**IN THE COURT OF APPEAL**
**AT SUVA**
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. AAU0056 OF 2011**

**BETWEEN** : **1. JOSEVATA TAGICAKIBAU**

**2. SOLOMONE QURAI**

**APPLICANTS**

**AND** : **THE STATE**

**RESPONDENT**

**COUNSEL** : **1st Applicant in Person**

: **Mr. S. Waqainabete for 2nd Applicant**

: **Mr. M. Korovou for Respondent**

**Date of Hearing** : **23 July 2013**

**Date of Ruling** : **26 July 2013**

# RULING

[1] This is an application for leave to appeal against sentence.

[2] The applicants were sentenced to 7 years' imprisonment each, after they pleaded guilty to the following offence:

**STATEMENT OF OFFENCE**

**AGGRAVATED ROBBERY**: Contrary to Section 311(1) (a) of the Crimes Decree BNo.44 of 2009.

**PARTICULARS OF OFFENCE**

**JOSEVATA TAGICAKIBAU AND SOLOMONE QURAI** on the 12th day of December 2010 at Suva in the Central Eastern Division robbed ASHIKA PRASAD of her Toshiba Laptop valued at $1,600.00, LG mobile phone valued at $600, Canterbury carry bag valued at $50.00 and a wallet, all to the total value of $2,250, belonging to the said Ashika Prasad.

[3] At the hearing of this application, the 1st applicant abandoned his initial grounds and relied upon the grounds of appeal filed by the 2nd applicant. He further complains that his remand period was not taken into account in sentence. The 2nd applicant's grounds of appeal are:

1. That the Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive for the following reasons:

   a) Appellant did not use any weapon;

   b) No physical violence on the victim;

   c) Minimal fear caused to the victim;

   d) Recovery of items as a result of cooperation by the Petitioner with the Police.

2. The Learned Judge erred in law when he commenced his sentencing starting point with 8 years which was too high considering the facts of the offending.

3. The Learned Judge erred in law when he did not take the early guilty plea as a separate mitigating factor and accordingly allow an appropriate discount.

4. The Learned Trial Judge erred in law when he took into account the aggravated factor twice that is one when arriving at the starting point and thereafter as a separate addition to increase the starting point.

[4] Sentencing is not a mathematical exercise, but is an exercise of judicial discretion of many considerations to arrive at a just and fair sentence for an offender. For an appellate court to disturb a sentence, the appellant must demonstrate that the sentencing court fell into error in exercising its sentencing discretion. In *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999), the Court of Appeal adopted the following principles at page 2:

> 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).

[5] The learned judge picked 8 years' imprisonment as his starting point after referring to the tariff of 8 to 14 years' imprisonment for aggravated robbery as established by cases such as *State v Elia*

*Manoa*, Criminal Case No. HAC 108 of 2009 & HAC 61 of 2010; *State v Raymond Johnson,* HAC 120 of 2008, *State v Rasaqio* (2010) FJHC 287. Clearly, the starting point was picked up from the lower end of the tariff for aggravated robbery. After adjusting for the mitigating and aggravating factors, the learned judge arrived at a final sentence of 7 years' imprisonment for each applicant. The guilty pleas were clearly considered as a mitigating factor and the weight to be attached to the guilty pleas was a matter of discretion for the learned judge. While some judges give separate reduction to guilty pleas as a matter of practice, there is no hard and fast rule that that practice has to be followed in every case. The Sentencing and Penalties Decree makes no mention of such a practice.

[6] However, there are two matters that are arguable. The first matter relates to the remand period. Although not raised as a ground of appeal, counsel for the 2nd applicant moved the court to include the remand period as a ground of appeal after counsel for the State fairly conceded that remand period was not taken into account in sentence, albeit at the sentencing hearing, counsel for the State advised the learned judge that each applicant had been in custody on remand for 5 months. In sentencing the applicants, the learned judge ignored this concession and made no reduction to the sentence to reflect the remand period of each applicant.

[7] The second arguable issue relates to the aggravating factors identified by the learned judge to enhance the sentences of the applicants by 4 years. These factors are:

a) Both of you had entered a Motel room in a broad daylight.

b) You have threatened a young female nurse victim.

c) Both of you were actually involved in robbing a laptop, mobile phone and a bag.

d) Stealing of laptops and Mobile phones was treated serious attack on another Person's personal belongings.

[8] Apparently, the last two factors were the ingredients of the offence of aggravated robbery. There is an arguable error in enhancing the sentences based on improper aggravating factors.

[9] Leave is granted on the above two issues only.

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**DANIEL GOUNDAR**
**JUDGE**

**Solicitors:**

1st Applicant in Person
Office of the Legal Aid Commission for 2nd Applicant
Office of the Director of Public Prosecutions for Respondent.