IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0027 of 2023
[Court of Appeal No. AAU 0057of 2020]

BETWEEN	:	**LEMEKI SEVUTIA TAUVOLI**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Anthony Gates, Judge of the Supreme Court**
		The Hon. Justice Brian Keith, Judge of the Supreme Court
		The Hon. Justice Terence Arnold, Judge of the Supreme Court
Counsel	:	**Petitioner in person**
	:	**Mr. A. Singh and Ms. S. Swastika for the Respondent**
Date of Hearing	:	**14 October 2024**
Date of Judgment	:	**30 October 2024**

JUDGMENT

Gates, J

[1] The petitioner raises issues on his sentence. In calculating the term of imprisonment, did the sentencing judge fix the starting point within the tariff for the offence, by having regard to the aggravating circumstances? If so, was there an element of double counting when further time for the aggravating factors was then as a second step added? Was the non-parole period, which should allow some chance for the prisoner to rehabilitate and to gain a reduction of time to serve from such rehabilitation, fixed too close to the head sentence?

[2] On the 28th of December 2018 the petitioner had pleaded guilty in the High Court to a single count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act, on the basis of the summary of facts set out below. By that section the information had alleged the offence had been committed with two others. The judge convicted him upon his plea and sentenced him to 13 years imprisonment with a non-parole period of 12 years.

The Summary of Facts

[3] This crime was committed in the course of a home invasion. The occupant of the house in Howell Road was a 60 year old woman. She lived there with her husband, who was not in the house at the time. The petitioner also lived in the same road. He was aged 20 years and had been employed as a labourer for a construction company.

[4] On the 30th of December 2016 at around 7 pm it was becoming dark. Alerted by the barking of her dog, the complainant unlocked the main door of her residence. She put on the verandah light and walked outside into the compound. Suddenly she was pushed back into the house by the petitioner and two others.

[5] The intruders were masked and wore hand gloves. They were seen to hold weapons, namely a knife, a pair of scissors, and a baseball bat. Cash and overseas currency were taken from the complainant's purse and from one of the bedrooms. Other items stolen included 2 I-pads, digital cameras, perfume, liquor and wines, a mobile phone, 3 laptops, valued in total at over $13,000.

[6] Before leaving the residence, the petitioner and the others tied the hands of the complainant behind her back with a cable, and tied a scarf around her eyes. She was further immobilized in some way with a shirt and a blanket.

[7] They then fled the residence leaving the complainant tied up. Later she managed to free herself partially, and to go to her neighbours to relay the incident before reporting to the police.

[8] On the 20th of January 2017 the petitioner was arrested and questioned under caution. He admitted his involvement in the robbery and the circumstances as related by the complainant.

[9] The police recovered some of the valuable items, the mobile phone, the I-pad and the 3 laptops. Prior to sentence the defence urged the recovery as a mitigating factor. It was said for the petitioner by his counsel that the petitioner had co-operated with the police, and through this assistance the police had made the partial recovery. No confirmation of this was made by the prosecutor. However, the judge in his sentencing remarks referred to defence counsel having "presented a well written plea in mitigation".

[10] I conclude that his Lordship had read that part of the submission which stated:

> *"He fully co-operated with the police. Through the co-operation of our client there was partial recovery of the items."*

I will return to this matter further on.

The Drafting of the Information

[11] The petitioner with his co-accused were charged with aggravated robbery. However, the charge had not been drafted to include the second circumstance of aggravation section 311(1)(b), that the petitioner "at the time of the robbery, had an offensive weapon with him."

[12] They were charged under section 311 of the Crimes Act which reads:

> *"311. – (1) A person commits an indictable offence if he or she –*
>
> *(a) commits a robbery in company with one or more other persons; or*
> *(b) commits a robbery and, at the time of the robbery, has an offensive weapon with him or her.*
>
> *Penalty – Imprisonment for 20 years.*

(2) For the purposes of this Act, an offence against sub-section (1) is to be known as the offence of aggravated robbery.

(3) In this section –

"offensive weapon" includes –

(a) an article made or adapted for use for causing injury to, or incapacitating, a person; or
(b) an article where the person who has the article intends, or threatens to use, the article to cause injury to, or to incapacitate, another person."

[13] The charge in the information was drafted as follows:

*"**Statement of Offence***

***AGGRAVATED ROBBERY**: Contrary to section 311(1)(a) of the Crimes Act 2009.*

Particulars of Offence

***PITA DOMONI, LEMEKI SAUVUTIA TAUVOLI and MALAKAI TOKA** on the 30th December 2016, at Samabula in the Central Division, robbed JULIE SUTHERLAND of cash valued at $65, 1x black I-Pad cover valued at $4000,1x Apple brand I-Pad valued at $2000,1x Sony digital camera valued at $300,1x Nikon digital camera valued at $300,2x packets of perfume valued at $150,1x black backpack bag valued at $80, 1xbottle Whisky valued at $150,1x Japanese Choya valued at $50,2x bottles of white wine valued at $40,1x Samsung S4 galaxy mobile phone valued at approximately $1,500 and 1xsilver Dell Inspiron laptop valued at approximately $1,043,Australian foreign currency AU$ 3,000 approximately valued at $4,735. 1xblack Dell Inspiron laptop valued at approximately $1250 and 1x black Dell Latitude laptop valued at a[approximately $1250,all to the total approximate value of $13,313.00, the said property of **JULIE SUTHERLAND**."*

[14] Though the statement of the offence mentioned paragraph (a) of subsection (1) of section 311 nothing was stated in the particulars of "being in company", which is the circumstance which lifts the offence from ordinary robbery to one of aggravated robbery, and which carries a higher penalty (20 years imprisonment).

[15] The facts of this case included not one, but two, circumstances of aggravation. The second circumstance was that "at the time of the robbery, (the accused) had an offensive weapon

with him". This circumstance, section 311 (1) (b) was neither stated in the statement of offence nor mentioned in the particulars.

[16] The omission of the allegation of being "*in company*" still held good, though not mentioned in the particulars, because the correct paragraph had been included in the statement of offence. Importantly there could be no misunderstanding by the person facing the charge that being "*in company*" was included in the accusation.

[17] However, there was no mention of "having an offensive weapon with him" either in the statement of offence or in the particulars of offence. Did this have the consequence of lessening the gravity of the charge? Could the fact that the petitioner had an offensive weapon with him at the time of the robbery be used against him when considering the sentence?

[18] A similar point came up in ***Koroivuki v State*** [2013] FJCA 15; AAU 0018.2010 (5 March 2013). The reasoning in that judgment began at paragraph [12]:

> *"[12] In **Vakalalabure**, the accused was convicted of taking engagements in the nature of an oath purporting to bind himself to commit treason. The offence did not require proof that the accused committed an act of treason. The trial judge imputed a higher culpability on the accused for setting up the new government after the lawful government was taken hostage by George Speight in 2000. After citing the English and Australian authorities, the Supreme Court concluded that the petitioner was sentenced for treasonable conduct for which he was not charged or convicted.*
>
> *[13] In **The King v Bright** [1916] 2 KB 441 Darling J, giving the judgment of the Court of Criminal Appeal, said at 444-5:*
>
> > *"...the judge...must not attribute to the prisoner that he is guilty of an offence with which he has not been charged - nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation."*

[14] ***Bright*** *was followed by the High Court of Australia in* ***The Queen v De Simoni*** *(1981)147 CLR 383 where Gibbs CJ said at 389:*

> *"....the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted... a judge, in imposing sentence, is entitled to consider all of the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence." (emphasis added).*

[15] *In my judgment the last statement by Gibbs CJ in* ***De Simoni*** *sums up the principle. The principle is that if the statute prescribes some form of aggravation exposing the offender to a conviction for a more serious offence then he cannot be sentenced for that aggravation unless he is charged and convicted of that aggravation. In other words, if the State could have charged an accused with a serious offence or with an offence prescribing circumstances of aggravation, but elects not to do so, on conviction or guilty plea, the accused cannot be sentenced for the uncharged offence or aggravation. In* ***Vakalabure****, the accused could have been charged with treason but due to the statutory time limitation, he was charged with a less serious offence. For this reason, the Supreme Court concluded that the trial court erred in imputing a treasonable conduct on the offender as an aggravating factor."*

[19] Goundar J concluded:

> *"18. Under the principle laid down in* ***Bright****,* ***De Simoni*** *and* ***Vakalabure*** *an accused charged and convicted under section 210(1), cannot be sentenced for circumstances prescribed under subsections (2) and (3). The offender will have to be charged and convicted for the statutory aggravation under subsections (2) and (3) first, before the court will be permitted to sentence on the basis of aggravation."*

[20] The petitioner was charged in the information with aggravated robbery. The circumstance of aggravation was "being in company." If the Judge were to take into account in sentencing the carriage of weapons during the robbery, this would not offend the principle in **Bright,** provided the circumstances would not warrant a conviction for a more serious

offence. With the first limb of the offence section 311(1)(a) already having being charged, the allegation was of aggravated robbery for which the penalty was 20 years imprisonment. The allegation of carrying weapons whilst committing the offence, did not increase the liability to a higher penalty than that for aggravated robbery whilst in company. This means the sentencing judge could refer to the aggravating factor additionally though it had not been charged.

Additional Ground

No discount for co-operation with police and recovery of items

[21] This point was not raised before the Court of Appeal. The sentencing judge did not specifically list the petitioner's co-operation as a mitigating factor. But from the judge's comments on counsel's plea, it is more than likely that it was taken into account. This ground does not meet the threshold for leave to appeal, and fails.

Ground (ii) Element of the offence used as an aggravating factor

[22] In his sentence the judge set out the aggravating factors:

> *"8. (i) Cowardly attack and the invasion of the home of an elderly person. The female complainant was 60 years old and rightly enjoying the comfort of her house. You and others invaded her house, attacked her and tied her up, and stole her properties, as itemized in the information. The court will not tolerate these types of cowardly attack on vulnerable members of the community;*
>
> *(ii) You and your friends pre-planned this offending. You came prepared to implement your evil deeds;*
>
> *(iii) You and your friends were masked and armed with weapons, that is, a knife, scissors and a baseball bat. You and your friends bullied the 60 year old complainant, subdued her, tied her up and stole her properties;*
>
> *(iv) By offending against her, you showed no regard to her right as a human being, her right not to be harmed and disregarded her property rights by stealing her properties."*

Ground (i) Double Counting

[23] The judge selected 12 years as his starting point. The tariff for a single offence of aggravated robbery in cases of home invasion is now 8 to 16 years ***Wise v State*** [2015] FJSC7; CAV0004.2015 (24 April 2015). However, the actual sentence appropriate to the circumstances of the offending will depend on the aggravating and mitigating factors.

[24] 12 years was a midway point on the tariff. The petitioner argues this must therefore have included some of the aggravating factors.

[25] The judge sets out his method of arriving at the head sentence:

> *"10. I start with a sentence of 12 years imprisonment. I add 3 years for the aggravating factors, making a total of 15 years imprisonment. For time already served while remanded in custody, I deduct 1 year, leaving a balance of 14 years imprisonment. For the guilty plea, I deduct 1 year, leaving a balance of 13 years imprisonment."*

[26] Clearly the judge was correct to list some of the matters as aggravating factors [see paragraph 8 (i)]. First this was a home invasion. The victim was a vulnerable person, being retired and aged 60. She was tied up having been placed face down on the bed. There can be no doubt the handling of this victim was an undignified and frightening ordeal for her with her eyes covered and a blanket tied over her. The judge was right to refer to her as having been "bullied".

[27] The robbers were masked and this was correctly listed as another aggravating factor.

[28] Pre-planning was also listed as an aggravating factor. The petitioner himself in his interview had volunteered that he had made the plan to invade the home. However, the planning, appears to have been in essence rudimentary and minimal. It was not such that it could amount to anything of real significance as a circumstance of aggravation. I would disregard it.

[29] On balance, it is a better practice to commence with a starting point at the lower end of the tariff, being careful not to figure in any of the aggravating and mitigating factors at this stage: ***Kumar v State*** [2018] FJSC30; CAV0017.2018 (2 November 2018). The starting point should have been at 10 years.

[30] Selecting a starting point has been discussed in several judgments of this Court over the years. In ***Kumar*** Keith J at paragraph 56 said:

> *"Whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence."*

[31] Methodologies for exercising the sentencing discretion in Fiji are likely to evolve further. So far we do not have a strict structure for sentencing as in other more sophisticated jurisdictions. Sentences need to be kept within the permissible range of the tariff, unless with clear explanation, a sentence is necessarily to be imposed outside of it. Whether a primary sentencing judge or an appellate court, each will stand back from a sentence to consider whether in all the circumstances it is right for that particular offending and offender. The appellate courts are concerned with whether the sentencing discretion has miscarried, and whether the sentence imposed is proportionate in all the circumstances.

Re-considering the sentence

[32] The judge had shown clearly how he had arrived at the final sentence, after adding in the aggravating factors and deducting time for the mitigating factors. His Lordship was generous, correctly in my view, in deducting 1 year for the time spent whilst remanded in custody [9 months]. For the late plea he deducted a further year. This was also generous and correct. I would include within that year, recognition for the petitioner's assistance to

the police in the recovery of some of the stolen items. Because of prior offending of a similar nature the petitioner was not entitled to any discount for good character.

[33] The original sentence had fixed a non-parole period at only 1 year less than the head sentence. This allows too little incentive for rehabilitation. In re-calibrating the final sentence now, further time should be allowed for a closer adherence to the purposes of section 4 (1) and section 18 (4) of the Sentencing and Penalties Act: ***Tora v State*** [2015] FJCA 20; AAU 0063.2011 (27 February 2015).

[34] Taking all of the matters into account traversed in the judgment, I would grant special leave to appeal sentence and allow the appeal. I would start on the tariff at 10 years imprisonment, and add 2 ½ years for the remaining aggravating factors. I would deduct 1 year for the late plea. The sentence therefore is reset as follows:

Head Sentence	:	11 years 6 months imprisonment.
Non-parole period	:	10 years.

Because he has spent time on remand the actual time he must now serve will be:

Head Sentence	:	10 years 6 months.
Non-parole period	:	9 years.

Keith, J

[35] I agree with the judgment of Gates J and with his reasoning and the proposed orders.

Arnold, J

[36] I have read the judgment of Gates J in draft and agree with the orders proposed for the reasons the Judge gives.

Orders of the Court:

1. Leave granted to appeal sentence.
2. Appeal allowed.
3. Original sentence quashed.
4. In substitution, sentence imposed of:

Head Sentence : 10 years 6 months.
Non- parole period : 9 years.

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon. Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon. Justice Terence Arnold
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

Solicitors:

Petitioner in person
Office of the Director of Public Prosecution for the Respondent