

WAIKAKE MATAHAU ULUIKADAVU v STATE (HAA0035 of 2004)

HIGH COURT — APPELLATE JURISDICTION

5 WINTER J

17, 25 June 2004

10 **Criminal law — sentencing — robbery with violence — home invasion — 67-year-old victim — 8 years' imprisonment — whether incorrect application of tariff.**

15 On New Year's Eve of 2003, the Appellant and one other broke into the home of the 67-year-old Complainant, frightened and grabbed him about the neck, forced him from his bed and demanded money. The Complainant gave his bag containing a mobile phone, cash, wristwatch, and a wallet.

The Appellant pleaded guilty to one charge of robbery with violence and was sentenced to 8 years' imprisonment.

20 On appeal, counsel for the accused argued that (a) the absence of weapons and injury to the victim set the Appellant's offending in a less culpable category of robbery; (b) there were number of decisions where offenders committed similar offences and received lighter penalties; (c) that on the principle of parity, 8 years in prison was too harsh; (d) the learned magistrate did not appropriately take into account several mitigating features including the youthfulness of the Appellant; (e) the fact that the Appellant was a first offender; (f) the fact of the Appellant's immediate acknowledgment of the responsibility and early plea; and (g) that the absence of physical injury to the victim was counterbalanced by the psychological and emotional trauma of home invasion. On the other hand, the State submitted that home invasion cases are serious and a lengthy custodial sentence cannot be avoided.

30 **Held** — The sentence imposed was wrong in principle because the starting point was too high and that 8 years' imprisonment was harsh and excessive. While in sentencing offenders for home invasions, the courts have treated violence that occurred in a person's house as an extreme aggravating factor requiring a higher sentence, the starting point of 10 years' imprisonment for the Appellant's offending was too high. Ten years' imprisonment is only a starting point and requires the application of appropriate aggravating and mitigating circumstances. Consequently, 2 years added to the starting point for the aggravating features balanced with the mitigating factors.

35 Appeal allowed.

Cases referred to

40 *R v Mako* [2000] 2 NZLR 170; *R v Moananui* [1983] NZLR 537; *Raymond Sikeli Singh v State* [2004] FJCA 8, cited.

State v Navau Lebobo [2004] FJHC 517, considered.

A. *Vakaloloma* for the Appellant

K. *Bavou* for the State

45 **Winter J.** The Appellant pleaded guilty to one charge of robbery with violence. On 19 January 2004, he was sentenced to 8 years' imprisonment. He appealed against sentence.

Particulars of the offence

50 The summary of facts reveals that on New Year's Eve 2003 the Appellant and one other broke into the Complainant's home at Pacific Harbour.

The Appellant went into the bedroom, grabbed the victim by his collar and demanded money. The victim was then dragged from his bed to the sitting room where in response to menacing demand he pointed out a black bag to the robber and his partner in crime. The bag was stolen. The bag contained a mobile phone, 5 \$350 in Fijian cash, a seiko wristwatch, a brown wallet in all some \$870 worth of property. The 67-year-old victim was understandably shocked and frightened by his home invasion. The accomplice has not been found.

The appeal

- 10 In a written request to appeal the Appellant submits:
- (1) That there is an incorrect application of principle in the sentencing.
 - (2) That there is an incorrect application of tariff precedent in that by comparison the instant offence was not as serious as these robberies made with the assistance of weapons.
 - 15 (3) That there is an absence of violence or forceful restraint.
 - (4) That there is an exaggeration in sentence about the circumstances of the offending in that the victim was not forced out of his bed at 2 am.
 - (5) That not enough weight was given to the fact that this was the Appellant's first offence or the early guilty plea.

20 **At appeal**

At appeal the accused was represented. His counsel provided helpful written submissions and spoke to those. He emphasised that the absence of weapons and injury to the victim clearly placed this offending in a less culpable category of robbery.

25 Counsel made reference to a number of decisions contending that other persons who had committed similar offences received lighter penalties. He argued on the principle of parity that 8 years in prison was therefore too harsh a penalty.

30 Counsel claimed that the learned magistrate did not appropriately take into account several mitigating features including the youth of the Appellant, the fact that he was a first offender and his immediate acknowledgement of responsibility and early plea.

35 Counsel accepted the prevalence of the crime of home invasion and forthrightly acknowledged several aggravating features of this crime. He conceded that the tariff decisions he referred to ranging from 1988 to 1992 while reflecting a sentencing pattern of 3 years' imprisonment for similar offending were none the less dated, stale and lacked relevance to present sentencing circumstances.

40 Counsel also conceded that the absence of physical injury to the victim was counterbalanced by the psychological and emotional trauma of home invasion. Counsel agreed that a deterrent sentence was called for.

45 For the State Ms Bavou provided helpful written submissions. Counsel made a proper concession that a sentence of 8 years' imprisonment on the facts of this case was "slightly" excessive. However, the State submitted that home invasion cases are particularly serious and that a lengthy custodial sentence was inevitable.

50 When addressing the court, counsel concentrated on two decisions. The recent Court of Appeal decision of *Raymond Sikeli Singh v State* [2004] FJCA 8 (*Singh*) Sheppard, Gallen and Ellis JJA judgment dated Friday 19 March 2004, and also a decision by my brother Gates J in *State v Navau Lebobo* [2004] FJHC 517 (*Lebobo*) a criminal appeal heard in the Fiji High Court in Suva on 6 and 7 April this year.

In *Singh* the Court of Appeal had an opportunity to review sentencing tariffs for robbery. They were there dealing with a planned armed robbery of a bank. The offenders were armed with pinch-bars and cane knives. They got away with \$74,000. The bank staff were terrorised by the robbers. Only \$11,070 was recovered from the crime. Each Appellant had previous convictions. The court approved the sentencing judges' approach. The court accepted the relevance of two New Zealand decisions *R v Moananui* [1983] NZLR 537 and *R v Mako* (2000) 2 NZLR 170. These tariff decisions of the New Zealand Court of Appeal are tempered by the difference in the available sentence. The maximum penalty in Fiji being life imprisonment. The court said at 13:

... For arriving at a starting point a combination of factors is significant for the purposes of this case it is enough to say the Court held that starting points for serious armed robbery of commercial premises start at 6 or more years. Where there is a greater risk of harm or actual violence used the starting point was said to be 8 years or more. The Court noted that in the case of a very serious armed robbery a starting point of about 10 years would be appropriate.

The Court of Appeal did comment that these were starting points and no more than that. The court noted that the appropriate penalty must always depend on the impact of the significant facts of each case. Sentences of 10 years for the principal offender and 8 years for their assistants were upheld.

In *Lebobo* my brother Gates J sentenced a truly bad home invader who meted out a heartless, cruel, prolonged and unnecessary beating of an old man and rape of his wife. His Honour marked the robbery offending with a sentence of 10 years' imprisonment.

Decision

In effect the Appellant is submitting to the court that the sentence was wrong in principle as the starting point was too high and therefore the length of the jail term was unduly harsh and excessive. I agree.

The facts of the matter are that two men late at night invaded the home of a 67-year-old gentleman. They frightened him. The Appellant grabbed the old man about the neck, forced him from his bed and demanded money. In this regard I concur with the learned magistrate that the crime was senseless and unwarranted. It was committed without mercy or thought. It was also selfish, thuggish and deserving of high condemnation. Criminals will learn that home invasion will be met with stern prison sentences.

Home invasion

The *Singh* and *Lebobo* decisions set appropriate tariffs for offending of this sort sought in relation to home invasion. I concur with my brother Gates J comment at [12] in *Lebobo*:

It is plain that the community in Fiji is increasingly concerned at crimes committed during "home invasions". By these sentences the Courts must strive to protect all persons in their homes. But the Courts must take an even stronger line with crimes committed against vulnerable persons in their homes such as the young or the old, the weak or the infirm.

Home invasions are a particularly traumatic intrusion into the lives of citizens. The most striking feature of these episodes is the sheer terror to its victims. They are set upon within the apparent safety of a private dwelling by complete strangers. These unjustified acts of terrorism by intruders within the home invade the family sanctuary and violate the sense of security that lies at the heart of each

home. As such these acts not only affect the lives of their immediate victims but also instil fear in the whole community creating a siege like mentality.

Entry into dwellings at night and assaults upon occupants must draw stern sentences to reflect society's attitude to such conduct. In sentencing offenders for home invasions the courts have always recognised the sanctity of the home and have insisted that violence occurring in a person's house is to be treated as an extreme aggravating factor calling for a higher sentence. At the very least the victim and society deserve the small comfort of knowing that while incarcerated these home invaders are not free to ply their miserable trade.

10 However, in my view a starting point of 10 years' imprisonment for this offending was too high. In *Valui* a 9-year sentence was reduced to 7 years because of an early and genuine plea of guilty. In *Bainibalavu*, it was said that 8 years' imprisonment is a valid starting point for violent robbery. Home invasions by multiple accused deserve a starting point of between 6 to 8 years' imprisonment.

15 This is only a starting point and will need to be adjusted by the application of appropriate, aggravating and mitigating circumstances. This offending was in the mid-range of home invasion, no weapons were used and accordingly a starting point of 7 years would have been appropriate. The aggravating features applicable in this case are:

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- The age of the victim; 67 years.
 - The fact that he lives alone.
 - The use of violence as the victim was grabbed by the collar and taken from his bed.
 - The terror, psychological and emotional harm accompanying home
- 25 invasion at night by multiple accused.
- Limited property recovered.

I would add 2 years to the starting point for these aggravating features.

However, balanced out against those aggravating features are the mitigating factors such as:

- 30
- Cooperation with the police.
 - An early plea of guilt at the first opportunity.
 - A first offender with no previous convictions.
 - No weapons used.
 - The youth of the offender who at 21 years of age needs the hope of a
- 35 sentence that is short enough to see him habilitated and returned to his community for a more useful existence.

In my view the best mitigation is an early guilty plea. Courts have often recognised that sparing victims the agony of reliving their terror through the process of an adversarial trial deserves full recognition. In addition the assistance to the due process of justice and sparing the expense of trial deserves some discount. The offender used no weapons in the crime. He is a young first offender. By his plea he has maturely expressed proper remorse. For these reasons I see a discount of 3 years as being appropriate.

45 **Conclusion**

The result is that the sentence in the court below 8 years' imprisonment is quashed. I substitute a sentence of 6 years' imprisonment.

Appeal allowed.