

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 119; 115; 129 OF 2015
High Court Criminal Case: HAC 46 of 2015

BETWEEN : **ILAITIA NADAVULEVU** *1st Appellant*
MATAIASI MOCEILEVUKA *2nd Appellant*
IRAMI CEINATURAGA *3rd Appellant*

AND : **THE STATE** *Respondent*

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Mr T Lee for the 1st Appellant**
Mr M Fesaitu for the 2nd Appellant
3rd Appellant in Person
Mr A R Jack for State

Date of Hearing : **3 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read the judgment in draft form of Nawana, JA and I agree with the reasoning and conclusions.

Prematilaka JA

- [2] I have read in draft the judgment of Nawana, JA and agree with the reasons and conclusions therein.

Nawana JA

- [3] These are appeals by three appellants against their sentences upon convictions on three counts of aggravated robbery, punishable under Section 311 (1) (a) of the Crimes Act, 2009.
- [4] The charges preferred against the three appellants by the Director of Public Prosecutions were as follows:

COUNT 1

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311[1][a] of the Crimes Decree No.44 of 2009.*

Particulars of Offence

ILAITIA NADAVULEVU, MATAIASI MOCEILEVUKA and IRAMI CEINATURAGA on the 7th day of January 2015 at Suva in the Central Division, committed theft of cash of \$120, assorted jewellery valued at about \$4820, assorted electronic items valued at about \$5400, a pair Nike shoes valued at about \$200, assorted perfumes valued at about \$400 assorted clothes valued at \$300, and KIA OPTIMA motor vehicle registration number FX 665 valued at \$40,000 all to the total value of \$51,240, the property of KARUN GANDHI and immediately before committing theft used force on KARUN GANDHI with intent to commit theft.

COUNT 2

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311[1][a] of the Crimes Decree 44 of 2009.*

Particulars of Offence

ILAITIA NADAVULEVU, MATAIASI MOCELEVUKA and IRAMI CEINATURAGA on the 7th of January 2015 at Suva in the Central Division, committed theft of assorted gold jewellery valued \$8409, 1 Samsung mobile phone valued at \$309, assorted perfumes valued at \$800, 2 wrist watch valued at \$1450, 2 pair canvas shoes valued at \$300 all to the total value of \$11,268 the property

of MAMTA GANDHI and immediately before committing theft used force on MAMTA GANDHI with intent to commit theft.

COUNT 3

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311[1][a] of the Crimes Decree 44 of 2009.*

Particulars of Offence

ILAITIA NADAVULEVU, MATAIASI MOCEILEVUKA and IRAMI CEINATURAGA on the 7th day of January 2015 at Suva in the Central Division committed theft of assorted electronics items valued at \$5700, 2 pairs shoes valued at \$250, after shave valued at \$100 and 1 GB flash drive valued at \$16, all to the total value of \$6066, the property of JAIMESH GANDHI and immediately before committing theft used force on JAIMESH GANDHI with intent to commit theft.”

- [5] Each appellant pleaded guilty to each charge in three counts on 04 May 2015. Summary of facts, submitted at the sentence hearing on 25 May 2015, was admitted by all three appellants.

- [6] After hearing submissions in mitigation, the learned judge sentenced the first and the second appellants to terms of twelve year-imprisonment for each count with a non-parole period of eleven years; and, the third appellant to a term of fourteen year-imprisonment for each count with a non-parole period of thirteen years.

- [7] The sentences among the three appellants differed on the basis that the first and the second appellants, who were aged of 23 and 18 respectively, were first offenders, while the third appellant, aged 29, was not a first offender.

- [8] The appellants appealed the sentences on nine grounds. A single justice of appeal, by his ruling dated 15 May 2019, granted leave only in respect of the 2nd and the 9th grounds and refused leave in respect of the rest of the grounds holding that those grounds were not arguable.

- [9] The two grounds, upon which leave was granted, were as follows:

- “Ground (2)*
- (i) *Aggravation re-accounted, superfluous to charges of aggravated robbery.*

- Ground (9)*
- (ii) *The starting point is at the high end of the tariff whereby the aggravating factors being added to the charge of aggravated robbery made it harsh and excessive making ineffective any credit on mitigation allowed under the court discretion.”*

[10] At the hearing before the full court, the first and the second appellants were represented by counsel, while the third appellant appeared in person. Learned counsel, having filed written submissions dated 30 January 2020 and 27 November 2019, made further oral submissions in support of the two grounds of appeal upon which leave to appeal had been granted. The third appellant, too, made oral submissions and relied on the written submissions dated 24 December 2019.

[11] The summary of facts revealed that the three appellants had intruded into the dwelling of Mr Karun Gandhi, 51, in the thick of the night on 07 January 2015, by levering the rear door. Mr Gandhi; his wife Mrs Mamta Gandhi, 45; and, their son, Jaimesh Gandhi, 21, were asleep at the time of the intrusion. Mr Karun Gandhi, awakened by the noise of intrusion, saw the three appellants inside the sitting room of the house armed with a pinch bar, sticks and stones. The three inmates of the house were put in fear as they were threatened with hurt if any alarm was raised.

[12] The appellants then ransacked the house and stole the property belonging to Mr Gandhi. Mrs Gandhi and Mr Jaimesh Gandhi. They made their getaway with the robbed items in the car owned by Mr Gandhi, which was later found abandoned at an adjacent locality. The total value of the property robbed exceeded \$ 68,000.00.

[13] As the information disclosed, the items robbed were described in the counts in relation to each inmate with the corresponding value of the property. The police were able to recover the property worth \$ 44,200.00 only, while the rest appeared to have been disposed of by the appellants; hence, remained unrecovered.

[14] It is in light of these facts that the learned sentencing judge imposed the above sentences on the three appellants in pursuance of their convictions on their own

pleas of guilt. The learned judge, in his sentencing remarks, stated that ‘*Aggravated Robbery*’ was a serious offence and it carried a maximum penalty of twenty year-imprisonment in terms of Section 311 (1) of the Crimes Act, 2009.

[15] Having relied on *Nawalu v State* [2013] FJSC 11; CAV0012.12 (28 August 2013); unreported); and, *Wallace Wise v State*; [2015] FJSC 7; CAV 0004.2015 (24 April 2015), the learned judge underlined the distinction between the tariffs of sentences for a single instance of robbery and a spate of robberies by stating that the tariff of sentence for the former was only 8-16 years, while the tariff for the latter was 10-16 years.

[16] In determining the real sentence that was to be imposed on each appellant, the learned judge took into consideration aggravating factors and mitigating factors. The aggravating factors considered by the learned judge were:

- (i) Home Invasion Offence: This aggravated robbery was committed against a family (i.e. father, wife and son) while they were sleeping in their house at Prince Street, Tamavua at 2am in the morning on 7 January 2015. An attack on a family while resting in their house always a serious matter and will always wall for a higher sentence as a deterrence to others. It is the duty of the court to make clear to offenders that a heavy prison sentence will be given to home invaders, as a warning to others.
- (ii) This offending was carried at the complainant’s home while they were asleep at night.
- (iii) The offending was carried out with premeditation and planning.
- (iv) A pinch bar, a *bolt cutter* and *empty beer bottles* were used as weapons in this offending.
- (v) The victims were verbally threatened and their privacy were seriously compromised.

[17] The mitigating factors considered by the learned judge were:

- (i) The early guilty pleas;
- (ii) Being on remand for eight months;
- (iii) The first appellant, aged 23 years, and the second appellant, aged 18 years, were in their youth and they were first offenders; and,
- (iv) The property worth of \$ 44, 200.00 was recovered out of the property robbed worth \$ 68574.00

[18] The learned judge, having taken fourteen years as the starting point of the sentence within the range of 8-16 years, proceeded to add five years for aggravating factors and reduced it by four years for early guilty pleas. The resultant fifteen-year period was reduced by eight month-period to set-off the eight-month long detention on remand. Furthermore, four months were reduced to reflect a discount for the recovery of the part of the robbed items. The learned judge had, accordingly, arrived at the figure of fourteen years in respect of all three appellants at the conclusion of determining the sentence after taking into account the aggravating factors against mitigation.

[19] The learned judge gave effect to the fact that the first and the second appellants were young first offenders by reducing their sentences by further two years each resulting in the ultimate term of twelve years. The term of fourteen years on the third appellant was allowed to be in force because he was not a first offender.

[20] The term of sentence on each appellant, as applicable, was imposed in respect of each charge in counts (1), (2), and (3). The sentences were ordered to run concurrently with each other on application of the totality principle with effect from 10 September 2015.

[21] The twelve year-term of imprisonment on the first and the second appellants was subject to a non-parole period of eleven years, while the fourteen year-term of

imprisonment on the third appellant was subject to a non-parole period of thirteen years.

[22] Learned counsel for the first appellant submitted that the learned judge had increased the sentence by one year for each aggravating factor and added five years in total in order to denote the aggravation. The complaint of the learned counsel was that the decision in the case of Wallace Wise v State [2015] FJSC 7; CAV0004 of 2015 (24 April 2015), was silent on the actual figure for enhancing the sentence when considering the aggravating features other than to say that the sentences will be enhanced where additional aggravating factors were also present.

[23] It is important to note that the Supreme Court, in the case of an aggravated robbery, considered the following factors as those of aggravation for enhancement of the sentence in the case of Wallace Wise (supra). They were:

- “(i) offence committed during a home invasion;*
- (ii) in the middle of the night when victims might be at home asleep;*
- (iii) carried out with premeditation, or some planning;*
- (iv) committed with frightening circumstances, such as the smashing of windows damage to the house or property, or the robbers being masked;*
- (v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way;*
- (vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye; and,*
- (vii) the victims frightened were elderly or vulnerable persons such as small children.”*

[24] The second complaint of the learned counsel was that the learned judge ‘may have’ mistaken a fact; and, also erred by double-counting factors when considering the enhancement of the sentence on the basis of aggravation. The fact mistaken, as urged by the learned counsel, was in relation to the reference by the learned judge to a ‘bolt-cutter and empty beer bottles’ when the summary of facts had, in fact, not

referred to such items as weapons of offence. Similarly, an error was sought to be attributed to the learned judge on the basis that the learned judge ‘may have fallen into error of double counting’ in replicating the factors in paragraph 6 (i), (ii) and (iii).

- [25] Learned counsel for the second appellant, too, complained that there was double counting by the learned judge when he relied on certain factors of aggravation after picking-up a starting point of fourteen years at the higher end within the range of the sentence of 8-16 years. Learned counsel relied on the decision in the case of Nadan v State [2019] FJHC 29; CAV0007.2019 (31 October 2019), where the phenomenon of double counting was commented on.
- [26] The third appellant, too, made the complaint of double counting and relied on the written- submissions he had filed in support of the appeal.
- [27] Learned counsel for the state in his oral arguments and in the written submissions contended that the good practices suggested by the authorities would not have to be adopted in every case by a sentencing judge. It was his position that the discretion of a judge is paramount and not limited by such practices; and, what matters is the imposition of a just and fair sentence proportionate to the gravity of the offence.
- [28] Learned counsel for the state further submitted that the learned judge had given consideration to the seriousness of the offence but not to the offending in paragraph 5 of the sentencing ruling. Instead, the learned judge had identified the aggravating factors and mitigating factors in paragraphs 5 and 6 respectively of the ruling. Learned counsel advanced the proposition that, even though the reference to the home invasion as an aggravating factor was made, it had not been considered as a factor in determining the starting point.
- [29] I have considered the two grounds of appeal, submissions made in support by learned counsel for the 1st and the 2nd appellants and the third appellant in person in light of the above and the statutory provisions, as applicable, in the Sentencing and Penalties Act, 2009, in this appeal seeking a review of the correctness of the

sentence. I have also considered the submissions of the learned counsel for the state, who relied on case precedents precisely on the point.

- [30] I am of the view that it is a matter of essential importance to have a uniform approach in the deliberations of judges on matters of sentence in the same way that they do have on the application of legal principles in the conduct of judicial proceedings.
- [31] The process of sentencing and its decision-making, however, seems to be a very complicated exercise of judicial functioning, which, more often than not, appears to be filled with inconsistencies or lack of uniformity. As a result, disparity of sentences is often seen, which certainly causes concern to accused-persons who stand charged for the same offence in identical circumstances; and, also to the system of justice.
- [32] It is, indeed, a continuing effort all over the world to set a structured and easily understandable sentencing formula, at least at optimal levels, as the human mind hardly thinks the same, although the matter upon which learned judges have to rule on, is the same.
- [33] The concept of tariff that is hardened into the sentencing structure in Fiji seeks to ensure uniformity and consistency in sentencing. The selection of the starting point of the sentence, which is an important step in the process, in my view, is an opportunity where a great deal of consistency and uniformity can be infused into, on the basis of acceptable principles.
- [34] His Lordship Justice Goundar, in *Laisiasa Koroivuki v State*; [2013] FJCA 15; AAU0018.2010 (05 March 2013), had this to say with approval, on the tariff and the starting point in a sentence:

[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When

punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range

(Underlined for emphasis)

[35] This holding of Goundar J., with which Chandra J. and Lecamwasam J. agreed, has the effect of ensuring that potential aggravating factors are not subsumed in the starting point by adding colour to the offence on the basis that the offence at hand is a serious offence; and, hence fixing the starting point at a higher end.

[36] His Lordship Brian Keith J., after relying on Seninlokula vs State [2018] FJSC 5; and, Kumar v State [2018] FJSC 30, said in Nadan v State (supra):

The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors, which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had, therefore, fallen into the trap of double counting.

(At paragraph 41)

[37] The views of the Supreme Court, in the case of Kumar v State [2018] FJSC 30, would be instructive in that regard. The Supreme Court in that case said:

[56] ...If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[57] ... First, a common complaint is that a judge has fallen into the trap of “double-counting”, ie: reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.

[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years’ imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of “double-counting”, which must, of course, be avoided.

- [38] I am of the view that there was double counting as complained by the three appellants when the learned judge considered a series of aggravating factors to enhance the sentence by five years after selecting a starting point of fourteen years at a higher end within the range of 8-16 year-sentence for the offence of aggravated robbery punishable under Section 311 (1) (a) of the Crimes Act, 2009.
- [39] Such double counting could occur when the learned judge, having considered the home invasion and its inherent surrounding circumstances as factors of aggravation, kept on adding that (i) the offending was carried out at the complainant’s home while they were sleeping; and, (ii) the victims were verbally threatened and their privacy were seriously compromised as aggravating factors.
- [40] Moreover, taking into account pre-meditation and planning as factors of aggravation was wrong in principle as such matters were already existent in the offence of aggravated robbery as elements of the offence, in terms of Section 311 (1) (a) of the Crimes Act, 2009, refers to the offence being committed whilst being in a group.

[41] The learned judge had, on the other hand, erred in his reference to the weapons of offence that the appellants were alleged to have been armed with, when some such weapons were not reflected in the summary of facts as admitted by the appellants. It is wrong in principle to import new factors that were not agreed to by an accused-person at the time of tendering the plea of guilty before imposing the sentencing by a judge.

[42] In the circumstances, I am of the view that the matters complained of, on the basis of the two grounds of appeal, satisfy the criteria as set-out by the Supreme Court in Naisua v State [2013] FJSC 14; CAV0010.2013 (20 November 2013) to justify the intervention with the sentence by this court. The Supreme Court, in Naisua v State (supra) held that an appellate court would interfere with a sentence imposed by a trial court if it is shown that:

- (i) That the learned judge acted upon a wrong principle;
- (ii) That the learned judge allowed extraneous or irrelevant matters;
- (ii) That the learned judge mistook facts; and,
- (iii) That the learned judge failed to take into account some relevant considerations.

[43] I conclude that the learned judge, in this case, had acted upon wrong principle and had mistaken facts. This court, in the exercise of the powers in terms of Section 23 (3) of the Court of Appeal Act, needs to pass such other sentence that may deem necessary in order to effect correction in the sentence imposed by the learned judge.

[44] I would, accordingly, order that the 1st and the 2nd appellants be awarded with a term of ten year-imprisonment each; and, the 3rd appellant with a term of 12 year-imprisonment. I would further order that the 1st and the 2nd appellants shall serve a minimum period of seven (7) year-imprisonment before being eligible for parole. The 3rd appellant shall serve a minimum period of ten (10) year-imprisonment before being eligible for parole.

[45] I am of the view that such lengths of imprisonment would meet the ends of justice and would meet the objectives as laid down in Section (4) of the Sentencing and Penalties Act, 2009.

Orders, accordingly, are:

- (i) *Appeals of the appellants allowed;*
- (ii) *Sentences imposed by the High Court quashed and set aside;*
- (iii) *1st and the 2nd appellants are sentenced to a ten-year term of imprisonment each with a non-parole period of seven years; and,*
- (iv) *3rd appellant is sentenced to a term of twelve year-term of imprisonment with a non-parole period of ten years.*



Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL