

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0012 of 2019
[On Appeal from Court of Appeal No: AAU 0041 of 2015]

BETWEEN : EREMASI TASOVA

Petitioner

AND : THE STATE

Respondent

Coram : Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court
Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court

Counsel : Mr. S. Waqainabete for the Petitioner
Ms. P. Madanavosa for the Respondent

Date of Hearing : 08 August 2022

Date of Judgment : 25 August 2022

JUDGMENT

Gates, J

1. I have read the judgment of Lokur, J in draft. I am in agreement with the orders, conclusions and the reasoning behind them.

Jayawardena, J

2. I agree with the draft judgment of His Lordship Lokur, J.

Lokur, J

3. Criminal procedure in respect of penal offences consists of four stages, with each one as important as the other. Investigation – the first stage - should be meticulous so that the actual offender is caught and tried. This is in the interest of society, for if an innocent person is compelled to go through the rigours of the process, then not only does the process become the punishment, but the actual offender could be found roaming the streets. There is no short cut to effective and efficient investigation.
4. The second stage is the pre-trial process which acts as a check on excesses, if any, by the police and investigators and occasionally acts as a filter separating (to the extent possible) the actual offender from the assumed offender. The pre-trial procedures are, in a sense, a safety net for those falsely accused by the investigators of having committed an offence.
5. The third stage is the trial which requires a degree of expertise to elicit the truth from the witnesses and it is here that the role of the trial judge becomes important for an accused, for the trial ultimately decides the fate of the accused – freedom versus incarceration.
6. Finally, the stage of sentencing, a feature of criminal procedure that seems to have been treated as a distant cousin of the main processes and procedures. This petition is an illustration of the absence of importance given to sentencing.
7. In all these stages, mistakes are likely to occur, but every mistake cannot be understood to imply an irremediable defect at any stage or one that would vitiate the process of justice. Some defects are minor and may be overlooked as a part of the process of adjudication and decision making, while others might be substantive that affect the basic and natural rights of any person seeking justice. This separation is important and distinguishes miscarriage of justice from substantial miscarriage of justice.

8. With this introduction, this Court considers this petition for special leave to appeal directed by the petitioner-convict against the judgment and order dated 19th December, 2018 by the Court of Appeal in Criminal Appeal No. AAU 0041 of 2015 (on appeal from High Court Case No. HAC 0048 of 2012).
9. The petitioner is also aggrieved by the sentence awarded to him, that is, 12 years imprisonment for aggravated robbery, 9 months imprisonment for theft of a motor vehicle and 6 months imprisonment for resisting arrest. The sentences are to be served concurrently.

Background facts

10. On 12 March 2012, it is alleged that Jackson Bhai and Sarwan Singh, both employees of British American Tobacco Company were in a black Hyundai vehicle of the said company and were on their normal delivery routine. They stopped in Lautoka at Singh's Shop owned by Sumindra Kaur. They were allegedly approached by three persons, that is, the petitioner, Laisenia Vuluma and Jolame Vunituraga. The further allegation is that these three persons beat up Jackson Bhai and Sarwan Singh. They then drove off in the Hyundai vehicle stealing cartons of assorted cigarettes, cash, a cheque and two Nokia mobile phones.
11. The petitioner was arrested two days later in Nadera, Suva on 14 March 2012. The allegation against the petitioner is that he resisted arrest. The petitioner denied any involvement in the entire episode.
12. On the basis of the above allegations, the petitioner was charged as follows:-

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311(1)(a) of the Crimes Decree, No. 44 of 2009.*

Particulars of Offence

EREMASI TASOVA, LAISENIA VULUMA and JOLAME VUNITURAGA on the 12th day of March, 2012 at Lautoka in the Western Division robbed JACKSON BHAI and SARWAN SINGH of cartons of assorted cigarettes valued at \$29,943.10, \$2,010.60 cash, \$359.80 cheque, Nokia mobile phone valued at \$400.00 all to the total value of \$32,713.50, property of British American Tobacco Company and at the time of robbery did use personal violence on the said JACKSON BHAI and SARWAN SINGH.

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311(1) (a) of the Crimes Decree, No. 44 of 2009.

Particulars of Offence

EREMASI TASOVA, LAISENIA VULUMA and JOLAME VUNITURAGA on the 12th day of March, 2012 at Lautoka in the Western Division robbed JACKSON BHAI of Nokia mobile phone valued at \$100.00 and cash of \$120.00 all to the total value of \$220.00 and at the same time of such robbery did use personal violence on the said JACKSON BHAI.

THIRD COUNT

Statement of Offence

THEFT OF MOTOR VEHICLE: Contrary to Section 291(1) of the Crimes Decree, No. 44 of 2009.

Particulars of Offence

EREMASI TASOVA, LAISENIA VULUMA and JOLAME VUNITURAGA on the 12th day of March, 2012 at Lautoka in the Western Division stole a Hyundai H1 motor vehicle registration number: FW 722 valued at \$89,000.00, the property of British American Tobacco Company.

FOURTH COUNT

Statement of Offence

RESISTING ARREST: Contrary to Section 277(b) of the Crimes Decree, No. 44 of 2009.

Particulars of Offence

EREMASI TASOVA on the 14th day of March, 2012 at Lautoka in the Western Division resisted Detective Constable No. 3952 Senitiki Nakatasavu, a police officer whilst effecting arrest in due execution of his duty.

13. At this stage, it may be mentioned that the two co-accused Jolame Vunituraga and Laisenia Vuluma confessed in the caution interview and were accordingly convicted and sentenced. Their appeal against the sentence awarded (Criminal Appeal No. AAU 062 of 2014) was dismissed by the Court of Appeal on 19 December 2018. They are not before this Court.
14. The petitioner pleaded not guilty on all four counts. Since he pleaded not guilty, he was tried before the High Court at Lautoka and convicted on all four counts by a judgment and order dated 9 May 2014 and sentenced (as above) on 22 July 2014.
15. Feeling aggrieved, the petitioner sought leave to appeal before the Court of Appeal. On 3 July 2017 the petitioner was granted leave to appeal by a learned Single Judge of the Court of Appeal. Leave was granted in respect of the conviction and sentence.
16. The petitioner's appeal was then heard by a Full Bench of the Court of Appeal which dismissed it on 19 December 2018. The petitioner's conviction was upheld by the Court of Appeal. However, the Court of Appeal did not advert to the appeal against the sentence, hence the distant cousin observation.

Delay in filing the petition for Special Leave to Appeal

17. The petition for special leave to appeal is said to have been filed in this Court after a delay of 5 months and is, therefore, barred by time. However, the record indicates (and this is not denied by the State nor controverted) the petitioner was incarcerated in the Maximum Correction Centre and he had, on 11 January 2019 given a notice of

application for leave to appeal but it appears that the Corrections Office did not process it.

18. A formal petition for special leave to appeal was filed much later (and thereafter an amended petition). This so-called delay has given rise to the view that the petition for special leave to appeal was filed beyond time. However, if the crucial date is taken as 11 January 2019, as it must, then this petition is well within time. The petitioner cannot be faulted for any lapse by the Corrections Office.
19. It is, therefore, concluded that there is no delay in the petitioner filing the petition for special leave to appeal. Assuming there is some delay, this Court condones the delay in view of the circumstances of the case and enlarges the time for filing the petition for special leave to appeal.

Grounds of Appeal and Discussion

20. The petitioner has raised several grounds of appeal in his petition against conviction and sentence. However, learned counsel for the petitioner pressed only one ground regarding the conviction and one ground regarding the sentence.

Discussion on Ground 1

Ground 1: THAT the learned Trial Judge erred in law and in depriving the Appellant of his right to a fair trial by not remitting the charge of resisting arrest to be tried in the Magistrate Court since it was a summary offence triable only in the Magistrate Court. Failure to do so resulted in a miscarriage of justice in the circumstances of the case and the Appellant.

21. With regard to this ground of appeal, the facts are that the prosecution made an application on 20 March, 2012 before the Magistrate for the case to be transferred to the High Court. The application was accepted by the Magistrate who transferred the case to the High Court. It is the contention of learned counsel that the Magistrate was in error in doing so.

22. Section 277 of the Crimes Act 2009 deals with serious assaults in the following words:

“277. A person commits a summary offence if he or she—

(a) assaults any person with intent to commit an indictable offence, or to resist or prevent the lawful apprehension or detention of himself, herself or of any other person for any offence; or

(b) assaults, resists or wilfully obstructs any police officer in the due execution of his or her duty, or any person acting in aid of such an officer; or

(c) assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, business or manufacture or respecting any person concerned or employed by it; or

(d) assaults, resists or obstructs any person—

(i) engaged in lawful execution of court process; or in

(ii) making a lawful distress, with intent to rescue any property lawfully taken under such distress; or

(e) assaults any person on account of any act done by him or her in the execution of any duty imposed by law.

Penalty - Imprisonment for 5 years.”

23. There is no doubt therefore, that the charge against the petitioner is that of committing a summary offence. The jurisdiction for trying such a charge lies with exclusively with a Magistrate as provided for in section 4(1) (b) of the Criminal Procedure Act 2009. This provision reads as follows:

“Offences under the Crimes Act 2009 and extension of jurisdiction

“4.-(1) Subject to the other provisions of this Act

(a) any indictable offence under the Crimes Act 2009 shall be tried by the High Court;

(b) any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and

(c) any summary offence shall be tried by a Magistrates Court.”

24. Consequently, the charge of resisting arrest ought to have been tried by a Magistrate and could not have been transferred to the High Court which had no jurisdiction to try the charge in terms of section 277 (b) of the Crimes Act 2009 read with section 4(1) (c) of the Criminal Procedure Act 2009. The Magistrate gravely erred in divesting himself of jurisdiction exclusively vested in him and impermissibly conferring it on the High Court. *Ex facie*, there is a miscarriage of justice as far as the fourth count is concerned. Accordingly, the petitioner is granted special leave to appeal in respect of ground 1 urged by his counsel and must succeed.

No other ground was pressed by learned counsel as far the petitioner's conviction is concerned.

25. The petitioner has raised two grounds of appeal in his petition against the sentence awarded to him, but has pressed only ground 2 which is:

Ground 2: THAT the time the Appellant spent in custody [whilst in remand] was not been deducted and thereby is an error of law on which sentence was passed.

26. There is substance in this ground of appeal against the sentence. The petitioner has relied on section 24 of the Sentencing and Penalties Act 2009 which reads:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender." (Emphasis supplied)

The petitioner has categorically stated that he spent 22 months and 19 days in remand (equivalent to 1 year 10 months and 19 days) for which he has not been given the benefit in terms of section 24 *supra*. This period is not in dispute.

27. In *Apakuki Sowane v. The State*¹ this Court laid down three important propositions: (i) the word “shall” occurring in section 24 of the Sentencing and Penalties Act 2009 is mandatory in nature. However, an option is given to the court to order otherwise as mentioned in the section “unless a court otherwise orders.” (ii) it is not necessary for the court to make an exact allowance for days or weeks in remand. It is for the court to take a call depending upon the offence and the total significance of the sentence. (iii) a court could itself calculate and set out the actual period to be served for an offence by taking the provisions of section 24 into consideration. In the present case, both the High Court and the Court of Appeal have overlooked the provisions of section 24 of the Sentencing and Penalties Act 2009.
28. The State has, in all fairness, conceded the position in law and also the submission of the petitioner. The State has agreed that the petitioner must get the benefit of the period spent by him in remand. Accordingly, this Court takes the admitted remand custody period and rounds it off to 23 months or one year 11 months.

Under the circumstances, special leave to appeal is granted to the petitioner in respect of the issue of the benefit of remand of the petitioner in custody in calculating the period of incarceration.

29. Accordingly, while upholding the sentence awarded to the petitioner, it is directed that the petitioner be given the benefit of 23 months spent by him in remand custody (equivalent to 1 year 11 months). The petitioner succeeds in the second ground urged by him.

Conclusion

30. On a consideration of the entire record and submissions made by learned counsel for the parties, this Court is of the opinion that this is a fit case for grant of special leave to appeal against the conviction of the petitioner on the fourth count (of resisting arrest).

¹ [2016] FJSC 8

31. Special leave to appeal is also granted to the petitioner limited to the question of calculating the period of incarceration of the petitioner and giving him the benefit of the period spent by him in remand custody, that is, 23 months (equivalent to 1 year and 11 months) as required by section 24 of the Sentencing and Penalties Act 2009.

The Orders of the Court are:

1. *Delay, if any, in filing the special leave to appeal is condoned.*
2. *Special leave to appeal against his conviction on the fourth count is granted to the petitioner and it is held that the conviction of the petitioner on this count by the High Court was without jurisdiction and is therefore set aside.*
3. *Special leave to appeal against the sentence awarded to the petitioner is granted limited to the question of calculating the period of incarceration of the petitioner. The petitioner is entitled to and is granted the benefit of the period spent by him in remand custody, that is, 23 months (equivalent to 1 year 11 months) as required by section 24 of the Sentencing and Penalties Act 2009 for calculating the period of incarceration.*
4. *The head sentence of the petitioner is 12 years. The period of remand custody for which the petitioner is entitled to a benefit is 1 year and 11 months. The sentencing period is, therefore, calculated as 10 years and 1 month.*



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Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court



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Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court



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Hon. Mr. Justice Madan B. Lokur
Judge of the Supreme Court