

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 015 OF 2021
High Court No. HAC 060 of 2020

BETWEEN : **SAKIUSA TAKIRUA**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
Mr R. Kumar for Respondent

Date of Hearing : **5 March, 2024**

Date of Ruling : **21 March, 2024**

RULING

1. The Appellants [Sakiusa Takirua] with another was charge with 1 count of Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Act.
2. The appellants were represented by Legal Aid Counsel at their trial. Both pleaded guilty to the charge and were sentenced to 12 years imprisonment with a non-parole period of 10 years, on 19 November 2020.

Brief Facts

3. At the sentence hearing, the facts tendered by the prosecution in support of the charge are as follows:

“On the 25th of August 2020, at around 9pm, the Accused persons with another, forcefully entered into the house of a couple, the complainants in this case, Kamlesh Chand, school teacher, and Kajal Karishma Devi, in Seaqaga. The couple also had another adult male cousin residing with them, Shalvin Chand also a school teacher.

The Accused persons with another approached the back door of the complainant’s house and struck the door with a hard object. They then forcefully entered the house. The Accused persons with another had broken into the house knowing that the couple had a lot of cash with them and intending to steal money from couple.

Once the Accused persons entered the house, they began threatening the occupants of the house. The Accused persons then attacked the occupants of the house namely the two males, Kamlesh who was at the sitting room - he was struck on the chin 3 times, while Shalvin was being beaten on the stomach with an iron rod. Both Kamlesh and Shalvin suffered injuries from the beatings.

The Accused persons were wearing masks. They demanded for money as they continued to assault the occupants of the house, namely the 2 men – Kamlesh and Shalvin. The occupants of the house then told them to take the money inside the van, which was \$400. After taking that money, the Accused persons were all still not satisfied.

Then the Accused persons also entered the bedroom of Mrs Kajal Karishma Devi and demanded more money from her. After she gave them some money, they still demanded more and threatened to rape her daughter if she did not give them more. At that point, Shalvin was brought back into the room by the Accused persons, injured. The threats to Mrs Kajal by the Accused persons continued and she was ordered to lift her dress.

The couple’s daughter was sitting awake on her bed when the Accused persons threatened to rape her if they were not given more money. The whole family was in complete shock and extreme fear.

Thus, the couple then brought out another brown envelope containing \$7000.00 cash. The Accused persons kept all the adults in one room, closed the door and left them there, after stealing the \$7000.00. A total of about \$10,000.00 was stolen that day however, \$8360.75 was recovered.

The Police were later contacted and investigations conducted. The appellants were both arrested and there were recoveries made. The appellants made their free and voluntary admissions to the Police about their involvement in the robbery.

The admissions and the specific roles they played are as per their record of interviews and the injuries sustained from the above attacks are as documented in the Fiji Police Force Medical Examinations form, that are attached.”

4. According to the medical reports of the victims, they sustained the following injuries from the appellants’ assault:

Kamlesh Kumar

Head – Hematoma 4 × 4 cm on scalp

Left Eye – swollen

Left Face – puncture wound actively bleeding, swollen and collection of blood

Hospitalized due to the seriousness of the injuries.

Kajal Karishma Devi

Face – swollen

Upper lip – bruises

Shalvin Chand

Left eyebrow – 1 × 1 cm laceration

Abdomen and chest – blunt trauma and tenderness

5. This appeal is against sentence on the basis that it is harsh and excessive.
6. The Supreme Court in Naisua v State [2013] FJSC 14 (CAV No: 010/2013) stated the guidelines for the court of appeal to follow when there is an appeal against sentence, thus:

*[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** [1999] FJCA 21 (Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

*[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in **Chirk King Yam v The State** Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge’s conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae’s** case.*

Grounds of Appeal Against Sentence

7. **Ground 1:** the trial judge acted on the wrong sentencing principle in not following the approach to sentencing adopted in Koroivuki v State [2013] FJCA 15 (AAU No: 0018/2010) in not following the two-tier approach, whereby the starting point is stated, to reflect the nature and objective seriousness of the offence in particular. The appellant refers to paragraph 26 and 27 of Koroivuki (supra) ruling:

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

8. The appellant further submits that the weakness in the approach adopted by the trial judge in sentencing him in this case, was by selecting 15 years as the starting point had taken into consideration subjective factors which are not relevant at that point. The appellant refers to the case Ilaitia Nadavulevu & 2 Others v State [2020] FJCA 14 (AAU 119/2015) as supporting his case for a review of the sentence against him. He refers to the:

"[33] The concept of tariff that is hardened into the sentencing structure in Fiji seeks to ensure uniformity and consistency in sentencing. The selection of the starting point of the sentence, which is an important step in the process, in my view, is an opportunity where a great deal of consistency and uniformity can be infused into, on the basis of acceptable principles.

[36] His Lordship Brian Keith J., after relying on Seninlokula vs State [2018] FJSC 5; and, Kumar v State [2018] FJSC 30, said in Nadan v State (supra)

"The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors, which caused him to go up to 15 years before

allowing for mitigation. In case he had done that, and had, therefore, fallen into the trap of double counting."

9. The Supreme Court, in **Kumar v State** [2018] FJSC 30, said:

"[56] ... 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 in 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 aggravating factors and they will then have to factor into the exercise all the aggravating features of the case as well as mitigating features. Either way, you should end up with the same sentence. If you do not, not, you will know that something has gone wrong somewhere.

[57] ... First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e.: reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.

[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided."

10. The trial judge in sentencing the appellant stated as follows:

*"[4] The maximum penalty prescribed for aggravated robbery is 20 years imprisonment. In **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) the Supreme Court said at [25]-[27]:*

[25] We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.

[26] Sentences will be enhanced where additional aggravating factors are also present. Examples would be:

- (i) offence committed during a home invasion.
- (ii) in the middle of the night when victims might be at home asleep.
- (iii) carried out with premeditation, or some planning.
- (iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.
- (v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.
- (vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.
- (vii) the victims frightened were elderly or vulnerable persons such as small children.

[27] It is our duty to make clear this type of offences, will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders.

[5] In the present case, apart from the statutory aggravation, there are additional aggravating factors. The robbery was committed during a home invasion. The offenders threatened a couple, their daughter and a male occupant with physical violence. They wore masks to conceal their identities. They frightened the occupants by striking their house with a hard object before gaining entry. They carried an iron rod with them. They struck two male occupants with the iron rod multiple times. The occupants sustained physical injuries. One occupant was hospitalized due to the injuries from the attack. The couple's daughter was threatened with rape. The adult female occupant was forced to lift her dress and was humiliated. The robbery was pre-planned and then executed."

11. Since the sentence in this appeal was passed against the Appellant, the Supreme Court in **State v Tawake** [2022] FJSC 22 (CAV No: 025/2019) provided the sentencing guideline for aggravated Robbery as follows:

[26] Once the court has identified the level of harm suffered by the victim, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they pleaded guilty or not guilty and irrespective of previous convictions:

	ROBBERY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED ROBBERY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)	AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)
HIGH	Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment	Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment	Starting point: 9 years imprisonment Sentencing range: 6-12 years imprisonment
MEDIUM	Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment	Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment	Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment
LOW	Starting point: 18 months imprisonment Sentencing range: 6 months-3 years imprisonment	Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment	Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment

[27] Having identified the initial starting point for sentence, the court must then decide where within the sentencing range the sentence should be, adjusting the starting point upwards for aggravating factors and downward for mitigating ones. What follows is not an exhaustive list of aggravating factors, but these may be common ones:

- Significant planning
- Prolonged nature of the robbery

- *Offence committed in darkness*
- *Particularly high value of the goods or sums targeted*
- *Victim is chosen because of their vulnerability (for example, age, infirmity or disability), or the victim is perceived to be vulnerable*
- *Offender taking a leading role in the offence where it is committed with others*
- *Deadly nature of the weapon used where the offender has a weapon*
- *Restraint, detention or additional degradation of the victim, which is greater than is necessary to succeed in the robbery*
- *Any steps taken by the offender to prevent the victim from reporting the robbery or assisting in any prosecution*

[28] *Again, what follows is not an exhaustive list of mitigating factors, but these may be common ones:*

- *No or only minimal force was used*
- *The offence was committed on the spur of the moment with little or no planning*
- *The offender committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure*
- *No relevant previous convictions*
- *Genuine remorse evidenced, for example, by voluntary reparation to the victim*
- *Youth or lack of maturity which affects the offender's culpability*
 - *Any other relevant personal considerations (for example, the offender is the sole or primary carer of dependent relatives, or has a learning disability or a mental disorder which reduces their culpability)*

[29] *Having decided on the appropriate sentence in this way, the Court should then reduce the sentence by such amount as is appropriate – first for a plea of guilty and then for the time the offender spent in custody on remand awaiting trial and sentence. If judges take these steps in the order I have identified, it is to be hoped that sentences will be more likely to fit the crime, and that undesirable disparities in sentences will be avoided.*

[30] *This methodology is new to Fiji. In the recent past the higher courts have usually only identified the appropriate sentencing range for offences. They have only infrequently in recent times assisted judges by identifying where in the sentencing range the judge should start. That has caused difficulties identified by the Supreme Court on a number of occasions: see, for example, Seninolokula v The State [2018] FJSC 5 at paras 19 and 20 and Kumar v The State [2018] FJSC 30 at paras 55-58. If this methodology is used, that problem is avoided. Indeed, there is, in my opinion, no reason why this methodology should be limited to “street muggings”, and it may be that thought will be given in the appropriate quarters to find cases to bring to the Court of Appeal for this methodology to be considered for sentencing for other offences.*

13. In light of the sentence guideline for aggravated robbery set out in **Tawake** (supra) the sentence against the appellant needs to be reviewed, because it may be on the excessive side. **Wise v State** [2015] FJSC 7 was relied upon by the trial judge in passing sentence against the appellant, which is now overruled by Tawake. The starting point under **Tawake** for Aggravated Robbery with another and use of weapon is 9 years, with starting point between 6-12 years.
14. There is an issue of law to be determine on the sentencing of the appellant in this case. Leave is granted to review the sentence of the appellant.

ORDERS

1. Leave to appeal against sentence is allowed.




Isikeli U Maitaitoga
Resident Justice of Appeal