

JONACANI NACANI v STATE (HAA026 of 2007)

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

13, 20 April 2007

10 **Criminal law — sentencing — appeals against conviction and sentence — Appellant charged with escaping from lawful custody and sentenced to consecutive term of 9 months' imprisonment — whether punishment was harsh and excessive — imposed sentence was within tariff — no error in prison sentence — breach of autrefois convict principle for being punished again by the Prisons Tribunal — court had no jurisdiction to quash finding of Prisons Tribunal — Penal Code s 20.**

15 The Appellant escaped from lawful custody at Korovou prison. He remained at large until 7 September 2006. He was charged with the criminal offence of escaping from lawful custody. He pleaded guilty. The Magistrates Court sentenced him to a consecutive term of 9 months' imprisonment. He was later taken before a prison tribunal which punished him again for the escape. He lost privileges, including remission for 2 months and 18 days. He appealed the sentence. He claimed that the 9-month term was harsh and excessive and he
20 had been punished twice for the same offence.

Held — (1) The 9-month term imposed upon the Appellant was within the tariff. The magistrate did not err in imposing the 9-month consecutive term. However, his term was lengthened by at least 1 month because he was punished again by the Prisons Tribunal.

25 (2) The Appellant was punished again by the Prisons Tribunal. There was a breach of the autrefois convict principle.

(3) The court had no jurisdiction to quash the finding of the Prisons Tribunal because the decision was endorsed by the Officer-in-Charge of the Korovou Prison, and the right of review was to the Commissioner of Prisons. It was ordered that a copy of the judgment be sent to the Commissioner of Prisons to invite him to review the decision of the Prisons
30 Tribunal in relation to the Appellant.

Appeal dismissed.

Case referred to

Joeli Tawatatau v State [2007] FJCA 26, cited.

35 Appellant in person

A. *Tuiketeti* for the State

Shameem J. On 1 August 2006, the Appellant escaped from lawful custody, by cutting and opening a window grill at Korovou Prison and climbing over the
40 prison wall. He was at large until 7 September 2006 and was charged with the criminal offence of escaping from lawful custody. His case was called in the Suva Magistrates' Court. He pleaded guilty and was sentenced to a consecutive term of 9 months' imprisonment. He was later taken before a prison tribunal and punished again for the escape. He lost privileges, including remission, for
45 2 months and 18 days. He now appeals against sentence saying that the 9-month term is harsh and excessive, and that he has been punished twice for the same offence.

State counsel agrees that he has been punished twice. However, she submits that the 9-month term imposed is within the tariff, and that no charge should have
50 been brought against him by the Tribunal once he had been sentenced by the courts. However she says that the Appellant's remedy is in a review of the

decision of the Prisons Tribunal. She confirmed that the Appellant was disciplined by the Prison Tribunal on 26 September 2006 for the offence of escaping from lawful custody, contrary to reg 123(3) of the Regulations, and that he lost 1 month's remission. The Officer-in-Charge then endorsed the decision of the Prison Tribunal.

The 9-month term imposed by the Suva Magistrates' Court was indeed within the tariff. In mitigation the Appellant had told the court that he was 27 years old, married with one child. He was serving a 7-year term, and was due for release in 2009. He had a large number of previous convictions most of which were imposed in November 2003. None were for escaping. The learned Magistrate did not err in imposing the 9-month consecutive term. However, his term has now in effect, been lengthened by at least 1 month, because he was punished again by the Prison Tribunal.

The question of double jeopardy in these circumstances was recently considered by the Court of Appeal in *Joeli Tawatatau v State* [2007] FJCA 26. In that case, the magistrates' court had imposed a 6-month term of imprisonment for escaping. That was reduced to 5 months by this court to take into account the 2 months loss of remission subsequently imposed by the Prisons Tribunal. The Court of Appeal referred to s 20 of the Penal Code which defines the principle of *autrefois convict* which I set out fully:

A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

The Court of Appeal found that the Prisons Regulations were part of our written law, and that the prisoner had been punished twice for the same offence and quashed the sentence imposed by the Magistrate. It found at 12:

In future, once an escaper is charged in the Magistrates' Court under section 138 of the Penal Code, no charge of escape under the Prisons Regulations should be brought until the result of the Magistrates' Court hearing is known. If the prisoner is punished by the Magistrate, no further charge of escape should be brought under the Regulations.

In this case, the Appellant was punished again by the Prisons Tribunal and there therefore was a breach of the *autrefois convict* principle.

However, I have no jurisdiction to quash the finding of the Prison Tribunal. The decision was endorsed by the Officer-in-Charge of the Korovou Prison, and the right of review is to the Commissioner of Prisons. I have no confidence that the Appellant is able to seek such review on his own.

For that reason I order that a copy of this judgment be sent to the Commissioner of Prisons, drawing his attention to the contents of it, and inviting him to review the decision of the Prisons Tribunal in relation to the Appellant on 26 September 2006. I also order that a copy of the decision of the Fiji Court of Appeal in *Joeli Tawatatau v State* be sent for his attention for future cases of escaping. The appeal is otherwise dismissed.

Appeal dismissed.

women and men about breast cancer and the measures that can be taken, even without formal medical examination, to detect lumps at an early stage.

Application granted.

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