IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 08 OF 2016

BETWEEN : SERU WATISONI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Miss V. Nayara for the Appellant
Ms. S. Kiran for the Respondent

Date of Judgment : 23rd of June 2016

JUDGMENT

Introduction

1. The Appellant filed this Petition of Appeal against the sentence imposed by the learned Magistrate of Lautoka dated 22nd of March 2016 on the following grounds, inter alia;

   i) *The learned Magistrate erred in law and in fact by imposing a 2 year 6 months sentence making the sentence harsh and excessive considering the full aspects of the case,*

   ii) *The learned Magistrate erred in law and in fact when the magistrate failed to consider that the appellant was initially charged with theft contrary to Section 291*

(1) (a) of the Crimes Decree 2009, but was sentenced for the charge of robbery contrary to Section 310 (1) (a) (i) of the Crimes Decree,

iii) The learned Magistrate erred in law and in fact when he failed to act upon section 214(2) of the Criminal Procedure Decree.

2. The Appellant was initially unrepresented and filed this grounds of appeal in person. Subsequently, the Legal Aid Commissions appeared for the Appellant and informed the court the Appellant wishes to abandon ground 2 and 3 of the grounds of appeal and only relies on the first ground. Hence, this appeal is now limited to the ground one of the petition of appeal.

3. The learned counsel for the Appellant and the Respondent consented to conduct the hearing by way of written submissions, I accordingly directed them to file their respective written submissions, which they filed as per the direction.

Background

4. The Appellant was charged in the Magistrates court for one count of Robbery contrary to Section 310 (1) (a) (i) of the Crimes Decree. The Appellant pleaded guilty for this offence on his own free will on the 15th of February 2016. He was then sentenced to a period of two (20 years and six (6) months imprisonment by the learned Magistrate on the 22nd of March 2016. The learned Magistrate has not imposed any non-parole period in his sentence. Being aggrieved by the said sentence, the Appellant now appeals against the said sentence.

5. The learned counsel for the Appellant submitted in her submissions that the Appellant has entered an early plea of guilt and has an unblemished record. The

learned Counsel further submitted that according to the summary of facts admitted by the Appellant, there is no evidence of any physical force used by the Appellant. Neither the victim sustained any injuries due to this incident. Having stated above grounds, the learned counsel for the Appellant submitted that the learned Magistrate has not taken those ground into consideration in the sentence. The learned counsel went further and submitted that in view of the grounds mentioned above, the learned Magistrate should have suspended the sentence of the Appellant.

6. The learned counsel for the Respondent in her submissions stated that the sentence is within the acceptable tariff limit. Hence the sentence is not harsh and excessive.

The Law and Analyses

7. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach adopted by the appeal court in interfering in the sentence imposed by the lower court, where it was held that;

'It is well established law that before this 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 the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.'

8. The Fiji Court of Appeal in **Mohammed Jabar v The State (Criminal Appeal No AAU 026 of 2012)** held that;

"The guiding principles or yardstick when an appeal court should interfere with a sentence, has been decided by several judgments. The principles are, if the trial judge;

i) Acted on a wrong principle,

ii) Relied on extraneous or irrelevant matters,

iii) Mistook the facts,

9. Justice Madigan in **Sakiusa Rarawa v State (2015) FJHC 324; HAA05.2015 (30 April 2015)** has expounded the acceptable tariff for the offence of Robbery, where his lordship found that;

" In summary the tariff for robbery should be

i) Aggravated robbery : 10 to 16 years,

ii) Robbery (but with concomitant violence) : 8 to 14 years,

iii) Robbery without violence : 2 to 7 years,

10. The learned Magistrate has considered the tariff as 4 to 7 years, which is in fact the old tariff limit for the offence of Robbery. He has selected 5 years as the starting point, which is close to the higher end of tariff limit as outlined in **Rarawa (supra)**. However, I find that the starting point is within the acceptable tariff limit of 2 to 7 years.

11. Having selected the starting point, the learned Magistrate has considered the physical force used by the Appellant on the victim as an aggravating factor in

paragraph 10 of his sentence. Moreover, the learned Magistrate in paragraph 7 of his sentence has stated that;

"There was unproved and surprise attack and the fact that you have deceived the victim the right to use personal property and money".

12. I presumed that the learned Magistrate had intended to consider that the Appellant had deprived the victim to enjoy his right to use personal property and money as an aggravating factor in paragraph 7 of the sentence.

13. The Fiji Court of Appeal in **Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008)** has expounded the applicable approach in determining the starting point and aggravating factors in sentencing, where it was held that;

""The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point"

14. According to the guideline enunciated in **Naikelekelevesi (Supra)** the aggravating features of the offence and the ingredients of the offence are to be considered in determining the starting point. The learned Magistrate has selected a starting point close to the higher end of the acceptable tariff limit. Hence, it is my opinion that the use of physical force and deprivation of the victim's property are already subsumed in the ingredients of the offence of robbery. It appears that those factors have already been considered in selecting the starting

point. Hence, recognising them as aggravating factors constitutes to double counting.

15. Having concluded that the learned magistrate made an error in considering aggravating circumstances, I now turn onto consider whether this error warrant an intervention of this court.

16. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that;

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".

17. According to the above judicial precedent, the appellate court is required to consider whether the sentence is within the permissible range or a one that could reasonably imposed by a sentencing judge.

18. In this instant case, the Appellant had stolen one mobile phone valued at $340 and cash of $80 from the victim. He took hold the victim and then stole the mobile phone and cash. He then ran away. Accordingly, it appears that the Appellant had used minimal force on the victim and had not used any other form of physical assault. The victim was not injured due to this robbery.

19. Justice Madigan in **Rarawa (supra)** sentenced the Appellant for a period of two (2) years imprisonment with non-parole period of eighteen (18) months. In **Rarawa (supra)** the Appellant had punched the victim on his jaw when the victim was coming out of a convenience store. The victim had fallen on to the pavement due to the assault. He then took his wallet containing $ 500 cash and $15 phone recharge card. The Appellant was drunk at that time.

20. Justice Gounder in **State v Timoci Tikina (HAC 180 of 2010)** sentenced an accused for two years imprisonment period with 12 month of it to be served in prison and the remaining 12 months is suspended for 2 years for an offence of robbery where the accused has snatched the bag of the victim and ran away. The accused in **Tikina (supra)** was a 22 years old young first offender. His lordship found that the accused had used minimum force and the victims were not physically injured.

21. Having considered the sentencing approaches in **Rarawa (supra)** and **Tikina (supra),** I do not find that a sentence of two years and six months imprisonment period, though it falls within the acceptable tariff limit set out in **Rarawa (Supra),** comes within the permissible range of sentencing. It does not reflect the proportionate criminal liability of the Appellant.

22. In view of these findings, it is my opinion that the sentence imposed by the learned magistrate is excessive and harsh. I accordingly quash the sentence delivered by the learned magistrate pursuant to section 256(3) of the Criminal Procedure Decree.

23. I find that offences of this nature are prevalent in the society. The public in any civilised society need to enjoy their rights of property and rights of movement at any time of the day without any undue interventions. The Appellant has used minimum force by holding the victim while he was walking alone the street. In considering these factors, I select 4 years as the starting point.

24. According to the time and place of this offence was committed, it appears that this is an opportunistic crime. I consider this as aggravating circumstances of this offence. I increase 6 months for the aggravating factors.

25. The Appellant is a young first offender, which I consider heavily on your favour. He has sought the forgiveness in the Magistrates court. I consider them as mitigating factors. I reduce 18 months for the above mitigating factors and reach to interim sentence of 3 years. I further reduce one year for the early plea of guilt. Now the final sentence is two years of imprisonment.

26. I am mindful of the fact that a sentence which is below two years of imprisonment could be suspended pursuant to Section of the Sentencing and Penalties Decree. Having considered the young age and unblemished record of the previous character of the Appellant, it is my opinion that partly suspended sentence would adequately serve the purpose of deterrence and the opportunity for rehabilitation.

27. I accordingly sentence the Appellant for a period of two (2) years for the offence of Robbery contrary to Section 310 (1) (a) (1) of the Crimes Decree. You are to serve twelve (12) months of the said imprisonment in prison and the remaining twelve (12) months is suspended for a period of 2 years from the date of release from the prison.

28. If you commit any crime during the suspended period of 2 years and found guilty by the court you are liable to be charge and prosecute for an offence in pursuant of section 28 of the Sentencing and Penalties Decree.

29. Thirty (30) days for appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka

23rd of June 2016

HIGH COURT OF FIJI
LAUTOKA

Solicitors : Office of the Director of Public Prosecutions

Office of Legal Aid Commission