

3. They are charged on the basis that the offences have been committed in a single transaction.
4. The learned Magistrate was conferred jurisdiction by this Court to try this matter in extended jurisdiction pursuant to section 4(2) of the Criminal Procedure Decree, 2009.
5. Accused pleaded guilty to all the counts at the first available opportunity when the charge sheet was read out by the Magistrate on 14th March, 2016.
6. Having recorded a conviction against each accused, the learned Magistrate has transferred this case back to this Court for sentencing on the basis that he does not have jurisdiction to sentence the accused as the tariff set for Aggravated Robbery in *Rarawa v State* HAA 5 of 2005 (30 April 2015) is beyond his sentencing powers.
7. According to section 4(3) of the Criminal Procedure Decree, a Magistrate hearing a case in extended jurisdiction is not empowered to impose a sentence in excess of the sentencing powers of the Magistrate.
8. Sentencing powers of the Magistrate are defined in Section 7 of the Criminal Procedure Decree. According to Section 7(1) (a), the maximum prison term that can be imposed by a magistrate is 10 years.
9. Where the magistrate decides to impose a consecutive sentence upon a person convicted of more than one offence, maximum aggregate sentence that could be imposed is 14 years. [Section 7(2)]
10. Accordingly, given plurality of offences in the charge sheet, the learned Magistrate had the power to impose a term of imprisonment not exceeding 14 years if the circumstances warranted him to do so.

11. I now turn to Rarawa (*supra*), according to which, the learned Magistrate believes, his sentencing powers in Aggravated Robbery cases have been taken away.
12. Judgment of the High Court in Rarawa (*supra*) that the learned Magistrate has cited concerns an appeal against the sentence in a Robbery case where the appellant was charged under Section 310 (1)(b) of the Crimes Decree, 2009. It bears the heading ‘A new Tariff for robbery’.
13. It should be noted that although the said judgment has discussed the changes that have taken place after the introduction of the Crimes Decree offences- Robbery (S.310) and Aggravated Robbery (S.311) in place of Penal Code offences of Robbery simpliciter [S. 293(2)] and Robbery with violence [SS 293 (1) (a) and 293 1(b)], it has not set a new tariff for the offence of Aggravated Robbery. It has only summarized the tariffs for all robbery categories in Paragraph 25 including the new tariff set for the Crimes Decree offence of Robbery.
14. This view is further reinforced by the phrasings in paragraphs 11, 13 and 15 of the Judgment wherein Justice Madigan has observed:

“.. There is no doubt that the tariff for aggravated robbery is a term of 10 to 15 years as recently confirmed by the Court of Appeal in Maya AAU 0053.2011” (27 February, 2015) (Paragraph 11)

“In the very recent Supreme Court decision (24th 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) (Paragraph 13)

“....While the tariff for aggravated robbery is now well settled...” (Paragraph 15)

15. I now turn to other cases Justice Madigan has cited in Rarawa (*supra*) to arrive at his conclusion that “*the tariff for aggravated robbery is now well settled...*”
16. In Maya v State [2015] FJCA 19; AAU0053. 2011 (27 February 2015), the Court of Appeal considered appeals against the sentence on the basis that ‘*the trial judge erred in law by using the tariff for Robbery with Violence to guide his starting point of sentencing when the offence convicted of was Robbery simpliciter*’.
17. In that case the two appellants along with another accused were indicted for armed Robbery: contrary to section 293(1) (a) of the Penal Code. Learned trial judge had decided to take 9 years as the starting point, while recognizing that robbery with violence should attract 10 to 15 years’ imprisonment.
18. The Court of Appeal held:

“Taking into account the fact that the two appellants were indicted under 293(1)(a) of the Penal code for which the life imprisonment is prescribed as the maximum sentence, the learned trial judge had not erred in law by taking 9 years as the starting point in this case”. [Para 75]
19. The offences under the Penal Code and Crimes Decree are not always exactly the same or necessarily equivalent as to description, legal elements, or penalties. Livai Nawalu v The State CAV0012/2012 (Para 25)
20. There are drastic differences between the Penal Code offences of Armed Robbery S. 293(1) (a) / Robbery with violence S 293(1) (b) and Crimes Decree offence of Aggravated Robbery (S 311). Sentences prescribed under these two regimes also differ considerably.
21. Life imprisonment is prescribed as the maximum sentence for aggravated forms of robbery falling within the description of both these provisions – 293(1) (a) and 293(1) (b) - whereas the maximum imprisonment prescribed for Aggravated Robbery under the Crimes Decree is 20 years’ imprisonment.

22. Therefore, application of tariff affirmed by the Court of Appeal in Maya (*supra*) for Penal Code offences of Armed Robbery S. 293(1) (a) / Robbery with violence S 293(1) (b) to Crimes Decree offence of Aggravated Robbery is not rational or logical.

23. Justice Madigan himself acknowledges these differences in his judgment in Rarawa (*supra*) in following terms:

“ Up until 1st February 2010, the Penal Code being the then operative criminal law prescription, robbery could be robbery simpliciter (s.293(2)) with a maximum penalty of 14 years or aggravated robbery being armed with offensive weapons or robbery with violence (ss.293(1)(a) and 293(1)(b) respectively). Both of these aggravated offences attracted a maximum penalty of life imprisonment. [Paragraph 9]...

....This latter offence of robbery with violence has not been translated into the Crimes Decree as a separate offence. There is no longer an offence of robbery with violence and it is not part of the offence of aggravated robbery which is predicated on either plurality of offenders and/or the possession of offensive weapons. Violence is not mentioned. A robbery with violence is now then subsumed in the offence of robbery”.

24. Therefore, his Lordship’s observation that... ‘*There is no doubt that the tariff for aggravated robbery is a term of 10 to 15 years as recently confirmed by the Court of Appeal in Maya*’, cannot, with all due respect, be accepted as reflecting the correct legal position.

25. Now I turn to the Supreme Court Judgment in Wallace Wise (*supra*) case. It was an appeal against a sentence imposed by the High Court exercising its appellate powers.

26. I reproduce below the paragraph 3 of Wallace Wise (*supra*) judgment which Justice Madigan has specifically referred to in Rarawa (*supra*):

The Petitioner [Accused 1] and his co-Accused Ratu Meli Bainivalu [Accused 2] elected High Court trial and their cases were ordered to be transferred to the High Court. At the High Court on 20th September 2010, the first call, Accused 2

pleaded guilty. On 24th January 2011 the Petitioner who had initially pleaded not guilty, later changed his plea, and received a sentence of 7 years imprisonment with a non-parole period of 5 years. Accused 2, who had pleaded guilty straightaway in the High Court received an appropriate discount for doing so, and was sentenced to 6 years imprisonment with a non-parole period of 4 years. Even these sentences appear to be lenient. We are concerned with a single case here and not a spate of robberies: Livai Nawalu v The State CAV0012/2012 at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years. (emphasis mine)

27. It is clear that the matter under appeal before the Supreme Court in Wallace Wise was a single case of Aggravated Robbery whereas the case of Livai Nawalu was concerned with a 'spate of robberies'. In Nawalu, there were 16 offences in 8 separate court files. They included offences of shop breaking and larceny, burglary, office breaking, unlawful use of a vehicle, and robbery with violence. These cases involved offences against the Penal Code.
28. Although the sentences under appeal in Nawalu (*supra*) had been imposed in respect of Penal Code offences by the court below, unlike in Maya, (*supra*) the Supreme Court considered the legality of the impugned sentences under the Crimes Decree in light of the transitional provisions of the Sentencing and Penalties Decree 2009.

"However on an appeal in such circumstances, section 61(2)(b) of the Sentencing and Penalties Decree permits the appeal court to vary the original sentence and impose any sentence in accordance with the Decree. This is by way of a transitional provision". [Paragraph 21]
29. Therefore, the tariff affirmed by the Supreme Court in Nawalu (*supra*) is applicable to a sentence to be imposed in respect of Crimes Decree offence of Aggravated Robbery where there is a 'spate of aggravated robberies'.
30. However, the operative part in so far as a single case of Aggravated Robbery is concerned is to be found at Paragraph 25 of Wallace Wise (*supra*) judgment.

31. His Lordship the Chief Justice Anthony Gates observed:

“The matter does not end there. We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them”.
(emphasis mine)

32. This Court is of the view that a tariff range of 8-16 years’ imprisonment has been prescribed for a single offence of Aggravated Robbery and the reference to Nawalu (supra) by the Supreme Court in Wallace Wise (supra) should be considered *obiter* in so far as a single case of Aggravated Robbery is concerned.

33. Therefore, learned Magistrate’s reliance only on Rarawa (supra) Judgment in coming to his decision to transfer the case to this Court under Section 190 of the Criminal Procedure Decree appears misconceived.

34. The Supreme Court in Wallace Wise (supra) has described the cases which should be dealt within the range of 8-16 years’ imprisonment:

“Sentences will be enhanced where additional aggravating factors are also present. Examples would be:

(i) *offence committed during a home invasion.*

(ii) *in the middle of the night when victims might be at home asleep.*

(iii) *carried out with premeditation, or some planning.*

(iv) *committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*

(v) *the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*

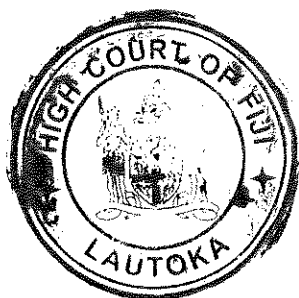
(vi) *injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*

(vii) *the victims frightened were elderly or vulnerable persons such as small children. [Paragraph 26]*

“It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders”. [Para 27]

35. There is no evidentiary basis either in the summary of facts or sentencing submissions filed by the State to find any of these additional aggravating factors that would warrant a sentence beyond the Magistrate’s sentencing powers.
36. Therefore, this Court is of the view that a Magistrate has the power to sentence an accused who has been convicted of a single offence of Aggravated Robbery unless he decides otherwise in terms of Section 190 (1) (b) of the Criminal Procedure Decree.
37. Before a case involving an Indictable Offence is remitted to the magistracy under Section 4(2) of the Criminal Procedure Decree, Judge of the High Court is supposed to address his or her judicial mind to the gravity and the factual circumstances surrounding the commission of the offence and be satisfied that it is a fit and proper case to be dealt with by a lower court.
38. In the exercise of his or her discretion, the Judge is always assisted by the Prosecutor who is possessed of information relating to facts and circumstances of the case. Before coming to a decision of transfer, the High Court Judge should be guided by the list of aggravating circumstances or examples described in the Supreme Court judgment in *Wallace Wise* (para 25) that would warrant an enhanced sentence.

39. Once a decision is made to remit a case back to the magistracy, the Magistrate is vested with jurisdiction to try the case and sentence the offender unless he decides otherwise in terms of Section 190 (1) (b) of the Criminal Procedure Decree.
40. Upon a conviction being recorded, if the Magistrate forms an opinion to transfer the case back to the High Court for sentencing under Section 190, he should record reasons that prompted him to do so.
41. According to Section 190(1) (b) of the Criminal Procedure Decree, Magistrate's reasoning should be based on
- a. the nature of the offence,
 - b. circumstances surrounding its commission or
 - c. previous history of the accused person.
42. The Magistrate has failed to record any of such reasons before transferring this case to this Court.
43. Therefore, having considered the submissions of the State, and acting in terms of Section 190 (5) of the Criminal Procedure Decree, I remit the case back to the same Magistrate who has recorded the conviction for sentencing.



Aruna Aluthge

Judge

At Lautoka

19th August, 2016