SAKIUSA BASA v STATE (AAU0024 of 2005)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, STEIN and FORD JJA

15, 24 March 2006

Criminal law — sentencing — Appellant both lookout and driver in armed robbery — Appellant's plea of guilty delayed — whether sentence harsh and excessive — whether judge did not give sufficient credit to Appellant's guilty plea — whether judge did not reduce term imposed considering overcrowding in prison.

The Appellant and four others robbed a money transfer office where the Appellant was both the lookout and getaway driver. His accomplices, armed with cane knives and iron rods, smashed the glass doors of the office, assaulted a security guard and stole two tills containing more than $32,000. The Appellant pleaded guilty in the High Court to one count of robbery with violence and one count of unlawful use of a motor vehicle and was sentenced to 6 years' imprisonment for the robbery and 6 months concurrent for the unlawful use. He appealed against the sentence.

The High Court accepted that the Appellant received only $4000 of the sum involved and made a full admission to the police although he did not identify his accomplices, who were still at large. The learned judge took 8 years as an appropriate starting point, increased it to 10 years for the aggravating factors but reduced it to 6 years after taking into account the various mitigating factors and the time the Appellant had spent in custody before the trial. The Appellant was already serving a sentence of 4 years for robbery with violence which had been imposed shortly. The learned judge considered that if the sentence she was passing was consecutive to that term, the total sentence of 10 years would exceed the totality of the offending and ordered that the sentence of 6 years should be served concurrently with the sentence he was already serving. The issues were whether: (1) the sentence was harsh and excessive; (2) the judge did not give sufficient credit to the Appellant's plea of guilty; and (3) the judge did not reduce the term imposed considering the overcrowding in the prison.

Held — (1) The sentence was not harsh nor excessive since the learned judge chose 8 years' imprisonment as starting point given the magnitude of the armed robbery. The tariff for robbery with violence was 4–7 years but a higher starting point was justified just like in the present case. There was a planned joint enterprise in which the various participants took different parts within the overall plan. Although the Appellant was the driver, he clearly knew of the plan and was as responsible for it as the others. The learned judge was justified in fixing her starting point at 8 years on the basis of the overall offence and noted as a mitigating factor, that the Appellant was the driver and did not enter the building.

(2) The judge sufficiently gave credit to the following mitigating factors in favour of the Appellant:

(a) age — 25 years old;
(b) guilty plea — although delayed;
(c) 1 year in remand;
(d) sincere attempts to run a cassava business; and
(e) non-entering in the premises.

The delay in pleading guilty reduced the value of the plea considerably.

(3) There was no need for reducing the term imposed since the Appellant had previous convictions and had just received a sentence of imprisonment for a similar offence committed since the present offence. The final sentence that the Appellant has to serve is as short as it properly could be and the court would not have interfered had a considerably longer term been ordered.

Appeal dismissed.

Cases referred to

R v Moananui [1983] NZLR 537, adopted.

R v Bibi [1980] 1 WLR 1193; (1980) 71 Cr App Rep 360; *R v Mako* [2000] 2 NZLR 170; *R v Taueki* [2005] 3 NZLR 372; *Raymond Sikeli Singh v State* [2006] FJCA 24, cited.

State v Ilaisa Sousou Cava [2001] FJHC 14, considered.

Appellant in person

K. Bavou for the Respondent

[1] Ward P, Stein and Ford JJA. The Appellant pleaded guilty in the High Court to one count of robbery with violence and one count of unlawful use of a motor vehicle. The offences were committed on 30 August 2003 when the Appellant and four others robbed the Western Union Money Transfer office in Suva. This Appellant was both lookout and getaway driver and his accomplices, armed with cane knives and iron rods smashed the glass doors of the office, assaulted a security guard and stole two tills containing more than $32,000. He was sentenced to 6 years' imprisonment for the robbery and 6 months concurrent for the unlawful use. He appeals against that sentence.

[2] When sentencing the Appellant on 9 March 2005, Shameem J accepted that the Appellant had received only $4000 of that sum and had made a full admission to the police although we are advised that it did not go as far as identifying his accomplices, who have still not been apprehended.

[3] The learned judge took 8 years as an appropriate starting point, increased it to 10 years for the aggravating factors but reduced it finally to 6 years after taking into account the various mitigating factors and the time the Appellant had spent in custody before the trial.

[4] The court was advised that the Appellant was already serving a sentence of 4 years for robbery with violence which had been imposed shortly before on 18 February 2005. The learned judge considered that, if the sentence she was passing was consecutive to that term, the total sentence of 10 years would exceed the totality of the offending. As a result, she ordered that the sentence of 6 years should be served concurrently with the sentence he was already serving.

[5] This appeal is solely against the sentence of 6 years' imprisonment but, in considering that sentence, we note that the final order that it be served concurrently with the 4-year sentence reduced the effective length of that sentence from 4 years to 20 days.

[6] The appeal is brought on three main grounds, (i) that the sentence was harsh and excessive and, in particular, the judge did not apply the correct principles, (ii) that the judge did not give sufficient credit for the plea of guilty and (iii) that the judge should have made allowance for the conditions in the prison and failed to do so.

[7] On the first ground, the Appellant points to an earlier decision of Shameem J in the case of *State v Ilaisa Sousou Cava* [2001] FJHC 14, in which she conducted a review of the sentencing trends in England, New Zealand and Fiji including a number of cases decided in this court. She concluded:

> Considering these authorities, the Fiji Court of Appeal clearly considers the New Zealand guidelines for Robbery with violence to be of particular relevance for Fiji.

> Sentences for robberies involving firearms should range from six to eight years. A lower range of four to seven years is appropriate where firearms are not used and the premises are banks, or shops, post offices or service stations. However the sentence may be higher where the victim or victims are particularly vulnerable due to age, infirmity, disability or where children are involved. Similarly where injuries are caused in the course of the robbery, a higher sentence will be justified. The value of the property stolen, evidence of planning or premeditation, multiple offences and previous convictions for similar offences should be considered aggravating features.
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> The sentence may be reduced where the offender has no previous convictions, has pleaded guilty and has expressed remorse.
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> This list of aggravating and mitigating features is by no means exhaustive. Furthermore, the sentence will always be adjusted up or down, depending on the facts of the particular case.

[8] We would comment that the reference in the above passage to the nature of the premises robbed, as was suggested in the New Zealand case of *R v Moananui* [1983] NZLR 537 and adopted by this court, has been reconsidered in the more recent cases of *R v Mako* [2000] 2 NZLR 170 (*Mako*) and *R v Taueki* [2005] 3 NZLR 372. In *Mako*, the New Zealand Court of Appeal concluded that the categorisation of robberies and the determination of the seriousness by reference to the premises in which they occurred had become too rigid: see also *Raymond Sikeli Singh v State* [2006] FJCA 24.

[9] In the present case, the judge stated:

> The tariff for robbery with violence is 4 to 7 years but a higher starting point is justified in a case of armed robbery. In this case given the magnitude of the robbery, I choose 8 years imprisonment as my starting point.

[10] The Appellant asks the court to consider that, as he was the driver, he did not carry any weapon and so the appropriate level of sentencing in his case should not have been that for armed robbery. That misunderstands the position where an offence is carried out jointly by a number of offenders.

[11] This was a planned joint enterprise in which the various participants took different parts within the overall plan. Although the Appellant was the driver, he clearly knew of the plan and is as responsible for it as the others. The learned judge was justified in fixing her starting point at 8 years on the basis of the overall offence. In fact, she noted, as a mitigating factor, that the Appellant was the driver and did not enter the building.

[12] The Appellant also points out that he had spent 1 year, 1 month and 14 days in custody before the trial but the judge only allowed for 1 year on remand. When calculating the appropriate sentence for any offence, the judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount.

[13] The second ground is that the judge did not give sufficient credit to the Appellant for his plea of guilty. It is clear that she took it into account. After increasing the sentence from 8 to 10 years for the matters of aggravation she continued:

> In your favour is your age (25 years), your plea of guilty (although it was not an early plea), your one year in remand and your sincere attempts to run a cassava business. I take into account all that has been urged most competently by your counsel including the fact that you did not enter the premises robbed but were the getaway driver. To reflect these mitigating factors I reduce the sentence to 6 years imprisonment on count 1.

[14] The Appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.

[15] Having said that, the fact that the matters of mitigation mentioned by the learned judge enabled her to reduce a sentence of 10 years to one of 6 years suggests she took a very generous view of them. That she then made it concurrent with the sentence of 4 years for an offence committed presumably while on bail for this offence can only be described as lenient.

[16] Finally the Appellant seeks a reduction in the term imposed on account of the overcrowding in the prison. He relies, he says on the comments of Lane LCJ in *R v Bibi* [1980] 1 WLR 1193; (1980) 71 Cr App Rep 360 (*Bibi*), in which he referred to the dangerous overcrowding that was found at that time in English prisons. We accept that the prisons in Fiji are overcrowded at present but there is no evidence that it has reached the situation that was described by Lane LCJ in *Bibi*. However, even in that case, the Lord Chief Justice's direction was for all courts, when sentencing to imprisonment, to ensure they examine each case carefully, "to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal".

[17] All courts in Fiji apply that principle when sentencing. This was a case where the duty of the court to protect the interests of the public was clear. The Appellant had previous convictions and had just received a sentence of imprisonment for a similar offence committed since the present offence.

[18] Anyone who commits robbery with violence must expect an immediate sentence of imprisonment. This was a well-planned attack carried out with weapons and a clear willingness to use violence. Since that offence, this Appellant has committed another robbery. We do not interfere with the sentence ordered but we are constrained to add that the final sentence that the Appellant has to serve is as short as it properly could be and we would not have interfered had a considerably longer term been ordered.

[19] We would also suggest that the earlier decisions of this court in which New Zealand cases have been used as guidance in assessing the appropriate sentence for robberies with violence may need to be reconsidered in the light of continuing offences of this nature being repeated by the same offenders. The maximum sentence for the comparable offence in New Zealand is 14 years' imprisonment and 19 years where they involve home invasion.

[20] In Fiji, the maximum penalty is life imprisonment showing clearly that it is regarded as being in the most serious category of offences. The maximum penalty in England is also life imprisonment and so it may be more appropriate in future to consider English cases as guidance for the appropriate term of imprisonment.

[21] The appeal is dismissed and the sentence confirmed.

Appeal dismissed.