IN THE COURT OF APPEAL, FIJI
[On Appeal from the Extended Jurisdiction of the Magistrates' Court]

CRIMINAL APPEAL NO.AAU0032/2011 & AAU118/2013
[Magistrates' Court Criminal Case No.1498 of 2009]

BETWEEN	:	**JOSHUA BENJAMIN ROGERS**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Basnayake JA** **Lecamwasam JA** **Goundar JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Ms S Puamau for the Respondent**
Date of Hearing	:	**17 November 2017**
Date of Judgment	:	**30 November 2017**

JUDGMENT

Basnayake JA:

[1] I agree that this appeal should be dismissed.

Lecamwasam JA:

[2] I agree with Goundar JA that the appeal should be dismissed.

Goundar JA:

[3] This is an appeal against sentence from the extended jurisdiction of the Magistrates' Court at Suva. The appellant was jointly charged with three others with two counts of robbery with violence contrary to section 293 (1) (b) of the Penal Code, Cap. 12. The offences arose from the same transaction. Two women were robbed in their home on 19 November 2009. The two counts reflected the two victims.

[4] On 23 November 2009, all four accused appeared in the Magistrates' Court. On 8 February 2010, plea was taken. The appellant pleaded not guilty to the charges. Subsequently, the Magistrates' Court's jurisdiction was extended to hear the trial pursuant to section 4(2) of the Criminal Procedure Act 2009.

[5] On 27 September 2010, the appellant pleaded guilty to the charges in the Magistrates' Court. Earlier on in the proceedings before the Magistrates' Court, the appellant had indicated his intention to plead guilty. He was represented by counsel when he pleaded guilty. He admitted the facts tendered by the prosecution in support of the charges.

[6] The facts were that the appellant together with three others forcefully entered the victim's home during the daytime on 9 November 2009. The premises were also used to operate a shop. The intruders were armed with a pinch bar that was used to forcefully open the burglar-grill door to gain entry. The occupants at the time were two women. One was middle age. The other was a younger woman. The intruders threatened them with the use of violence if they raised alarm. The older victim was dragged by her hair before her mouth and hands were gagged with a tape. The younger victim was also gagged in the same manner. The intruders stole cash, liquor, cigarette, mobile recharge cards and jewellery all to the value of about $11,000.00 before fleeing the scene. When the appellant was arrested, he admitted the offence under caution.

[7] On 29 December 2010, the appellant was sentenced to a head sentence of 8 years imprisonment. The learned Magistrate ordered 4 years of the head sentence to be served concurrently and the remaining 4 years to be served consecutively with his

pre-existing sentence of 7 years' imprisonment imposed on 3 September 2010 by the Nasinu Magistrates' Court in an unrelated case.

[8] On 20 January 2011, the appellant applied for leave to appeal against sentence only. The appeal was timely. On 28 March 2013, Madigan JA refused leave on all except on the question whether the sentence of 8 years' imprisonment should have been made wholly concurrent instead of partially concurrent.

[9] On 5 December 2013, the appellant applied for an enlargement of time for leave to appeal against conviction. That application was refused by a single justice of appeal. Subsequently, the appellant renewed his application for an enlargement of time to appeal against conviction before the Full Court, but at the hearing, the application was abandoned. The appellant informed the Court that he made the decision to abandon his renewed application for leave to appeal against conviction in the Criminal Case No 1498 of 2009 freely and voluntarily and with an understanding that his appeal against conviction will be dismissed as a result. The appeal against conviction being abandoned is dismissed.

[10] The appeal against sentence is now advanced on two additional grounds, namely,

1. The Learned Sentencing Magistrate failed to separately deduct the time spent in remand.
2. There is a disparity in sentencing in that some of the Appellant's co-accused received a lesser sentence than the Appellant thus injustice caused to the Appellant.

[11] At the hearing, it was discovered that the appellant had been sentenced in other cases against him before and after the sentence subject of this appeal was imposed. A summary of his sentences are as follows:

Case No 1019/06
3 July 2010 - Giving false name to a police officer - 6 weeks imprisonment

Case No 199/07
27 July 2010 - Damaging property & Larceny – 14 months imprisonment - concurrent to 1019/06

Case No 2602/04, 2245/06 & 1333/07
27 July 2010 - Larceny from person, larceny, larceny from dwelling house – 15 months imprisonment – concurrent to 199/07

Case No 198/07
20 August 2010 - Warehouse breaking entering & larceny – 20 months imprisonment – 20 months imprisonment – concurrent to 2602/04, 2245/06 & 1333/07

Case No 226/09
6 September 2010 - House breaking with intent to commit felony – 15 months imprisonment – concurrent to 198/07

Case No 393/09, 394/09, 395/09, 396/09
22 September 2010 - Robbery with violence (4 counts) & Office breaking entering larceny – 7 years imprisonment – consecutive to 226/09

Case No 394/09
29 December 2010 - Robbery with violence (2 counts) – 8 years imprisonment – 4 years concurrent & 4 years consecutive to 393-396/09.

Total effective as of 29 December 2010 – 12 years 8 months imprisonment

Case No 1340/07
Warehouse breaking entering larceny – 27 months imprisonment – 16 March 2011 – concurrent to 394/09

Case No 200/07 & 1334/07
Damaging property & larceny – 12 months imprisonment – 15 April 2011 – consecutive to 1340/07 according Criminal Records Office but unclear from the warrant of commitment.

Total effective as of 15 April 2011 – 13 years 8 months imprisonment.

[12] An appellate court reviews a sentence for errors in the exercise of the sentencing discretion (*Kim Nam Bae v The State* unreported Cr App No AAU0015 of 1998S; 26 February 1999).

Whether there is an error in the exercise of the sentencing discretion in making the sentence partially consecutive to a pre-existing sentence?

[13] The appellant's complaint is that the learned Magistrate made the sentence partially consecutive for wrong reasons. He submits a reasoned justification is required to depart from the default position provided by section 22 (1) of the Sentencing and Penalties Act 2009 and by the common law (*Asaeli Vukitoga v State* unreported Cr App No AAU0049 of 2008; 13 March 2013).

[14] To put matters into context, we set out the reasons that the learned Magistrate gave for making the sentence partially concurrent and partially consecutive in full:

> It has become practice amongst the repeat offenders to plead guilty to all the pending cases against their name once they have been convicted for a considerable period of time. Until such time, irrespective of the time those cases dragged on before the Court, such repeat offenders maintain not guilty plea. As long as such offenders are out on bail, they keep on committing further offences.
>
> Accused in this case is also a repeat offender and before he pleads guilty to this case he was convicted for 07 years imprisonment for "Robbery with violence" cases.
>
> When accused pleads guilty he confirms the prosecution's version of the case and admits the allegation levelled against his name. The question is did he not know that he was guilty on the first date he was produced before the court. Why he waited till he receive a conviction for a considerable period of time in one case, to plead guilty to all the other cases pending against him?
>
> I am of the view that Courts are duty bound to consider the rights of the innocent victims in the same way Courts are showing mercy towards the accused persons.

> Sentences imposed by Courts always should reflect the gravity of the offence and as per sec. 4(1) (a) of the Sentencing and Penalties Decree 2009 the term imposed by the Court should be adequate to punish offenders to an extent and in a manner which is just in all the circumstances.
>
> If a repeat offender is allowed to go home serving one jail term for all the offences he committed simply because he choose to plead guilty after he got convicted for a considerable period of time, as Judicial Officers, I am of the view that we are failing in our duty towards the victims as well as to the society.
>
> A repeat offender must realize the taste of punishment in the same manner he enjoyed his time committing crimes on the innocent people.

[15] It is clear from the above reasons that the partially consecutive sentence was justified on basis that the guilty pleas were made late and that the appellant was a repeat offender. Counsel for the appellant submits that these reasons are unjustified because the guilty pleas indicated remorse and the previous criminal history was irrelevant. This submission in my judgment cannot be sustained. The guilty pleas were in fact late and the appellant's previous criminal history called for a longer sentence to denounce the offending and to protect the community.

[16] The offences in HAC 32 of 2010 were committed on 19 November 2009. The appellant first appeared in court on these charges on 23 November 2009. After numerous adjournments, he pleaded guilty to the charges on 27 September 2010. By 27 September 2010, the appellant had become a serving prisoner. On 22 September 2010, the appellant was sentenced to a total term of 7 years' imprisonment for a spate of home invasion robbery by the Nasinu Magistrates' Court.

[17] The timing of the guilty plea is important. An early guilty plea may indicate that the accused is genuinely remorseful for his conduct. A belated guilty plea may on the other hand indicate that the accused wants to escape the inevitable.

[18] In the present case, the appellant's contention that he was remorseful is without merit. He only pleaded guilty after he had become a serving prisoner, with the hope to receive concurrent sentences for a spate of offences. To make the matters worse for himself, the appellant committed the offence in HAC 32 of 2010 while he was on bail in other cases of robbery and home invasions. Consecutive sentence is justified by law when an accused commits a further offence while on bail awaiting trial for an earlier offence. As the Supreme Court in *Joji Waqasaqa v State* unreported Cr App No CAV0009 of 2005S; 8 June 2006 said at [33]:

> In a case like the present, where the later offence is committed while the prisoner was on bail awaiting trial for the earlier offence, a substantial concurrency of sentences for the two separate escapades would only encourage the prisoner on bail to make (criminal) hay while the sun shines. Sentencing practice in Australia, England and New Zealand reflects these principles by generally imposing consecutive rather than concurrent sentences in these situations.

[19] The sentencing practice to impose a consecutive sentence on an accused who commits an offence while on bail is now reflected in section 22 (6) of the Sentencing and Penalties Act 2009. Section 22 (6) states that "very term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on bail in relation to any other offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment".

[20] There is no doubt that the appellant did in fact make criminal hay while on bail. He went on a criminal spree after being released on bail. The courts have a duty to protect people and denounce anti-social behaviour with its menace to persons and property. As the Supreme Court in *Livai Nawalu v The* State unreported Cr App N CAV0012 of 2012; 28 August 2013, said at [27]:

> So far as the head sentence is concerned, the court finds 13 years to be within range set by recent authority for serious violent crime such as robbery with violence. Here the outstanding factors triggering a high penalty in the range

> 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour. With this type of offending, personal mitigation of the kind raised by the Petitioner, that he is married and now has a small child, count for little. (per Gates CJ)

[21] Further, where a question arises, in relation to whether later sentences should be served consecutively or concurrently with existing sentences, the issue for the court is whether the overall sentence, including the fact of accumulation, properly reflects the totality of the criminality involved, and whether the sentence would have been appropriate, had the appellant come before the court for sentence for all the offences on a single appearance (*Josefa Baleiloa v State* unreported Cr App No AAU0039 of 2005S; 10 March 2006, [22]).

[22] The effect of making the appellant's sentence partially consecutive was that his total sentence was 12 years 8 months' imprisonment as of 29 December 2010. The sentence was within the range for a spate of offending involving home invasions and thefts. The overall sentence reflects the totality of criminality involved and there is no error shown in the exercise of the discretion to make the sentence partially consecutive.

Whether there is an error in the exercise of the sentencing discretion in not deducting the time spent in custody while on remand separately from the mitigating factors?

[23] Time spent in custody while on remand is a relevant factor in sentencing. There is a statutory obligation on the courts to consider the remand period in sentence, created by section 24 of the Sentencing and Penalties Act 2009. While the courts are obliged to consider the time spent in custody while on remand, no precise formula is required to discount the remand period. Recently, this Court in *Maya v State* unreported Cr App No AAU0085 of 2013; 14 September 2017, said at [13]:

> ... the methodology used for discounting does not involve an error of principle (*Qurai v State* unreported Cr App No CAV24 of 2014; 20 August 2015).

Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors. Unlike a recent decision of this Court in *Domona v State* unreported Cr App No AAU0039 of 2013; 30 September 2016, in *Sowane v State* unreported Cr App No CAV0038/2015; 21 April 2016, the Supreme Court did not prefer one method over the other (see, [16]).

[24] Both parties agree that the appellant had been in custody on remand for about seven months before he became a serving prisoner on 3 July 2010. In paragraph 25 of the sentencing remarks, the learned Magistrate took into account the remand period and gave a discount of 2 years to reflect the mitigation and the remand period. The only mitigating factor in the appellant's case was his late guilty pleas. Mathematically, the appellant received a discount of 17 months for his late guilty pleas and 7 months for the remand period. There is no error in the exercise of the sentencing discretion to give a separate discount for the remand period.

Whether there is an error of the parity principle in the exercise of the sentencing discretion?

[25] The parity principle in sentencing applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence with a justifiable sense of grievance (*Bote v The State* unreported Criminal Appeal No. AAU0011 of 2005, 11 November 2006; *Bulitaiwaluwalu v State* unreported Cr App No AAU0046 of 2010, 5 December 2014).

[26] When disparity in sentences is raised as a ground of appeal, the question for the appellate court is whether a reasonable and independent observer, with full knowledge of the facts and circumstances relating to the disparity could consider that something had gone wrong with the administration of justice (*Sakeasi Raitumaiye v State* (unreported Criminal Appeal No. AAU0060 of 2008S; 25 March 2006). In *R v Lawson* [1982] 2 NZLR 21, the New Zealand Court of Appeal held that "the Court would have regard to disparity as a ground of appeal only where the disparity is unjustifiable and gross".

[27] In the present case, the appellant's three co-offenders were sentenced after trial on 21 September 2015 by another Magistrate as follows:

Isei Korodrau	-	5 years' imprisonment
Osea Vakacereivalu	-	5 years' imprisonment
Joseph Nonu	-	9 years' imprisonment

[28] By the time the co-offenders were sentenced, Mr Korodrau was serving a pre-existing sentence in an unrelated case. His sentence was made concurrent with his pre-existing sentence.

[29] Mr Nonu was sentenced in absentia. His sentence was higher than others because of lack of mitigation.

[30] Mr Korodrau at the time of this offending was a first time offender and both he and Mr Vakacereivalu spent a significant period in custody while on remand awaiting trial. Both were given a substantial reduction to reflect their lengthy remand periods.

[31] The appellant takes no issue with the length of the terms of imprisonment imposed on his co-offenders. Counsel for the appellant submits that there is a disparity in sentence arising from Mr Korodrau's concurrent sentence. The argument is that Mr Korodrau's sentence was made concurrent although he did not plead guilty but was convicted after trial. The appellant's sentence was made partially concurrent after he pleaded guilty, leaving him with a justifiable sense of grievance. The Court has not been informed of the total term of imprisonment that Mr Korodrau received after his sentence was made concurrent with his pre-existing sentence. But at the hearing, counsel for the appellant fairly conceded that Mr Korodrau's circumstances of offending were less serious than the appellant's circumstances of offending.

[32] There is no evidence that Mr Korodrau went on a crime spree while on bail awaiting trial like the appellant. In these circumstances, a reasonable and independent observer, with full knowledge of the facts and circumstances relating to the disparity will not think that something had gone wrong with the administration of justice.

[33] For the reasons given above, I would affirm the sentence and dismiss the appeal.

Order of the Court:

Appeal dismissed.

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Hon. Mr Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr Justice D. Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent