

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

Criminal Appeal No. AAU 0025/06
(High Court Criminal Appeal HAA 53/04L)

BETWEEN:

SEREMAIA NAICORI

Appellant

AND

THE STATE

Respondent

Coram: Ward, P
Barker, JA
Scott, JA

Hearing: 7 March 2007

Counsel: *Appellant in person*
R. Gibson for the Respondent

Judgment: 9 March 2007

JUDGMENT OF THE COURT

[1] The Appellant, with leave granted, appeals against a sentence of ten years imprisonment imposed upon him by the Ba Magistrates' Court on 23 September 2003 and confirmed by the High Court at Lautoka on 13 August 2004.

- [2] The Appellant's sole ground of appeal is that the sentence imposed upon him was so disproportionate to those imposed upon several of his co-accused that it was wrong in law (Court of Appeal Act – Cap. 12 – Section 22 (1A) (1)).
- [3] On 21 September 2003 the Appellant, together with five others, variously equipped with cane knives, iron rods, a kitchen knife, bolt cutters and pliers went to Padarath's chicken farm at Navau Ba. Arriving at the farm at about 10.30 p.m. they gained access to the farm where a number of employees were working a night shift. The six accused punched and threatened the employees, tied their arms and legs and robbed them. The six accused then broke into the Padarath residence where they assaulted Mr. Padarath and several other members of his family inflicting a number of quite serious injuries before making off with jewellery and cash.
- [4] The Resident Magistrate, before whom the Appellant and another accused, one Taniela Rasuaki, pleaded guilty to five counts of robbery with violence described what had occurred as:

"an act of terror ... not to be tolerated under any circumstances."

The Appellant (who had one previous conviction for robbery with violence in 2001) and Rasuaki (who was of previous good character) were then both sentenced to a total of ten years imprisonment.

- [5] On 13 August 2004 the High Court at Lautoka (Connors J) dismissed an appeal by the Appellant and Rasuaki. After considering sentencing guidelines and the totality principle the Judge concluded that the sentence was within the sentencing range and, in the case of the Appellant was, if anything, lenient.
- [6] The remaining four co-offenders were located some time after the Appellant and Rasuaki had been dealt with by the Ba Magistrates' Court. One of them pleaded guilty to similar charges in the Lautoka High Court in March 2005 and received seven years imprisonment from a different judge.
- [7] In June 2005 two further co-offenders pleaded guilty to similar charges and were both sentenced by Connors J to 5½ years imprisonment.
- [8] In May 2006 the last co-offender was convicted after trial in the High Court at Lautoka and was sentenced by another judge to 5 years imprisonment.
- [9] When granting leave to appeal, this Court asked the Director of Public Prosecutions to ascertain whether there was any significant difference in the part played by each of the six accused involved in the invasion of Padarath's chicken farm. The DPP has now advised us that the full record of the various proceedings is no longer available and that therefore there is nothing to suggest any material differences. We are therefore obliged to treat each offender as being equally culpable.

[10] The DPP accepts that "a prima facie case of disparity of sentence exists between the Appellant and the other co-accused dealt with in the High Court". Where such a disparity exists the question is whether:

"right thinking members of the public, with full knowledge of the facts and circumstances, learning of the sentences would consider that something had gone wrong with the administration of justice."

(per Lawton L.J. in Fawcett (1983) 5 Cr. App R (s) 158).

[11] In R v. Lawson [1982] 2 NZLR 219, 222, 223 the New Zealand Court of Appeal explained that mere differences in the length of sentences imposed on co-accused are not of themselves evidence of disparity. The Court went on to observe that:

"Sentencing is not exact science and the circumstances of one offender can rarely be closely compared with those of another. The sentencing judge must not only consider the relative involvement of the individuals in the offence but also the mitigating factors affecting each. But a marked difference in the sentences imposed on co-offenders and for which no justification can be shown, may be of importance to the administration of justice generally in that such a marked and unjustified difference will tend to bring the administration of justice into disrepute. The courts must bear in mind

that public confidence in the administration of justice is best preserved if justice appears to be administered evenhandedly. It is for this reason that the disparity in sentences imposed on co-offenders may justify a reduction in the sentence imposed on one which would otherwise be appropriate."

[12] In the present case, two co-offenders (one of whom was of good character) pleaded guilty at the first opportunity in the Magistrates' Court and received sentences which were twice as long as three of their co-accused who were not finally dealt with (by the High Court) until several years after the crime was committed. In our view, this disparity is both unjustifiable and gross.

[13] In Payne [1950] 1 All ER 102 Goddard CJ referred to the dangerous consequences of dealing with co-accused on different occasions. The practice, he explained:

"can only lead to different sentences being passed [which] will naturally leave a sense of grievance in the minds of prisoners."

[14] In Weekes (1980) 74 Cr. App R 161 the English Court of Appeal stated:

"This Court has said on numerous occasions that it should be left to the judge who may sentence those who have pleaded guilty to sentence all. There may be exceptions but generally it is clearly right, it is clearly fairer and it is better for the public and the

defendants concerned that all are sentenced at the same time by the same court whenever that is possible."

[15] We appreciate that where different accused are located at different times it may not always be possible to ensure that all are dealt with together. In these circumstances a heavy responsibility rests on judges, magistrates and counsel alike to take every care to ensure that disparate sentences of the kind involved in this appeal are not imposed. Given the particular and indeed peculiar nature of the offences committed by these co-accused we cannot fail to express our surprise that such obviously disparate sentences could have been imposed.

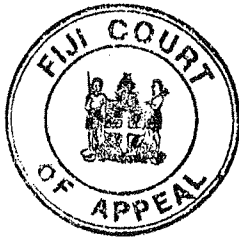
[16] In our view the sentences imposed in the Magistrates' Court on two young men who had pleaded guilty were on the high side. On the other hand the sentences imposed by the High Court sitting at first instance were plainly too lenient. We do not know why the State did not seek leave to appeal against those sentences.

[17] In the difficult circumstances resulting from the piecemeal way in which the six co-accused were dealt with, there can now be no wholly satisfactory outcome. The least unsatisfactory course is to allow the appeal and reduce the Appellant's sentence to one of 6 years imprisonment.

[18] Before leaving the matter we think it right to indicate that this Court would give favourable consideration to an application for leave to appeal out of time by the co-accused Rasuaki.

RESULT

1. Appeal allowed;
2. Total sentence reduced to 6 years imprisonment with effect from 26 September 2003.



Ward

Ward P.

R.D. Barker

Barker J.A.

Scott

Scott J.A.

Solicitors:

Director of Public Prosecutions for the Respondent