

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 152 OF 2023

STATE

vs.

AVISHAL KUMAR & OTHERS

Counsel : Mr. U. Lal for the State.
Mr. F. Singh for the Accused.

Date of Submissions : 18 June, 2024

Date of Sentence : 21 June, 2024

SENTENCE

1. The accused is charged with the following offences with two others as per the information filed by the Director of Public Prosecutions dated 30th November, 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JOVESA NADOMO, AVISHAL KUMAR & ADRIAN KOROI in the company of each other on the 23rd day of August, 2023 at Lautoka in the Western Division, stole 1 x Bose Speakers, 1 x Panasonic Sub-Woofer, 1 x Blue Coloured I-Phone 12 Pro Max, wallet containing assorted cards, 1 x IMAC, 1 x bag of clothes, 1 x I-Phone Charger, 2 x bicycles coloured red and blue and cash amounting to \$40.00 the properties of PRANJEET SINGH and immediately before stealing, threatened to use force on the said PRANJEET SINGH.

COUNT TWO

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

JOVESA NADOMO, AVISHAL KUMAR & ADRIAN KOROI in the company of each other on the 23rd day of August, 2023 at Lautoka in the Western Division, stole 1 x TCL branded TV, the property of ANCHORAGE BEACH RESORT with the intention to permanently deprive ANCHORAGE BEACH RESORT of the said property.

2. On 19th February, 2024 the accused pleaded guilty to the above counts in the presence of his counsel. Thereafter, on 3rd June, 2024 the accused in the presence of his counsel admitted the summary of facts read to him.

3. The summary of facts is as follows:

On 23rd August, 2023 between 7.15 and 7.30 pm, the victim and his wife whilst in their apartment at Anchorage Beach Resort room no. 401, heard someone break open the front door and they saw the accused with two others entering their apartment forcefully.

The accused with others entered their apartment and threatened both the victim and his wife to stay put or they will be assaulted.

The accused with others then stole the following items:

1. 1 x TCL brand TV valued at	\$ 150.00	
2. 1 x Bose Speakers valued at	\$1,400.00	
3. 1 x Panasonic Sub-Woofers valued at	\$ 200.00	
4. 1 x blue coloured 1-phone 12 Pro Max valued at	\$3,000.00	
5. Wallet containing assorted cards		
6. 1 x IMAC valued at	\$4,000.00	
7. 1 x bag of clothes valued at	\$ 250.00	
8. 1 x I-Phone charger valued at	\$ 250.00	
9. 2 x bicycles coloured red and blue both valued at each)	\$1,200.00	(\$600
10. Cash	<u>\$ 40.00</u>	
TOTAL		<u>\$10,490.00</u>

The accused and others then fled from the scene in taxi registration number LH 1465.

The matter was reported to police and after the investigation, the police managed to arrest the accused person. The accused was interviewed under caution wherein he admitted committing the offences.

4. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview, this court was satisfied that the accused had entered an unequivocal plea of guilty on his freewill.
5. This court was also satisfied that the accused had understood the nature of the charge and the consequences of pleading guilty. Furthermore, the summary of facts satisfied all the elements of the offence of aggravated robbery and theft which was committed by the accused in the company of others.
6. In view of the above, on 3rd June, 2024 this court found the accused guilty as charged and he was convicted accordingly. Both counsel filed sentence and mitigation submissions for which this court is grateful.
7. The counsel for the accused presented the following mitigation:
 - (a) The accused was 27 years of age at the time of the offending;
 - (b) Unemployed and he is a first offender;
 - (c) Never married;
 - (d) Resides with his elderly parents;
 - (e) Supports his elderly parents;
 - (f) Substantial recovery of the stolen items;
 - (g) No violence on the victims;
 - (h) Early guilty plea;

- (i) Cooperated with the police during investigations.

TARIFF

8. The maximum penalty for the offence of aggravated robbery is 20 years imprisonment. The accepted tariff for this offence is from 8 years to 16 years imprisonment (*Wallace Wise-v-The State, CAV0004 of 2015 (24 April, 2015)* since this is a home invasion by a group of men during night time.
9. I take cognizance of the Supreme Court decision in *The State vs. Eparama Tawake CAV 0025 of 2019 (28 April, 2022)* which has provided guidance in regards to the appropriate sentence based on:
 - a) The degree of the offender's culpability; and
 - b) The level of harm suffered by the victim.
10. I am mindful that this case has a different set of facts compared to the case of *Tawake* (supra) and for this reason I am unable to strictly follow the tariff in *Tawake's* case. The facts in *Tawake's* case was of street mugging and this is a case of home invasion for which the tariff in *Wise* case (supra) applies.
11. For the offence of theft the maximum penalty is 10 years imprisonment. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:

“(i) For the first offence of simple theft the sentencing range should be between 2 and 9 months.

(ii) any subsequent offence should attract a penalty of at least 9 months.

(iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.

(iv) regard should be had to the nature of the relationship between offender and victim.

(v) planned thefts will attract greater sentences than opportunistic thefts.

12. I do get some comfort in saying that the final sentence can be higher or lesser than the accepted tariff depending upon the aggravating and mitigating factors, the nature and circumstances of the offending. I note in this case there were no weapons used and there was no violence on the victims.

AGGRAVATING FACTORS

13. The following aggravating factors are obvious:

(a) Planning

There is a high degree of planning involved and the accused was an active member of the plan. He was bold and undeterred in what he did that night.

(b) Victims were unsuspecting

The victims had no clue, they were in their apartment going about their normal chores when the accused and his group disturbed their peace. A substantial amount of properties were stolen.

(c) Safety of the Victims

The victims were supposed to be safe in their apartment but this was not to be due to the actions of the accused.

(d) No regard to the property rights of others

The accused had no regard for the property rights of the victims.

(e) Prevalence of the offending

There is an increase in property related offending that victims live in fear these days.

13. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

14. I am satisfied that the offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the two offences.

15. After assessing the objective seriousness of the offences committed I take 8 years imprisonment (lower end of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, however, it is reduced for good character and mitigation.
16. The accused is a first and a young offender (27 years at the time) who has come to court with a clean record hence he receives a discount for good character and other mitigating factors. I have also taken into account the affidavit on behalf of the accused filed by his parents. The fact that the accused had assisted in the recovery of the stolen items is a positive factor in his favour as well.
17. The accused pleaded guilty at the first available opportunity after the filing and service of the information and disclosures. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:
18. [14]. In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In ***Mataunitoga -v- The State*** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15]. The principle in ***Rainima*** must be considered with more flexibility as ***Mataunitoga*** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

19. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
20. This court accepts that the accused has shown genuine remorse when he pleaded guilty. From the caution interview of the accused Q's and A's 70, 71 and 153 I accept that the accused had extended his apology to the victims shows that he had a change of heart although late in time.

21. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se* see *Gordon Aitcheson's* case (supra). In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt the timing of the guilty plea is early and that the prosecution had a strong case against the accused.
22. Nevertheless, by pleading guilty the accused saved the court's time and expenses and also prevented the victims from reliving their experience in court. Bearing this in mind, the accused ought to receive some reduction for his guilty plea bearing in mind that the offences committed are serious.
23. I also note from the court file that the accused was remanded for 22 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 1 month as a period of imprisonment already served. The accused counsel is asking for a partial suspended sentence unfortunately home invasion is a very serious crime. The high tariff for such an offending reeks of a custodial sentence. The courts in this country cannot turn a blind eye to such an offending. People should enjoy peace and harmony within the confines of their homes hence this is the reason why a high tariff has been set for such an offending. The final aggregate sentence is 6 years and 7 months imprisonment.
24. The final aggregate sentence is below the tariff because the accused had cooperated with the police which resulted in substantial recovery of stolen items, early guilty plea, what he did was out of character, young offender

(27 years at the time), had apologized to the victims at the time, none of the victims were hurt and the accused was not in possession of any weapons.

25. In my considered view the above factors favour the accused and he ought to be given another chance in life to rehabilitate himself and also to avoid a crushing effect on him.
26. Having considered section 4(1) of the Sentencing and Penalties Act and the serious nature of the offences committed compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
27. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
28. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State AAU0063.2011 (27 February 2015)* at paragraph 2 Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-

parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

29. The Supreme Court in accepting the above principle in *Akuila Navuda v The State* [2023] FJSC 45; CAV0013.2022 (26 October 2023)] stated the following:

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

30. Considering the above, I impose 5 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the

expectations of the community which is just in the circumstances of this case.

31. Mr. Kumar you cannot be forgiven for what you have done there is no short cut you must earn with your hard work. What you did was a daring night time robbery after much planning. Greed for money has taken you away from your family, you should be ready to face the consequences of your deeds. You should be ashamed of yourself.
32. This court will be failing in its duty if a custodial sentence is not imposed. No amount of regret or repentance will save you from a custodial sentence. Your elderly parents in their affidavit are asking for forgiveness on your behalf shows their concern for you. You should have thought about them before embarking on such an unlawful activity.
33. In summary I impose an aggregate sentence of 6 years and 7 months imprisonment for one count of aggravated robbery and one count of theft with a non-parole period of 5 years to be served before the accused is eligible for parole.
34. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

21 June, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.