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

CRIMINAL APPEAL NO.AAU 004 of 2019
[In the High Court at Suva Case No. HAC 031of 2017S]

BETWEEN	:	**PITA DOMONI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**10 December 2020**
Date of Ruling	:	**11 December 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with three others on 30 December 2016 at Samabula in the Central Division.

[2] The information read as follows.

'Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1)(a) of the Crimes Act 2009.

Particulars of Offence

PITA DOMONI, LEMEKI SEVUTIA TAUVOLI and MALAKAI TOKA on the 30 December 2016, at Samabula in the Central Division, robbed JULIE SUTHERLAND of cash valued at $65.00, 1 x black I-Pad cover valued at

$400.00, 1 x Apple brand I-Pad valued at $2,000.00, 1 x Sony digital camera valued at $300.00, 1 x Nikon digital camera valued at $300.00, 2 x packets of perfume valued at $150.00, 1 x black backpack bag valued at $80.00, 1 x bottle Whiskey valued at $150.00, 1 x bottle of Japanese Choya valued at $50.00, 2 x bottles of white wine valued at $40.00, 1 x Samsung S4 galaxy mobile phone valued at approximately $1,500.00 and 1 x silver Dell Inspiron laptop valued at approximately $1,043.00, Australian foreign currency AU$3,000.00 approximately valued at $4,735.00, 1 x black Dell Inspiron laptop valued at approximately $1,250.00 and 1 x black Dell Latitude laptop valued at approximately $1,250.00, all to the total approximate value of $13,313.00, the said property of JULIE SUTHERLAND."

[3] The appellant had pleaded guilty to the information and he had admitted the summary of facts and the particulars of the offence given in the information on 27 April 2018. The High Court judge had convicted the appellant on his own plea and sentenced him on 28 December 2018 to a sentence of 13 years of imprisonment with a non-parole period of 12 years.

[4] The summary of facts is as follows.

'The Accused

- *PITA DOMONI - 23 years of age, unemployed of Wailea Settlement, Vatuwaqa*

The Complainant

- *JULIE SUTHERLAND – 60 years of age, unemployed of 72 Howell Road, Samabula*

1. On 30th December, 2016 at around 6 pm, Julie Sutherland (hereby referred to as "PW1") took her dog for a stroll at Albert Park and returned home at around 7 pm. Upon arriving at her residence, PW1 switched on the front balcony lights, unlocked the front door, entered and locked the door behind her.

2. Whilst PW1 was inside the house, she heard her dog barking towards one of the bedrooms. PW1 unlocked the main door, switched on the verandah light and upon walking outside to check the compound was suddenly pushed back into the house by Pita Domoni (hereby referred to as "the accused") and two other unknown persons (hereby referred to as "others").

3. The accused and others were masked and wore hand gloves; PW1 saw that the accused and others were holding weapons namely a knife, a pair of scissors and a baseball bat. PW1 led the accused and others to the master

bedroom where they took $40 cash from PW1's purse. PW1 took them to another bedroom where $25 cash was stolen.

4. The accused then tied PW1's hands behind her back with a cable they saw lying on the kitchen counter and used PW1's scarf to tie around her eyes. The accused also tied a t-shirt around PW1's neck, pulled it up to cover PW1's mouth and covered PW1 with a blanket to prevent her from moving.

5. The accused with others stole the following items:
a. Cash valued at $65.00
b. 1 x black I-Pad cover valued at $400.00,
c. 1 x Apple brand I-Pad valued at $2,000.00,
d. 1 x Sony digital camera valued at $300.00,
e. 1 x Nikon digital camera valued at $300.00,
f. 2 x packets of perfume valued at $150.00,
g. 1 x black backpack bag valued at $80.00,
h. 1 x bottle Whiskey valued at $150.00,
i. 1 x bottle of Japanese Choya valued at $50.00,
j. 2 x bottles of white wine valued at $40.00,
k. 1 x Samsung S4 galaxy mobile phone valued at approximately $1,500.00
l. 1 x silver Dell Inspiron laptop valued at approximately $1,043.00,
m. Australian foreign currency AU$3,000.00 approximately valued at $4,735.00,
n. 1 x black Dell Inspiron laptop valued at approximately $1,250.00
o. and 1 x black Dell Latitude laptop valued at approximately $1,250.00,

All to the total approximate value of $13,313.00 the properties of PW1.

6. The accused and others then fled the residence leaving PW1 tied up. PW1 later managed to loosen the cable to untie her hands as well as remove the cloth covering her mouth and uncovered her eyes. PW1 then went to her neighbour's residence to relay the incident before later reporting the matter to police.

7. The accused was arrested and caution interviewed on 20th January 2017, where he admitted robbing PW1 at her residence at Howell Road Q&A19, climbing the fence from the back compound then onto the back porch Q&A32, walking to PW1 and telling her to keep quiet Q&A33.

8. The accused further admitted to stealing $65 cash and fastening her hands together with a cable Q&A34, stealing assorted items Q&A35 and 37, taking PW1 into a bedroom fastening her hands behind her back, covering her mouth with a cloth and covering her with a blanket Q&A39.

- *[A copy of the Record of Interview of the Accused is annexed as A1] [Not included]*

9. Police recovered the following stolen properties:
a. 1 x Samsung S4 galaxy mobile phone;
b. 1 x Apple brand I-Pad;
c. 1 x silver Dell Inspiron laptop;

d. A x black Dell Inspiron laptop;
e. 1 x black Dell Latitude laptop.

The said items were positively identified by PW1 as the same items that were stolen from her residence."

[5] A timely notice to appeal against sentence had been filed by the appellant on 15 January 2019. The Legal Aid Commission had filed amended grounds of appeal against sentence and written submissions on 15 September 2020. The State had tendered its written submissions on 23 October 2020.

[6] In terms of section 21(1) (c) of the Court of Appeal Act, the appellants could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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.

[8] ***Grounds of appeal***

1. The Learned Sentencing Judge erred in principle when sentencing the Appellant in that

(i) Having accounted for aggravating factors that is reflected in selecting the starting point which amounted to double counting; and

(ii) Having accounted an element of the offending as an aggravating factor.

01st (i) ground of appeal

[9] The appellant complains that the trial judge having followed **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the sentencing tariff was set at 08-16 years of imprisonment for aggravated robbery 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, had taken 12 years as the starting point and arguably double counted same features which had gone into the starting point as aggravating factors to enhance the sentence by 04 more years.

[10] The trial judge had explained the sentencing process as follows in the sentencing order.

> *8. "Aggravated Robbery", as a criminal offence, is viewed seriously by the law-makers of this country, and it carried a maximum sentence of 20 years imprisonment. For a spate of robberies, the tariff is a sentence between 10 to 16 years imprisonment: see Livai Nawalu v The State, Criminal Appeal No. CAV 0012 of 2012, Supreme Court of Fiji. With a single case of aggravated robbery, the tariff is now a sentence between 8 to 16 years imprisonment: see Wallace Wise v The State, Criminal Appeal No. CAV 0004 of 2015, Supreme Court of Fiji. The actual sentence will depend on the aggravating and mitigating factors.*
>
> *9. In Wallace Wise v The State (supra), the Hon. Chief Justice A Gates said as follows:*
>
> > *"... it is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious*

civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders..."

10. Furthermore, the Hon. Chief Justice, in the above case, commented as follows:

"...Sentences will be enhanced where additional aggravating factors are also present, examples would be:

(i) Offence committed during a home invasion.
(ii) In the middle of the night when victims might be at home asleep.
(iii) Carried out with premeditation, or some planning.
(iv) Committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.
(v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way."
(vi) Injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eyes.
(vii) The victims frightened were elderly or vulnerable persons such as small children..."

11. The aggravating factors in this case were as follows:

(i) The offence was a home invasion. The female complainant was 60 years old. She was in her house at 7 pm after going for a walk. You Accused No. 1 and 3, with another, attacked her in her own house. It was dark at the time. You obviously showed no respect to her right to live peacefully in her house. I am sure you would not want 3 armed i-taukei men attack your family in your own house. Thus you must expect to serve a long prison term in this case to teach you to respect other people's home.

(ii) Pre-planning. You obviously prepared yourselves when you attacked the complainant. You knew the surroundings well, and came prepared as a group, to counter oppositions.

(iii) The two of you, and your friend were masked and wearing gloves. You were armed with a knife, scissors and a baseball bat. You confronted the 60 year old complainant as a group, and completely subdued her and threaten her to surrender her properties.

(iv) You tied her up, gagged her and confined her, so she could not resist. The complainant was vulnerable.

(v) By offending against her, you had no regards to her right as a human being, her right not to be harmed, and her right to a happy and peaceful life.

12. The mitigating factors were as follows:

> *(i) Accused No. 1, you pleaded guilty to the charge after 1 year 3 months 4 days after first call in the Suva Magistrate Court. Accused No. 3, you pleaded guilty to the charge 1 year 8 months after first call in the Suva Magistrate Court. For this, you are entitled to some discount, as you had saved some court time.*
>
> *(ii) Accused No. 1, you had been remanded in custody for approximately 5 months, while awaiting sentence. This was because on 13.6.17 and 2.1.18, you were sentenced to 13 months and 4 years 10 months imprisonment, both to be concurrent to each other.*
>
> *(iii) Accused No. 3, you had been remanded in custody for approximately 1 year 4 months, as you were sentenced to 30 months imprisonment on 2.5.18.*
>
> *(iv) Some stolen properties were recovered.*

13. I start with a sentence of 12 years imprisonment. I add 4 years imprisonment for the aggravating factors, making a total of 16 years imprisonment……'

[11] The appellant's argument is that the trial judge had double counted matters under paragraph 11(i) and (iv) of the sentencing order as aggravating factors which the judge may have already considered in picking the starting point in the middle rage of the tariff at 12 years.

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

[13] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that 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.

[14] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[15] I have already quoted the observations of the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018). 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.

[16] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows:

> *(i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence i.e. objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.*
>
> *(ii) Then the judge applies the aggravating features of the offender i.e. all the subjective circumstances of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, (i.e. a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (tier two).*

[17] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to do that is to follow the two-tiered approach diligently as stated above. In this regard, it is always helpful for the sentencing judges to indicate what aggravating

factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[18] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) are also instructive in this regard.

> *'[48] The Sentencing and Penalties Decree does not provide any specific guideline as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.*
>
> *[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate 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. This is the methodology adopted by the High Court in this case.*
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> *[50] It is significant to note that the Sentencing and Penalties Decree 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", 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.*
>
> *[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable*

to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

[19] 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. Some of them relate to offending and some relate to the offenders. It could only be suspected that at least some factors itemised as aggravating features may have gone into the decision of picking the starting point at 12 years. If so, there is double counting when the sentence was enhanced in consideration of those features for the second time.

[20] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

> *'[30] In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point. Therefore, it becomes clear that there had been double counting when the same or similar factors were counted as aggravating features to enhance the sentence. Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in **Nadan** may not arise. Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed 'somewhere in the middle of the range' of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naikelekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.'*

[21] If ***Naikelekelevesi*** guidance is carefully followed *i.e.* first set out the objective circumstances *i.e.* the factors going to the gravity of the offence to pick the starting point and then state the aggravating features of the offender *i.e.* all the subjective circumstances of the offender to enhance the sentence, the danger of double counting expressed by the Supreme Court may be able to be avoided.

[22] However, 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). 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).

[23] Nevertheless, whether the sentence imposed on the appellant is justified should be decided by the full court despite the sentencing error. If so, the full court would decide what the ultimate sentence should be though I cannot state at this stage affirmatively that is there a reasonable prospect of success in the appellant's appeal against the sentence on this ground. The full court exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act would have to decide that matter after a full hearing.

01st (ii) ground of appeal

[24] The appellant argues that the factors identified under paragraph 11 (ii) and (iii) are part of the elements of the offence and should not have been counted as separate aggravating factors.

[25] The Supreme Court in **Kumar v State** (supra) identified another instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[26] The appellant had been charged under section 311(1)(a) of the Crimes Act, 2009 and therefore the fact that the appellant and others were armed could legitimately been taken as an aggravating factor.

[27] As for pre-planning, ***Wallace*** has laid down 'premeditation and some planning' as an additional aggravating factor (see paragraph [26(iii)]. 'Coming prepared as a group to counter opposition', it appears, may not be exactly the same as simply committing the robbery in the company with one or more other persons which refer to the number of participants to make a simple robbery to be an aggravated robbery and not the manner

in which the robbery is carried out. Section 311(1)(a) refers only to the number of people but the manner in which the robbery is executed by that group may be an additional aggravating factor. In this context, the comments of the full bench on a similar ground of appeal in **Nadavulevu v State** [2020] FJCA 14;AAU119 of 2015; 115 of 2015; 129 of 2015 (27 February 2020) could be re-examined by the full court while considering this appeal. My comments in **Cikaitoga v State** [2020] FJCA 99; AAU141 of 2019 highlighted by the appellant was made in relation to the fact that the offence was committed in a group had been considered as an aggravating factor.

[28] Therefore, I do not think that this ground of appeal has a reasonable prospect of success.

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL