IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 08 OF 2018

(BA CRIMINAL CASE NO 355 OF 2015)

BETWEEN : **NALUVEA NASILASILA**

Appellant

AND : **STATE**

Respondent

Counsel : **Ms V. Narara for Appellant**
Ms L. Latu for the Respondent

Dates of Hearing : **9th and 13th August, 2018**
Date of Judgment : **17th August, 2018**

JUDGMENT

Introduction

1. On his own pleas of guilty and agreement of facts filed by the State, the Appellant was convicted by the Magistrate Court at Ba for one count of Attempted Robbery under Section 310(1)(a) read with Section 44 and one count of Assault Causing Actual Bodily Harm under Section 275 of the Crimes Act 2009.

2. The learned Magistrate on 2nd November 2017 sentenced the Appellant to a term of 3 years 5 months and 2 weeks' imprisonment on count one and 6 month imprisonment on count two to be served concurrently. No non-parole period was fixed.

3. Being dissatisfied with the sentence, the Appellant filed his petition of appeal through his counsel approximately three months out of time. The State did not object to leave being granted to the Appellant to file his appeal out of time thus leave was granted.

4. The charges upon which the Appellant was convicted read as follows:

FIRST COUNT

Statement of Offence

ROBBERY: Contrary to Section 44 and 310 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NALUVEA NASILASILA on the 29th day of August, 2015 at Main Street, Ba Town, in the Western Division, attempted to rob from **Abdul Aziz** and immediately before stealing, used force on the said **Abdul Aziz.**

SECOND COUNT

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NALUVEA NASILASILA on the 29th day of August, 2015 at Main Street, Ba Town, in the Western Division, assaulted **Manpreet Singh** thereby occasioning him actual bodily harm.

Grounds of Appeal

5. Being dissatisfied with the sentence, the Appellant filed following grounds of appeal:

I.i. The learned trial Magistrate erred in law when he failed to give sufficient discount to the Appellant for being a first and young offender.

ii. *The learned Magistrate earred in law and fact by imposing a 3 years 5 months and 2 weeks imprionment making the sentence harsh and excessive considering the full aspcts of the case.*

Law

6. 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 (Bae v State [1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499).

Facts

7. The Appellant admitted the following summary of facts before the learned Magistrate:

> *"On the 29th day of August, 2015 at about 1900 hrs at Main Street, Ba Town, Ba one Naluvea Nasilasila (Accused), 27 years, Student of Nailaga assaulted one Abdul Aziz (PW-1), 26 years, Sheet Metal Worker of Maururu, Ba and one Manpreet Singh (PW-2), 28 years, Machinist of Vatiyaka, Ba whereby both (PW-1) and (PW-2) received injuries.*
>
> *On the above mentioned date, time and place (PW-1) and (PW-2) was waiting for their friends beside Bika Bhai Shop, Main Street, Ba when they were approached by a group of i-Taukei youths. One Naluvia Nasilasila (Accused), 18 years, Student of Nailaga, Ba approached (PW-1) and asked (PW-1) for 50 cents but (PW-1) hesitated to give him 50 cents that's when (Accused) grabbed (PW-1) on the shirt and threw punches on him and also try to put his hand in (PW-1)'s pocket and in the same process (PW-1)'s shirt was torn. (PW-2) tried to assist (PW-1) that's when (Accused) threw punches also at him and grabbed*

his wrist watch and the face of the silver wrist watch fell off. (PW-1) and (PW-2) came back from the shop and saw what was happening they then started shouting and accused with the other group of i-Taukei youths fled from the scene.

(PW-1) and (PW-2) received injuries as per medical report; (PW-1) – scratched on right shoulder, tenders on right chest (soft tissue pain), (PW-2) – Abrasion on left hand 20 to fall, no obvious bruise or swelling on chest or hand as person punching did not punch properly.

Matter was reported to Police and upon enquiry with the assistance of (PW-1) and (PW-2) accused was brought in under arrest and cautioned interviewed whereby he admitted to the allegation and formally charged for two counts of Assault Causing Actual Bodily Harm. Accused is in custody for Ba Magistrate Court 31.08.15"

Analysis

8. Both grounds of appeal will be considered together as the second ground incorporates the first ground. Since the final sentence is based on the sentence imposed on the head count of Attempt to Commit Robbery, it is pertinent to examine whether the learned Magistrate had fallen in to an error in exercising his sentencing discretion when he reached the final sentence on the head count.

9. The maximum sentence for Robbery under the Crimes Act is 15 years imprisonment. Pursuant to Section 44 of the Crimes Act a person who attempts to commit an offence is punishable as if the offence attempted had been committed. Accordingly, the maximum sentence for Attempt to Commit Robbery is 15 years' imprisonment.

10. In selecting the tariff, the learned Magistrate had referred to the judgment of this court in the case of ***Rarawa v State*** [2015] FJHC 324; HAA05.2015 (30 April 2015) where Madigan J pronounced a new tariff for the offence of Robbery as stated in the caption of the said judgment. In paragraph 25 of the judgment Madigan J stated;

In summary the tariffs for robbery should be:

1 *Aggravated robbery: 10 – 16 years.*

2 *Robbery (but with concomitant violence): 8 – 14 years.*

3 *Robbery without violence: 2 – 7 years.*

11. The learned Magistrate had selected 8 years as the starting point of the sentence. It is obvious that the learned Magistrate had selected the tariff between 8 and 14 years which is reserved, according to ***Rarawa*** (supra), for robbery with 'concomitant violence'.

12. In ***Raisokula v State*** HAA 24 of 2017 (2 March 2018) Vinsent Perera J stated:

> *"It is pertinent to note that the term 'violence' found in the aforementioned sentencing tariff or the category declared by Madigan J. is not found in the provisions under section 310 of the Crimes Act".*

13. Having discussed the cardinal legal principle expounded by the Supreme Court in ***Vakalalabure v The State*** [2006] FJSC 8; CAV0003U.2004S (15 June 2006) that *"no one should be punished for an offence of which he has not been convicted ... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."* Perera J came to the conclusion that the sentencing tariffs in the nature of the one that was set out by Madigan J. with regard to robbery with concomitant violence have not been discredited by the Supreme Court in ***Vakalalabure*** (supra).

14. I agree with the opinion of Perera J. Before applying the higher tariff (between 8 and 14 years) the sentencer must be fully satisfied that the robbery was associated with 'violence'.

15. The law does not provide a clear guidance as to when the use of force becomes violence. In ***Raisokula*** (supra) the Court observed:

> *"I am inclined to hold the view that the learned Magistrate had reasons that there is no clear guideline that specifies the degree and the nature of force that*

would constitute 'violence' in a case of robbery for the purpose of deciding whether a particular offending would come under the aforementioned tariff in question".

16. In my opinion, the facts established before the learned Magistrate does not justify the selecting of the higher tariff that is reserved for robbery with concomitant violence. The said tariff (in Rarawa) has been set for the substantive offence of Robbery and not for Attempt to Commit Robbery. A sharp distinction has to be drawn between the two offences when it comes to sentencing because the offender in an attempt case is punished for his guilty mind and not for the harm (property loss) caused to the victim.

17. It should also be noted that the Appellant in this case has been punished for using violence in a separate charge.

18. Although the maximum penalty has to be decided in terms of Section 44 of the Crimes Act, when applying the said tariff, which is judge made law, the sentencer has to be satisfied that the offending involved violence and that the application of said tariff is justifiable and proportionate to the circumstances of offending. In appropriate cases, without jeopardizing the principles of equality and uniformity of the sentencing process, the judicial officers are always at liberty to deviate from the set tariff if cogent and justifiable reasons are available.

19. I carefully read the summary of facts and the caution interview of the Appellant. As per those documents, the Appellant had never been interviewed nor an admission recorded for the offence of Attempt to Commit Robbery. Even the summary of facts (reproduced above) confirms that the Appellant was interviewed only for two counts of Assault Casing Actual Bodily Harm.

20. As per the caution interview, the Appellant, in the company of his friends, was waiting at the Ba bus stand expecting another friend who had offered to buy drinks for them to come. The friend had not arrived as promised. Then the Appellant had approached one of the victims (PW1) and asked for 50 cents. When PW1 hesitated to give 50 cents, the Appellant had pulled his shirt and told him to give 50 cents. PW1 had then tried to push the Appellant holding onto his pocket. When PW 2 tried to intervene, friends of the Appellant had grabbed and manhandled PW 2 causing him minor injuries and damaging his wrist watch.

21. According to the summary of facts, the victims had received minor injuries. PW1 had a scratch on right shoulder and tenders on right chest (soft tissue pain) and PW 2 had an abrasion on left hand. There was no obvious bruise or swelling on chest or hand as the person punching did not punch properly. The Appellant had resorted to his action only after he solicited a nominal sum of 50 cents.

22. I take the view that the selection of higher starting point of 8 years is not justified in the circumstances. Given that the learned Magistrate had applied a high tariff which is not appropriate in the circumstances of the offending as established by the facts; it is my view that the sentence of the learned Magistrate should be revisited in light of compelling mitigating circumstances of this case.

23. The Appellant is a first and young offender. He was 18 years old student and had just attained adulthood. The learned Magistrate has failed to appreciate and mention accused's youth in his Ruling perhaps due to the discrepancy in the summary of facts as to his age. In line two it is stated that the accused was 27 years old while, in the second paragraph, his age is stated as 18 years. (The State concedes that the Appellant was 18 years old at the time of the offence). The Appellant pleaded guilty at the first available opportunity (both at the police interview and in court) and was genuinely remorseful. He sought forgiveness of the court and begged for another opportunity to reform himself. He cooperated with police. The time spent in remand (two weeks) should also be considered.

24. Having considered all these aspects, I select 3 years as the starting point of the sentence for the first count (Attempt to Commit Robbery).

25. There are no aggravating features. Considering the remand period, the fact that the Appellant was a young and first offender I would deduct 1 year of the sentence. The Appellant is accordingly sentenced to 2 years' imprisonment on the first count. I would not disturb the sentence of 6 months imprisonment imposed by the learned Magistrate on the second count (Assault Causing Actual Bodily Harm) to arrive at a sentence of 2 years imprisonment to be served concurrently.

26. Since the sentence does not exceed two years, I would consider the option of passing a suspended sentence in light of subjective circumstances of the offender and other compelling mitigating factors discussed above. A sentence of 2 years imprisonment for an 18 year old first offender is excessive and inappropriate.

27. In ***Nariva v The State*** [2006] FJHC 6; HAA0148J.2005S (9 February 2006) Madam Shameem J observed;

> *"A total sentence of 2 years imprisonment for a 28 year old first offender is excessive and inappropriate. The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment".*

28. In ***Singh v The State*** [2000] FJHC 115; Haa0079j.2000s (26 October 2000) Her Ladyship further observed:

> *"However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. I believe that in this case, every effort should have been made to keep four of the Appellants out of prison".*

29. Given the fact that the offence of robbery is prevalent in our society and therefore with the view of protecting the community and deterring others from committing like offences, I do not consider it appropriate to suspend the whole sentence. Imprisonment term of one year would balance the competing interests of deterrence and rehabilitation. Accordingly, half of the sentence is suspended for a period of two years.

30. The Appellant is accordingly sentenced to two years' imprisonment on the 1st count to be served concurrently with the sentence on the second count. One half of the sentence (12 months) is suspended for a period of 2 years.

Following Orders are made:

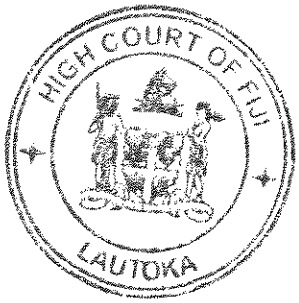
i. Appeal against the sentence is allowed;

ii. The sentence imposed by the learned Magistrate at Ba in criminal case No355 of 15 is set aside;

iii. An imprisonment term of 24 months is substituted;

iv. 12 months of the sentence is suspended for a period of two years;

v. Accordingly the Appellant is sentenced to 12 months imprisonment to be served concurrently with effect from 2nd November, 2017.



Aruna Aluthge

Judge

At Lautoka

17th August, 2018

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent