Office

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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0100 OF 2007
HIGH COURT CRIMINAL APPEAL NO.: HAA 69 OF 2007

BETWEEN:

SAVENACA RAQAUQAU

-APPELLANT-

AND:

THE STATE

-RESPONDENT-

Coram:	Byrne, JA Goundar, JA Scutt, JA
Hearing:	Friday 20th June, 2008
Counsel:	Appellant in Person Mr. P. Bulamainaivalu for the Respondent
Date of Judgment:	Monday 4th August, 2008

JUDGMENT OF THE COURT

Background

[1] The appellant was charged with the following offence:

Statement of Offence (a)

ROBBERY WITH VIOLENCE: Contrary to Section 293(1)(b) of the Penal Code (Cap.17).

Particulars of Offence (b)

SAVENACA RAQAUQAU on the 22nd day of October, 2005 at Brown Lane, Nausori in the Central Division assaulted and robbed one ATISH NARAYAN s/o SATISH NARAYAN of $71.00 cash and immediately before such robbery used personal violence on the said ATISH NARAYAN s/o SATISH NARAYAN

[2] On 11 April 2007, the appellant pleaded guilty to the charge and was sentenced to a term of 5 years imprisonment by the Magistrates' Court at Nausori. The appellant appealed against conviction and sentence to the High Court.

[3] On 27 July 2007, the High Court dismissed the appeal against conviction but allowed the appeal against sentence by reducing the term of imprisonment from 5 years to 4 years.

[4] The appellant then filed a timely appeal against sentence to this Court. On 29 November 2007, Byrne J, sitting as a single judge of appeal, granted leave to appeal sentence on the ground of disparity between the appellant's sentence and that of ***Josese Tuwaqa***, Criminal Appeal No. HAA 0036 of 2007. We note that this ground was not advanced in the High Court but, since the appellant is unrepresented, we consider the issue on merits. This being a second appeal, the right of appeal is restricted to a question of law alone (see, s. 22 of the Court of Appeal Act).

Facts

[5] On the evening of 22 October 2005, the complainant, Atish Narayan, aged 18 years, after finishing off work at Taras Supermarket in Nausori Town, was walking on a back road, when he was approached by the appellant and a co-accused. The

appellant grabbed the complainant from the back and held his hands, while the co-accused punched him. They stole $71.00 in cash from the complainant and fled. The appellant was subsequently arrested on the same evening in a night club when the complainant identified him to the police. He was interviewed under caution and admitted the offence.

Consideration of Appeal

[6] The appellant cites the case of ***Josese Tuwaqa v The State***, Criminal Appeal No. HAA 0036 of 2007 to support his contention that the sentence imposed on him is disproportionate to the sentence imposed on Josese Tuwaqa who was also convicted of robbery with violence but in an unrelated case.

[7] In ***Tuwaqa's*** case, a term of 2 ½ years imprisonment was imposed for robbery with violence and upheld by the High Court on appeal to that Court because the offender was a serving prisoner and the 2 ½ years was made consecutive to the pre-existing sentence, resulting in a total sentence of 8 years and 1 month. The total sentence imposed on Tuwaqa was far more than that imposed on the appellant. For this reason we find little substance in the appellant's argument based on the parity principle.

[8] In ***Sikeli Singh and Others v The State***, Criminal Appeal No. AAU0008 of 2000S (19 March 2004), this Court said:

> "As far as it is possible to do so in a just society people should be treated in a similar way in similar circumstances. The difficulty comes in making an adequate comparison sufficient to determine what are similar circumstances. In every case the weight which will be given to particular factors must differ and inevitably it will often be extremely difficult to determine what weight was given in individual cases to individual factors. To that extent comparisons can never be mathematical and never exact. Even persons involved in the same offence may need to be dealt with in different ways (as occurred in this case) because their participation is different or because different considerations apply to them. That will for

> example be the case where one offender is very young and others are not."

[9] In ***Bote v The State,*** Criminal Appeal No. AAU0011 of 2005S (11 November 2005), the Court said:

> "Two other cases were cited as having involved offenders with worse records, and a greater number of charges than those of which the appellant was charged.
>
> The parity principle, which applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence, with a justifiable sense of grievance (***Lowe v The Queen*** (1984) 154 CLR 606 and ***R v Fawcett*** (1983) 5 Cr. App. R(S) 158), does not apply in such a situation.
>
> Otherwise, the identification of unrelated cases, with different objective and personal circumstances, which form but part of a pattern of sentencing, provides only limited assistance. Of more relevance is the tariff, as determined by guideline judgments, such as those which applied here."

[10] The principle in ***Bote*** is applicable to this appeal. Citing sentences in other unrelated cases is of limited relevance in determining the appropriateness of the sentence subject of an appeal. The proper approach to a sentence subject of an appeal was considered in the case of ***Bae v The State*** Criminal Appeal No. AAU0015 of 1998S (26 February 1999). The 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 relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (***House v The King*** (1936) 55 CLR 499)."

[11] Robbery with violence is considered a serious offence because the maximum penalty prescribed for this offence is life imprisonment. The offence of robbery is so prevalent in the community that in ***Basa v The State*** Criminal Appeal No.AAU0024 of 2005 (24 March 2006) the Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those of New Zealand, as had been the previous practice, because the sentence provided in Penal Code is similar to that in English legislation. In England the sentencing range depends on the forms or categories of robbery.

[12] The leading English authority on the sentencing principles and starting points in cases of street robbery or mugging is the case of ***Attorney General's References (Nos. 4 and 7 of 2002) (Lobhan, Sawyers and James)*** (the so-called 'mobile phones' judgment). The particular offences dealt in the judgment were characterized by serious threats of violence and by the use of weapons to intimidate; it was the element of violence in the course of robbery, rather than the simple theft of mobile telephones, that justified the severity of the sentences. The court said that, irrespective of the offender's age and previous record, a custodial sentence would be the court's only option for this type of offence unless there were exceptional circumstances, and further where the maximum penalty was life imprisonment:

- The sentencing bracket was 18 months or 5 years, but the upper limit of 5 years might not be appropriate 'if the offences are committed by an offender who has a number of previous convictions and if there is a substantial degree of violence, or if there is a particularly large number of offences committed'.

- An offence would be more serious if the victim was vulnerable because of age (whether elderly or young), or if it had been carried out by a group of offenders.

- The fact that offences of this nature were prevalent was also to be treated as an aggravating feature.

[13] Applying these principles to the present appeal, we are satisfied the High Court correctly considered the appellant's appeal against sentence. The sentence was reduced from a term of 5 years imprisonment to a term of 4 years imprisonment. All relevant factors were taken into consideration in arriving at the term of 4 years imprisonment. The sentence of 4 years imprisonment is within the tariff.

[14] We are satisfied that no error of law is shown in relation to sentence.

Result

[15] The appeal is dismissed.

Byrne, JA

Goundar, JA

Scutt, JA

At Suva
Monday 4th August, 2008

Solicitors:
In Person for the Appellant
Office of the Director of Public Prosecutions, Suva for the State