

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

CRIMINAL APPEAL NO. AAU0058 OF 2005S
(High Court Criminal Action No. HAA 145 of 2004S)

BETWEEN:

MILIO NAKOROLUVU

Appellant

AND:

THE STATE

Respondent

Coram:

Ellis, JA
McPherson, JA

Hearing:

Tuesday, 12th June 2007, Suva

Counsel:

Appellant in Person
D Goundar for the Respondent

Date of Judgment: Monday, 25th June 2007, Suva

JUDGMENT OF THE COURT

- [1] In this case the appellant appeared in person and relied on his written submission filed on 28 April 2007. Counsel for the State filed a succinct submission which correctly outlines the substance of the matter. We can do no better than reproduce it.
- [2] The appellant was charged in the Magistrates' Court with robbery with violence (count 1). Unlawful use of motor vehicle (count 2), assaulting police officer in due execution of his duties (count 4), driving motor vehicle without a valid licence

(count 5), and driving motor vehicle in contravention of the third party policy (count 6). On 13 April 2004, the appellant was convicted on his guilty plea on the three traffic offences (counts 2, 5 and 6) and sentenced to a total of 6 months imprisonment. On 15 October 2004, the appellant was convicted of the remaining charges after a contested hearing. He was sentenced to 5 ½ years imprisonment for robbery with violence and 9 months imprisonment for assaulting a police officer in due execution of his duties, the later to be served concurrent with the former.

- [3] The appellant appealed his sentence to the High Court. On 25 February 2005, Shameem J dismissed the appellant's appeal with the following concluding remarks:

"In respect of sentence, the sentence passed was within the tariff, and reflected the gravity of the offending. It also took into account all mitigating circumstances."

- [4] On 11 August 2005 the appellant filed an untimely appeal against sentence to this Court. The time to appeal is within 30 days of the date of decision (s.26(1) of the Court of Appeal Act, Cap.12). The appellant was out time by nearly 6 months. On 17 February 2006, Ward P refused leave to appeal out of time.
- [5] The appellant has renewed his application for leave but has erroneously labeled it as a petition to the Supreme Court. The proper venue to renew an application for leave that was refused by a single judge is the full Court of Appeal (s.35(3) of the Court of Appeal Act). This being a second appeal, the right of appeal is restricted to issues of law only (s 22 of the Court of Appeal Act).
- [6] For the appellant to succeed in the application, he must show good cause for the late filing of appeal, the merits of the appeal, and the absence of prejudice to the State (*State v Patel* Criminal Appeal No. AAU0002 of 2002S).

[7] In his application, the appellant has not advanced any reasons for the delay in filing his appeal. Another hurdle for the appellant is that his right of appeal is confined to an issue of law only. The issues presented by the appellant can be summarized as follows:

1. The victim did not suffer serious injuries.
2. Sentence is manifestly excessive.
3. Disparity between his and the sentences of the co-offenders.
4. Disparity between his and the sentences in other unrelated cases.

[8] None of the above issues raise a question of law only. The first issue is purely a question of fact. There is no right of appeal against the severity of the sentence under section 22 of the Court of Appeal Act. The disparity between the sentences of the offenders requires the Court to look into the factual basis used by the learned Magistrate to arrive at the different sentences. For instance, the learned Magistrate considered the age, remorse, family circumstances, and previous clean record of the first accused to arrive at the sentence of 4 years imprisonment. Not all those circumstances were present in the appellant's case, and the learned Magistrate was justified to impose the sentence of 5 ½ years imprisonment in his case. Clearly this not a case where the sentence imposed on co-offenders were so disproportionate as to leave the appellant, with a justifiable sense of grievance. As far as other unrelated cases with different circumstances are concerned, they only provide assistance in terms of the tariff for such offences (*Bote v State* Criminal Appeal No. AAU0011 of 2005S).

[9] In our view and on the merits of the matter we agree with Shameem J that the sentences totaling 5½ years imprisonment are within the range for such offending and the matters raised by the appellant do not persuade us otherwise.

[10] No satisfactory reason for the late application to appeal is advanced and no question of law is raised. Leave to appeal is accordingly refused.

A. A. Ellis

Ellis, JA



B. McPherson JA

McPherson, JA

Solicitors:

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

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