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

CRIMINAL APPEAL NO. AAU 004 OF 2019
[In the High Court at Suva Case No. HAC 31 of 2017]

BETWEEN : **PITA DOMONI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Ms T. Kean for the Appellant**
Mr R. Kumar for the Respondent

Date of Hearing : **8th September, 2023**

Date of Judgment : **28th September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree that the appeal against sentence should be dismissed.

Mataitoga, JA

[2] I agree with the judgment of Qetaki, JA.

Qetaki, JA

Background

[3] This is an appeal against the decision of the High Court of Suva initially brought before a Single Judge against sentence 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.

[4] 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 SAUVUTIA TAUVOLI** and **MALAKAI TOKA** on the 30th December 2016, at Samabula in the Central Division, robbed JULIE SUTHERLAND of cash valued at $65, 1x black I-Pad cover valued at $4000,1x Apple brand I-Pad valued at $2000,1x Sony digital camera valued at $300,1x Nikon digital camera valued at $300,2x packets of perfume valued at $150,1x black backpack bag valued at $80, 1xbottle Whisky valued at $150,1x Japanese Choya valued at $50,2x bottles of white wine valued at $40,1x Samsung S4 galaxy mobile phone valued at approximately $1,500 and 1xsilver Dell Inspiron laptop valued at approximately $1,043,Australian foreign currency AU$ 3,000 approximately valued at $4,735. 1xblack Dell Inspiron laptop valued at approximately $1250 and 1x black Dell Latitude laptop valued at a[approximately $1250,all to the total approximate value of $13,313.00, the said property of JULIE SUTHERLAND."*

[5] 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 27 April 2018.The

High Court Judge convicted him on his own plea and sentenced him on 28 December 2018 to a term of imprisonment of 13 years with a non-parole period of 12 years.

Summary of Facts

[6] The complainant Julie Sutherland (hereby referred to as "*PW1*") is 60 years of age, unemployed of 72 Howell Road, Samabula, and Pita Domoni (hereby referred to as the "*accused*") is 23 years of age, unemployed of Wailea Settlement, Vatuwaqa. On 30 December 2016 at around 6pm PW1 took her dog for a stroll at Albert Park and returned home at about 7pm. Upon arriving at her residence, PW1switched on the front balcony lights, unlocked the front door, entered and locked the door behind her.

[7] While she 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 the accused and two other unknown persons (hereby referred to as "*others*.")

[8] 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.

[9] 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 with a blanket to prevent her from moving. The accused with others stole the items listed in the information.

[10] 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.

[11] The accused was arrested and caution interviewed on 20th January 2017, where he admitted robbing PW1 at her residence at Howell Road climbing the fence from the back compound then onto the back porch walking to PW1 and telling her to keep quiet.

[12] The accused further admitted to stealing $65 cash and fastening her hands together with a cable, stealing assorted items and taking PW1 into a bedroom fastening her hands behind her back, covering her mouth with a cloth and covering her with a blanket.

[13] Police recovered the following stolen properties:

a. 1x Samsung S4 galaxy mobile phone;
b. 1x Apple brand I-Pad;
c. 1x silver Dell Inspiron laptop;
d. 1x black Dell Inspiron laptop;
e. 1x black Dell latitude laptop.

Grounds of Appeal

[14] The Grounds for leave to appeal are:

> *"The Learned sentencing Judge erred in principle when sentencing the appellant in that:*
>
> *(i) Having accounted for aggravating factors that is reflected in selecting the starting point which amounted to double counting; and*
> *(ii) Having accounted an element of the offending as an aggravating factor.*

Before a Single Judge

[15] The learned single Judge after discussing the merits and prospect for success of the grounds for leave to appeal, allowed leave to appeal against sentence based on Ground 1(i) above. He stated (paragraph [23] of Ruling:

> *"Nevertheless, whether the sentence imposed on the appellant is justified should be decided by the full court despite the sentencing error. If so, the full court would decide what the ultimate sentence should be though I cannot state at this stage affirmatively that 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."

[16] The appellant's complaint is centered on the learned Judge having set the sentencing tariff at 8-16 years of imprisonment for aggravated robbery having followed **Wallace Wise v The State** [2015] FJSC 7; CAV0004.2015 (24 April 2015).That the trial Judge had double counted matters under paragraph 11(i) and (iv) of the sentencing order as aggravating factors which the judge may have already considered in picking the starting point in the middle range of the tariff at 12 years.

[17] In **Wallace Wise v The State** (supra), the Hon. Chief Justice A Gates said as follows:

"…it is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders…"

[18] At paragraph 10 of the sentencing, the learned trial Judge referred to the aggravating factors cited by the Hon Chief Justice, A. Gates in the same case:

Sentence will be enhanced where additional aggravating factors are also present, example examples would be:

(i) Offence committed during home invasion.
(ii) In the middle of the night when victims might be at home asleep.
(iii) Carried out with premeditation, or some planning.
(iv) Committed with freighting circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.
(v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.
(vi) Injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eyes.
(vii) The victims frightened were elderly or vulnerable persons such as small children……"

[19] The learned sentencing Judge cited the aggravating and mitigating factors in this case in paragraphs 11 and 12 of the Sentencing as follows:

"11.The aggravating factors in this case were as follows:

(i) *The offence was a home invasion. The female complainant was 60 years old. She was in her house at 6pm after going for a walk. You accused No. 1 and 3, with another, attacked her in her own house. It was dark at the time. You obviously showed no respect to her right to live peacefully in her house. I am sure you would not want 3 armed itaukei man attack your family in your own house. Thus you must expect to serve a long prison term in this case to teach you to respect other people's home.*

(ii) *Pre-planning. You obviously prepared yourselves when you attacked the complainant. You knew the surrounding well, and came prepared as a group, to counter oppositions.*

(iii) *The two of you, and your friend were masked and wearing gloves. You were armed with a knife, scissors and a basketball bat. You confronted the 60 year old complainant as a group and completely subdued her and threaten her to surrender her properties.*

(iv) *You tied her up, gagged her and confined her, so she could not resist. The complainant was vulnerable.*

(v) *By offending against her, you had no regards to her right as a human being, her right not to be harmed, and her right to a happy and peaceful life.*

12. The mitigating factors were as follows:

(i) *Accused No.1, you pleaded guilty to the charge after 1 year 3 months 4 days after first call in the Suva Magistrates Court…….For this, you are entitled to some discount, as you have saved some court time.*

(ii) *Accused No. 1, you had been remanded in custody for approximately 5 months, while awaiting sentence. This was because on 13.6.17 and 2.1.18 you were sentenced to 13 months and 4 years 10 months imprisonment, both to be .concurrent to each other*

(iii) *……*

(iv) *Some stolen properties were recovered."*

[20] In fixing the appellant's sentence the learned Judge started with a sentence of 12 years imprisonment. 4 years was added for aggravating factors which were not specified, making a total of 16 years imprisonment. A deduction of 5 months for time already served while remanded in custody, leaving a balance of 15 years 7 months imprisonment. 2 years 1 month was deducted for indicating a guilty plea since 5 May 2017 and pleading guilty on 27 April 2018, leaving a balance of 13 years 6 months. 6 months deducted for properties recovered leaving a balance of 13 years imprisonment. The appellant was sentenced to 13 years imprisonment with a non-parole period of 12 years. The sentence is concurrent to any prison sentence presently served.

The Law

[21] The proper approach to appeals against sentence is set out in **Kim Nam Bae v the State** (unreported Criminal Appeal AAU 15 of 1998 (26 February 1999), as follows:

> *"It is well established law that before this Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If a trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the appellate court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King** [1936] HCA 40; (1936) 55 CLR 499)."*

[22] The test before the full bench of this Court is governed by section 23(3) of the Court of Appeal Act Cap.12 where the court may set aside the verdict of any ground where there appears to be a miscarriage of justice:

> *23-(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed or may dismiss the appeal or make such other order as they think just,"*

Discussion

[23] There are two limbs to this appeal. Firstly, in Ground 1(i), the appellant complains that the trial judge was wrong in following **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) , where the sentencing tariff was set at 8- 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 robbery. He had taken 12 years as the starting point in this case and had arguably double counted some features which had already been taken account of in determining the starting point, as aggravating factors.

[24] Counsel for the appellant had indicated in writing, and orally at the hearing that the appellant will rely on the written submissions filed at the leave stage. The respondent submitted a consolidated written submissions which was field on 8 September 2023.The appellant asserts that the learned trial judge had double counted matters in paragraphs 11(i) and (iv) of the sentencing order, which the learned judge may have already considered in picking the starting point in the middle range of the tariff of 12 years.

[25] The learned single judge (Prematilaka JA) had in his Ruling adequately and comprehensively covered the case law and legal principles applicable to sentencing in which sentencing orders may be challenged for double counting or taking account of the same features to increase a sentence, which amounts to double punishment. For example, in **Senilolokula v State** [2018] FJSC 5; CAV0017 (26 April 2018] where the Supreme Court raised a few concerns regarding the selection of the 'starting point' in the two-tiered approach to sentencing, in the face of criticism of 'double counting'.

[26] A survey of the development on how the Courts have attempted to resolve issue raised where double counting is asserted indicate as follows:

(a) **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018), where the Supreme Court said that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other*

aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

(b) **Nandan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) where the concern on double counting was echoed once again by the Supreme Court. The Court stated that the difficulty is that the appellate courts 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.

(c) **Salayavi v State** 2 [2020] FJCA 120; AAU0038 of 2017(3 August 2020) where it was stated (Prematilaka JA):

"[30] In the present case, however, it is clear what features the learned judge had considered in selecting the starting point. Therefore, it becomes clear that there had been double counting when the same or similar factors were counted as aggravating features to enhance the sentence. Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in ***Nandan*** *may not arise. Therefore, in view of the pronouncements of the Supreme Court in* ***Nandan*** *it will be a good practice, if not a requirement, in the future of trial judges to set out the factors they have taken into account, if the starting point is fixed somewhere in the middle of the range of the tariff. This would help prevent double counting in the sentencing process, in doing so, the guidelines in* ***Naikelekelevesi*** *and* ***Koroivuki*** *may provide useful tools to investigate the process of sentencing thereafter."*

(d) **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (5 March 2013) where the starting point is picked from the lower or middle range of the tariff.

(e) **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which expressed the method of sentencing commonly known as the two-tiered process now commonly followed by judges in Fiji. If the guidance set in this case is carefully followed i.e. First set out the objective circumstances, meaning the factors going to the gravity of the offences to pick the starting point and then state the aggravating features of the offender i.e., all the subjective circumstances of the

offender to enhance the sentence, the danger of double counting expressed by the Supreme Court may be avoided.

(f) **Qurai v State** [2015] FJCA 15; CAV24.2014 (20 August 2015) which elaborated on the principles enunciated in **Naikelekelevesi** (supra), also emphasizing that,

"[48] The Sentencing and Penalties Decree does not provide any specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case……"

[27] However, this Court is being asked to review the sentence passed on the appellant in this case. 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 State** [2006] FJSC 5; CAV0006.2005S (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 lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[28] Secondly, in limb (ii) the appellant argues that the factors identified under paragraph 11(ii) and (iii) are part of the elements of the offence and should not have been counted as separate aggravating factors.

[29] In **Kumar v State** (supra) the Supreme Court stated that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. To do so would be another example of double counting.

[30] Pre-planning as an additional aggravating factor was considered in **Wallace Wise v the State** Criminal Appeal No. CAV0004 of 2015 (FJSC) there was pre-planning and the Court (Hon. Chief Justice A. Gates as he then was) stated:

> *"10……..it is our duty to make clear these types of offences will severely be disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders……."*

[31] There is a distinction between 'coming prepared as a group to counter opposition', to simply committing the robbery in the company with one or more persons which refer to the number of participants to make a simple robbery to be an aggravated robbery. Section 311(1)(a) of the crimes Act refers only to the number of people but not the manner in which the robbery is executed. The latter (manner in which the robbery is executed) may be regarded as an additional aggravating factor in a count of aggravated robbery under the section.

[32] In **Nadavulevu v State** [2020] FJCA 14; AAU119.2015; AAU115.2015, AAU129.2015 (27 February 2020) at paragraph [40], this Court had stated:

> *"[40] Moreover, taking into account pre-meditation and planning as factors of aggravation was wrong in principle as such matters were already existent in the offence of aggravated robbery as elements of the offence, in terms of section 311(1)(a) of the Crimes Act 2009, refers to the offence being committed whilst being in a group."*

[33] In my view, "*premeditation and planning*", are matters that occur prior to the execution/commission of the offence. Premeditation means planning in advance. Planning means to intend or to form a plan or outline (Collins English Dictionary & Thesaurus.). It is to be differentiated from what actually took place or the manner of execution at the crime scene. The latter, in my view may be regarded as additional aggravating factor in a count under section 311(1)(a) aforesaid. The manner of execution or the commission of an offence of aggravated robbery differ according to different factual situations and circumstances. There is a perception of a '*normal'* aggravated

robbery case, there is also a perception of a "*worst case scenario of aggravated robbery*" case defined by its own facts and circumstances. Such, make up the aggravating features additional to the factors that are elements of the offence. Due to the above distinction, in my view, the appellant's reliance on **Cikaitoga v State** [2020] FJCA 99; AAU 141.2019, AAU115.2015; 8 July 2020) is misconceived.

[34] In the circumstances, both the appeal grounds are dismissed being without merit. The appeal is disallowed, and the conviction is affirmed there being no miscarriage of justice, (substantial or otherwise) as a result.

Order of the Court:

Appeal against sentence is dismissed.

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL