

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE MAGISTRATES COURT  
*exercising extended jurisdiction*

CRIMINAL APPEALS AAU 109 OF 2016  
AAU 137 OF 2016  
(Magistrates Court No. 333/2011 at Lautoka)

BETWEEN : MISIRAINI TAGIDUGU  
ENERI NASANIBALO

*Appellants*

AND : THE STATE

*Respondent*

Coram : Calanchini P

Counsel : Mr K Prasad with Mr T Lee for the First Appellant  
Ms S Ratu for the Second Appellant  
Mr S Babitua for the Respondent

Date of Hearing : 19 September 2018

Date of Ruling : 29 November 2018

**RULING**

- [1] The appellants were convicted on their pleas of guilty on one count of aggravated robbery by the Magistrates Court at Lautoka exercising extended jurisdiction of the High Court.

On 26 July 2016 the appellants were each sentenced to a term of imprisonment of 8 years with non-parole periods of 6 years to be served concurrently with any existing sentences.

[2] On 23 August 2016 the appellant Nasanibalo filed a notice of appeal against sentence in error in the High Court registry at Lautoka. The notice of appeal was subsequently forwarded to the Court of Appeal Registry. The notice is to be regarded as timely. The appellant Tagidugu filed a timely notice of appeal against sentence on 23 August 2016. Both appeals are filed under section 21(1)(c) of the Court of Appeal Act 1949 (the Act). Leave is required. Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (Naisua -v- The State [2013] FJSC 14; CAV 10 of 2013, 30 November 2013).

[3] The appellant Tagidugu filed in person 8 grounds of appeal against sentence. The Legal Aid Commission by way of amended notice of appeal consolidated those grounds into the following:

- "1. *The learned sentencing Magistrate erred in law and fact in imposing a sentence of 8 years without considering the facts and circumstances of this case (grounds 1, 6 and 8).*
2. *The learned Sentencing Magistrate erred in law and principle when he acted upon the wrong aggravating features thereupon enhancing the sentence (ground 2).*
3. *The learned sentencing Magistrate erred in law and fact by not properly discounting the sentence for the appellant being a first offender (grounds 3, 4 and 7).*
4. *The learned sentencing Magistrate erred in law in not properly discounting the early guilty plea (ground 5)."*

[4] The grounds of appeal against sentence upon which the appellant Nasanibalo relies are:



- "1. That the learned sentencing Magistrate erred in law in using the aggravating factors that is (sic) already subsumed in the elements of the offence.*
- 2. That the delay in passing the sentence of the appellant after their guilty pleas entered on 6 May 2013 is unconstitutional."*

- [5] Before determining whether leave should be granted, it is appropriate to refer briefly to the circumstances of the offending as outlined by the sentencing magistrate. Both appellants and one other entered the complainant's flat by removing 3 louver blades. They threatened the complainant and her husband with a pinch bar, a crow bar and screw driver. The intruders demanded money. The premises were ransacked. These events happened on 1 May 2011 at about 2.20am. The appellants and then co-offender stole items with a total value of \$3,200.00. The complainant was forced to drive the appellants in her vehicle to Tavakubu Back Road. None of the stolen items were recovered.
- [6] Both appellants had pleaded guilty on 6 May 2013. However they were not sentenced until 26 July 2016. Between those two dates the Supreme Court decision in **Wallace Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015 was delivered on 24 April 2015. It is apparent that the sentencing Magistrate has applied the tariff recommended by the Supreme Court for a case involving a night time home invasion that is part of the circumstances of an aggravated robbery conviction. It is arguable that the tariff that was applicable in 2013 should have been applied in the present case or even perhaps the tariff that was applicable in 2011 when the offence was committed.
- [7] It must be remembered in sentence appeals from the Magistrates Court exercising extended jurisdiction of the High Court that the tariff for aggravated robbery applies equally to the Magistrates Court as it does in the High Court. The fact that the maximum sentence that can be imposed by a Magistrates Court for one offence is 10 years does not have the effect of reducing the tariff for sentencing in the Magistrates Court. If the offending is sufficiently serious and the Magistrate considers it necessary to impose a sentence beyond the jurisdictional limit, the matter should be referred to the High Court for the appropriate sentence to be imposed.

[8] I am of the view that the early guilty plea may not have been given sufficient discount and it is not apparent whether the appellants were on bail or in custody pending sentencing.

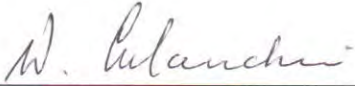
[9] The appellants were convicted under section 311(1) (b) of the Crimes Act which in general terms is aggravated robbery due to the presence of an offensive weapon. It is arguable that there has been an error by regarding the threat of violence with the offensive weapons as an aggravating factor when those matters form part of the element of the offence of aggravated robbery.

[10] In this case leave to appeal sentence should be granted to both appellants.

Order:

*Leave to appeal against sentence is granted to both appellants.*



  
Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**