IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 61 of 2011
(High Court HAC 154 of 2008)

BETWEEN	**:**	**KELEPI SERUKALOU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini AP**
Counsel	**:**	**Appellant in person.** **Mr L. Fotofili for the Respondent.**
Date of Hearing	**:**	**28 June 2013**
Date of Decision	**:**	**14 August 2013**

DECISION

[1] This is an application by the Appellant for leave to appeal against sentence. The Appellant along with 3 others was charged with robbery with violence contrary to section 293(1) of the Penal Code Cap 17. The Appellant pleaded guilty to the charge

after the voir dire hearing and was convicted and sentenced to a term of imprisonment of 6 years with a non-parole term of 4½ years with effect from 19 May 2011. The other three co-accused pleaded not guilty and were convicted after the assessors found them guilty. They were each sentenced to terms of 10 years imprisonment with non-parole terms of 8 years.

[2] Initially the Appellant filed an application for leave to appeal against conviction and sentence on 29 June 2011. By letter dated 14 May 2012 the Appellant applied to withdraw his appeal against conviction. In a Ruling dated 7 June 2012 the Court of Appeal granted the Appellant's application and ordered that the appeal against conviction be dismissed.

[3] In a Ruling dated 20 March 2012 the other three Appellants (Cama, Naqova and Tawake) were granted leave to appeal against conviction. The Appellant Naqova has applied for leave to call additional evidence. That application will be listed for callover at the same time as the appeals on a date to be fixed.

[4] Pursuant to section 21 (1) (c) of the Court of Appeal Act Cap 12 a person convicted on a trial held before the High Court may appeal to the Court of Appeal with the leave of the Court against sentence unless the sentence is one fixed by law. Pursuant to section 35 (1) of the Act the jurisdiction of the Court to grant leave to appeal against sentence may be exercised by a single judge of the Court.

[5] The grounds of appeal against sentence were first set out in the Appellant's Notice of Appeal dated 16 June 2011 and filed on 29 June 2011. Further material was filed by the Appellant in February 2012, April 2012 and May 2013.

[6] The grounds of appeal may be conveniently summarised as follows:

1. The sentence is manifestly harsh and excessive in light of all the circumstances of the case.

2. The learned Judge erred in that no reason was given for the sentence passed, contrary to sentencing principles.

3. The learned Judge erred when he failed to impose a sentence consistent with the status of the Appellant as a first offender.

4. The Appellant has been denied a second chance to rehabilitate himself since he was a first offender.

5. The learned Judge erred in law in not giving any allowance for the plea of guilty to the charge.

6. The severity of the sentence was inconsistent with the circumstances of the offence being the *"mere snatching"* by an unarmed offender with no violence inflicted on the victim.

7. The assessment of the sentence was unfair.

[7] The fixing of a sentence involves the exercise of a discretion by the learned Judge. It is not a mathematical exercise. For an appellant to be granted leave to appeal against sentence he must establish an arguable case that the learned Judge fell into error in exercising his sentencing discretion. If the Appellant can establish an arguable point that the learned judge acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide him or affect him, or has mistaken the facts or failed to take into account some relevant consideration, then he may be granted leave to appeal against sentence (See: **Kim Nam Bae –v- The State** AAU 15 of 1998; 26 February 1999).

[8] The learned Judge selected 10 years as the starting point after referring to the tariff of 7 to 14 years' imprisonment for the offence of robbery with violence under section 293 (1) of the Penal Code which has since been repealed and replaced by the offence of aggravated robbery under section 311 (1) of the Crimes Decree 2009. The authorities relied upon by the learned Judge establish that the appropriate tariff at the time was 8 to 14 years. The starting point selected was at the lower end of that range. After adjusting for the mitigating and aggravating factors, the learned Judge arrived at a final sentence of 6 years imprisonment for this Appellant. The three co-Appellants

were sentenced to 10 years. It is clear that the guilty plea, which was entered after the voir dire hearing, was one of the matters considered as mitigating factors. The weight to be attached to that late guilty plea was a matter of discretion for the learned Judge. It is true that some judges give a separate reduction as the last stage of the sentencing process for a guilty plea as a matter of practice. No doubt that practice emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). There is, however, no mandatory rule that that practice has to be followed in every case. There is no requirement to follow that practice specified in the Sentencing and Penalties Decree 2009. It is clear that section 4(2) (f) of the Sentencing and Penalties Decree expressly requires that a guilty plea be considered in arriving at a final sentence. It is also desirable that the reduction for a guilty plea should be apparent in the sentencing decision. For that reason it would seem to be appropriate that other mitigating factors should be considered independently of the reduction for a guilty plea.

[9] There are three matters that should be considered by the Court of Appeal. The first matter relates to the non-parole period ordered by the learned Judge. Although not raised as a ground of appeal, the Appellant raised the matter with the court and indicated that he challenged the length of the non-parole sentence. The question that needs to be determined by the Court of Appeal is whether the discretion that is required to be exercised by a sentencing judge under section 18 of the Sentencing and Penalties Decree to fix a non-parole term is appealable under section 21 (1) (c) of the Act.

[10] The second issue relates to the aggravating factors identified by the learned Judge to enhance the sentence of the Appellant by 3 years. These factors are:

(a) It was well planned robbery.

(b) It was committed in broad daylight at a public place.

(c) The amounts involved were $62,972.34 cash and $1,033.76 in cheques.

It would appear that the first two factors were matters that were taken into account by the learned Judge when he selected his starting point of 10 years. There is an arguable error in enhancing the sentence based on duplicate consideration of these factors.

[11] The third issue concerns the manner in which a guilty plea should be considered by a sentencing judge and the reduction that should be allowed depending upon the stage in the proceedings when the plea was entered or the intention to plead guilty made known.

[12] As a result leave is granted to the Appellant to appeal against sentence.

HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT