

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

CRIMINAL APPEAL AAU 30 OF 2017
(Magistrates Court No. 738 of 2015 at Suva)
(with AAU 108 of 2016 & AAU 116 of 2017)

BETWEEN : **ELENOA VOTABUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **20 November 2018**

Date of Ruling : **18 December 2018**

RULING

[1] The appellant (along with Senivuya Tikoisuva Tamani and Joji Telamaitoga) was convicted on her plea of guilty by the Magistrates Court exercising extended jurisdiction at Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes

Act 2009. On 21 July 2016 the appellant and her co-accused each received a sentence of 8 years imprisonment with non-parole terms of 5 years.

- [2] This is the appellant's application for an extension of time for leave to appeal against sentence. The application is made under section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives power to a single judge of the Court to enlarge time.
- [3] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced: **Kumar and Sinu -v- The State [2012] FJSC 17; CAV 1 of 2009, 21 August 2012.**
- [4] The application will be taken to have been made when the appellant in error filed in person a notice of appeal against sentence in the High Court Registry on 27 February 2017. The appeal is about 6 months out of time. The explanation for the delay is set out in her supporting affidavit sworn on 7 March 2018. The appellant maintains that she had sent a letter of appeal dated 29 July 2016 to the Corrections Office. It would appear that the Corrections Office did not receive the letter until 24 February 2017. There is a copy of a letter dated 29 July 2016 exhibited to the affidavit. That letter appears to have been received by the Corrections service on 6 April 2017. In the file there is a letter dated 29 July 2017 that appears to have been received by the Corrections Office on 24 February 2017. Neither of these discrepancies has been explained by either party. In any event the application proceeded on the basis that the appeal was about 6 months late. The appellant has not satisfied me that there is any compelling explanation for the delay. The issue then is whether the appeal is likely to succeed.
- [5] Before proceeding further it is appropriate to state briefly the relevant background facts. During the night of 24 February 2015 the 60 years old complainant and his six years old

son were sleeping in their home in Suva. The complainant was woken up by a person knocking on his bedroom door and asking for Panadol. The complainant got up, tried to turn on the light but there was no power. He found some Panadol and opened the door. Three masked men entered the bedroom and confronted the complainant. The intruders threatened the complainant and locked his son in the bathroom. One intruder held a knife to the complainant's neck and the other two searched the premises. Cash and assorted items of value including jewellery to the total value of \$10,213.00 were stolen by the intruders.

[6] The grounds of appeal against sentence are:

- “1. *The learned Resident Magistrate erred in law and fact in failing to give the proper discount for a first offender.*
2. *The learned Resident Magistrate erred in law and fact in failing to give the proper discount for the items being (sic) recovered*
3. *The learned Resident Magistrate erred in law by enhancing the sentence based on improper aggravating factors.”*

[7] In the first ground the issue is the discount given by the Magistrate for a first offender. It must be recalled that the discount is given for good character and being a first offender is only one aspect of good character. As a young person the significance of no prior criminal history is not as great as for an older person. The Court allowed a discount of 2 years for good character. There is no error in that discount.

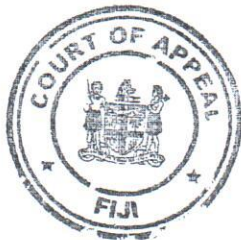
[8] The appellant's submissions refer to the decision of **Tevita Jone Rami v Reginam** (1963) 9 Fiji LR 69 and the observations of Mac Duff CJ concerning the desirability of imposing a short sharp sentence on a young convicted offender. Those observations must be considered in the context of the offence. In **Rami** (supra) the conviction was for larceny by a servant involving property to the value of £5. However aggravated robbery is a serious offence for which the maximum sentence is 20 years and for which the courts

have settled on a tariff for one instance of night time home invasion of 10 – 16 years. The principles in the Rami (supra) decision cannot apply in this case.

- [9] The issue of not allowing a discount for the recovery of items stolen does not constitute an arguable error in the exercise of the sentencing discretion in this case.
- [10] The third issue relates to aggravating factors for enhancing the sentence. The appellant was convicted for aggravated robbery under section 311(1)(a) of the Crimes Act 2009. This offence is aggravated robbery in the form of robbery in company. It is correct to argue that the offence of robbery consists of stealing and the use of or the threat of force. However the degree of force and the circumstances under which the force is used or threatened may be aggravating factors.
- [11] The sentence is at the lowest end of the range for this type of offending. For the reasons stated the appeal against sentence is unlikely to succeed. As a result the application for an enlargement of time is not likely to succeed.

Order:

Application for an enlargement of time refused.



W. Calanchini

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