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

CRIMINAL APPEAL NO. AAU 055 of 2022
[In the High Court at Suva Case No. HAC 101 of 2022]

BETWEEN	**:**	**THE STATE**
		Appellant
AND	**:**	**RATU MAIKA BOLOBOLO** **INOKE RAIWALUI KIRIKIRIKULA**
		Respondents
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. R. Kumar for the Appellant** **Ms. T. Kean for Respondent**
Date of Hearing	**:**	**15 December 2023**
Date of Ruling	**:**	**18 December 2023**

RULING

[1] The respondents had been charged in the High Court at Suva jointly for committing the offence of aggravated robbery on 15 March 2022 at Naisnu, in the Central Division contrary to section 311 (1) (a) of the Crimes Act, 2009 by steeling 1x black Samsung J7 Mobile Phone, 1x Nokia Mobile Phone, 9 x assorted Ladies Sarees (Clothes) and $35.00 cash from Suruj Mati and immediately before stealing from Suruj Mati, used force on her on whilst being in the company of each other.

[2] The respondents had pleaded guilty and the trial judge had entered convictions accordingly and sentenced them on 30 June 2022 to sentences of 04 years with non-parole periods of 02 years, the ultimate sentence being 03 years and 08 months with a non-parole period of 01 year and 08 months after deducting a period of remand.

[3] The appellant had lodged a timely appeal against sentence. In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against 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)].

[4] Further guidelines to be followed 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].

[5] The trial judge had summarized the facts in the sentencing order as follow:

> *4. Upon the reading of the summary of facts on the 28th of June 2022, both of you admitted the following summary of facts save and except the fact of tying both the hands of the complainant Suruj Mati tightly with a duct tape appearing at paragraph 7 thereof;*
>
> *i. That the Complainant in this matter is Suruj Mati, 65 years old, retired Teacher of Lot 11 Kings Road, Nasinu, and the 1st Acused is Ratu Maika Bolobolo is 22 years old, Construction worker of Tunoloa road, Caubati and you the 2nd Accused is Inoke Raiwalui Kirikirikula, 18 years old, Unemployed of Lot 24 Vesida Place, Nasinu. There is no relationship between the complainant and the accused persons in this matter. On the 15th day of March, 2022, at Nasinu, the accused persons Ratu Maika Bolobolo and Inoke Raiwalui Kirikirikula, in the company of each other, stole 1x black Samsung J7 Mobile Phone, 1x Nokia Mobile Phone, 9 x assorted Ladies Sarees (Clothes) and $35.00 cash from complaint Suruj Mati and immediately before stealing from the complainant, used force on her.*

ii. *On the above mentioned date at about 1.40pm, Complainant was at her house with her grand-daughter namely Mahira Dutt, 5 year old, female. The complainant went outside her house to bring dry clothes from the laundry line when she was called by one Apenisa.*

iii. *Apenisa called the complainant on the pretext that he has Dalo (Root crop) however there was no Dalo in his farm.*

iv. *Whilst the Complainant was outside her house speaking to her neighbor Apenisa both the accused persons entered into the complainant's house through the front house door without the complainant's consent.*

v. *The Complainant finished her conversation with Apenisa and returned to her house. Upon entering her house through the back kitchen door the complainant realized that she cannot hear her granddaughter's voice therefore she called out her name however there was no response.*

vi. *The Complainant then rushed to her granddaughter's room where she heard her granddaughter's cries. As the complainant reached her granddaughter's room she saw an I-Taukei male (accused person) standing inside the room. At this point in time the second accused approached the complainant from behind and grabbed the complainant's mouth from behind preventing her from shouting.*

vii. *Both the accused persons then tied the complainant's mouth up to neck area with duct tape, tied both her hands tightly with a duct tape and thereafter took the complainant in one of the rooms and made the complainant sit on the floor.*

viii. *The accused persons then tied the complainant's 5 year old granddaughter's mouth with the duct tape and took her to a room where her granddaughter was seated and made her sit on the floor with the complainant.*

ix. *One of the accused person demanded money from the complainant whereby the complainant then showed him her handbag. The accused then opened the handbag and took out the wallet which contained $35.00 cash. Whereas, the other accused proceeded to other parts of the house and continued to search the house.*

x. *Both the accused ransacked the complainant's house and dishonestly appropriated the following items:*

- *1x Samsung J7 Mobile Phone valued at $600.00,*
- *1 x Nokia (Button) Mobile Phone valued at $59.00,*
- *9 x assorted ladies Sarees (dresses) valued at $1,500.00.*

xi. *The total value of the complainant's stolen items is $2,149.00.*

xii. *After stealing the above mentioned items both the accused persons fled from the complainant's house.*

xiii. *According to the Complainant she sustained swellings on her hands and mouth. However, the Complainant did not went to medical examination as she was traumatized and had fear that the accused person may come back to her house and do something to her.*

xiv. *The complainant managed to pull out the tape from her mouth and hands, and thereafter opened the tape from her granddaughter's mouth.*

xv. *The matter was reported to Police and Investigations were carried out.*

xvi. *The first accused Ratu Maika Bolobolo sold the Samsung J7 Mobile Phone to one Rupeni Vakalalabure, Labourer of Tunuloa Road, Caubati, for $80.00. Whereas, the second accused Inoke Raiwalui Kirikirikula sold the Nokia Mobile Phone to one Ashok Kumar, of Lot 9 Mama's place for $10.00.*

xvii. *Both the Mobile Phones and assorted Ladies Sarees were recovered. (Attached here and marked "A" is the search list and "B" is Photographic Booklet).*

xviii. *The accused persons were arrested on the 21st March, 2022, and were interviewed under caution whereby both fully admitted committing the alleged offence.*

xix. *Both the accused persons were charged with one count of Aggravated Robbery; contrary to section 311 (1) (a) of the Crimes Act 2009.*

xx. *You Ratu Maika Bolobolo admitted in question number 45 to 61 of the cautioned interview, that on the 15th March, 2022, at about 1.40pm, that you and Inoke jumped into an Indian Lady's house and robbed her, tying her and taking her into a room and admits stealing mobile phones and Sarees. Further, you admit selling the phone to one Rupeni Vakalalabure for $80.00.*

xxi. *You Inoke Raiwalui Kirikirikula, dmitted in question number 35 to 60 of the cautioned interview, that on the 15th March, 2022, you met your friend Maika and went to one Indian lady's house along the Kings road, and entered the house through the front house door. You also admit you saw a small Indian girl inside the house and that tied her mouth and took her to one of the rooms inside the house so that she doesn't runs away and they saw the complainant coming from the kitchen, they approached her, and tied the complainant's mouth and put her in a room. You admit taking the mobile phones, a bag and clothes. The said Nokia mobile phone was on the tale inside the sitting room and Maika brought other items from the other room that Maika took the touch screen phone.*

xxii. *That both of you have no previous convictions.*

[6] The sole ground of appeal urged by the appellant is as follows:

Sentence

Ground 1:

THAT whether the Learned Sentencing Judge erred in the exercise of his sentencing discretion by giving one third remission to both the respondents on their guilty pleas after the matter proceeded to Newtown Hearing rendering the sentence to be unduly lenient.

Grounds 1

[7] The appellant's only complaint is about the trial judge having accorded a 1/3 discount on account of the appellants' guilty plea, particularly in the light of the appellants'

decision to go for a Newton hearing requiring the 65 year old female complainant to testify and relive the trauma of the incident in court. The state argues that one of purposes of a guilty plea is to release the complainant of the mental pain of having to relate the traumatic experience for the second time in court and if an accused's stance defeats that objective, he should not be entitled to the same credit for the guilty plea which he otherwise would have been entitled to.

[8] No criticism could be made of the trial judge having taken 09 years as the starting point (apart from concern of possible double counting) as per sentencing guidelines in **Wallace Wise v State** [2015] FJSC 7 CAV0004.2015 (24 April 2015) but in my view, the enhancing the sentence by 02 years for the aggravating factors arguably did not reflect the totality of aggravation, some or most important of which were set out by the trial judge, in that he had not taken into account the psychological impact of the appellants' actions on the 04 year old child; it could last her lifetime. Unfortunately, the victim impact statement does not even mention as to how the child's frightful experience has affected her emotionally. Nevertheless, the trial judge cannot and should not have ignored this aspect of the case in the context of aggravation.

[9] Be that as it may, the trial judge went onto state the discount on the guilty plea that:

> *'17. ……In this regard, I will consider a reduction of 3 years and 6 months for the early guilty pleas which is a 1/3rd reduction and another 3 year for the previous good character and youth and another 6 months for the other mitigating factors which brings both of your sentences down to four (4) years' imprisonment.'*

[10] On the subject of discount for guilty pleas, I had the occasion to remark in **State v Ravasua** [2023] FJCA 95; AAU153.2020 (9 June 2023) as follows:

> *'**Discount on guilty plea in general***
>
> *[22] Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'. The 33% discount for a guilty plea was expressed in the New Zealand case of **Hessell v R** [2009] NZCA 450, [2010] 2 NZLR 298 [Hessell (CA)] where the Court of Appeal established a sliding scale which permitted a discount of 33 per cent for a plea entered at first reasonable opportunity, reducing to 10 per cent for a plea entered three weeks before trial. In **Hessell** the court held that the*

maximum discount of 33 per cent included remorse, for which an additional allowance might be made only in exceptional cases where it had been demonstrated in a practical and material way. The Court justified bundling the guilty plea with non-exceptional remorse on four grounds: a guilty plea is the best evidence of remorse; an allowance for remorse is "automatically built in" to the guilty plea discount; remorse is easily claimed but not easily gainsaid; and the guilty plea discount would be more predictable if it incorporated remorse. However, the New Zealand Supreme Court in ***Hessell v R*** *[2010] NZSC 135, [2011] 1 NZLR 607 [Hessell (SC)] at [73] rejected the Court of Appeal's scaled discount approach, holding rather that a guilty plea discount requires an evaluative assessment reflecting all the circumstances of the case, including the strength of the prosecution case and the point at which the defendant had the opportunity to be informed of all implications of the plea. It follows that an early plea need not earn a full discount. The Supreme Court capped the guilty plea discount at 25 per cent.*

[23] It is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of ratio decidendi of the decision. In ***Aitcheson v State*** *[2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court stated that the principle in* ***Rainima*** *must be considered with more flexibility and the overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given and the one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably. Therefore, in Fiji there is neither 1/3 discount or 1/4 discount automatically granted to an early guilty plea.'*

[11] The Supreme Court in ***Aitcheson*** approved the approach taken by Goundar JA in **Mataunitoga –v- The State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) where it was held:

> *"In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment"."*

[12] It is high time that the sentencers in Fiji avoid following Madigan J's remarks in ***Rainima*** and follow, as they are bound to do, the guidance in ***Mataunitoga*** and ***Aitcheson*** in the matter of discounts for guilty pleas which is in line with section 4(2)(f) of the Sentencing and Penalties Act 2009 rather than a mechanical percentage of discounts as suggested Madigan J.

[13] There seems to be some merit in the appellant's submission that in any event, in the light of the appellants' decision to dispute the admission *"tied both her hands tightly with a duct tape"* at paragraphs 7 of the amended summary of facts necessitating a Newton hearing (per Lord Lane C.J in **R v Newton** 77 Cr. App. R. 13) and calling the complainant to testify and face cross-examination, the appellants should not have been given 1/3 discount. The appellants do not seem to have given evidence at the hearing at all. The trial judge in his ruling[1] allowed the impugned statement on the summary of facts. There may be a possible sentencing error that deserves to be looked into and rectified by the full court, if not the final sentence itself as the full court may decide.

[14] For example, in **R v Browning** [2001] EWCA Crim 1831, [2002] 1 Cr App R (S) 377, Browning had pleaded guilty but there had to be a *Newton* hearing. Browning's evidence was not accepted so he was not entitled to full credit for his plea. ***Browning*** was endorsed in **R v Cooksley R v Stride R v Cook Attorney General's Reference** (No 152 of 2002) All ER 2003 Volume 3; [2003] EWCA Crim 996.

Order of the Court:

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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

Solicitors:

Office for the Director of Public Prosecutions for the Appellant
Legal Aid Commission for the Respondent

[1] **State v Bolobolo** [2022] FJHC 321; HAC101.2022 (28 June 2022)