

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: HAA 006 OF 2009**

**BETWEEN:**

1. MOSESE WAINI
2. MELI TUVEI RATU
3. VOATE NARASIA

***Appellants***

**AND:**

**THE STATE**

***Respondent***

Date of Hearing: 30<sup>th</sup> July 2009

Date of Judgment: 10<sup>th</sup> September 2009

Counsel: Appellants in person  
Mr. L. Savou for State

**JUDGMENT**

[1] The appellants were convicted on their own pleas of guilty on one count of robbery with violence and three counts of assault occasioning actual bodily harm.

- [2] For the offence of robbery with violence, the first and the second appellants were sentenced to four years and eight months imprisonment, while the third appellant was sentenced to five years imprisonment.
- [3] On each count of assault occasioning actual bodily harm, all three appellants were sentenced to twelve months imprisonment to be served concurrently with each other, but consecutively with the sentence for robbery with violence. The total overall sentence for the first and the second appellants was five years and eight months imprisonment, while the total sentence for the third appellant was six years imprisonment.
- [4] All three appellants appeal against sentence alone. They advance similar grounds of appeal.
- [5] The first contention is that the learned Magistrate failed to consider their guilty pleas.
- [6] Since the appellants committed a home invasion robbery the learned Magistrate took 7 years as her starting point. The starting point of 7 years imprisonment for the offence of this nature is consistent with the decisions of the Court of Appeal in ***Basa v. State*** *Criminal Appeal No. AAU24/05* and ***Mitieli Naikelekelevesi v. State*** *Criminal Appeal No. AAU0001 of 2007*.
- [7] In ***State v Raiwaqa*** [2008] FJHC 32; HAC042.2004 (4 March 2008), this Court observed:

“Home invasion robberies are prevalent in Fiji. Conduct of this kind affects the sense of security for the whole community. A home provides privacy and safety to a person. The sanctity of the home must be recognized.

It is the duty of the courts to protect the public against any form of violence or threat of violence while they are in the safety of their homes.”

[8] The appellants committed a serious robbery. They entered the home of an elderly couple in their late sixties at night time to rob them. The couple was assaulted. The husband sustained a swollen scalp and the wife suffered psychological trauma. When the couple raised alarm and the neighbours came to their rescue, they were assaulted as well. They suffered bruises, cuts and swelling. In the process of defending themselves the husband struck the first appellant with a knife. The appellants fled. The first appellant was seriously injured and was hospitalized. The learned Magistrate took these facts into account when sentencing the appellants.

[9] After taking 7 years as her starting point, the learned Magistrate said:

“From the balance of 7 years, the accused have all pleaded guilty in the first instance and co-operated with police investigators. This entitles them to a 1/3 discount. On the charge of robbery with violence then, a sentence of 4 years 8 months is imposed on Accused 1 and 2. For Accused 3, his term is increased to 5 years to account for his previous offending.”

[10] As can be seen from the sentencing remarks, the learned Magistrate took the guilty pleas of the appellants into account and reduced the sentence substantially.

[11] The second contention is that the learned Magistrate erred in not considering the disparity in the sentences in other cases for similar offence. The appellants cite cases in which lesser sentences were imposed on offenders committing robbery with violence. In ***Bote v. State Criminal Appeal No. AAU0011 of 2005S*** the Court of Appeal held that the parity principle, which applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence, with a justifiable sense of grievance does not apply to the sentences that had been passed in other cases involving similar offence. The Court said that the sentences in unrelated cases are imposed with different objective and personal circumstances and therefore are of limited relevance to the parity principle.

[12] As regards the first and the second appellants there is no disparity in their sentences. However the same cannot be said about the third appellant. The reason for the higher sentence for the third appellant is evident from the following statement of the learned Magistrate:

“For Accused 3, his term is increased to 5 years, to account for his previous offending.”

[13] It is settled law 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 (***Tuisavusavu & Savou v. State Criminal Appeal No. AAU0064 of 2004S***).

- [14] Clearly the learned Magistrate erred in law when she enhanced the sentence of the third appellant because of his previous conviction for larceny in 2007. The first and the second appellants also had previous convictions but none were for larceny or robbery. Because their convictions were not of similar nature, the learned Magistrate gave a discount of 12 months in their sentences. The decision to reduce the sentence because the previous convictions of the offenders were not similar in nature was erroneous, but the error was not prejudicial to the first and the second appellants. In fact, they benefitted from the error.
- [15] However, the error in respect to the third appellant prejudiced him. He received a higher sentence because the learned Magistrate acted on a wrong principle to justify the disparity in the sentences. Justice will be served if the sentence of the third appellant is brought to par with the sentences imposed on the first and the second appellants.
- [16] There cannot be any legitimate complaint about the sentence for robbery with violence being directed to be served consecutively with the sentences for assault occasioning actual bodily harm. In **Bote** (supra), the Court of Appeal said:
- "The true question is one of appropriateness of the overall sentence, that is whether it reflects the totality of the criminality involved."
- [17] In this case, four individual victims were attacked and therefore it was well within the sentencing discretion for the sentences on two counts to be imposed consecutively. The total overall sentence is just and appropriate and reflects the totality of the criminality involved.

[18] For these reasons, the first and the second appellants' appeals are dismissed. The third appellant's appeal is allowed on the ground of disparity in the sentences. The third appellant's sentence of 5 years imprisonment for robbery with violence is set aside and substituted with a sentence of 4 years and 8 months imprisonment.

Daniel Goundar  
**JUDGE**

At Lautoka  
10<sup>th</sup> September 2009

**Solicitors:**

Appellants in person  
Office of the DPP for State