

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA095 of 2008

Between: **MANASA WAQA** **Appellant**

And: **THE STATE** **Respondent**

Hearing: 16th January 2009
Judgment: 23rd January 2009

Counsel: Appellant in person
Ms N. Tikoisuva for State

JUDGMENT

[1] The Appellant, who pleaded guilty to one count of robbery with violence, one count of being found in possession of housebreaking implements and one count of resisting arrest, appeals against his sentence of two years imprisonment. The State opposes the appeal, and invites the Court to enhance the sentence on the ground that it is manifestly lenient for the offence of robbery with violence.

[2] The charges, which were filed on the 18th of March 2008 allege that on the 14th of March 2008 at Samabula, the Appellant with others, being armed with an offensive weapon, robbed Simon Fong of various items valued at \$2,885. The second count alleged that the Appellant on the 14th of March 2008 at Samabula, was found by night in possession of a pinch bar, torch and hand gloves. On the same day he is alleged to have resisted his lawful apprehension by Police Constable Peni Turaga.

[3] On the 18th of March, when the case was first called the Appellant asked to have his plea deferred so that he could get legal advice. He alleged police assault at the Samabula Police Station. The Court ordered medical attention and deferred plea. On the 20th of March 2008, counsel appeared from the Legal Aid Commission. The prosecution objected to bail on the ground that the Appellant had offended whilst on an extra-mural programme. There were several adjournments because of the non-production of the Appellant, who was in custody. On the 4th of June 2008, the Legal Aid Commission withdrew representation. The Appellant was given bail so that he could instruct alternative counsel. On the 30th of June 2008 however, the Appellant waived his right to counsel. The court states – “Final disclosure confirmed.” A hearing date was set for the 1st of August.

[4] On the 1st of August, it appears from the court record, that the Appellant had left his disclosure at home. The prosecution was ready to proceed. The trial did not commence, until 2.30pm, but the Appellant (who lived at Tamavua Village) still did not have the disclosure with him. The learned Magistrate proceeded with the trial saying the Appellant could look at the statements in the prosecution file. It is not clear whether the Appellant did so.

[5] The evidence of Simon Fong was that he was at home on the 14th of March 2008 when he heard noises coming from his sitting room. Looking at his security camera he could see one person sitting on the stairs, and another breaking the door. He set off the alarm and telephoned the ADT Security Company.

[6] Some people then came to his bedroom door and forced it open. They were masked and were holding crow bars. They demanded money. He gave them his wallet containing credit cards, money and a driving license. They then took other personal items. A neighbor saw a fourth man down the stairs. Then they all left.

[7] On the 15th of March 2008, he identified his credit cards at the police station. His name was on the cards. Under cross-examination he agreed that he had not seen the Appellant.

[8] The evidence of Police Constable Peni Turaga was that he attended the report of the robbery on the 14th of March 2008. He left the scene of the robbery with Special Constable Iowane on mobile patrol. At the junction of Princess Road, they saw the Appellant get a taxi 50 meters away. Special Constable Iowane called out to him saying "Manasa" but the Appellant kept walking. He was seen to throw something away twice. When they investigated they saw that he had thrown away a black carry bag containing pinch bar, hand gloves, balaclava, black-shirt and a torch. The police officers then apprehended the Appellant and searched him. They found on him two bank cards and one Visa card. The name "Simon Fong" was on the cards.

[9] Under cross-examination, the witness said that the Appellant was apprehended half an hour after they attended the report of the robbery on the same morning as the robbery.

[10] The trial was then adjourned until the 4th of August. The court record then reads:

"Accused this morning informed the court that he wants to change his plea. When asked why he said he did what he did and the stolen items were found in his possession."

[11] The charge was then read and explained and the Appellant pleaded guilty on all three counts. The facts were then read. On Count 3, the facts read were that whilst the accused was being arrested by the officers, the accused tried to escape but was overpowered by the officers. He was then escorted to Samabula Police Station.

[12] These facts were admitted. The Appellant had 13 previous convictions dating from 1994 to 2001. They include larceny, burglary, trespass and two convictions for robbery with violence. In mitigation, he said he was 32 years old, single and unemployed. He said he was a member of the Methodist Church and that he had kept out of trouble since 2002 when he was last released from prison.

[13] Sentence was delivered on the 8th of August 2008. The learned Magistrate said that the tariff for robbery with violence was 4 to 8 years imprisonment, and that given the prevalence of the offence, he should impose a deterrent sentence. He accepted that the appellant had received only \$10 and the credit cards as his share of the robbery and took into

account the guilty pleas and remorse. He then sentenced the Appellant to 2 years imprisonment on Count 1, 9 months imprisonment on Count 2, and 6 months imprisonment on Count 3. All sentences were to be served concurrently. Thus the total to be served was 2 years imprisonment.

[14] The Appellant in his petition of appeal confined his appeal to one against sentence alone, saying that the learned magistrate had failed to put any weight on his mitigation. However when the appeal was first called in the High Court (before Goundar J) on the 28th of November 2008, his Lordship made the following remarks to the Appellant and to State counsel:

"Sentence below tariff for home invasion robbery. Advised Appellant to seek Legal advice on merits of his appeal as this Court has powers to increase sentence."

[15] He then adjourned the matter for hearing to the 16th of January 2009, to this Court. On the 16th of January the Appellant said that he had chosen not to take legal advice despite this clear warning by Goundar J, and he wanted to proceed to hearing. When I asked why I should not increase his sentence, he said he did not take part in the offence and that he only pleaded guilty because he had not received his disclosure. I then proceeded on the basis that he was also appealing against conviction.

[16] State counsel refuted this, saying that the Appellant had received full and final disclosure on the 27th of March 2008, and that he pleaded guilty because the evidence showed that he had been found red-handed in possession of the stolen credit cards shortly after the robbery. State counsel further said that 2 years imprisonment was very lenient for a home invasion,

and that the Appellant was clearly a principal offender because he had been in possession of the breaking implements.

[17] The Appellant then agreed that he had taken part in the robbery but said that he had only been the lookout." He said he was told to ensure that no one disturbed the robbery and that he was given the credit cards by the other offenders who had also given him the breaking implements to keep until the next morning.

[18] After this admission in the course of the appeal, it is clear that the Appellant was rightly convicted for robbery with violence. Although he now says the breaking implements were not his, the facts to which he agreed in the Magistrates' Court, were that his mother told the police that the implements belonged to the Appellant. If this is the case, and I accept that it is, on the basis of the Appellant's admission of the facts in the lower court, then he was more than a mere lookout. He had taken part in the robbery carrying a pinch bar, balaclava and torch. The complainant's evidence was that the robbers had been carrying "crow bars." Clearly the Appellant should have been sentenced as one of the principal offenders.

[19] The 2 year sentence imposed on the Appellant was entirely wrong in principle. The starting point for home invasion robberies is much higher than for other types of robbery because of the destruction of the sanctity and security of the home. In this case there was evidence of a home invasion robbery using offensive weapons. The starting point should have been 8 years imprisonment. After deducting for the guilty plea (which was not an early plea) and the attempts of the Appellant to stay out of trouble since 2002, the appropriate sentence should have been 6 years imprisonment. With two previous convictions for robbery with violence the

Appellant was entitled to no discount for good character. The two year sentence imposed is so lenient, that I would be failing in my duty to the community if I did not increase it. I do so. The Appellant was warned I November that he was at risk of having his sentence enhanced and he has had ample time and opportunity to make submissions opposing such a step. He had told me nothing which persuade me that his two year term should remain. I do however take into account the length of time he has been in custody from March to June 2008. For that, I deduct a further 6 months. The two year term imposed on August 7th 2008 is quashed and is substituted with a sentence of 5 ½ years to run from August 7th 2008.

[20] The Appellant's appeal is dismissed. His sentence is increased.

Nazhat Shameem
JUDGE

At Suva
23rd January 2009