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

CRIMINAL APPEAL NO. AAU 113 of 2017
[In the Magistrates Court of Lautoka Criminal Case No. 368 of 2013]

BETWEEN	:	**IOWANE NAIO** **SAINIVALATI NAVOTI** ***Appellants***
AND	:	**STATE** ***Respondent***
Coram	:	**Prematilaka, RJA** **Bandara, JA** **Rajasinghe, JA**
Counsel	:	**Ms. T. Kean for the Appellants** **Ms. R. Uce, Mrs. P. Lata and Mr. S. Babitu for the Respondent**
Date of Hearing	:	**03 February 2023**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Bandara, JA and agree with the reasons and order proposed.

Bandara, JA

[2] The Appellant stood trial in the Magistrate's Court in Lautoka under extended jurisdiction on four counts of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act 2009.

[3] Charges against the Appellant read as follows:

'FIRST COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY*: Contrary to Section 311(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence (b)

IOWANE NAIO *and* ***SEINIVALATI NAVOTI*** *on the 3rd day of March 2013, at Lautoka in the Western Division, robbed Rajnesh Rohindra Chand of $33.00 Cash and immediately before such robbery, did use personal violence on the said Rajnesh Rohindra Chand.*

SECOND COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY*: Contrary to Section 311(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence (b)

IOWANE NAIO *and* ***SEINIVALATI NAVOTI*** *on the 3rd day of March, 2013, at Lautoka in the Western Division, robbed Mohammed Imtiaz of $60.00 Cash and immediately before such robbery, did use personal violence on the said Mohammed Imtiaz.*

THIRD COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY*: Contrary to Section 311 (1) (a) of the Crimes Decree No.44 of 2009*

Particulars of Offence (b)

IOWANE NAIO *and* ***SEINIVALATI NAVOTI*** *on the 3rd day of March 2013, at Lautoka in the Western Division, robbed Parmeshwar Naidu of $708.00 Cash and immediately before such robbery, did use personal violence on the said Parmeshwar Naidu.*

FOURTH COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY*: Contrary to Section 311 (1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence (b)

IOWANE ANIO *and* ***SENIVALATI NAVOTI*** *on the 3rd day of March, 2013, at Lautoka in the Western Division, robbed Diwani Amma of $300.00 Cash and immediately before such robbery, did use personal violence on the said Diwani Amma.'*

[4] At the conclusion of the trial on the 24th April 2017 the Learned Magistrate found the Appellants guilty as charged.

[5] On the 19th July 2017 each Appellant was sentenced to an imprisonment of 9 years with a non-parole period of 6 years.

[6] Both Appellants have filed timely appeals before this Court.

[7] Both Appellants were charged with an indictable offence and the matter was transferred to the High Court on the 18th of June 2013.

[8] The matter was remitted from the High Court to the Magistrate Court on the 25th of July 2013 with extended jurisdiction.

[9] Upon both Appellants pleading not guilty to the charges preferred against them, the trial commenced in the course of which both Appellants appearing in person, had strenuously challenged their cautioned interviews.

[10] The Learned Magistrate, consequent to the voir dire inquiry ruled that the caution interviews were admissible.

[11] The prosecution called 6 witnesses in support of its case and upon defence being called both Appellants had given sworn evidence.

The Factual Background

[12] This case involves a spate of four robberies committed in respect of four different victims in the early hours of the 3rd March 2013.

[13] PW1 Rajnesh Chand (in respect of whom the count 01 stands) testified, that he finished work at 12 p.m. and reached his home in Lautoka around 01 a.m., driving his vehicle which bore the registration number EL557.

[14] Having reached home he opened the gate and drove the car inside. When the witness was closing the gate he saw a grey toyota twin cab (which the witness thought to be a police vehicle) came and stopped near his gate. The driver of the vehicle asked him about the person living in the opposite house. Thereafter, the driver and one of the passengers sitting in the front, came out of the vehicle and the latter hit Rajnesh Chand on his head. He fell down at which point the driver stepped on his neck and took the wallet which contained $33.00.

[15] He did not raise cries for assistance since the culprits drove away. Witness received injuries from the assault and reported the matter to the police.

[16] There had been five passengers in the offending vehicle though only two came out to get involved in the incident. Responding to the questions raised in the cross-examination the witness Chand identified both the Appellants as the persons perpetrated the robbery by resorting to personal violence, and the witness specifically identified the 1st Appellant as the person who punched him.

[17] PW2 Mohammed Imtiaz (in respect of whom count 2 stands), a restaurant owner testified that on the day in question he had been at SM Koya Road drinking grog whilst being in the company of a friend. He was robbed by 4 people. The robbers had come in a grey twin cab which bore the registration letters EU.

[18] They had stopped the vehicle in which Mohammed Imtiaz and his friend were travelling and informed them they were police officers. They demanded the witness to produce the driving licence and wanted to search his car. Thereafter, they pulled Imtiaz and his friend out of the car. One of the robbers held Imtiaz whilst another held his friend. Whilst two other robbers had robbed their monies and mobile phones.

[19] Imtiaz was robbed of $40 dollars. The four robbers were wearing green nets, similar to the ones worn by the army officers. In response to the questions raised in the cross-examination Imtiaz had identified the two Appellants as two of the persons that took part in the robbery.

[20] The 3rd prosecution witness Parmeshwar Naidu, in respect of whom count 3 stands, testified that on the day in question he had been returning home from Nadi having dropped off a friend. He had been using the car belonging to his brother, and his mother and the daughter also had been with him at the time.

[21] He parked the car at the gate of his house and his mother was getting off to open the gate, when a twin cab came and stopped behind their car. One of the persons who got off from the cab approached Naidu's mother and asked for her licence. Thereafter he had grabbed her purse whilst another person who got off the twin cab came up to the car switched off the engine and pulled out the key. The same person tried to take out Naidu's wallet from the rear pocket when the latter started yelling.

[22] When the person failed in his attempt, he pulled Naidu out of the car, pushed him down and bumped his head on the pavement. At that point two others came out of the vehicle and took out his wallet and drove off in the twin cab. The wallet contained Naidu's driving licence, ID card, FNPF card and cash $700. He could not recall the registration number, except the two english numbers 'EU' on the number plate.

[23] In the course of the incident Naidu received injuries and had been medically examined the report of which was produced in evidence. In response to the questions raised in the cross-examination Naidu identified both Appellants as culprits involved in the robbery.

[24] PW4 Diwani Amma (in respect of whom Count 4 stands), testified that, on the day in question about 1.20 a.m. she had returned from the airport along with her son and the granddaughter. When she was getting off the car to open the gate a grey van approached their car and stopped behind it. One of the passengers of the van approached her and obstructed her from getting off the car. The person asked her son for his driving licence and took her purse which contained $300.

[25] Another passenger of the van turned off the engine of the car and threw the ignition key away. Thereafter, he pulled her son out of the car and with the assistance of another had pulled the wallet out of the pocket. When she tried to assist her son she was pushed away. However, she had kept crying and shouting and sustained injuries on her eyes and head. The medical report on her had been tendered as Exhibit 3.

[26] Responding to the questions raised by the 1st Appellant in the cross-examination PW4 identified the 2nd Appellant as the robber who was standing beside her obstructing her of getting out of the car. She further identified the 1st Appellant as the robber who stood beside her son at the time of the robbery.

[27] Identification parades had not been held in the course of the investigations.

[28] The 5th prosecution witness Police Constable 3830 Appenna testified that on the 26th of May 2013 he caution interviewed (constable Samuela being present) the 1st Appellant Iowane Naio in relation to the robbery in question.

[29] The said cautioned interview had been admitted in evidence by the Learned Magistrate consequent to a duly held voir dire inquiry.

[30] PW6 Detective Constable 2195 Samuela testified, that on 29th of May 2013 he caution interviewed the 2nd Appellant. The said cautioned interview had been admitted in evidence by the Learned Magistrate consequent to a duly held voir dire inquiry marked as Exhibit 5. A reconstruction of the scene had been done through the 2nd Appellant. At the conclusion of the prosecution case upon a defence being called both Appellants had testified on oath.

[31] The 1st Appellant on oath had testified that he was brought to the Lautoka Police Station and was interviewed by the police about the robbery. He further testified that he did not know anything about the robbery and was forced and threatened by the police to admit the offence, under which circumstances the cautioned interview was obtained.

[32] The 2nd Appellant testified that he was arrested by a *'strike back team'* of the police. After the arrest he had been brought to Lautoka and questioned about the robbery. Even though he had denied the allegation the police had threatened and forced him to admit the

crime. In the course of the cross-examination he stated that he was telling the truth and he did not voluntarily answer the questions asked by the police in the cautioned interview.

The Appellate Procedure

[33] Appellants in person had filed timely appeals against both the conviction and the sentence before this court.

[34] The Single Judge of Appeal had granted leave to appeal, against the following grounds both on the conviction and the sentence:

> "***Grounds of Appeal against Conviction:***
>
> *'**Ground One***
>
> *The learned Magistrate erred in law and facts by not directing himself to consider the truthfulness and weight to be attached to the confessional statements.*
>
> ***Ground Two***
>
> *The learned Magistrate erred in law and facts by not directing himself to consider the Turnbull principles.*
>
> ***Ground Three***
>
> *The appellant's right to a fair trial is infringed by lack of legal representation.*
>
> ***Grounds of Appeal against Sentence***
>
> ***Ground Four***
>
> *The final sentence imposed on the appellants is excessive given the nature of the offending in that;*
>
> *(i) The learned Magistrate had applied the wrong tariff.*
>
> *(ii) Selecting a starting point outside the applicable tariff; and*

(iii) Enhancing the sentence with an element of the offending as an aggravating factor."

[35] In the course of the oral submissions before the Full Court, both Appellants submitted that they did not intend to pursue ground of appeal No. 3.

Consideration of the Grounds of Appeal

1st Ground of Appeal

"*The learned Magistrate erred in law and facts by not directing himself to consider the truthfulness and weight to be attached to the confessional statements."*

[36] A voir dire inquiry was commenced in the Magistrate's Court on the 26th of January 2016, following which the Learned Magistrate ruled that both caution interviews of the Appellants were admissible in evidence.

[37] At the voir dire inquiry the prosecution had led the evidence of four police officers, and the Appellants too had given evidence. No other evidence was called by the Appellants. The caution interview statements had been led in evidence as prosecution exhibits.

[38] In **Rokomaraivalu v State** [2020] FJCA 62; AAU 18.2018 (1 June 2020) the Court of Appeal observed that:

*'The correct law and appropriate direction on how the assessors should evaluate a **confession** could be summarised as follows.*

*(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No. AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the ***confession*** *(vide* ***Volau****).*

(iii) Once a ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau****).*

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[39] In relation to ground of appeal No. 1, relying on the principle set out in **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51, it is the claim of the Appellants that, the Learned Magistrate had not considered the weight and the truthfulness to be attached to the caution interviews.

[40] At the voir dire inquiry, the Appellants challenged their caution interviews on the basis that they were fabricated and previously prepared by the police forcing them to admit the crimes under oppression. They further claimed that they were forced to sign ready-made

cautioned interviews prepared by the police. The said allegations were denied by the police officers involved.

[41] At the conclusion of the voir dire inquiry the Learned Magistrate made a Ruling that both caution interviews were voluntarily made and admitted them in evidence.

[42] It appears that the stance taken up by the Appellants is that, the Learned Magistrate did not seem to have taken into consideration the voluntariness of the Appellants cautioned statements in the judgment, not in relation to the admissibility in evidence *per say,* but in relation to the weight and value to be attached to them, as the Appellants had challenged the voluntariness for a second time at the trial proper.

[43] Undoubtedly the Learned Magistrate had adequately looked into the voluntariness of the self-incriminatory cautioned interviews having highlighted the rules set by the following authorities:

> *"**State-v-Rokotuiwai** [1996] FJHC 159:*
>
> > *"In the Privy Council case of WONG KAM-MING v THE QUEEN (1982) A.C. 247 at 261 in the judgment of LORD HAILSHAM of MARYLEBONE; on the basic control over admissibility of statement, it is stated:*
> >
> > > *"The basic control over admissibility of statement is found in the evidential rule that an admission must be voluntary i.e. not obtained through violence, fear or prejudice, oppression, threats and promises or other improper inducements. See decision of LORD SUMNER in IBRAHIM v. R (1914-15) AER 874 at 877. It is to the evidence that the court must turn for an answer to the voluntariness of the confessions." (underlining mine for emphasis)*
> > >
> > > *These cases are IBRAHIM v KING (1974) AC 574, THE DIRECTOR OF PUBLIC PROSECUTIONS v PIN LIN (1976) A.C. 574, R v PRAGER (1972) 58 Cr. App. R. 151, R v. SANG (1980) A.C. 402 and SHIU CHARAN v R (F.C.A, Crim. App. 46/83). In SHIU CHARAN (supra) it is stated:*

"First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage – what has been picturesquely described as "the flattery of hope or the tyranny of fear. "Ibrahim v R (1914) AC 599. DPP v Pin Lin (1976) AC 574, Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ c-E."(underlining mine for emphasis).

"I cannot myself help regarding the issue as basically one of fact. The trial judge should approach his task by applying the test enunciated by Lord Sumner in a common sense way to all the facts in the case in their context much as a jury would approach it if the task had fallen to them. In the light of all the facts in their context, he should ask himself this question, and no other. Have the prosecution proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or (where it is relevant, as is not the case on appeal here) by oppression?"(underlining mine for emphasis)

In the Preamble to the Judges Rules is set out the legal test for admissibility in evidence of an alleged confession as follows:

> *"That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression." (Emphasis mine)*

[44] In paragraph 8-9 of the Ruling on the voir dire the Learned Magistrate specifically stated that:

> *"[8] The application turns on the evidence and therefore this Court must consider the evidence and what weight to ascribe to the testimonies of the witnesses in Court.*
>
> *[9] I have carefully considered the evidence before the Court and I have formed the view that the State has established beyond reasonable doubt that the caution interviews and formal charge statements that were respectively taken on the 26th of May, 2013 and 28th of May, 2013 were read and explained to the accused and they were given voluntarily by both the accused. The cautioned interviews and form charge statement will be allowed to be tendered to from part of the evidence."*

[45] In **Volau v State** [2017] FJCA 51; AAU 0011.2013 (26 May 2017) Court of Appeal observed that:

> *"(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness.*
>
> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (Chan Wei Keung, Prasad and Murray) inter alia on the premise that there might be cases in which the jury would conclude that a statement is involuntary according to the rule relating to inducement, but nonetheless it is manifestly true (Wendo)*
>
> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them."*

[46] The Learned Magistrate in his Judgment too had considered the voluntariness of the inculpatory admissions of both Appellants observing that they had been given voluntarily.

[47] Following excerpts of the Judgment are specifically noteworthy in this regard. In relation to the 1st Appellant it had been observed that:

> *"The interview was conducted in the Crime office where the accused was presence and Constable Samuela. The interview was conducted in the English language. The accused was explained with all his right before the commencement of the interview. He identified the caution interview through accused and his signature and read out the caution interview in court."*

[48] In relation to the 2nd Appellant it had been observed that:

> *"The sixth prosecution witness was Detective Constable 2195 Samuela Namusu of Lautoka Police Station. He cautioned interviewed Senivalati Navoti in the English language. The accused was explained about his right before the commencement of the interview. He identified the caution interview through the accused and his signature."*

[49] The Learned Magistrate had considered the truthfulness and the weight of the cautioned interviews even from the context of the defence evidence at the trial proper. In paragraph 15 and 16 of the Judgment it is stated:

> *"[15] ....He testified on oath and stated that he was brought to Lautoka Police Station and was interviewed by the police officer at the Crime Section about the robbery, he stated that he did not know about the matter and was forced by a police officer to admit the crime. They used many to threaten him and have no other option to admit the offence. In cross-examination he confirmed his name, place of residence and date of birth that was exactly provided in the caution interview. He was forced and threatened by the Police was made up and he had put all the question to the police officer during the voir dire hearing."*

(In relation to the 2nd Appellant evidence):

[16] ....He testified on oath and stated that he was arrested by the Strike back Team from Namaka. He was brought to Lautoka and he was questioned about the case. He denied the allegation but he was threatened and forced him to admit the crime. In cross-examination he admitted that he is telling the truth and he did not voluntary answer the question given by the police in the caution interview. All the questions had been put to the police officer during the voir dire hearing."

[50] Furthermore, in relation to the issue of consideration of truthfulness and the weight of the record of interviews, the Learned Magistrate had specifically taken into account the following portions of the cautioned interviews, as mentioned in his judgment:

(In relation to the 1st Appellant's cautioned interview):

"Q. 11. Can you recalled what time were you at Field 40?
A. It was around 1.00am
Q. 12. Then what happened at Field Forty?
A. Whilst we were at Berar Place same time we saw one Indian man parked his vehicle inside his compound and was closing the gate when we approached him.
Q. 13. Then what happened?
A. Samuela was sitting in the passenger front seat and myself and Senivalati was sitting at the back seat we all got off, Dwayne Hicks punched this Indian man and we all took his wallet containing cash.
Q. 16. Then what happened?
A. From there we got inside the van and came towards Andra School, then to M.N. Naidu Road then to Sukanaivalu Road.
Q. 17. Can you recall what happened whilst at you were at Sukanaivalu Road?
A. At Sukanaivalu Road off S.M. Koya Road we saw a blue private car parked at the right side of the main road with two Indian boys sitting inside.
Q. 18. Then what happened?
A. We parked beside them all got off the car and pull this two Indian boys out of the car and searched them whereby we managed to take their wallet containing cash.
Q. 20. Then what happened after that?

A. *We all got inside the van, Dwayne Hicks was still driving and we were following Sukanaivalu Road to Link Road then to Tavakubu Road.*

Q. 21. *Can you recalled what happened at Tavakubu Road?*

A. *At Tavakubu Road off Satya Place we saw one taxi parked on the left side of the main road.*

Q. 22. *Then what happened?*

A. *We saw one Indian Man was at driving seat and one Indian Lady was sitting at the passenger's side and another Indian lady was sitting at the back.*

Q. 23. *Then what happened next?*

A. *We stopped beside the taxi and we all got off same time we approached them, told them to get out of the car and Sinivalati grabbed the wallet from the Indian lady and Samuela grabbed the wallet from the Indian man.*

Q. 29. *How much did you received from your share?*

A. *About $250.00.*

Q. 34. *Can you show us all the places where you robbed and stole all the money?*

A. *Yes.*

Interview suspended at 1300 for reconstruction of the scene.

Interview recommence at 1315 hours at Field 40

Q. 35. *Is this the exact place you show where you robbed the Indian man?*

A. *Yes that was the exact place I show you that we robbed him.*

Q. 36. *At 343 Sukanaivalu Road – Is this the exact place where that 2 Indian Man parked their car and you robbed them?*

A. *Yes, this is the exact place where we robbed them.*

Q. 37. *At Tavakubu Road at about 1321 hours, is this the exact place you show me where you robbed and stole cash from that Indian Lady and an Indian Man?*

A. *Yes."*

(In relation to the 2nd Appellant's cautioned interview):

"Q40. *What happened when you reach the new Subdivision at Field 40?*

A. *I saw an Indian man got out of his car and was about to close his gate.*

Q41. *What happened then?*

A. *We ran towards him got hold of him stole his wallet from his pockets*

Q42. *What happened after you robbed that Indian Man at Field 40?*

A. *We all got in the twin cab and drove away.*

Q44. *Who all robbed the Indian Man?*

A. *Myself, Samu and Iowane.*

Q46. What happened when you reach at Sukanaivalu Road?

A. As we drove along Sukanaivalu Road and pass S.M. Koya Road a car was parked on the road.

Q47. What did you do when you saw the car was parked at Sukanaivalu Road?

A. We stopped beside the car, we got out, opened the car, we searched both the occupants, took out money and got back in the twin cab.

Q54. What happened whilst driving on Tavakubu Road?

A. As we drove along Tavakubu Road before we reach Razak Road we saw a taxi was parked beside the road.

Q55. What did you do then?

A. This taxi was facing into a house and back to the road, we stopped at the back of the taxi.

Q56. What happened after that?

A. We saw an Indian lady with the granddaughter got out of the taxi.

Q57. What did you do after that?

A. Samu and Iowane ran towards the taxi.

Q58. What about you where did you go?

A. I ran towards the Indian lady.

Q59. What did you do to the Indian lady?

A. I pulled his purse out from her and ran back to the twin cab.

Q60. What about Samu and Iowane?

A. They pulled the money out from the pocket and ran back to the twin cab.

Q67. Can you show me the places where you followed and robbed at Field 40, Sukanaivalu and Tavakubu Road and the places at Vakatora Housing?

A. Yes.

Interview suspended for re-construction at the scene.

Interview commenced at Berar Road.

Q69. We are now at Berar Road, Field 40 what place did you rob that Indian man that night?

A. That place – pointing at the gate at House Number 37 Berar Road.

Q71. We are now at Sukanaivalu Road what place did you tell that you rob the two Indian Man at Sukanaivalu Road?

A. That place – pointing beside the road – beside S.M. Koya Road.

Q73. We are now at Tavakubu Road what place did you rob the Indian lady and stole her purse containing $700.00 that night?

A. That gate – pointing at the gate of House Number 76 – Tavakubu Road."

[51] This ground of appeal has no merit.

2nd Ground of Appeal

"*The learned Magistrate erred in law and facts by not directing himself to consider the Turnbull principles."*

[52] One significant factor of the whole case is, that the prosecution had not made any attempt to establish the identification of the Appellants through any of the lay witnesses. In fact the State in the course of the examination-in-chief had not put a single question to the lay witnesses seeking a dock identification.

[53] The identification of the Appellants at the trial was completely based on their caution interviews. The State in its oral arguments before the Full Court, categorically stated that they did not rely on the testimony of the lay witnesses to establish identification of the Appellants. The identification of the Appellants had been totally established by their cautioned interviews which had been duly admitted in evidence.

[54] In the examination-in-chief no questions had been put to the witnesses of the prosecution by the State seeking dock identifications. In the course of the trial, the State had at no stage had tried to rely on identification of the Appellants by the lay witnesses. The dock identification of the Appellants had arisen from the cross-examination consequent to purposefully put questions, to the witnesses by the Appellants appearing in person. Hence, a necessity for the consideration of this ground does not arise.

[55] This ground of appeal has no merit.

Ground of Appeal against the Sentences

"Ground Four

The final sentence imposed on the appellants is excessive given the nature of the offending in that:

(i) The learned Magistrate had applied the wrong tariff.

(ii) Selecting a starting point outside the applicable tariff; and

(iii) Enhancing the sentence with an element of the offending as an aggravating factor."

[56] In relation to this ground of appeal it is the grievance of the Appellant that the Learned Magistrate had applied the wrong tariff in sentencing, based on the **Wise v State** [2015] FJSC 7; CAV 0004.2015 (24 April 2015) principles.

[57] It appears that the contention of the Appellants is that though the Magistrate had applied the sentencing tariff of 08-16 years of imprisonment as set out in **Wise v State** (supra), the appropriate sentence should have been that of street mugging than of a home invasion.

[58] This is a case that involves violent robberies committed in respect of four individuals in four separate incidents where violence were perpetrated on some victims whilst they were being at front gates of their own homes. The circumstances clearly lead to the inference, that this was not a case of simple street mugging, but a spate of carefully planned robberies, not far from the gravity of committing home invasion in the night.

[59] The Appellants with others unknown to the prosecution were travelling around in a twin cab, perpetrating a deception of being law enforcement officers and targeting unsuspecting innocent civilians, who were returning home at midnight hours.

[60] It cannot be argued that the application of the **Wise** principles is erroneous in the circumstances of the present case, when some features seen therein could be seen fitting into the **Wise** principles such as:

"(v) …….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 eye.

(vii) the victims frightened were elderly or vulnerable persons such as small children."

[61] In his Sentence Ruling the Learned Magistrate had made the following order:

> *"For each count of Aggravated Robbery, I start at 8 years and increase this by 2 years for your aggravating factors before reducing it by 1 year for your mitigating factors for a total sentence of 9 years imprisonment. You will both serve 6 years before being eligible for parole."*

[62] In **Bae v The State** Criminal Appeal No. AAU0015 of 1998S (26 February 1999). The Court said:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the 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. This 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) 55 CLR 499)."*

[63] In **Qurai v The State** (CAV 24 of 2014; 20 August 2015) the Supreme Court observed:

> *"The Sentencing and Penalties Decree does not provide 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."*

[64] Having regard to the circumstances of the instant case and applying the foregoing principles pertaining to the sentencing, I do not intend to interfere with the sentence imposed by the Learned Magistrate in the instant case, except to the extent of deducting the remand period of 11 months which had not been taken into account in the sentence ruling as conceded by the State.

[65] Subject to the said variation of the sentence appeal is dismissed.

[66] As a concluding remark it is worth mentioning obiter, the following observations made by Hon. Justice Prematilaka, RJA, in **State v Laveta** [2019] FJCA 258; AAU 65.2013 (28 November 2019):

> *"[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 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."*

[67] Hon. Justice Prematilaka, RJA also said in the Leave to Appeal Ruling:

> *"[47] Before parting with this ruling, I feel constrained to state as an observation that given the fact that this case……The High Court judges should exercise more care and vigilance in investing the magistrates with jurisdiction to try indictable offences under section 4(2) of the Criminal Procedure Act, 2009. "*

Rajasinghe, JA

[68] I have read the judgment of Bandara, JA in draft and agree with the reasons and proposed orders.

Orders of the Court:

1. Appeal against the conviction is dismissed.
2. Appeal against the sentence partly succeeds.
3. The final sentence imposed by the Magistrate Court is substituted with a sentence of 8 years with a non-parole period of 6 years in respect of both Appellants with effect from 19 July 2017.

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

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

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