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

CRIMINAL APPEAL NO. HAA 10 OF 2017

IN THE MATTER of an Appeal from the decision of the Suva Magistrate's Court, in Criminal Case No. 474 of 2016.

BETWEEN : **ASAELI VAKANANUI NABUKA**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Ms. Lavinia David for the Appellant
Ms. Siteri Navia for the Respondent

Date of Hearing : 13 October 2017

Judgment : 9 March 2018

JUDGMENT

[1] The Appellant was charged before the Magistrate's Court of Suva, in Criminal Case No. 474 of 2016 with one count of Attempted Robbery, contrary to Section 44(1) and 310 (1) (b) (i) of the Crimes Act No. 44 of 2009 ("Crimes Act"), as follows:

CHARGE

Statement of Offence

ATTEMPTED ROBBERY: Contrary to Section 44(1) and 310 (1) (b) (i) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ASAELI NABUKA, on the 14th day of March 2016, at Lami in the Central Division, attempted to steal the coin money box from **AKUILA VAKADRANU**, and at the time of attempting to commit theft, used force on **AKUILA VAKADRANU**.

[2] On 29 September 2016, the Appellant pleaded guilty to the charge, on his own free will. On the same day, the Summary of Facts were read out and explained to the Appellant who admitted to same. It is recorded in the proceedings of 29 September 2016, that the Appellant had waived his right to counsel.

[3] On 9 January 2017, the Appellant was sentenced to a term of 8 years imprisonment, with the non-parole period set at 7 years imprisonment.

[4] Aggrieved by this Order, the Appellant submitted an Appeal against the Sentence, which was received at the Registry of the High Court on 30 January 2017. The Appeal was filed in person and was filed within time.

[5] On 27 April 2017, the Legal Aid Commission appeared as counsel for the Appellant, and on 11 May 2017, was granted leave to file Amended Grounds of Appeal.

[6] On 9 June 2017, the Commission filed the Amended Grounds of Appeal. The Appellant moved to appeal his Sentence on the following grounds:

(i) THAT the Learned Magistrate erred in principle when he granted a discount on early guilty plea on the initial reduction of the sentence rather than considering it as the final component of the sentence.

(ii) THE Learned Trial Magistrate erred in principle in fixing the non-parole period too close to the head sentence.

(iii) THE sentence passed by the Learned Magistrate is manifestly harsh and excessive.

[7] As could be seen from the above, the Appellant has filed the Appeal only against his Sentence.

[8] Both Counsel for the Appellant and the State filed written submissions, and also referred to case authorities, which I have had the benefit of perusing.

Law and Analysis

[9] 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)."*

[10] 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."

[11] 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.

Ground 1

[12] That the Learned Magistrate erred in principle when he granted a discount on early guilty plea on the initial reduction of the sentence rather than considering it as the final component of the sentence.

[13] In terms of Section 310 (1) of the Crimes Act:

> **310. — (1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and —**
>
> *(a)* immediately before committing theft, he or she—
>
> (i) uses force on another person; or
>
> (ii) threatens to use force then and there on another person —
>
> with intent to commit theft or to escape from the scene; or
>
> ***(b)* at the time of committing theft, or immediately after committing theft, he or she—**
>
> **(i) uses force on another person**; or
>
> (ii) threatens to use force then and there on another person—

with intent to commit theft or to escape from the scene.

[Emphasis is mine].

The prescribed penalty for this offence is a term of imprisonment for 15 years.

[14] In terms of Section 44 (1) of the Crimes Act "A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed."

[15] In ***State v. Baleikivuya*** [2011] FJHC 467; HAC095 of 2010 (12 August 2011); His Lordship Justice Temo stated that:

""Attempted robbery" carries the maximum sentence of 15 years imprisonment. The tariff in this type of cases is a sentence between 8 to 14 years imprisonment. I agree with and accept His Lordship Justice Goundar's statements in ***State v. Elia Manoa****, Criminal Case No. HAC 108 of 2009 and 61 of 2010, High Court, Suva. The actual sentence will again depend on the mitigating and aggravating factors."*

[16] This sentence was later confirmed by the Court of Appeal in ***Baleikivuya v. State*** [2016] FJCA 16; Criminal Appeal No. AAU 81 of 2011 (26 February 2016).

[17] In ***Rarawa v. State*** [2015] FJHC 324; Criminal Appeal No. HAA 5 of 2015 (30 April 2015); His Lordship Justice Madigan held as follows:

"[8] The maximum penalty for robbery is 15 years imprisonment and the maximum penalty for aggravated robbery is 20 years imprisonment.

[9] Up until 1st February 2010, the Penal Code being the then operative criminal law prescription, robbery could be robbery simpliciter (s.293(2)) with a maximum penalty of 14 years or aggravated robbery being armed with offensive weapons or robbery with violence (ss.293(1)(a) and 293(1)(b) respectively). Both of these aggravated offences attracted a maximum penalty of life imprisonment.

[10] This latter offence of robbery with violence has not been translated into the Crimes Decree as a separate offence. There is no longer an offence of robbery with violence and it is not part of the offence of aggravated robbery which is predicated on either plurality of offenders and/or the possession of offensive weapons. Violence is not mentioned. A robbery with violence is now then subsumed in the offence of robbery.

.....

[15] While the tariff for aggravated robbery is now well settled, the tariff for robbery simpliciter is not. It has been informally accepted to be between 4 and 8 years imprisonment but it is quite apparent that such a range is totally inadequate for robberies that are carried out accompanied by violence. The use of violence in robberies should still attract the stiff penalties that they did under the Penal Code regime whilst robberies with little or no violence could be visited with a sentence of 3 or 4 years depending on the circumstances.

[16] To facilitate sentencing for robbery simpliciter, it would be appropriate to apply two tariffs one for robberies accompanied by violent force should be in the range of 8 to 14 years (in recognition of the lower maximum penalty applied to robbery by the legislature as opposed to the penalty for aggravated robbery). The general tariff for robbery, not accompanied by violence, can then be visited with sentences in the range of two to seven years.

[18] In passing the sentence the Learned Magistrate has made reference to the above Judgments and the relevant tariff.

[19] In determining the starting point within a tariff, the Court of Appeal, in ***Laisiasa Koroivuki v State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"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 time. 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."

[20] In this case, the Learned Magistrate has chosen 8 years as the starting point. Having regard to the objective seriousness of the offence it was well within his discretion to select 8 years as the starting point in this case.

[21] The Magistrate has increased the sentence by 2 years for the aggravating factors thereby making the sentence 10 years. 1 year has been deducted for mitigation and 1 year for the guilty plea, thereby ending up with a sentence of 8 years imprisonment.

[22] In ***Rainima v. State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015); His Lordship Justice Madigan took the view that:

"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance."

[23] However, this contention was rejected by His Lordship Justice Goundar in ***Ashwin Prasad v. The State*** (unreported) Criminal Appeal No. HAA 39 0f 2016 (14 March 2017); where he held *"....Provided the sentencing court considers the guilty plea, there is no legal requirement for the discount for guilty plea to be assessed on numerical terms."*

[24] In ***Qurai v. State*** [2015] FJSC 15; CAV 24 of 2014 (20 August 2015); the Supreme Court held (per His Lordship Justice Marsoof):

> *"In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges."*

[25] Similarly, in ***Bonaseva v. State*** [2015] FJSC 12; CAV 22 of 2014 (20 August 2015); His Lordship Chief Justice Gates said:

> *"Sentencing is not an exact science: **Maciu Koroicakau v The State** [2005] FJSC 5; CAV0006.2005S (4 May 2006). It is an exercise of discretion and it must remain a practiced art. The judge might have granted a discount appropriate to the mitigating factors after allowing such discount as appropriate for the guilty plea."*

[26] Having considered the relevant case authorities, it is clear that there is no legal requirement for the discount for guilty plea to be assessed on numerical terms, provided the sentencing court considers the guilty plea. In this case, the Learned

Magistrate has considered the guilty plea and deducted one year from the sentence to be imposed on the Appellant.

[27] However, considering all the facts and circumstances of this case, I am of the opinion that the Learned Magistrate should have granted a greater concession for the early guilty plea. Accordingly, I reduce 3 years from the sentence for the early guilty plea.

[28] Accordingly, the sentence would be 6 years imprisonment. This would bring the sentence outside the tariff of 8 to 14 years imprisonment for Attempted Robbery. However, considering the fact that the Appellant is said to be a first offender, is said to be remorseful of his actions and has pleaded guilty to the offence, it is the opinion of this Court that, it is not unreasonable to go outside the relevant tariff.

Ground 2

[29] That the Learned Trial Magistrate erred in principle in fixing the non-parole period too close to the head sentence.

[30] Section 18 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act"), which deals with the provisions of fixing of non-parole period by the sentencing court, is re-produced below:

> *"(1) Subject to sub-section (2),* ***when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.***
>
> *(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).*
>
> *(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.*

(4) ***Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.***

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented under a law making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6)."

[Emphasis is mine].

[31] In ***Bogidrau v. State*** [2016] FJSC 5; CAV 31 of 2015 (21 April 2016); the Supreme Court held (per His Lordship Justice Brian Keith):

> *"Section 18 of the Sentencing and Penalties Decree provides for the fixing of a non-parole period. Unless the nature of the offence or the past history of the offender make the fixing of a non-parole period inappropriate, the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender may not be released. The non-parole period was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission. At present there is no mechanism in place to enable prisoners to be released on parole: a parole board, or an equivalent body, has not yet been created. That means that the only route by which an offender can currently be released before the*

expiry of his head sentence is by the operation of the current practice relating to remission."

[32] It was further held:

"Section 18(4) of the Sentencing and Penalties Decree provided that the non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:

(i) "[T]he non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent": per Calanchini P in ***Tora v The State*** *[2015] FJCA 20; (AAU 63 of 2011 (27 February 2015)).*

(ii) "[T]he sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court. It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment": ***Maturino Raoga v. The State*** (CAV 003 of 2010, 19 August 2010).

[33] However, in ***Singh v. The State*** [2016] FJCA 126; AAU 9 of 2013 (30 September 2016); the Court of Appeal concluded:

"I am also of the view that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended."

[34] Therefore, it is clear that fixing of the non-parole period is at the sole discretion of the sentencing judge. In the instant case, the Learned Trial Magistrate has fixed the non-parole period as one year less than the head sentence. This Court is not inclined to interfere with the decision of the Learned Magistrate.

Ground 3

[35] That the sentence passed by the Learned Magistrate is manifestly harsh and excessive.

[36] Having considered all the facts and circumstances of this case, this Court has decided to reduce the sentence imposed on the Appellant from 8 years to 6 years imprisonment. Therefore, it is no longer necessary to go into this Ground of Appeal.

Conclusion

[37] In the light of the above, the Appeal against the Sentence is allowed.

[38] The 8 years term of imprisonment imposed on the Appellant is reduced to 6 years imprisonment. The Appellant will not be eligible for parole until he serves 5 years of this sentence.

[39] For the sake of clarity, this sentence of 6 years and the non-parole period of 5 years shall be effective from 9 January 2017.

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

At Suva
This 9th Day of March 2018

Solicitors for the Appellant : Office of the Legal Aid Commission, Suva.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Suva.