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

CRIMINAL APPEAL NO. AAU0037 of 2004S
(High Court Criminal Action No. HAC 10 of 2003L)

BETWEEN:

MOSESE BOSIGA TAWAKE

Appellant

AND:

THE STATE

Respondent

Coram: Scott, JA
Wood, JA
Ford, JA

Hearing: Wednesday, 9 November 2005, Suva

Counsel: Appellant in Person
Mr N. Nand for the Respondent

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

---

[1] This is an appeal against sentence imposed in the High Court pursuant to leave being granted.

[2] On about 29 August 1994 the Appellant was one of a group of young men who robbed Hai's Service Station, Ba in the early hours of the morning.

[3] The two persons in attendance at the service station at the time of the attack were a petrol attendant and an elderly night watchman. Both were assaulted. The night watchman was punched twice by the Appellant and fell to the floor. The Appellant

then kicked him. When he fell the night watchman fractured his skull and some time later he died.

[4] Two of the members of the group were dealt with by the High Court at Lautoka in November 1996. Both had originally been charged with murder and robbery with violence however in due course pleas to manslaughter and robbery with violence were accepted. Sentences of six years imprisonment for the manslaughter and three years imprisonment concurrent for the robbery with violence were imposed.

[5] The Court of Appeal dismissed an appeal against sentence by the first member of the group however the sentence for manslaughter imposed on the second member of the group was reduced to four and half years imprisonment. The sentence of three years imprisonment concurrent for robbery with violence was not disturbed (Criminal Appeal AAU0021 of 1996).

[6] In the course of its judgment, the Court of Appeal remarked that the sentences imposed by the High Court:

> ***"... were within range, but only just. Longer sentences could have been justified."***

The sentence which was reduced from six to four and half years imprisonment was varied first, because that Appellant had spent much longer in custody on remand than his co-Appellant and secondly, because he had not himself assaulted the night watchman who died.

[7] For a number of reasons which are not germane to the outcome of this appeal there was a very substantial lapse of time before the present Appellant also appeared in the High Court to answer the charges for which his colleagues had been dealt with some seven and half years before. The Appellant pleaded guilty to manslaughter and robbery with violence. He admitted punching and kicking the night watchman.

[8] In his sentencing remarks, the judge (Connors J.) took as his starting point the same sentence of six years imprisonment which had been imposed on the Appellant's colleagues by the High Court and which was upheld in one case by the Court of Appeal and varied in the other.

[9] The judge noted that the starting point reflected the guilty pleas which had been offered and which were also offered on this occasion by the present Appellant. He also specifically took into account the Appellant's previous good character and reduced the sentence by twelve months. Finally, the judge took into account the nine months which the Appellant spent in custody on remand and reached a final term of four years imprisonment which he imposed.

[10] The Appellant advanced four principal grounds of appeal. The second ground complained that the sentences imposed had not been concurrent. The third suggested that the Appellant's guilty plea and his previous good character were not taken into account by the judge. It is plain from the judge's written sentencing remarks that the sentences were indeed imposed to run concurrently and that the judge took both the Appellant's good character and his guilty plea into account. These two grounds of appeal fail.

[11] The Appellant's first ground of appeal was that the judge erred in sentencing the Appellant "without having possession of the facts relating to all of us (co-accused) and was unable to assess properly the degree of guilt among us."

[12] A copy of the statement of facts given to the High Court, was not included in the appeal book. This was an inexcusable omission which would not have occurred if Rule 44(6) of the Court of Appeal Rules had been complied with. Once we received a copy of the statement of facts to which the Appellant had agreed, it became clear that the judge was fully aware that the Court of Appeal had varied one of the sentences imposed on the Appellant's colleagues to reflect the fact that he did not himself actually assault the night watchman. The present Appellant admitted

that he himself had punched and kicked the night watchman and he was therefore not entitled to any discount from the starting point of six years on the ground of lesser involvement in the crimes.

[13] The Appellant's colleague whose sentence was reduced to four and half years had spent exactly the same period on remand in custody as the present Appellant. There is no basis for increasing the discount of twelve months given to the Appellant on this ground.

[14] The fourth ground of appeal was that the sentence imposed was manifestly excessive. As has been pointed out the Court of Appeal expressed the view that the sentences imposed in 1996 were so low as to be only just within the acceptable range for offences of this kind. Both manslaughter and robbery with violence carry a maximum sentence of life imprisonment. While we recognise, as did the High Court, that the Appellant has now married, and has obtained qualifications and a good job we are satisfied that the sentence imposed was anything but excessive and that there are no grounds advanced for interfering with it.

Result

[15] Appeal dismissed.

Scott, JA

FIJI COURT OF APPEAL

Wood, JA

Ford, JA

Solicitors:

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