

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0056 of 2011
(High Court Case No: HAC 22 of 2011)

BETWEEN : 1. **JOSEVATA TAGICAKIBAU**
2. **SOLOMONE QURAI**

Appellants

AND : **THE STATE**

Respondent

Coram : Chandra JA
Basnayake JA
Gamalath JA

Counsel : Mr. J. Savou for 1st Appellant
Mr. S. Waqainabete for 2nd Appellant
Mr. L. J. Burney for the Respondent

Date of Hearing : 9 September 2014

Date of Judgment : 2 October 2014

JUDGMENT

Chandra JA:

I have perused the draft judgment and I agree with the judgment and reasoning of Gamalath JA.

Basnayake JA:

I agree with the reasoning and conclusion arrived at by Gamalath JA.

Gamalath JA

[1] This is an appeal against the quantum of sentence of imprisonment. On information forwarded by the Director of Public Prosecutions, the appellants were tried on a charge of Aggravated Robbery contrary to Section 311(1) (a) of the Criminal Decree No. 44 of 2009.

- [2] According to the particulars of the offence, the appellants were involved in a robbery on 12th December 2010 at Suva, where they allegedly robbed one Ashika Prasad of her Toshiba Laptop valued at \$1600. LG mobile phone valued at \$600, Canterbury carry bag valued at \$50 and a wallet, altogether valued at \$2,250.
- [3] The details of the case in brief are that the victim Ashika Prasad, a nurse at Nabouwalu Hospital, was sleeping in her flat in Room 2014 at Annandale Apartment, Waimanu Road, when she was suddenly awoken by the presence of the two appellants who have intruded and demanded money at the point of a butter knife.
- [4] As can be expected she was petrified; since she didn't have any money with her, they were told to take away anything as they wish, in lieu of cash. She was ordered to sit in the bed, and the appellants walked away with the valuables referred to in the charge.
- [5] After they left the police were alerted, and consequently, the 2nd Appellant was arrested on the same day of the incident, whereas the 1st Appellant was arrested on a different date.
- [6] On 15th December 2010 and 20th December 2010 the 2st appellant and 1st appellant were brought before the Magistrate's Court respectively and remanded for a period of 5 months each.
- [7] The matter was then referred to the High Court for further proceedings.
- [8] On 11th May 2011 the appellants pleaded guilty to the charge and convicted accordingly and each was sentenced to 7 years imprisonment.

- [9] The matters that had been considered by the learned High Court Judge in computing the sentence can be summarised as follows:-

Aggravating Circumstances:

- (i) *The appellants entered the Motel Room in broad daylight;*
- (ii) *The victim was young in age and living alone at that time;*
- (iii) *Both of them were actually involved in the robbing a laptop, mobile phone and a bag;*
- (iv) *Robbery of a laptop and a mobile phone should be treated seriously for they are personal belongings of another person.*

- [10] Further, the learned High Court Judge took into account the circumstances of mitigation in imposing the sentence of imprisonment.

- [11] This appeal has been filed against the sentence of imprisonment. When the leave to appeal was pursued, the 1st appellant abandoned his initial grounds of appeal and decided to rely on the grounds of appeal of the 2nd Appellant.

- [12] In the Court of Appeal, having considered the submissions made on behalf of the appellants, the Hon. Judge granted leave only on the following two grounds;

‘Ground 1

That the Learned High Court Judge had failed to deduct the 5 months in remand from the total sentence of imprisonment imposed on the appellants;

The Learned Counsel for the State in keeping with the good traditions conceded that there is merit to this ground of appeal. We also agree for according to the Sentencing and Penalties Decree 2009, convicted accused are entitled to this reduction and therefore this ground of appeal succeeds.

‘Ground 2

The 2nd issue on which the learned Court of Appeal Judge granted leave is in relation to the aggravating factors considered by the learned High Court Judge in assessing the period of imprisonment. We have already referred to them earlier’.

[13] According to the Learned Judge of the Court of Appeal, since the last two factors identified by the Learned High Court Judge are in fact ingredients subsumed in the offence of Aggravated Robbery, there is a contentious issue whether the Learned High Court Judge had erred in law by considering them as aggravating circumstances.

[14] In the Crimes Decree 2009, the offence of Robbery is defined in Section 310. What makes it an Aggravated Robbery is in Section 311 which states that;

311-(1) A person commits an indictable offence if he or she –

(a) Commits a robbery in company with one or more other persons ;or

(b) Commits a robbery and, at the time of the robbery, has an offensive weapon with him or her.

[15] By advertent to the language of the above section, what qualifies the offence of robbery simplicitor to one of aggravated robbery is either it should have been committed jointly by one or more other persons or at the time of the robbery, there has to be an offensive weapon in the possession of a culprit.

[16] We find that, in assessing the appropriate sentence the Learned High Court Judge had advertent his mind to the case of State v Rokonabate & Others (2008) FJHC 226, in which it states that:

“The dominant factor in assessing seriousness for any types of robbery is the degree of force used or threatened. The degree of injury to the victim or the nature of and duration of threats are also relevant in assessing the seriousness of an offence of robbery with violence. If a weapon is involved in the use or threat of force that will aggravate feature. Group offending will aggravate an offence because the level of intimidation and fear caused to the victim will be greater. It may also indicate planning and gang activity. Being the ring leader in a group is an aggravating factor. If the victims are vulnerable, such as elderly people and persons providing public

transport, then that will be an aggravating factor. Other aggravating factors may include the value of times taken and the fact that an offence was committed whilst the offender was on bail.

The seriousness of an offence of robbery is mitigated by factors such as a timely guilty plea, clear evidence of remorse, ready co-operation with the police, response to previous sentence, personal circumstances of the offender, first offence of violence, voluntary return of property taken, playing a minor part, and lack of planning involved”.

- [17] The Learned Assistant DPP referred us to the decision of Samuel Donald Nileshwar Sing v The State, Criminal Appeal No .AAU15 &16 of 2010 in which the following pronouncement had been made by Hon Justice Calanchini, then Acting President of the Court of Appeal;

The facts of the case in brief are;

“The Appellant with two others went to the house of Imran Ali at about 9.30 pm on 26 October 2010. Imran Ali was not home. The Appellant and the two others were admitted into the house by Ms Ronika Karan, the wife of Imran Ali. The appellant was known to both Imran and his wife. Also in the house at the time was the couple’s child (a son). One of the groups held a chopper at the neck of the wife whilst the Appellant asked the whereabouts of her husband. She was taken forcefully to the bedroom. Demands were made for money and jewellery. Ms Ronika Karan was punched by one of the offenders on her forehead. The wife revealed where he valuables were kept. The house was ransacked and Ms Karan assaulted. During the course of the robbery cash, jewellery. Mobile phones, sunglasses, digital cameras, ipods, MP3 players and a carry bag with a total assessed value of \$21,730.00 were taken. At some time during the course of the robbery adhesive tape was placed across Ms Karan’s mouth and her hands tied behind her back. The Appellant and the others fled the house when Imran Ali returned home.

The admitted facts relating to the second conviction may also be stated briefly. The Appellant with three others hired a seven seater passenger carrier van to go to Saweni beach. Upon arrival at the beach one of the Appellant’s group threatened the complainant driver with a knife and forced him from the driver’s seat and into the back of the van. The vehicle was then driven around. During the journey the complainant was forced to hand over \$95.00 in cash and two mobile phones valued at \$200.00. The complainant was dropped off at Saweni and the vehicle subsequently abandoned in Lautoka. In the meantime the vehicle was stripped of its accessories being a car

stereo, amplifier and mobile phone charger with a total assessed value of \$350.00.

In adding four years for aggravating factors, the learned Judge has been more than fair. This offence took place in a family home. It was committed after one of the victims had invited the Appellant and his co-offender into the home.

The victims were a defenceless woman and a young child. Whilst violence may be an element of the offence, the status of the victims and the degree of violence can be regarded as aggravating factors in view of the fact that the starting point selected by the learned Judge was at the lower end of the range. Furthermore, the length of time over which the victim was immobilised by having been bound aggravated the offence".

[18] In the instant case the Learned High Court Judge had picked the starting point as 8 years and this undoubtedly is at the lower end of the established tariff for the offence. Once this factor is read in conjunction with the cited passage of the judgement of the Learned President of the Court of Appeal, we doubt very much whether the Learned High Court Judge had erred in ordering the sentences which are sought to be impugned in this case.

[19] In the circumstances, we see no reason to interfere with the sentence imposed in the High Court save that the period of remand of 5 months, should be deducted from the total sentence.

The Orders of the Court are:

- 1) Appeal allowed in part.
- 2) Sentence varied by reducing the imposed sentence by 5 months for time spent on remand.

Suresh Chandra

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Hon. Justice S. Chandra
JUSTICE OF APPEAL



E. Basnayake

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

S. Gamalath

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL