

IN THE SUPREME COURT OF FIJI  
Appellate Jurisdiction  
CRIMINAL APPEAL NO. 21 OF 1981

Between:

RUPENI NUKU alias Tuiogea

APPELLANT

- and -

R E G I N A M

Appellant in Person.  
Mr. A.M. Seru for the Respondent.

J U D G M E N T

The appellant was on the 13th November, 1979, convicted of the offence of Robbery with Violence, Contrary to Section 326(1)(b) of the Penal Code, by the Magistrate's Court Suva.

The learned Magistrate sentenced the appellant to 4 years imprisonment and made the following order :

"Pay complainant \$70.00 or 6 months consecutive in default.  
Pay in 28 days.  
28 days to appeal ".

The appellant lodged his Petition of Appeal on the 5th December, 1979.

The Chief Registrar investigated the reasons for the delay in hearing this appeal but was unable to determine the cause.

The appellant appeals against conviction and sentence. Since he pleaded guilty to the charge and the grounds relate only to sentence, it would appear that he omitted to delete the word "conviction" in paragraph 3 of the Petition of Appeal form. To put the issue beyond doubt the appeal against conviction is dismissed.

Before dealing with the question of sentence the validity of the Magistrate's order has to be considered. 000229

It is not clear to me whether the appellant was fined \$70.00 (the default sentence would suggest it was) and the Magistrate purported to act pursuant to section 159 of the Criminal Procedure Code. On the other hand the \$70.00 appears to be compensation. On the facts \$70.00 is a complete indemnity to the complainant who lost money and a wrist watch to that value.

Whatever the position may be the monetary fine or purported order to compensate the complainant raises an issue which some Magistrates do not properly consider.

D.A. Thomas in his Principles of Sentencing p.219 in the chapter discussing 'Policy in the use of Fines' states :

" The main principal governing the use of fines is that the offence must be one for which a sentence of imprisonment is not required."

At p.222 the learned author states :

" The importance of the offenders capacity to pay as a mitigating factor has been stressed in many cases. The Court has frequently stated that to impose a fine ~~is~~ beyond the capacity of the offender to pay will merely lead to his committal to prison in default of payment."

While fully appreciating the learned Magistrate's compassion for the complainant, in my view magistrates should only have recourse to the compensation out of fines procedure where there is a reasonable prospect that the fine will be paid and that by the offender himself and not his family.

To sentence a young Fijian to 4 years imprisonment for Robbery with Violence and fine him (if it was a fine) \$70 in default 6 months imprisonment is wrong in principle although legal. I will deal with this order when considering the sentence.

The appellant with two others on the 27th October, 1979, hired a taxi and later robbed the driver of \$35 cash and his wrist watch valued at \$35. The unfortunate driver was physically assaulted and received minor injuries.

The offence was a serious one and much too prevalent. A substantial deterrent sentence was called for. The appellant stated that he was charged with 2 others who were sentenced to 3 years imprisonment. There is nothing in the record to indicate why they received a lighter sentence. All three were fully involved in the offence.

The appellant had 4 previous convictions, one of which was for assault occasioning actual bodily harm. The fine of \$30 in default 2 months imprisonment would indicate it was not considered a serious assault.

Crown Counsel's view was that the sentence was on the high side, a view I also share.

The appeal is allowed as to sentence only.

The order made by the Magistrate relative to payment of \$70 to the complainant and the fine of that sum (if it is a fine) is set aside.

The sentence of 4 years imprisonment is reduced to a term of 3 years.

*R.G. Kermode*

(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA,

15 MAY, 1981.