

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0022 of 2008

BETWEEN:

JOELI VULAWALU

Appellant

AND:

THE STATE

Respondent

Coram: Byrne P
Goundar JA
Temo JA

Hearing: 31st May 2010

Counsel: Appellants in person
Ms S. Puamau for State

Date of Judgment: 11th June 2010

JUDGMENT OF THE COURT

- [1] The appellant was convicted on his own guilty pleas in the Magistrates' Court at Suva on charges contained in two separate cases.
- [2] The learned magistrate sentenced him as follows:

File No. 984/07

Count 1: Robbery with Violence: 6 years imprisonment.

Count 2: Unlawful use of Motor Vehicle: 4 months imprisonment.

These two sentences be served concurrently.

Total = 6 years imprisonment

File No. 752/07

Robbery with Violence: 4 years imprisonment.

All these i.e. 6 years and 4 years to be served consecutively.

Total = 10 years imprisonment.

- [3] The appellant appealed against conviction and sentence to the High Court. On 8 February 2008, the High Court dismissed the appeal against conviction but allowed the appeal against sentence by reducing the total sentence from 10 years to 7 years imprisonment.
- [4] He filed a timely appeal to this Court and on 11 September 2008 Hickie JA refused him leave to appeal after concluding no error of law was shown by the appellant.
- [5] Since this was a timely appeal against a judgment of the High Court in its appellate jurisdiction under section 22 of the Court of Appeal Act, the appellant was not required to obtain leave to appeal. Section 22 reads:

- (1) Any party to an appeal from a magistrate's court to the High Court may appeal under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate's court.

(1A) No appeal under subsection(1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground –

(a) the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.

[6] The appeal to this Court is against sentence. Thus the question for this Court is whether the sentence imposed on the appellant was an unlawful one or was passed in consequence of an error of law.

[7] The two grounds of appeal presented by the appellant are:

(1) that the learned Judge erred in law when he failed to properly apply and consider the totality principle that was necessary to be applied in all the circumstances of the cases.

(2) that the cumulative sentence of 7 years was harsh and excessive and failed to properly consider whether his role in the offences justified the imposition of such sentences.

[8] The facts admitted by the appellant disclose a joint enterprise. In Case No: 984/07, the appellant admitted being part of a group of ten armed men who entered the house of the complainant and inflicted physical violence on him to rob him. The robbery was committed at night and in the presence of the complainant's spouse and two children aged 9 and 4 years. Not only substantial properties were stolen, but the complainant was seriously injured and was hospitalized for a few days.

[9] In Case No: 752/07, a similar modus operandi was used to rob the complainant in his house at night. The complainant's elderly mother was threatened and his 7-year old daughter's gold chain was snatched during the robbery. The exact role played

by the appellant was unknown. However, in this case, no physical violence was inflicted on the occupants.

[10] The learned magistrate considered the two robberies as separate offences involving different victims. He ordered the sentences for the robberies to be served consecutively, making a total sentence of 10 years imprisonment.

[11] On appeal to the High Court, the learned judge reduced the total sentence from 10 years to 7 years imprisonment by giving the following brief reasons:

“The appeal against sentence was on the basis that it was harsh and excessive. I find the trial Magistrate’s sentence in each of the cases principled and correct: see *Sakiusa Basa v The State* [2006] FJCA 23 and *Tomasi Vosalevu v The State*, FCA Crim App Case No: AAU 02 of 2005. On the totality of the sentence and given the role played by the appellant, I would hold that 7 years would be fairer on the facts of the cases here.”

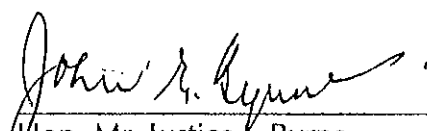
[12] In a recent judgment in the case of *Philip Fong Toy v. The State* AAU0099/08 we have disapproved the procedure of reducing the aggregate sentence when considering the totality principle. In that case, we said:

“The effect of the totality principle is to require a sentencer when ordering a series of sentences to run consecutively to consider whether the total sentence is too much and will have a crushing effect on the offender. If a sentencer concludes that making a series of sentences cumulative will have a crushing effect on the offender, then the sentences should be made concurrent. That is how the totality principle operates.”

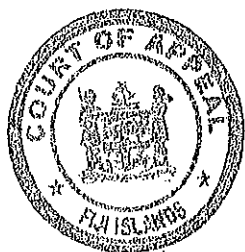
[13] The learned judge clearly made an error of law when he reduced the aggregate sentence instead of considering whether the sentences should be ordered to be served concurrently or consecutively.


- [14] However, the error was not prejudicial to the appellant. In fact he benefitted from the error by having his sentence reduced.
- [15] Since the appellant was unrepresented and in fairness to him, we clearly explained to him the risk of pursuing this appeal and the sentence being enhanced if we were to set aside the sentence of the High Court and reinstate the sentence of the Magistrates' Court.
- [16] The appellant informed us that he understood the risk but decided to proceed with the appeal.
- [17] During the hearing of the appeal and again in fairness to him, we invited the appellant to make submissions why his sentence should not be enhanced. He submitted that he did not physically participate in the robberies.
- [18] The facts admitted by the appellant clearly show he participated in the robberies. He was part of a joint enterprise and equally responsible for the offences regardless of his exact role.
- [19] These were indeed serious offences committed on different victims. Robbery with violence is a crime against person.
- [20] The learned magistrate was justified to order the sentences to be served consecutively. In our judgment it was wrong for the High Court to interfere with the discretion of the learned magistrate.
- [21] For the reasons given, we quash the sentence imposed on the appellant by the High Court and reinstate the sentence imposed by the Magistrates' Court. The effect of our judgment is that the appellant's total sentence is enhanced.

[22] The sentences for the two robberies are to be served consecutively, as ordered by the Magistrates' Court, making a total sentence of 10 years imprisonment.




Hon. Mr. Justice J. Byrne
President, Court of Appeal





Hon. Mr. Justice D. Goundar
Judge of Appeal



Hon. Mr. Justice S. Temo
Judge of Appeal

Solicitors:

Appellant in person

Office of the Director of Public Prosecutions for State