IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 182 OF 2023

STATE

V

JOSHUA CECIL EMMANUEL TUINIVONO, NEORI RAYA AND ANOTHER

Counsel	:	Mr. U. Lal for the State. Ms. R. Nair for the First Accused.
	:	Ms. P. Reddy for the Second Accused.
Date of Submissions	:	22 July, 2024
Date of Sentence	:	24 July, 2024

SENTENCE

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1. Both the accused persons are charged with the following information filed by the Director of Public Prosecutions dated 9th April, 2024:

Statement of Offence

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

Particulars of Offence

JOSHUA CECIL EMMANUEL TUINIVONO, NEORI RAYA and another on the 30th day of September, 2023 at Lautoka, in the Western Division in the company of each other, stole 1 x Samsung Galaxy A13 mobile phone, 1 x Black Nokia button mobile phone, pair of blue canvas, 1 x Toyota Prius Taxi Registration Number LK 1164 and cash amounting to $100.00 being the properties of MOHAMMED IFRAZ HUSSAIN and immediately before stealing, used force on the said MOHAMMED IFRAZ HUSSAIN.

2. On 7th June, 2024, the first accused Joshua Tuinivono pleaded guilty to the above count in the presence of his counsel. Thereafter on 11th June, 2024 the second accused Neori Raya pleaded guilty in the presence of his counsel.

3. On 14th June, 2024 both the accused persons in the presence of their counsel admitted the summary of facts read and explained to them in their preferred language.

4. The summary of facts is as follows:

   a) On 30th September, 2023 at around 10.30 pm, the victim was driving his taxi registration number LK 1164 in Lautoka City. Upon reaching Naviti Street traffic lights, he stopped his car. At this time both the accused persons and another boarded the taxi and told the victim to take them to Naikabula, Lautoka.

   b) Whilst on their way, one of the accused persons who was seated at the back behind the driver's seat, held the victim's neck, choked him and told him to stop the taxi. The victim did as he was told both the accused persons pulled the victim out of the taxi and took him to the back seat.

c) The first accused drove the taxi to Abaca and whilst on their way, the second accused punched the victim on his stomach and face. Upon reaching Abaca, both the accused persons parked the taxi at an isolated area.

d) The second accused pulled the victim out of the taxi, cut the seat belt and tied him to a nearby tree with the seat belt. They also tied and covered the victim's mouth with a t-shirt. Both the accused persons and another went away with the following items:

i.	1 x Samsung galaxy A13 mobile phone valued at	$ 480.00
ii.	1 x Black Nokia button mobile phone valued at	$ 45.00
iii.	Canvas blue in colour valued at	$ 18.00
iv.	Cash amounting to	$ 100.00
v.	Taxi registration number LK 1164 valued at	$18,000.00
Total		**$18,643.00**

The matter was reported to police after which an investigation was carried out by a team of police officers.

e) The police managed to arrest both the accused persons who were interviewed under caution whereby both admitted committing the offence.

f) The victim was medically examined at the Lautoka Hospital for injuries sustained on his right shoulder.

5. After considering the summary of facts read by the state counsel which was admitted by both the accused persons and upon reading their respective caution interviews this court is satisfied that the accused persons have entered an unequivocal plea of guilty on their freewill.

6. This court is also satisfied that both the accused persons had fully understood the nature of the charge and the consequences of pleading guilty. Furthermore, the summary of facts satisfies all the elements of the offence of aggravated robbery.

7. In view of the above, this court finds both the accused persons guilty as charged and they are convicted accordingly. Counsel filed sentence and mitigation submissions for which this court is grateful.

8. The counsel for the accused presented the following mitigation:

<u>JOSHUA CECIL EMMANUEL TUINIVONO</u> (Accused one)

a) The accused is 23 years old;
b) Is married and has a 2 year old child;
c) Worked as a Labourer and earned $189.00 per week;
d) Sole breadwinner of the family;
e) Takes full responsibility for his actions;
f) He accepts his wrong doing;
g) Pleaded guilty at the earliest opportunity;
h) Is remorseful;
i) Cooperated with the police;
j) Seeks forgiveness and mercy of the court;
k) Regrets what he has done;
l) Promises not to reoffend;
m) Substantial recovery.

NEORI RAYA (Accused two)

a) The accused is a first offender;
b) Was 25 years of age at the time;
c) Was employed at Lautoka Wharf earning $360.00 weekly;
d) Takes responsibility for his actions;
e) Pleaded guilty at the earliest opportunity;
f) Sincerely remorseful for his actions;
g) Cooperated with the police;
h) Seeks forgiveness of the court;
i) Regrets what he has done;
j) Promises not to reoffend;
k) Substantial recovery.

TARIFF

9. The maximum penalty for the offence of aggravated robbery is 20 years imprisonment. The acceptable tariff for the offence of aggravated robbery against public service providers such as taxi, bus and van drivers is from 4 years to 10 years imprisonment (*see Usa vs. State, Criminal Appeal AAU 81 of 2016 (15 May, 2020).*

10. This court also takes 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 in aggravated robbery offences based on:

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

11. In *Tawake's* case (supra) the Supreme Court has given a tariff for aggravated robbery with another person under medium harm category (which the facts of this case falls into) is a sentence between 3 to 7 years imprisonment. This is a case of aggravated robbery on a public service provider for which a specific tariff applies.

AGGRAVATING FACTORS

12. The following aggravating factors are obvious:

(a) Planning

There is some degree of planning involved both the accused persons were looking for a taxi driver in the night to rob so that they could get some money.

(b) Victim was unsuspecting and vulnerable

The victim was lured into believing that he was hired to undertake a genuine public service work but this was not to be. The accused persons were bold and undeterred in what they did.

(c) Breach of Trust

The victim was carrying on his usual public service duty in driving the accused persons from Lautoka City to Naikabula as requested. The accused persons by doing what they did breached the trust of the victim. The victim was also outnumbered by the accused persons.

(d) Prevalence of the offence

This type of offending has become very prevalent nowadays offenders are preying on innocent public service providers for easy money. The accused persons left the victim in an isolated surrounding at night without any regard for his life and safety.

DETERMINATION

13. Considering the objective seriousness of the offence committed I select 4 years imprisonment (lower range of the tariff) as the starting point of the sentence. The sentence is increased for the aggravating factors by 4 years. The interim sentence for both the accused is 8 years imprisonment. The sentence is reduced for mitigation and good character for the second accused Mr. Raya since he is a first offender by 2 years which is now 6 years imprisonment.

14. I note that Mr. Tuinivono (first accused) has two previous conviction for similar offending hence he does not get any discount for good character. His sentence is reduced for mitigation by 1 year and 6 months which is now 6 years and 6 months imprisonment.

GUILTY PLEA

15. Both the accused pleaded guilty at the earliest opportunity after the matter was first called in this court. 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:

*[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.*

16. 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).*

17. This court accepts that both the accused have shown some remorse when they pleaded guilty. By pleading guilty the accused persons prevented the victim from reliving his experience in court which is also a factor to the credit of the accused persons.

18. 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 both the accused persons by pleading guilty have shown some remorse as opposed to genuine remorse in view of the strong prosecution case against them.

19. The sentence is further reduced for early guilty pleas and remorse by a further 1 year for both the accused persons. The head sentence for the first accused Mr. Tuinivono is now 5 years and 6 months imprisonment and for the second accused Mr. Raya his sentence is 5 years imprisonment.

20. As for the remand period of Mr. Tuinivono he does not get the benefit of any reduction since he has already received a reduction of 8 months for his remand period in HAC 174 of 2023 (24 June, 2024). The accused cannot get a double reduction. The final sentence for the first accused is 5 years and 6 months imprisonment.

21. I have taken into account that Mr. Tuinivono is a young offender (was 23 years at the time), pleaded guilty at the earliest opportunity, has shown some remorse, cooperated with police and he takes responsibility for his actions. I have also taken into account the fact that he is currently serving

1 year and 4 months imprisonment. The offence committed is serious which shows blatant disregard for public service providers. In my considered judgment a concurrent sentence will be too lenient and to have some deterrence in sentencing bearing in mind the tariff in place this term of imprisonment will be served consecutively to the sentence of 1 year and 4 months in HAC 174 of 2023 (24 June, 2024). This means Mr. Tuinivono will serve 6 years and 10 months imprisonment.

22. 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.

23. 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.

24. 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.

25. Considering the above, I impose 5 years and 10 months imprisonment 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.

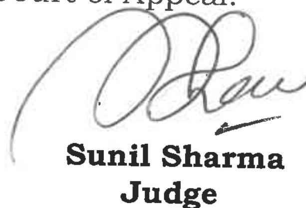
26. For Mr. Raya I note from the court file that this accused was remanded for 14 days in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 1 month as a period of imprisonment already served. The final sentence for Mr. Raya is 4 years and 11 months imprisonment.

27. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim 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.

28. In summary the first accused Mr. Tuinivono is sentenced to 5 years and 6 months imprisonment which will be served consecutively to the sentence of 1 year and 4 months in HAC 174 of 2023 (24 June, 2024). This means Mr. Tuinivono will serve 6 years and 10 months imprisonment with a non-parole period 5 years and 10 months to be served before this accused is eligible for parole.

29. For the second accused Mr. Raya he is sentenced to 4 years and 11 months imprisonment with non- parole period of 3 years and 11 months to be served before this accused is eligible for parole. The non-parole period is below the tariff due to this accused early guilty plea, cooperation with the police during investigation and it was an out of character offending.

30. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

24 July, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.