against sentence.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court unless it is on a question of law alone. For a timely appeal, the test for leave to appeal against conviction 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] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] The delay of this conviction appeal is very substantial. The appellant had not given any explanation for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The

respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] The appellant urges the following grounds of appeal against conviction and sentence:

> *'**Conviction:***
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> ***Ground 1***
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> *THAT the Learned Trial Judge erred in law and in fact in considering improper and irrelevant matters to convict the appellant and as a result this has led to a grave substantial miscarriage of justice.*
>
> ***Sentence***
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and fact by abusing his judicial discretionary power for giving some prejudicial comments in his sentence.*
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> ***Ground 3***
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> *THAT the Learned Trial Judge erred in law and fact when there was a marked disparity in Sentencing each of the appellant's co-accused's who received lesser sentences than the appellant thus the appellant has suffered injustice.*
>
> ***Ground 4***
>
> *THAT the Learned Trial Judge had double counted the aggravating factors resulting in a grave miscarriage of justice.*

[8] The High Court judge had set out the summary of evidence of the prosecution in the sentencing order as follows:

> *'……..It was proved during the hearing that you and two other accomplices had planned to rob the complainant's house. Three of you had then carried out the said plan on the early morning of the 4th of September 2019. You and one of your accomplices had entered the house through a window, while the third accomplice was guarding at the outside. You were not wearing a mask, though your accomplice wore a mask. Your accomplice had then placed a chopper on the complainant's neck and demanded him the cash. You had collected the cash and money box from the complainant. You then tied the hands and legs of the complainant and pushed him on the bed. Two of you had then fled the scene with the third accomplice.'*

01st ground of appeal

[9] The appellant complains about allowing the first time dock identification by the trial judge. Unless there is no dispute over identity and the defence does not object to a dock identification, it should rarely, if ever, take place (vide **Naicker v State** [2018] FJSC 24; CAV0019 of 2018 (01 November 2018). However, dock identifications are not, of themselves and automatically, inadmissible and thus, a dock identification is not inadmissible evidence *per se* and that the admission of such evidence is not to be regarded as permissible in only in the most exceptional circumstances. However, a trial judge will always need to consider whether the admission of such testimony, particularly where it is the first occasion on which the accused purportedly indented, should be permitted on the basis that its admission might imperil the fair trial of the accused [vide **Tido v R** (2011) [2017] EWCA Crim 742; 2 Cr. App. R 23)]. Even in the absence of a prior identification parade, a dock identification was admissible in evidence, although when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence [vide **Pop (Aurelio) v R** (2003) UKPC 40]

[10] In **Nalave v State** [2019] FJSC 27; CAV0001.2019 (1 November 2019) Stock J held that:

> *"Whilst it is correct that a trial judge has a discretion to allow a dock identification, I endorse the suggestion by the editors of Archbold 2018 that "in practice the exercise of such a discretion should not even be considered unless the failure to hold an identification procedure was as a result of the defendant's default."*

[11] The prosecution had adduced evidence to establish that the appellant had refused to stand for an identification parade during the investigation of this matter, thus preventing the complainant an opportunity to make an identification of the suspect at an identification parade. The description of the appellant explained by the complainant at the trial had been similar to his actual appearance before he made the dock identification.

[12] The trial judge had explained in detail at paragraphs 10-20 of the judgment as to why he allowed the dock identification. He had also given his mind to Turnbull guidelines to assess the quality of the identification of the appellant at the crime scene by the complainant at paragraph 22 and been satisfied that the complainant had correctly and clearly seen the appellant as the person dressed in a blue t-shirt and robbed him on the 04 September 2019.

[13] According to PW2 Ms. Arieta the appellant dressed in a blue t-shirt and another had asked for a screwdriver around 7.00 pm on 02 September 2019 saying that they need it for a job and after that, they will give her money and again come back around 8.00 pm on 03 September 2019 and the appellant was dressed in the same blue t-shirt. PW3 Mr. Momo while corroborating PW2 had also stated that on 03 September 2019, at around 05 p.m. he witnessed the appellant and Temo (co-suspect) was standing at the front gate of the Holiday Car Rentals. The appellant was dressed in the same blue coloured t-shirt and they were hanging around the carwash till about 9.30 p.m. on that day.

[14] PW7 Ravai, an accomplice had said that on 03 September 2019, at around midday, he was at home waiting for the appellant to come, as they had planned to steal from the Hindu Temple with Temo. At around 10 a.m. on the morning of that day he, Temo, and Isoa had made a plan to steal the said temple. They made this plan at the BBQ stall. Ravai had met the appellant and Temo at around 10 p.m. They then went to the house near the temple at about 2 a.m. on 04 September 2019. His role was to guard the scene while the appellant and Temo entered the house and carried out the robbery. The appellant and Temo had entered the house through the window. Five minutes after they entered the house, they had come back with money in their hand. The appellant had held cash with him. They shared the proceeds of the crime and then went away in their separate directions.

[15] The accomplice (PW7) had earlier (*i.e.* on 27 January 2020) pleaded guilty along with Themo in HAC 324 of 2019 and been sentenced to 05 years of imprisonment. Therefore, he had no incentive to implicate the appellant falsely.

[16] The High Court judge had considered PW7's evidence at paragraphs 23-25 and held that:

> *24. Mr. Tevita Ravai's evidence has not been shown or suggested by the accused as unreliable or tainted with adverse motive. Moreover, I find Mr. Ravai's evidence has been corroborated by the evidence of the Complainant, Ms. Arieta, and Mr. Momo. Therefore, I accept the evidence of Mr. Ravai as credible, reliable, and truthful evidence.'*

[17] The High Court judge had addressed the assessors in detail on identification at paragraphs 52-62 and accomplice evidence at paragraphs 63-66.

[18] Therefore, I do not thank that the appellant has a reasonable prospect of success with his appeal against conviction.

02nd ground of appeal

[19] The appellant complains of the remakes of the High Court judge at paragraph 4 of the sentencing order:

> *4. In view of the above observation made by the Supreme Court of Fiji in respect of violent home invasions in the night, I find this is a very serious offence. Hence, it is my opinion that such offenders must be dealt with severe and harsh punishment. Therefore, the purpose of this sentence is founded on the principle of deterrence and the protection of the community. I am mindful of the principle of rehabilitation; however, this offence's seriousness obviously outweighs the principle of rehabilitation.'*

[20] The Court of Appeal said in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022):

> *'[44] Section 4(1) (a), (b), (c) and (e) of the Sentencing and Penalties Act set out the only purpose of sentencing as punishment, protection of community, deterrence and denouncement of the offence. Section 4(1)(d) prescribes rehabilitation of offenders as the only other purpose. Thus, most weight is given to punitive aspect of a sentence rather than rehabilitative aspect. Therefore, if a sentencing regime is far too lenient or too harsh it will not serve the purpose of sentencing.*

[45] The offenders must always be punished adequately but not more than adequately to signify that the courts and the community denounce the offences, in a way that must protect the community and deter the prospective offenders without, however, rendering rehabilitation ineffectual…..'

[21] I do not see any objection to the above comments by the High Court judge.

03rd ground of appeal

[22] The appellant argues that there is a marked disparity in sentencing each of the appellant's co-accused's who received lesser sentences than the appellant and the appellant has thus suffered injustice.

[23] In **State v Niumataiwalu** - Sentence [2020] FJHC 29; HAC324.2019 (27 January 2020) the two co-accused had pleaded guilty and the trial judge had selected the starting point at 08 years and after adjusting it for aggravating and mitigating factors they had been finally sentenced to 05 years of imprisonment where the trial judge had said *inter alia:*

'Seruvatu Niumataiwalu (1st accused)

10. Seruvatu Niumataiwalu, you are 18 years of age bachelor and a student at the Maritime Academy. You have cooperated with police investigations and pleaded guilty to the charge at the first available opportunity. You have saved time and resources of this court by tendering an early guilty plea. You are remorseful of your actions. You are young. You seek another chance to rehabilitate yourself and forgiveness of this court. You have been in remand for nearly one month. Your remand period is separately discounted. For mitigating factors and the remand period, I discount your sentence by 5 years to arrive at a sentence of 5 years' imprisonment.

Tevita Ravai (2nd Accused)

11. Tevita Ravai, you are 22 years of age and a market vendor by profession. You are in a de-facto relationship and expecting to have your first baby in four months. You have cooperated with police investigations. You have pleaded guilty to the charge at the first available opportunity. You have saved time and resources of this court by tendering an early guilty plea. You have been remorseful of your actions. You are a first offender. You seek another chance to rehabilitate yourself and you seek forgiveness of this court. You have been in remand for nearly one month. Your remand period

will be discounted separately. For mitigating factors and the remand period, I discount your sentence by 5 years to arrive at a sentence of 5 years' imprisonment.

12. *Both of you are young and first offenders. Leniency by way of a sentence under tariff is to acknowledge that you are young and you have maintained a clean record thus far. Given your age and the clean record, you have a strong potential for rehabilitation. In view of that, I would not fix a non-parole period so as to allow you to reap the complete benefit of remission should you earn one during incarceration.'*

[24] The trial judge in the appellant's sentencing order had similarly given ample reasons why he arrived at the sentence of 09 years after deducting remand period of 11 months. The reasons adduced by the trial judge demonstrates why the appellant's sentence had to be different from his co-accused. The trial judge had adopted 'instinctive synthesis' method in arriving at the sentence. There is nothing wrong with it. The 'instinctive synthesis' approach has been recognized in the sentencing process in Fiji (see **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015) and specifically approved in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022):

*'[47] As held in **Quari,** Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis" if a sentecer is confident and comfortable with it.'*

[25] Both judges have correctly applied the sentencing tariff in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). If there is any complaint it would be that the co-appellants' sentence was far too lenient and not that the appellant's sentence was harsh and excessive.

[26] If offenders are not treated alike, the resulting disparity 'can result in injustice to an accused person and may raise doubts about the even-handed administration of justice' [vide **R v Morris** [1991] 3 NZLR 641 (CA) at 645]. Conversely, dissimilar cases should not be treated in a like fashion. Both of these situations would lead to injustice

and erode public confidence in the legal system [vide **R v Lawson** [1982] 2 NZLR 219 (CA) at 223)].

[27] I do not think that there is such a disparity between the sentences of the appellant and his co-accused as to call it unjustifiable and gross and leads to injustice and erodes public confidence in the legal system.

[28] On the other hand when a sentence is reviewed in 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).

[29] The appellant's sentence of 09 years lies at the lower end of the sentencing tariff of 08-16 years. Those convicted of home invasions in the night receive much higher sentences in Fiji.

04th ground of appeal

[30] The appellant complains of double counting. I do not see any form of double counting in the sentencing order. Even if there had been any doubt of double counting, the fact remains that the ultimate sentence lies at the lower end of the sentencing tariff.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent