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

CRIMINAL APPEAL NO.AAU 0078 of 2019
[High Court at Suva Case No. HAC 293 of 2017]

BETWEEN	**:**	**EMOSI BALEIDROKADROKA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**04 October 2021**
Date of Ruling	**:**	**08 October 2021**

RULING

[1] The appellant had been indicted 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 29 August 2917 at Suva in the Central Division. The information read as follows:

*'**Statement of Offence***

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

Particulars of Offence

KITIONE CAGI, EMOSI BALEDROKADROKA *and another on the 29th day of August 2017 at Suva in the Central Division, in the company of each other robbed* ***JANG WAN BANG & MYOUNG HEE KIM*** *of 1 x Samsung brand S7 mobile phone, 1 x Kia 3 smart watch, 1 x Swiss brand wrist watch, 1 x brown German brand wrist watch, 1 x National Assembly of Korea brand wrist watch, 1 x black leather wallet containing $150 cash, ATM and credit cards, 1 x bottle of*

black label whiskey, 1 x bottle of blue label whiskey, 1 x bottle of chivas regal whiskey, 1 x bottle of champagne, 15 bottles of other assorted alcohol and 1 Kia brand sorento vehicle registration number FZ079 approximately valued at $65, 000, $250 cash, 1 x gold ring, 1 x pair of 18ct gold earrings, 1 x blue sapphire 18ct white gold ring, 1 x 18ct gold chain, 1 x diamond white gold ring, 1 x wrist watch, 1 HP brand laptop, 1 x pink apple brand IPOD, 1 x translator machine, 1 x pair of black Adidas brand shoes, 1 x pair of black Nike brand shoes, 1 x black puma bag and 1 x black jacket, the properties of ***JANG WAN BANG & MYOUNG HEE KIM****.'*

[2] On 24 May 2019 the appellant represented by counsel had pleaded guilty. He had admitted the summary of facts. Upon being satisfied that the appellant had fully comprehended the legal effect of the plea of guilty and his plea was voluntary the trial judge had convicted him on 07 June 2019 and sentenced to 10 years of imprisonment with a non-parole period of 08 years (after deducting the period of remand the actual period being 09 years and 07 months with a non-parole period of 07 years and 07 months).

[3] The appellant had filed a timely appeal against conviction and sentence. He had filed amended grounds and written submissions from time to time. He had also filed two applications under the headings 'Notice for leave to call further witnesses' and 'Application for fresh evidence' both of which had been withdrawn later. The State had tendered its written submissions 01 March 2021. The appellant participated at the leave hearing *via* Skype.

[4] The summary of facts is as follows:

> *3. According to the summary of facts, which you admitted in the court, that you have committed this crime with four other accomplices. You and your accomplices had entered into the house of the complainant at about 2 a.m. on the 29th of August 2017, while the complainant, his wife and his nephew were sleeping in their respective rooms. All of you were masked and armed with knives and pinch bars. You have entered into the house by removing the louver blade from the window. You have then entered into the room of the nephew of the complainant, who was eighteen years old at that time. You and your accomplices had threatened him with a bolt cutter. You then tied up the hands, legs and mouth of the young nephew of the complainant using neck ties. After stealing certain items from the room of the nephew of the complainant and also from the sitting room, you have entered into the*

bed room of the complainant and his wife. After threatening them not to shout, the hands, legs and mouth of the complainant was tied up with neck ties. The hands of the wife of the complainant was also tied in the same manner. You and your accomplices have then stolen the items as described in the information. Having stolen those items, you and your accomplices had fled the house, using the vehicle of the complainant, which is registered as FZ 079.

[5] In terms of section 21(1) (a) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test in a timely appeal for leave to appeal against 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) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry 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)].

[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 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.

[7] The ground of appeal urged on behalf of the appellant is as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Appellant submit that he was pressured by the words of the Judge and exerted by Defence Counsel to plead guilty subsequent to the completion of the pre-trial. The plea was involuntary and ought to be a nullity.*
>
> ***Sentence***
>
> *Breach of the Totality Principle.*

01st ground of appeal

[8] The appellant's complaint amounts to an allegation of an equivocal plea of guilty under pressure from the trial judge and his counsel.

[9] In **Masicola v State** [2021]; AAU 073.2015(29 April 2021), the Court of Appeal said:

> *'[14] ……guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see R v Murphy [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).'*

[10] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:

> *'[21] ……..It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client…….'*
>
> *[22] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place……'*

[11] Earlier in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).'*

[12] 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."*

[13] Assessed against the above principles of law relating to guilty pleas, the appellant's position on equivocal plea of guilty become untenable. There is no material before this court to substantiate that the trial judge had stated in open court that he would impose a longer or consecutive sentence unless the appellant pleaded guilty and that his trial counsel had promised him a concurrent sentence with two other sentences the appellant was already serving, if he was to plead guilty. There is simply no material to buttress the appellant's allegation that he was tricked or cheated by the trial judge or

misled by the trial counsel. The appellant's complaint seems to be an afterthought borne out of his disappointment of not getting a concurrent sentence.

[14] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal in so far as it criticises the trial counsel cannot be even entertained.

[15] Therefore, there is no reasonable prospect of success in this ground of appeal.

Sentence ground of appeal

[16] The gist of the appellant's argument is that the trial judge had breached the totality principle in making the current sentence consecutive to the two other sentences he was serving.

[17] The relevant paragraphs in the sentencing order dealing with the previous sentences read as follows:

> 1. *You are currently serving two sentences. The first sentence is a period of eight (8) years and nine (9) months imprisonment with six (6) years and nine (9) months of non-parole period, which was imposed on you on the 28th of March 2019 in respect of the HAC 117 of 2018. The second sentence is a period of nine (9) years imprisonment with seven (7) years non-parole period which was imposed on the 9th of May 2019 in respect of HAC 115 of 2018. You are presently serving both of these sentences concurrently. Moreover, the above two sentences were imposed on you in relation to the offences of Aggravated Robbery.*
>
> 2. *In HAC 117 of 2018, the Court found you guilty to the offence of Aggravated Robbery subsequent to the hearing. In that matter, you have assaulted and robbed a person with another accomplice when he was walking to his home along the road in the evening. In HAC 115 of 2018, you have pleaded guilty to the offence of Aggravated Robbery. In this matter, you have entered into a car wash with two other accomplices and assaulted the victims and then robbed therein. Accordingly, it is clear that the two sentences that you are presently serving are also involved with violent robberies.'*

[18] Thus, it appears that the appellant was serving an imprisonment of 08 years and 09 months imposed on 28 March 2019 in HAC 117/2018 and another sentence of 09 years' imprisonment imposed on 09 May 2019 in HAC 115/2018 when the trial judge had to sentence the appellant on 07 June 2019 in this case. There is no doubt that the appellant was serving both previous sentences concurrently. The trial judge has also recorded that the appellant had three more convictions against his name committed after the date of the offence in the information.

[19] The trial judge had acted under section 22 (1) of the Sentencing and Penalties Act in making the current sentence consecutive to the previous two concurrent sentences. There is no doubt that the trial judge had the discretion to do so (see **Vaquwa v State** [2016] FJSC 12; CAV0016 of 2015 (22 April 2016)]. The judge had considered the totality principle and observations thereon by the Court of Appeal in **Tuibua v State** [2008] FJCA 77; AAU0116 of 2007S (07 November 2008)] too.

[20] The trial judge had stated that the appellant committed the three offences within a period of just 07 months and all of them were violent robberies. The judge had also observed that if the current sentence was to be made concurrent to the two previous ones the total aggregate sentence would only be nearly 10 years for all three offences which *'would undoubtedly be perceived by the public as a weak and lenient punishment for such a series of horrendous crimes committed on innocent citizen of the society'*. He had further observed:

> *'[29] One of the main purposes of the sentencing is to protect the public from the commissions of such crimes by making it clear to the offenders and to other persons with similar impulses, that, if you commit such a crime, you will meet with severe and appropriate punishment……'*
>
> *'[30] Therefore, a consecutive term of imprisonment would precisely reflect the proper proportionality between the gravity and seriousness of the offence and the sentence. The accused is 26 years old and maximum penalty to the offence of aggravated robbery is twenty years imprisonment. Therefore, a consecutive sentence would not destruct any reasonable expectation of a useful life after release.'*

[21] The appellant had submitted that the sentences imposed on his two previous cases were above the tariff applicable as one was a street mugging case and the other was an invasion of an office or business premises and he argues that the trial judge should have considered that aspect as well. The state submitted at the hearing that this court had already granted leave to appeal against sentence in AAU 33 of 2019 (HAC 117/2018) and AAU 75 of 2020 (HAC 115 of 2018) is to be mentioned on 19 October 2021. In any event, the trial judge had no authority to review those sentences as submitted by the appellant. Moreover even if the appropriate sentences in the previous cases happened to be more lenient that would not have affected the trial judge's decision to make the current sentence consecutive, for with those two sentences as they were before him the trial judge still decided to make the current sentence consecutive to the earlier ones. However, it would be prudent for the full court to consider all three appeals (AAU 33 of 2019, AAU 75 of 2020 and AAU 78 of 2019) together in deciding the appropriate sentence to be imposed on the appellant.

[22] The appellant also argues that the decision by the trial judge to make the current sentence consecutive would effectively leave him with a total aggregate sentence of over 18 years of imprisonment to serve with an equally long non-parole period.

[23] On the other hand if the trial judge were to adhere to the default position under section 22 of the Sentencing and Penalties Act and make the current sentence also concurrent to the previous two, the total sentence for all three offences would have been under 10 years. I am convinced that given the appellant's propensity to commit robberies accompanied by violence or threat of violence, deterrence and protection of the community should play a pivotal role in the sentence. He clearly poses a threat to the peaceful living of the law abiding citizens and should be kept away from society for a considerable period of time.

[24] In my view, the automatic application of section 22 of the Sentencing and Penalties Act (default position) would result in a hardly justifiable and inadequate aggregate sentence of 10 years or less. On the other hand, is an aggregate sentence of over 18 years of incarceration harsh and excessive in the circumstances and offend the proportionality principle given also the fact that the maximum penalty for aggravated

robbery being 20 years of imprisonment? In other words, has the trial judge erred in the exercise of his discretion under section 22 of the Sentencing and Penalties Act in making the whole of the current sentence consecutive to the earlier two sentences?

[25] In **Sauduadua v State** [2019] FJCA 86; AAU0053.2016 (6 June 2019) I had the occasion to consider section 22(1) of the Sentencing and Penalties Act, 2009:

> *'[39] Section 22(1) of the Sentencing and Penalties Act, 2009 reads as follows*
>
> *'Concurrent or consecutive sentences:*
>
> *22. — (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'*
>
> *[40] It is clear that the imprisonment imposed on the appellant does not come under sub-section (2) of section 22. Therefore, the justification for the consecutive sentence should be considered under section 22(1) itself. It looks as if the words 'unless otherwise directed by the court' in section 22(1) permits the trial judge to make a sentence consecutive to another sentence even when section 22(2) does not apply. The issue is in what circumstances the discretion vested in the trial judge by those words should be exercised and whether the discretion exercised in this instance could be justified.'*

[26] In **Donu v State** [2021] FJCA 81; AAU0005.2020 (25 March 2021) I remarked:

> *[33] There is another aspect to this issue. That is the totality principle. The totality principle depends on the sentence for each of the offences committed in one transaction having been correctly determined [vide **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The totality principle requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide **Rawaqa v State** [2009] FJCA 7; AAU009.2008 (8 April 2009)].*

[27] In my view, the full court may consider this aspect of the sentence and decide whether it is desirable in the interest of justice to make the current sentence consecutive (as done by the trial judge) or partly consecutive and partly concurrent to the existing sentence of 09 years of imprisonment imposed on 09 May 2019 in HAC 115/2018 (08 years and 09 months of imprisonment imposed on 28 March 2019 in HAC 117/2018 anyway runs concurrent to the sentence in HAC 115/2018). I do not see any merits in other submissions on the sentence by the appellant.

[28] There is another aspect of the sentence where the trial judge seems to have erred and which may need the intervention of the full court. The trial judge had failed to fix a non-parole period for the aggregate sentence of over 18 years. The judge had merely fixed a non-parole period for the sentence imposed in the present case.

[29] The state also submitted that considering the three cases of aggravated robbery committed within 07 months and the three convictions against his name committed after the date of the offence in the present case the full court may consider whether the appellant should be declared a habitual offender in terms of section 11 of the Sentencing and Penalties Act.

Orders

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

COURT OF APPEAL FIJI

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