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

CRIMINAL APPEAL NO. AAU 0050 of 2020
[High Court at Suva Case No. HAC 299 of 2017S]

BETWEEN : **ILAITIA SARAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, AP**
Qetaki, JA
Winter, JA

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

Date of Hearing : **7th November, 2024**

Date of Judgment : **28th November, 2024**

JUDGMENT

Background and appeal submissions

[1] The appellant was the second accused charged contrary to section 311 (1) (a) of the Crimes Act 2009, for two AGGRAVATED ROBBERY offences of a currency exchange business and its manager on 25 September 2017 at Sports City, Suva.

[2] The appellant was arrested and then caution interviewed by the police on 8 October 2017. He confessed to the crime explaining what happened in some detail and even accompanied the police to the scene of the crime. He says he originally made an appearance in the Suva Magistrates Court where he was released from custody. The State submitted that the appellant appeared before the High Court on the 23 October 2017 when the case was adjourned to the 3 November 2017. The record on that cannot be verified but the court accepts State counsels' submission. In any event, it is clear the appellant was aware of the proceedings, summonsed and charged. What is equally clear is the appellant then fled to Kadavu, he never appeared again and so by his conduct was found by the trial judge to have chosen not to attend his trial. Bench warrants were issued against him and remained active throughout his trial. He was tried in his absence.

[3] The prosecution case relied on his confession to the crime. The learned trial judge took care to warn the assessors about Mr Sarai's absence asking them to ignore his non attendance when they came to consider the evidence. The Judge also instructed the assessors to ensure, despite the accused's absence, they correctly applied the burden and onus of proof in a criminal trial.

[4] After the summing-up, the assessors expressed a unanimous opinion that the appellant was guilty of both counts. The Trial Judge agreed with the assessors and convicted the appellant. He was sentenced, in his absence, on 14 May 2019 to a concurrent term of 12 years of imprisonment with a non-parole period of 11 years. His sentences to run from the day of his arrest.

[5] The appellant was arrested on 02 June 2020, in Kadavu. He filed his 'late' appeal on 29 June 2020 against conviction and sentence.

[6] As to conviction, although the appellant complained about the trial proceeding in his absence and misdirection upon essential elements of the offence and dock identification these grounds were found without merit. Enlargement and leave upon conviction were granted on only one ground. The failure of the learned trial judge to determine by 'voir dire' the admissibility of the appellant's confession made during that caution interview. No renewal being made the conviction appeal need only consider this ground.

[7] At the full court hearing the unrepresented appellant remained concerned the sentencing Judge never heard and so could not consider such mitigation as there may have been before passing judgement. The appellant was also agitated over a failure by the sentencing judge to finally deduct time served on remand from the end sentence under s24 of the Sentencing and Penalties Act 2009. Further submissions might be distilled to a ground that overall, the sentence was manifestly excessive.

[8] I will first summarise the facts of the offending, then comment on the background to the appellants absence at trial before disposing of ground one in a practical way now the High Court Record is available. Thereafter the appeal against sentence will be considered.

The facts

[9] The complainant Ms. Roseline Mudaliar (PW1) was employed as a teller for the Real Forex Exchange Office at Sports City, Suva. Around 8.30 am the 25 September 2017 Ms. Mudaliar opened the shop front door. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly the robbers came through the front door. One of them climbed over the counter and glass partition and went into her office. He opened the office door and let the other robber into the room. The two then threatened Ms. Mudaliar not to raise the alarm, or they would kill her. They demanded money. They punched her on the head and back. They then forced her to open the office safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole some of Ms. Mudaliar' s property detailed in count no.2. The two then fled the crime scene, along with others who had functioned as lookouts near the front door. The incident was over quite quickly. The total value of the property the

robber's stole was FJD$4221.50 from the business and a handbag and FJD$500.00 from Ms. Mudaliar. Nothing was recovered.

The law

[10] This appeal will resolve for practical reasons now apparent from the record produced after the leave decision was granted. However, for completeness I briefly mention the legal framework for the conviction appeal.

[11] Section 288 of the Criminal Procedure Act requires a voir dire on the admissibility of a confession after the accused has pleaded to the information. This often occurs before the trial proper commences. The lead decision *Rokonabete v The State* explains when and how to conduct a voir dire inquiry over the admissibility of a confession[1]:

> *"[24] Whenever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defense specifically declines such a hearing. When the accused is not represented, a trial within a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led."*

[12] *Rokonabete* deals with two situations. When the accused appears in person and is represented by counsel or when the accused appears but is unrepresented. In either situation, when the trial court is informed that there is a challenge to the confession a voir dire must be held to determine its admissibility. If the accused is represented and his counsel does not wish to challenge the confession a voir dire hearing need not be held. If, however, the accused is unrepresented a voir dire must always be held. This means that even if an unrepresented accused does not challenge his confession the trial court should still hold a voir dire inquiry to assess its voluntariness and be satisfied that

[1] *Rokonabete v The State* [2006] FJCA 40; AAU0048.2005S (14 July 2006)

there are no general grounds of unfairness that adversely affect the confession's admissibility.

[13] If the court is bound to hold a voir dire inquiry about a confession when the accused appears and is unrepresented, logically the court must do so when the accused is absent from court. The High Court in *Ravouvou v State*[2] held and I agree that:

> *"17. If the prosecution proposes to adduce the confession made by the accused in his caution interview in evidence, in a trial which is conducted in the absence of the accused pursuant to Section 14 (2) (h) (i) of the Constitution, the trial court must conduct a trial within a trial, in order to determine the admissibility of the caution interview of the accused in evidence."*

[14] The trial record prepared for this appeal now reveals the trial judge made a considered decision to proceed with the trial in the appellants absence. Difficulties may arise in the trial of an absent accused. The judge must of course, be especially vigilant to ensure a fair trial. The law and prudence must require that, if the judge has any reason to suppose the voluntary character of a statement proposed to be put in evidence by the prosecution is likely to be in issue, then a voir dire is required and furthermore one that seeks to protect the absent accused's fair trial right.

Analysis of the Record

[15] The record reveals the trial judge held a *voir dire* hearing, on the 7th of May 2019.[3] The trial Judge first made a finding that the trial should proceed in the appellants absence and then deemed a not guilty plea entered to all charges then held a voir dire hearing on the admissibility of the appellants confession. This was before the trial proper commenced. Furthermore, during the voir dire, the trial judge took care to ensure the interviewing officer was cross examined on oath about the absence of assaults, threats, or promises to induce a false confession and further that there were no complaints of ill

[2] *Ravouvou v State* [2018] FJHC 79; HAA130.2017 (23 January 2018)
[3] *Judges trial notes page 23 and High Court Record page 284.*

treatment made by the suspect. The trial judge also ensured the confession was made voluntarily by a willing person[4].

[16] The trial Judge gave reasons for his ruling in the summing up. Further he took care to emphasise for the assessors that in reaching their opinion they should not hold the accused's absence against him but rather remember the burden and onus of proof remains the same even when the accused was not present in court. He addressed the assessors as follows.[5]

> *"29. In considering the above alleged admissions, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make sure that the confessions were made, and they were true. You will examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he have his statements voluntarily and the police did not assault, threaten, or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you."*

[17] As can be seen in this paragraph the trial judge ruled the confession admissible but properly left it to the assessors to judge the voluntariness of the appellant's confession and to weigh its value. The court finds Ground One without merit. The conviction appeal is dismissed.

Sentence

[18] The High Court Judge recorded that the maximum penalty for the offence of aggravated robbery is 20 years' imprisonment. The Judge then referred to the sentencing tariff of

---

[4] *See Record of the High Court pages 283-286*
[5] *See Record of the High Court page 72*

eight to 16 years' imprisonment for offences of aggravated robbery, set out in the judgment of the Supreme Court in *Wise v State.*[6]

[19] The Judge adopted a starting point for the appellant's sentence of ten years imprisonment, which he then increased by three years for aggravating factors of the offending: multiple offenders had committed the aggravated robbery, injuries to the complainant, who was helpless, alone and vulnerable at the time and showing 'no regard' for her or the exchange business.

[20] The Judge found no other mitigating circumstances other than time served. Although this appellant had only spent 25 days on remand in custody, he gained the benefit of a generous additional discount of I year for that period. This led to the ultimate sentence of 12 years imprisonment.

[21] A trial judge will be left upon conviction of an absent accused with the need to sentence carefully. That is a very challenging task as the absent accused cannot speak to the court to explain the offending in context and submit any personal mitigating circumstances. It will be common for the sentencing judge in those circumstances to 'not know what they don't know.' Although not a fixed rule, in those circumstances, rather than proceed to sentence immediately it may be wiser and make for a more just outcome to delay the sentence of an absent convicted person until their arrest. The reason is obvious.

[22] Once arrested and the sentence activated the prisoner may well appeal the sentence, as Mr. Sarai has done, claiming unconsidered mitigation led to a manifestly excessive sentence. That requires this court on appeal to review the sentence passed in the prisoner's absence. Such appeals must elongate the process of justice rather than shorten it.

---

[6] *Wise v State* [2015] FJSC 7; CAV004.2015 (24 April 2015)

Appeal submissions.

[23] Mr. Sarai was unrepresented at his appeal hearing and found it difficult to say how the sentence was manifestly excessive beyond latching onto his primary ground that as he was absent from his sentencing so the trial judge could not properly account for the '*mitigations'* he referred to in his appeal papers. To those we would add the need to discount for his original remorse and cooperation with the police made clear from his caution interview confession, although, that mitigation must be tempered as Mr Sarai chose to run away from the consequences of his admitted offending.

[24] The State relied on their leave submissions and accepted the Judge used the more serious *Wise* tariff adopting the view that was reasonable. Further the State submitted the appellants unconsidered 'mitigation factors' were in any event irrelevant and would not have reduced the ultimate sentence which should remain undisturbed.

Discussion

[25] For a sentence appeal, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading up to the ultimate sentence. The appellate court assesses whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing Judge; that is, whether the sentence imposed is within the permissible range.

[26] Unlike home invasions, street muggings and taxi driver aggravated robberies there is no tariff judgment for sentencing on the aggravated robbery of commercial premises. However, The Court of Appeal in *State v Liku*[7] approved the use of the *Wise* tariff, for other types of aggravated robberies in terms of the level of harm and culpability assessment[8]. I agree with my brother Justice Prematilaka' s comments in a commercial aggravated robbery leave and sentencing appeal for two accused *Cikaitoga*[9] and *Cati*[10] that there is no reason why the same *Wise* tariff should not apply to the current type of

[7] *State v Liku* [2022] FJCA 9; AAU067.2016 (3 March 2022)
[8] *Wise v State* [2015] FJSC 7; CAV0004 of 2015 (24 April 2015)
[9] *Cikaitoga v State* [2020] FJCA 99; AAU141.2019 (8 July 2020)
[10] *Cati V State* [2022] FJCA 388; AAU 101. 2016 (29 September 2022)

sentencing. Both types of aggravated robbery share common culpability and harm characteristics that bare enough comparison for a useful assessment of the seriousness and aggravated circumstances of the offending to inform a just sentence.

[27] This not a guideline judgement. However, to both inform sentences for commercial aggravated robberies and illustrate sentence starting points for obviously similar offending. And as a basis for the discussion of this sentence appeal, some assitance might be had from gathering those common culpability and harm characteristics together to outline the seriousness of commercial aggravayed robberies.

[28] A higher starting point might be required for serious offending such as the robbery of commercial premises by a group, where members of the public can be expected to be present; targeting substantial sums in tills or a safe; with a lethal weapon, disguises, and other indications of preparation. If the shopkeeper is confined or assaulted or confronted by multiple offenders; or if more money and other property is taken the upper end for a starting point may well be appropriate.

[29] A mid-level starting point might be justified for robbery of a small shop by one person, possibly with an accomplice waiting to facilitate getaway or acting as a lookout; demanding money from the till under threat of the use of a weapon; with no customers present, no actual violence, and a sum of money taken.

[30] A low-level starting point, although rare as the offence may be better found in aggravated burglary, might be justified where the offence is more serious than a simple street mugging such as one person, spontaneously demanding money or property under threat of the use of a weapon; with no customers present, no actual violence, and a small sum of money taken

[31] Examples of recent comparator cases include *Cati v State*[11], where the appellant and three others forcefully entered the Comsol Movie Shop at CenterPoint, Nasinu and

[11] *Cati V State* [2022] FJCA. AAU 101. 2016 (29 September 2022)

robbed one person of his mobile phone valued at $200.00. Whilst inside they assaulted one shopkeeper and locked another in the toilet. They stole $950.00 in cash, one Nokia N65 brand mobile phone valued at $400.00 all to the value of $1,350.00. Eight years with five years non parole was upheld on appeal.

[32] In *Nabainivalu v State*[12] two persons armed with a cane knife entered a gas station and took away a mobile phone, laptop, and money after threatening the gas station attendant The mobile phone and laptop were subsequently recovered, but the money could not be found. The Supreme Court said an ultimate sentence of six years' imprisonment is appropriate for the appellant's offending, with a non-parole period of five years.

Discussion

[33] In the present case, the appellant acted with another person, but there was no evidence that either had a weapon. They had lookouts, they picked their time in the early morning to commit the crime, just after opening time, so that indicates some rudimentary planning and premeditation. The victim was helpless, alone, punched in the head, threatened, and briefly confined. The total amount stolen from the business and the complainant was some $5000.00. The appellant's offending should be placed in the medium category of seriuosness, for which the trial judge appropriately selected a starting point of ten years.

[34] However, we find only one aggravating feature. The first feature described by the trial judge of a cowardly attack by multiple offenders with threats and injury is already accounted for in the offence under section 311 (1) (a), i.e., a robbery aggravated by multiple offenders. This double counting error and the need to account for the claimed mitigating factors justifies revision of the sentence.

[35] The remaining two aggravating circumstances circulating as they do around victim harm and vulnerability distil to one matter. There was evidence that the primary victim suffered physical injury and must have also suffered emotional and psychological trauma from this unexpected and frightening crime. The business suffered a significant loss. The

[12] *Nabainivalu v State* CAV 027 of 2014: 22 October 2015 [2015] FJSC 22

offender is poor. The monetary loss of the complainant and the business cannot be recovered. This aggravating circumstance requires an uplift of one year. Taking the aggravated total to a sentence of eleven years.

[36] As for mitigation we agree with the States submission the there is little merit to be found from the appellants mitigating 'factors' including his obligations to family, farm, and village. That said the appellant's personal circumstances and original remorse found in his cooperation with the police and immediate confession to the crime deserve some modest recognition of one year. Although generous we see no need to disturb the one-year deduction by the trial judge for time on remand as in effect this will now include both mitigation for other personal circumstances and the statutory deduction under section 24 of the Sentencing and Penalties Act 2009. The head sentence is reduced to nine years. Finally, the offending being contained in the one event but of two parts means we agree with the trial judge that a concurrent end sentence is required.

[37] As for the minimum term required. Section 18(1) of the Sentencing and Penalties Act, 2009 mandates a non-parole period to be fixed when the sentence is more than two years with no discretion to the sentencing judge.

[38] The Court heard no argument on whether the non-parole period fixed under s 19 of the Sentencing and Penalties Act 2009 was appropriate. The approach to non-parole periods taken by the Supreme Court in *Ratu v State*[13] applies. A non-parole period representing approximately75% of the head sentence provides a sufficient "gap between the non-parole period and the head sentence [to] be a meaningful one". Seven years is not at a level which might disincentivize good behaviour in prison.[14] In my view, the non-parole period should be adjusted to one of seven years.

[13] *Ratu v State* [2024] FJSC 10; CAV 24.2022 (25 April 2024) at paras 33–35.
[14] Ibid, at para 34.

ORDERS:

(1) The appeal against conviction is dismissed.

(2) The appeal against sentence is allowed.

(3) The sentence imposed on the appellant of twelve (12) years imprisonment, with a non-parole period of eleven (11) years imprisonment is quashed.

(4) A sentence of nine (9) years imprisonment, with a non-parole period of seven (7) years is imposed on the appellant with effect from that date of his arrest on Kadavu 2 June 2020.

(5) Deduction of time on remand under S24 is accaited for within the new head sentence and there is no order made for further deduction.

The Hon. Mr Justice Isikeli Mataitoga
ACTING PRESIDENT COURT OF APPEAL

COURT OF APPEAL FIJI

The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

The Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL