

IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

Petition for Special Leave to Appeal No:
CAV0004/2015 [on appeal from Court of
Appeal, Crim. App. No. AAU0020 of
2011].

[High Court Criminal Case No. HAC178
of 2010].

BETWEEN: **WALLACE WISE**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Chief Justice Anthony Gates,
 President of the Supreme Court
 The Hon. Mr. Justice Saleem Marsoof PC,
 Judge of the Supreme Court
 The Hon Mr. Justice Almeida Guneratne PC,
 Judge of the Supreme Court

Counsel: Petitioner in Person
 Mr. L. Fotofili for the Respondent

Date of Hearing: Tuesday 14th April 2015

Date of Judgment: Friday 24th April 2015

JUDGMENT OF THE COURT

Gates P

- [1] The Petitioner petitions this court to appeal against his sentence for aggravated robbery, an offence against section 311(1)(a) of the Crimes Decree 2009. He makes a timely appeal.

- [2] Three persons were originally brought before the Magistrates' Court, this Petitioner and two others. One of the accused Eseroma Gade pleaded guilty straightaway and was sentenced in the Magistrate's Court to 3 years imprisonment. This was a very lenient sentence. No doubt it reflected that Accused's swift acknowledgement of his crime and thereby demonstrated his remorse.
- [3] 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.
- [4] In the Court of Appeal, the Petitioner claimed there was a disparity in his sentence when compared with that of Accused 2.

The Facts

- [5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.
- [6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were

masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.

- [7] The intruders got away with jewellery worth \$550 and \$150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.

- [8] Following this incident Mr. Ram and his family had been fearful at nighttime. It had affected his wife. His granddaughter had witnessed the intrusion. She had been hidden behind a bed so that she could not be seen. Damage had been done to the house and windows. The Petitioner in his police interview denied any involvement in the crime.

- [9] Before he was sentenced, Accused 2 had asked to confront the complainant and to apologise to him. He did so, though the complainant was not willing at that time to forgive him because he said he could not trust him. Accused 2 had no prior convictions, so the prosecuting counsel said. However Accused 2 volunteered himself that he had a previous conviction in 2005 for house breaking, and had been sentenced to 10 months imprisonment before the Nasinu Magistrate's Court.

- [10] Accused 2 could have kept silent. No doubt his frankness was taken alongside his plea as a sign of genuine remorse to be reflected in his lesser sentence.

- [11] On 15 October 2010 some 2 weeks after Accused 2 was sentenced, the prosecuting counsel indicated to the judge that the State would call the accomplice to give evidence against the Petitioner. The case was mentioned in the Petitioner's presence on 29th October 2010 and again 19th January 2011. On the later date the Petitioner confirmed to the judge he was maintaining his plea of not guilty. The judge asked him: "Can we have the trial on 31.1.2011?" To which the Petitioner replied "Yes, sir, I am ready."

- [12] A pre-trial conference was fixed to occur beforehand, that is on 24.1.2011. When the case was called on that day, the Petitioner informed the court that he wished to change his plea. The judge proceeded carefully to establish that this was a decision to plead guilty made of his own free will. The court was satisfied that the plea was unequivocal, and convicted him accordingly.
- [13] Prosecuting counsel referred to 22 previous convictions having been recorded against the Petitioner, which the Petitioner accepted. A date for mitigation was set and the Petitioner was informed that he could file submissions if he wanted to, which he subsequently did.

Ground 1 – Late plea not accepted as remorse

- [14] In the Court of Appeal the Petitioner had argued one ground only, that of the sentence being manifestly excessive. The petition before the Supreme Court now is in reality the same. He claims the sentence “was passed on an error of law.” What is clearly not understood by the Petitioner is that a late plea such as one made just prior to the commencement of trial in the High Court is not to be treated as substantial remorse. All along he had maintained his plea of not guilty. One cannot say whether it was the prospect of his co-Accused Ratu Meli Bainivalu, already sentenced, coming to give evidence that made up the Petitioner’s mind to give up his contest with the charge. He says the change was made because he experienced a change in his life between September to January.
- [15] This account does not fit however with his maintenance of the not guilty plea well into January. Eseroma Gade had pleaded guilty at the very first opportunity in the Magistrate’s Court. As a result there was no transfer of his case to the High Court. The matter was disposed of swiftly in the Magistrate’s Court. That first opportunity plea was accepted as a substantial sign of remorse. Accordingly he received a substantial discount for the early plea, a long established practice followed by sentencing courts. Eseroma Gade received, as I have said earlier, a very lenient sentence for what was a home

invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar. For circumstances such as these, rightly abhorrent to the law-abiding community, will compel courts to harden their hearts and to impose harsher sentences.

- [16] The plea of guilty was a matter for the Petitioner to decide voluntarily and without pressure. He chose a different path from that of his co-Accused at the time they were both before the Magistrate's Court, and therefore must accept the consequences of his free choice.

- [17] The Director of Public Prosecutions, if the matter had even been brought to his attention, could have appealed Eseroma's sentence. This was not done, and does not now affect the sentence to be assessed for the Petitioner. There is a difference in mitigation between an early plea of guilty and a late plea. A late plea, albeit that remorse was expressed by the Petitioner to the sentencing court and given credit for it [at para 9 of the Judge's sentencing remarks], will attract substantially less discount in sentence. This is what happened here and the plea was correctly assessed and weighed in the Petitioner's case.

- [18] The difference in discount accorded to Ratu Meli Bainivalu and the Petitioner is pitched well within principled bounds. There were other differences also between each of their cases. Ground 1 fails.

Ground 2 – prior convictions wrongly considered as an aggravating factor

- [19] Ground 2 alleges the sentencing judge considered the Petitioner's prior convictions as an aggravating factor. If that were so, such a sentencing procedure would be incorrect: *Lilo v The State* [2008] FJCA 36; CAV0006.2007.

- [20] The judge said this [at para 8] in his sentencing remarks:

“Now I consider the aggravating factors.

- a) This is an organized gang robbery.
- b) You have entered the house of the victim at 2.30am.
- c) You have used deadly weapons to commit the offence.
- d) The victim was 62 years old.
- e) The victim was assaulted and had received injuries on the head, chest and on the eyebrow and later received treatment.
- f) The wife of the victim was also threatened at pre dawn hours of the day and her jewellerys were robbed.

Considering all I increased 6 years. Now your sentence is 12 years imprisonment.”

- [21] There is no mention of the Petitioner’s prior record – at all – in the judge’s sentencing remarks.
- [22] An accused is sentenced for the offence he or she commits. Each is not to be punished for past crimes in his criminal history. But if you are a person with 22 prior convictions, or have a long criminal history of repeated offending the courts cannot grant you the discount available to a first offender. Ground 2 fails.

Ground 3 – 5 year non-parole period wrong in law

- [23] Ground 3 is really a reversion to the ground in the court below, which complained of a manifestly excessive sentence. The Petitioner says the imposition of a 5 year non-parole period is wrong in law. This ground was not developed and it fails as it was correctly addressed and explained by the Court of Appeal in its judgment.
- [24] The penalty for aggravated robbery set by law is 20 years [section 311(1) Crimes Decree]. Having arrived at a sentence of imprisonment within the range for such offences the sentencing court must fix a non-parole period – section 18(1) of the Sentencing and Penalties Decree. The exercise of the discretion here was unremarkable.
- [25] 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.

[26] 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.

[27] 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.

Conclusion

[28] The Petitioner's grounds of appeal do not meet the requirements of section 7(2) of the Supreme Court Act for the grant of special leave. In any event we conclude that the grounds lack merit.

Marsoof JA

[29] I have perused the draft judgment of Gates P and concur with its reasoning and the orders proposed.

Guneratne JA

[30] Similarly I have read the draft judgment of Gates P and concur with the reasons and the orders proposed.

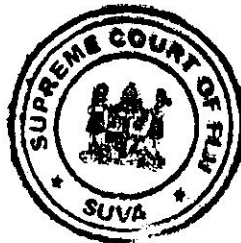
Gates P

[31] In the result the orders are:

1. Special Leave is refused.
2. The decision of the Court of Appeal is affirmed.



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Hon. Chief Justice Anthony Gates
President of the Supreme Court




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Hon. Mr. Justice Saleem Marsoof PC
Judge of the Supreme Court



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Hon. Mr. Justice Almeida Guneratne PC
Judge of the Supreme Court

Solicitors for the Petitioner:
Solicitors for the Respondent:
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In person
Office of the Director of Public Prosecutions