(24)

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Criminal Appeal No. AAU 0061/07

BETWEEN:

MITIELI NAIKELEKELEVESI

Appellant

AND

THE STATE

Respondent

Coram:	Mr. Justice Davendra Pathik - Presiding Mr. Justice Isikeli Mataitoga -Justice of Appeal Mr. Justice Izaz Mohammed Khan - Justice of Appeal
Hearing:	18 June 2008.
Counsel:	Mr. F. Vosarogo [Director, LAC] for Appellant Mr. N Nand for the Respondent
Judgment:	27 June 2008

JUDGMENT OF THE COURT

1. This is an appeal from a judgment of Mr. Justice Govind in the High Court at Lautoka in which he sentenced the appellant to 8½ years imprisonment in total on the 4 June 2007.

Background

2. The appellant was charged with two counts of Robbery With Violence, contrary to section 293(1) of the Penal Code Cap 17 and one count of Attempted Robbery With Violence: contrary to sections 380 & 293 (1) of the Penal Code Cap 17. He pleaded guilty before the High Court. When entering his plea he advised the court that he did so voluntarily, without any undue influence from anyone.

3. A summary of facts was outlined in Court and the appellant agreed to it. This was a significant concession given that the sentencing would be largely determined from the agreed facts.

4. The appellant was convicted as charged and sentenced to 8½ years imprisonment on the first count of *Robbery with Violence*; 8 years imprisonment for the second count of *Robbery With Violence* and 5½ years imprisonment for the count of *Attempted Robbery.* These terms of imprisonment were ordered by the High Court to be served concurrently, thus making the total term of imprisonment for the appellant for the three counts to be 8½ years imprisonment.

5. The appellant filed his Leave to Appeal against the sentence in the High Court, on 24 April 2007. The grounds of appeal were contained in two letters from the appellant to the court dated 12 June 2007 and 17 April 2008. The leave application was heard by Justice of Appeal Mr. John Byrne on 28 January 2008 and he granted leave under section 35(1) of the Court of Appeal Act Cap 12. He also limited the ground for leave which was granted to the issue of parity in sentences and in that context whether the 8½ years imprisonment was excessive.

6. Following leave to appeal, the appellant has since filed his amended grounds of appeal and this is its determination. This application is under section 21(1)(c) of the Court of Appeal Act Cap 12. Under this provision the appellant, with the leave of this court, may appeal against sentence, unless it is a sentence fixed by law.

Grounds of appeal

7. We are grateful to Mr. Vosarogo, counsel for the appellant for his written submission filed in court and his oral submission during the hearing of the appeal.

8. The appellant's basic complain is that the total sentence of 8½ years is excessive. Further, it was a sentence made in error of law and that alleged error was the decision of the learned Judge to take 10 years as the starting point in making the sentence determination in the two counts of the robbery with violence charges in the indictment.

9. The appellant's written submission states:

> '[6] In particular, it is against the severity of the total sentence of 8½ years imprisonment.

[7] The ground of appeal is premised upon the principle of parity and excessiveness of sentence'

10. The appellant further submits that the failure of the sentencing court to make structured reference to a list of issues, made the sentence harsh and excessive and unprincipled. In this regard the Australian High Court case of **House v R (1936) 55 CLR 499** was cited in support. During the appeal hearing counsel for the appellant submitted that the robbery in this instance was not in a home and therefore the serious approbation the court attaches to 'home invasion' cases should not have been applied.

11. The appellant also submitted that the 10 years starting point of the sentence determination for the two counts of robbery with violence was wrong in law. This was supported on the factual claim that the appellant's role was minor, that of a watchman and the fact that the place robbed was a commercial premises not a home.

12. On the issues of parity of sentences, the appellant in his written submission referred to three[1] recent cases in the High Court involving robbery with violence cases, the sentences passed were 6 years, 5½ years and 7 years respectively. It was not submitted on behalf of the appellant what these cases show, but it reasonable to suggest that in the appellant's view, the proper sentence in this case should have been in the range of the sentences in those three cases. Those were cases where the court could infer the parity in sentences.

Admitted Facts

13. Before the appellant was sentenced in the High Court, a summary of facts was put to him, which he admitted. These admitted facts are set out in full below because they were the basis of the sentence passed by the learned trial Judge:

> ***'On 16 of February 2006 between 11.30pm and 1 am, the accused Mitieli Naikelekelvesi and others went to the house of one Tulsi ram s/o Ganga Dharam at Naikabula Road, Lautoka with the intention to rob him. Mr. Tulsi Ram is the owner of Tulsi Construction Company Ltd.***
>
> ***The accused and others were armed with cane knives, timber and stones and upon entering Mr. Ram's compound, confronted a Fijian and Indian security guard. The Fijian security guard after being confronted ran to the back of the house to secure the back door at the rear porch. The accused and others threatened the Indian security guard with cane***

[1] **State v Jeke Vakararawa**, Criminal Case No: HAC 047 of 2006; **State v. Noa Yasa**, Criminal Case No: HAC 030 of 2005; **Wainiqolo v The State**, Crim App Case No: AAU 0061 of 2005.

knife and he did not resist. The accused and another than robbed him off his wristwatch worth $60.00 and his *torch worth $5.00. The accused with another after robbing the Indian security guard than took him to the back and guarded him.*

The Fijian security guard whilst securing the back was attacked by other accomplices of the accused and he fell unconscious. They also robbed him off $100 while he was unconscious. When the Fijian security guard was unconscious, accomplices of the accused went to the bedroom of Mr. Tulsi Ram and broke all the windows. After all the windows were broken they than used a bolt cutter to break the burglar bars. Mr. Ram who was inside the bedroom at that time used a cane knife to retaliate against the robbers in an attempt to frighten them away. The robbers struck a cane knife and it injured Mr. Ram on the left hand. They also threw stones, coconut and block of wood at him that caused injuries to his body. Whilst this was going on, accused and accomplices heard a car tooting its horn from the front gate. They decided to leave the premises and ran away.

The Fijian security guard and Mr. Tulsi Ram were conveyed to Lautoka Hospital for medical treatment as both sustained serious bodily injuries from the attack. Mr. Ram was also admitted.

Relevant investigations were immediately carried out whereby accused and others were arrested. They were interviewed under caution and charged for the alleged offences by police.

The accused Mitieli admitted in his caution interview that he was part of the group that committed the alleged offence. He also admitted that he was the one that robbed the Indian security guard off his wristwatch. He also admitted in his formal charge statement to police that he was only a watchman outside and that he did not cause injury to anyone.

14. Before the respondent's arguments are referred to, the setting out of the admitted facts is critical in evaluating whether the submission of the appellant is based on the facts of the case here or not.

15. Counsel for the respondent has filed detailed written submissions addressing all the issues raised by the appellant. We are grateful for those.

16. During the appeal hearing he stressed that, before this court is minded to interfere with the sentences passed by the learned High Court Judge we must be satisfied that the

sentence he passed was in error of law or that he acted on incorrect principles or that he considered irrelevant factors in determining the sentence. Counsel for respondent submits that none of the above exists in this case. In his view the sentence is not excessive and this court should uphold it.

Appeal Determination

17. This court in **Raymond Sikeli Singh & Ors v The State [2004] FJCA 8;AAU 0008 of 2003** said the following with regard to sentencing in cases of robbery with violence:

> *' The starting point in determining what sentence are appropriate for offences of this kind here is the seriousness with which it is regarded by the State which defines the crime and imposes the maximum penalty. In Fiji robbery with violence carried with it a maximum penalty of life imprisonment. It needs to be said therefore that the state places it as an offence in the most serious category..... .*
>
> *The second principle is to ensure that as far as possible sentencing judges in determining the severity of the sentence take into account those factors which acting on behalf of the community may be seen as significant. These may well vary from time to time which explains why making a comparison between sentences imposed a considerable time ago with those imposed more recently is not always a helpful exercise.'*

18. Some of the circumstances of the offence that would significantly increase the severity of the sentence are:

> *' The judge ..was right to express concern at the increasing prevalence of crimes of this kind in the area where this offence occurred. The need for deterrence in respect of a particular kind of offending is proper concern in arriving at appropriate response to offending in a particular case.**[Raymond Singh Supra]***

19. In **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** this court said:

> *'It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the*

relevant considerations, then the appellate court may impose a different sentence.'

And the Court further said:

'An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the high Court and the Court of appeal for offences of the type in question to determine the appropriate range of sentence.'

20. In considering the appellant's submissions, it suffered two basic error. The first was an error of fact in the appellant's submission that the premise that was robbed and severely damaged was a commercial premises and not a home. When this was pointed out to counsel for the appellant he did not disagree. It is a fact that the property robbed was the home of Tulsi Ram who was the owner of Tulsi Ram Construction Ltd.

21. The second error was based on a misunderstanding of the basis of a sentencing court's choice of starting point in determining a sentence. Counsel for the appellant attacked the starting point of 10 years in the sentence determination in the High Court on the basis of ' the failure of the sentencing court to make structure reference to the factors that were considered by this court in **Sakiusa Basa**[2]**.**

22. In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.

23. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence.

[2] Sakiusa Basa v. The State [2006] FJCA 23; AAU 0024 of 2005.

24. In this case, the learned High Court Judge did just that when determining the starting point of the sentence of 10 years, when he said

> *'However, I cannot ignore the rampant nature of this type of crime, the terror and fear that is inflicted on those whose homes are invaded in the middle of the night. A person's home which ought to be a bastion of security is being turned in fortress with iron grills and other safety devices. But even then that was not enough in this case. I also take cognizance of the fact he was not a major player but as a joint offender he is liable for the acts of his co-offenders. But I place little reliance on the assertion that he was led into this by others, as he is not a stranger to this type of offending.'* [Page 24 of Court Record]

25. The learned trial Judge in our view correctly referred to the features of the case just quoted above, because they are the very factors that assist him in choosing the starting point in his sentence determination. In doing so he acted properly and in accordance with the principles of sentencing practice in the Fiji courts.

26. In **Raymond Singh** this court observed the following with regard to starting points in sentencing:

> *'The Court noted that for arriving at a starting point a combination of factors is significant and for the purpose of this case it is enough to say the Court held that the starting points for serious armed robbery of commercial property start at 6 or more years. Where there is greater risk of harm or actual violence is used the starting point was said to be 8 years or more. The Court noted that in the case of very serious armed robberies the starting point of about 10 years would be appropriate. Starting points are no more than that. The appropriate penalty must depend upon the impact of the significant factors in the case.'*

27. The Supreme Court in **Joji Waqasaqa v The State; (2006)FJSC Crim App No: CAV 0009 of 2006** in commenting on a sentence of 6½ years imprisonment for one count of robbery with violence said:

> 'In our view, the sentences were very light for a planned armed robbery with violence and stolen property of this magnitude. We note that the Court of Appeal recently has suggested that its earlier decision may need to be reconsidered in the light of continuing offences of this nature being committed by the same offenders (Sakiusa Basa v. The State, Criminal

Appeal No. AAU 0024 of 2005). The statutory maximum for an offence of robbery with violence is imprisonment for life[Penal Code, section 293(1)]. The two principal offenders were fortunate that their sentences were not the subject of appeal by the state.'

28. On the facts of this case, this was a planned robbery on the residence of Tulsi Ram, where a considerable amount of physical violence to property and persons was inflicted by the offenders, of which the appellant was one. It is precisely the kind of case where the sentences to be imposed must be on higher end and in the opinion of this court the 8½ years imprisonment was not harsh nor excessive.

29. The court was not impressed with the submission by the appellant that he played a minor role for two reasons. First, he did not play a minor role because by his own admission as revealed in the admitted facts he was the robber that stole the wrist watch from one of the security guards. Second, since the criminal enterprise in question was carried with pre-planning and a joint operation where all the participants are in law liable as a principal offender.

30. On the need to observe the Principles of Parity in Sentencing, the appellant submitted that on the basis of the three High Court cases he referred this court to in his written submission the sentence should have been in the range of 5-7 years.

31. We simply say this, that in the light of the clear desire to increase sentences for robbery with violence cases given its prevalence, as evident in recent judgments of this court referred to above and the Supreme Court in **Joji Waqasaqa [supra],** sentences of the kind passed by the learned trial judge in this case will probably set the new benchmark.

32. In addition we noted that even in recent sentences of the High Court in **State v Filimone Vetau & Ors [2008] FJHC ; HAC 0055 of 2007** where the sentence for the robbery with violence count was 8 years imprisonment for Filimoni Vetau was passed; in **State v Maikeli Rawaqa & Segran Murti [2008] FJHC 32; HAC 0042 of 2004** for the Robbery with Violence they were sentenced to 8 years and 10 years imprisonment respectively and in **State v. Dick Sheped, Mahendra Jeet Maharj and Guston Kean [2008] FJHC 82, HAC 158 of 2007,** the third accused was sentenced to 11 years imprisonment with fixed minimum term of 9 years imprisonment to be served.

33. From the above High Court cases it is clear that on the claim of lack of parity in the sentence passed against the appellant, there is little merit in it. We must dismiss this ground of appeal as having no merit.

34. In conclusion, we find no merit in the appeal against sentence. We uphold the sentence passed by the learned trial judge. We dismiss the appeal accordingly.

Davendra Pathik P

Isikeli Mataitoga J.A.

Izaz Khan J.A.