IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPEAL NO. AAU009/08
Suva High Court Case HAA118/2007

APPELLATE JURISDICTION

BETWEEN: TAITO RAWAQA
APPELLANT

AND: STATE
RESPONDENT

Coram: Byrne J.A.
Shameem J.A.

Counsel: V. Vosarogo for the Appellant
U. Ratuvili for the Respondent

Date of Hearing : 26th March 2009

Date of Judgment: 8th April, 2009

JUDGMENT OF THE COURT

1.0 INTRODUCTION

1.1 On 23rd July 2007, the appellant pleaded guilty in the Magistrates Court at Suva to two counts of Robbery with Violence contrary to Section 239(1) (b) of the Penal Code, Cap 17 and one count of Unlawful Use of a Motor Vehicle. On the 3rd of August 2007 he was convicted and sentenced by a

Magistrate to 6 years imprisonment on the first offence, three months on the second and four months on the third which were to be served concurrently. The sentences were made consecutive to a three-year term of imprisonment for a similar offence which he was still serving.

1.2 He appealed to the High Court against the severity of the sentence on the ground that it should not have been made consecutive to any existing term of imprisonment he then was serving.

1.3 The appeal was heard by Mataitoga J. on the 13th of December 2007 and the Judge dismissed the appeal as being without merit.

1.4 The appellant, being dissatisfied with that decision appealed from the High Court to this Court and lodged his appeal in person.

1.5 The Court then invited the Legal Aid Commission to assist the Appellant both in redrafting his appeal petition and in representing him in this court on the appeal.

2.0 **GROUNDS OF APPEAL**

2.1 The application for leave came before Hickie J.A. on the 15th August, 2008 when leave was granted to the appellant on two grounds, namely:

a) Whether the sentence of 6 years imprisonment made consecutive did not properly take into account the totality principle; and

b) Whether the sentence of six years imprisonment was harsh and excessive in all the circumstances of the case.

3.0 **THE LAW**

3.1 Section 22 of the Court of Appeal Act, Cap 12 governs second appeals from the High Court to the Fiji Court of Appeal. It reads :

"Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence);"

Section 22 (1A) of the Court of Appeal Act, Cap 12 states :-

"(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground –

(a) That the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) That the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence".

3.2 The appellant argues that both the learned Magistrate and Mataitoga J erred in making the 6 years imprisonment consecutive to his present term of imprisonment because in so doing they failed to consider that his punishment for the present offences would thus be delayed.

3.3 It was submitted that whilst normally a sentence to be made consecutive will run from the last day of any term of imprisonment currently being served, the totality principle requires the sentencer to stand back and consider the overall effect of the sentence that he is about to impose and then decide whether the overall sentence would offend against the totality principle.

3.4 The totality principle is so well known now that it is necessary only to make a passing reference to it. It requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interests of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct.

3.5 The appellant says he was not treated fairly by either the Magistrate or the learned High Court Judge. He says that because he pleaded guilty to the offence by his own wish, and this was done at an early stage, he could expect to be sentenced as early as possible.

3.6 He submits that to delay the effective date of punishment to 13th March 2011 for an offence to which he pleaded guilty on 23rd of July and was sentenced on 3 August 2007 would be an error that must be revisited by this court under its powers under Section 22(1) of the Court of Appeal Act.

3.7 The appellant does not complain about the 6 years imprisonment in itself, bearing in mind that the current tariff for robbery with violence ranges from 6-7 years upwards, the maximum being imprisonment for life.

3.8 The appellant argues that justice would be done in his case if this Court were to order that the sentence should have begun on the date on which it was imposed, namely 3rd August 2007 and not be delayed to begin on 13th of March 2011.

3.9 The Respondent replies to this submission by quoting paragraph 22 from the judgment of Mataitoga J which reads:

"The appellant advances the argument that the sentence of imprisonment passed by the trial magistrate should be made concurrent and not consecutive to the terms of imprisonment he was serving. I cannot agree, for that would mean that the appellant would effectively have not been punished at all for these very serious offences that he committed. In this instance the totality principle in sentences cannot be relied on for a convicted person to escape the lawful sentence that the court must impose upon him. I consider the approach of the learned magistrate proper and that the justice of the case demands it."

3.10 This court agrees. It also agrees with the observation of Mataitoga J during the appeal before him that in his view the sentence was lenient and if there had been a cross-appeal, he would have increased the sentence. This court also has the power under Section 23 of the Court of the Appeal Act to quash the sentence passed at the trial and substitute whatever other sentence it considers should have been passed. This of course includes the power to increase the sentence. In the present case, though borderline, we shall not do so.

4.0 FACTS OF THE PRESENT CASE

4.1 The facts reveal many aggravating circumstances. The victims were an elderly couple visiting Fiji as tourists. At about 2.45am on the 6th January 2006, the appellant with others armed with cane knives and wearing face masks entered Home Stay Accommodation at Princes Road at Tamavua where Mr Martin and Mrs Margret Gorman were staying. The appellant threatened them and demanded all their possessions be given to him as the person in charge of the group. The robbery was planned. The total value of the possessions stolen was $5,200.

4.2 The appellant also stole the keys to a rental vehicle used by the victims and unlawfully used it.

4.3 None of the money or goods stolen was recovered. The appellant before this case had 146 previous convictions, the vast majority involving cases of serious violence and violation of individual rights and privacy.

4.4 The judge said in paragraph 16 of his Judgment :

" ***They were vulnerable, the use of cane knives, the fact that it was a gang robbery that was well planned, all demand a long custodial sentence. The fact the elderly couple who are victims in this case would have been terrified with this experience. When this is taken in the context of the 146 previous convictions of the appellant, the sentence is not excessive".***

We agree.

4.5 We also agree with Mataitoga J when he said in paragraph 21 of his judgment:

"***The prevalence of this type of offending being perpetrated by a few individuals like the appellant has caused many in our community not to feel safe in their own home. Victims would have been traumatized for a very long time, if not to also suffer psychological harm. The court must where appropriate, ensure that long custodial sentences be passed on individuals like the appellant in this case".***

5.0 This appeal is without merit and the court therefore dismisses it.

FIJI COURT OF APPEAL

Hon Justice J.E. Byrne
Justice of the Appeal

Hon Justice N. Shameem
Justice of the Appeal

At Suva
8th April, 2009