

Thereafter the matter was stood down. Upon resumption the record reads as follows:

"12.05 P.M. PROSECUTION: *State will amend information to accommodate plea (returned to Ms Tabuya). The words "while armed with an offensive weapon" are deleted and I have initialled that amendment - ASSESSORS FORMALLY DISCHARGED. ACCUSED CALLED UPON AS TO ANYTHING TO SAY WHY JUDGMENT SHOULD NOT BE PRONOUNCED ON HIM ACCORDING TO LAW.*

ACCUSED: *Says nothing.*

PROSECUTION: *Tender Statement of Facts."*

The full text of "Summary of Facts" as tendered reads:

SUMMARY OF FACTS

On Wednesday, 13th July 1994, a van belonging to the ANZ Banking Group Limited registration number CF 324 left the ANZ main Branch in Suva at 8am. On board was Krishna Murti s/o Satin Narayan, bank supervisor, Anisa Billings, bank teller, Apenisa Rayawa, bank teller, and Sivaniolo Nairabe, a Wormald security officer. The group were escorting cash amounting to \$48,726.00, bound for the ANZ Bank Branch at R B Patel Centrepoint Shopping Complex. The cash was stored in three teller trunks.

At 8:55 am, the van pulled up at the ANZ Branch at R B Patel Centrepoint. The security officer checked the area, and after finding it clear, he signaled it to the others. Krishna Murti handed the keys to the boot to the security officer, who proceeded to open the boot.

As the security officer did this, three masked men armed with cane knives alighted from a white van registration number E 6210 which was parked nearby. They advanced towards the back of the van. The masked men brandished the knives at the group, who quickly moved away. The men grabbed the teller trunks and ran back to the van. They boarded the van, and sped away in to Ratu Dovi Road, towards Laucala Beach Road."

It is not in dispute that subsequently the police raided the Appellant's house and recovered the sum of \$9,493 from him and his de facto wife.

After the Appellant admitted the contents of the "Summary of Facts", evidence of his antecedents and previous convictions were tendered. The Appellant admitted the previous convictions.

Before us the learned Director of Public Prosecutions very properly pointed out that the facts as outlined by the prosecution did not implicate the Appellant.

But it is clear the Appellant pleaded guilty to robbery in company with others but denied that he was armed with an offensive weapon. The nature of his plea led to the amendment of the charge. Furthermore in mitigation before the High Court the Appellant said - "I was only driving the motor vehicle and not one of the ones brandishing knives." (See p.24 of the Record.)

Before us he made it very clear that he was appealing against sentence only but wished the Court to take into account the fact that he was not one of those brandishing the knives at the time of robbery.

Appellant's Contention

The Appellant was not represented either in the Court below or before this Court. He was however represented at the Preliminary Inquiry in the Magistrates' Court. He contends that the sentence of 4 years was harsh and excessive. He made 3 submissions in writing. Though sometimes difficult to follow they may be summarised as follows:-

- (1) That he was not given an opportunity to make submission in mitigation at the appropriate time;
- (2) That he had no legal counsel to represent him;
- (3) That none of the complainants received any injuries;

- (4) There was insufficient evidence for the trial judge to hold that there was planning and pre-meditation for 2 months;
- (5) That insufficient credit was given to the fact that \$9,400 was recovered from him;
- (6) That the trial judge was not justified in holding that he (the Appellant) did not co-operate with the police; and
- (7) That his previous convictions ought to have been disregarded especially the 2 of Robbery with Violence which occurred a long time ago.

Trial Judge's Sentencing Remarks

In assessing sentence the learned Judge treated the following as factors of aggravation:

- "(a) The degree of planning and premeditation involved in the preparation and commission of the offence;*
- (b) The fact that 4 men were involved in carrying out the offence;*
- (c) The sizeable sum, nearly \$50,000 that was taken, only \$9,400 odd being recovered;*
- (d) Failure to co-operate with police in identifying the co-offenders, instead lying to them;*
- (e) Possession of a long criminal record, in which two previous Robberies with Violence occur, though very long ago, meaning the accused is denied the status of being of clean record or a first offender."*

He took the following factors as being in favour of the Appellant:

- "(i) That he has pleaded 'Guilty' and saved the State the expense of a lengthy trial (ii) that he was merely the getaway car driver and was not himself in possession of a cane knife, and did not brandish such a knife, plus the*

overall fact that no physical injury was occasioned to any person during the robbery."

He concluded his sentencing remarks as follows:

"Balancing all factors including signs he has turned over a new leaf, as appears by his glowing reference from the Kinoya Crime Prevention Advisory Committee I think the proper sentence on the accused for this offence is 6 years imprisonment, but I will discount that by one-third for the mitigating factors enumerated above to a sentence of 4 years imprisonment."

In the earlier part of his sentencing remarks the learned Judge made adverse observations and findings based on material he had extracted from the depositions.

The following two examples will suffice:

- (i) *"The robbery was planned for 2 months in meetings in the accused's home. A veteran criminal named EMORINAQOVA was mastermind. The Appellant and the 3 other conspirators were always conversing in whispers when anyone was near them. The Appellant said he had met one of the conspirators named Jone in Korovou jail 1993.*

Eventually as the day of the robbery approached, number plates were stolen from a disused van located by NAQOVA, and transferred to another vehicle of identical make and model, which was stolen on 12 July 1994, the day before the robbery." (See page 34 of the Record.)

And at page 35 he said, inter alia,

- (ii) *"Under questioning the accused told a lot of lies about only being picked up on the road by the white van entirely unexpectedly."*

Reliance on the Depositions

The State concedes that "the Sentence was based on matters that had not been outlined in the facts but had been drawn from the depositions". The depositions of course included the Appellant's interview statement. Ms Shameem the Director of Public Prosecutions very properly pointed out that at page 12 of the Record the Appellant had disputed the contents of his caution interview on grounds of police threats.

It is therefore necessary to refer to His Lordship's reliance, for sentencing purposes, on information which he derived from the written statements tendered to the Magistrates' Court during the "paper" committal proceedings conducted pursuant to Section 255 of the Criminal Procedure Code (Cap. 21). Such reliance was considered by this Court in Rajend Kumar v. The State (Criminal Appeal No. 5 of 1992: 9 November 1993). There the Court said:

"It is apparent, therefore, that a defendant has the opportunity to challenge any of the evidence contained in the written statements. If this has not been done then we consider the trial Judge is entitled upon a plea of guilty to take into account the contents of the written statements. We should add that if, following committal, the Judge indicates his intention to rely upon any part of the written statements which the defendant then wishes to challenge then, notwithstanding the prior failure to raise the matter, we would expect the Judge to give an opportunity for counsel to be heard, and, if necessary, for evidence to be taken in order that the matter in dispute could be resolved."

What was said there may be misunderstood as authorising the Judge to rely on the contents of the written statements without giving the defendant an opportunity to challenge them, as long as he does not indicate his intention of doing so. That was not what the Court meant; it would, we believe, be an unfair way of proceeding. What is required is that, before the Judge relies on the contents of a written statement, he should inform the defendant, or his counsel, that he is considering doing so, so that the defendant, or his Counsel, can challenge or admit the correctness of what is in the statement. In this case the learned Judge made extensive use of the depositions to elicit material which was mostly adverse to the Appellant and which the Appellant was not given an opportunity to contest.

Although the learned Judge erred in relying on "facts" not properly before the Court we are of the view that there was sufficient material properly before him to justify a finding of guilt and the imposition of a prison sentence.

In view of our conclusions on the adequacy of sentence we do not think any injustice has occurred.

Re Absence of Conviction

Before we deal with the quantum of sentence we wish to refer to the fact that the appeal book does not disclose that a conviction was entered in this case. Section 281 of the Criminal Procedure Code Cap. 9 states -

"If the accused pleads "guilty" the plea shall be recorded and he may be convicted thereon."

The permissive "may" is designed to cater to a situation where the trial judge may not wish to enter a conviction for some reason. Here the imposition of a prison sentence negates any suggestion that it was intended to avoid a conviction. In such circumstances a conviction ought to have been entered. For obvious reasons it is a sound and desirable practice to enter conviction before passing sentence. The failure to do so in this case was a mere irregularity constituting a curable defect. The Appellant is deemed to have been convicted of Robbery in company of others under Section 293 1(a) of the Penal Code.

The Sentence

We now turn our attention to the question of the alleged severity of sentence.

The offence was serious. It was committed by a number of men together. Clearly a substantial custodial sentence had to be imposed. A fairly lengthy plea in mitigation by the Appellant is recorded at page 17 of the appeal book. It is unlikely that much more could have been said on his behalf if he had been legally represented. Proceeding on the basis that the Appellant was not involved in the planning of the robbery for two months nevertheless from the undisputed facts outlined at the trial it is clear that offence was premeditated and not committed on the spur of the moment. The fact that the Appellant's share of the proceeds was recovered means that he has not remained enriched by the offence; but with such a serious offence that can be given very little weight. The credit for recovery of the part of the stolen property goes to the police and not the Appellant. Finally, his criminal record included a considerable number of serious offences, the three most recent having been committed in 1995. But the learned Judge did not punish the Appellant for his past offences. He merely did not give him any credit. This was the correct approach. See *R v. Queen* [1982] Crim. L. R. 56.

As noted above, his Lordship took into account in the Appellant's favour his plea of "guilty" and that he was the driver of the get away car and not one of those who approached the security officer and threatened him with cane knives. In fact he was at pains to give credit for everything possible including the Appellant's desire to reform. A discount of one-third of what the Judge considered would have been the appropriate sentence was allowed on account of those mitigating factors. We cannot see any reason to disagree with him.

On an appeal against sentence this Court has wide powers to decide what was an appropriate sentence. See Section 23(3) of the Court of Appeal Act as repealed and replaced by Section 3 of the Court of Appeal (Amendment) Decree 1990.

In our view the sentence of 4 years' imprisonment was appropriate. It was not harsh or excessive; there are no proper grounds for reducing it.

Decision

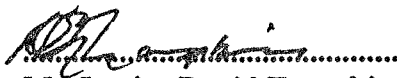
For the reasons we have stated above the appeal is dismissed.



.....
Sir Moti Tikaram
President



.....
Mr Justice Ian Thompson
Justice of Appeal



.....
Mr Justice David Tompkins
Justice of Appeal

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions for the Respondent