

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO. AAU0030 OF 2007

BETWEEN : **ISIKELI NAKATO** *Appellant*

AND : **THE STATE** *Respondent*

BEFORE THE HONOURABLE. JUDGE OF APPEAL MR JUSTICE
JOHN E. BYRNE

Counsel : Appellant - In Person
Ms A. Prasad for the Respondent

Date of Hearing &
Ruling : 27th November 2007

R U L I N G

[1] The Appellant seeks leave to appeal out of time against a Conviction and sentence of the Magistrates' Court at Suva on the 12th of April 2005 when he was convicted of one count of "*Unlawful Use of a Motor Vehicle*", two counts of "*Larceny*", one count of "*Burglary*" and three counts of "*Robbery With Violence*". He was sentenced to 6 years imprisonment on the 19th of April 2005.

- [2] He appealed this decision before Shameem J. in the High Court on the 3rd of August 2005. She delivered her Judgment on the 5th of August 2005 and rejected the appeal confirming the conviction and sentence.
- [3] On the 19th of March 2007 the Appellant applied for leave to appeal out of time giving as his ground the fact that he had not been able to acquire the assistance of legal advice.
- [4] In his appeal to the High Court he said that his pleas of guilty were equivocal and then he had no idea that the people who had asked him to drive the car to the place of the robbery were doing anything wrong. He said he only realised when he reached the house which was to be robbed, and thereafter was forced to co-operate. Counsel for the Respondent submitted to Shameem J. that his pleas were unequivocal and that the sentence was at the lowest end of the tariff, reflecting the secondary role played by the Appellant.
- [5] Shameem J. accepted this submission. She pointed out that initially the Appellant pleaded not guilty. He changed his plea two years later. He had clearly plenty of time to think about it. The charges were read to him and he said he understood. On the 16th of March 2005 when

he was represented by counsel, he said "***I understand this. Change plea on my own free-will***". The learned Judge pointed out that not only was he represented by competent counsel, he was also asked on several occasions whether he understood his plea. He said he did. Accordingly the Judge rejected his submission and found that his pleas were unequivocal. The learned Judge, as did the Magistrate, took into account his good character, age and the guilty pleas. The Appellant was a first offender. The Judge considered that the Magistrate was correct and the sentence he imposed was at the lowest end of the tariff for this offence.

[6] **Sentence**

Shameem J. said that the tariff for what is now rather euphemistically called "***home invasion robberies***" but formerly, when I was practising in the criminal courts, the more expressive "***breaking, entering and stealing***", is six to eight years. Thus the Judge found that the learned Magistrate started at the lower end of the scale obviously because the Appellant was a first offender and because of good character. She considered the total sentence was neither harsh nor excessive and accordingly dismissed the appeal.

[7] To be given leave to appeal the Appellant must satisfy this Court that the Judge in the High Court committed an error of law, in this case in the sentence she imposed. The Appellant referred to two English cases - R. v. Waddingham [1983] Crim. L. R. 492 and Bashir Begum Bibi [1980] 71 Criminal Appeal Reports 360. In Waddingham the Court said that its function was essentially to consider whether or not the punishment did fit the crimes. If the punishment was excessive then the Court would be bound to reduce it but if the punishment, albeit severe, was appropriate to the serious nature of the offences, it would be wrong to interfere merely because the Appellant now realised how wrongly he had behaved and shown a willingness to behave well in prison. The latter statement was never part of the Appellant's argument before me, and so I find this case of no assistance to me. It is trite law that sentences should not be excessive but always within the tariff.

[8] The headnote to R. v. Bibi reads:

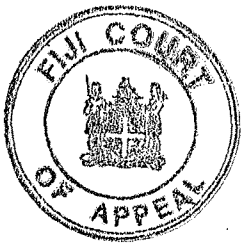
"In view of the present overcrowding of prisons, sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence imposed is as

short as possible, consistent only with the duty of the court to protect the interests of the public and to punish and deter the criminal. Guidelines to be followed – uniformity of approach and not uniformity of sentence”.

[9] The Court there was only re-stating what has been a major principle of sentencing for many years. In my Judgment it does not assist the Appellant because it does not state any new law. The Courts of Fiji have been applying these principles for many years.

[10] The more I listened to the Appellant the more I formed the view that he was wasting this Court's time. I have no doubt he was aware of his rights and has attempted to mislead this Court as he attempted to mislead Shameem J. into thinking that he was hard done by. Any person who embarks on such a course is treading dangerously because the inevitable result, as I find here, is that his application for leave to appeal out of time will be held to be a sham. I accordingly refuse him leave to appeal on the ground that his application is vexatious and frivolous within the meaning of

Section 35(2) of the Court of Appeal Act. The application is dismissed.



A handwritten signature in black ink, which appears to read "John E. Byrne". The signature is written in a cursive style and is positioned above a horizontal dotted line.

[John E. Byrne]

JUDGE OF APPEAL

At Suva

27th November 2007