

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

**CRIMINAL APPEAL NO. AAU0023 OF 2007.**  
(High Court Criminal Case No. HAC008 of 2006)

**BETWEEN:**                                 **PENI BAINIVALU**                                 **Appellant**

**AND**                 **:**                                 **THE STATE**                                 **Respondent**

**Coram:**                                 Ward, President  
Ellis JA  
Penlington, JA

**Hearing:**                                 Wednesday 20<sup>th</sup> June 2007

**Counsel:**                                 Appellant in person  
Ms A Prasad for the respondent

**Date of Judgment:**     Monday 25<sup>th</sup> June 2007

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**JUDGMENT OF THE COURT**

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[1]     An appeal against sentence. The appellant pleaded guilty in the High Court to one charge of robbery with violence contrary to section 293 (1)(b) of the Penal Code. He was sentenced to 5 years imprisonment. The other two men who faced charges arising out of the incident stood trial and were subsequently convicted of murder.

[2] The Summary of Facts relates:

“On Saturday 11<sup>th</sup> February 2006 at about 1040pm at Kewals Yard, Kalabu, Stage 3A, 6½ miles, Peni Bainivalu alias ‘Ben Ache’ aged 26 of Raiwai and two others were involved in a confrontation with three others.

On this day Mohammed Azim Khan (the deceased), Ashwin Kumar and Mohammed Maushin went searching for two of their friends who were late in returning from a nearby shop.

On their way towards the shop at Kewals Yard, these three men were confronted by Peni Bainivalu and two others. During this confrontation Peni Bainivalu and his companions attacked the deceased Mohammed Azim Khan and Ashwin Kumar. One of Peni Bainivalu’s companion’s also used a knife during this robbery which the 3<sup>rd</sup> accused came to know about later on after the robbery. Peni Bainivalu used personal violence against the deceased Mohammed Azim Khan. Peni Bainivalu firstly pushed the deceased and then punched the deceased on his head and face.

The police carried out investigations and Peni Bainivalu was questioned under caution. Peni Bainivalu admitted being part of the robbery and using violence in his Record of Interview where he described how the events unfolded.”

[3] The sentencing Judge accepted that the appellant did not know of the knife until afterwards. She recorded that only \$12 was taken, that the appellant did not cause the death of the deceased, that he was a first offender, was in steady employment as an electrical maintenance engineer and while on bail worked very well for an employer who wrote to the Court commending him. She found that he had committed the offence because of peer pressure and had expressed remorse.

[4] The Judge then referred to *Singh and others v State* C.A. AAU0008 of 2005 where this Court discussed the principles of sentencing in cases of this kind. She recorded that in New Zealand there had been a significant trend to higher sentences for the more serious cases of aggravated robbery. That trend is evident in Fiji also where this is real concern at the prevalence of this type of offence.

[5] In *Singh* this Court said at page 9:

“A robbery with violence either actual or threatened will always give rise to serious consequences. If not actual and physical then certainly psychological; and as has been pointed out it is the threat of such consequences which is the whole basis of such behaviour. The vulnerability of the victims and the effect on them and their lives must rank high in the scale of aggravating circumstances.”

In the present case a man was killed. The appellant was not charged with the killing but it fully bears out the seriousness of this type of robbery.

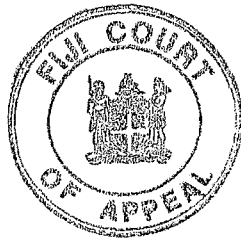
[6] The Judge took all the factors we have mentioned into account picked the starting point of 7 years imprisonment and deducted 2 years for previous good character, guilty plea and youth and so arrived at the sentence of 5 years imprisonment.

[7] Before us the appellant submitted that insufficient credit was given for the fact that he did not get any money himself, the fact that he was a first offender and had no previous history of violence and that he was the only breadwinner in his family.

[8] The appellant also submitted that in the Magistrate's Court he was only charged with assault and he had tried to stop the fighting and his finger was bitten by the victim when he the appellant was retaliating to a punch. He told us that he gave himself up to the police and told them what had happened.

[9] It is true the Judge did not explicitly refer to all the matters raised by the appellant but in our view they are subsumed by the credit given for the guilty plea and the fact he was only charged with robbery with violence. The credit for being a first offender and a good worker was also taken into account. We are of the opinion the selection of the 7 year starting point and the reduction of 2 years properly assesses the criminality and credit to the appellant.

[10] For the above reasons we dismiss the appeal against sentence.



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Ward, President

*[Handwritten signature]*

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Ellis, JA

*[Handwritten signature]*

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Penlington, JA

**Solicitors:**

**Appellant in person**

**Office of the Director of the Public Prosecutions, Suva for the Respondent**