IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO: AAU 0020 of 2011
[High Court Criminal Case No. HAC 178 of 2010]

BETWEEN	:	**WALLACE WISE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Calanchini P** **Chandra JA** **Gamalath JA**
Counsel	:	**Appellant in Person** **Mr. L. Fotofili for the Respondent**
Date of Hearing	:	**05 September 2014**
Date of Judgment	:	**5 December 2014**

JUDGMENT

Calanchini P:

[1] I have read the draft judgment of Gamalath JA and agree that the appeal should be dismissed.

Chandra JA:

[2] I have read the judgment and I agree with the reasons and conclusions of Gamalath JA.

Gamalath JA

[1] The appellant Wallace Wise, being aggrieved by the sentence of seven years imprisonment imposed by the learned High Court Judge at Suva, has launched this appeal to have the sentence revised.

[2] His appeal is based on the single ground ,that it is manifestly excessive ,compared with the sentence of three years imposed on the co-accused Eseroma Gade, who pleaded guilty to the charge of Aggravated Robbery under Section 311 (1) (a) of the Crimes Decree 2009, in the first instance itself, in the Magistrate's Court.

[3] In legal parlance, the appellant is alleging 'disparity of sentence', a valid ground in law to appeal any sentence of imprisonment.

The Facts

[4] The appellant, with Ratu Meli Bainivalu, Eseroma Gade and some others, in the ungodly hours, between 2:00am and 3:00am on 16 April 2010, broke into the house of the victim Shiu Ram, a 62 year old grocer, who was asleep in the house with his family. The intruders, according to Shiu Ram had worn hoods, so that they could not be identified, and were armed with weapons such as a knife and iron rod.

[5] As they entered, one of the intruders punched Shiu Ram in the face and struck him with the knife, occasioning an injury to his eyebrow. He received further cut injuries to his head and when he fell on the ground he was punched in his chest. They held the knife at

his wife and demanded money and jewelry. Whilst this pandemonium continued for about half an hour, another member of the gang remained in the yard and pelted stones at neighbors who were rushing to the scene to rescue Shiu and his family. They caused damage to Shiu's property, robbed valuables such as jewelry, money, to the total value of around $640.00.

[6] This is the first experience of this kind that Shiu and his family had experienced. In fact, he was ailing with a severe earache when the culprits stormed into the house. These incidents had traumatized his entire family including a young granddaughter who lived with them. The family was terrified to such an extent that they continued to experience nightmares.

The Investigation

[7] Following the successful investigation the police arrested 3 persons. They were the appellant Wallace Wise, Ratu Meli Bainivalu and Eseroma Gade. Based on the available evidence, charges were preferred against them under Section 311 (1) (a) of the Crimes Decree of 2009 for Aggravated Robbery.

[8] The evidence shows that the accused were members of a joint enterprise, the common design of which was to rob Shiu Ram, and thus the criminal liability should be attached jointly to them.

[9] All three accused stood charged in the Magistrate's Court at Nasinu, where the accused Eseroma Gade pleaded guilty to the charge, in the first instance itself.

[10] He was sentenced to three years imprisonment. His guilty plea in the first instance had been rightly considered as a valid, mitigating circumstance.

[11] The case of the appellant and Ratu Meli Baininvalu was transferred to the High Court at Suva by virtue of the sections 191 and 196 of the Criminal Procedure Decree.

The Proceedings in the High Court

[12] On 10 September 2010, both Ratu Meli Bainivalu and the appellant were arraigned in the Suva High Court.

[13] The appellant pleaded not guilty to the charge, whilst Ratu Meli Bainivalu pleaded guilty.

[14] Ratu Meli Bainivalu was sentenced to six years imprisonment.

The Appellant's Stance

[15] Unlike Ratu Meli Bainivalu, until 15 October 2010, the appellant's protestations of innocence remained unchanged. However, marking a significant turn of events, on 15 October 2010, the State informed the Court, that the prisoner Ratu Meli Banivalu would be called in as a state witness in the case against the appellant. Consequently, Ratu Meli's statement was served on the appellant. The next significant turn of events took place on 24 January 2011. On that day, the appellant changed his original plea of not guilty and informed the court that he was pleading guilty.

[16] He has 22 previous convictions for committing various crimes, and as such, he was unable to claim good character in mitigation.

[17] Having taken all the relevant factors into account, the learned High Court Judge sentenced him to 7 years imprisonment, with a non-parole period of 5 years.

[18] The learned High Court Judge, in determining the period of imprisonment, had adverted his mind to the existing aggravating factors, such as, that the offence was a premeditated gang robbery.

The Ground of Appeal

[19] The appellant is dissatisfied with this sentence for he believes that it is manifestly harsh and excessive compared with the 3 years imprisonment imposed on Eseroma Gade. This disparity, he contends, should be eliminated by reducing the sentence of imprisonment to 3 years, so that there will be equality in the manner of punishment between him and the other perpetrators.

[20] As discussed above Eseroma Gade's case is distinguishable from the case of the appellant for several good reasons.

[21] As already stated earlier, in the case of Eseroma Gade he had pleaded guilty to the charge in the first instance in the Magistrate's Court itself. Having taken into account all the attendant circumstances the Learned Magistrate sentenced him to 3 years' imprisonment.

[22] The appellant's conduct is quite the other way round. He, as it appears, changed his mind after learning from the Respondent that his former co-accused Ratu Meli Bainivalu was turning against him by becoming a State witness. Until such time, the appellant maintained that he was not guilty. There is absolutely nothing on the record to demonstrate his feeling of remorse over the commission of the crime. Nor, that there is anything to indicate any offering of at least an apology to the victim, who suffered heavily, at the hands of the perpetrators.

[23] In the circumstances as such, is it reasonable for the appellant to expect this Court to place him on an equal footing with Eseroma Gade?

[24] In order for us to find answers, we need to turn to the legal concepts relating to the subject of disparity of sentences.

Disparity of Sentence as a Ground of Appeal

[25] *Archibald*, [1997] part 5-106 pg 597 States thus;

> "*Disparity of sentence may occur in a number of different forms. The most obvious is where one co-defendant receives a more severe sentence than the other, when there is no good reason for the difference (R v Church, 7 Cr. App. R (S.) 370 C.A. There may equally be disparity when the defendants receive identical sentences, despite relevant difference in their culpability or personal circumstances, R v Sykes, 2 Cr. App. R(S.) 173, C.A.; R v. Good-acre [1996] 1 Cr. App. R (S.) 424 C.A.*
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> *Furthermore, "a failure to distinguish in favor of a defendant who has pleaded guilty will normally amount to disparity. There may equally be disparity where the difference between the sentences imposed on two defendants either exaggerates the difference in their culpability or personal circumstances, or is insufficient to mark the difference, R. v. Tilley, 5 Cr. App. R.(S.) 235, CA; R. v Griffiths [1996] 1 Cr. App. R. (S.) 444, CA.*

Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious.

It has been said that the court would interfere where "right-thinking members of the public, with full knowledge of the relevant facts and circumstances, [would] consider that something had gone wrong with the administration of justice" (per Lawton L.J. in R. v Fawcett, 5 Cr. App. R.(S.)158, CA; but this was rejected, as providing little guidance as to those cases in which the court's sense of injustice would be so offended that it would interfere, in R. v. Coleman and Petch, unreported, October 10, 2007, CA ([2007] EWCA Crim. 2318), where it was said that there was no identifiable principle on which the court would intervene on this ground. Certainly, there are cases where the court has refused to interfere with proper sentences by reference to the good fortune of another offender, where that other offender has received a lenient sentence for no apparent reason (R. v. Tate (2006)150 S.J. 1192, CA) or, despite having been alleged to have been more deeply involved than the appellant, has been convicted of a lesser offence for lack of evidence (Coleman and Petch, ante).

The court will not make comparisons with sentences passed in the Crown Court in cases unconnected with that of the appellant (see R. v. Large, 3 Cr. App. R. (S.)80, CA). There is some authority for the view that disparity will be entertained as a ground of appeal only in relation to sentences passed on different offenders on the same occasion: see R.v. Stroud, 65 Cr. App. R. 150, CA. It appears to have been ignored in more recent decisions, such as R. v. Wood, 5 Cr. App. R. (S.) 381, CA, Fawcett, ante, and Broadbridge, ante.

The present position seems to be that the court will entertain submissions based on disparity of sentence between offenders involved in the same case, irrespective of whether they were sentenced on the same occasion or by the same judge, so long as the test stated in Fawcett is satisfied.
Archbold, 2012, 5-159, pgs. 608 – 609 (Emphasis added).

[26] In this appeal, to draw a parallel between the guilty pleas tendered by the appellant in January 2010 in the High Court, to that of the guilty plea tendered by Eseroma Gade, in

the first instance itself in the Magistrate's Court, would not only be unfair but also wrong under the circumstances.

[27] Clearly, the appellant's change of mind can be ascribed to nothing but the fact that the former co-accused Ratu Meli Bainivalu had decided to become a state witness, and it is not incorrect to think that with this new turn of events, the appellant, having realized that his fate would be sealed, decided to plead guilty.

Conclusion

[28] The task that has been entrusted with this court is to make a determination whether the appellant should be treated as an equal of Eseroma Gade, disregarding the differing circumstances under which they were convicted.

[29] Eseroma Gade, as discussed at the beginning, tendered a guilty plea , in the very first instance ,before the Magistrate's Court, whereas ,the circumstances under which the appellant accepted his guilt had been completely different, and under no circumstances is a reflection of the behavior of a person acting with remorse.

[30] As discussed earlier, the appellant changed his plea only after learning about the new turn of events, where Ratu Meli Bainivalu had decided to testify for the prosecution.

[31] The Learned Trial Judge had taken into account both the aggravating circumstances as well as mitigating circumstances, in determining the appropriate length of sentence of imprisonment of the appellant.

[32] From the point of view of the victim, he was a peaceful, 62 year old person when the appellant with others invaded his home and caused harm to them. There is evidence in this case, that the victim was indisposed with a sever earache when the Appellant entered his house, on that dreadful night. The appellant and his companion, having invaded the privacy of this family, not only robbed them of their valuables but also injured him with a knife. The family had been traumatized to such an extent, that they experienced sleepless nights after this incident. As referred to earlier, it is important to note that the Appellant's previous conviction record prevented any discount for good character. He, at no stage showed any genuine regret over the matter. As further discussed above, his change of plea was nothing but a ruse to evade a much harsher judicial censuring.

[33] Moreover, there is a great concern about the exponential rise of cases of robbery in society and the Learned High Court Judge, in denying the appellant a lower sentence had observed, that the punishment for the crime of robbery should reflect the social abhorrence of the community.

[34] This Court is convinced, that, in the light of the available evidence in this case, there is no benefit that the appellant can draw from principles pronounced in '*Fawcett'(supra).*

[35] The learned trial judge, having taken into account all the attendant circumstances had imposed an accurate punishment to the appellant and thus this Court sees no reason to interfere with the sentencing discretion exercised by the High Court.

[36] In the circumstances the appellant's appeal is dismissed.

The Orders of the Court are:

1) *The High Court sentence dated 11 September 2012 is confirmed.*
2) *The appellant's appeal is dismissed.*

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Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL