RAYMOND SIKELI SINGH and 3 Ors v STATE (AAU0008 of 2000S)

COURT OF APPEAL — CRIMINAL JURISDICTION

SHEPPARD, GALLEN and ELLIS JJA

11, 19 March 2004

Criminal law — appeals — sentencing — whether sentence imposed excessive.

Criminal law — offences — unlawful use of a motor vehicle — robbery with violence.

The robbery was planned 2 days before its commission in which the Appellants' target was the Westpac Bank Agency (the agency) at Namaka because it was more vulnerable than the main bank. On the morning of the robbery, the Appellants were taken by a taxi to the Regent Hotel car park from which car park the first Appellant, Raymond Sikeli Singh (A1) stole a motor vehicle. The method of bringing cash to the agency was by taxi. The stolen car was taken to the vicinity of the agency and when the taxi bringing the cash to the bank arrived, the stolen car was driven adjacent to the taxi. A1 remained in the car as the getaway driver. The second Appellant, Aminiasi Nawiri (A2) carried a pinch-bar which he used to threaten the bank officer holding the money and required him to drop the bag which contained it. The third and fourth Appellants Ilikena Bula (A3) and Emosi Seru (A4) respectively, both carried cane knives with which the bank employees were threatened. All the Appellants wore masks. The Appellants succeeded with the robbery and drove to a nearby beach in which the stolen car was abandoned and returned to their homes. Some of the Appellants claimed that the whole amount of money which was $74,000 was retained by A2. One Appellant submitted that the money was divided. However, the evidence established that only a part of the funds in the sum of $11,070 was recovered which had been buried by A4 at a cemetery. The balance was never recovered or accounted for.

The Appellants pleaded guilty and all were convicted and sentenced on two counts: count 1 — unlawful use of a motor vehicle and count 2 — robbery with violence.

The Appellants contended that the sentences imposed were excessively severe and heavier than those that had been imposed in Fiji in comparable cases.

Held — (1) In Fiji, robbery with violence is considered as an offence in the most serious category and carries a maximum penalty of life imprisonment. The judge did not use any wrong principle or that he took into account material that he should not have done or failed to take into account mitigating factors in sentencing the Appellants. He set out eight aggravating factors and three mitigating factors in considering the case. The judge was of the view that the Appellants were hardened criminals who chose to declare war on society and said that they were given chances earlier on but failed to avail themselves of these chances. Thus, all of those factors were significant and indicated that the robbery fell into a serious category. It was open to the judge to consider parity of sentencing between the offenders and make distinctions and said that it was not given enough material to justify interfering with the sentences imposed. Thus the sentences imposed stand but was altered in the case of A1 in that the sentence be served concurrently with the sentence imposed in this case.

Appeal dismissed.

Cases referred to

Joseva Lui v State [1998] FJCA 8; *Moananui* [1983] NZLR 537; *R v Mako* [2000] 2 NZLR 170; *State v Banivalavu Case* [1998] FJHC 28, cited.

Appellants in person

Allan for the Respondent

Sheppard, Gallen and Ellis JJA. The above named Appellants having entered pleas of guilty were all convicted and sentenced on 2 counts. Count 1 unlawful use of a motor vehicle count 2 robbery with violence.

All seek leave to appeal against sentence and three of the Appellants also sought leave to appeal out of time. The Appellant Singh initially appealed against conviction but did not pursue this at the hearing. In the circumstances of this case we grant leave for the appeals to be brought whether commenced within time or not.

Background facts

Before sentencing a summary of facts was presented on behalf of the State. The court record shows that this was submitted to counsel for the Appellants and accepted as correct.

With the summary of facts, the prosecution tendered statements made by the four Appellants. These were all available to the sentencing judge who had already heard 4 weeks of evidence in a trial within a trial. It is therefore convenient to set out the background from the sentencing notes.

It appears that the robbery was planned 2 days prior to its commission. The judge accepted that the target chosen was the Westpac Bank Agency at Namaka and the judge considered that particular agency was targeted because it was more vulnerable than the main bank. The judge noted that the robbery had been planned with some care. The method of bringing cash to the agency was by taxi. The route of the taxi was checked by the Appellants to the extent of timing how long it took from its point of departure to its arrival at the agency. Its arrival at the agency was watched on the day before the robbery took place and the persons involved in the delivery noted.

On the morning of the robbery the Appellants were taken by taxi to the Regent Hotel car park from which car park the first Appellant (A1) stole a motor vehicle belonging to a chef employed at the hotel. That car was then taken to the vicinity of the agency and when the taxi bringing the cash to the bank arrived the stolen car was driven adjacent to that taxi.

A1 remained in the car as a getaway driver.

The Appellant Nawiri carried a pinch-bar with which he threatened the bank officer holding the money and required him to drop the bag containing it. The Appellants Bula and Seru both carried cane knives with which the bank employees were threatened and all the participants were wearing masks.

Having succeeded in terrifying the bank employees so that they handed over the bag containing the money the Appellants drove to a nearby beach in the stolen car which was abandoned at that point and the Appellants returned to their homes.

The amount of money which had been taken in the robbery was $F74,000. What happened to the bulk of this money is not known. The Appellants' statements differ with regard to this. Some suggest that the whole was retained by Nawiri for later division. One suggests that the money was divided. What is clear is that the only part of the funds recovered was the sum of $11,070 which had apparently been buried by the Appellant Seru at a cemetery. The balance has never been recovered or accounted for.

During the course of the hearing of the appeal we gave an opportunity for each of the four Appellants to give some information which might have led to the return of the missing funds or any part of them but all indicated that they were not in a position to do so.

The judge in sentencing referred to eight aggravating features.

(1) Extensive pre-planning and reconnaissance of the scene, and the movements of the bank staff, and security guard.

(2) A gang of men operating in company with each other.
(3) The gang being armed with weapons that could inflict serious injuries, 2 cane knives and a 2–feet pinch-bar with stones being carried in the car.
(4) Masks worn to conceal identity.
(5) $62,930 never recovered and no information forth coming from the robbers as to its whereabouts.
(6) No remorse or offer to return the money.
(7) No plea of guilty until 4 weeks had been wasted by a trial within a trial when the realisation of the inability to avoid conviction hit home.
(8) The criminal records of all four prisoners.

A1 Singh had previously been imprisoned for the possession of dangerous drugs, for forgery and uttering offences, house breaking and entering, and larceny and in 1994 he had escaped from legal custody. In September of 1998 a 6-month sentence suspended for 2 years for unlawful use of a motor car had been imposed. He was 23 years of age.

The second Appellant Nawiri was 26 years of age; he had received a suspended sentence for theft and breaking and entering. He had had a further sentence for breaking and entering suspended a year later, and had been sentenced to 9 months' imprisonment for burglary.

The third Appellant Bula was 26 years of age and had had sentences suspended in respect of unlawful use of a motor vehicle and house breaking, and had been sentenced to imprisonment for house breaking and subsequently for forgery. Later he had had a term of imprisonment imposed for shop breaking with a further year consecutive for an act with intent to cause actually bodily harm, and had been sentenced to a period of imprisonment for robbery with violence.

The fourth Appellant Seru was 23 years of age. He had had a suspended sentence for shop breaking and been placed on probation for further breaking and entering. In 1995 he had been sentenced to 9 months' imprisonment for burglary, suspended for 3 years. Subsequently he was sent to prison for 2 ½ years for robbery with violence and subsequently had a further period of imprisonment imposed for escaping from custody.

The judge went on to consider whether there were any mitigating factors and he accepted that there were three.

(1) No one was injured in the robbery nor was the getaway car damaged. It had been held for only a short time.
(2) All four had entered pleas of guilty after a trial within a trial to determine the admissibility of statements, had been held. The pleas avoided a further trial which would have been expected to last some 4 weeks.
(3) There was an amateurishness about the whole enterprise in spite of the planning to which reference has been made. They acted in a number of ways which allowed themselves to be identified and which led to the arrests and charges.

The judge took the view that a deterrent sentence was called for.

He stated that robberies were on the increase in the western part of Fiji and he knew from the appeals which came before him robberies, home invasion, and attacks on taxi drivers were a matter for concern.

The judge expressed the view that all four Appellants should be kept away from society for as long a period as was consistent with proper sentencing policy.

On the first count relating to the theft of the motor vehicle all were sentenced to 6 months' imprisonment to be served concurrently. On the second count which was more serious, Raymond Sikeli Singh was sentenced to 10 years' imprisonment and in addition a suspended sentence imposed on the 7 September 1998 in the Nadi Magistrates Court of 6 months was activated consecutive to the sentence of 10 years. The Appellant Aminiasi Nawiri on the second count was sentenced to 10 years' imprisonment. The Appellant Ilikena Bula was sentenced to 8 years' imprisonment on the second count. The Appellant Emosi Seru was sentenced on the second count to 8 years' imprisonment.

Appeal

None of the four Appellants was represented before us. All four however appeared. Each had put in submissions in writing and each was given an opportunity to supplement this orally. In each case they were assisted by interpretation in Fijian.

In each case the Appellants contended that the sentences imposed were excessively severe and heavier than had been imposed in Fiji in comparable cases. Each referred to cases which he claimed were similar in circumstances but where the penalities imposed were substantially shorter than the sentences imposed in each case on the Appellants. All placed an emphasis on the fact that there were a number of cases to which they referred where victims had been seriously injured or killed and other cases where the amount of money involved was very much greater than that in this case. In each such case to which reference was made the penalty imposed was less than that imposed in this case.

Each of the Appellants apologised for their part in the robbery and each claimed that during the period they had already served in prison they had taken advantage of such opportunities for rehabilitation as were available including courses to equip them to fit more conformably to society. All indicated that their imprisonment had imposed great hardship on their families and in respect of two of the Appellants their marriages had suffered and their children were at risk because of their absence.

In the case of A1, he has suffered serious ill health requiring operative treatment while in prison. He maintained that he does not receive the medication which is necessary as a result of his illness. All complained that periods of imprisonment on remand had not been taken into account and two maintained money paid by way of bail bond had not been returned.

Principles of sentencing in cases of this kind

We were asked to comment generally on sentencing in cases of robbery with violence and to consider suggesting guidelines.

The starting point in determining what sentences are appropriate for offending of the 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 carries 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 importance of this may be seen when the position in Fiji is contrasted with the position in New Zealand where the maximum penalty for a comparable offence is 14 years' imprisonment (except in the case of home invasion where the maximum is 19 years). It follows than that although a sentencing judge may obtain some assistance from the statement of principles which apply in for example New Zealand it is necessary to bear in mind that the offence is regarded more seriously in Fiji.

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 comparision between sentences imposed a considerable time ago with those imposed more recently is not always a helpful exercise. As an example reference may be made to the fact that in New Zealand the increasing prevalence of what have been described as "home invasions" led to statutory intervention.

The judge in this case was therefore 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 a proper concern in arriving at an appropriate response to offending in a particular case. That involves a recognition of the kind of offending in its context and its perceived effect on the community. As counsel for the State submitted the effect on ordinary members of the community, of criminal behaviour of the kind contemplated is a major matter. Members of the community are entitled to go about their lawful business without their freedoms being restricted by the activities of those who choose to behave in a way unacceptable to the community as a whole.

The consequences of behaviour of this kind need to be borne in mind. It is for this reason that where robberies accompanied with violence or threats of violence occur in public places where members of the public can be expected to be found and may well be disturbed or placed at risk by such behaviour then that is a factor which significantly increases the severity of an appropriate response.

Behaviour which affects people where they may expect to be secure increases the seriousness of the offending. That is why "home invasions" are regarded as extremely serious. The vulnerability of small-scale businesses such as dairies ought to be taken into account. In this case the fact that the object was a less well-protected agency is significant.

The kind of behaviour involved in the offence is important. A planned operation is generally to be perceived as worse than something which occurs on the spur of the moment. A planned enterprise is generally speaking worse (but not always) than an opportunist action because there has been time and opportunity to consider the consequences and to reconsider.

The number of persons involved is of significance. From the point of view of the public a criminal enterprise involving a number of people is often both more frightening and more sinister than one involving an individual and constitutes a much greater threat to the maintenance of law and order. This is compounded where the persons concerned are disguised or where efforts have been made to avoid recognition and detection. This goes beyond mere planning because it gives rise to apprehension in the public, and is also a direct contravention of the maintenance of law and order.

The nature of the offence is significantly affected by the means used to carry it out. This is why the use of force or threats of force is always significant and why the use or availability of weapons is a major factor. Obviously the use of firearms must be seen as extremely serious since such arms involve not only immediate risk and give rise to much greater fear but also provide a direct threat to means used by the state to maintain law and order. In this case the Appellants had cane knives and used them to threaten and in addition carried a heavy pinch-bar. All three are capable of inflicting very serious injuries and even if their range is perhaps not quite so extensive, they can cause major injuries.

Once the nature of the offence has been determined it is then necessary to consider its consequences. In assessing consequences care must be taken. Where serious consequences are intended or where the perpetrators have no concern for the effect on others, this will always be seen as placing the offence among the more serious categories. By contrast an unintended consequence which could not have been foreseen may still be relevant but sometimes less so since in assessing the seriousness of a crime intention is always of importance.

A robbery with violence either actual or threatened will always give rise to serious consequences. If not actual and physical then certainly psychological; and as has been pointed out it is the threat of such consequences which is the whole basis of such behaviour. The vulnerability of the victims and the effect on them and their lives must rank high in the scale of aggravating circumstances.

The extent of the loss arising from the criminal action is always seen as one of the more important aspects to be taken into account in sentencing. While it is a factor which to some extent determines the seriousness of the crime it does not have an overriding effect. The bank robbery which fortuitously nets the perpetrator only a small amount of money may be worse in other respects than a robbery which results in a loss of substantial sums.

Subsequent behaviour is also a matter to be taken into consideration.

In every case a previous criminal record is an important factor.

Having taken all these matters into account it is also necessary for the sentencing judge to give consideration to factors which might be regarded as mitigating the offending. Obviously restoration of what has been taken or an attempt to put right what has been wrongly done must rank high in the scale of mitigation. This is more than a question of remorse. Where a large sum of money has been taken the court may properly impose a penalty which at least postpones the opportunity to enjoy what may have been set aside for subsequent use.

The question of remorse is also important although not necessarily having the same weight as other aspects to be taken into account. Remorse before sentencing is useful. Remorse expressed afterwards no matter how genuine cannot carry as much weight.

While the above are some of the direct matters to be taken into account there are other factors which are important in ensuring that sentences imposed properly reflect and meet the needs of the case and achieve as far as possible a just result. Deterrence and retribution are not the only factors to be considered when sentence is imposed. In a civilised society rehabilitation is also a matter of importance. Balancing the requirement for deterrence and retribution against rehabilitation is often one of the more difficult tasks which judges face. In the long-term society is best served not only when behaviour of the kind under consideration is deterred but also when the offender is rehabilitated to become a productive and non-threatening member of the community.

There will be times when the age or the circumstances of the offender or of his or her family may give rise to the need to impose a sentence which is lower than would otherwise be the case so that rehabilitation can occur.

It is necessary to bear in mind that it is often circumstances of the kind referred to above which provide an explanation for what might otherwise be seen as a light sentence or one which is out of line with others imposed in similar cases.

All of the Appellants in their submissions to us indicated that they have taken steps to ensure their rehabilitation and eventually to become useful and worthwhile members of the community. Nevertheless the time at which such matters mainly affect the imposition of sentence is at sentencing itself.

What we have attempted to do is to set out factors which are important in considering imposition of sentence in cases of this kind. Obviously every case is different and there will sometimes be factors to which we have not referred or cases where some of the factors to which we have referred have no application. We have also attempted to indicate the extent to which particular factors influence the severity of the outcome or by contrast suggest a less heavy penalty is appropriate. That is a matter which each judge must weigh up in context on each particular occasion. The significance of certain factors such as the place where the offending occurs as we have already said may vary from time to time and from community to community. That is the difficult exercise which a sentencing judge must embark upon in each case.

Parity of sentences

Each of the Appellants contended that other persons who had committed 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.

Not only did the Appellants refer to other cases but counsel for the State provided for us a number of cases which bore some resemblance in some way to that at present before the court. The judge himself did this in his sentencing notes when he referred to a number of authorities.

We say immediately that in the material available to us there are cases which are irreconcilable. This may occur because we do not have all the information which is necessary to determine whether a particular case has been correctly decided or not and it may occur because in some cases the sentence was simply wrong. This observation may apply at either end of the scale, to either what may have been an unduly lenient sentence or one which may have been unduly harsh.

As we have already indicated the starting point is that the State considers this one of the most serious offences which can come before the court providing that the maximum penalty for it is life imprisonment. References were made to sentences in other countries. These can only ever be of limited assistance as the law differs as for example in New Zealand where the maximum penalty is 14 years not life imprisonment. Reference was made both in New Zealand and in Fiji for many years to the decision of the Court of Appeal of New Zealand in *Moananui* [1983] NZLR 537 (*Moananui*).

In that case the Court of Appeal in New Zealand endeavoured to set out guidelines for sentencing in cases for robbery. That case was decided in 1983. It is important to note that the Court of Appeal did not lay down what are sometimes referred to as "starting points" for the imposition of sentences in this class of case. Rather what the Court of Appeal did was to carry out a careful analysis of a considerable number of cases and to draw from a comparison of those cases a range of sentences which had been imposed in various classes of case. What the court did therefore was not indicate what the starting point of

sentences ought to be but rather gave an indication of the level of sentences which were being imposed in certain categories of case, thus providing bases for comparison to sentencing judges. The court indicated that in that class of case which included planned armed robberies in premises such as banks the sentences usually imposed were in the vicinity of 6–8 years, although the court was careful to indicate the upper and lower limits had to be regarded as flexible in the light of particular facts. *Moananui* was reconsidered in 2000 in the case of *R v Mako* [2000] 2 NZLR 170 (*Mako*). The significance of that case was that it considered the categorisation of robberies and the determination of seriousness by reference to the premises in which they occurred had become too rigid. The Court of Appeal took the opportunity to refer to circumstances which would be relevant in assessing appropriate sentences and then proceeded to indicate what it referred to as guidelines in particular categories of case. The court in arriving at these proceeded on the same basis as had been done in *Moananui* that is a considerable number of cases were analysed to ascertain a trend in sentencing. The court concluded that there had been a significant trend to higher sentences for the more serious cases of aggravated robberies than in *Moananui*

The court gave some views as to the weight which was appropriate to place on certain factors and suggested what it referred to as "starting points". The court noted that for arriving at a starting point a combination of factors is significant and for the purposes of this case it is enough to say the court held that starting points for serious armed robbery of commercial premises start at 6 or more years. Where there is a 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, a 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.

This case

We now proceed to consider the application of those considerations to this case. The judge set out what he regarded as eight aggravating features.

He expressed the view that all four Appellants were hardened criminals who had chosen to declare war on society and he noted that all had been given chances earlier on but did not avail themselves of them. All of those factors were clearly relevant and indicated that this robbery fell into a serious category. The judge considered that there were only three matters which could be offered in mitigation.

In considering the length of term the judge noted in England some years ago the tariff for serious commonly occurring offences of this nature was between 15 and 18 years as a starting point. He referred to the decision in this court of *Joseva Lui v State* [1998] FJCA 8 where in 1998 it was said that the level of sentencing in Fiji for robbery with violence was too low. In that case a 9-year sentence had been reduced to 7 years because of an early and genuine plea of guilty. The judge referred to *Moananui* and the schedule it contained but noted that the case was now 17 years old and out of date. He referred to the *State v Verebalavu* [1998] FJHC 28 when Mr Justice Pain considered 8 years' imprisonment as a starting point for violent robbery. That was the case where quite serious injury had been inflicted on the victims. However there had been a genuine plea of guilty and information given to the police without which the crime could not have been solved. In the event the sentence was reduced by reason of the mitigating factors to six-and-a-half years.

We cannot see that approaching the matter as he did the judge used any wrong principle or that he took into account material that he should not have done or failed to take into account mitigating factors.

The only questions which arise relate to parity of sentencing. We cannot say on the material before us that the judge moved outside the range which was open to him and which ensures that as far as possible people are dealt with an equal fashion. The sentences looked at in the light of *Mako* referred to above are severe but they do not go beyond the range contemplated by that case when aggravating circumstances are taken into account, and it must also be remembered that the maximum penalty in New Zealand is lower than that which applies here.

Parity must also be considered as between the offenders in the case. The judge considered here that the Appellant Singh should receive a heavier penalty as being the key figure in planning and preparing the robbery, by arranging the carrier by means of which the route was reconnoitred by stealing the car used in the robbery and by driving the getaway vehicle.

He considered that the Appellant Nawiri should also receive a heavier sentence as he was the leader of the group which actually used the threat of violence to bank staff and the judge considered that on the evidence he had initially obtained the proceeds of the robbery the present whereabouts of which had never been discovered. We think it was open to the judge to make those distinctions and while therefore we consider the sentences imposed to be at the top level of those which were appropriate we do not consider that we have been given sufficient material to justify interfering with those sentences.

There are however certain minor matters which we do consider should be taken into account. In the case of the Appellant, Singh an existing suspended sentence of 6 months was activated to be served consecutively with the sentence of 10 years imposed in this case. We consider that in the circumstances of this case to activate such a sentence as consecutive was unnecessary and the appeal will be allowed to the extent that such sentence is to be served concurrently with the existing sentence. In the case of all Appellants we were informed that they had not been given credit for time spent in custody on remand. We consider that in each case credit should be given for such periods. We are unable to make any orders with regard to funds made available to support bail applications. They must be dealt with according to the appropriate legal provisions.

Outcome

While generally the sentences imposed will stand, in the case of the Appellant Singh the direction that the suspended sentence of 6 months be served consecutively to the service of 10 years imposed in this case is altered to require that sentence to be served concurrently with the sentence imposed in this case. In respect of each of the four Appellants the sentence imposed is to be reduced by the period spent in custody on remand. We request the prosecution service to obtain details in each case and to provide such details to each of the Appellants and to the registrar.