

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL AAU 0048 OF 2008
[Appeal from Suva High Court Criminal
Case No. HAC 158 of 2007]

BETWEEN: GUSTON F. KEAN

APPELLANT

AND: THE STATE

RESPONDENT

Coram : W. Marshall, JA
 K. Chitrasiri, JA
 S. Temo, JA

Counsels : Ms. S. Vaniqi for Appellant
 Ms. N. Wickramasekera for Respondent

Date of Hearing : 11 November, 2010

Date of Judgment : 25th November, 2010

JUDGMENT OF THE COURT

[1] The appellant was tried with two others, for the offence of "robbery with violence", contrary to section 293(1)(a) of the Penal Code, Chapter 17, at the Suva High Court, from 7th to 14th April 2008. On 16th April 2008, the High Court sentenced the appellant (accused No. 3) to 11 years imprisonment, Dick Shepard (accused No. 1) to 4 years imprisonment, and Mahendra Jeet Maharaj (accused No. 2) to 9 years imprisonment.

[2] The case concerned a man, his wife and two sons, aged 12 and 13 years, at the time. The man operated 8 taxis from R. B. Centre Point. On 2nd September 2005, at about 2.30am, he had \$12,000 in taxi business income in his drawer. His family was fast asleep at the time. Suddenly, his dogs were barking and eight masked men broke into his house, armed with bolt cutters, pinch bars and knives. His front door was smashed open. His family was threatened with serious injuries if they resisted. The men demanded money. They stole his \$12,000 and two watches, and fled the scene. According to the trial judge, the appellant was "the leader or one of the leaders" of this robbery. He played a critical role in the robbery.

[3] The appellant was dissatisfied with his conviction and sentence. On 14th July 2009, he filed his amended grounds of appeal on conviction. On 10th June 2010, he was granted leave to appeal on sentence.

[4] On conviction, his grounds of appeal were as follows:

- 1] *The learned Judge erred in fact and law in directing the assessors on the proceedings and outcome of the Voir dire regarding admissibility of the caution interview, and by doing so prejudice the appellant;*
- 2] *The learned Judge erred in law when he failed to draw his mind to the Turnbull warning requirements on identification and as such failed to properly direct the assessors on the law.*

[5] On sentence, the appellant's grounds of appeal were as follows:

- 1] *Disparity of sentence*
- 2] *The sentence was harsh and excessive*

[6] We will now deal with each ground.

[7] Ground 4(1): Direction on Voir dire Proceeding:

The appellant complained that, "the learned Judge erred in fact and law in directing the assessors on the proceeding and outcome of the voir dire regarding admissibility of the caution interview, and by doing so prejudice the appellant". We have

carefully looked at His Lordship's summing up, as a whole, to find out whether or not the appellant's complaint was substantiated. We find that it was always unhelpful to pick out certain parts of a summing up, and criticize the same, without considering it in the context of the summing up, as a whole.

8] In this case, although it was unwise to direct the assessors on the proceeding and outcome of the *voire dire* [page 33 of the record, 2nd paragraph], His Lordship nevertheless left it to the assessors to decide whether or not to accept or reject, part of or the whole caution interview statements. [See page 30 of the record, 1st paragraph, page 31 of the record, 3rd paragraph, page 32 of the record, last paragraph, page 33 of the record, 1st, 3rd, 4th and 5th paragraphs, page 35 of the record, 1st paragraph]. In other words, His Lordship properly directed the assessors, in their role, in accepting or rejecting the appellant's caution interview statements. As a result, it did not prejudice the appellant. This ground must therefore fail.

9] **Ground 4(2): R v Turnbull Warning:**

The appellant complained that, "the learned Judge erred in law when he failed to draw his mind to the Turnbull warning requirements on identification and as such failed to properly direct the assessors on the law". We have carefully considered the record to find out whether or not this complaint was made out. We found that the trial judge found there was no eye witness to link the appellant to the "robbery with violence", at the material time. There was therefore no need for the **R v Turnbull** warning. This ground must therefore fail.

10. **Ground 5(1): Disparity of Sentence:**

In **Singh v State**, *Criminal Appeal No. AAU 0008 of 2005*, this court said the following, "...Each of the appellants contended that other persons who had committed the offences similar to those with which they were charged had received lighter penalties. 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..." (Page 7).

11. In this case, the trial judge applied the above principle. His Lordship started with a 7 years prison sentence for each accused. He considered the common aggravating factors in paragraph 7 of his sentence. For Dick Shepard (accused No. 1), His Lordship considered the mitigating and other aggravating factors from paragraphs 9 to 13. For Mahendra Jeet Maharaj, His Lordship considered the additional aggravating and mitigating factors from paragraphs 14 to 20. For the appellant (accused No. 3), His Lordship considered the additional aggravating factors and mitigating factors from paragraphs 21 to 27. In our view, there was no disparity of sentence. Each accused was sentenced after taking into account their personal history, characteristics, and their individual role in the commission of the crime. This was in accordance with the principle mentioned above. This ground therefore fails and is accordingly dismissed.

12. **Ground 5(2): The Sentence was Harsh and Excessive:**

Robbery with Violence carries a maximum sentence of life imprisonment. The tariff for home invasion gang robbery is a sentence between 6 to 14 years imprisonment: *Sakiusa Basa v The State*, Criminal Appeal No. AAU 0024 of 2005, Fiji Court of Appeal; *Semisi Wainiqolo v The State*, Criminal Appeal No. AAU 0027 of 2006, Fiji Court of Appeal; *Singh v The State*, Criminal Appeal No. AAU 0008 of 2000, Fiji Court of Appeal and *Mitieli Naikelekelevesi v The State*, Criminal Appeal AAU 0061 of 2007, Fiji Court of Appeal. His Lordship carried out the proper sentencing approach, when he considered a starting point, the mitigating and aggravating

factors. His Lordship arrived at a sentence of 11 years imprisonment. This was well within the tariff, and it was not harsh and excessive. This was a dreadful home invasion robbery with violence. This ground therefore fails.

13. In summary, the appellant's appeal against conviction and sentence fails, and we accordingly dismiss it.

William R Marshall

Hon. Mr. Justice W. Marshall
Judge of Appeal



K. Chitrasiri

Hon. Mr. Justice K. Chitrasiri
Judge of Appeal

S. Temo

Hon. Mr. Justice S. Temo
Judge of Appeal

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