

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 293 of 2017

BETWEEN: **STATE**

PROSECUTION

A N D: **EMOSI BALEIDROKADROKA**

ACCUSED PERSON

Counsel : Ms. S. Lodhia with Mr. Z. Zunaid for the State
 : Mr. A. Chand for the Accused

Date of Sentence : 07th June 2019

SENTENCE

1. Mr. Emosi Baleidrokadroka, you are being charged with one count of Aggravated Robbery, contrary Section 311 (1) (a) of the Crimes Act, which carries a maximum sentence of twenty (20) years imprisonment. The particulars of the offence are that:

Statement of Offence

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

Particulars of Offence

KITONE CAGI, EMOSI BALEDROKADROKA and another on the 29th day of August 2017 at Suva in the Central Division, in the company of each other robbed **JANG WAN BANG & MYOUNG HEE KIM** of 1 x Samsung brand S7 mobile phone, 1 x Kia 3 smart watch, 1 x Swiss brand wrist watch, 1 x brown German brand wrist watch, 1 x National Assembly of Korea brand wrist watch, 1 x black leather wallet containing \$150 cash, ATM and credit cards, 1 x bottle of black label whiskey, 1 x bottle of blue label whiskey, 1 x bottle of chivas regal whiskey, 1 x bottle of champagne, 15 bottles of other assorted alcohol and 1 Kia brand sorento vehicle registration number FZ079 approximately valued at \$65, 000, \$250 cash, 1 x gold ring, 1 x pair of 18ct gold earrings, 1 x blue sapphire 18ct white gold ring, 1 x 18ct gold chain, 1 x diamond white gold ring, 1 x wrist watch, 1 HP brand laptop, 1 x pink apple brand IPOD, 1 x translator machine, 1 x pair of black Adidas brand shoes, 1 x pair of black Nike brand shoes, 1 x black puma bag and 1 x black jacket, the properties of **JANG WAN BANG & MYOUNG HEE KIM**.

2. You pleaded not guilty to the offence, hence, the matter proceeded to the pre-trial stages. Subsequent to the completion of the pre-trial steps, the matter was set down for the hearing on the 3rd of June 2019. However, you changed your position of plea and pleaded guilty to the offence on the 24th of May 2019. Satisfied by the fact that you have fully comprehended the legal effect of your plea and your plea was voluntary and free from influence, I now convict you to this offence of Aggravated Robbery.

3. According to the summary of facts, which you admitted in the court, that you have committed this crime with four other accomplices. You and your accomplices had entered into the house of the complainant at about 2 a.m. on the 29th of August 2017, while the complainant, his wife and his nephew were sleeping in their respective rooms. All of you were masked and armed with knives and pinch bars. You have entered into the house by removing the louver blade from the window. You have then entered into the room of the nephew of the

complainant, who was eighteen years old at that time. You and your accomplices had threatened him with a bolt cutter. You then tied up the hands, legs and mouth of the young nephew of the complainant using neck ties. After stealing certain items from the room of the nephew of the complainant and also from the sitting room, you have entered into the bedroom of the complainant and his wife. After threatening them not to shout, the hands, legs and mouth of the complainant was tied up with neck ties. The hands of the wife of the complainant was also tied in the same manner. You and your accomplices have then stolen the items as described in the information. Having stolen those items, you and your accomplices had fled the house, using the vehicle of the complainant, which is registered as FZ 079.

4. This is a violent home invasion in the night while the occupants were sleeping and then stealing therein. The Supreme Court in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) found that:

“It is our duty to make clear these 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 view of the above observation made by the Supreme Court of Fiji in respect of violent home invasions in the night, I find this is a very serious offence.
6. In view of the seriousness of this offence, it is my opinion that such offenders must be dealt with severe and harsh punishment. Therefore, the purpose of this sentence is founded on the principle of deterrence and protection of community.
7. Tariff for the offence of Aggravated Robbery is between **eight (8) years** to **sixteen (16) years** of imprisonment. (**Wise v State**) (**supra**).

8. The Supreme Court in **Wise v State (supra)** has further outlined the aggravating factors that the sentencing court could take into consideration when sentencing offenders to offences of this nature, where Hon Former Chief Justice Gates held that:

“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.*

9. The complainant was 58 years old and his wife was 56 years old at that time. The nephew of the complainant was 18 years old. Undoubtedly, this is a horrific and horrendous experience to them. This horrific experience would definitely stay in their mind for a long period. The victim impact report explains the depth of the emotional and psychological effect caused by this dreadful crime to the complainant and his wife.

10. You and your accomplices were masked and armed with offensive weapons when you invaded the house of the complainant. You have entered into the house while the occupants were sleeping in the night. They were not in a position to react or escape from the ordeal that you and your accomplices were going to unleash on them. This is a properly planned and

well executed home invasion. You have used substantial amount of physical force by tiding up the hands, legs and mouths of the complainant, wife of the complainant and the nephew of the complainant. Accordingly, I find the level of harm and culpability in this offence are significantly high.

11. Most of the stolen items were not recovered, which I find as an aggravating factor.
12. The learned counsel for the defence in his mitigation submissions highlighted your family and personal circumstances, which I do not find much mitigatory value.
13. You have been adversely recorded with five previous convictions. However, three of those offences were committed after the commission of this offence. Hence, for the purpose of this sentence, you have two previous convictions. There is no evidence or information before this court to consider your general reputation in the society and also no information about any significant contribution that you have made to the community. Therefore, you are not entitled for any discount for your previous character.
14. You pleaded guilty to this matter just before the commencement of the hearing. Therefore, you are only entitled to a meagre discount for your plea of guilty.
15. Having taken into consideration the above discussed reasons, I sentence you to a period of ten (10) years imprisonment to the offence of Aggravated Robbery.
16. Having considered the seriousness of this crime, the purpose of this sentence and your age, I find eight (8) years of non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for a period of eight (8) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

17. Accordingly, Mr. Emosi Baleidrokadroka, I sentence you to a period of **ten (10) years** imprisonment to the offence of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. Moreover, you are not entitled to any parole for a period of **eight (8) years** pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

18. You have been remand in custody for this case for a period of four (4) months and twenty two (22) days before the sentence as you were not granted bail by the court. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of five (5) months as a period of imprisonment that have already been served by you.
19. Accordingly, the actual sentencing period is **nine (9) years and seven (7) months** imprisonment with non-parole period of **seven (7) years and seven (7) months**.

Consecutive Sentences

20. You are currently serving two sentences. The first sentence is a period of eight (8) years and nine (9) months imprisonment with six (6) years and nine (9) months of non-parole period, which was imposed on you on the 28th of March 2019 in respect of the HAC 117 of 2018. The second sentence is a period of nine (9) years imprisonment with seven (7) years non-parole period which was imposed on the 9th of May 2019 in respect of HAC 115 of 2018. You are presently serving both of these sentences concurrently. Moreover, the above two sentences were imposed on you in relation to the offences of Aggravated Robbery.
21. In HAC 117 of 2018, the Court found you guilty to the offence of Aggravated Robbery subsequent to the hearing. In that matter, you have assaulted and robbed a person with another accomplice when he was walking to his home along the road in the evening. In HAC 115 of 2018, you have pleaded guilty to the offence of Aggravated Robbery. In this matter,

you have entered into a car wash with two other accomplices and assaulted the victims and then robbed therein. Accordingly, it is clear that the two sentences that you are presently serving are also involved with violent robberies.

22. Having taken into consideration the nature of the offences for which you are presently serving, I now draw my attention to consider whether this is an appropriate sentence to be served consecutive to the above two sentences. I am grateful to the learned counsel for the prosecution and the defence for providing very helpful and properly researched submissions on this issue.
23. Section 22 (1) of the Sentencing and Penalties Act deals with the concurrent and consecutive sentences.

“Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment”

24. According to Section 22 (1) of the Sentencing and Penalties Act, every sentence imposed by the court must be served concurrent with any pending sentence of imprisonment. However, the Section 22 (1) has allowed the court to decide otherwise. The Supreme Court in **Vaqewa v State [2016] FJSC 12; CAV0016.2015 (22 April 2016)** has outlined the proper construction of Section 22 (1) of the Sentencing and Penalties Act, where Keith J held that:

“In my opinion, the proper construction of these provisions is as follows. The default position is that any term of imprisonment passed on someone by a court has to be served concurrently with any sentence of imprisonment he is currently serving. There are two situations in which the default position must or may be disapplied. It must be disapplied in any of the five circumstances set out in section 22(2). That is the effect of the opening words of section 22(1) – “Subject to sub-section (2) ...” – and the opening

words of section 22(2) – “Sub-section (1) does not apply ...” In addition, though, even in a case which does not come within any of the five circumstances set out in section 22(2), the default position may be disapplied. That is the effect of the words “unless otherwise directed by the Court” in section 22(1).”

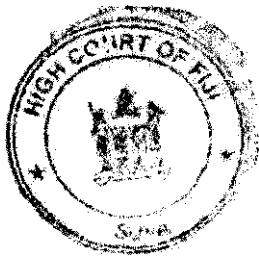
25. Accordingly, the words “*unless otherwise directed by the Court*” in Section 22 (1) has given a discretion to the sentencing court to depart from the default position of imposing concurrent sentences, if it finds the consecutive sentence is the appropriate punishment.
26. The Fiji Court of Appeal in **Tuibua v State [2008] FJCA 77; AAU0116.2007S (7 November 2008)** has discussed the applicable approach in imposing consecutive sentences. The Fiji Court of Appeal in **Tuibua (supra)** said that:

“The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A sentencer who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentencer must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced (Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.) 180). When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones [1995] UKPC 3; (1996) 1 Cr.App.R. (S.) 153, R v Millen (1980) 2 Cr.App.R. (S.) 357 and Nollen v Police (2001) 120 A Crim R 64).”

27. In view of the principles enunciated in **Tuibua (supra)** the court has to take into consideration the propriety of the aggregate sentence as a whole when the court is imposing a consecutive sentence to an accused, who is already serving a term of imprisonment in relation to another matter. Accordingly, the court is required to consider the totality of the aggregate sentence. The totality principle in sentencing encompasses two main elements. The first is proportionality between the sentence and the offence. The second element is that the court should not impose a “crushing” sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: **(Martino v Western Australia [2006] WASCA 78 [16])**.
28. As I explained before, the two sentences that the accused is currently serving are involved with two cases of serious violent robberies. In this matter, the accused had used a substantial amount of violence on the victims and carried it out in a frightening circumstances. This offence was committed on the 29th of August 2017. The aggravated robbery that involves in HAC 117 of 2018 was committed on the 11th of March 2018. The accused had committed the offence of aggravated robbery which involves in HAC 115 of 2018 on the 15th of March 2018. Accordingly, it appears that the accused had committed these three serious violence robberies within a period of seven months.
29. One of the main purposes of the sentencing is to protect the public from the commissions of such crimes by making it clear to the offenders and to other persons with similar impulses, that, if you commit such a crime, you will meet with severe and appropriate punishment. If the court applies the default position of concurrent sentence as stipulated under Section 22 (1) of the Sentencing and Penalties Act, the accused will only serve a period of nearly ten years for the commission of above discussed three serious violent crimes. It would undoubtedly be perceived by the public as a weak and lenient punishment for such a series of horrendous crimes committed on innocent citizen of the society.
30. Therefore, a consecutive term of imprisonment would precisely reflect the proper proportionality between the gravity and seriousness of the offence and the sentence. The accused is 26 years old and maximum penalty to the offence of aggravated robbery is twenty

years imprisonment. Therefore, a consecutive sentence would not destruct any reasonable expectation of a useful life after release.

31. Having taken into consideration the above discussed reasons, I order that this sentence to be served consecutive to the remaining period of the current two sentences that the accused is presently serving.
32. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
07th June 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Defence.