

LIVAI NAWALU v STATE (AAU0017 of 2011)

COURT OF APPEAL CRIMINAL JURISDICTION

5 TEMO JA

12 October, 2 November 2012

10 **Criminal law — sentencing — leave to appeal sentence — grounds of appeal — no question of law — sentence not unlawful - no right of appeal — Court of Appeal Act ss 22(1), (1A), 35(2).**

15 The appellant was convicted of nine counts of robbery with violence and seven further related offences, including taking vehicles without authority, burglary and larceny. He was sentenced to 15 years' imprisonment, which was reduced on appeal to 13 years' imprisonment. The appellant applied for leave to appeal out of time on the grounds that he was prejudiced by being unrepresented. His appeal against sentence was on the grounds that the total 13 years' imprisonment was harsh and excessive.

Held –

20 The appellant has not fulfilled the requirements of s 22(1) and (1A) of the Court of Appeal Act, Chap 12. The appellant's appeal does not involve a question of law, nor does his appeal on sentence show that the sentence imposed by the High Court was unlawful or passed in consequence of an error of law. The appellant has no right of appeal.

Application for leave to appeal out of time refused and dismissed.

25 Appellant in Person

P. Madanavosa instructed by *Office of the Director of Public Prosecution, Suva* for Respondent

30 [1] **Temo JA.** The appellant appeals against the decision of the High Court of Lautoka on 3rd December 2009, when it was exercising its appellate jurisdiction.

[2] In Criminal Appeal No HAA 014 of 2009, the Lautoka High Court said as follows

35 “...1) This appellant was charged with nine (9) counts of robbery with violence and seven (7) further related offences including taking vehicles without authority, burglary and larceny. These offences were comprised in Nadi Magistrate Court File Nos 235/09, 237/09, 245/09, 253/09, 255/09, 257/09, 258/09 and 259/09.

2) The offences and respective sentences when tabulated read as follows:

40	235/09	Shop Breaking & Larceny	18 months
	237/09	Larceny	18 months
	245/09	1. Burglary	10 months (concurrent to 2)
		2. Robbery with Violence	4 years 2 months
45	253/09	Shop Breaking, Entering & Larceny	10 months
	255/09	1. Robbery with Violence	4 years 2 months
		2. Robbery with Violence	4 years 2 months (Concurrent)
50		3. Unlawful Use of Vehicle	1 month (Concurrent)

5	257/09	1. Office Breaking, Entering & Larceny	18 months
		2. Robbery with Violence	4 years 2 months
		3. Unlawful Use of Vehicle	1 month (concurrent)
	258/09	1. Robbery with Violence	4 years 2 months
		2. Robbery with Violence	4 years 2 months (concurrent)
10	259/09	1. Robbery with Violence	4 years 2 months
		2. Robbery with Violence	4 years 2 months (concurrent)
		3. Robbery with Violence	4 years 2 months (concurrent)

15 3) 235, 237, 255, 258 and 259 were all consecutive to 245 while 253 and 257 were both concurrent to 245 making a total sentence of 19 years 8 months. The individual sentences are lenient but the real question to be addressed is the question of totality of sentence with so many cases being sentenced together.

20 4) In the interest of totality the Magistrate reduced the 19 years 8 months by 4 years and 8 months to make a total sentence of 15 years.

5) The appellant appeals the sentence as being harsh and excessive...

25 8) Miss Tabuakoro for the State has filed very detailed and very helpful submissions. She, most properly, points out that the Magistrate exceeded his sentencing powers by passing a sentence of more than 14 years and concedes that the appeal should be allowed to that extend alone.

30 9) I would go further. Although the offences display a whole catalogue of violent and rapacious behaviour within a 2 month period (January and February 2009) a total sentence of 14 years is extremely harsh and provides the convict with no hope of a future crime free life. He demonstrated remorse and contrition before me and he appears to have done so too before the Magistrate. He tells me that he has a 3 month old baby, a child obviously born after this spree of violence and theft.

35 10) In the circumstances I would allow the appeal to the extent that the total sentence is reduced to 14 years to fit the maximum in the power of the Magistrate and I would allow one further year to reflect his remorse and his hope of a life with his new young family. The total sentence he must serve is now 13 years..."

40 [3] On 16th February, 2011, the appellant applied for leave to appeal out of time. He was approximately 1 year 1 month out of time. He advanced four grounds in asking for leave to appeal out of time. However, they revolved around one issue, that is, he was prejudiced in that he was legally unrepresented. He is not appealing his conviction. He is merely appealing his sentence. He advanced four grounds in appealing his sentence. The four grounds are really one, that is, the total 13 years imprisonment was harsh and excessive. This was the same ground he advanced, when he appealed his sentences in the Nadi Magistrate Court, to the High Court at Lautoka.

[4] I have taken note of both parties' submissions, and have read all the papers they filed in court.

50 [5] Section 22(1) and (1A) of the Court of Appeal Act, Chap 12, governs appeals from the High Court, when it sits in its appellate jurisdiction. It reads as follows:

“...22(1) 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;

5 22(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...”

[6] In my view, the appellant’s appeal does not involve a question of law.
10 Furthermore, his appeal on sentence does not show that the total 13 years imprisonment imposed by the Lautoka High Court on 3rd December 2009, was an unlawful one, or passed in consequence of an error of law. The appellant has not fulfilled the requirements of s 22(1) and (1A) of the Court of Appeal Act, Chap 12. In fact, given what he had submitted, he has no right of appeal. Pursuant
15 to s 35(2) of the Court of Appeal Act, Chap 12, his application for leave to appeal out of time is refused, and I accordingly dismiss it. He has no chance of success on his appeal against sentence.

Application dismissed.

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