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

CRIMINAL APPEAL NO. AAU 149 of 2020
[In the High Court at Suva Case No. HAC 430 of 2018S]

BETWEEN	:	**SETAREKI RAVIA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. T. Kean for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**10 March 2023**
Date of Ruling	:	**13 March 2023**

RULING

[1] The appellant along with Jekemaia Rabonu (the appellant in AAU 047 of 2020) had been convicted in the High Court at Suva on two counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 and one count of resisting arrest contrary to section 277(b) of the Crimes Act, 2009 committed on 10 November 2018 at Nasinu in the Central Division.

[2] The information read as follows:

*"**Count 1***

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

SETAREKI RAVIA & JEKEMAIA RABONU *on the 10th day of November 2018, at Nasinu in the Central Division, in the company of each other, robbed SAT DEO MAHARAJ of a wallet containing $340.00 cash and assorted cards, the property of the said SAT DEO MAHARAJ.*

Count 2

Statement of Offence

AGGRAVATED ROBBERY*: Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

SETAREKI RAVIA & JEKEMAIA RABONU *on the 10th day of November 2018, at Nasinu in the Central Division, in the company of each other, robbed PARBHA WATI of handbag which contained: $204.00 (cash), 1 x Alcatel mobile phone, 1 x Gold plated bangle, 1 x Silver and purple coloured bangle and 1 x Gold chain, the property of the said PARBHA WATI.*

Count 3

Statement of Offence

RESISTING ARREST*: Contrary to Section 277 (b) of the Crimes Act 2009.*

Particulars of Offence

SETAREKI RAVIA *on the 10th day of November 2018, at Nasinu in the Central Division, resisted arrest by Police D/Cpl 1853 Luke Lewabeci, in the execution of his duty."*

[3] After trial, the appellant was convicted of both counts of aggravated robbery by the learned High Court judge concurring with the unanimous opinion of assessors. He had earlier pleaded guilty to the only count of resisting arrest. The trial judge sentenced the appellant on 20 October 2020 to a period of 10 years' imprisonment with a non-parole period of 06 years on each of the aggravated robbery counts and 03 months of imprisonment on resisting arrest and directed that all sentences should run concurrently.

[4] The appellant's appeal against conviction and sentence is timely.

[5] 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. 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)].

[6] 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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[7] The brief facts of the case were as follows. The first complainant, Mr. Sat Deo Maharaj (PW1) was married to the second complainant, Ms. Parbha Wati (PW2). They had been married for 49 years, and on 10 November 2018, the date of the aggravated robberies, PW1 was 71 years old, while PW2 was 65 years old. At about 11 am on a sunny Saturday morning, the 10th November 2018, they were walking on Bal Govind Road near Veiraisi Settlement to visit relatives in Nadawa. Suddenly, two i-taukei youths aged about 18 and 20 years old jumped out of the bush and confronted them. They repeatedly punched PW1 in the face, chest and stomach, and dragged PW2 along the road. PW1 fell on the road and injured himself. He later needed 07 stiches to close his facial injuries. The two youths were later identified to be the

appellant and another. They later stole the complainants' properties, as itemized in the charge and fled the crime scene.

[8] The grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows:

> '**Conviction**
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact;*
>
> *i) By admitting the appellant's record of caution interview into evidence in the voir dire, when doing so had wrongly assessed the evidences by not considering the medical evidences.*
>
> *ii) When he failed to give proper direction to the assessors regarding the evidence of an alibi and in doing so, the assessors would not properly analyzed alibi evidence.*
>
> ***Sentence:***
>
> ***Ground 2***
>
> *THAT the final sentence imposed on the appellant is excessive because;*
>
> *i) The sentencing learned judge having acted on a wrong principle by adopting a sentencing tariff that is not applicable to the facts of the case to commence the sentencing process.*

01st ground of appeal

[9] The first compliant is that notwithstanding medical evidence the learned trial judge had admitted the cautioned interview in evidence as being voluntary. The trial judge in his reasoning in the *voir dire* ruling has said:

> *6. 'The voluntariness of the alleged confession, and the fairness in police conduct while the accused was in police custody was contested in this case, All the police officers appeared to be saying that the accused was given his rights, his right to counsel, was given the breaks and meals, while in police custody. The police witnesses said they did not assault or threatened him to confess while he was, in their custody. They said, they treated him well and he gave his caution interview statements voluntarily and out of his own free will.*

7. *The accused, on the other hand, said exactly the opposite. He said, the police assaulted him when he was arrested on 10 November 2018. He said, they assaulted him in the police vehicle when they transported him to Valelevu Police Station. He said, he was again assaulted at Valelevu Police Station. He said, he was later taken to Raiwaqa Police Station and was also assaulted there. On 11 November 2018, he said, he was caution interviewed at Valelevu Police Station. He said, he was also assaulted there. He said, he was taken to a doctor at 11 am on 11 November 2018 to be medically examined. He said, he did not give his caution interview statement voluntarily and the police conduct on him was unfair.*

8. *Doctor Tracy Shackley (DW2) was called by the accused. She was the doctor who medically examined him on 11 November 2018. DW2 submitted the accused's medical report as Defence Exhibit No. 1. In D(12) of the report, DW2 said, the accused was unable to completely open his jaw, but was able to bite on his back teeth. She said, there was tenderness on the back of the scalp and there was abrasion to the right knee. The doctor, however when cross examined said, she did not find any severe injuries, to support the accused's alleged severe assaults by police.*

9. *Having considered both parties' version of events, and having critically examined the whole evidence, I accepted the prosecution's version of events, and ruled the accused's caution interview statements, as admissible evidence. If I had accepted the accused's version of events of severe beatings and assaults by police, he should have been dead.'*

[10] Medical evidence had revealed a few not so serious injuries on the appellant which appear to be far less proportionate to the severe alleged assault on him by the police. The trial judge had rejected the appellant's evidence of police assault on the basis that if he had been assaulted the way described by him he should have suffered far more serious injuries, probably suggesting that the injuries may not have been connected to any police assault. On the other hand, at the hearing it was confirmed that the appellant's mother had been present when his cautioned interview was recorded as stated by PW6 but she had not been summoned by the defence in support of any assault by the police. Either the appellant had surprisingly not complained to his mother or such an assault never took place; the injuries being unrelated to any police assault. Had there been such a police assault, it is very unlikely that the police would have allowed the appellant's mother to be present at the interview. There is nothing to indicate that the appellant had complained of any police assault to the doctor or to court when he was produced for the first time.

[11] However, the prosecution does not seem to have led evidence to show that those injuries were of pre-arrest origin. Since the appellant had been medically examined after the recording of the cautioned interview and the burden was on the prosecution to prove the voluntariness of the confession beyond reasonable doubt, in the absence of any evidence to explain those injuries, the appellant is entitled to argue that trial judge might have erred in ruling the cautioned statement voluntary.

[12] However unlike in **Nacagi v State** [2015] FJCA 156; AAU49.2010 (3 December 2015) where the learned Judge has concluded that the caution statements were made voluntarily without any indication that he had considered, analyzed and accepted or rejected that medical evidence, the trial judge here had indeed referred to medical evidence and rejected the appellant's assertion of police assault. In ***Nacagi*** where the absence of any analysis of the independent medical evidence and the absence of any indication as to how much, if any, weight ought to be attached to that evidence representing a wrong assessment of the evidence, led the Court of Appeal to conclude that had the learned Judge assessed the independent medical evidence he would have reached the conclusion that the state had failed to establish beyond reasonable doubt the voluntariness of the caution statements and therefore the caution statements should not have been admitted into evidence. In this appeal as well, the appellant might argue that there is insufficient assessment of the effect of medical evidence and lack of sufficient reasons for admission of the confession despite medical evidence. However, in this case I am doubtful even if the trial judge had more fully analyzed medical evidence and the weight to be attached thereto, the decision to admit the confession would have been different. In any event, the court may readily apply the proviso to section 23(1)(a) to this situation and conclude that there is no substantial miscarriage of justice.

[13] The trial judge's directions to the assessors (paragraphs 28) on the confessional statement is substantially in line with guidelines in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) paragraph [26]. The trial judge had expressed his view even in the judgment that the confession of the appellant was voluntary.

[14] The second grievance is that the trial judge had failed to give proper directions on *alibi* to the assessors. The trial judge had referred to the evidence of the appellant and DW3 on *alibi* at paragraphs 20. However, the trial judge had failed to direct the assessors as to how they should approach *alibi* evidence.

[15] In **Kishore v State** [2022] FJCA 40; AAU0085.2016 (26 May 2022) the Court of Appeal held that:

> *'[26] Evidence of alibi means 'evidence tending to show by reason of the presence at a particular place or in a particular area at a particular time he was not, or was unlikely to have been at the place he was not, or was unlikely to have been at a place where the offence is alleged to have been committed at the time of its alleged commission' per Fatiaki, J in **Andrew Ian Carter v State (**1990) 36 FLR 125. The law is that when an accused raises alibi as a defense, in addition to a general direction on burden of proof, the judge should direct assessors that prosecution must disprove an alibi and even if they conclude that the alibi is false, it does not by itself entitle them to convict the accused (vide **Ram v State** [2015] AAU 87 of 2010 (02 October 2015). On a similar complaint that inadequate directions were given by the trial judge with regard to the late alibi notice, the Supreme Court had stated that non-compliance with 21 day statutory period for alibi notice is a matter that goes to the weight of an alibi [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]'*

[16] The respondent has submitted that the *alibi* notice was given late. However, the trial judge without state's objection had allowed him to give evidence and called an *alibi* witness. Therefore, the trial judge should have given the standard directions on *alibi* as complained by the appellant.

[17] Yet, the appellant's counsel had not sought redirections in respect of the above omission and the failure to do so would disentitle the appellant even to raise them in appeal with any credibility as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[18] In any event, whether this omission would have resulted in a substantial miscarriage of justice should be considered in the light of other evidence. There was eye-witness evidence in the form of PW3 who clearly saw and identified the appellant and his co-accused while they were attacking and robbing the complainants as vividly described at paragraphs 29 and 30 of the summing-up. The appellant does not challenge her identification evidence.

[19] In the light of PW3's evidence, I do not think that the omission to give the typical *alibi* directions would have materially affected the assessors' opinion. Given that, the court may apply the proviso to section 23(1)(a) to this omission and conclude that there is no substantial miscarriage of justice.

[20] Overall, there is no reasonable prospect of success in the appeal against conviction (vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) at paragraph [6]).

02nd ground of appeal

[21] The appellant argues that the trial judge had used the wrong principle which resulted in a harsh and excessive sentence. The appellant seems to join issue with the trial judge having applied tariff of 08-16 years set in **Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015). He argues that the tariff of 08-16 years is applicable to aggravated robbery in the form of a home innovation and the learned trial judge had erred in applying the same tariff to his offending which is a street mugging.

[22] While this case is not case of home invasion as in ***Wise*** it is still a very serious case of street mugging which may fall into medium or high band in terms of level of harm as per **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) guidelines on street mugging carrying a sentence between 3-7 or 5-9 years of imprisonment. This is a case where serious physical and psychological harm (or both) has been suffered by the elderly victims. The victims do not appear to have offered resistance and I see no reason for the violence perpetrated, particularly on PW1.

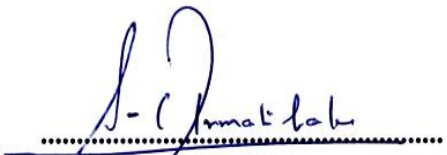
[23] The appellant had received 01 year for being a first offender but the trial judge does not seem to have given any discount for his young age though his remand period had been fully discounted.

[24] In my view, a sentence towards the higher end of medium band or middle of high band in ***Tawake*** may be warranted given all circumstances of the case.

[25] Therefore, it is best that the full court will decide the appropriate sentence as 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 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).

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.



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