

**IN THE COURT OF APPEAL
AT SUVA**

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0082 OF 2011

BETWEEN : **ESIRA NAWAQALEVU**

APPLICANT

AND : **THE STATE**

RESPONDENT

COUNSEL : **Applicant in Person**

Mr. Prasad for Respondent

Date of Hearing : **25 June 2013**

Date of Ruling : **1 July 2013**

RULING

[1] This is an application for leave to appeal against sentence. Initially, the applicant had appealed against conviction as well, but that appeal was abandoned at the hearing of this application. The only complaint is that the sentence is harsh and excessive.

- [2] The applicant was jointly charged with two others with one count of murder and one count of robbery with violence. Before the commencement of his trial, the applicant pleaded guilty to the charge of robbery with violence but not to murder. The trial commenced in the High Court at Labasa on the murder charge, and after the close of the case for the prosecution, the learned trial judge acquitted the applicant of the murder charge. The applicant was sentenced to 9 years' imprisonment for the robbery with violence.
- [3] The facts were that on 6 December 2009, the applicant and his two accomplices planned to rob a small grocery shop located in the rural community in Bua, Vanua Levu. They entered the compound at the night time by cutting open the fence. At the time, an elderly watchman and his wife in their late sixties were guarding the shop. The intruders assaulted the elderly couple with a piece of timber (3 x 2). The watchman received physical injuries to his head. The intruders took off after stealing groceries to a total value of \$2,711.00.
- [5] At the time of the offending, the applicant was 27 years old, unemployed and married with 3 children. He was not a first time offender. The personal circumstances of the applicant and his early guilty plea were taken into account as the mitigating factors by the learned judge.
- [6] Using a starting point of 10 years from the establish tariff for robbery with violence, the learned judge increased the sentence by 4 years to reflect the aggravating factors and reduced the sentence by 5 years to reflect the mitigating factors.

[7] The same starting point and aggravating factors were used to arrive at the sentences of the two accomplices. However, since they were first time offenders, a further reduction was made to their sentences. They were sentenced to 7 years' imprisonment. The previous good character of the two accomplices explains the disparity in the sentences between them and the applicant.

[8] In determining whether to grant leave to appeal against sentence, I am bound by the judgment of the Full Court in *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999) at paragraph 2:

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)55 CLR 499).

[9] After considering the submissions of the applicant, I am not convinced that there is an arguable ground showing an error in the sentencing discretion exercised by the learned High Court judge to impose a term of 9 years' imprisonment for a dreadful robbery on an elderly vulnerable couple. The sentence could hardly be considered harsh and excessive in the circumstances of this case.

[10] Leave is refused.

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DANIEL GOUNDAR

JUDGE

Solicitor:

Applicant in Person
Office of the Director of Public Prosecutions for Respondent.