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

**CRIMINAL APPEALS NO.AAU 049 of 2015**
**[In the High Court at Suva Case No. HAC 111 of 2014)**

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| **BETWEEN** | : | **SENIJIELI BOILA** |
| | | ***Appellant*** |
| **AND** | : | **STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, JA**<br>**Bandara, JA**<br>**Temo, JA** |
| **Counsel** | : | **Ms. S. Nasedra for Appellant** |
| | : | **Mr. S. Babitu for the Respondent** |
| **Date of Hearing** | : | **16 April 2021** |
| **Date of Judgment** | : | **04 May 2021** |

# JUDGMENT

**Prematilaka, JA**

[1] The appellant had been charged with 03 others in the High Court at Lautoka on one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 committed on 15 August 2014 at Nadi in the Western Division.

[2] Following a trial in the High Court at Lautoka the assessors had returned unanimous opinions of guilty against the appellant. The learned trial Judge had agreed with the opinions of the assessors and convicted the appellant accordingly. The appellant had been sentenced on 14 April 2015 to a term of imprisonment of 11 years and 4 months with a non-parole term of 09 years.

[3] The appellant had filed a timely notice of appeal against conviction on 27 April 2015. By notice dated 01 February 2016 the appellant had filed amended grounds of appeal against conviction and a notice of appeal against sentence that was out of time by about 8 months. Further notices amending the grounds of appeal had been subsequently filed by the appellant. On 27 July 2017 the Legal Aid Commission had filed an amended notice of appeal against conviction.

[4] On 27 February 2018 the Appellant filed a signed notice of abandonment of appeal against sentence which, however, had been withdrawn before the Court of Appeal on 30 November 2018.

[5] The grounds of appeal considered by the single Judge at the leave to appeal stage are as follows:

> '*1. The learned trial Judge erred in law when he did not properly consider that there was no evidence led by the State to support the charge of aggravated robbery;*
>
> *2. The learned trial judge erred in law and in fact when he did not properly consider the evidence of Cpl Semi under cross examination where he stated that another man had the black bag that contained the green bad that contained the stolen money;*
>
> *3. The learned trial judge erred in law when he did not warn the assessors in the summing up about the unreliability of the dock identification without laying of the prior foundation either through an identification parade of through a photo identification unless if the appellant had refused to be subjected to an identification parade.*
>
> *4. The learned trial judge erred in law when he did not direct the assessors on the Turnbull guideline directions regarding the identification evidence provided by the prosecutions witness thus resulted to substantial miscarriage of justice.*
>
> *5. That the learned trial judge erred in law when he misdirected the assessors to the inappropriate elements of the offence of aggravated robbery in the summing up which resulted in an inappropriate summing up.*
>
> *6. The learned trial judge erred in law and in fact when he did not properly direct the assessors in respect of the circumstantial evidence.*

7. *The learned trial judge erred in law he did not caution the assessors that they should dismiss all emotions, sympathy or prejudice against the Appellant when deciding the facts of the case.*

8. *The learned trial judge erred in law and in fact when he did not direct the assessors to disregard the evidence of bad character in the caution interview when determining the case.'*

[6] The single Judge in his ruling dated 27 April 2018 had refused leave to appeal against conviction on grounds 1- 4 while dismissing grounds 5-8 in terms of section 35(2) of the Court of Appeal Act. The Legal Aid Commission had filed an amended renewal notice of appeal on 19 March 2019 containing a single ground of appeal consisting of ground 02 in respect which leave was refused and another ground not directly urged before the single Judge but related to the issue of 'recent possession' referred to under appeal ground 01 where leave was refused by the single Judge. In the written submissions dated 05 May 2020 the Legal Aid Commission had split the single renewed ground to two grounds of appeal. In addition, another ground of appeal against sentence had been mentioned in the written submissions filed for the full court hearing without any submissions.

[7] The state undertook to file its written submissions for the full court within 07 days of the call over date but failed to do so. Therefore, at the conclusion of the hearing the state counsel was directed to file his written submission by 21 April 2021 with a copy to the appellant's counsel. The state's written submissions had been filed on 20 April 2021.

[8] Thus, the court heard the appellant's counsel on two grounds of appeal against conviction and the counsel left it to this court to decide on the ground against sentence. The three grounds are as follows:

***Ground One:***

*THE learned Trial Judge erred in law and in fact when he did not properly consider the inconsistencies in the evidence of Corporal Semi in stating that another man had the black bag and in failing to properly consider this also failed to properly consider the inconsistency of his evidence with the evidence of Pastor Tevita Nauasese as such evidence could not have reasonable supported the conviction of the Appellant.*

***Ground Two:***

*THE learned Trial Judge erred in law and in fact when he failed to properly and fully consider the doctrine of recent possession and with that failed to fully analyze the break in the link in evidence adduced in the State's case in terms of the black bag that was said to have been found on the Appellant thus an irresistible inference of guilt cannot have been placed on the Appellant in light of the inability of the State's evidence to prove the link in evidence for recent possession ergo making the conviction unreasonable and cannot be supported having regard to the evidence.*

***Ground Three:***

*THE learned Sentencing Judge erred in law and in fact when he gave a head sentence of 11 years and 4 months imprisonment being at the higher end of the tariff as such making the sentence harsh and excessive.*

[9] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau 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.

[10] The relevant facts are briefly as follows. The appellant together with three others travelled by car and stopped at the front of the gate of the car park of City Forex Fiji Limited. Two of the group then ran towards two employees of City Forex Fiji Limited as they were about to board a vehicle with a green bag under padlock containing $50,000.00 cash to travel to their branch at the Nadi International Airport. One in the group was armed with a screw driver and another was armed with a cane knife. The two employees were forced to lie on the ground face down. The bag containing the $50,000.00 cash was removed from their possession. The appellant was found in possession of a bag containing the stolen cash while he was travelling to Suva in a minivan from Nadi a few hours after the robbery.

***01st ground of appeal***

[11] The main thrust of the argument on this ground is based on the premise that the appellant was not the person holding the black bag inside of which there was a green bag containing money amounting to $50,000.00 stolen at the robbery. The appellant's argument is that inside the minivan the appellant was seated at the back of the driver's side and there was another person travelling in the same van who had the black bag. The defense particularly referred to the evidence of Cpl. Semi Ravuiwasa under cross-examination where he had admitted that it was the passenger seated at the passenger door side who had the black bag.

[12] There had been two witnesses who had spoken to the appellant having had the black bag whilst inside the van. One is Cpl. Semi and the other is Pastor Tevita Nauasese. Cpl. Semi seems to have said in examination-in-chief that the man who got off the van and punched him damaging his uniform was seated beside the door. He is the one who was carrying a bag and threw it away whilst trying to flee the scene. The witness had, however, identified the appellant as the person who was involved in the scuffle with him and was arrested at the scene. Cpl. Semi had admitted under cross-examination in response to a suggestion that the appellant was seated on the first row of the back seat on the window side which he had reiterated in re-examination. But, he never resiled from the position that it was the appellant who was carrying the black bag.

[13] Pastor Tevita Nauasese who was also travelling in the same van had testified that out of the two men who were asked to get off the vehicle by the police one was seated on the single seat and the other just behind the driver. He had clearly seen the second person seated behind the driver carrying a black bag. The first person had got off the van and was standing outside and the second one who was carrying the black bag had got off and tried to run away. After he was arrested by the police officers in the church compound the witness had seen inside the black bag a green tarpaulin bag containing money. Pastor Tevita Nauasese had identified that person as the appellant facing the trial and who had also punched the police officer. Therefore, Pastor Tevita was unequivocal that it was the appellant who was in possession of the black bag.

[14] The appellant in his testimony at the trial had stated that he was seated at the back of the driver's seat. Thus, his suggestion to Cpl. Semi was in line with his evidence and Cpl. Semi too had accepted under cross-examination and re-examination that the appellant was seated behind the driver near the window. Pastor Tevita Nauasese had confirmed this position. Therefore, despite the confusion in Cpl. Semi's evidence in examination-in-chief as to where the appellant was seated the picture coming out of the totality of the above evidence is that the appellant was seated behind the driver on the window side and he is the one who was carrying the black bag which contained the green bag with money.

[15] Two witnesses from City Forex Fiji Limited namely Sunil Prasad and Ranjeet Prasad had identified the green bag, the padlock and $50,000.00 at the trial as exhibits. PC Usaia Nataruku had seen one man jumping out of the minivan carrying a black bag and punched one police officer. After he was arrested the witness had seen the black bag that had fallen onto the ground and inside it a green bag with money. The witness had collected the black bag and given it to A/IP Esira Bari. He had identified the appellant as the person so arrested and the green bag and the padlock too at the trial. Cpl. Maciu Temo had testified that the passenger seated behind the driver started acting suspiciously and then he heard Cpl. Semi yelling that 'he punched me'. That person whom the witness had identified as the appellant had then run towards the church and the black bag he was carrying had fallen onto the ground. The bag had been collected by PC Usaia. A/IP Esira Bari had come to the scene and taken charge of the black bag from PC Usaia. He had seen a green bag inside the black bag and money inside the green bag. He had handed over the black bag with everything inside to Divisional Crime Officer Manasa Talala. Cpl. Jona Toga had taken charge of two suspects including the appellant from Divisional Crime Officer Manasa Talala along with the padlocked green bag with cash. Cpl. Jona Toga had called a manager of City Forex Fiji Limited and to bring the key to the padlock to open the green bag and Sunil Prasad had obliged and opened it. He had identified the green bag with cash at the police station.

[16] The prosecution case against the appellant was primarily based on 'recent possession' of the green bag with money stolen from Sunil Prasad and Ranjeet Prasad of City Forex Fiji Limited. The evidence reveals that the robbery had taken place around 10.30 a.m. to 11.0 a.m. at Nadi. On his own account, the appellant had been present in Nadi around 10.00 a.m. and got into a van plying to Suva when it was searched by the police at Tagaqu Village. His defense was that it was not him but another passenger who was travelling in the van with the black bag which was found to contain the stolen green bag with cash amounting to $50,000.00. The police tracked the van after getting information in Nadi that the passengers (one of whom carrying a bag) in the suspected getaway vehicle had got into a minivan heading towards Suva and caught up with the minivan around 12.00 noon.

[17] In **Wainiqolo v The State** [2006] FJCA 49; AAU0061.2005 (28 July 2006) the Court of Appeal said:

> *'19] The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the accused shortly after the theft, it is open to the court to convict the person in whose possession the property is found of theft or receiving. It is really no more than a matter of common sense and a Court can expect assessors properly directed to look at all the surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the accused, the nature of the property and the lack of any reasonable or credible explanation for the accused's possession of the property. What is recent in these terms is also to be measured against the surrounding evidence.'*

[18] The *'doctrine of recent possession'* may be applied in appropriate cases [see **David Kio v R** [Unreported Criminal Appeal Case No. 11 of 1977; Davis CJ; at page 3]. In **Trainer v R** (1906) 4 CLR 126 Griffith CJ explained the '*doctrine of recent possession*' at page 132:

> *'It is a well-known rule that recent possession of stolen property is evidence either that the person in possession of it stole the property or received it knowing it to have been stolen according to the circumstances of the case.*

*Prima facie the presumption is that he stole it himself, but if the circumstances are such as to show it to be impossible that he stole it, it may be inferred that he received it knowing that someone else had stolen it.' (emphasis added)'*

[19] **R v Langmead** (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:

*'I do not agree ... that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'*

[20] Dickson C.J. and McIntyre, Le Dain and La Forest JJ. said in **R v Kowlyk** [1988] 2 SCR 59:

*'The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of its truth.'*

[21] In **Beumazi Ndoro Chaila -** Appellant **and Republic** - Respondent [2016] eKLR the Court of Appeal at Mombasa (Kenya) summarized the following principles relating to 'recent possession':

*'……The inference is drawn from possession of recently stolen property rather than recently taking possession of stolen property.*

*However, before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters:* ***i****. That the accused was in possession of the property;* ***ii****. That the property was positively identified by the complainant;* ***iii****. That the property was recently stolen;* ***iv****. That the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent;* ***v.*** *That there are no co-existing circumstances, which point to any other person as having been in possession and;*

*The doctrine being a rebuttal presumption of facts is rebuttable with an accused being called upon to offer an explanation, which if he fails to do an inference is drawn that he either stole or is guilty receiver.*

*In proving possession, the prosecution must establish that the accused had possession of the property in question, i.e. had custody of or control over that property and intended to have custody or exercise control over it. The fact that a third party has physical possession of the property does not mean it could not have been possessed by the accused. In this regard, the prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time.*

*Again, the term* "recent" *depends, as already stated, on the nature of the property. Frequently circulated property such as bank notes remain* "recently stolen" *for a shorter period than less frequently traded objects like cars, books, clothes, electronic appliances etc.'*

[22] Therefore, I am of the view that the totality of evidence clearly demonstrates that the appellant was in recent possession of the recently stolen green bag with cash amounting to $50,000.00 and in the absence of any explanation other than his denial it could be inferred that he was involved in the theft and by extension the robbery. His movements of the day of the incident, suspicious behavior upon seeing the police and attempt to run away after attacking a police officer provide additional circumstantial evidence in this regard.

[23] Therefore, there is no reasonable prospect of success or merits of this ground of appeal.

***02nd ground of appeal***

[24] The counsel for the appellant argued that there is a break in the chain or the link in evidence to connect the green bag found in the appellant's possession as the one stolen from Sunil Prasad and Ranjeet Prasad of City Forex Fiji Limited. The learned trial judge had not only directed the assessors on this aspect adequately but addressed himself on this issue in his judgment.

[25] As I have already discussed under the 01st ground of appeal there is clear evidence that the green bag with money that was found inside the black bag being carried by the appellant within about 02 hours of the robbery is the same bag stolen from Sunil Prasad and Ranjeet Prasad in the course of the said robbery. There is no break in the

link. The facts in **Baleilevuka v State** [2019] FJCA 209; AAU58 of 2015 are materially different and the decision in ***Baleilevuka*** is based on different facts cannot apply to the present case though the principles relating to 'recent possession' had been correctly articulated. Unlike in ***Baleilevuka*** there is sufficient and strong evidence in the form of recent possession and other circumstantial evidence to draw an irresistible inference of guilt against the appellant in respect of robbery.

[26] Therefore, there is no reasonable prospect of success or merits of this ground of appeal.

***03rd ground of appeal***

[27] Although the appellant's written submissions had not dealt with the ground of appeal against sentence I shall still deal with it. The appellant's complaint is that the sentence is harsh and excessive.

[28] The guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

> *(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.*

[29] In **Basa v State** [2006] FJCA 23; AAU0024.2005 (24 March 2006) where *inter alia* the offence of robbery with violence was committed by the appellant and four others robbing the Western Union Money Transfer office in Suva and a sentence of 06 years had been given, the Supreme Court said as far back as in 2006:

*'This was a well-planned attack carried out with weapons and a clear willingness to use violence…….we would not have interfered had a considerably longer term been ordered.'*

[30] **Samuel Donald Singh v State** Crim. AAU15 and 16 of 2011 Calanchini P in the Court of Appeal said:

*"...there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started as the lower end of the range."*

[31] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court once again said:

*'[27] So far as the head sentence is concerned, the court finds 13 years to be within the range set by recent authority for serious violent crime such as robbery with violence. Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour. With this type of offending, personal mitigation of the kind raised by the Petitioner, that he is married and now has a small child, count for little.*

*[28] This approach and the tariff have been established in several cases: **The State v Rokonabete** HAC 118/07; **The State v Rasaqio** [2010] FJHC, HAC155/2007, **Basa v The State** [2006] FJCA 23; AAU0024/05, 24th March 2006. It was decided that the English cases were to be followed rather than the New Zealand cases since the English penalties were closer to those in Fiji's legislation.*

[32] Just 10 days after the appellant was sentenced by the learned trial judge the Supreme Court in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) said:

*'[25] The matter does not end there. We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.'*

[33] Though, the facts and circumstances in the appellant's case are not exactly the same as in the above decisions they provide an insight into the evolving thinking of the Supreme Court over a period of nearly a decade on appropriate sentences in cases of robbery with violence under the Penal Code and ever increasing aggravated robbery cases under the Crimes Act, 2009.

[34] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognizing the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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, again 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) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. 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).

[35] Therefore, I do not find any sentencing error in the sentence imposed on the appellant by the learned trial judge and therefore no reasonable prospect of success in appeal against sentence. Given the nature and gravity of the offence, the term of imprisonment of 11 years and 04 months with a non-parole term of 09 years cannot be termed as harsh and excessive and is within the accepted range of sentences. Given the appellant's previous character [see for e.g. **Boila v The State** [2006] FJCA 34; AAU0073U & AAU0090U.2005S (14 July 2006)] and his notable propensity to engage in criminal behavior (vide his record of previous convictions), protection of community should legitimately be a prime consideration.

**Bandara, JA**

[36] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

**Temo, JA**

[37] I have read the draft judgment of Hon. Mr. Justice C. Prematilaka, JA and agree with His Lordship's reasons and conclusions.

**Orders**

1. Leave to appeal against conviction and sentence refused.
2. Appeal against conviction and sentence is dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL