

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

CRIMINAL APPEAL NO. AAU0116 OF2007S  
(High Court Criminal Action No. HAA 24 & 28 of 2007S)

BETWEEN: VILIAME TUIBUA

Appellant

AND: THE STATE

Respondent

Coram: Lloyd, JA  
Goundar, JA  
Hickie, JA

Hearing: Tuesday, 4<sup>th</sup> November 2008, Suva

Counsel: F. Vasarogo for the Appellant  
A.G. Elliott for the Respondent

Date of Judgment: Friday, 7<sup>th</sup> November 2008, Suva

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JUDGMENT OF THE COURT

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Jurisdiction

- [1] The appellant Viliame Tuibua ('the appellant') appeals from a sentence of imprisonment imposed upon him by Winter J in the High Court on 25 May 2007 in respect of two charges of escaping lawful custody which charges had been dealt with by different Magistrates and on different dates when the appellant came to be sentenced for the two offences.
- [2] In hearing the appellant's appeal against sentence Winter J was carrying out the High Court's appellate jurisdiction in criminal cases. Pursuant to the terms of s22(1A)(a) of the Court of Appeal Act this Court can only entertain an appeal

from a sentence imposed by a judge of the High Court in its appellate jurisdiction where the appeal is on the ground that:

*“the sentence was an unlawful one or was passed in consequence of an error of law”.*

[3] When the appellant commenced the appellate proceedings in this Court he was without legal representation. He drafted his own grounds of appeal and it was only later that the Legal Aid Commission came to represent him at the request of this Court. The appellant’s latest grounds of appeal are to be found in a letter to this Court dated 5 February 2008. In summary, he asserts that the sentence imposed upon him in the High Court was too severe for two main reasons:

(a) The sentence imposed should have been made concurrent to his existing sentences, particularly in the circumstances where he pleaded guilty to both offences at an early stage,

(b) In accordance with the principles in *R v Potter* there is disparity in his sentence because other offenders have received lesser sentences for the same offence.

[4] We are satisfied that the appellant brings this appeal asserting that the High Court judge who sentenced him on appeal erred in law in arriving at the sentence he imposed and for that reason we are satisfied the appeal comes within the provisions of s22(1A)(a) of the Court of Appeal Act.

#### **The Brief Facts**

[5] In mid 2006 the appellant was serving a term of imprisonment at Suva prison for a number of unrelated offences. Early on the morning of 31 July 2006 the appellant escaped from his prison cell by cutting the window grill and then scaling the prison wall by using a prison blanket to assist in getting over the wall. On 6 August 2006 the appellant was apprehended by police and taken to Valelevu police station. Whilst at this station the appellant was handcuffed. At a time when his cell door was open the appellant (whilst still handcuffed) ran from his cell, through the charge room, out the front door of the police station and

down nearby streets. He was soon apprehended by police and members of the public giving chase.

- [6] For the second escape in time the appellant was sentenced by a Magistrate to a term of imprisonment of 12 months. For the first escape in time he was sentenced by a different Magistrate to 9 months imprisonment. The sentences imposed were made consecutive to each other and to his existing term of imprisonment for prior offences. The appellant appealed his sentences to a single judge of the High Court. This judge upheld the sentence of 12 months but varied the 9-month sentence by ordering it to be served concurrently with the 12 month term.

**Concurrent or Consecutive sentences?**

- [7] As we understand the appellant's argument, he asserts that the sentences imposed upon him by Winter J in the High Court and the Magistrate on 8 August 2006 should have been ordered to be served concurrent to the period of imprisonment to which he was already subject prior to his commission of the offences the subject of this appeal. He argues that this is particularly so given his early pleas of guilty to these two offences.

- [8] We are of the opinion that there is no merit in this submission. As stated recently by the Fiji Supreme Court in *Alifereti Misioka v The State* (FJSC CAV 12/2007) there is simply no basis for a sentencing principle to the effect that a sentence for escaping from lawful custody should ordinarily be made concurrent with any sentences already being served. As stated by Shameem J in the earlier proceedings in the High Court concerning *Alifereti Misioka* and as adopted by the Supreme Court:

***“if sentences for escaping are to have any deterrent effect at all, they must be served consecutive to existing terms, so that the result is to lengthen the incarceration period”.***

- [9] While we are not prepared to go so far as saying that a sentence of imprisonment concurrent to existing sentences could never be appropriate for escape offences, special and compelling reasons would need to be shown to justify concurrency. The appellant's case is clearly not one where concurrency is appropriate. The

fact of early pleas of guilty to the escape charges does not change the situation. In our experience, early pleas of guilty are entered for most escape charges as most guilty pleas are entered in the face of a powerful prosecution case. The fact of an early guilty plea is not on its own any basis for the imposition of a sentence concurrent with any terms of imprisonment already being served. We can see nothing in the objective facts of these two escapes or in the subjective circumstances of the appellant that support his submission.

### **Disparity**

[10] The appellant also argues that because he can point to other cases where other offenders charged with the same offence have received lesser sentences than the sentence imposed upon him, or have been dealt with by concurrency of the sentence imposed with an existing term of imprisonment, he should be treated the same way. But quite obviously, this of itself does not demonstrate injustice or legal error. The fact that other offenders may have received sentences outside the usual range or were dealt with on sentence otherwise than in accordance with principle is simply no proper basis on which to found an appeal against the sentence imposed upon the appellant.

### **The Appropriate Tariff for Escape Offences**

[11] Having rejected the appellant's primary assertions we should however examine the severity of the 12 months sentence of imprisonment imposed upon the appellant by the judge of the High Court and the reasons stated by the judge for imposing such a sentence. This is particularly in light of the submissions made to us by the parties on the usual tariff for the offence of escaping from lawful custody.

[12] Escaping from lawful custody is a misdemeanour. It is an offence under the provisions of s138 of the Penal Code. The maximum penalty is not prescribed in s138 but by virtue of the provisions of s47 of the Penal Code, which section prescribes penalties for misdemeanours, the maximum penalty for this offence is stated to be two years imprisonment.

- [13] Counsel for both the parties to this appeal have helpfully provided us with copies of dozens of previous cases from the present time and well into the past where judges in Fiji have sentenced offenders for the offence of escaping from lawful custody. We feel there is little to be gained in exhaustively reviewing these cases because the facts and circumstances of each case are quite obviously different. Nevertheless, it is quite clear from these previous cases that High Court judges and magistrates regard the usual tariff for the offence of escaping from lawful custody as between 6 and 12 months imprisonment. Apparently this Court has not before been called upon to consider the appropriateness of this usual tariff. In order to assist uniformity and consistency in sentencing for the offence of escape from lawful custody, we feel it appropriate to state that a sentence of between 6 and 12 months imprisonment is an appropriate usual tariff for this type of offence. But as with all tariffs for all offences there will always be cases which because of their peculiar facts fall outside the usual permissible range of sentences for this type of offence. In approving the usual tariff we are in no way intending to put a straight jacket on sentencing judges and magistrates.
- [14] Any sentence outside the usual tariff should however be regarded as exceptional and should be justified by the objective facts of the offence (for example, the degree of violence involved; the degree of damage to property; the degree of planning; the length of time at liberty before recapture; the reason for the escape; early guilty plea; voluntary surrender; other offending during the escape and whilst at large; age of the offender) and/or the subjective circumstances of the offender. As a general rule, when there is a joint escape by two or more prisoners, then the appropriate range of sentence will increase in severity to between 9 to 12 months imprisonment.

### The Totality Principle

- [15] Before we examine the severity of the sentence imposed we should also mention the totality principle as it was mentioned by the judge of the High Court in support of the sentence he imposed.
- [16] The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A sentencer who

imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentencer must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced (Mill v The Queen (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.) 180). When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones (1996) 1 Cr.App.R. (S.) 153, R v Millen (1980) 2 Cr.App.R. (S.) 357 and Nollen v Police (2001) 120 A Crim R 64).

[17] It has been said in England that where there are a series of offences for which sentences are to be imposed, the proper course is to pass a sentence which each of the offences merits and make the sentences concurrent; it is wrong sentencing practice to pass short sentences and make them consecutive (R v Dolby (1989) 11 Cr.App.R. (S.) 335). In Australia, the High Court has said that where the totality principle falls to be applied in relation to sentences to be imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed, but where practicable the former is to be preferred (Mill v The Queen at page 63). We agree with this approach.

[18] All the above is the background against which the totality of the appellant's sentence falls to be evaluated. The appellant argues that when the judge in the High Court hearing his appeal allowed his appeal from the sentences imposed in the Magistrate's Court and resented him, the judge's sentencing discretion miscarried and that in accordance with the well known principles in House v The Queen ((1936) 55 CLR 499 at page 505) we should review the exercise of that sentencing discretion and resentence the appellant to a lesser term of imprisonment than the sentence of 12 months imprisonment imposed by the judge in the High Court.

- [19] We see merit in the appellant's submission. We are of the view that the High Court judge did fall into error in several ways when exercising his discretion to resentence the appellant. Firstly, *'in striving to achieve a practical result'* and by dismissing the appeal on the 12 months sentence imposed by the Magistrate for the first heard charge (the escape of 6 August 2006) the judge failed to properly consider the objective facts of the escape, which in our opinion fall at the low end of the usual tariff for this type of offence as laid down by us above. In our opinion this escape was deserving of a sentence of only 6 months imprisonment. We have set out the brief facts of this escape earlier in this judgment. Clearly, this escape was quite opportunistic with no planning, caused no injury, and was only fleeting. The appellant was only 19 at the time and pleaded guilty to the offence two days after the escape when brought before a Magistrate. The only aggravating factors were his prior record (at that time) of one escape conviction and the fact that this escape was committed whilst on the run from prison. But in reality he had only been on the run for just a few days. The High Court judge in our view was quite correct when he said, prior to arriving at a *'practical result'*, that a six month term was appropriate for this offence.
- [20] The second error made by the High Court judge in our opinion was in upholding the nine month term of imprisonment imposed by the Magistrate for the escape of 31 July 2006 and ordering it to be served *'concurrent with all other serving terms'*. Before arriving at his *'practical result'* in disposing of the appeal from the Magistrate, the High Court judge had stated in his considerations that a sentence of six months was appropriate for this escape. We agree. A term of imprisonment of six months was within the permissible range of sentences for this type of offence and in our opinion was justified on the facts of the escape which we have also set out earlier in this judgment. The appellant was sentenced by a Magistrate for the escape of 31 July 2006 on 14 September 2006. The appellant was aged only 19 at the time and nobody was injured in the escape. He pleaded guilty at the first opportunity and expressed contrition and remorse. The only aggravating circumstance was his record of two prior escapes (the second of which was his escape from Valelevu Police Station after being apprehended for this escape). If the High Court judge was of the view that the facts of the case

justified a six month term of imprisonment (as he first stated they did) then that is the term he should have imposed. But quite clearly and for the reasons stated by us above the judge should have ordered that any term of imprisonment imposed was to be served consecutive to the total period of imprisonment to which the appellant was already subject.

[21] A final error of principle made by the High Court judge was that he failed to properly apply the principle of totality. We have stated above that in our opinion terms of imprisonment of six months were the appropriate terms for both escapes. The High Court record reflects that the High Court judge was also of that opinion. But he then fell into error in a failed attempt to properly apply the totality principle. In our view, given the young age of the appellant and given the fact that the two escapes took place within just a few days of each other and were otherwise factually linked, we feel that the just and appropriate aggregate term reflecting the appellant's overall criminality is a sentence of eight months imprisonment. In accordance with the principles sated by us above this sentence of eight months imprisonment should be consecutive to the total period of imprisonment to which the appellant is already subject.

### Orders

[22] For the above reasons we order that:

- (1) The appeal be allowed;
- (2) The sentence of 12 months imprisonment imposed by a Magistrate on the appellant on 8 August 2006 for the offence of escape from lawful custody on 6 August 2006 be quashed and substituted with a sentence of six months imprisonment;
- (3) The sentence of nine months imprisonment imposed upon the appellant by Winter J on 25 May 2007 for the offence of escape from lawful custody on 31 July 2006 be quashed and substituted with a term of six months imprisonment;



- (4) Four months of the sentence the subject of Order 3 to be served concurrently with the sentence the subject of Order 2, and the remaining two months to be consecutive to the sentence the subject of Order 2;
- (5) The sentences the subject of Orders 2 and 3 to be consecutive to the total period of imprisonment to which the appellant is already subject.



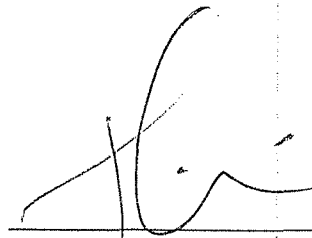
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Lloyd, JA



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Goundar, JA



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Hickie, JA

Solicitors:

Office of the Legal Aid Commission, Suva for the Appellant  
Office of the Director of Public Prosecutions, Suva for the Respondent