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

CRIMINAL APPEAL NO.AAU 067 of 2016
[In the Magistrate's Court at Labasa Case No. 493 of 2014]

BETWEEN : **THE STATE**

Appellant

AND : **SAILOSI LIKU**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Vosawale for the Appellant**
: **Mr. M. Fesaitu for the Respondent**

Date of Hearing : **23 April 2020**

Date of Ruling : **28 April 2020**

RULING

[1] The respondent with another had been arraigned in the Magistrates court of Labasa exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed on 24 October 2014 regarding two mobile phones and one digital camera all to the value of $2200.00

[2] The respondent had pleaded guilty to the charge, been convicted and sentenced on 30 May 2016 to 38 months of imprisonments (03 years and 02 months) with a non-parole period of 24 months.

[3] The appellant being dissatisfied with the sentence imposed on the respondent had filed a timely notice of appeal against it containing a single ground of appeal on 06 June 2016 seeking to have the sentence quashed and another sentence ought to have been passed substituted therefor in terms of section 23(3) of the Court of Appeal Act.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. Therefore, the matter had been taken up for hearing on leave to appeal on 04 February 2020. However, due to the demise of Suresh Chandra RCJ the ruling could not be delivered. When the matter was called in court on 23 April 2020 both counsel agreed to have a ruling delivered by me on the written submissions already filed.

[5] 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 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with leave to appeal applications against sentence as well.

[6] 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 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.*

Ground of appeal

> *'THAT the sentence is too lenient when the facts reveal a violent home invasion deserving a higher starting point and that too much weight has been afforded to the defendant's mitigation'*

[7] The evidence of the case as stated by the State reveals that the respondent and another had entered the home occupied by the 56-year-old complainant, his 55-year-old wife and 79-year-old father around 2.00 a.m. on 24 October 2014.When the complainant had woken up and confronted the respondent, he had punched him on his face thrice making him unconscious. His wife too had been hit twice on her face by the respondent whose accomplice had covered her face with a pillow. Thereafter, the complainant's father had been slapped twice on his face by the respondent. Al three inmates of the house had suffered injuries due to the respondent's assault. Thereafter, the respondent and his accomplice had fled the house with two mobile phones and a digital camera belonging to the complainant to the combined value of $2200/- .

[8] The maximum sentence for aggravated robbery under section 311(1)(a) of the Crime Decree, 2009 is 20 years. The appellant argues that the tariff applicable to the aggravated robbery in the form of a home innovation was set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) as 08-16 years of imprisonment and the learned Magistrate had erred in not following ***Wise.*** The tariff in ***Wise*** was set in the following background facts involving a home invasion in the night with accompanying violence perpetrated on the inmates.

> *' [5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*
>
> *[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her*

jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched

[9] The respondent agrees that the tariff set in ***Wise*** was applicable to the respondent but argues that the powers of sentencing of the Magistrate is regulated by section 07 of the Criminal Procedure Act and therefore cannot pass any sentence of imprisonment beyond 10 years. Thus, the appellant contends that the imprisonment of 03 years and 02 months was within the powers of the Magistrate.

[10] It is true that the powers of the Magistrates court in terms of sentencing is limited to its powers given under section 07 of the Criminal Procedure Act. By virtue of section 4(3) of the Criminal Procedure Act, 2009, this is so even when the Magistrates Court exercises extended jurisdiction under section 4(2) of the Criminal Procedure Code. In **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019) the Court of Appeal said

'[39] As a final word of advice, I would like to caution that it is always advisable for a Magistrate…… to be mindful of the sentencing powers of the Magistrates Court and if it could be reasonably contemplated upon entering a conviction that the possible sentence would be beyond its powers, to transfer the person convicted by the Magistrates Court to the High Court for sentencing and greater punishment in terms of section 190 of the Criminal Procedure Act. Such a course of action would obviate appeals such as the present one by the State and make the offender serve an appropriate sentence in the end.

[11] Similarly, it is also the duty of the High Court judges to be mindful that cases where the accused, if convicted, deserves sentences beyond the sentencing powers of the Magistrates not to act under section section 4(2) of the Criminal Procedure Code and make orders to invest the Magistrates with jurisdiction to try such offences.

[12] Upon an examination of the impugned sentencing order of the learned Magistrate, it is clear that he had acted upon a wrong principle in selecting 05 years as the starting point without assigning any reason to do so contrary to ***Wise*** and then reducing 1/3 of the sentence for the early guilty plea without considering the serious nature of the offence. Both had resulted in the inadequate sentence imposed on the respondent.

[13] Although 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) it had not been accepted as an absolute standard but subjected several qualifications in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015). The Supreme Court said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. 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 as Goundar J has cautioned 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.'*

[14] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in 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.*

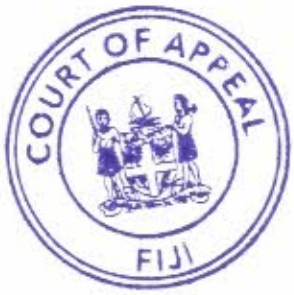
[15] The learned Magistrate had not considered ***Mataunitoga*** at all.

[16] In the above circumstances, there is a reasonable prospect of success of the appeal by the State.

[16] Accordingly, leave to appeal against sentence is allowed.

Order

1. Leave to appeal against sentence is allowed.



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL