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

CRIMINAL APPEAL NO.AAU 060 of 2020
[In the High Court at Suva Case No. HAC 411 of 2018]

BETWEEN	:	**ALIKI KAIKOSO**
	:	**TIMOCI SORO**

Appellants

AND	:	**STATE**

Respondent

Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. K. Cheng for the 01st Appellant**
	:	**02nd Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**28 October 2022**
Date of Ruling	:	**31 October 2022**

RULING

[1] The appellant had been charged in the High Court at Suva on two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 and one count of attempted aggravated robbery contrary to section 44(1) and 311(1)(a) of the Crimes Act, 2009 committed on 27 October 2018 at Nasinu in the Central Division.

[2] After the summing-up, the assessors had expressed a unanimous opinion that the appellants were guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted and sentenced them on 14 February 2020. The 01st appellant was sentenced to 13 years of imprisonment as an aggregate sentence with a non-parole period of 10 years and the 02nd appellant to 12 years of imprisonment as

an aggregate sentence with a non-parole period of 09 years. The sentences had been adjusted for the remand period spent to read as 11 years and 08 months imprisonment with a non-parole period of 08 years and eight (8) months and 11 years and 01 month imprisonment with a non-parole period of 08 years and 01month respectively.

[3] The 01st appellant's appeal only against conviction is timely. The 02nd appellant's appeal against conviction is timely but out of time by more than 02 years against sentence.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and 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) 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] Guidelines to be applied when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[6] According to the trial judge's sentencing order **t**he prosecution proved beyond a reasonable doubt that the two appellants, together with two others, had robbed Mr.

Nitya Nand Singh on the morning of the 27 October 2018. They had then gone to the Mad Hatter Coffee Shop and tried to rob Ms. Chung when she was having her birthday breakfast with her parents. Having failed to execute the planned crime at the Mad Hatter Coffee Shop, the two had then gone to the town and robbed Ms. Noor Farida Fleming when she was walking towards the town from Holiday Inn Hotel.

[7] The 01st appellant's grounds of appeal against conviction are as follows.

Ground 1

THAT the Learned Trial Judge erred in law and in fact when he found that the identification Parade carried out in the investigation to be fair and allowed dock identification.

Ground 2

THAT the Learned Trial Judge erred in law and in fact when

[8] The 02nd appellant's grounds of appeal against conviction and sentence are as follows.

Conviction

Ground 1

The learned trial judge erred in law and fact when he found the identification parade to be fair and placed considerable weight on the same.

Ground 2

The learned trial judge had erred in law and fact when he relied on the inconsistent nature of the descriptions given by the witnesses.

Ground 3

The learned trial judge had erred in law and fact in putting more weight on the evidence of the arresting officers to support the evidence of identification and draw the inference of guilt of the appellant from their respective evidence.

Sentence

Ground 4

The learned trial judge had fell into serious error by placing reliance on the authority in Wise v State CAV 4 of 2015 FJSC 7 (24 April 2015) to justify the imposition of 11 years as starting point in the appellant's circumstances since the authority in Wise as recently identified in State v Eperama Tawake principally

deals with offences of home invasion and does the margin of such error elevates the appellant's position as an exceptional circumstances warranting the Court of Appeal to grant leave to appeal against sentence out of time?

[9] The evidence against the appellants were primarily eye-witness accounts at the crime scenes and their secondary identification at the police identification parade just two days after the incident.

[10] The conviction grounds of appeal of the 01st and 02nd appellants could be considered together as all of them deal with different facets of the issue of identification.

[11] The trial judge had dealt with identification of the appellants in the judgment as the central issue as follows.

> *5. The prosecution alleges the two accused, together with others, had robbed Mr. Singh at the Bal Govind Road on the morning of the 27th of October 2018. The two accused had then gone to Mad Hatter Coffee Shop and tried to rob Ms. Chung but failed to execute their plan. Afterward, they had gone to the town and robbed Ms. Fleming when she was walking to the town from the Holiday Inn hotel.*
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> *6. The main issue, in this case, is to determine whether Mr. Singh, Ms. Chung, and Mr. Soqeta had mistaken in their respective identifications of the two accused as the two suspects who involved in the two alleged incidents of Aggravated Robberies and one incident of Attempted Aggravated Robbery.*
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> *7. Mr. Singh had traveled in his taxi to the scene of the incident from Tacirua East with the four suspects. The said journey took about seven to ten minutes. During the journey, one of the accused was sitting next to him in the front passenger seat. His view of that accused was not obstructed or impeded with anything. Another accused got off from the car and stood beside the door of the driver's side. He saw this accused about 20 to 30 seconds. His view of the accused was not obstructed or impeded with anything. The defence did not challenge the accuracy of evidence of the identification of Mr. Singh in cross-examination. Neither had they suggested otherwise.*
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> *8. Two days after the incident, Mr. Singh identified the two accused at the identification parade held at the Totogo Police Station as two of the four suspects who robbed his money, mobile phone, and the taxi. He was kept alone with a Police Officer at the Police Station before he went to the room of the identification parade. According to his evidence, no one helped or assisted him in making the identification of the two accused.*

9. Ms. Chung had seen the face of the first accused when he tried to grab her bag. He was facing her. She then saw the second accused when she tried to push him to the door with her mother. Her view of the two accused was not obstructed or impeded by anything. She saw the two suspects were fleeing the scene in a taxi. The defence in cross-examination did not challenge the accuracy of the evidence of identification by Ms. Chung. Ms. Chung also identified the two accused at the identification parade as the two suspects who tried to rob her at Mad Hatter Cafe. She had not spoken to or met any of the witnesses before or after the identification parade. Furthermore, she had not seen or met; the two suspects when they were escorted into the room by the police.

10.Mr. Soqeta said that he saw the first accused when he was getting off and then getting into the taxi from a distance of ten metres. He then saw the second accused when he came to their taxi and spoke to them after the robbery. His view of the two suspects was not obstructed or impeded by anything. As in the case of the first two witnesses, the defence in cross-examination did not challenge the accuracy of the evidence of identification by Mr. Soqeta. Mr. Soqeta also identified the two accused at the identification parade as the two men who committed the robbery in the town.

[12] On the integrity of the identification parade, the trial judge had stated in the judgment as follows.

11. The defence suggested to Mr. Singh, Ms. Chung, and Mr. Soqeta during the respective cross-examinations whether they saw or met the two accused before they entered the room, which the three witnesses denied. The three witnesses had not met each other and discussed anything before they have made their respective identifications at the identification parade.

12. ASP Nand said that the eleven civilians who took part in the identification parade had similar appearances in terms of their size, and built. However, Mr. Singh found it differently, as he observed the size, built, and appearance of the people in the line was different. Ms. Chung found, though one person looked a bit old, others appeared in the same age group. They all appeared the same to her.

13. The description given by the three witnesses about the two suspects matches with the physical appearance of the two accused. The police arrested them a few hours after the alleged incidents and within the proximity of the crash site of the taxi.

15.There is no evidence or any suggestion of interference by the few Police Officers who were present during the identification parade. Therefore, I do not find the presence of those police officers has affected the fairness of the identification parade.

[13] On the alleged inconsistencies in the evidence of Mr. Soqeta the trial judge had stated as follows.

> *14. I am mindful of the inconsistent nature of the evidence of Mr. Soqeta with the statement he made to the Police. The statement contains no descriptions of the two suspects. Moreover, there is no mention in the statement about the conversation he had with the second accused. Mr. Soqeta explained in his re-examination that he explained everything to the Police Officer, but he has not correctly recorded it in the statement. I accept the explanation; hence, the reliability and credibility of Mr. Soqeta's evidence of identification are not adversely affected by the said inconsistencies.*
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> *16. Given the above-discussed reasons, I accept the evidence of the witnesses of prosecution as reliable, credible, and truthful evidence. Accordingly, I find the prosecution has successfully proved beyond a reasonable doubt that the two accused have committed these three offences as charged. Hence, I do not find any cogent reasons to disagree with the unanimous opinion of guilty given by the three assessors.'*

[14] It is clear that the trial judge had addressed the assessors on all matters highlighted by the appellants from paragraphs 28-45 and 49-50 of the summing-up. The trial judge had summed-up to the assessors on how to evaluate reliability, credibility and inconsistencies and contradictions at paragraphs 53-65 of the summing-up. The judge in particular, had directed them on the matter of identification at paragraphs 66-71.

[15] The assessors having been so guided had found the appellants guilty and the trial judge had independently given his mind to the issue of identification in the judgment and convicted the appellants on all counts.

[16] In **Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat** on 24 May, 1983; 1983 AIR 753, 1983 SCR (3) 280 the Supreme Court of India made the following observations relevant to most of the appellants' complaints.

> "*1:2. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses herefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are:*
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> > *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen;*

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details;
(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another;
(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder;
(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the 'timesense' of individuals which varies from person to person.
(6) ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on;
(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment. [286 B-H, 287 A-E]"

[17] The Court of Appeal very recently dealt with a similar complaint in **Ram v State** [2021] FJCA; AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

[18] In **Fraser v State** [2021] FJCA; AAU 128.2014 (5 May 2021) the Court of Appeal reiterated the role of the trial judge as the final authority in Fiji.

> *'[26] ……. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].*

[19] In my view, it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[20] Therefore, I do not see any reasonable prospect of success in the appellants' appeal against conviction on any of the grounds of appeal.

02nd appellant's ground of appeal against sentence

[21] The 02nd appellant's sentence appeal is extraordinarily late. He had not given any reasonable explanation for the delay. I shall still see whether he has a real prospect of success in his appeal [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.

[22] The 02nd appellant's primary concern is the application of **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) where tariff for the offence of aggravated robbery was set at 08 to 16 years of imprisonment, which dealt with a home invasion in the night. He argues that his sentence is excessive and harsh in view of **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) which dealt with street mugging.

[23] It appears that the first count of aggravated robbery is that of a taxi driver where the sentencing tariff is 04-10 years of imprisonment (vide **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020).

[24] The second count of attempted robbery resembles a home invasion of some sort as Ms. Chung was having her birthday breakfast with her parents at Mad Hatter Coffee Shop which was a commercial establishment. The third count of aggravated robbery was a street mugging.

[25] Considering the spate of two robberies and one attempted robbery in broad daylight with a sense of bravado but with little regard to the well-being of all the victims who were going about their legitimate businesses, I do not think that the aggregate sentence is harsh and excessive.

Orders

1. Leave to appeal against conviction for both appellants is refused.
2. Enlargement of time to appeal against sentence for the 02nd appellant is refused.

COURT OF APPEAL FIJI

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