IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0011 OF 2005S
(High Court Criminal Action No. HAA 100 of 2004S)

BETWEEN:

PAULIASI BOTE

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Wood, JA
Ford, JA

Hearing: Wednesday, 9 November 2005, Suva

Counsel: Appellant in Person
Mr D. Goundar for the Respondent

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

Background

[1] The appellant was convicted on his own guilty plea in the Magistrates' Court at Suva on charges contained in three separate cases. On the 7 October 2003, he received two, 4 year consecutive imprisonment sentences, for two counts of robbery with violence, committed on the 5 August 2003. On the 14 October, 2003, he received

4 months imprisonment for an unlawful use of motor vehicle, committed on the 13 August 2003, and a further 4 months imprisonment for an unlawful use of motor vehicle concurrent with 2 years imprisonment for a conspiracy to commit a felony, committed on the 25 August, 2003. The sentences for the offences committed on the 13 and the 25 August, 2003, were made consecutive to the sentences imposed on the 7 October, 2003. The result of the three cases was that the appellant received a total sentence of 10 years and 4 months imprisonment, although this was reduced to 8 years and 8 months when the conviction and sentence for the conspiracy count were set aside by Shameem J.

Right of Appeal

[2] This being the second appeal, the appellant's right of appeal is limited. Pursuant to section 22(1) of the Court of Appeal Act, the right of appeal is limited to any ground of appeal that involves a question of law only.

Grounds of Appeal

A. The robbery sentences should not have been directed to be served consecutively

[3] These offences were committed in the same premises, and on the same night. As the judgment in the High Court shows, they were part of a home invasion and involved two victims. The first victim, Peter Boshier was robbed of property to the value of $3,698 and sustained facial injuries, including an injury to an eye, after he was threatened with a knife and punched by either the appellant or his accomplice.

[4] After his property was taken, the intruders threatened his wife, Sheryl Boshier, with the knife, and forced her to hand over jewellery to the value of $2,517.

[5] In sentencing the appellant, the learned magistrate correctly made reference to the tariff for robbery with violence of 4 to 8 years and to the guideline judgments in

Apenisa Ralulu v. The State Cr. App. AAU009 of 1995S and ***The State v. Ilaisa Sousou Cava*** HBC007 of 2005. By reason of the limited jurisdiction of the Magistrate's Court, the maximum available sentence for each offence was 5 years imprisonment.

[6] In sentencing the appellant to two consecutive terms each of 4 years, the mitigating and aggravating circumstances were held, on appeal, to have been appropriately taken into account. In that respect the offences were gravely serious in so far as they were premeditated, occurred during a home invasion, and involved the use of a knife. See ***Raymond Sikeli Singh and Ors. v. The State*** Cr. App No. AAU0008 of 2005 at p.8.

[7] Moreover the appellant had a number of previous convictions, including convictions for robbery with violence, the last of which had occurred on 27 November 2000, and had attracted a sentence of imprisonment for four years. That sentence with remissions had only just been served when the present further offences of robbery with violence were committed.

[8] The appellant now submits that there was error of law in that the sentences should have been directed to be served concurrently, since they arose out of a single episode of criminality, citing the general proposition, referred to in decisions such as ***Henry Kalfau v. The Public Prosecutor*** (1990) VUCR 9, that separate offences that form part of the same overall event or transaction should normally attract concurrent sentences.

[9] The law however is not such as invariably to call for concurrent sentences in such an instance, the true question being one of the appropriateness of the overall sentence, that is whether it reflects the totality of the criminality involved: See ***R v. Bradley*** (1979) 2 NZLR 262.

[10] That there is no hard and fast or inflexible rule in relation to the matter was established in ***Wong Kam Hong v. The State*** Cr.App. No. CAV002 of 2003S; and see also ***R v. Lawrence*** (1989) 11 Cr.App. R (S) 580, ***R v. Wheatly*** (1983) 5 Cr. App. R (S) 417, and ***Mugining v. The Queen*** (1975) PNGLR 352.

[11] In a case where there were separate acts of robbery, each with violence, directed at two individual victims, it was well within the sentencing discretion for the sentences to be imposed consecutively. That follows from the fact that robbery with violence is an offence against the person.

[12] There was no error of law in this respect. Nor was there any error of law by Justice Shameem J. in the finding that the total sentence to be served should be one of 8 years and 8 months, taking into account the accumulation arising from the subsequent convictions and sentences, each of 4 months, for offences involving the unlawful use of a motor vehicle, on two separate occasions, which were dealt with in cases 1884/2003 and 1929/2003. Those offence were committed on 18 and 25 August 2003 respectively, that is within 3 weeks of the robbery offences.

[13] Once again, the repetitive and separate nature of this offending clearly justified an accumulation of sentence, in order to reflect the total criminality involved.

B. Disparity in sentencing was shown in relation to the sentences that had been passed in other cases involving robbery with violence.

[14] Two other cases were cited as having involved offenders with worse records, and a greater number of charges than those of which the appellant was charged.

[15] 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 (***Lowe v. The Queen*** (1984) 154 CLR 606 and ***R v. Fawcett*** (1983) 5 Cr.App. R (S) 158), does not apply in such a situation.

[16] Otherwise, the identification of unrelated cases, with different objective and personal circumstances,, which form but part of a pattern of sentencing, provides only limited assistance. Of more relevance is the tariff, as determined by guideline, judgments, such as those which applied here.

C. **The appellant sought to advance certain additional submissions which were not raised during the appeal to the High Court.**

(a) Error occurred in the Magistrates Court in that victim impact statements were received in relation to the robbery offences, and that the appellant was disadvantaged in the High Court when Legal Aid Counsel failed to raise that point.

[17] It was contended, that there was no jurisdiction in the Magistrate's Court for the provision of victim impact statements, and that the result of such statements being provided, in a case where there had been guilty pleas, was to result in an undue familiarity between the victims and the Court. This was said to have involved a denial to the appellant of his right to a fair trial under s.29(1) of the 1997 Constitution.

[18] There is no basis, upon the material available, to suggest that the pleas of guilty were overlooked, or that the Magistrate imposed an inappropriate sentence by reason of the victim impact statements. There is even less basis to suggest that the reception of victim impact statements led to some undue familiarity between the Magistrate and victims, or to bias on the part of the former. Both the common law and s.306 of the Criminal Procedure Code Cap. 21 provide a proper basis for the reception of evidence in relation to the impact of an offence upon a victim.

(b) There was error in charging the appellant with two separate offences of robbery with violence in a case involving a single ongoing transaction.

[19] This ground has no merit. There were two separate offence committed, each was lawfully charged, and the consequence was not to charge the appellant ***"on the same facts in a more aggravated form,"*** as was contended.

(c) There were erroneous findings of fact, in relation to the identity of the person who threatened or inflicted physical violence, and no medical evidence of actual injury to the male victim.

[20] So far as these involved findings of fact, which were not challenged in the High Court, no right of appeal lies. In any event, in a case of joint enterprise, each party to the enterprise is equally culpable. There could have been no reason, in the circumstance of this case, to differentiate between the offenders on the basis of the party who actually inflicted violence.

(d) Insufficient consideration was given to the motivation of the appellant for the crimes, or to other possible matters of mitigation

[21] The fact that the crimes were poverty driven, and that the property stolen was recovered by the Police, did not reduce the objective criminality of the serious offences before the Court, and were not factors that could or should have operated in mitigation of sentence.

[22] Otherwise the fact that the appellant admitted his involvement to Police and his early plea of guilty, were appropriately taken into account.

[23] No error of law is shown in relation to sentence.

[24] The appeal is dismissed.

Ward, President

FIJI COURT OF APPEAL

Wood, JA

Ford, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions Office, Suva for the Respondent

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