

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Miscellaneous No. 004 of 2009**

**BETWEEN:**

**SALENDRA BHAN SINGH**

***Appellant***

**AND:**

**THE STATE**

***Respondent***

Counsel: Appellant in Person  
Mr. T Muloilagi for State

Date of Hearing: 28 August 2009  
Date of Ruling: 4 September 2009

**JUDGMENT**

- [1] On 23 January 2009, the appellant appeared in the Magistrates' Court and voluntarily pleaded guilty to a charge of robbery with violence, after waiving his right to counsel.
- [2] On the same day he was convicted and sentenced to 5 years and 8 months imprisonment.

- [3] The appellant seeks leave to appeal out of time against sentence. The appeal is out of time by about one month.
- [4] Since the court record is filed and the delay is not substantial, I grant leave to appeal out of time and consider the substantive appeal.
- [5] The grounds of appeal are:
- (i) The learned Magistrate failed to consider the effect of intoxication on intent;
  - (ii) The learned Magistrate erred in considering the appellant's previous convictions as aggravating factor;
  - (iii) The learned Magistrate gave insufficient weight to the appellant's guilty plea, cooperation with police and remorse.
  - (iv) The sentence is harsh.
- [6] The facts were that on 4 October 2008 at about 2.00am, the appellant went and knocked at the complainant's house. The complainant was 70 years old and a widow. She lived alone with her mentally handicapped daughter. When the complainant opened the door, the appellant entered the house and slapped her face. He pushed, punched and kicked her. He demanded money from her. After realizing the complainant did not have any money, the appellant snatched a pair of earrings and fled. The complainant ran to her neighbours and reported the incident. She recognized the appellant because he lived in the same neighbourhood. The appellant was arrested. He admitted the offence to the police. One earring was found in a boat owned by the appellant's

employer. The appellant said he lost the other earring while fleeing after committing the offence.

[7] The complainant was medically examined. She sustained injuries to her face and back.

[8] In his sentencing remarks the learned Magistrate considered the following as aggravating factors:

- a. the offence was a home invasion;
- b. the victim was a vulnerable person;
- c. the actual assault on the victim;
- d. the assault was sustained in that he punched and kicked her several times;
- e. the victim suffered injuries as a result of the assault; and
- f. the attack was at night.

[9] The learned Magistrate noted that the appellant was 31 years old and married with two children. He was a fisherman and earned \$50.00 per week. Further the learned Magistrate said the value of property was small and the injuries sustained by the complainant were not serious.

[10] The learned Magistrate used 8 years as the starting point and increased the sentence by 1 year to reflect the aggravating factors. In taking into account the early guilty plea, the sentence was reduced by one third, arriving at a sentence of 5 years and 8 months.

[11] The starting point of 8 years imprisonment for a home invasion robbery is consistent with the decisions of the Court of Appeal in **Sakiusa Basa v State** Criminal Appeal No. AAU0024 of 2005 and **Mitieli Naikelekelevesi v State** Criminal Appeal No. AAU0001 of 2007.

[12] In **State v Raiwaqa** [2008] FJHC 32; HAC042.2004 (4 March 2008), this Court said:

“In the case of **Basa v State** [2006] Cr. App. AAU 24/05, 24 March 2006, the Court of Appeal pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those from New Zealand, as had been the previous practice, because the maximum penalty in England is also life imprisonment.

In England the sentencing range is 13–16 years (10–12 years after a guilty plea) for robbery in the home involving physical violence. In this type of case, the starting point is justified mainly by the high level of violence, although it is clear that longer terms will be appropriate where extreme violence is used (see **R v Driscoll** [1986] 8 Cr. App. R(s) 121).”

[13] The Court further 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.

[14] In the present case, the learned Magistrate was justified to take a serious view to the offence. The victim was an elderly woman living with her handicapped daughter. The appellant took advantage of the victim’s vulnerability. He was from the same neighbourhood. Actual violence was used. The victim was punched and kicked. She suffered physical injuries

albeit the injuries were not serious in nature. These were the aggravating features.

[15] The mitigating factors were the early guilty plea and the appellant's family circumstances.

[16] After adjusting for the mitigating and aggravating factors the learned Magistrate imposed a sentence of 5 years and 8 months.

[17] The appellant contends that the learned Magistrate failed to consider the effect of intoxication on intent. Intoxication is not available as a defence to an offence of robbery with violence. Intoxication aggravates an offence and the appellant is fortunate that the learned Magistrate did not consider intoxication as an aggravating factor.

[18] The appellant committed the offence while serving a suspended sentence for assault occasioning actual bodily harm. The appellant is also fortunate in this respect that his suspended sentence was not activated by the learned Magistrate. The learned Magistrate considered the appellant's previous convictions and gave no credit for previous good character. The previous convictions of the appellant were not used as an aggravating factor to enhance the sentence. No error of law has been shown.

[19] The appellant refers to a newspaper article where an offender was sentenced to nine months imprisonment for two charges of robbery with violence. The fact that some other offender has received a different sentence is not a proper basis on which to found an appeal against sentence imposed upon the appellant.

[20] The sentence of 5 years and 8 months is neither wrong in principle, nor manifestly excessive on an objective assessment of the facts in this case.

[21] The appeal against sentence is dismissed.

Daniel Goundar  
**JUDGE**

At Labasa  
Friday 4 September 2009

**Solicitors:**  
Appellant in person  
Office of the DPP for State