

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

CRIMINAL APPEAL NO.AAU 011 of 2021
[In the High Court at Suva Case No. HAC 031of 2017S]

BETWEEN : **MALAKAI TOKA** ,
Appellant

AND : **STATE**
Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **30 May 2022**

Date of Ruling : **07 June 2022**

RULING

[1] The appellant with two others (whose appeals are unnumbered AAU 004/2019 and AAU 057 of 2020) 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 TAUVOLO 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 16 March 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.

1. 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").

1. 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.

1. 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.

1. The accused with others stole the following items:

- a. Cash valued at \$65.00
- a. 1 x black I-Pad cover valued at \$400.00,
- i. 1 x Apple brand I-Pad valued at \$2,000.00,
- a. 1 x Sony digital camera valued at \$300.00,
- a. 1 x Nikon digital camera valued at \$300.00,
- a. 2 x packets of perfume valued at \$150.00,
- a. 1 x black backpack bag valued at \$80.00,
- a. 1 x bottle Whiskey valued at \$150.00,
- a. 1 x bottle of Japanese Choya valued at \$50.00,
- a. 2 x bottles of white wine valued at \$40.00,
- a. 1 x Samsung S4 galaxy mobile phone valued at approximately \$1,500.00
- i. 1 x silver Dell Inspiron laptop valued at approximately \$1,043.00,
- a. Australian foreign currency AU\$3,000.00 approximately valued at \$4,735.00,
- a. 1 x black Dell Inspiron laptop valued at approximately \$1,250.00
- a. 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.

1. 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.

1. 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.

1. 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]

1. 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;*
- a. *A x black Dell Inspiron laptop;*
- a. *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 25 January 2019. The Legal Aid Commission had filed an application for enlargement of time with amended grounds of appeal against sentence and written submissions on 29 November 2021. The State had tendered its written submissions on 23 December 2021.
- [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 Caucu 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 whether the sentencer has (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). **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.**

[8] **Ground of appeal**

1. *The Learned Judge erred in principle when sentencing the Appellant by accounting for aggravating factors in selecting the starting point which amounted to double counting and resulting in the sentence being harsh and excessive.*

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] It is open to a reasonable suspicion at this stage that the trial judge might have considered at least some, if not all, the aggravating factors set out at paragraph 11 of the sentencing order in selecting 12 years as the starting point. If so, when he enhanced the sentence by 04 more years for those aggravating factors, the judge may have unwittingly erred in double counting the aggravation of the offence. This is the concern expressed by the Supreme Court in **Senilokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019).
- [11] The Supreme Court in **Nadan** (supra) repeated the difficulty of the appellate courts in this situation in that that they 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.
- [12] 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.

- [13] Therefore, to overcome this dilemma the best approach now is to allow the full court to decide on the propriety of the ultimate sentence as 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, 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). I cannot and do not pretend to say at this stage that there is 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.

Order

1. Leave to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL