

PAULIASI BOTE v STATE (AAU0011 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 WARD P, WOOD and FORD JJA

9, 11 November 2005

10 **Criminal law — sentencing — robbery with violence — unlawful use of motor vehicle — conspiracy to commit felony — whether accumulation of sentence valid — disparity between past sentences — consecutive sentences — 1997 Constitution s 29(1) — Court of Appeal Act s 22(1) — Criminal Procedure Code (Cap 21) s 306.**

15 The Appellant invaded the home of the two victims who were husband and wife. The Appellant robbed them, punched the husband and threatened both with a knife. The Magistrates Court convicted the Appellant on his own guilty plea on charges contained in
20 three separate cases. The Appellant received two consecutive 4-year imprisonment sentences for the first offence (robbery with violence). Later, the Appellant received 4 months' imprisonment for the second offence (unlawful use of a motor vehicle), and a further 4 months' imprisonment concurrent with 2 years' imprisonment for the third offence (conspiracy to commit a felony). The Magistrates Court made sentences for the second and third offences consecutive to the sentences imposed for the first offence. Thus,
25 the Appellant received a total sentence of 10 years and 4 months' imprisonment but was reduced to 8 years and 8 months when the conviction and sentence for the third offence was set aside. The Appellant appealed and the two issues were whether: (1) the accumulation of sentence was valid; and (2) the second appeal was valid.

30 **Held** — (1) In a case where there were separate acts of robbery, each with violence, directed at two individual victims, it was well within the sentencing discretion for sentences to be imposed consecutively. The repetitive and separate nature of the offending reflected the totality of criminality involved and justified the accumulation of sentence. The Appellant had a number of previous convictions for robbery with violence and the sentence with remissions had only just been served when the present further offences were
35 committed.

(2) The parity principle did not apply. The identification of unrelated cases, with different objective and personal circumstances, which form but part of a pattern of sentencing, provided only limited assistance. The second appeal was invalid since there were two separate offences committed and each was lawfully charged. The case also involved findings of fact which were not challenged in the High Court.

35 Appeal dismissed.

Cases referred to

40 *Apenisa Ralulu v State* Crim App AAU0009 of 1995S; [1997] FJCA 13; *Henry Kalfau v Public Prosecutor* (1990) VUCR 9; *Lowe v R* (1984) 154 CLR 606; 54 ALR 193; *Mugining v R* (1975) PNGLR 352; *R v Bradley* [1979] 2 NZLR 262; *R v Fawcett* (1983) 5 Cr App Rep (S) 158; *R v Lawrence* (1989) 11 Cr App Rep (S) 580; *R v Wheatly* (1983) 5 Cr App Rep (S) 417; *Raymond Sikeli Singh and 3 Ors v State* Crim App AAU0008 of 2000S; [2004] FJCA 8; *State v Ilaisa Sousou Cava* Crim case HAC0007 of 2000S; [2001] FJHC 14; *Wong Kam Hong v State* Crim App CAV0002 of 2003S; [2003] FJSC 13, cited.

45 Appellant in person

D. Goundar for the Respondent**Ward P, Wood and Ford JJA.****Background**

50 [1] The Appellant was convicted on his own guilty plea in the Magistrates Court at Suva on charges contained in three separate cases. On 7 October 2003, he received two, 4-year consecutive imprisonment sentences, for two counts of

robbery with violence, committed on 5 August 2003. On 14 October 2003, he received 4 months' imprisonment for an unlawful use of motor vehicle, committed on 13 August 2003 and a further 4 months' imprisonment for an unlawful use of motor vehicle concurrent with 2 years' imprisonment for a conspiracy to commit a felony, committed on 25 August 2003. The sentences for the offences committed on 13 and 25 August 2003, were made consecutive to the sentences imposed on 7 October 2003. The result of the three cases was that the Appellant received a total sentence of 10 years and 4 months' imprisonment, although this was reduced to 8 years and 8 months when the conviction and sentence for the conspiracy count were set aside by Shameem J.

Right of appeal

[2] This being the second appeal, the Appellant's right of appeal is limited. Pursuant to s 22(1) of the Court of Appeal Act, the right of appeal is limited to any ground of appeal that involves a question of law only.

Grounds of appeal

A. The robbery sentences should not have been directed to be served consecutively

[3] These offences were committed in the same premises and on the same night. As the judgment in the High Court shows, they were part of a home invasion and involved two victims. The first victim, Peter Boshier, was robbed of property to the value of \$3698 and sustained facial injuries, including an injury to an eye, after he was threatened with a knife and punched by either the Appellant or his accomplice.

[4] After his property was taken, the intruders threatened his wife, Sheryl Boshier, with the knife and forced her to hand over jewellery to the value of \$2517.

[5] In sentencing the Appellant, the learned magistrate correctly made reference to the tariff for robbery with violence of 4 to 8 years and to the guideline judgments in *Apenisa Ralulu v State* Crim App AAU0009 of 1995S; [1997] FJCA 13 and *State v Ilaisa Sousou Cava* Crim case HAC0007 of 2000S; [2001] FJHC 14. By reason of the limited jurisdiction of the Magistrates Court, the maximum available sentence for each offence was 5 years' imprisonment.

[6] In sentencing the Appellant to two consecutive terms each of 4 years, the mitigating and aggravating circumstances were held, on appeal, to have been appropriately taken into account. In that respect, the offences were gravely serious in so far as they were premeditated, occurred during a home invasion and involved the use of a knife. See *Raymond Sikeli Singh and 3 Ors v State* Crim App AAU0008 of 2000S; [2004] FJCA 8 at 8.

[7] Moreover, the Appellant had a number of previous convictions, including convictions for robbery with violence, the last of which had occurred on 27 November 2000 and had attracted a sentence of imprisonment for 4 years. That sentence with remissions had only just been served when the present further offences of robbery with violence were committed.

[8] The Appellant now submits that there was error of law in that the sentences should have been directed to be served concurrently, since they arose out of a single episode of criminality, citing the general proposition, referred to in decisions such as *Henry Kalfau v Public Prosecutor* (1990) VUCR 9, that separate offences that form part of the same overall event or transaction should normally attract concurrent sentences.

[9] The law however is not such as invariably to call for concurrent sentences in such an instance, the true question being one of the appropriateness of the overall sentence, that is, whether it reflects the totality of the criminality involved: See *R v Bradley* (1979) 2 NZLR 262.

5 [10] That there is no hard and fast or inflexible rule in relation to the matter was established in *Wong Kam Hong v State* Crim App CAV0002 of 2003S; [2003] FJSC 13; and see also *R v Lawrence* (1989) 11 Cr App Rep (S) 580, *R v Wheatly* (1983) 5 Cr App Rep (S) 417 and *Mugining v R* (1975) PNGLR 352.

10 [11] In a case where there were separate acts of robbery, each with violence, directed at two individual victims, it was well within the sentencing discretion for the sentences to be imposed consecutively. That follows from the fact that robbery with violence is an offence against the person.

15 [12] There was no error of law in this respect. Nor was there any error of law by Shameem J in the finding that the total sentence to be served should be one of 8 years and 8 months, taking into account the accumulation arising from the subsequent convictions and sentences, each of 4 months, for offences involving the unlawful use of a motor vehicle, on two separate occasions, which were dealt with in cases 1884 of 2003 and 1929 of 2003. Those offences were committed on
20 18 and 25 August 2003 respectively, that is within 3 weeks of the robbery offences.

[13] Once again, the repetitive and separate nature of this offending clearly justified an accumulation of sentence, in order to reflect the total criminality involved.

25 **B. Disparity in sentencing was shown in relation to the sentences that had been passed in other cases involving robbery with violence**

[14] Two other cases were cited as having involved offenders with worse records and a greater number of charges than those of which the Appellant was charged.

30 [15] The parity principle, which applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence, with a justifiable sense of grievance (*Lowe v R* (1984) 154 CLR 606; (1984) 54 ALR 193 and *R v Fawcett* (1983) 5 Cr App Rep (S) 158), does not apply in such a situation.

35 [16] Otherwise, the identification of unrelated cases, with different objective and personal circumstances, which form but part of a pattern of sentencing, provides only limited assistance. Of more relevance is the tariff, as determined by guideline, judgments, such as those which applied here.

40 **C. The Appellant sought to advance certain additional submissions which were not raised during the appeal to the High Court**

*(a) Error occurred in the Magistrates Court in that victim impact statements were received in relation to the robbery offences and that the Appellant was disadvantaged in the High Court when legal aid counsel failed to raise that
45 point*

[17] It was contended, that there was no jurisdiction in the Magistrates Court for the provision of victim impact statements, and that the result of such statements being provided, in a case where there had been guilty pleas, was to result in an undue familiarity between the victims and the court. This was said to
50 have involved a denial to the Appellant of his right to a fair trial under s 29(1) of the 1997 Constitution.

[18] There is no basis, upon the material available, to suggest that the pleas of guilty were overlooked or that the magistrate imposed an inappropriate sentence by reason of the victim impact statements. There is even less basis to suggest that the reception of victim impact statements led to some undue familiarity between the magistrate and victims or to bias on the part of the former. Both the common law and s 306 of the Criminal Procedure Code (Cap 21) provide a proper basis for the reception of evidence in relation to the impact of an offence upon a victim.

10 ***(b) There was error in charging the Appellant with two separate offences of robbery with violence in a case involving a single ongoing transaction***

[19] This ground has no merit. There were two separate offences committed, each was lawfully charged and the consequence was not to charge the Appellant “on the same facts in a more aggravated form”, as was contended.

15 ***(c) There were erroneous findings of fact, in relation to the identity of the person who threatened or inflicted physical violence and no medical evidence of actual injury to the male victim***

20 [20] So far as these involved findings of fact, which were not challenged in the High Court, no right of appeal lies. In any event, in a case of joint enterprise, each party to the enterprise is equally culpable. There could have been no reason, in the circumstance of this case, to differentiate between the offenders on the basis of the party who actually inflicted violence.

25 ***(d) Insufficient consideration was given to the motivation of the Appellant for the crimes or to other possible matters of mitigation***

[21] The fact that the crimes were poverty driven and that the property stolen was recovered by the police, did not reduce the objective criminality of the serious offences before the court, and were not factors that could or should have operated in mitigation of sentence.

30 [22] Otherwise, the fact that the Appellant admitted his involvement to police and his early plea of guilty, were appropriately taken into account.

[23] No error of law is shown in relation to sentence.

[24] The appeal is dismissed.

35 *Appeal dismissed.*

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