IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 60 OF 2023

IN THE MATTER of an Appeal from the Decision of the Magistrate's Court of Rakiraki, in Criminal Case No. 102 of 2017 [EJR 02 of 2017].

BETWEEN : **KALASITA WAQA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Appellant Appeared in Person
Ms. Rukalesi Uce for the Respondent

Date of Hearing : 13 November 2024

Judgment : 4 December 2024

JUDGMENT

[1] This is an Appeal made by the Appellant against her conviction and sentence imposed by the Magistrate's Court of Rakiraki, in Criminal Case No. 102 of 2017 [EJR 02 of 2017].

[2] The Appellant, together with Aminisitai Navunivesi and Sairusi Voreqe (who was a Juvenile at the time), were first produced in the Magistrate's Court of Rakiraki, on 10 April 2017, charged with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act). [Vide page 17 of the Magistrate's Court Record].

[3] Since Aggravated Robbery is an indictable offence the matter was transferred to the High Court of Lautoka.

[4] Pursuant to Section 4 (2) of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act), the Lautoka High Court had invested extended jurisdiction on the Resident Magistrate, Magistrate's Court of Rakiraki, to try this matter according to law.

[5] It is recorded that on 12 July 2017, the Appellant, together with Aminisitai Navunivesi and Sairusi Voreqe, had pleaded not guilty to the charge [Vide page 22 of the Magistrate's Court Record]. This must have been to the original charge filed in the Magistrate's Court of Rakiraki.

[6] On 14 November 2018, the prosecution had moved to file Information in Court. As per the Information filed the Appellant, together with Aminisitai Navunivesi and Sairusi Voreqe, are charged with the following offence:

COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) read with Sections 45 and 46 of the Crimes Act 2009.

Particulars of Offence

AMINISITAI NAVUNIVESI, SAIRUSI VOREQE and KALISITA WAQA, on the 6th day of April 2017, at Waimari, Rakiraki, in the Western Division, dishonestly appropriated (stole) 3 x Packets of Rewa Milk valued at $15.00, 2 x 16 Crest Chickens valued at $30.00, 4 x frozen fish valued at $20.00, 1 x Packet Drumstick valued at $14.00, 1 x JVC DVD Deck valued at $300.00, 1 x Alcatel Mobile Phone with charger valued at $100.00, 1 x Solar light bulb valued at $15.00, all to the total value of $494.00 the property of **RAM KISHOR** and immediately before such robbery and prior to stealing the said items **AMINISITAI NAVUNIVESI, SAIRUSI VOREQE and KALISITA WAQA** used force on **RAM KISHOR.**

[7] On 10 April 2019, when the Information was put to them, Aminisitai Navunivesi and Sairusi Voreqe pleaded guilty to the Information, while the Appellant, pleaded not

guilty. However, since Aminisitai Navunivesi and Sairusi Voreqe, were not admitting to the Summary of Facts touching all elements for the offence of Aggravated Robbery, their guilty pleas were vacated [Vide pages 33-34 of the Magistrate's Court Record].

[8] Since the prosecution was relying on the caution interview statements made by Aminisitai Navunivesi, Sairusi Voreqe and the Appellant, a voir dire hearing was held on 20 and 21 April 2022. However, by Ruling dated 24 June 2022, the said caution interview statements were held inadmissible in respect of all three.

[9] It has been established that Sairusi Voreqe and the Appellant are siblings. It has also been established that Aminisitai Navunivesi and the Appellant were in a de-facto relationship at the time of the alleged incident in 2017. At the time, the three of them were residing together.

[10] On 7 March 2023, the trial proper commenced. The prosecution led the evidence of only the complainant and closed its case. The Learned Resident Magistrate held that there was a case to answer and called for the defence. Aminisitai Navunivesi and the Appellant testified under oath.

[11] On 9 June 2023, the Judgment was delivered. Aminisitai Navunivesi, Sairusi Voreqe and the Appellant were all found guilty of the charge. Aminisitai Navunivesi and the Appellant were convicted of the charge.

[12] On 18 August 2023, Aminisitai Navunivesi, was sentenced to 5 years and 10 months imprisonment (70 months imprisonment). Considering the time he had spent in remand, 4 months and 12 days had been reduced from his sentence. Thus, the remaining period to be served was 65 months and 16 days imprisonment. A non-parole period of 48 months imprisonment was imposed on the said accused.

[13] Sairusi Voreqe (who was a Juvenile at the time of offending) was imposed a punishment of 9 months imprisonment. Considering the time he had spent in remand, 18 days had been reduced from his punishment, bringing the punishment to 8 months and 10 days imprisonment. The Juvenile was ordered to serve 1 month imprisonment immediately. The remaining 7 months and 10 days imprisonment was suspended for a period of 2 years.

[14] The Appellant had been imposed a sentence of 5 years and 2 months imprisonment (62 months imprisonment). Considering the time she had spent in remand, 18 days had been reduced from her sentence. Thus, the remaining period to be served was 61 months and 10 days imprisonment. A non-parole period of 10 months and 10 days imprisonment was imposed on the Appellant.

[15] Aggrieved by the said Order, on 14 September 2023, the Appellant filed a Notice of Appeal in the High Court. The said Notice of Appeal was originally in respect of the sentence only. However, by a Notice of Amended Appeal, filed on 17 April 2024, the Appellant challenges both her conviction and sentence.

[16] This matter was taken up for hearing before me on 13 November 2024. The Appellant (in person) and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[17] As per the Grounds of Appeal filed by the Appellant the Grounds of Appeal are as follows:

GROUNDS OF APPEAL AGAINST CONVICTION

(1) That the Judgment that has been passed by the Learned Magistrate does not support in any ways that she was involved in Aggravated Robbery.

(2) That as per the Judgment, she has never caused any injuries to the complainant. The injuries had been caused by the First Accused.

GROUNDS OF APPEAL AGAINST SENTENCE

(3) That the sentence is harsh and excessive considering all the circumstances of the case.

(4) That the sentence is biased and unsupported by law.

[18] As can be observed there are two Grounds of Appeal against conviction; and two Grounds of Appeal against sentence.

THE LAW

[19] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."

[20] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

THE GROUNDS OF APPEAL AGAINST CONVICTION

Ground 1

[21] The first Ground of Appeal against conviction is that the Judgment that has been passed by the Learned Magistrate does not support in any ways that she was involved in Aggravated Robbery.

[22] The Learned Magistrate's Judgment is not found in the Copy Record of Magistrate's Court of Rakiraki. However, a copy of the Judgment is separately available in the original Magistrate's Court record. The Judgment contains 16 pages.

[23] The transcripts of the evidence (proceedings) given by the complainant, Ram Kishor, is found at pages 84 to 87 of the Magistrate's Court Record. In his Judgment the Learned Resident Magistrate has duly summarized the evidence of complainant Ram Kishor [From paragraphs 16-42 of the Judgment]. Similarly, the transcripts of the evidence given by the 1st Accused, Aminisitai Navunivesi, and the Appellant, is found at pages 88 to 90 of the Magistrate's Court Record. In his Judgment the Learned Resident Magistrate has duly summarized the evidence of 1st Accused, Aminisitai Navunivesi, and the Appellant [From paragraphs 46-60 of the Judgment].

[24] In terms of the provisions of Section 46 of the Crimes Act, the Learned Magistrate has correctly identified that this was an offence committed by joint offenders in prosecution of a common purpose [From paragraphs 81-93 of the Judgment]. Having identified the elements of the offence of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act [From paragraphs 67-80 of the Judgment], he has then analysed the totality of the evidence in relation to the elements of the offence [From paragraphs 98-132 of the Judgment]. Accordingly, the Learned Magistrate has found the Appellant guilty of the charge and convicted her.

[25] There is no denying the fact that the Appellant too had entered the complainant's residence together with the 1st Accused and the 2nd Juvenile. In his Judgment, the Learned Resident Magistrate has stated as follows [At paragraphs 26-27 of the Judgment]: *"While struggling with the bearded man or with the 1st defendant at the passage, Mr. Kishor saw the 3rd Defendant empty the fridge. The fridge was a meter away. The 3rd Defendant emptied and put 'the stuff' namely powdered milk, 2 x no. 16 chicken, 4 x frozen fish and 1 x pack of drumstick into a carry bag....The 3rd Defendant then exited the house using the same kitchen door that was pushed open."*

[26] I find that the evidence in the case clearly supports the fact that the Appellant was involved in committing of this offence. For the aforesaid reasons, I find that this Ground of Appeal against conviction is without merit.

Ground 2

[27] This Ground of Appeal against conviction is that as per the Judgment, she has never caused any injuries to the complainant. The injuries had been caused (to the complainant) by the 1st Accused.

[28] I too concede that this position is correct. Whatever assault or force that was used on the complainant was perpetrated by the 1st Accused. However, the prosecution is basing its case on the principle of joint enterprise or that this was an offence committed by joint offenders in prosecution of a common purpose.

[29] Therefore, even though the Appellant was not personally responsible for the assault caused to the complainant, she becomes liable for committing of the offence of Aggravated Robbery on the basis of joint enterprise.

[30] This is further established by what is stated by the Learned Resident Magistrate in his Judgment as follows [At paragraphs 121-122 of the Judgment]:

> *"121. For instance, the 1st Defendant accepts that he was present but claims that Mr. Kishor head butted him. The 2nd Defendant (the 2nd Juvenile) although he did not testify, when his plea was taken on the 10-04-19 to the information, he accepted that he stole from Mr. Kishor.*
>
> *122. The recovery of stolen items from the Defendants' home a day after the robbery when put together with PW1 Mr. Kishor's evidence, further supports the involvement of all the Defendants in the offence. The items were recovered from the bedroom of the 2nd Defendant."*

[31] For the aforesaid reasons, I find that the said Ground of Appeal against the conviction is also without merit and should be rejected.

APPEALS AGAINST SENTENCE

[32] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"...It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. 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] HCA 40; [1936] 55 CLR 499)."*

[33] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v. The King*** *[1936] HCA 40; [1936] 55 CLR 499; and adopted in* ***Kim Nam Bae v The State*** *Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration."

[34] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[35] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

*"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with

a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

THE GROUNDS OF APPEAL AGAINST SENTENCE

[36] There are two Grounds of Appeal against sentence raised by the Appellant.

(1) That the sentence is harsh and excessive considering all the circumstances of the case.

(2) That the sentence is biased and unsupported by law.

[37] I find that the above two Grounds of Appeal against sentence are interconnected and can be addressed together.

[38] The Learned Magistrate's Sentence is found at pages 95 to 104 of the Magistrate's Court Record [It is a Sentence (in respect of the 1st Accused and the Appellant) and Punishment (in respect of the 2nd Juvenile)].

[39] The offence of Aggravated Robbery in terms of Section 311 (1) of the Crimes Act carries a maximum penalty of 20 years imprisonment.

[40] The general tariff for the offence of Aggravated Robbery was held to be between 8 and 16 years imprisonment. This tariff was endorsed by the Supreme Court in ***Wallace Wise v. State*** [2015] FJSC 7; CAV 04 of 2015 (24 April 2015); where it was held:

> *".....We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them."*

[41] The current authority setting out the tariff for Aggravated Robbery is the Supreme Court decision in ***State v. Tawake*** [2022] FJSC 22; CAV 0025.2019 (28 April 2022). As per the tariff set out in the said case, the circumstances of this case would fall under the Category of *Aggravated Robbery (Offender with Another)* with the level of harm being in the *High* Category, which is a sentencing range of 5 to 9 years imprisonment.

[42] The Learned Resident Magistrate has made reference to the aforesaid Judgments of ***Wallace Wise v. State (Supra)*** and ***State v. Tawake (Supra)*** in his Sentence. Considering

the facts and circumstances of this case, he has correctly identified the level of harm as being high. Therefore, the sentencing range would be between 5 to 9 years imprisonment.

[43] The Learned Magistrate has adopted the Instinctive Synthesis Approach in passing the sentence in this case. He has referred to the Appellant's personal circumstances at paragraph 20 of the Sentence. He has highlighted the aggravating factors (in respect of all three offenders) from paragraphs 38 – 41 of the Sentence. At paragraph 44, he has stated that the Appellant will be given some limited discount due to the fact that she had stated during her testimony that she accepts that some stolen items were recovered from her home. He has considered the fact that the Appellant was a first offender and that she was around 19 years old at the time of the incident (Therefore, that the Appellant was a young offender). He has also stated that both the 2nd Juvenile and the Appellant were following the lead of the 1st Accused in this matter.

[44] At paragraphs 51-52 of the Sentence, the Learned Resident Magistrate has stated as follows:

"51. I take into account that all your personal circumstances has changed since the time of the offence which is almost 6 years ago. I have observed changes to your mannerisms and behaviour during the initial stages of the proceedings until now and they are positive for all of you. Your address to the parties and to the Court and even your dressing or attire had improved remarkably.

52. More importantly, all of you now have a young family to support. You are no longer the blithe youths or bachelors you once were when you committed the offence."

[45] Accordingly, considering all the above factors, the Learned Magistrate has imposed on the Appellant a sentence of 5 years and 2 months imprisonment (62 months imprisonment). Considering the time she had spent in remand, 18 days had been reduced from her sentence. Thus, the remaining period to be served was 61 months and 10 days imprisonment. Stating that a non-parole period should meet the objectives of her sentence, the Learned Magistrate has set out her non-parole period as of 10 months and 10 days imprisonment.

[46] In the circumstances, it cannot be said that the sentence imposed by the Learned Magistrate is harsh and excessive or is biased and unsupported by law.

[47] As could be observed, this sentence is at the lower end of the tariff of between 5 to 9 years imprisonment. Even the non-parole period stipulated by the Learned Magistrate is less than 12 months.

[48] Considering the aforesaid, I am of the opinion that the Grounds of Appeal against sentence are without merit.

Conclusion

[49] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[50] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Rakiraki, in Criminal Case No. 102 of 2017 [EJR 02 of 2017] is affirmed.

HIGH COURT OF FIJI AT LAUTOKA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA
This 4th Day of December 2024

Solicitors for the Appellant: **Appellant Appeared in Person.**
Solicitors for the Respondent: **Office of the Director of Public Prosecutions, Lautoka.**