

**IN THE SUPREME COURT OF FIJI**  
**[APPELLATE JURISDICTION]**

**CRIMINAL PETITION NO. CAV 0045 of 2023**  
**[Court of Appeal No. AAU 0011 of 2021]**

**BETWEEN** : **MALAKAI TOKA**

**1<sup>st</sup> Petitioner**

**AND** : **THE STATE**

**Respondent**

**CRIMINAL PETITION NO. CAV 0003 of 2024**  
**[Court of Appeal No. AAU 0004 of 2019]**

**BETWEEN** : **PITA DOMONI**

**2<sup>nd</sup> Petitioner**

**AND** : **THE STATE**

**Respondent**

**Coram** : The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court  
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court  
The Hon. Mr. Justice William Young, Judge of the Supreme Court

**Counsel** : Both Petitioners in person  
: Mr. R. Kumar for the Respondent

**Date of Hearing** : 03 April 2025

**Date of Judgment** : 29 April 2025

**JUDGMENT**

**Gates, J:**

**Introduction**

- [1] On the 28<sup>th</sup> of September 2023, both petitioners had their separate appeals against sentence rejected by the Court of Appeal. Their appeals against the sentences passed on a joint charge of aggravated robbery in the Suva High Court had been heard together. Both have brought timely petitions to this court against their sentences. Neither petition challenges their convictions.
- [2] Originally, they had pleaded guilty in the High Court, [Pita on 27 April 2018 and Malakai on 17 September 2018] and the third accused Lemeki Sauvutia Tavoli [on 14<sup>th</sup> May 2019]. Lemeki's petition had been heard in the October 2024 sittings of this court and adjustments were made to his sentence. His sentence of 13 years imprisonment with a non-parole period of 12 years had been varied to a sentence of 11 years and 6 months imprisonment with a non-parole period of 10 years. Because of time he had already spent on remand the actual sentence was one of 10 years and 6 months imprisonment with a non-parole period of 9 years. In the High Court both Pita and Malakai had received the same sentences, namely 13 years imprisonment with a non-parole period of 12 years.
- [3] Pita and Malakai now seek the same indulgence raising similar grounds for reduction of their sentences. They seek parity with Lemeki's varied sentence. Pita also says his time spent on remand was not fully and correctly taken into account so as to arrive at the actual time he should serve. Additionally, Malakai says he should have received a lesser term because he was only the lookout for the robbery.

**The Summary of Facts**

- [4] This crime was committed in the course of a home invasion. The occupant of the house in Howell Road was a 60 year old retired woman. She lived there with her husband, who was not in the house at the time. The Petitioners Lemeki and Malakai also lived in the same

road. Malakai was aged 25 years and had been employed as a casual labourer on a construction site. Pita was aged 21 years and did farming at his settlement.

- [5] On the 30<sup>th</sup> of December 2016 at around 7 pm it was becoming dark. Alerted by the barking of her dog, the complainant unlocked the main door of her residence. She put on the verandah light and walked outside into the compound. Suddenly she was pushed back into the house by the petitioners and Lemeki.
- [6] The intruders were masked and wore hand gloves. They were seen to hold weapons, namely a knife, a pair of scissors, and a baseball bat. Cash and overseas currency were taken from the complainant's purse and from one of the bedrooms. Other items stolen included 2 I-pads, digital cameras, perfume, liquor and wines, a mobile phone, 3 laptops, valued in total at over \$13,000.
- [7] Before leaving the residence, the petitioners tied the hands of the complainant behind her back with a cable, and tied a scarf around her eyes. She was further immobilized in some way with a shirt and a blanket.
- [8] They then fled the residence leaving the complainant tied up. Later she managed to free herself partially, and to go to her neighbours to relay the incident before reporting to the police.
- [9] All the petitioners were questioned under caution. They admitted their involvement in the robbery and the circumstances as related by the complainant.
- [10] The police recovered some of the valuable items, the mobile phone, the I-pad and the 3 laptops. Prior to sentence the defence urged the recovery as a mitigating factor. It was said for the petitioners that the petitioners had co-operated with the police, and through this assistance the police had made the partial recovery. No confirmation of this was made by the prosecutor. However, the judge in his sentencing remarks referred to defence counsel having "presented a well written plea in mitigation". That at least was for Lemeki. Counsel

for Malakai had urged the same. It seems clear that was an early realisation by the petitioners that they would be pleading guilty. They admitted their crime in their caution interviews with the police, and assisted in the recovery of some of the items.

### **The High Court Sentences**

[11] In his sentencing remarks on 28<sup>th</sup> December 2018 the judge set out the petitioners circumstances:

- ‘5. Through his counsel, Accused No. 1 [Pita] admitted he had 3 previous aggravated burglary convictions, and 2 theft convictions since 2013, 2017 and 2018. In his plea in mitigation, he said he was 21 years old, single and resided at Howell Road with his extended family. He said, he is a farmer at Naitasiri and earns approximately \$100 per week. He said, he comes from a broken family. He said, he pleaded guilty and had been remanded in custody since January 2017. He is serving 4 years 10 months from 2 February 2018. He asks for a concurrent sentence. The matter was later adjourned for sentencing.*
- 6. On 17 September 2018, the information was reput to Accused No. 3 [Malakai], in the presence of his counsel. He pleaded guilty to the same. The prosecution read their summary of facts in court. It was similar to the summary of facts presented to Accused No. 1, in terms of its material facts. Counsel for Accused No. 3 asks for an adjournment to enable her to consult her client on the summary of facts. Time was given to them. On 3 December 2018, counsel for Accused No. 3 told the court that he agrees with the prosecution’s summary of facts, and the particulars of the offence in the information. On the basis of the above admissions, the court found Accused No. 3 guilty as charged and convicted him accordingly.*
- 7. Through his counsel, Accused No. 3 admitted he had a conviction on 2 May 2018 for aggravated burglary and theft, and is serving 30 months imprisonment. In his plea in mitigation, he said he is 25 years old, living with his defacto-wife and 1 year old daughter. He said, he is a casual labourer and earns about \$100 per week. He pleaded guilty and had been remanded in custody since 23 January 2017. He asks for leniency. He said, some stolen properties were recovered.’*

[12] The judge listed the aggravating factors. This was a home invasion. The complainant was a vulnerable person, an elderly female alone in her home. The intruders wore masks and gloves. They were armed with a knife, scissors, and a baseball bat.

- [13] The complainant was tied up. She was gagged and she was confined so that she could not resist. The judge in Lemeki's case had said, "You and your friends bullied the 60 year old complainant". He said they had shown no regard to her right as a human being not to be harmed or to have her property stolen.
- [14] The judge had found there was a certain amount of pre-planning. They had prepared themselves, knew the surroundings well, and were ready as a group to counter opposition. Of course aggravated robbery carried within the charge the two circumstances of aggravation, "being in company of one or more other persons" and having at the time "an offensive weapon with him or her". These were elements of the charge and so further enhancement of sentence could not be made. The charge brought already included those features of the case as elements of the offence of aggravated robbery, a more serious offence than plain robbery. The approach in the High Court had therefore lapsed into double counting.
- [15] Clearly the judge was correct to list some of the matters as aggravating factors [see paragraph 8 (i)]. First this was a home invasion. The victim was a vulnerable person, being retired and aged 60. She was tied up having been placed face down on the bed. There can be no doubt the handling of this victim was an undignified and frightening ordeal for her with her eyes covered and a blanket tied over her. The judge was right to refer to her as having been "bullied".
- [16] The robbers were masked and this was correctly listed as another aggravating factor.
- [17] Pre-planning was also listed as an aggravating factor. Lemeki himself in his interview had volunteered that he had made the plan to invade the home. However, the planning, appears to have been in essence rudimentary and minimal. Pita and Malakai were only told about the job as they walked to the victim's house. The planning or discussion was not such that it could amount to anything of real significance as a circumstance of aggravation. I would disregard it.

[18] The judge found the following mitigating factors:

- ‘(i) Accused No. 1[Pita], you pleaded guilty to the charge after 1 year 3 months 4 days after first call in the Suva Magistrate Court. Accused No. 3 [Malakai], you pleaded guilty to the charge 1 year 8 months after first call in the Suva Magistrate Court. For this, you are entitled to some discount, as you had saved some court time.*
- (ii) Accused No. 1, you had been remanded in custody for approximately 5 months, while awaiting sentence. This was because on 13.6.17 and 2.1.18, you were sentenced to 13 months and 4 years 10 months imprisonment, both to be concurrent to each other.*
- (iii) Accused No. 3, you had been remanded in custody for approximately 1 year 4 months, as you were sentenced to 30 months imprisonment on 2.5.18.*
- (iv) Some stolen properties were recovered.’*

[19] The judge selected 12 years as his starting point. The tariff for a single offence of aggravated robbery in cases of home invasion is now 8 to 16 years Wise v State [2015] FJSC7; CAV0004.2015 (24 April 2015). However, the actual sentence appropriate to the circumstances of the offending will depend on the aggravating and mitigating factors.

[20] 12 years was a midway point on the tariff. The petitioners argue that this must therefore have included some of the aggravating factors.

[21] In arriving at the sentence for each of the two petitioners the judge set out his methodology:

*“13. I start with a sentence of 12 years imprisonment. I add 4 years imprisonment for the aggravating factors, making a total of 16 years imprisonment. For Accused No. 1, for time already served while remanded in custody, I deduct 5 months, leaving a balance of 15 years 7 months imprisonment. For Accused No.3 for time already served while remanded in custody, I deduct 1 year 4 months, leaving a balance of 14 years 8 months imprisonment. Accused No. 1, for indicating a guilty plea since 5 May 2017 and pleading guilty on 27 April 2018, that is, 1 year 3 months 4 days after first call in the Suva Magistrate Court, I deduct 2 years 1 month, leaving a balance of 13 years 6 months. Accused No. 3, for pleading guilty 1 year 8 months after 1st call, I deduct 1 year 2 months, leaving a balance of 13 years 6 months. I deduct 6 months from your sentences to account for the properties recovered. The balance for Accused No. 1 is 13 years imprisonment, and for Accused No. 3, 13 years imprisonment.*

14. *Mr. Pita Domoni (Accused No. 1) and Mr. Malakai Toka (accused No. 3), for committing aggravated robbery against the complainant on 30 December 2016 at Samabula in the Central Division, I sentence both of you to 13 years imprisonment each with a non-parole period of 12 years imprisonment each, effective forthwith. This sentence is concurrent to any prison sentence presently served."*

[22] On balance, it is a better practice to commence with a starting point at the lower end of the tariff, being careful not to figure in any of the aggravating and mitigating factors at this stage: **Kumar v State** [2018] FJSC30; CAV0017.2018 (2 November 2018). The starting point should have been at 10 years, not 12 years.

[23] Selecting a starting point has been discussed in several judgments of this Court over the years. In **Kumar** Keith J at paragraph 56 said:

*'Whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence.'*

### **Reconsidering the sentences**

[24] Pita raises the issue that the 5 months time he was said to have spent on remand was not correct. We asked Mr. Kumar to check that position and to report back to us. Very efficiently, Mr. Kumar made written report in the afternoon after the hearing. He reported that the sentencing judge had made no error. Pita had been sentenced on the 13<sup>th</sup> of June 2017, in the Suva Magistrate's Court to 18 months imprisonment consecutive to any other term of imprisonment. Mr. Kumar enclosed a copy of the relevant judgment. So the sentencing judge had been given the correct period when Pita was on remand for his case, and when he had become a serving prisoner in the Magistrate's court matter. Pita is

therefore mistaken on the length of the remand period. The discount he received on sentence for being on remand had been correct.

[25] Malakai submitted that he should have received a lesser sentence since he was only the lookout. The summary of facts to which he had pleaded guilty with his counsel present does not bear that out. Even if he had been a lookout on the balcony, checking the front and back of the house, he was clearly part of the joint enterprise to rob the complainant, in the company of the others, and that he knew they carried weapons. He fully participated, entering the home with the others and jointly sharing in the proceeds. As such, he is to be treated equally as one of the robbers, prepared to use force to prevent or subdue any resistance encountered. His claim for a discount on this basis fails.

[26] Lemeki had received a reduction of his sentence [*Tauvoli v The State* [2024] CAV 0027 of 2023 (30 October 2024)]. The errors identified to give rise to this were:

- “(i) The starting point on the tariff was too high, perhaps having taken into account unwittingly some of the aggravating features of the case.*
- (ii) There was an element therefore of double counting.*
- (iii) Some of the aggravating factors were already elements of the section 311(1) charge, the circumstances of aggravation.*
- (iv) The non-parole period was fixed too close to the head sentence.”*

[27] In Lemeki’s case at [paragraph 33] this court had said:

*‘The original sentence had fixed a non-parole period at only 1 year less than the head sentence. This allows too little incentive for rehabilitation. In re-calibrating the final sentence now, further time should be allowed for a closer adherence to the purposes of section 4 (1) and section 18 (4) of the Sentencing and Penalties Act: *Tora v State* [2015] FJCA 20; AAU 0063.2011 (27 February 2015).’*

[28] I would grant leave to appeal against sentence on both petitions under section 7 (2) (b) finding there are substantial questions of principle affecting the administration of criminal justice involved.



[29] Keeping to similar steps with the sentencing judge I arrive at the following sentences:

**Pita Domoni:**

- (a) Starting point on the tariff of aggravated robbery [8 to 16 years] 10 years imprisonment.
- (b) Term increased by 2 ½ years for the aggravating factors.
- (c) For the early plea of guilty when indicated, deduct 2 years 1 month [no change].
- (d) For cooperation with recovery of items stolen, deduct 6 months [no change].
- (e) Time spent on remand, deduct 5 months [no change].

Head Sentence : Imprisonment 9 years 6 months  
Non-parole period : 8 years.

**Malakai Toka:**

- (a) Starting point on the tariff for aggravated robbery [8 to 16 years] 10 years imprisonment.
- (b) Term increased by 2 ½ years for the aggravating factors.
- (c) For the late plea of guilty, deduct 1 year 2 months [no change].
- (d) For cooperation with recovery of items stolen, deduct 6 months [no change].
- (e) For time spent on remand, deduct 1 year 4 months [no change].

Head Sentence : Imprisonment 9 years 6 months.  
Non-parole period : 8 years.

**Keith, J:**

[30] I agree with the judgment of Gates J. There is nothing I can usefully add.

**Young, J:**

[31] I agree with the orders proposed by Gates J and the reasons he has given.

**Orders of the Court:**

1. *Leave granted to appeal against sentence for both petitioners.*
2. *Appeals allowed.*
3. *Original sentences quashed.*
4. *In substitution, sentences imposed of:*

**Pita Domoni:**

*Head Sentence : Imprisonment for 9 years 6 months*

*Non-parole period : 8 years.*

**Malakai Toka:**

*Head Sentence : Imprisonment for 9 years 6 months.*

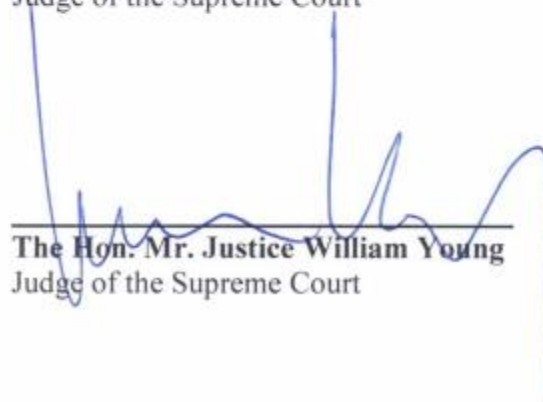
*Non-parole period : 8 years.*



The Hon. Mr. Justice Anthony Gates  
Judge of the Supreme Court



The Hon. Mr. Justice Brian Keith  
Judge of the Supreme Court



The Hon. Mr. Justice William Young  
Judge of the Supreme Court

**Solicitors:**

Both Petitioners in person  
Office of the Director of Public Prosecutions for the Respondent