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IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0021 OF 1996S
(High Court Criminal Case No.HAC005/95L)

BETWEEN:

JOELI TIKOLEVU
JONETANI ROKOUA

Appellants

AND:

THE STATE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: Tuesday, 9 November 1999, Suva

Counsel: Appellants in Person
Mr. J. Naigulevu for the Respondent

Date of Judgment: Friday, 12 November 1999

JUDGMENT OF THE COURT

Both appellants, along with two others had been charged with murder and robbery with violence arising out of the robbery of a service station at Ba on 30th August 1994. A night watchman died and a service station attendant was injured; cash and cigarettes amounting to $400 were stolen.

At their trial in the High Court at Lautoka on 30th November 1996, the prosecution accepted pleas of guilty of manslaughter by the appellants. In the case of the first appellant, this did not take place until part-way through the trial. The two appellants and one other had also pleaded guilty to the robbery charge. The fourth accused wished to plead not guilty to that charge. Because

the appellants might have been witnesses at the fourth accused's robbery trial, they were sentenced on 21st November 1996.

Sadal J. on that date had for sentence the 2 appellants for both manslaughter and robbery with violence and a co-offender named Kililala against whom the prosecution did not proceed on the count of murder.

Both appellants were sentenced to 6 years' imprisonment for manslaughter and to 3 years' imprisonment concurrent for robbery. The sentences were consecutive on their existing sentences i.e. 2 ½ years imprisonment for house breaking for Tikolevu, imposed on 23 February 1996 and 18 months imprisonment for Rokoua imposed on 8th July 1986 for escaping from lawful custody. Tikolevu had also been sentenced to 12 months' imprisonment on 20 June 1995 for possession of drugs. Kililala, a first offender, received 2 years' imprisonment for his part in the robbery.

Leave to appeal against sentence was given by a single Judge of this Court to the appellants on 12 January 1998. The record was requested by the Court of Appeal office from the Lautoka Court on 2 January 1997 but not received until November 1998. Once again, we are obliged to deprecate the delay in preparing and certifying the record. Whether the delay was by the Court office in preparing the record or by the Judge in certifying it we do not know. The record was very modest in size - only 15 pages. A delay of that dimension in preparing and certifying such a simple record is unacceptable particularly in a criminal case where appellants are wanting to know the extent of their sentences.

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Facts

The robbery took place in the early hours of the morning. The four offenders planned to rob the Cross Road Service Station at Yalalevu, Ba. The robbery was carried out by the two appellants: Kililala, armed with a cane-knife, stood guard at the adjacent tyre centre and the fourth offender, Nabaro, kept watch at the rear of the premises.

Rokoua punched a nightwatchman employed at nearby premises who happened to be at the service station, Rokoua struck the service station attendant with the blunt side of a cane-knife. The night watchman fell to the ground and fractured his skull. Tikolevu then kicked him. The night watchman died later. He was undergoing surgery for his head injuries. A complicating factor is that a doctor from the Ba Mission Hospital refused to attend to the deceased. The service station attendant was more fortunate: it was not contended that he had sustained permanent injury.

The Judge noted that this was a planned robbery in which the deceased was viciously attacked and the attendant assaulted. The Judge noted that the appellants, then aged 19 and 22 both had previous convictions and that Rokoua had escaped from custody pending trial and was charged with committing other offences whilst at large. The Judge stated that he had taken account of the time spent by each in custody. He did not specify the relevant period for either.

The appellants before us appeared in person. They made extensive written submissions supplemented orally to the effect that the penalties were too harsh. In particular they submitted, inter alia:

(a) The Judge did not give sufficient regard to their guilty pleas.

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(b) The youth of the first appellant at the time of the offending (17 years 3 months) was given insufficient weight.

(c) The Judge was wrong to characterise the killing as senseless and brutal.

(d) Other cases demonstrated more lenient sentences.

(e) The Judge did not distinguish between the two appellants in that it was only Tikolevu who had assaulted the deceased.

(f) The sentence for robbery was excessive since this was a robbery at the lower end of the scale and out of line with other sentences for robbery.

(g) The Judge gave insufficient weight to the time each appellant had spent in custody awaiting trial.

Sentences for manslaughter can vary widely because the offence itself can be at one end of the spectrum a negligent act and at the other end near murder. Thus penalties have ranged from a suspended sentence to 10 years imprisonment were the degree of violence was high and the provocation minimal. *See Rauve v State* (Criminal Appeal 14 of 1990) where this Court said: "However we note that punishment in Fiji for manslaughter of a serious kind has normally ranged from 7 to 10 years imprisonment depending on the degree of gravity."

For aggravated robbery, this Court in *Lui and others v State* (Criminal Appeal AAU005 of 1997S) approved the approach of the New Zealand Court of Appeal in *R v Moananui* [1983] NZLR 539. Under the Moananui categorisation, robberies of service stations can attract from 2 ½ to 8 years imprisonment depending on the circumstances.

In our view, the Judge was quite right to denounce this offending as senseless and

brutal. The armed robbery of a facility which serves the public on a round-the-clock basis, such as a service station, is particularly bad. Staff working in such places deserve protection from thuggery and the Court should pronounce deterrent sentences.

Given the gravity of the offending, we think that the sentences imposed here were within range, but only just. Longer sentences could have been justified. The offending was planned and involved the death of a frail elderly man who was doing a public duty in endeavouring to repel those robbing the service station. It is no answer for the appellants to say they did not intend to kill the man. That averment may have been enough to have justified the withdrawal of the murder charges but nevertheless, the Court was faced with the task of sentencing for both a manslaughter at the serious end of the spectrum plus an armed robbery of a public facility late at night.

The first appellant's youth was a factor which might indicate in other circumstances some leniency but which cannot be used as an excuse for this major offending. As to the guilty pleas, there was an inevitability that these two would be convicted of manslaughter so that there is not so much credit to be given as might normally be expected. Both were properly convicted of manslaughter under the joint enterprise provisions and /or the accomplice provisions of the Penal Code.

We have however given close consideration to the submission that the sentence of the second appellant Rokoua for manslaughter ought to be less than that of Tikolevu who struck the deceased causing him to fall to the ground and kicked him. Rokoua did not touch the deceased but instead hit the service station attendant with the blunt end of a cane knife.

In our view, this was a common enterprise for which both are equally responsible in

law. The first appellant attacked the nightwatchman and the second appellant the attendant. It was an unfortunate consequence that the nightwatchman was felled and cracked his skull on the floor. It was a fortunate consequence that the attendant suffered no permanent injury. The first appellant then kicked the night watchman which makes his culpability greater.

The Judge was not specific about the time each appellant spent in custody as he should have been. We have made enquiries. Both appellants were arrested on 1 September 1994. According to the list of previous convictions, the first appellant was sentenced to 12 months imprisonment on 20 June 1995 and to 2 ½ years' imprisonment on 23 February 1996. The Judge, quite correctly, made the terms of imprisonment imposed for this offending consecutive on these terms.

Accordingly, it seems that the first appellant was in custody pending trial solely for this offending for some 9 ½ months. The second appellant's position is different. He escaped from custody pending trial for these offences on 24 June 1996. He was recaptured on the same day. He was sentenced to 18 months' imprisonment for escaping on 2 July 1996. The period between his arrest and his escape was about 22 months. This is the period in custody pending trial for which he should be given credit on this sentencing.

The Judge remarked that the second appellant had allegedly committed offences during the short period he was at large. If that be so, any offences cannot be taken into account at a sentencing for crimes committed previously.

In all the circumstances, we conclude that the second appellant should receive a differentiation in sentence because of the length of period in custody be spent pending trial for these

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offences as compared with the other appellant. He spent 22 months as against the first appellant's 9 ½ months. With remission, the 22 months in custody amounted to a 3 year sentence. We think that the 9 ½ months in custody for the first appellant, amounted to an extra year onto his sentence and the Judge took that into account. However, we think that the sentence of the second appellant ought to be reduced by 18 months to 4 ½ years to take account of the extra time spent in custody pending trial and because he did not kick the deceased.

Apart from that we think the sentences are appropriate.

Result

Appeal of Tikolevu dismissed.

Appeal of Rokoua allowed: sentence of 6 years imprisonment for manslaughter reduced to 4 ½ years' imprisonment.

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

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Sir Ian Barker
Justice of Appeal

Solicitors:

Appellants in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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