

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 047 of 2014**

STATE

V

1. PENI YALIBULA
2. MIKAELE TURAGANIVALU
3. RUSIATE TEMO ULUIBAU
4. ULAIASI QALOMAI
5. TEVITA QAQANIVALU

**Counsel:** Mr. J. Niudamu for the Prosecution  
Ms. V. Narara for 1<sup>st</sup> Accused  
Ms. S. Nasedra for 2<sup>nd</sup> Accused  
Ms. P. Chand for 3<sup>rd</sup> Accused  
4<sup>th</sup> Accused *in absentia*  
5<sup>th</sup> Accused in Person

**Date of Conviction** : 13<sup>th</sup> June, 2016

**Date of Sentence** : 11<sup>th</sup> July, 2016

**SENTENCE**

[1] On the 13<sup>th</sup> day of June 2016, all five accused were convicted on the following counts after a full trial:

## **FIRST COUNT**

### *Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.

### *Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **MANI RAM**, unlawfully wounded the said **MANI RAM** by kicking, hitting and striking him in the head with a liquor bottle.

## **SECOND COUNT**

### *Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.

### *Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **NAUSAD MOHAMMED**, unlawfully wounded the said **NAUSAD MOHAMMED** by kicking, hitting and striking him in the head with a liquor bottle.

## **THIRD COUNT**

### *Statement of Offence*

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

*Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, robbed **MANI RAM** of assorted liquor valued at \$3,400.00, assorted cigarettes valued at \$1,300.00 and \$5,300.00 cash all to the total value of \$10,000.00 and immediately before the robbery, force was used on the said **MANI RAM**.

**FORTH COUNT**

*Statement of Offence*

**DAMAGING PROPERTY:** Contrary to Section 369 (1) of the Crimes Decree 2009.

*Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, willfully and unlawfully damaged assorted liquor valued at \$3,200.00, assorted juice valued \$580.00, 1 x computer valued at \$650.00, dried Kava valued at \$220.00 and 1 x cash register valued at \$499.00 all to the total value of \$6,609.00 the property of **MANI RAM**.

- [2] The Court now turns to sentencing of each accused consequent to those convictions. Sentencing was delayed due to non-availability of complete sentencing submissions by the State and 5<sup>th</sup> accused's demand that he be given time to file a motion in arrest of judgment pursuant to Section 239 of the Criminal Procedure Decree.

**Facts:**

- [3] The Complainant, Mr. Mani Ram, had been running a shop in Matintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini van, got off near the shop and started drinking alcohol. Around 3

a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1<sup>st</sup> accused was apprehended red handed by members of the the public while others fled with the loot. The entire 'horrific drama' lasted nearly for eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended. 1<sup>st</sup> accused made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed during trial showed a systematic and coordinated brutal attack on the victims and and their property.

**Act with Intent to cause Grievous Harm :**

- [4]. The maximum penalty for Act with Intent to Cause Grievous Harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Tariff for the offence under the Penal Code was recognised by Justice Madam Shameem in *Mokubula* (2003) FJHC 164) as between 6 months and 5 years. Much higher sentences have been passed when the circumstances demanded. In *Tuigulagula* HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. In *Nalulu* [2013] FJHC 358 HAC 155.2010 (23 July 2013) Justice Madigan stated... "*The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order*".
- [5]. In the instant case, the act of hitting the shop owner and his security guard on the head with bottles filled with liquor was terrible. Attacks to the head, which is a very vulnerable part of the body should attract additional aggravating penalty. I take these circumstances into consideration in sentencing the accused in respect of first two counts of Act with Intent to Cause Grievous Harm.

### Aggravated Robbery:

- [6]. The offence of Aggravated Robbery contrary to S.311 (b) of the Crimes Decree 2009 carries a maximum penalty of 20 years' imprisonment. According to the definition, a robbery can be aggravated either by being perpetrated by more than one person or perpetrated with offensive weapons. Five people participated in this robbery in a joint enterprise. They also used bottles filled with liquor that can be considered as 'offensive weapons' to attack the innocent shop keepers.
- [7]. The tariff for Aggravated robbery is now well settled. The Court of Appeal in Maya AAU 0053.2011 (27 February, 2015) set the tariff for Aggravated Robbery in the range of 10 to 15 years. In the very recent Supreme Court decision (24<sup>th</sup> April 2015) of Wallace Wise CAV 0004 of 2015, the court confirmed the tariff for Aggravated Robbery to be between 10 and 16 years (*para 3*). The Court went further by listing factors which could be considered as aggravating. They were:
- i offence committed during a home invasion.
  - ii in the middle of the night when victims asleep.
  - iii premeditation or some planning.
  - iv frightening circumstances, such as breaking of windows, damage to the home or robbers being masked.
  - v weapons used to inflict violence or injury.
  - vi injuries caused needing hospital treatment.
  - vii victims elderly or vulnerable including the frightening of small children.
- [8]. The Chief Justice Gates in delivering the judgment of the Court said: *"it is a fundamental requirement of a harmonious civilised and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders."*

## **Damaging to Property**

- [9]. The maximum sentence for Damaging to Property is two years' imprisonment. In this case the accused wilfully and unlawfully damaged property to the value of \$ 6609.

## **Aggravation**

- [10]. Most of the aggravating features discussed in Wallace Wise (*supra*) in respect of Aggravated Robbery are subsumed in the elements of the other offences with which the accused are charged in this case. Aggravating features in common in this case for all the offences are:

- (i) Night time invasion;
- (ii) Considerable pre-planning of the robbery;
- (iii) Frightening circumstances;
- (iv) Victims vulnerable / the complainant was an elderly person.
- (v) Both victims received treatments at hospital after the incident. Neither Mr. Mani Ram nor Mr. Naushad are able to settle or sleep following this violent and very brutal attack.

## **Mitigation:**

- [11]. Counsel for 1<sup>st</sup> to 3<sup>rd</sup> accused from the Legal Aid Commission filed helpful written submissions in mitigation and State Counsel tendered 2 victim impact reports with his sentencing submission. 1<sup>st</sup> accused wanted the mitigation filed on his behalf withdrawn at the last moment. Nevertheless, I take into consideration all mitigating factors favourable to him. This Court has taken into account all of these matters in crafting the sentence.

## **Sentencing:**

- [12]. Given that the crimes proved here are without doubt crimes committed in the course of a

joint enterprise, common sentences will be passed for each of the four offences and then adjustments to those sentences will be made in respect of each of the 5 accused taking into account that accused's peculiar circumstances.

- [13]. Complainant, Mr. Mani Ram, was keeping his shop open to cater to the people who enjoy the night life in the airport city of Nadi which is also a main tourist attraction in the country. He was not only engaged in a business but also providing community service. People of his caliber should be protected against wanton disregard of their property and safety. This type of invasions must be deterred to keep the night time peace in the area to promote tourism, the main foreign exchange earner of the country.
- [14]. I bear in mind that in the sentencing process, that young offenders generally deserve lenient sentences as a measure of rehabilitation. But the ultimate approach to a sentence is that the punishment must fit the crime, even if the offenders are young.
- [15]. Apart from deterrence, the purpose of his sentence is the protection of the community. In the past, 1<sup>st</sup> and 5<sup>th</sup> accused had been given opportunities to reform themselves but they made no use of those opportunities. By taking into account their past record and character and the circumstances of the present offending, I treat 1<sup>st</sup> and 5<sup>th</sup> accused to be habitual offenders posing a general threat to the community.
- [16]. In assessing objective seriousness of the offence, I take into consideration the degree of force used, fear instilled, degree of injuries caused to the victims, the nature and degree of threats during the invasion and the weapon (bottles filled with alcohol) used to commit the offence. Victims were vulnerable; especially the shop owner Mr. Mani Ram was in his sixties. According to Victim Impact Statement and the medical reports, victims have suffered mentally and physically.
- [17]. Having considered the circumstances of the offending and the impact of the victims, I deem that the tariff set for the offence of Aggravated Robbery (although Aggravated Robbery is not the most serious offence in this case in terms of maximum sentence

prescribed by law makers) is the most fitting and appropriate to the circumstances of this case in forming the foundation for the overall sentence.

[18]. For the Aggravated Robbery offence, I take a starting point of 12 years and add 3 years for the aggravating features discussed above. The sentence for the Aggravated Robbery count for each accused is a term of imprisonment of 15 years.

[19]. The assault with intent to cause grievous harm was dreadful and deliberate. I take a starting point of 3 years and add 2 years to that for aggravating features. The sentence for the offence of Act with Intent to Cause Grievous Harm is a term of imprisonment of 5 years.

[20]. Having considered the degree of damage caused to the property, I impose a sentence of 12 months' imprisonment for Damaging to Property count.

[21]. Having considered the totality and one transaction principles, I take an aggregate sentence of 15 years' imprisonment as the final sentence for all the counts.

[22]. All the accused are in their prime youth. It is pathetic that they resorted to these types of activities even risking their own lives. Some of them have made friends in the prison and it is unfortunate that prisons have turned into breeding grounds for more criminal activities rather than centers of rehabilitation. This Court appreciates that incarceration of young criminals *per se* will not help to ease the situation. Court has no option but to confine their personal liberty in order to safeguard personal and property rights of innocent people. Courts cannot allow a few people to disturb the public tranquility and peace.

**First accused Mr. PENI YALIBULA :**

[23]. Peni is 25 years old. He had previously worked as a cleaner at Lautoka City Council. He is the youngest of the family of eight children. His father is deceased. According to the



report filed by the State, he had been in remand from 11.04.2014 to 11.08. 2014.

- [24]. He has two previous convictions which afford him no credit for previous good behavior. The minister of his church expresses hope that he can be rehabilitated if given another chance. He has no mitigating factors to be considered by Court apart from his youth and personal circumstances. He was apprehended and assaulted by the members of the public at the encounter, causing severe injuries to his body. While meeting out summary justice in this fashion is not condoned, in fairness to the accused Court considered the summary punishment he received at the hands of the public. From the aggregate sentence of 15 years, I deduct 4 years for his mitigating circumstances and time spent in remand. **Final sentence for the 1<sup>st</sup> accused for all of these counts is 11 years' imprisonment. He will serve a minimum term of 08 years before being eligible for parole.**

**Second accused Mr. MIKAELE TURAGANIVALU:**

- [25]. Mikaele is 20 years old and single. He worked as a cleaner at Suva City Council earning \$150 per fortnight. He has no previous convictions and has been in remand since 16.01.2016.
- [26]. From the aggregate sentence of 15 years, I deduct 5 years for his relative youth and clear record. **Second accused's final sentence for all of these counts is one of 10 years' imprisonment. He will serve a minimum of 7 years before being eligible for parole.**

**Third accused: Mr. RUSIATE TEMO ULUIBAU**

- [27]. Temo is 19 years old at the time of the offence and works in Lautoka as a labourer at the Water Authority of Fiji earning approximately \$165 fortnightly. He is single and lives with his parents. He is the sole breadwinner of his family. He has no previous convictions. He had been in remand from 24.10.2013 to 28.04.2014.
- [28]. From the aggregate sentence of 15 years, I deduct 5 years for his mitigating

circumstances and time spent in remand. **Final total sentence for all of these offences for the 3<sup>rd</sup> accused is 10 years' imprisonment. He will not be eligible for parole until he has served 7 years.**

**Fourth accused: Mr. ULAIASI QALOMAI**

[29]. On the eve of the trial, Ulaiasi absconded and waived his right to defend and right to make submission in mitigation. However, I do not consider his 'escape' from prison as an aggravating feature. He has no previous convictions. He had been in remand for about 3 months.

[30]. From the aggregate sentence of 15 years, I deduct 5 years for his youth and his time in remand. I am unable to give credit for good character. **Final total sentence for all of these offences for the 4<sup>th</sup> accused is 10 years' imprisonment. His term will start run from the day of his arrest or surrender to Court. He will serve a minimum term of 7 years before being eligible for parole.**

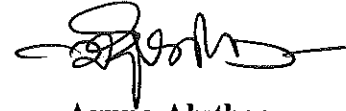
**Fifth accused Mr. TEVITA QAQANIVALU**

[31]. Mr. TEVITA QAQANIVALU has not filed any mitigation despite he was explained his right to do so. He has two previous convictions. He has been in remand for 28 months while serving another prison term.

[32]. From the aggregate sentence of 15 years, I deduct 4 years for his youth and time spent in remand. His previous convictions do not allow for any further deductions. **He will serve a sentence of 11 years for all of these offences and will be eligible for parole after serving 8 years.**

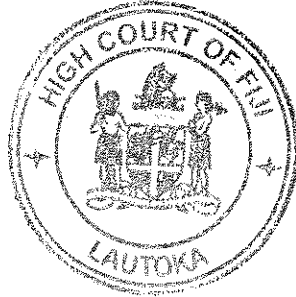
[33]. Aggregate sentence has been calculated on the basis that sentence for each count should run concurrent to the head sentence and to the sentences that are currently being served by the accused.

[34]. 30 days to appeal the the Fiji Court of Appeal.



**Aruna Aluthge**

**Judge**



**At Lautoka**

**11<sup>th</sup> July 2016**

**Solicitors: The Office of the Director of Public Prosecutions for State  
Legal Aid Commission for 1<sup>st</sup> -3<sup>rd</sup> Accused  
5<sup>th</sup> Accused in Person**