IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 29 OF 2012

BETWEEN: TIRATH ANAND

APPELLANT

AND: STATE

RESPONDENT

Counsels : Mr L Sovau for the Appellant

Ms Kiran for the Respondent

Date of Judgment : 11 October 2013

JUDGMENT

1. The appellant was charged before the Magistrate Court with one count of Robbery with Violence contrary to Section 293(1) (b) of the Penal Code, Cap 17. He pleaded guilty to the charge and was convicted and sentenced to 6 years imprisonment on 8th October 2012.

2. Summary of facts agreed by the appellant are as follows:

   'On 17.5.2009 at about 1730 hours at Guruwaiya Street, Waiyavi, Lautoka, Tirath Anand (Appellant) with others assaulted Pranil Sharma, 24 years, Digger operator and robbed him of one car stereo valued at $300, Nokia mobile phone valued at $29, Alcatel mobile phone valued at $29 and loose coins of about $2 all to the total value of $360.

   On the above mentioned date, time and place, victim was on his way back from dropping one of his workmate when stopped by the appellant and group of drunken Fijian youth on the road.

Victim stopped his car whereby appellant with his friend quickly enter inside the car and demanded money from victim. Later appellant with his friend assaulted the victim and removed the car stereo and also stole two mobile phones and loose coins of about $2 from the car. Victim reported the matter to the police.

The appellant was arrested, interviewed under caution and had admitted assaulting the victim with his friend.'

3. The appellant had appealed against the sentence on 22nd October 2012.

4. His grounds of appeal are:

   (i) The sentence passed is manifestly harsh and excessive in all circumstances.
   (ii) The learned Magistrate failed to take into account that he had pleaded guilty and thought it was untimely, nevertheless it should have qualified him for a discount in light of the fact the other prosecution witnesses were saved from giving further evidence.
   (iii) The learned Magistrate failed to take proper consideration while imposing a six year term for a first offender such as he.
   (iv) The learned Trial Magistrate erred in fact while taking irrelevant factors into account while sentencing.
   (v) That the tariff used was inconsistent with the tariff and sentence imposed on young first offenders.
   (vi) That the sentence imposed is longer and is disparity with other more violent crimes of similar nature, where sentences imposed were more lenient and less compared to the appellants.

5. In **Kim Nam Bae v The State** [1999] FJCA 21; AAU 0015 of 1998 it was held that:

   "*It is well established law that before the 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 facts, if he does not take into account some of relevant considerations, 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."

   I am guided by above principles in this judgment.

6. **Ground-1-** Sentence is manifestly hash and excessive in all circumstances and the tariff was inconsistent with the tariff for first offenders.

The Magistrate had followed the judgment of Madigan J (**Baleinakeba v State** [2010] FJHC 207; HAA008.2010) in selecting a starting point of 7 years. This is the lowest point given in the tariff for the Magistrates Court. There is no special tariff for the first offenders and the fact that the appellant was a first offender had been considered by the Magistrate as a mitigating factor.

The attention of court is drawn to following judgments by the counsel for the appellant. **Vakanavue v State** [2006] FJHC 5; HAA 0158J.2005S (9 February 2006) where A.H.C.T. Gates J (as then was) had identified the tariff for robbery with violence is 4-7 years imprisonment.
Further attention is drawn to **Seseu v The State** [2003] FJHC 224; HAM 0043J.2003S (10 December 2003) where Nazhat Shameem J held that the tariff for robbery with violence is 4-7 years.

However both these judgments were before the Court of Appeal judgment of **Sakiusa Basa v The State** (Criminal Appeal No. AAU 0024 of 2005-24 March 2006) where it was held that:

"*the learned judge was justified in fixing her stating point at eight years on the basis of the overall offence."*
Further it was held that "*We should suggest that the earlier decisions of this Court in which New Zealand cases have been used as guidance in assessing the appropriate sentence for robberies with violence may need to be reconsidered in the light of continuing offences of this nature repeated by the same offenders. The maximum sentence for the comparable offence in New Zealand is 14 years imprisonment and 19 years where they involve home invasion.*
In Fiji, the maximum penalty is life imprisonment showing clearly that it is regarded as being in the most serious category of offences. The maximum penalty in England is also life imprisonment and so it may be more appropriate in future to consider English cases as guidance for the appropriate term of imprisonment."

Therefore this ground fails as the learned Magistrate had selected the correct sentence guide line tariff.

7. **Ground-2** The learned Magistrate failed to consider his guilty plea although it was untimely as it saved other prosecution witnesses from giving evidence.

Magistrate had stated that 'Although you pleaded guilty, I cannot consider that as a timely plea. You pleaded guilty only during the trial after the complainant gave evidence.' There is no indication in the sentence as to whether any deduction was given to the guilty plea.

In **Sakiusa Basa v The State** Criminal Appeal No AAU 0024 of 2005 the Court of Appeal held that:

'*The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the*

amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.'

It was held in **Naikelekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that: '*Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.'*

Considering the time of plea in this case the Magistrate is justified in not giving any reduction for the guilty plea separately from the mitigating factors. Thus this ground of appeal fails.

8. **Ground-3** The learned Magistrate failed to consider that he was a first offender. The Magistrate had considered that the appellant was a first offender as a mitigating factor. Thus there is no merit in this ground and it fails. Counsel for the appellant had admitted this in his submissions.

9. **Ground-4** The learned Magistrate considered irrelevant factors into account for sentencing. The Magistrate had considered the following as aggravating factors in this case:

   (a) You committed this offence being a member of a gang,
   (b) You committed this offence on a driver on a public high way,
   (c) The stolen items were not recovered.

   The fact that stolen items were not recovered cannot be considered as an aggravating factor. This position was affirmed by Madigan J in **Soko v State,** [2011] FJHC 777; HAA 031.2011 (29 November 2011) where he held that "*Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature."*

   This point was also highlighted by Nawana J in **Vasuca v State** [2012] FJHC 1244; HAA 03.2012(31 July 2012)

   "As regards 'not all items were recovered', it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently the fact that all or some items of property were not recovered cannot be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa."

It was in evidence that the victim was punched and injured and this was not considered as an aggravating factor by the Magistrate.

The Magistrate had only increased the sentence by one year for the above three aggravating factors. When third factor is left out it is justifiable to increase the sentence by one year for other aggravating factors. Therefore this ground too fails.

10. Based on the above, the term of 6 years imprisonment imposed with 3 years non-parole in the circumstances of this particular case is neither wrong in principle nor manifestly excessive.

11. The appeal against the sentence is dismissed.

Sudharshana De Silva
JUDGE

At Lautoka
11th October 2013

Solicitors for the Appellant: Qoro Legal
Solicitors for the Respondent: Office of the Director of Public Prosecution