IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO.AAU0064 OF 2004S
(High Court Action No. HAC 007 of 2007S)

BETWEEN:

1. **TEVITA TUISAVUSAVU**
2. **JONE SAVOU**

Appellants

AND:

THE STATE

Respondent

Coram: **Pathik, JA**
Powell, JA
Lloyd, JA

Hearing: **Monday, 30th March 2009, Suva**

Counsel: **Appellants in Person**
U. Ratuvili for the Respondent

Date of Judgment: **Friday, 3rd April 2009, Suva**

JUDGMENT OF THE COURT

Introduction

[1] Tevita Tuinasavusavu ('the 1st appellant') and Jone Savou ('the 2nd appellant') were both charged with the same offence of robbery with violence contrary to s293(1)(b) of the Penal Code (Cap.17), the robbery taking place in November 2003. On 7 June 2004 both appellants pleaded guilty to the charge. After hearing from their counsel in mitigation, on 28 June 2004 a High Court Justice sentenced both appellants to eight and a half years (8.5) imprisonment for their commission of the offence. The maximum penalty for the subject offence is life imprisonment.

[2] In 2005 the 1st appellant made application to a single judge of this Court for leave to appeal both his conviction and sentence. Leave to appeal was refused. Similarly, the 2nd appellant applied to a single judge for leave to appeal his sentence. He was also refused leave to appeal. Both appellants now make application to this Court pursuant to the provisions of s35(3) of the Court of Appeal Act for leave to appeal their sentences and, for the 1st appellant, his conviction also. Each of the appellants appeared before the single judge of appeal and in this Court unrepresented by counsel. Written submissions tendered by them were drafted by themselves.

The brief facts

[3] The salient facts of the subject offence can be briefly stated. Late on the evening of 18 November 2003 the two appellants and another man went to the residence of Dr Graham Roberts at an address in Nadera. Whilst outside the residence the appellants saw that the gate to the house was open. They also observed Dr Roberts watching television in an upstairs room of the house. The 2nd appellant then acted as a lookout while the 1st appellant gained entry to a downstairs room of the house, from which room he stole a bag containing $90.00. Armed with the stolen money the appellants and their accomplice departed the scene and caught a taxi to Suva. Once in Suva the three men went to several nightclubs wherein they consumed alcoholic

beverages. They then decided to return to Dr Roberts' residence to burgle it again.

[4] On their way back to Nadera by taxi the appellants consumed yet more alcohol. On arrival at Dr Roberts' residence in the early morning hours of 19 November 2003 the appellants and their accomplice saw Dr Roberts in his yard. They gained entry into the yard and began punching and kicking Dr Roberts about his face and body, causing the doctor to suffer bruising and lacerations. When Dr Roberts shouted for assistance the appellants dragged him into the house. The 2nd appellant guarded Dr Roberts while the 1st appellant and the accomplice searched the house for valuables. A quantity of jewellery, a knife and other small items to the value of $3,060.00 were located and stolen by the men. The 2nd appellant took Dr Roberts' mobile phone from the doctor's pocket.

[5] Meanwhile, neighbours heard Dr Roberts cries for help and alerted the police. The police arrived at the scene whilst the robbery was in progress. On being confronting by the police the appellants and their accomplice each tried to flee the scene. The 1st appellant made good his escape but the 2nd appellant was arrested at the scene. The 1st appellant was arrested some time later at Newton. The 2nd appellant was injured whilst attempting to flee the scene, he being accidentally hit with a knife by one of his accomplices whilst the police chased the robbers.

<u>The conviction appeal of the 1st appellant</u>

[6] In written submissions dated 2 March 2009 the 1st appellant submits that his guilty plea in the lower court was 'equivocal' and that in entering the plea of guilty he was '*influenced and tricked [into] pleading guilty*' by counsel for the 2nd appellant and the judge. Further that the plea of guilty *'was not given by me but the 2nd [appellant's] counsel who was representing me on the day in questioning (sic)'.*

[7] At the hearing of the matter the 1st appellant conceded that he pleaded guilty through his then counsel Ms B Malimali on 7 June 2004 after having been advised by her that he would receive a discount on sentence if he was to plead guilty. He also conceded that Ms Malimali represented him (and not just the 2nd appellant) at the time and that she discussed with him his mitigating circumstances so that she could enhance his chances of obtaining a lenient sentence. He further conceded that the charge laid against him was read to him in open court as were the summary of facts.

[8] The court record reflects Ms Malimali appearing for both appellants when pleas of guilty were entered by both of them on 7 June 2004. Ms Malimali tendered to the High Court Justice comprehensive written submissions in mitigation on behalf of both appellants, those submissions dealing with the objective and subjective features of each appellant separately. With respect to Ms Malimali her written submissions were of the highest quality. The court file reveals nothing that would suggest the 1st appellant's guilty plea was in any way equivocal.

[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see ***Bogiwalu v State*** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea *'with caution bordering on circumspection'* (***Liberti*** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.

[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was

not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in ***Meissner v The Queen*** ((1995) 184 CLR 132);

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

[11] The 1st appellant has not met the burden cast upon him of establishing that his plea of guilty was equivocal.

The appeals against sentence

[12] Both appellants seek leave to appeal the severity of the 8.5 year term of imprisonment imposed upon them by the High Court Justice for their commission of the subject offence.

[13] In his written submissions dated 2 March 2009 the 1st appellant submitted that the sentencing judge fell into error by giving insufficient weight to his guilty plea; by giving too much weight to his prior convictions; gave insufficient weight to his subjective mitigation and erred in holding that the

appropriate starting point for a sentence for robbery with violence should be 8 years imprisonment.

[14] In his written submissions dated 23 January 2009 the 2nd appellant submitted that the sentencing judge erred by giving insufficient weight to his subjective features (including his relatively young age and prior good record); gave insufficient weight to his plea of guilty and too little weight to his good prospects of rehabilitation.

[15] In its submissions the prosecution assert that the case of ***Basa v State*** [2006] FJCA 23 is authority for the proposition that the general tariff for robbery with violence offences in Fiji is 4 to 7 years. We do not agree with this submission. If there ever was such a usual tariff the Court of Appeal made it clear in ***Basa*** that such a tariff was no longer appropriate given it had arisen from sentences imposed in New Zealand for the same type of offence, but which offence in New Zealand carries a maximum penalty of only 14 years imprisonment whereas the maximum penalty in Fiji is life imprisonment (as it is in England). The Court of Appeal went on to say that reference to English cases is more appropriate when assessing the length of sentence for robbery with violence offences. We agree totally with what this Court said in ***Basa*** (and see also this Court's remarks on sentencing guidelines for this type of offence in ***Singh v State*** [2004] FJCA 8).

[16] In our opinion it cannot be said that the sentencing judge fell into error in adopting a starting point of 8 years imprisonment before considering particular aggravating and mitigating circumstances. From a review of the sentencing judge's remarks on sentence it is clear that he took into account all appropriate factors when arriving at what he held to be an appropriate sentence.

[17] Yet it does appear from a close examination of his remarks on sentence that the sentencing judge erred in several respects in arriving at an appropriate

sentence. Firstly, the judge specifically found as an aggravating factor on sentence in the case of both the appellants the fact that prior to the robbery they had stolen money from the victim's house. To treat this prior offence as an aggravating factor on the robbery charge is impermissible. When a judge is imposing a sentence for a particular offence he is not permitted to consider as an aggravating factor any part of an offender's conduct that could have been charged separately (see ***R v De Simoni*** (1981) 147 CLR 383 at 389 and ***Pearce v The Queen*** (1998) 194 CLR 610 at 621). Secondly, the sentencing judge used as an aggravating feature the fact that the 1st appellant had 14 previous convictions and the 2nd appellant one previous conviction. The common law is that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. It seems to us that the sentencing judge has erred in using the appellants' prior criminal records as an aggravating feature.

[18] And thirdly, the sentencing judge saw no reason to differentiate in penalty as between the two appellants. In our opinion this was to ignore a lengthy sentence on the part of the 1st appellant but a record with just one minor offence on the part of the 2nd appellant. On any view of the subjective features of both appellants, the 2nd appellant's prospects of rehabilitation (by virtue of having only one prior offence) were far better than those of the 1st appellant and deserved to be reflected in a lesser sentence than that imposed upon the 1st appellant.

[19] Taking into account the above errors in the sentencing judge's approach to the task of assessing an appropriate sentence, we are of the view that we should intervene and reduce the sentences imposed by the sentencing judge on both appellants.

Orders of the Court

[20] For the above reasons we order that:

1. The 1st appellant be granted leave to appeal his conviction.

2. The 1st appellant's appeal against conviction is dismissed.

3. Both appellants be granted leave to appeal the sentences imposed upon them in the High Court.

4. The appeals against sentence of both offenders are allowed.

5. The sentence of eight and a half years imposed upon the 1st appellant is quashed and substituted with a sentence of seven years.

6. The sentence of eight and a half years imposed upon the 2nd appellant is quashed and substituted with a sentence of 6 years.

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Pathik, JA

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Powell, JA

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Lloyd, JA

Solicitors:

Appellants in Person
Office of the Director of Public Prosecutions, Suva for the Respondent