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

CRIMINAL APPEAL NO. AAU 048 of 2022
[In the High Court at Suva Case No. HAC 190 of 2008]

BETWEEN	:	**VILIAME GAUNA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person** **Ms. S. Shameem for the Respondent**
Date of Hearing	:	**11 January 2024**
Date of Ruling	:	**12 January 2024**

RULING

[1] The appellant had been charged in the High Court at Suva with one count of Robbery with Violence contrary to Section 293 (1) of the Penal code, one Count of Damaging Property contrary to Section 324 (1) of the Penal Code and one Count of Unlawful use of Motor Vehicle contrary to Section 292 of the Penal Code.

[2] After trial, the judge had concurred with the assessors, convicted the appellant and sentenced him on 19 August 2010 to a sentence of 17 years of imprisonment with a non-parole period of 15 years for robbery with violence with other sentences of 09 months and 03 months respectively to run concurrently with it.

[3] The appellant had appealed against conviction and his appeal had been unsuccessful in the Court of Appeal[1]and the Supreme Court[2].

[1] **Gauna v State** [2015] FJCA 61; AAU0071.2010 (28 May 2015)

[4] The appellant's current appeal against sentence is out of time by 11 years, 08 months and 22 days.

[5] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] There is no explanation for the delay of 11 years, 08 months and 22 days which alone is enough to defeat the appellant's appeal. However, I would still see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (06 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] Further 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].

[8] The trial judge had summarized the facts in the sentencing order as follows:

> *'[2] You were charged with one count of Robbery with Violence contrary to Section 293 (1) of the Penal code, one Count of Damaging Property contrary to Section 324 (1) of the Penal Code and one Count of Unlawful*

[2] **Gauna v State** [2016] FJSC 10; CAV022.2015 (21 April 2016)

use of Motor Vehicle contrary to Section 292 of the Penal Code.

[3] The facts are that on the 14th August 2008 at about 2.00am you with four other men armed with pinch bars, cane knives, iron rod broke into a dwelling house at No. 5 Fulaga Street Samabula, Suva where the victim Vijay Chand was residing.

[4] The victim Vijay Chand was 63 years old at the time of the incident was living with his wife and the daughter in the said house. You with others first broke into the house by breaking the burglars grill and gain entry to the house. When you were breaking open the other doors the victim Vijay Chand had called his cousin and tried to prevent you from entering his bedroom. You forced yourself, after breaking the door and attacked the victim who was 63 years old with a pinch bar on his head.

[5] You with the others after attacking the victim Vijay Chand demanded money from them. While the victim was bleeding the others were kept on fear of death.

[6] You and others forcibly broke open the drawers and took $3000 worth of jewelleries and cash $2000. The wife of the victim Bimla Wati heard saying in the Court that she was crying and begging not to harm the victim and herself.

[7] During the Robbery the victim Vijay Chand had received an injury on his head; subsequently he was treated at CWM hospital.

[9] The grounds of appeal urged by the appellant against sentence are as follows:

1. ***THAT*** *the Learned Sentencing Judge was wrong in principle in picking the starting point at the high end of the tariff for an offence of Robbery with Violence.*
2. ***THAT*** *by taking a starting point of 14 years following the sentencing tariff guidelines for Robbery with Violence involving home invasion set out in State v Sakiusa Rokonabete & Others (2008 FJHC 226: HAC 118.2007) the Learned Sentencing Judge had really acted upon a wrong principle.*
3. ***THAT*** *the Learned Sentencing Judge erred in law and in fact in applying the wrong tariff without assigning any cogent reason require immediate intervention of the Court of Appeal to decide whether to affirm the existing sentence or what the appropriate sentence should be.*
4. ***THAT*** *the Learned Sentencing Judge erred in law and in fact when he allowed extraneous or irrelevant matters to guide or effect him in imposing the particular sentence.*

5. ***THAT*** *the Learned Sentencing Judge erred in law and in fact in failing to take into account some very relevant consideration while imposing the Sentence.*

6. ***THAT*** *the Learned Sentencing Judge erred in law and in fact in not considering the disparity of sentence between co-offender charged for the very same offence and also offenders charged with similar nature of offences.*

7. ***THAT*** *the Sentence of 17 years imprisonment with a non-parole period of 15 years is manifestly excessive, harsh and wrong in principle and circumstances of this particular case compare to other aggravated cases.*

8. *In essence, the failure of the Learned Sentencing Judge to maintain uniformity in Sentence constitute a very serious error of principle. Uniformity in Sentence is a reflection of equality before the law. Offenders should know that punishment are even-handedly given in similar cases so that public's confidence in the criminal Justice system can be maintained.*

Ground 1, 2 and 3

[10] The maximum sentence for robbery with violence under the Penal Code is life imprisonment as opposed to 20 years for aggravated robbery under the Crimes Act. Though there was no sentencing tariff for robbery with violence under the Penal Code through a guideline judgment, courts were guided by a tariff of 12-15 years that was generally accepted as the sentencing range (see **State v Wainiqolo** [2006] FJHC 53; HAC015.2004S (28 July 2006) where 14 years of imprisonment was imposed). Therefore, the trial judge was not in error in following **State v Rokonabete** [2008] FJHC 226; HAC118.2007 (15 September 2008) where the trial judge took 12 years as the starting point. In fact the Supreme Court affirmed the High Court in **Rokonabete v State** [2018] FJSC 14; CAV0006.2012 (17 August 2018) and also approved **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006) and added that the tariff for aggravated robbery with violence was 10 to 16 years citing **State v Rasaqio** [2010] FJHC 287; HAC155.2007 (9 August 2010). Thus, the starting point of 14 years by itself cannot be considered a sentencing error.

Ground 4

[11] The trial judge does not seem to have considered any extraneous maters in the process of sentencing as alleged by the appellant. However, there is a concern of some double

counting. The trial judge had said at paragraph 27 that considering *the nature of the offence* and *the way it planned and executed* he commenced the starting point of the sentence at 14 years and added 05 years for the following aggravating factors some of which, if not all seem to include '*the nature of the offence* and *the way it planned and executed'* particularly in the absence of any clue as to what factors the judge considered in picking the starting point of 14 years.

> *1. It is a well planned robbery.*
> *2. You and your gang members are armed with deadly weapons such as pinch bar, cane knife, iron rod etc.*
> *3. You entered a dwelling house in the wee hours of the day namely 2.00am.*
> *4. You have attacked the victim who was 63 years old.*
> *5. You kept the victims wife who is an old lady and their daughter in a fear of death.*

Ground 5

[12] The trial judge does not appear to have missed out on any relevant factors in meeting out the sentence. Nor has the appellant specifically pointed out to any such matters.

Ground 6

[13] The appellant's argument is based on the sentence of 10 years of imprisonment imposed on his co-accused[3]. The difference is that the co-accused cooperated with the police by confessing and disclosing his accomplices and pleaded guilty. His role in the robbery had been described as minimal. In addition, unlike the appellant his co-accused was not declared as a habitual offender. The appellant was declared as a habitual offender on the basis of following previous convictions:

> *'-1 conviction for Robbery with Violence*
> *- 1 conviction for Act with Intent to Cause Grievous Harm*
> *- 2 convictions for Resisting Arrest*
> *- 2 convictions for Shop Breaking and Larceny*

[3] **State v Delana** [2010] FJHC 22; HAC190.2008; HAC108.2009; HAC113.2009; HAC126.2009 (1 February 2010)

- 1 conviction for Larceny from Person
- 2 convictions for Burglary
- 2 convictions for Larceny in Dwelling House
- 1 conviction for Bulk Store Breaking Entering and Larceny
- 1 conviction for Office Breaking with intent to Commit Felony
- 1 conviction for Escaping from Lawful Custody.

[14] Therefore, in terms of the Sentencing and Penalties Act, the judge was entitled to impose a longer sentence on the appellant as a habitual offender that he would otherwise have imposed on him though the trial judge had not in fact used his status as a habitual offender to justify 17 years of imprisonment. Thus, there is a clear basis for the disparity of sentences between the appellant and his co-accused.

[15] However, there is a concern that the trial judge had not specifically found the appellant to be a threat to the community as required in the process of declaring an accused as a habitual offender as adverted to in **Vura v State** [2023] FJCA 191; AAU012.2017 (28 September 2023). The question is whether even in the absence of a specific finding to that effect, the appellant past record spoke volumes for him to be legitimately declared as a habitual offender. In other words, whether the appellant's previous convictions were glaringly pointing to him being a habitual offender and it was the only conclusion possible from his past criminal record before the trial judge. However, as I have pointed out the trial judge had not imposed a longer sentence because the appellant was a habitual offender. Thus, his newly declared status as a habitual offender had not played any part in the sentence of 17 years. At the same time, the Court of Appeal is entitled to declare him as a habitual offender independently based on the evidence before it if it thinks fit to do so (see section 11 (2) of the Sentencing and Penalties Act).

Ground 7 and 8

[16] It is clear that the sentence of 17 years was high but that does not make the sentence necessarily harsh and excessive. The length of the sentence itself is not a ground to assail the sentence unless it is manifestly harsh and excessive and disproportionate to the gravity of the offending. The fundamental question whether it violates the proportionality principle.

[17] In all the circumstances, I do not think that there is a real prospect of success in any of the grounds but as pointed out above there is a concern on double counting and the legality of declaring the appellant as a habitual offender. However, whether they affect and if so to what extent they may affect the final sentence is a matter for the full court to decide.

[18] I think that despite the inexcusable delay, the full court may be reasonably afforded an opportunity of considering these questions in the light of the principle that 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)]. The approach taken by the appellate court in an appeal against sentence 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)].

Order of the Court:

1. Enlargement of time to appeal against sentence is allowed only on the two aspects of the sentencing order as stated above.

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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent