

IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 70 of 1983

BETWEEN : 1. TIMOCI BOLA
2. RUSIATE LUTU

Appellants

- and -

R E G I N A M

Respondent

Both Appellants in person.
Mr. J. Sabharwal for the Respondent.

Date of Hearing : 3rd July, 1984

Delivery of Judgment : 13th July, 1984

JUDGMENT OF THE COURT

Speight V.P.

Three men, Bola, Bose and Lutu were charged in the Supreme Court with robbery with violence under section 293(1)(b) arising out of an attack on a shopkeeper, and the taking of shop money. It is convenient here to set out the provisions of section 293 (1) and (2).

" 293.-(1) Any person who -

(a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or

(b) robs any person, at the time of or immediately after such robbery, uses or threatens to use any personal violence to any person,

is guilty of a felony, and is liable to imprisonment for life, with or without corporal punishment.

- (2) Any person who robs any person is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment. "

When asked to plead each man in turn said "I understand charge, plead guilty to robbery but no violence". The presiding Judge declined to accept these pleas because the victim, a Chinese lady, Mrs Chang, had suffered serious injuries at the hands of some person in the course of robbery; so the trial proceeded on the major charge.

At the conclusion assessor no. 1 gave the opinion that all three were guilty as charged. Assessors no. 2 and no. 3 gave the opinion that the first and third accused persons namely Bola and Lutu were guilty as charged but Bose was guilty of robbery only under section 293(2). The trial Judge accepted the majority opinion. He convicted the two who are now the appellants on the major charge. These two were hardened offenders and in due course he sentenced each to 8 years imprisonment but in respect of Bose who was the youngest man and with no previous convictions he imposed the extremely lenient sentence of 2 years imprisonment suspended for 3 years. Bola and Lutu appealed against sentence and appeared before this Court making their own submissions - being unrepresented here, as at the trial. Because they have not been represented their submissions were somewhat brief and not particularly relevant, so we have thought it proper to analyse the evidence against them in some detail to assess their respective participation.

Briefly the evidence was this. The complainant, Mrs Chang was struck down in her shop in business hours but she was not clear whether there was only one robber who struck her and then took the money or whether possibly there may have been one man who did the striking and another who took the money. She could not identify anyone.

PW2 Semesa Robarobalevu who was near the shop at the time saw Bose, whom he knew and could identify, standing outside the shop. Nobody argues but that Bose was acting as a lookout. This witness said that two other men, whom he could not identify, went into the shop and shortly afterwards he heard glass smashing.

PW3 Jioji Koroibanuve was near the shop at the time which must have been immediately after the crime and saw three men, including Bose, running from the shop.

PW4 Namara was at the shop shortly before the events, and as he came out he met Bola who gave him a light for his cigarette and he (Namara) then went away. A little bit later when he was again passing he saw Bose standing outside.

PW6 is Mrs Chang's son. He had been helping at the shop. He went to the toilet and when he returned he was himself punched by someone whom he could not recognize. He saw his mother lying on the shop floor and another person was taking the money from the till. It was discovered that \$400.00 had been taken. The rest of the evidence consists of the caution statement. Lutu said that the "grab" was planned. He admitted that he went into the shop with another man. He said this person was one Tukai but that may or may not be true. He said this other man struck down the lady in the shop and he (Lutu) took the money from the till, left the shop with the others and later shared the money with Bola.

On this evidence the Judge was clearly correct when he said that in respect of the man Lutu inside the shop that it did not matter which used violence. They were both equally responsible.

When applied to Lutu on the facts just outlined that is obviously correct, for he was clearly a party to what took place within the shop, particularly when it is noted that having seen the old lady struck down by his companion, whoever that man was, he then proceeded to take the money from the

till and later to share it with others. He was clearly a party to robbery with violence under section 293(1)(b). In respect of the sentence imposed upon him we see no ground for interfering with it. It was a serious crime. This elderly lady was badly hurt in a cowardly attack and a large sum of money was taken. Such crimes are becoming prevalent and a deterrent sentence was obviously called for. It is also noted that this man has a long list of convictions and cannot claim the indulgence of the court. His appeal is dismissed.

We have also considered the evidence in the case of Bola, and we acknowledge that the trial Judge was at some disadvantage in that the accused persons were defending themselves and probably could not do justice concerning their respective roles, as would have been the case with the assistance of counsel. Although this is not an appeal against conviction we have gone carefully over the evidence to assess what evidence there is to prove the role of Bola, and in particular to see whether there was evidence to prove that he was the other man in the shop, which was the basis upon which he was sentenced by the learned Judge.

We have already noted that there was no identification of him in the shop. Even Lutu's statement names another person, for such weight as might be attached to that, and this particular appellant in his confession statement denied throughout being in the shop, and he too named a fourth man, viz Tukai. In his statement to this Court he has said that his plea of guilty to robbery was on the basis only that he had been a lookout. There must, of course, be suspicion that there were only three men involved but suspicion is not enough to constitute him as one of the two persons inside the shop. One cannot on the evidence exclude the claim concerning a fourth man and the question of an appropriate sentence must be considered on basis that all the evidence makes out is that he too may have been a lookout like Bose and not one of the two intruders.

It has frequently been recognized in a number of courts that the man who is a lookout only and not a principal offender may be entitled to claim a less severe punishment, particularly where as here there is nothing to show that he had lent his assistance to a plan involving violence; though with premises manned by a snopkeeper that would always be a possibility. We also note the extremely lenient sentence passed on the other lookout Bose. While we recognize that Bose had very great claims to lenient treatment, which claims were properly recognized, yet it must be borne in mind that there should be some relationship between penalties imposed upon offenders who have committed the same crime. Suspicious though we may be, we think that it was not a proper basis by the Judge in approaching the sentencing of Bola to conclude that his involvement had been the same as that of Lutu. The evidence does not prove he did much more than Bose, suspicious though one may be.

Accordingly, we feel that 8 years imprisonment was manifestly excessive and that sentence is quashed. We substitute sentence which we think more appropriate of 5 years imprisonment. That is of course still a much heavier sentence than that imposed on Bose, but with his extensive criminal experience, Bola would have had a much greater appreciation of likely consequences than would Bose, who had no previous criminal association, and whose venture into this affair was quite out of character.

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Vice-President

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Judge of Appeal

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Judge of Appeal