

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

CRIMINAL APPEAL NO. AAU 010 OF 2017
(Magistrates Court No. 474 of 2016)

BETWEEN : **IOSEFO BAINIVALU**
ROBERT TUITUBOU

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Gamalath, JA
Nawana, JA

Counsel : **Mr. K. Chang for the Appellants**
Ms. J. Prasad for the Respondent

Date of Hearing : **03 November 2022**

Date of Judgment : **24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] Having read in draft the judgment of Gamalath, JA I agree with the reasons and orders.

Gamalath, JA

[2] The appellants were jointly charged in the Magistrate's Court at Suva on a charge of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Act (Decree) of 2009 (CAP017A); the particulars of offence state that they, on the 1st April 2006, at Suva, robbed one Ryu Kyeong Hee of one LG mobile phone valued at \$2,000.00, the property of the said Ryn Kyeong Hee.

[3] On being arraigned, on 26 August 2016, the appellants tendered a guilty plea to the charges. Amended summary of fact was tendered in Court states as follows;

- *Arrested and charged Iosefo Bainivalu (B-1), 20 years, unemployed of Qauia Village, Lami and one Robert Tuitubou (B-1), 22 years unemployed of Qauia Village, Lami for one count of Aggravated Robbery – contrary to Section 311(a) of the Crimes Decree No. 44 of 2009.*
- *On 18th April 2016 about 6.30pm along Stinson Parade one Ryu Kyeong Hee (A-1) was taking pictures using their white LG mobile phone valued at about \$2,000.00, then grabbed their phone and ran away.*
- *Later they were arrested and brought to Totogo Police Station under arrest by PC 3079 James Sukul (A-4), Police Officer of Totogo Police Station.*
- *(B-1) was brought down to Totogo Police Station and upon questioning stated the name of (B-2) that he ran away with the phone whilst he blocked (A-2) from running after (B-2).*
- *DC 4321 Rauli (A-5), police officer of Totogo Police Station went to raid the house of (B-2) at Qauia Village, Lami with the assistance of D/Sgt 2080 Josua and managed to arrest (B-2) and also recovered the white LG mobile phone from his possession from (B-2)'s residence.*

- *(B-1) was interviewed under caution by WDC 3067 Laisa (A-6) police officer of Totogo Police Station and he admitted in using his elbow in trying to stop (A-2) from running after (B-2) (Refer to Q & A 21-25).*
- *(B-2 was interviewed under caution by DC 5119 Sanjiv (a-7) and he also admitted in stealing the white LG mobile phone from the Korean nationals. (Refer to Q & A 30-37).*
- *Both (B-1) and (B-2) were jointly charged with one count each of Aggravated Robbery:- Contrary to Section 311(1)(a) of the Crimes Decree No.44 of 2009.*
- *(B-1) and (B-2) will be produced in custody on 20.4.16*

[4] Based on the guilty plea, the appellants were sentenced on 25 January 2017 and the learned Magistrate having picked a starting point of 11 years finally imposed a sentence of 8 years and 11 months imprisonment without specifying a parole period.

[5] Adducing reasons for the sentence, the learned Magistrate had stated that “the purpose of this sentence is to deter future perpetrators that any violation of a person’s personal security will be met with custodial sentences. The community should be able to walk freely in public without fear of their personal security being violated”. This Court completely endorses the above reasons of the learned Magistrate. If the innocent, law-abiding pedestrians are restricted in their free movements on the streets due to criminal activities of those who idle around on the waysides, waiting to grab any opportunity for their evil advantage to overpower the helpless and hapless pedestrian, that is a serious situation which requires stringent remedial measures to be adopted within the legal framework. We cannot agree more with the learned Magistrate that the message of deterrence should reach those miscreants, who cause immense harassment to the innocent.

[6] However, the courts are expected to dispense justice according to law. In that context, I find that the learned Magistrate’s sentencing order is not consonant with the applicable legal principles in sentencing in two basic ways. Firstly, the learned Magistrate had

overlooked the jurisdictional power in sentencing, which empowers him to impose a maximum sentence not exceeding ten years. So when the learned Magistrate started with a sentence of 11 years he had clearly exceeded his powers in sentencing and as such it needs to be rectified. Secondly, the reliance on the decision in **Wise v. The State** [(2015) FJSC 7; CAV04, 24 April 2015] to consider the aggravating circumstances involved in the instant case. As the learned single Judge His Lordship Calanchini P had observed in the single judge's ruling, "*The learned Magistrate has relied upon the Supreme Court Decision of **Wallace Wise v. The State** (supra), as the basis for his sentencing decision. However it must be recalled that the facts in that case concerned a night time home invasion that shocked and terrified the occupants. The facts of the present case can obviously be distinguished.*"

[7] Acknowledging the errors as stated above and having made reference to the young age of the appellant's, the State correctly submitted the sentences are excessive and hence should be readjusted.

[8] This in effect means the appellants would have already spent 5 years and 10 months in prison by 25 November 2022. Given the discussion above and taken into account the young age of the appellant I am of opinion, that would be a punishment commensurate to the gravity of the offence for which they were convicted.

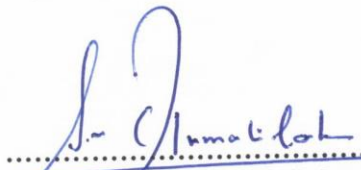
[9] Accordingly in place of sentence of 8 years and 11 months imprisonment, a sentence of 5 years and 10 months imprisonment is imposed and accordingly the appellants would complete their sentence of imprisonment on 25 November 2022.

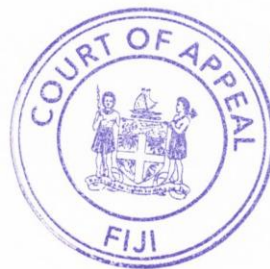
Nawana, JA

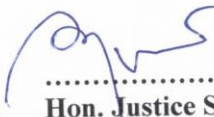
[11] I agree with the reasons, conclusions and orders proposed by Gamalath, JA.


Orders of the Court

- (1) The appeal against sentence allowed.
- (2) The sentence of imprisonment of 11 years by the learned Magistrate is substituted with a sentence of 5 years and 10 months imprisonment.
- (3) Accordingly the appellants shall be released from jail on 25 November 2022.


.....
Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL




.....
Hon. Justice S. Gamalath
JUSTICE OF APPEAL


.....
Hon. Justice P. Nawana
JUSTICE OF APPEAL