

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 107 of 2023

BETWEEN : **THE STATE**

A N D : **APISALOME TABANIVESIKULA YACA**

AND

TANIELA RAIKILAGI LOTAWA

Counsel : Ms. W.T. Elo for the State.
: Ms. S. Singh for the First Accused.
: Mr. F. Singh for the Second Accused.

Date of Submissions : 16 October, 2023

Date of Sentence : 25 October, 2023

SENTENCE

BACKGROUND INFORMATION

1. Both the accused persons are charged by virtue of the following information filed by the Director of Public Prosecutions dated 11th September, 2023:

Statement of offence

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

Particulars of Offence

APISALOME TABANIVESIKULA YACA and TANIELA RAIKILAGI LOTAWA on the 10th day of July, 2023, at Nadi in the Western Division, robbed ABHISHEK YASH CHAND of 1 x Samsung A32 mobile phone valued at \$629.00, 1 x Cloud-break brand wallet (black) and cash of \$180.00 and at the time of such robbery used personal violence on the said ABHISHEK YASH CHAND.

2. On 13th September, 2023 both the accused persons in the presence of their counsel pleaded guilty to the above count. Thereafter on 11th October, 2023 both the accused persons admitted the summary of facts read.
3. The summary of facts admitted by both the accused persons was as follows:
 - a) At about 4.30 am on the 10th July, 2023, the victim had knocked off work and was making his way home through the Kennedy junction when he was suddenly grabbed from behind and aggressively told to hand over his money and his mobile phone.
 - b) As the victim was being told of this, another man came in front of him. The victim noticed that he was of fair complexion, wearing a black shorts and black t-shirt with a cloth wrapped around his head. When the victim realized the threat, he reluctantly handed over his

A32 Samsung mobile phone valued at \$629.00 and his wallet containing cash of \$180.00. After taking the above properties the two men ran away.

- c) The victim went to the Nadi Police Station where he lodged his report. The police conducted a physical search around the area with the descriptions and information provided by the victim.
 - d) From the scene of crime, the police then continued back towards Nadi town where they noticed the two suspects whose descriptions matched those that were relayed to them by the victim. The two accused were arrested and the victim's properties were found in possession of the first accused.
 - e) The two men were cautioned interviewed where they admitted committing the robbery in the company of each other.
4. After considering the summary of facts read by the state counsel which was admitted by both the accused and upon reading their caution interviews this court is satisfied that both the accused persons have entered an unequivocal plea of guilty on their freewill.
 5. This court is also satisfied that both the accused persons have fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offence committed. Both the accused persons also admitted committing the offence in the company of each other.
 6. In view of the above, this court finds both the accused persons guilty as charged and they are convicted accordingly. Both counsel filed sentence and mitigating submissions for which this court is grateful.

7. The learned counsel for both the accused presented the following mitigation and personal details:

APISALOME YACA

- a) The accused is a first offender;
- b) He is 21 years of age;
- c) He is unemployed;
- d) Full recovery of all the stolen items;
- e) Regrets what he has done;
- f) Resides with his aunt;
- g) Co-operated with the police;
- h) Pleaded guilty at the earliest opportunity.

TANIELA LOTAWA

- a) The accused is a first offender;
- b) He is 22 years of age;
- c) Is a Security Guard;
- d) Was earning approx. \$200.00 per week;
- e) Full recovery of all the stolen items;
- f) Regrets what he has done;
- g) Resides with his uncle and supports his uncle;
- h) Co-operated with the police;
- i) Pleaded guilty at the earliest opportunity.

TARIFF

8. The maximum penalty of the offence of aggravated robbery is 20 years imprisonment. However, the accepted tariff for the offence of street mugging is from 1 year to 5 years imprisonment. The Supreme Court

in *The State vs. Eparama Tawake CAV 0025 of 2019 (28 April, 2022)* has provided guidance in regards to the appropriate sentence for such an offence. The final sentence is dependent on:

- a) The degree of the offender's culpability; and
- b) The level of harm suffered by the victim.

9. This is a case where two accused persons outnumbered the victim and robbed him early morning stealing a mobile phone and cash. According to the guideline in *Tawake's* case (supra) this case will fall under low level of harm suffered by the victim. The Supreme Court in *Tawake's* case (supra) from paragraphs 23 to 30 made the following pertinent observations:

[23] The State suggests that the best way for the Court to achieve consistency in sentencing for "street muggings" is to adopt the methodology of the Definitive Guideline on Robbery issued by the Sentencing Council in England. That Guideline (as with the case of other definitive guidelines issued by the Sentencing Council) classifies cases of robbery by reference to two important factors: the degree of the offender's culpability and the level of harm suffered by the offender's victim. There are three degrees of culpability and three levels of harm. The Guideline identifies a sentencing range for each class of case, and a starting point within that range.

[24] The English guideline covers three different types of robbery: "home invasions", professionally planned commercial robberies, and street and less sophisticated commercial robberies. Our focus in this case is on the last type. Even then, though, the English framework would require some refinement in Fiji, because in England there is a single offence of robbery, whereas Fiji has two offences of robbery: robbery contrary to section 310 of

the Crimes Act and aggravated robbery contrary to section 311 of the Crimes Act. Moreover, as we have seen, the offence of aggravated robbery takes two forms: where the offender “was in company with one or more other persons” at the time of the robbery, and where the offender “has an offensive weapon with him or her” at the time of the robbery. Such guidance as we give has to reflect these differences.

[25] For my part, I think that this framework, suitably adapted to meet the needs of Fiji, should be adopted. There is no need to identify different levels of culpability because the level of culpability is reflected in the nature of the offence, and if the offence is one of aggravated robbery, which of the forms of aggravated robbery the offence took. When it comes to the level of harm suffered by the victim, there should be three different levels. The harm should be characterized as high in those cases where serious physical or psychological harm (or both) has been suffered by the victim. The harm should be characterized as low in those cases where no or only minimal physical or psychological harm was suffered by the victim. The harm should be characterized as medium in those cases in which, in the judge’s opinion, the harm falls between high and low.

[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> WI TH ANOTHER <u>OR</u> WITH A WEAPON)	AGGRAVATED ROBBERY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)
HIGH	Starting point: 5 years imprisonment	Starting point: 7 years imprisonment	Starting point: 9 years imprisonment

	<i>Sentencing range: 3-7 years imprisonment</i>	<i>Sentencing range: 5-9 years imprisonment</i>	<i>Sentencing range: 6-12 years imprisonment</i>
<i>MEDIUM</i>	<i>Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment</i>	<i>Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment</i>	<i>Starting point: 7 years imprisonment Sentencing range: 5-9 years imprisonment</i>
<i>LOW</i>	<i>Starting point: 18 months imprisonment Sentencing range: 6 months-3 years imprisonment</i>	<i>Starting point: 3 years imprisonment Sentencing range: 1-5 years imprisonment</i>	<i>Starting point: 5 years imprisonment Sentencing range: 3-7 years imprisonment</i>

[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, Seninlokula 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.

AGGRAVATING FACTORS

10. The following aggravating factors are obvious:

a) No regard to victim’s property

The accused persons did not have any regard for the property rights of the owner. The offence was committed during the early hours of the morning when the victim was returning from work. The accused persons were bold and undeterred in what they did to the victim.

b) Prevalence of the offending

There has been an increase in such offending that people are reluctant to walk on the streets. The accused persons had outnumbered and over powered the victim.

c) Planning

From the facts there appears to be degree of planning involved. The accused persons saw the street was empty and the victim was alone. They took advantage of the situation.

11. After taking into account the objective seriousness of the offence committed I select 1 year imprisonment (lower range of the tariff) as the starting point of the sentence for both the accused persons. The sentence is increased for the aggravating factors, but reduced for mitigation and good character.
12. The sentence is further reduced for early guilty plea it is also noted that both the accused persons have been in remand for 3 months and 16 days hence further reduction is given.
13. The final sentence for one count of aggravated robbery is 3 years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
14. In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012)*, Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:


"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7: "Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits

a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

15. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.
16. Both the accused persons are young offenders (21 and 22 years of age respectively at the time of the offending), of good character, isolated offences were committed by them, have pleaded guilty at the earliest opportunity, are remorseful, cooperated with police and they take full responsibility of their actions. These special reasons render an immediate imprisonment term inappropriate.
17. I am sure both the accused persons have a bright future ahead of them hence an imprisonment term will not augur well for them. In view of the above, this court has taken into account rehabilitation over and above imprisonment. Both the accused persons are given another chance to be good citizens they have been in remand until today which serves as a reminder for the accused persons that such activities do not

end with a good result. They are able bodied persons who can earn their living from their sweat rather than being a nuisance to the members of the community.

18. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a suspended sentence is just in all the circumstances of this case.
19. In summary both the accused persons are sentenced to 3 years imprisonment for one count of aggravated robbery which is suspended for 5 years. The effect of the suspended sentence is explained to both the accused persons.
20. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

25th October, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused persons.