

Office

IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU0037/2008
High Court Action No. HAC 158 of 2007

BETWEEN:

MAHENDRA JEET MAHARAJ

Appellant/Applicant

AND

THE STATE

Respondent

Appearances:

Appellant/Applicant: Mr. I. Khan of Counsel

Respondent: Mr P. Bulamainavalu for the DPP

Date of Hearing: 16 December 2008

Date of Judgment: 22 December 2008

Coram: Scutt, JA

JUDGMENT

Headnote

Court of Appeal Act (Cap 12), ss. 20, 21, 35; Appeal against conviction & sentence; Disparate sentences; Common starting point; Differentials in mitigation, aggravation & public interest; Full Court not restricted to grounds on which leave granted

Apidopoulos v. Sheriff of Victoria (2000) 1 VR 476 These cases deal

Barry v. The State of Western Australia [2007] WASCA 12

Basa v. The State [2006] FJCA 23

Keating v. The State of Western Australia [2007] WASCA 98 (14 May 2007)

Pezzino v. The State of Western Australia [2006] WASCA 131

The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane (Summing Up) (CrimCas No. HAC 158 of 2007, 15 April 2008)

The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane (Judgment) (CrimCas No. HAC 158 of 2007, 16 April 2008)

The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane (Sentence) (CrimCas No. HAC 158 of 2007, 16 April 2008)

Sesoni Volau v. The State (CrimApp No: AAU0079/2008; HCt Action No. HAA 59 of 2008, 13 October 2008)¹

¹ In both *Viliame Daunabuna v. The State* and *Sesoni Volau v. The State* this Court dealt with the matter by granting an extension of time to Mr Daunabuna and Mr Volau to 'file' their appeal, so that the fresh grounds could be incorporated into their respective appeals, and referred the question to the Full Court in the following terms:

Viliame Daunabuna v. The State (CrimApp No: AAU0120/07, HCt Action No. HAA 114 of 2007, 14 October 2008)

Wentworth v. Wentworth (1994) 35 NSWLR 726

1. SENTENCE & GROUNDS OF APPEAL

Mahendra Jeet Maharaj, the Appellant/Applicant was found guilty of one count of Robbery with Violence contrary to section 293(1) of the *Penal Code* (Cap 17). He was tried together with two co-accused, Dick Sheped and Guston Frederick Keane.

1.1 The trial in the High Court ran for six (6) days and the assessors' opinion was unanimous. The judge agreeing with the assessors, all three were convicted.

1.2 For sentence, the starting point selected by the Court was seven years imprisonment, recognised as 'clearly at the high end of the tariff for sentence' adopted by the Court of Appeal in *Basa v. The State* [2006] FJCA 23. The High Court determined that this was the proper starting point, taking into account the 'level of premeditation, planning and violence': *The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane* (CrimCas No. HAC 158 of 2007, 16 April 2008), at 2

1.3 The Court also considered *State v. Semisi Wainiqolo* [2006] FJHC 53; *Taito Rawaga v. The State*, (HAA 118 of 2007); and *State v. Ilaisa Cava* (HAC 007 of 2000) in determining upon the sentences in the present case.

1.4 Because the starting point for each accused was identical, said the Court, there would be 'no disparity in the sentencing base'. The Court said that there would be differences in the terms of imprisonment imposed on each accused 'due to the application of the different mitigation, aggravating factors and the relevant public interest factors that the Court considers is relevant to each accused': at 2

1.5 The Court set out the aggravating factors common to the three accused, then went on to consider the sentence for each accused taking into account mitigating factors, aggravating factors and public interest for and as applicable to each individually:

- Mr Sheped received a sentence of four years imprisonment.
- Mr Kean received a sentence of 11 years imprisonment, concurrent with a term he was already serving and with a minimum term of 9 years set in the present case, fixed under section 33 of the *Penal Code* (Cap 17).
- Mr Maharaj received a sentence of nine years imprisonment.

1.6 The Grounds of Appeal set out in the Petition are:

3. In accordance with section 37 of the Court of Appeal Act, the Court refers to the Full Court a question of law, namely whether a single Judge of Appeal has the power under section 35(1)(b), consistent with section 26(1) and taking into account the Court of Appeal Rules on amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into her/his appeal new Grounds.

APPEAL AGAINST CONVICTION

- (A) That the Learned Trial Judge erred in law and in fact in misdirecting the Assessors on law regarding the charge of Robbery with Violence.
- (B) That the Learned Trial Judge erred in law and in fact in not putting to the Assessors the Appellants' case.
- (C) That the Learned Trial Judge erred in law and in fact in not directing the Assessors [to] the significance of Prosecution witnesses' conflicting and unreliable evidence.

APPEAL AGAINST SENTENCE

- (D) That the Appellants appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.
- (E) That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant.
- (F) That the Appellants reserve their right to add to the above grounds of appeal upon receipt of the Court records in this matter.

2. RELEVANT PROVISION OF COURT OF APPEAL ACT

The trial was conducted in the High Court. This being the first appeal, section 21 of the *Court of Appeal Act* (Cap 12) applies:

- 21.- (1) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal –
- (a) against his conviction on any ground of appeal which involves a question of law alone;
 - (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
 - (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

3. STATE'S SUBMISSIONS

The State's Written Submissions, which are comprehensive, address both conviction and sentence.

3.1 (a) **Conviction:** As to conviction, by reference to the Summing Up - *The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane (Summing Up)* (CrimCas No. HAC 158 of 2007, 15 April 2008) – on the first ground, the State contends there was no misdirection by the Court either in law or fact on the charge of Robbery With Violence. Not only did the Court 'correctly direct the assessors on the relevant elements' of Robbery with Violence, but the Court 'also highlighted the relevant evidence adduced by both the Prosecution and Defence'. Therefore, says the State, this ground 'lacks any merit and must be dismissed'.

3.2 Similarly as to the second ground, the State says that the Court informed the assessors of Mr Maharaj's case, 'in particular, his unsworn statement (at 9) and challenges to his caution interview statement'. Thus, it is said, this ground 'lacks any merit and must be dismissed'.

3.3 On the third ground, the State says that the Court directed the assessors 'on the entire evidence adduced in the trial by the Prosecution and Defence'. What credit and weight is to be attached to is 'the prerogative of the assessors and purely a question of fact rather than law'. So this ground, too, 'lacks any merit and must be dismissed'.

3.4 The State says further that the third ground vis-à-vis conviction 'does not raise any specific point' satisfying section 21(1)(a) or (b) of the Court of Appeal Act.

3.5 However, the State goes on to submit that leave be granted to appeal against conviction solely on the question –

Whether the Learned Judge had misdirected the assessors by informing them of his admission of the caution interview statement of [Mr Maharaj] and the accomplices after a trial within a trial: *The State v. Dick Sheped, Mahendra Jeet Maharaj and Guston Frederick Keane (Summing Up)* (CrimCas No. HAC 158 of 2007, 15 April 2008), at 6, 7, 10

3.6 (b) **Sentence:** On sentence, the State says that there is a matter to go before the Full Court of the Court of Appeal, namely as to the disparity in sentences between the three accused.

4. SUBMISSIONS FOR APPELLANT/APPLICANT

The Appellant/Applicant's Submissions in Reply to the State are short. They are, simply, that leave be granted to Mr Maharaj 'as conceded by the State' insofar as the particular grounds and parameters of the State's concession. With the remaining grounds, it is said that the Appellant/Applicant 'intends to argue [the] same upon receipt of the Court Record'.

5. DETERMINATION

It is convenient to deal first with the grounds relating to sentence, then those addressing conviction. There is also a question as to whether a decision of a single Judge in granting leave can limit the Full Court to consideration solely of the grounds upon which leave is granted.

5.1 (a) As to sentence, a perusal of the ruling on sentence indicates that the Court took into account the common factors existing between the three accused, set a starting point by reference to these, then proceeded (as the ruling says) to set the sentence for each offender:

- First by reference to the starting point;
- Then commencing from the starting point, taking into account mitigating factors relevant to each accused individually; and
- Taking into account any aggravating factors relevant to each accused individually; and
- Taking into account public interest as relevant or applicable to any of the accused.

5.2 For example, the accused who received the lightest sentence was a first offender. This did not apply to the third accused (Mr Kean) and the present Appellant (Mr Maharaj). The Court explained the reasons for the disparity and did so taking into account the authorities. Where there is appropriate justification backed by proper reasons and reasoning, it cannot be said that there is 'disparity in sentencing'.

5.3 Offenders not infrequently harbour a sense of grievance where sentences are disparate, although this may not be justified. The contention as to disparity in sentence arises where those who are convicted learn of other cases where it appears to them a differential sentence was

imposed which leads them to believe that their sentence is harsh and excessive, and manifestly unjust. Not infrequently, there is a proper explanation for the differential. Sometimes, there is not.

5.4 Disparity also arises where parties are tried together in respect of the same offence or offences, are convicted and then are sentenced and contend, as here, that there is a disparity in sentencing justifying a reduction. That is the case here.

5.5 In my view, the Court cogently explained the reasons which appear to be properly based. However, this being a matter in issue in the grounds of appeal and having been conceded by the State, it is appropriate in all the circumstances for the matter to go to the Full Court for a comprehensive determination.

5.6 (b) **Conviction:** As to conviction, the State opposes any leave in respect of all grounds, save as to a question whether the Court was correct in informing the assessors of the admission of the caution interview of the Applicant/Appellant and the accomplices are a voir dire.

5.7 It appears to me that there is a matter in this regard for the Full Court to address on appeal.

5.8 (c) **Scope of Appeal in Full Court:** This puts in issue a matter I have raised previously in leave applications. A single Judge of Appeal sits on leave applications to assist in the efficiency of the Court – so that a Full Court is not taken up with applications for leave, and those that are without merit can be dealt with at an early stage, without going before the Full Court.

5.9 However, this raises an important question:

- If the single Judge determines that there are matters to go to the Full Court in accordance with the applicable provisions of the Court of Appeal Act, is the Full Court restricted to those matters identified by the single Judge; or
- If the single Judge determines there are matters to go to the Full Court, does this mean that the Full Court is thereby seized of the whole appeal, so that should it wish to do so the Full Court can address all or any of the matters in the appeal, whether or not they are matters that have been ‘ruled out’ by the single Judge, or by reason of which the single Judge has granted leave; and
- Are the matters still ‘in’ the appeal if a single Judge has ruled them out as not being (for example) questions of law.

5.10 This question arises in other jurisdictions where one body makes a preliminary determination as to whether there is a ‘case’ to go on to another body, tribunal or Full Court. For example, under the *Anti-Discrimination Act* 1998 (Tasmania), the Anti-Discrimination Commissioner has the role of determining whether claims are rejected or accepted for investigation then, if accepted for investigation whether after investigation the claim is dismissed, referred to conciliation or referred to the Anti-Discrimination Tribunal for adjudication.

5.11 It was the practice of the Commission to conclude investigations of claims by dismissing in part, if that were indicated, the part not dismissed then being referred for conciliation or to the Tribunal for adjudication. The Tribunal determined that once it was seized of a claim – that is, it

had been referred to the Tribunal by the Commission, then the whole of the claim was open to the Tribunal for adjudication rather than the Tribunal's being restricted by any part-dismissal.

5.12 In the case of the Court of Appeal, the Court of Appeal Act provides a mechanism for expediting the Court's work by extending powers to single Judges vis-à-vis the grant of leave. A single Judge is bound to make the determination by reference to (for example and in the appropriate case) whether there is a question of law, or of combined law and fact, etc. However, an argument can be made that once leave is granted, the Full Court should be able to address the whole of the grounds put forward for the Appellant.

5.13 Judges do have differences of opinion as to merits and what constitutes questions of law or combined questions of law and fact. It would seem odd that a single Judge could, by determining that leave is not granted on a particular ground, hobble the Full Court in the scope of its adjudication of an appeal.

5.14 Indeed, it cannot be the case that this is so, for the Full Court has extensive powers in any event – which cannot be trammled by a single Judge. The Full Court can grant leave to add fresh grounds, for example. According to section 35 of the Court of Appeal Act, a single Judge cannot: *Viliame Daunabuna v. The State* (CrimApp No: AAU0120/07, HCt Action No. HAA 114 of 2007, 14 October 2008); *Sesoni Volau v. The State* (CrimApp No: AAU0079/2008; HCt Action No. HAA 59 of 2008, 13 October 2008)² As pointed out in those decisions, this is curious for a single Judge of Appeal has that power in civil appeals: s. 20

5.15 Hence, it appears to me that the restriction the State seeks to apply to Mr Maharaj's appeal is relevant as an indication only to the Full Court as to the basis upon which the State concedes Mr Maharaj's appeal.

5.16 Bearing this in mind, in granting leave I have not limited that grant in the way sought by the State,³ but leave this as a matter for the Full Court to address when it hears Mr Maharaj's appeal.

5.17 In passing, I note that the import of a determination by a single Judge on leave applications in criminal matters has been the subject of determinations in various Australian states: *Keating v. The State of Western Australia* [2007] WASCA 98 (14 May 2007); *Pezzino v. The State of Western Australia* [2006] WASCA 131; *Barry v. The State of Western Australia* [2007] WASCA 12. The question has also arisen in civil matters: *Wentworth v. Wentworth* (1994) 35 NSWLR 726; *Apidopoulos v. Sheriff of Victoria* (2000) 1 VR 476. These cases deal with the question of the powers and process of the Full Court where a single Judge has refused leave, however, they may be useful in considering the question vis-à-vis the powers of a single

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Judge where leave is granted and whether the Full Court is restricted to the scope of that grant of leave.

ORDERS

1. Leave granted to the Appellant/Applicant to appeal against conviction and sentence.
2. For the reasons set out herein, no limitation is set upon the grounds before the Full Court so that it is a matter for the Full Court as to whether it limits the appeal to the matters identified herein.

Jocelyne A. Scutt
Judge of Appeal
Suva
22 December 2008

