

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0115 OF 2007S
(High Court Criminal Action No. HAC18 of

2005)

BETWEEN: **MESAKE SINU**

Appellant

AND: **THE STATE**

Respondent

Coram: **Powell, JA**
 Lloyd, JA

Hearing: **Monday, 30th March 2009, Suva**

Counsel: **Appellant in Person**
 A. Driu for the Respondent

Date of Judgment: **Thursday, 2nd April 2009, Suva**

JUDGMENT OF THE COURT

Introduction

[1] On 1 February 2007 the appellant Mesake Sinu ('the appellant') appeared before High Court Justice Govind and pleaded guilty to a number of serious criminal offences committed by him on five separate occasions between 31 March 2004 and 5 July 2005. The offences to which the appellant pleaded guilty were the subject of four separate High Court cases and included, inter

alia, six robbery with violence offences and several offences of assault and wounding. The maximum penalty for the offence of robbery with violence is life imprisonment. The facts surrounding the subject offences included four separate home invasions by the appellant and his accomplices at night and whilst armed. In most of the cases the occupants were assaulted by the offenders whilst items of property owned by them were stolen. One of the cases involved the theft of an automatic teller machine in what is commonly known as a 'ram raid'. What took place overall could accurately be described as a 'crime spree' on the part of the appellant.

- [2] At the time of his appearance in the High Court on 1 February 2007 the appellant was in custody serving a number of existing sentences for other serious criminal offences committed by him on occasions other than those the subject of the proceedings before Govind J.
- [3] On 2 February 2007 counsel for the appellant presented his submissions in mitigation and the matter was adjourned to 20 February 2007 for sentence. On 20 February 2007, and paying due regard to the totality principle, Govind J sentenced the appellant to various terms of imprisonment for the subject offences, ordering that the various terms each be served concurrently, resulting in an effective total sentence of 10 years imprisonment. Having further regard to the totality principle Govind J ordered that the appellant's 10 year sentence be served consecutively to an existing term of three years imprisonment that the appellant was currently serving for other offences (case number 640/05) but concurrently with yet another term of three and a half years imprisonment that had earlier been imposed upon the appellant for a further separate group of offences (case numbers 1322/05 and 494/05).

The appeal to a single judge

- [4] Pursuant to the provisions of s35(1) of the Court of Appeal Act the appellant sought leave from a single judge of the Court of Appeal to appeal the severity of the sentence imposed upon him by Govind J in the High Court.
- [5] On 20 June 2008 after hearing from the appellant the single judge of the Court of Appeal declined to grant leave to the appellant to appeal the severity of his sentence. It is implicit in the single judge's reasons for his refusal to grant leave to the appellant to appeal his sentence that he saw no error in the sentence imposed by Govind J. But in refusing leave, the single judge usefully highlighted a serious error in the prison authorities' calculations of the overall length of sentence the appellant had to serve for all his accumulated sentences for a number of cases. According to the prison authorities the appellant has a total of 18.5 years to serve for all his offences when the correct figure (according to the single Judge of Appeal) is only 13.5 years. Apparently the prison authorities in making their calculations have not implemented Govind J's order that the 10 year sentence be served concurrent to the 3.5 year sentence imposed for the offences the subject of cases numbered 1322/05 and 494/05. The single judge highlighted this clear error in his written judgment having in mind that the prison authorities would then correct their records to the effect that the appellant has only 13.5 years to serve for all his offences.

The appeal to this Court

- [6] By way of handwritten letter dated 8 July 2008 the appellant pursuant to the provisions of s35(3) of the Court of Appeal Act now applies to this Court for leave to appeal the severity of his sentence. He supports his application by a written submission dated 20 January 2009 filed with the registry on 4 February 2009. In his written submissions the appellant, in effect, firstly submits that in imposing the 10 year sentence Govind J did not have proper regard to the totality principle. And secondly, in making the consequential orders that the

10 year sentence be served consecutively to an earlier 3 year sentence but concurrently with another earlier sentence of 3.5 years Govind J failed to properly apply the totality principle.

- [7] As regards his first submission, on the hearing of the matter in this Court, the appellant quite properly accepted that the 10 year sentence itself could not be regarded as too severe. On any view of the brief facts of the many serious crimes for which Govind J was called upon to sentence the appellant, an overall term of 10 years imprisonment for a series of violent home invasions committed by the appellant on separate occasions over a year long period at night, whilst armed and together with accomplices and with some of the occupants being wounded and traumatised could only be regarded as merciful and certainly was neither excessive nor a sentence which in any way breached the totality principle.

Indeed, a sentence of considerably longer length may well have been appropriate.

- [8] On the hearing of the matter it became clear that the appellant's major complaint was not as regards the sentence of 10 years but as regards the consequential orders made by Govind J. Further, the appellant's complaint was really the same as that raised before the single judge of the Court of Appeal, namely that the prison authorities state that he is to serve a total term of imprisonment of over 18.5 years and they have failed to give effect to Govind J's consequential orders. In our view there is no error whatsoever on the part of Govind J in the consequential orders made by him. His ordering the 10 year term of imprisonment imposed upon the appellant to be served consecutively to an existing 3 year term but concurrently with another existing term of 3.5 years is entirely in accordance with principle and reflects a proper application

of the totality principle. To have ordered the 10 year term to be served concurrently with both existing terms of imprisonment would have, in effect, negated both earlier terms of imprisonment which, for obvious reasons, would have been wrong in principle.

[9] However, there is merit to what the appellant submits as regards the prison authorities. In the printout from the prison authorities which comprises part of the appeal papers it is stated that the appellant is to serve a total of 18 years 9 months and 6 days imprisonment. The printout properly reflects that the last 10 years of this overall sentence is the sentence imposed by Govind J. But the printout on its face quite simply does not take into account or give effect to the consequential order of Govind J that this 10 year sentence be served concurrently with the 3.5 year term of imprisonment imposed in respect of cases 1322/05 and 494/05. To give proper effect to the order of Govind J, 3.5 years should be subtracted from the overall term of imprisonment the prison authorities now state that the appellant must serve.

[10] **Orders**

For the above reasons we make the following orders:

- (1) The appellant be granted leave to appeal the severity of his sentence,
- (2) The appellant's appeal against the severity of his sentence be dismissed,
- (3) The Commissioner of Prisons, the Criminal Records Office, the Commissioner of Police and any other interested government official alter their records where necessary so as to give proper effect to Govind J's order of 20 February 2007 that the appellant's 10 year

sentence be served concurrently with his earlier imposed 3.5 year term imposed in cases 1322/05 and 494/05.

Powell, JA

Lloyd, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent