MACIU KOROICAKAU v STATE (CAV0006U of 2005)

SUPREME COURT — CRIMINAL JURISDICTION

FATIAKI CJ, VON DOUSSA and MASON JJ

25 April, 4 May 2006

Criminal law — sentencing — robbery with violence — unlawful use of motor vehicle — minor traffic offences — backdating of sentence — Constitution of the Republic of Fiji ss 122(1), 122(2) — Court of Appeal Act (Cap 12) s 22(1).

The Petitioner pleaded guilty in the Magistrates Court on two charges of robbery with violence, one charge of unlawful use of a motor vehicle and two charges of minor traffic offences. The magistrate sentenced the Petitioner to 7 years' and 5 years' imprisonment respectively on the robbery charges and discharged him on the remaining charges. The two sentences were ordered to be served concurrently as they arose out of the same overall incident. The Petitioner was already serving a sentence of imprisonment for another unrelated offence and an order was made that the new total sentence of 7 years be concurrent with the pre-existing sentence being served. The Petitioner's appeal to the High Court was dismissed. He contended that the total sentence imposed by the learned magistrate was excessive and in any event, should have been backdated to run from 17 May 2004, the date of an earlier sentence he was already serving. Shameem J considered that an appropriate starting point from which to work out the sentence was 7 years rather than 8 years which was the starting point adopted by the learned magistrate, after making adjustments for matters of aggravation and allowing a discount for the Petitioner's early plea, she concluded that a sentence of 7 years was not excessive. Shameem J also held that there was no power to backdate the sentence and dismissed the appeal.

The Petitioner filed a notice of appeal to the Court of Appeal and appeared before a single judge. The appeal was dismissed and the issue was confined to an alleged error of law, namely that the sentence under appeal should have been backdated to the commencement of the earlier sentence.

Held — While the Petitioner was not armed with a weapon of some sort, he did use his fist in striking one of the women, and applied actual force to the other woman in gagging her. This use of actual force can be viewed as a factor of aggravation at least as serious as being armed with a weapon which in the event was not actually used. Every case must be assessed on its own facts and there was no hard and fast scale which arbitrarily applies a particular starting point or sentence just because a weapon was or was not involved.

The 5-year sentence was not shown in the Petitioner's previous convictions record before the High Court and Shameem J considered that the Petitioner was mistakenly referring to a sentence he had received for escaping from lawful custody. It transpired that the Petitioner was in fact sentenced to 5 years' imprisonment on 12 June 2004 for a number of robberies with violence and other offences. The mistake in the information in the Petitioner's record of previous convictions had prejudiced him in any way was not seen. On the contrary, the Petitioner should consider himself fortunate that Shameem J was unaware of the offences, the subject of the sentences imposed on 12 June 2004. Had Shameem J been aware of the other offending and the total 5-year sentence imposed, it was likely that the sentence under appeal would not have been ordered to be served concurrently with other sentences for which the Petitioner was then serving.

Appeal dismissed.

Case referred to

Director of Public Prosecutions v Rasea [1978] 24 FLR 91, cited.

Petitioner in person

D. Goundar for the Respondent

[1] Fatiaki CJ, Von Doussa and Mason JJ. The Petitioner seeks special leave to appeal to this court to enable him to challenge the severity of a term of imprisonment which he is currently serving.

[2] On 7 July 2004 the Petitioner pleaded guilty in the Magistrates Court to two charges of robbery with violence, one charge of unlawful use of a motor vehicle and two charges of minor traffic offences. The magistrate sentenced the Petitioner to 7 years' and 5 years' imprisonment respectively on the robbery charges and discharged him on the remaining charges. The two sentences were ordered to be served concurrently as they arose out of the same overall incident. The Petitioner was already serving a sentence of imprisonment for another unrelated offence and an order was made that the new total sentence of 7 years be concurrent with the pre-existing sentence being served.

[3] The Petitioner appealed to the High Court contending that the total sentence imposed by the learned magistrate was excessive, and in any event should have been backdated to run from 17 May 2004, the date of an earlier sentence he was already serving. The appeal was heard by Shameem J who dismissed the appeal. While her Ladyship considered that an appropriate starting point from which to work out the sentence was 7 years rather than 8 years which was the starting point adopted by the learned magistrate, after making adjustments for matters of aggravation and allowing a discount for the Petitioner's early plea she concluded that a sentence of 7 years was not excessive. Shameem J also held that there was no power to backdate the sentence and dismissed the appeal.

[4] The Petitioner filed a notice of appeal to the Court of Appeal. He appeared before a single judge of appeal in chambers seeking to proceed on a number of grounds set out in the notice of appeal. All but one of those grounds was dismissed as not raising "*a question of law only*" as required by s 22(1) of the Court of Appeal Act [Cap 12]. The appeal therefore proceeded on the one ground that was confined to an alleged error of law, namely that the sentence under appeal should have been backdated to the commencement of the earlier sentence.

[5] The judgment of the Court of Appeal records that:

> At the hearing before this Court, the appellant advised that he had read the written submissions of the respondent and understood now that there is no power to ante-date a sentence. It is clear that is a correct statement of the law. It was so held by Grant CJ in *Director of Public Prosecutions v Rasea* in 1975 (Reported in [1978] 24 FLR 91) in which he pointed out:
>
> > A Magistrates court has no power to backdate a sentence of imprisonment or to order it to run from any date earlier than the date of which the sentence is imposed.
> >
> > That is still the law and has been confirmed many times since.

[6] The appeal was therefore dismissed.

[7] The Petitioner now seeks special leave to appeal to this court to enable him to argue that he received an inadequate discount for his early plea, and that Shameem J in considering his appeal to the High Court misunderstood his previous convictions and the term of the prison sentence he was then serving.

[8] The grounds on which the Petitioner seeks to appeal to this court are not grounds that were available to him in the Court of Appeal, and were not the subject of the decision of the Court of Appeal. That decision was confined to the question whether the sentence under appeal, could in law, be backdated. The

Petitioner accepted in the Court of Appeal that there is no power to backdate a sentence, and that is not an issue raised in his petition to this court.

[9] An appeal to this court lies only by leave, and then is an appeal against a judgment of the Court of Appeal: see s 122(1) and (2) of the Constitution. As the Petitioner does not seek to challenge the decision of the Court of Appeal, his petition is misconceived and must on that ground alone fail.

[10] However, we address briefly the Petitioner's contentions advanced in his submissions.

[11] The circumstances of his offending involved serious home invasions in company with another person. On the evening of 7 May 2004 two women were having tea on the balcony of their house. They went inside, leaving the door open. They heard the sound of running steps behind them, and were confronted by the Petitioner and another man. Both men were wearing dark clothes and hooded jackets. The Petitioner began strangling one of the women and demanded money and car keys. He forcibly removed her gold chain and earring, and stole her mobile phone, items of jewellery and cash to a total value of $2325. In the course of the robbery he punched the woman in the mouth. He then took the other woman into her bedroom, gagged her with a piece of cloth and stole items to the value of $370. He and his accomplice then left taking the complainant's car with them.

[12] The Petitioner had no driving licence, and when the car was recovered it had suffered extensive damage through running off the road.

[13] The Petitioner's argument as to his sentence points to the fact that the learned magistrate adopted a starting point of 8 years and after considering both aggravating and mitigating circumstances awarded a total sentence of 7 years, whereas Shameem J considered that an appropriate starting point was 7 years and none the less concluded that after adjustments a total sentence of 7 years' imprisonment was not excessive. The Petitioner argues that as the magistrate in effect discounted the starting pointing by 1 year, Shameem J should also have done so. This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.

[14] The Petitioner also argues that as he did not use a weapon the starting point of 8 years adopted by the learned magistrate was too high. This argument is without substance. While he was not armed with a weapon of some sort, he did use his fist in striking one of the women, and applied actual force to the other woman in gagging her. This use of actual force can be viewed as a factor of aggravation at least as serious as being armed with a weapon which in the event is not actually used. Every case must be assessed on its own facts and there is no

hard and fast scale which arbitrarily applies a particular starting point or sentence just because a weapon is or is not involved.

[15] Further, even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question. This is amply demonstrated by the fact that Shameem J adopted a lower starting point but after allowing for the weighting she considered appropriate for matters of aggravation and mitigation reached the same total sentence as the learned magistrate.

[16] The Petitioner also drew the attention of the court to the sentences imposed by a High Court judge in Criminal Appeal case No HAA0040-41 of 2005 and argued that as the offender in that case who was convicted of an apparently more serious armed robbery had received a sentence of six-and-a-half years, his sentence of 7 years was therefore excessive.

[17] The offending in that case also concerned a home invasion that had aggravating features not present in the Petitioner's case. However as we have said each case must be considered on its own facts, and different judges will view aggravating and mitigating circumstances differently. It seems to us that the sentence imposed in the other case to which the Petitioner refers was a lenient one and cannot be treated as indicating a benchmark.

[18] In our opinion the sentence awarded to the Petitioner was not excessive.

[19] The other contention of the Petitioner, that Shameem J misunderstood his previous convictions, arises from the fact that the Petitioner told Shameem J that he was at the time he was sentenced already serving a 5-year sentence imposed in June 2004. That sentence was not shown in his previous convictions record before the High Court and Shameem J considered that the Petitioner was mistakenly referring to a sentence he had received for escaping from lawful custody. It now transpires that the Petitioner was in fact sentenced to 5 years' imprisonment on 12 June 2004 for a number of robberies with violence and other offences. We are unable to see how the mistake in the information in the Petitioner's record of previous convictions has prejudiced him in any way. On the contrary, the Petitioner should consider himself fortunate that Shameem J was unaware of the offences the subject of the sentences imposed on 12 June 2004. Had Shameem J been aware of the other offending and the total 5-year sentence imposed, it is likely that the sentence under appeal would not have been ordered to be served concurrently with other sentences for which the Petitioner was then serving.

[20] The learned magistrate in imposing the sentence under appeal had been aware of the sentence imposed on 12 June 2004 and had ordered that the new total sentence of 7 years be served concurrently with the other sentence.

[21] In our opinion there is no substance in the matters raised by the Petitioner.

[22] The petition is dismissed.

Appeal dismissed.