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

CRIMINAL APPEAL NO. AAU 109 of 2016
CRIMINAL APPEAL NO. AAU 137 of 2016
(In the Magistrates Court at Lautoka No. 333/2011]

BETWEEN	:	**MISIRAINI TAGIDUGU** **ENERI NASANIBALO** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Gamalath, JA**
	:	**Prematilaka, JA**
	:	**Dayaratne, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant in 109/2016**
	:	**Ms. S. Ratu for the Appellant in 137/2016**
	:	**Mr. S. Babitu for the Respondent in 109/2016 & 137/2016**
Date of Hearing	:	**09 May 2022**
Date of Judgment	:	**26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft form and agree on the conclusion.

Prematilaka, JA

[2] The appellants had been charged in the Magistrate's court at Lautoka exercising extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 committed on 01 May 2011 at Nakorokoro Point, Saweni, Lautoka in the Western Division.

[3] The appellants had pleaded guilty on 06 May 2013 and admitted the summary of facts. The learned Magistrate had convicted them and sentenced both of them on 26 July 2016 to 08 years of imprisonment with a non-parole term of 06 years.

[4] Both appellants had appealed only against sentence and the single judge had allowed leave to appeal.

[5] The second appellant sought to abandon his appeal by filing an application in Form 3 under Rule 39 of the Court of Appeal Rules. In terms of the Supreme Court guidelines in **Masirewa v State** [2010] FJSC 5; CAV0014.2008S (17 August 2010) this court asked the appellant in the presence of his counsel whether (i) he wished to abandon his appeal (ii) he was doing so voluntarily (iii) he had received legal advice (iv) reasons for the abandonment at this stage and (v) he understood the consequences of this court allowing his abandonment application namely that he cannot prosecute his appeal again before this court. He answered all except the 04th question in the affirmative and in answering the 04th question he stated that his pending release from imprisonment in the not so distant future is the reason for the withdrawal of his sentence appeal. Accordingly, this court hereby allows the second appellant's application for abandonment of his sentence appeal.

[6] Having obtained leave to appeal against sentence, the 01st appellant pursued his appeal on four grounds of appeal before this court and they are:

> *'1. The learned sentencing Magistrate erred in law and fact in imposing a sentence of 8 years without considering the facts and circumstances of this case (grounds 1, 6 and 8).*

2. *The learned Sentencing Magistrate erred in law and principle when he acted upon the wrong aggravating features thereupon enhancing the sentence (ground 2).*

3. *The learned sentencing Magistrate erred in law and fact by not properly discounting the sentence for the appellant being a first offender (grounds 3, 4 and 7).*

4. *The learned sentencing Magistrate erred in law in not properly discounting the early guilty plea (ground 5).''*

[7] The admitted summary of facts is as follows.

'SUMMARY OF FACTS

COMPLAINANT: Monika Pattie, 37 years Clerk of Nakorokoro Point, Saweni.

ACCUSED: Misiraini Tagidugu accused 26 years dock worker of Evan Street and Eneri Nasanibalo, 22 yrs, delivery boy of VM Pillay Road, Lautoka and another.

DATE TIME AND PLACE OF OFFENCE: 1st May 2011 – 0220 hrs – Nakorokoro Point, Saweni, Lautoka.

FACTS:

On the above date, time and place both the accused with another threatened the complainant and her husband (PW – 2) namely Angus Pattie 47 yrs construction worker with a crow bar, pinch bar and screw driver and stole their assorted liquor valued at $1000.00, 1 x Acer laptop valued at $1000.00, 1 x Canon Digital camera valued at $600.00, 2 piece diamond ring valued at $500.00,1 box imitation ring valued $30.00 and 1 x alcatel mobile fone valued $70.00, all to the value of $3200.00, the property of the complainant.

The complainant and her husband with their children were sleeping in their double storey house when they were awakened by the accused person and another in their bedroom on the top floor. The entry was gained into the house by removing three louvre blades from the bottom flat in the living room window. The two accused with another threatened the complainant and her husband with a pinch bar, crow bar and a screw driver and demanded money from them and they ransacked the whole house and packed the above mentioned items in a black carry bag which they picked from inside the house and after packing the items they forced the complainant to drive her husband's company vehicle registration number EY 353 and take them to the place where they wanted to go. The complainant was frightened so did what she was told to do whereby she drove the said vehicle with the two accused and another. They came through the Saweni Beach road and followed the main Queens road

towards Nadi. On the way they told the complainant to go through the Vuda Back and then to Saru Back Road, Tavakubu Back Road, at Tokovuci Settlement Misiraini Tagidugu and another got off from the vehicle with the stolen items whereas Eneri Nasanibalo guided the complainant back to Sukanaivalu and Tomuka road junction where he got off and went to meet his accomplice. They then rand their pick up vehicle driven by Philip Lachman Kumar (PW – 3) driver of Saru Back Road as this was the same vehicle that took them to Saweni, and they were picked up and dropped at Vomo Street opposite the Tilak High School playground.

The matter was reported and then an investigation was conducted and the accused were located, arrested and later interviewed under caution and with evidence in hand, the accuseds were charged accordingly. The accused admitted committing the offence. The black carry bag which was used to pack the stolen items was recovered from Misiraini Tagidugu's house during search; he stated that he drank all stolen liquor with friends. Apart from the bag nothing else was recovered.'

01st ground of appeal

[8] The learned Magistrate had followed the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment in selecting the starting point at 10 years. He had enhanced the sentence on account of aggravating features by 03 years and given discounts of 02 years for the guilty plea and 01 year for mitigating features and another 02 years on account of the delay in sentencing the appellant following the guilty plea. The Magistrate accordingly ended up with the head sentence of 08 years.

[9] The main plank of the appellant's counsel's submission is that the learned Magistrate had committed a sentencing error in following the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) because the appellant had committed the offence on 01 May 2011 and pleaded guilty on 06 May 2013 but was sentenced on 26 July 2016 and therefore it was wrong for the Magistrate to have applied the sentencing tariff decided on 24 April 2015 in ***Wise***. By logically extending his argument, the counsel submitted that therefore, the Magistrate had acted on a wrong sentencing principle requiring the appellate court's intervention in the matter of sentence.

[10] Raising a similar grievance in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) the appellant therein complained that he should have been sentenced in terms of the tariff for rape existing at the time the offences were committed and not according to the tariff at the time of sentencing. After hearing full submissions of both parties the Court of Appeal decided in a well-considered judgment that sentencing tariffs do apply retrospectively.

> *'[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable.'*

[11] Earlier the Court of Appeal in **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 discussed the same issue in detail and held

> *"[39] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he did it. Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'*

> *'[40] ..... that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. ..... Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation. Therefore, the new tariff that was set out in **Gordon Aitcheson** (supra) could be retrospectively applied to the instant case. The punishment for the substantive offence of rape in terms of Section 207 (1) (2) of the Crimes Act 2009 is life imprisonment which remains the same before and after **Gordon Aitcheson.'***

[12] As sentencing tariffs decided by judges themselves are more procedural in nature than substantive law passed by legislature, the observations made by the Supreme Court in **Yunus v State** CAV 0008 of 2011:24 April 2013 [2013] FJSC 3 that *'there can be no*

doubt that where an amending legislation related to procedure only, as in The King v Chandra Dharma (1905) 2 K. B. 335 *it would have retrospective effect.....'* seem to suggest that tariff does not operate in the retroactive domain.

[13] Despite being aware of the 'debate' surrounding the applicability of sentencing tariff retrospectively the Supreme Court in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) did not make any pronouncement contrary to the legal position set out above. Justice Brian Keith said:

> *'[32] By considering whether Tawake's sentence was in accordance with the new guideline for "street muggings", I should not be thought to be contributing to the debate of the applicability of new guidelines to offenders whose offences were committed before the new guideline was announced. That debate is continuing in the reported cases. It just happens that I think that the sentence substituted by the Court of Appeal in this case was unimpeachable.'*

[14] Having set new sentencing guidelines for juvenile rape the Supreme Court in **Aitcheson v State** CAV0012 of 2018: 02 November 2018 [2018] FJSC 29 sentenced the appellant according to the new tariff and not the tariff applicable at the time the offending was committed.

[15] Therefore, unless a contrary view is expressed by the Supreme Court, I think that the legal position set out above should be upheld. Accordingly, I am not inclined to agree with the counsel for the appellant's counsel that the Magistrate erred in applying ***Wise*** tariff to his offending.

[16] As for the complaint that the sentence of 08 years do not justify the facts and circumstances of the case, I can only say that the sentence is far too lenient. The appellant's offending is clearly an armed home invasion in the night and has all the hallmarks representing several aggravating factors identified in ***Wise*** and other cases as referred to in **Tabualumi v The State** Criminal Appeal No. AAU 96 of 2016 (26 May 2022).

[17] Moreover, I consider the fact that the offenders forced the complainant, the lady of the house, to drive them in her car a considerable distance in the night to be a very serious

aggravating feature. She could have been easily subjected to personal and sexual violence. While she was being taken away by the offenders, her husband and the children would have gone through an unprecedented mental agony not knowing whether she would return alive.

[18] 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. 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 (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]

[19] I have no doubt that the sentence imposed on the appellant is more than fully justified given the facts and circumstances of the case.

02nd ground of appeal

[20] The appellant argues that the Magistrate had erred in referring to the offenders having used weapons as an aggravating factor, which they had disputed. What the Magistrate had in fact stated is that the offenders were armed with weapons and used them to threaten the inmates but not used on them. It is clear from the summary of facts that this had indeed been the case. I see no error in considering threatening with weapons as an aggravating factor. Having offensive weapons with them at the time of the robbery have made the offenders' robbery aggravated to be charged under section 311(1)(b) of the Crimes Act for aggravated robbery and using those weapons to threaten the inmates made it an aggravating feature enhancing the sentence. Using or threatening with weapons is not part of the offence and could legitimately be considered as an aggravating factor.

03rd ground of appeal

[21] The appellant's counsel also complains that the appellant was a first offender and the Magistrate had not given any discount for his lack of previous convictions. The sentencing order does not refer to the fact that the appellant was a first offender. I have perused sentencing submissions filed on the appellant's behalf before the Magistrate and do not find that his counsel had pleaded as a mitigating factor that he was indeed a first offender. The single Judge ruling too does not make any reference to the fact that the appellant had been a first offender. In the circumstances, I do not think that one can blame or criticize the Magistrate for not considering the appellant as a first offender for any reduction in the sentence.

04th ground of appeal

[22] The appellant submits that not adequate discount had been given for the guilty plea. The magistrate had given 02 years for the guilty plea and reduced further 02 years for the delay in sentencing. It is now well-settled that in Fiji as to what discount should be given to the guilty plea is governed by the decisions in **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) and there is no entitlement for an automatic 1/3 discount for early guilty pleas. In the context of the overall lenient sentence, I do not think that the appellant can reasonably complain about the inadequacy of the discount.

[23] When a sentence is challenged in appeal the guidelines are whether the trial judge (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 [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].

[24] I do not see any sentencing error which is so significant as to move this court to interfere with the sentence. Therefore, sentence appeal should be dismissed.

[25] However, before I conclude I would like to repeat what I observed in **State v Liku** [2022] FJCA 9; AAU067.2016 (3 March 2022) as I think that this case should not have been remitted to the Magistrate Court by the High Court and the Magistrate too in turn should have referred it to the High Court for sentencing as, objectively looking at it, the sentence is inadequate. The State's lack of vigilance too has contributed to this unsatisfactory scenario.

> *'[32] In **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019) the Court of Appeal cautioned sentencing Magistrates as follows to avoid complaints of inadequate sentences.*
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> > *'[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.'*
>
> *[33] I must also add that 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 as has been the case in this matter.*
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> *[36] It does not appear from the appellant's submissions that, being aware of the gravity of the case, the State had requested the High Court judge not to transfer the case to the Magistrate Court to hear and determine. Had the state fully apprised the High Court judge of the severity of the offending he may not have extended his jurisdiction to the Magistrates court. It also does not appear that even when the appellant pleaded guilty the State had requested the learned Magistrate to transfer the case to the High Court for sentencing. In my view, in both respects the state had been remiss. This, lack of vigilance on the part of the appellant has played a big part in the eventual inadequate sentence.'*

Dayaratne, JA

[26] I have read the draft judgment of Prematilaka, JA and agree with his reasons and the conclusion.

Order

(1) Appellant's appeal against sentence is dismissed.

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL