

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

CRIMINAL APPEAL NO. AAU0027 OF 2001S
(High Court Criminal Action No. 1 of 2001L)

BETWEEN:

SIKELI NAYAVUSOATA
SERU MAITOGA

Appellants

AND:

THE STATE

Respondent

Coram:

Tompkins, JA
Henry, JA
Penlington, JA

Hearing:

Wednesday, 27th May 2003, Suva

Counsel:

Appellants in Person
Mr. J. Rabuku for the Respondent

Date of Judgment: Friday, 30th May, 2003

JUDGMENT OF THE COURT

The appellants, together with one other person, were charged jointly with counts of murder and robbery with violence. They were both acquitted on the charge of murder, and convicted on the robbery count. The first appellant was sentenced to 7 years imprisonment and the second appellant to 5 years imprisonment. They both now appeal conviction and seek leave to appeal sentence. The third accused was found guilty of manslaughter and also of robbery with violence, and was sentenced to 9 years and 7 years imprisonment (concurrent) respectively on those charges.

The relevant facts can be summarised briefly. On the afternoon of 27 May 2000 the three accused, together with a number of other people, were drinking home brew at the home of a relative of one of them. The liquor ran out, and in the evening the three accused decided to obtain more liquor and for that purpose to get a taxi to Labasa. A taxi was unavailable, and they ended up breaking into a residential home, occupied by a married couple. Their object was obviously robbery. The occupants had had dinner, and the husband went to watch television in the bedroom, while the wife went to the bathroom to have a shower. The three accused had taken steps to disguise themselves, and were also armed with knives which they had taken from the kitchen following their forced entry into the premises. The second appellant, with his head covered, confronted the wife with a knife which he placed against her neck and told her to be quiet, threatening to kill her if she called out. She was then naked. In the meantime, the husband had been accosted in the bedroom and was stabbed to death. Neither appellant was responsible for the killing. Cash of \$20 and two hand bags were removed from the premises by the intruders who then left.

Conviction

The appeals against conviction can be dealt with quite shortly. The appellants do not deny that they were each involved in breaking into the home of the victims. The first appellant accepts that he was directly involved in stealing the cash and handbags which had been situated in the bedroom. His complaint is that because he was not in the bathroom and took no personal part in threatening the wife with the knife, he should not have been found guilty of robbery with violence. He was not represented at the hearing of

the appeal, and therefore did not appreciate the law as to parties to an offence. There is no doubt on the evidence that the three accused formed a common intention to break into the home and to steal. For that purpose, having entered the premises, they armed themselves with knives in order to carry out that intention, an intention which was ultimately successful. On the facts which are not under challenge there can be no doubt the elements of s.293(1) were established.

It reads:

"293.(1) Any person who –

(a) being armed with any offensive weapon or instrument or being together with one other person or more, robs any person is guilty of felony, and is liable to imprisonment for life."

Three persons effected the robbery, and each was armed for the very purpose of carrying out the robbery. The fact that the first appellant was not in the bathroom and did not himself physically threaten the wife is beside the point. He was undoubtedly a party within the meaning of s.21 of the Penal Code to an offence under s.293 (1)(a).

Similarly in the case of the second appellant the only matter put forward by him in support of the conviction appeal is that he did not participate in taking the cash and the handbags from the bedroom. That of course is quite irrelevant, as is the fact that he did not take or have possession of those items. On the uncontested facts his guilt as a party to the offence charged is beyond challenge.

The appeals against conviction cannot succeed.

Sentence:

The first appellant was 28 years of age and the time of the offence. He has no previous convictions. The second appellant was aged 27 years, without previous convictions. Both appellants were in custody on remand for 1 year 5 months prior to sentence. We agree with the Judge that there is little if anything to mitigate the gravity of this offending, which involved a forced intrusion into a home and the use of force to carry out a robbery. Three persons were involved, and they had armed themselves and taken steps to avoid identification.

Counsel for the State advised us that the tariff for offences under s.293(1)(a) appears to range from 2 years to 7 years imprisonment, depending of course on the circumstances of the particular case. This case must be at the upper end of the range. In Fiji the New Zealand sentencing guidelines for this type of offence appear to have relevance as for example R v. Moananui [1983] NZLR 537 is frequently relied upon. It should perhaps be noted by sentencing Judges that that authority has been reviewed by the New Zealand Court of Appeal – see R v. Mako [2000] 2 NZLR 170. In that case the Court sets out a helpful consideration of the factors which are relevant to such offending, and the likely range of penalty which may be expected to be imposed.

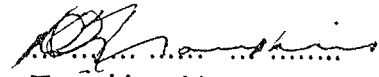
There are two matters which cause us a measure of concern in the present case. First, the appellants had both been on remand in custody for 1 year and 5 months. The 7 years imposed on the first appellant is an effective sentence of nearly 8 ½ years must be at the upper end of the range available, particularly when there was no physical injury inflicted on this victim and the value of the stolen property was small. In saying that we do not underestimate the seriousness of the threat of violence.

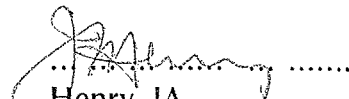
Secondly, we find it impossible to distinguish different degrees of responsibility as between these two appellants. Both took part knowingly in everything which took place in so far as the robbery was concerned. The second appellant held the wife under the threat to kill, while the other two proceeded to carry out the intention of all three. The responsibility of the second appellant, who was sentenced to 5 years imprisonment, is in our view equal to that of the first appellant who carried out the theft. No reason for the distinction is expressed in the sentencing notes, and we are left with the impression that perhaps the Judge was influenced by the fact that the first appellant was alleged to have been personally involved in an assault on the husband - but he was not charged with assault on the husband.

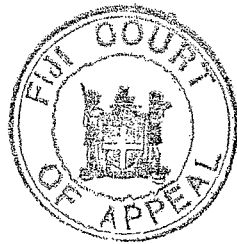
For these reasons we are satisfied that the interests of justice require an adjustment to the sentence of the first appellant to bring it into line with that imposed on the second appellant. We are not persuaded that the latter sentence is in any way excessive, or that it was based on any wrong principle. An effective sentence of 6 years and 5 months for this offending was justified.

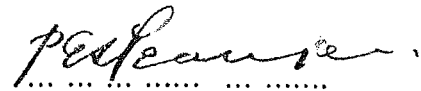
Conclusion

Both appeals against conviction are dismissed. The application of the first appellant for leave to appeal sentence is granted and that appeal is allowed. The sentence of 7 years imprisonment is quashed and a sentence of 5 years imprisonment is imposed in its place. The application by the second appellant for leave to appeal sentence is dismissed.


Tompkins, JA


Henry, JA




Penlington, JA

Solicitors:

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