IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO: AAU0005/97S
(High Court Criminal Miscellaneous Case No.HAM033/95L)

BETWEEN:

JOSEVA LUI
INOKE MATA
ILISONI VOLITIKORO — APPELLANTS

- AND -

THE STATE

RESPONDENT

First and third Appellants in person
Mr. A.K. Singh for second Appellant
Mr J. Naigulevu for the Respondent

Date and Place of Hearing: **9 February, 1998, Suva**
Date of Delivery of Decision: **12 February, 1998**

JUDGMENT OF THE COURT

Introduction

The appellants appeal against the sentences imposed on them in the High Court at Lautoka on 30th November 1995. Although the appeals were filed well out of time, leave to appeal was given by a single Judge. We note however that one of the stated grounds for leave to appeal - i.e. that the sentencing Judge did not inform the appellants of their right to appeal to this Court, can have no validity. A Judge in the High Court is under no obligation so to inform those who appear for sentence.

Facts of Offending

On 13th November 1995, Lui broke into a parked car which he then drove through the night to pick up the other two appellants who were some distance away. At 8.45 am on the following morning, 14th November 1995, the three appellants and another person drove in the car to the Lautoka shopping district. Armed with caneknives and a hammer, the three appellants entered a jeweller's shop where there were four persons present. A salesgirl, obviously frightened ran out to the back of the shop where the manager was saying his prayers. The two members of the public ran out of the shop.

The appellants smashed showcases and removed jewellery to the value of about $50,000. The car was abandoned and the appellants shared the haul. The Police later recovered most of the stolen jewellery. No actual violence occurred.

All three appellants admitted the offending when arrested. They pleaded guilty at first opportunity i.e. when they appeared in the Magistrate's Court on 16 November 1995. The Magistrate declined jurisdiction to sentence and remanded them to the High Court.

Sentences Imposed

On the principal offence of robbery with violence, Lui was sentenced to 8 years' imprisonment, Mata to 9 years and Volitikoro to 8 years. Lesser terms of imprisonment were imposed for illegal use of a motor vehicle (9 months' imprisonment for each appellant) and for

driving without a licence (1 month for Lui only) and driving without Third Party insurance (3 months for Lui only). All sentences were cumulative

On 15th December 1995, the Judge purported to reduce to 6 months imprisonment, the sentence of 9 months' imprisonment for Lui only for illegal use of a motor vehicle, 6 months is the maximum period of imprisonment authorised by s.292 of the Penal Code for this offence. He also disqualified Lui from driving. Why he took this action in respect of Lui only is unclear when the same irregular sentence had been passed on the other two appellants also. Moreover, it is not clear from the record that Lui was in Court when this amendment was made. The Court asked Lui about this at the hearing of the appeal. He advised that he had not been present

The Judge in his sentencing remarks:

(a) Correctly deplored the frequency in Fiji of the crime of robbery with violence particularly of retail premises;

(b) Emphasised the interests of the community for the Court to impose a deterrent sentence for this type of offending.

However, some of the Judge's diffuse sentencing remarks strike us as inappropriate. A sentencing Judge should confine himself to matters relevant to the exercise of

his sentencing discretion rather than embark on rambling excursions as to social conditions in other countries or to the extreme penalties for this offence exacted in other parts of the world.

Comments such as: 'I do not know if it is within my power to direct that your sentence be served with hard labour with the emphasis on hard' are not appropriate. The Judge should have known (and if he had not known, he could easily have ascertained), that there is no such sentence in Fiji as 'imprisonment with hard labour'.

The Judge said that he took into account the appellants' pleas of guilty at first opportunity and the fact that the goods had been returned. He expressed scepticism that the pleas may have been prompted by the appellants' having been caught red-handed by efficient police work, rather than by remorse. Nevertheless, the Judge noted the appellants' remorse and stated that he gave it appropriate weight. He noted that the appellants were unemployed, but did not regard that circumstance as providing an excuse for this offending.

All appellants had previous convictions for dishonesty. Mata had 5 previous convictions for robbery with violence, he had been imprisoned for offences committed in 1986 and 1989; on 22 June 1993, he was treated with what seems to have been almost unbelievable leniency in the Lautoka Magistrates' Court, when for a further offence of robbery with violence, he was sentenced to 18 months imprisonment, suspended for 3 years. Thus it was that, at the time when he appeared for sentence in the High Court, that suspended sentence was still operative.

The Judge declined to address the question of activating the suspended sentence. Instead, he directed counsel for the prosecution to bring his remarks to the attention of the judicial officer who had to decide whether to activate the suspended sentence. Secion 31(1) of the Penal Code states that an offender shall be dealt with in respect of a suspended sentence by the High Court or "where the sentence was passed by a Magistrates' Court, by any Magistrates' Court..."

We take this provision to mean that when the High Court has before it an offender for sentencing it can deal with any suspended sentence previously imposed on the offender: a Magistrate's Court, in a like situation, cannot deal with a suspended sentence unless that sentence had been imposed in a Magistrate's Court.

In our view, the Judge should have dealt with Mata in terms of s.30 of the Penal Code and decided which of the options under that section was appropriate for the case. Because of the Judge's failure to deal with the suspended sentence on Mata, no action has ever been taken to activate it. Obviously, this Court will now have to consider the matter.

Submissions

Lui and Volitikoro appeared in person at the appeal hearing. Mr Singh of counsel appeared with last-minute instructions for Mata. Lui's was a general plea for leniency and an offer to rehabilitate. Mr Singh stressed Mata's personal situation - he had a young child at the

time of sentencing. Volitikoro, whilst making similar general pleas for mercy, presented thoughtful written submissions in which he detailed sentences allegedly received by others convicted of robbery with violence. He claimed that he had obtained this informationfrom the prison records. A trend of sentences of under 5 years is revealed. We have no way of knowing further details about these cases. However, Volitikoro produced a newspaper clipping which showed a sentence of only 2 years imposed by a Magistrate in January 1998 for robbery of a dwellinghouse where the householder was tied and gagged and $5,110 worth of jewellery stolen. Volitikoro emphasised his unemployment and his family disadvantages. He submitted that by the use of the word 'community' 21 times in his sentencing remarks, the Judge was over-influenced by public opinion.

Counsel for the State was unable to provide any indication of sentencing patterns in this country for this offence. He referred to the decision of this Court in Iliaseri Saqasaqa v. State (Criminal Appeal No.7 of 1991, judgment 27 May 1994). There a sentence of 9 years' imprisonment for robbery with violence was reduced to 7 years, in a case where three intruders broke into a house and woke the occupants. One was armed with a knife which he held against one occupant, another held wire and a third a 'pinch bar.' There was a struggle. One of the intruders threw a vase and injured an occupant . The robbers removed property to the value of $2,000. They converted one vehicle belonging to the householder and smashed the windscreen of another. The appellant had pleaded not guilty. His conviction appeal was dismissed. His co-offender whose record was not as bad as Iliaseri's and who pleaded guilty, received 5 years' imprisonment.

Decision

Before dealing with the sentencing on the robbery counts we must address the errors already heralded.

(a) We find no jurisdiction for the Judge to have re-imposed sentence on Lui alone for illegal use of a vehicle. It is strange that he did not take this course for the other two appellants who had received the same sentence which was not justified in law. Nor was any reason given why he imposed the maximum sentence for this offence.

(b) The Judge should not have made cumulative the sentences for the offences under s.292 for all three and for the driving offences of Lui. Appellate Courts have stressed the 'total criminality' principle frequently; a sentencing Court must impose a sentence appropriate for a whole criminal escapade which often includes less culpable offences committed as ancillary to a major offence.

(c) The Judge should have exercised one of the options under s.30 of the Penal Code in respect of Mata's suspended sentence. Because the suspended sentence expired in June 1996 and no effort was made by the State to obtain an order under the section, it would now be inappropriate for this Court on appeal to take any action. However Mata's case is worse than those of the other two appellants because of his

previous convictions for robbery with violence and because he re-offended whilst under a suspended sentence.

We consider that a reduction in sentence for all appellants is justified for the following reasons:

(a) The sentences for the lesser offences should be concurrent, not cumulative.

(b) Volitikoro's sentence must recognise that he did not face the driving offences which Lui did. With that distinction, Lui and Volitikoro should be treated similarly. Mata for the reasons given must receive a greater sentence.

(c) In our view the Judge did not give sufficient credit for the guilty pleas, entered at the first opportunity and the expressions of remorse. The well- recognised 'discount' for a guilty plea varies, depending on the time when it is made and the inevitability of conviction. Nevertheless even in a clear case, a discount should be given to those who save the State the expense of a preliminary hearing and a defended trial. Good sentencing practice will often specify the amount of the 'discount'. Here we cannot see any real discount operating in the mind of the Judge.

(d) The offence, whilst serious, was not in the worst category of robbery with violence. The robbing of a bank filled with members of the public with the use and discharge of loaded firearms would be an example of a far graver scenario. Here no actual violence was offered to the persons in the shop, although they were not to know that the caneknives would not be used and their terror is easily understood.

(e) Such sentences as we have seen show that the sentences imposed were at the higher end of the sentencing scale for this offence.

We therefore reduce the sentences for Mata to 7 years: imprisonment for robbery with violence; for Lui to 6 years for robbery with violence: for Volitikoro to 5 years 9 months for robbery with violence. In each case, a sentence of 3 months' imprisonment for illegal use of a vehicle is substituted to be served concurrently with the robbery sentences as are the sentences imposed by the Judge on Lui for driving offences.

Guidance for Future Cases

If the meagre available evidence of sentencing levels for robbery with violence is any guide, then in our view, those current levels appear too low. As with most crimes, there are gradations of seriousness. A helpful summary with a review of sentencing patterns and a list of actual sentences can be found in the decision of the New Zealand Court of Appeal in R. V. Moananui [1983] N.Z.L.R. 537.

The State prosecution service ought to be encouraged to prepare a data base along the lines of that found in the Moananui judgment for the guidance of Magistrates and Judges. It will be seen from the Moananui judgment that sentences for aggravated robbery in New Zealand at Court rarely go below 4 years.

If as the learned Judge in the present case indicated, robbery with violence is becoming increasingly common in this country, then the Courts ought to develop principled sentencing patterns for dealing with the problem.

Summary

(a) Appeals allowed.

(b) Sentences for armed robbery reduced - Lui to 6 years imprisonment, Mata to 7 years imprisonment, Volitikoro to 5 years 9 months imprisonment.

(c) Sentences for unlawful use of motor vehicle of all appellants reduced to 3 months and made concurrent with their sentences for robbery with violence.

(d) Sentences for Lui imposed in the High Court for driving without insurance and for driving without a licence to be concurrent with his sentence for robbery with violence.

(e) No action is taken to activate the suspended sentence imposed on Mata in the Magistrates Court at Lautoka on 22 June 1993.

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Sir Ian Barker
JUDGE OF APPEAL

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Justice Gordon Ward
JUDGE OF APPEAL

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Justice J. D. Dillon
JUDGE OF APPEAL