IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU0049 OF 2007
[On Appeal from the High Court of Fiji]

BETWEEN	:	MOSESE MATASIGA	*Appellant*
AND	:	THE STATE	*Respondent*

Counsel : V. Vosarogo for the Appellant
A. Elliot for the Respondent

Coram : Byrne, J. A.
Hickie, J. A.
Khan, J. A.

Date of Hearing : 24th November 2008
Date of Judgment : 3rd March 2009

JUDGMENT OF THE COURT

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[1] This is an appeal from a Decision of Winter J. in the High Court in Suva dated 2nd February 2007. The Appellant was initially sentenced by the Magistrates Court on the 8th of June 2006 for the following:

a) One count of ***Robbery With Violence*** contrary to Section 293 of the Penal Code – 5 years imprisonment.

b) One count of ***Damaging Property*** - 2 years imprisonment.

c) Two counts of ***Acting With Intent to Cause Grievous Harm*** - 2 years imprisonment each.

The Magistrates Court Orders were that all sentences in (b) and (c) were to be served concurrently to each other and consecutive to the sentence in (a).

[2] The Appellant was thus ordered to serve an effective sentence of 7 years imprisonment from the date of the sentence of the Magistrates Court on the 8th of June 2006. He appealed to the High Court where his appeal was dismissed by Winter J.

[3] With the leave of a single Judge of this Court he was then given leave to appeal to the Full Court of this Court.

[4] The Appellant complains that the total of 7 years imprisonment he received was excessive and that Winter J. failed to consider relevant matters in deciding the appropriate sentence.

[5] Particularly it is contended that the learned Judge failed to pay any attention to the totality principle. We now consider the sentences to which the Appellant was liable. For ***Robbery with Violence*** under Section 293(1)(a) of the Penal Code - life imprisonment.

Damaging Property - (Section 324(1) - 2 years.
Act With Intent to Cause Grievous Harm - (Section 224) - life imprisonment.

[6] The Appellant does not challenge the sentence imposed for the offence of ***Robbery,*** correctly in our view because it was easily within the tariff identified in the following cases:

> **Singh -v- State** [2004] FJCA 8
> **Dresuna -v- State [2008] FJSC 14**
> **Basa -v- State [2006] FJCA 23**
> **Bote -v- The State [2005] FJCA 58**

[7] The Respondent concedes quite properly that the sentence for ***Damaging Property*** is excessive. The maximum penalty was imposed, despite the circumstances following short of those calling for the maximum. In the Appellant's case the value of the property damage was only $28.00. The Appellant contends that all the sentences in (b) and (c) above should have been made concurrent with the 5 year term for ***Robbery With Violence.*** We do not agree. The principle is that distinct offences call for distinct punishment. Concurrency will sometimes be ordered where the separate offences can be considered to be part of one single transaction or succession of offences. This was not the case here. There were separate assaults on the victims and this called for separate sentences. The offences were committed on different, albeit consecutive days. In our Judgment to impose concurrent sentences in this case would have resulted in a sentence which did not reflect the total criminality involved in the conduct. However, as we have said the Respondent concedes that the sentence for ***Damaging Property*** was excessive, it being the maximum under the Code. In our view considering the value of the property concerned a sentence of six months imprisonment should be substituted for

that of 2 years but the other sentences should stand with this qualification that the sentence of six months which we have substituted is to run concurrently with those of 2 years for the separate acts of ***Assault with Intent to Cause Grievous Harm.*** To this extent the appeal is partly successful in that the sentence for ***Damaging Property*** will be reduced but we see no reason to interfere with the Judgment of the High Court on the other two offences of ***Acts with Intent to Cause Grievous Harm.*** The result is that the Appellant will still serve a sentence of 7 years imprisonment.

[8] Before leaving this matter we should comment on one of the submissions made by the Appellant that the sentencing Magistrate failed to give due weight to the Appellant's guilty plea. It was submitted that there was no evidence in the sentencing Magistrate's remarks to show that he had considered the guilty plea. We do not agree.

[9] Whilst it may have been better for the Magistrate to have stated how the plea was taken into account, by stating the amount of the discount which was given for it, that failure is not, *per se,* an appealable error. We agree with the statement of the Northern Territory Court of Criminal Appeal in **Eric Allan Kelly** [2000] 113 A Crim R 263 that it is desirable that a sentencing Court should indicate the extent to which and the manner in which a plea of guilty has been given any weight as a mitigating factor. But the Court said the weight to be given to the plea will vary according to the circumstances.

[10] In **R -v- Thomson and Houlton** [2000] 115 A Crim R 104 at paragraph 160 the Court of Criminal Appeal of New South Wales said that a sentencing Judge should explicitly state that a plea of guilty has been taken into account and that failure to do so will generally be taken to indicate that the plea was not given weight. We note the qualification of the adverb generally. In the present case we are satisfied that due weight was given to the plea by both the learned Magistrate and by Winter J.

[11] Finally in this regard we also note the remarks of Thomas J. in **Thomas -v- Hales** [2000] NTSC 77 in paragraph 25 where the Judge said this:

> ***"The learned stipendiary Magistrate was delivering an ex-tempore decision. Whilst it would have been preferable for him to make reference to an allowance being made for the plea of guilty and the cooperation with the authorities, I do not consider his failure to mention these matters means the learned stipendiary Magistrate did not turn his mind to those aspects in arriving at a final sentence".***

[12] That statement is consistent with the authorities. In our Judgment no injustice was suffered by the Appellant by the failure of the Magistrate to explicitly state that he had taken into account the plea of guilty.

[13] For these reasons the appeal is dismissed although the sentences imposed by the High Court are varied to the extent mentioned

supra namely that the sentence for ***Damaging Property*** is reduced from 2 years to 6 months, to run concurrent with the sentences of 5 years and 2 years. There will be orders in these terms.

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Byrne, J. A.

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Hickie, J. A.

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Khan, J. A.

At Suva

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