

IN THE FIJI COURT OF APPEAL  
CRIMINAL APPEAL NO. 7 OF 1987

Between:

JONA SAUKILAGI

Appellant

- and -

THE STATE

Respondent

Appellant in person.  
Director of Public Prosecutions for the Respondent.

Date of Hearing: 5th May, 1988

Delivery of Judgment: 9th May, 1988

JUDGMENT OF THE COURT

The appellant was convicted on the 11th day of November 1986, by the then Supreme Court of the offence of robbery contrary to section 293(i)(a) of the Penal Code and sentenced to six years imprisonment.

He appeals to this court against conviction and sentence setting out a number of grounds of appeal.

On the hearing of the appeal against conviction, the appellant stated he was not proceeding with his appeal because he had no legal representation.

In the course of his plea for mitigation of his sentence on the main ground that it was excessive, he declared his innocence of the charge on which he was convicted.

2.

The court asked the appellant whether he still intended to abandon his appeal against conviction in view of his continued protestation of innocence and also asked him whether his decision to abandon that appeal was dictated solely by his inability to have his appeal presented by a legally qualified person.

The appellant made it clear that, notwithstanding his lack of legal representation, he had made up his mind that he would only appeal against sentence and he again confirmed that he abandoned his appeal against conviction.

Accordingly the appeal against conviction is accepted as having been abandoned and is dismissed.

On his appeal against sentence the court has considered the written plea tendered by the appellant but the only relevant matter which this court has to consider is whether the sentence of six years imprisonment in all the circumstances is excessive.

The information on which the appellant was jointly indicted with another person, charged the two accused with robbery with violence contrary to section 293(i)(b) of the Penal Code.

At the commencement of the trial the Crown Counsel applied for the amendment of the information to bring the charge under subsection (i)(a) of section 293 of the Penal Code. The amendment sought, if approved, necessitated deletion of the words "with violence" in the statement of offence and deletion of the words "and at the time of such robbery did use personal violence on the said Chandar Dip Singh/Deo Dutt Singh." The learned trial Judge granted the amendment.

3.

The trial proceeded on a charge of robbery without any allegation of violence having been used by the two accused. Section 293(i)(a) and (b) of the Penal Code is as follows:-

"293. - (i) Any person who -

(a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or

(b) robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person,

is guilty of a felony, and is liable to imprisonment for life, with or without corporal punishment."

We have the benefit of the learned trial Judge's written reasons for the sentence of six years he imposed on the appellant and we are concerned in particular with paragraph 3 of those reasons where the learned trial Judge stated as follows:-

" The violence in this case was unabated over a protracted period and the taxi driver suffered a number of injuries. He was hospitalised for 4 to 5 days. Further, a knife was produced and even used, the taxi driver being stabbed on the left hand. Quite obviously, he was in fear of his life."

There was evidence accepted by the assessors and the learned trial Judge that violence over a protracted period was used against the unfortunate taxi driver. He received a number of serious injuries and was hospitalised.

The learned Director of Public Prosecutions very properly drew the court's attention to the paragraph

quoted above and expressed the view that having allowed Crown Counsel to amend the charge to remove therefrom any allegations of robbery attended by active violence against the taxi driver it was not permissible in law at the sentencing stage to consider evidence of the violence proved to have been used by the accused.

The Director furnished the court with a photocopy of a number of pages from Boyle and Allen on Sentencing Law and Practice which is not available in the High Court Library.

One paragraph at page 222 is relevant in the instant case. The learned authors stated as follows:-

"(a) Sentencing for the correct offence

When an accused is convicted of an offence the sentencer must pass sentence solely in relation to that offence, ignoring all evidence which would have supported other offences (whether or not they were charged on the indictment). Seven situations may arise:"

The Director also expressed his view that as a result of the learned trial Judge considering the violence that had been used he imposed a sentence which was higher than courts would normally impose on a conviction for simple robbery under section 293(i)(a).

The learned trial Judge in his very full summing up to the assessors did not at one stage differentiate between subsection (a) and (b). He stated that the prosecution had to prove a number of ingredients. One of which was violence or putting persons in fear.

There is always an implied threat or fear of violence in all robbery cases. The offence is proved under subsection (a) if a person is armed with an offensive weapon and robs a person or if there are

two or more persons together who rob another person. Subsection (a) does not require proof of actual violence or threat to use it.

The prosecution in the instant case decided to amend the charge and proceed under subsection (a).

At a later stage in his summing up, the learned trial Judge stated as follows:-

"There is evidence that a knife was used. That is an aggravating factor. But the accused persons have not been charged therewith and so the offence as charged cannot be thereby aggravated."

Subsection (b) is concerned with a different form of robbery where actual personal violence is used or threatened just before at or immediately after the robbery. It is immaterial whether one or more persons are involved.

The evidence adduced by the prosecution did not establish robbery under subsection (b) and this was recognized by the learned trial Judge where he stated in his summing up to the assessors as follows:-

"It is not clear where exactly the goods were taken from him. The force used in taking the items from the taxi driver would not amount to sufficient violence in the matter, unless there was a struggle, of which there is no evidence. The point is, that the prosecution merely have to prove that the taxi driver was put in fear."

The law treats both types of robbery with equal severity. Life imprisonment with or without corporal punishment being the penalty provided. It is a moot point whether robbery under (a) should be considered to be an aggravated type of robbery or whether that term should be reserved for the offence under subsection (b).

Courts have however in practice imposed lighter sentences for persons convicted under subsection (a) than for those under subsection (b).

It is clear from the perusal of the learned trial Judge's expressed comments when sentencing the accused that he was deeply concerned about the violence used by the accused and others involved. There can be little doubt that the accused was convicted under subsection (a) but sentenced under subsection (b) on facts which were not in the statement of offence on which the accused was convicted.

The learned trial Judge's concern is shared by this court. The conduct of the accused and others involved in the offences display a complete lack of respect for law and property and the feelings for the unfortunate taxi driver who was subjected to a protracted period of brutal violence.

The appellant could have been charged with a number of other serious offences including aggravated assault, unlawful wounding, kidnapping and unlawful imprisonment. From the evidence there was a time when the perpetrators of the offences or one of them considered taking action against the driver which may have resulted in him losing his life. But for the presence of mind of the taxi driver who pretended to be dead and did not show any response when a knife was driven into his hand, he may well have lost his life.

Had the accused been charged with other serious offences that the evidence indicates were committed, we would have expected the cumulative punishment meted out to the appellant to have exceeded six years imprisonment.

