

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL CASE NO: HAM 10 OF 2009

BETWEEN:

WAISAKE MATEA

Appellant

AND:

THE STATE

Respondent

Date of Hearing: 4th June 2009

Date of Judgment: 30th July 2009

Counsel: Appellant in person
Mr. L. Savou for State

JUDGMENT

[1] On 11 February 2008, the appellant and two others appeared in the Magistrates' Court, charged with the following offences:

FIRST COUNT

Statement of Offence

ESCAPING FROM LAWFUL CUSTODY: Contrary to Section 138 of the Penal Code, Cap 17.

Particulars of Offence

Inosi Laqekoro, Jovilisi Godrova, Waisake Matea on the 30th day of September 2007 at Lautoka in the Western Division being in the lawful custody of POC Emani Ratuveitamana, escaped from such custody.

SECOND COUNT

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 324 of the Penal Code, Cap 17.

Particulars of Offence

Inosi Laqekoro, Jovilisi Godrova, Waisake Matea on the 30th day of September 2007 at Lautoka in the Western Division willfully and unlawfully damaged the iron bar and the perimeter fence valued at \$30.00, the property of Natabua Prison.

- [2] On the day of the arraignment, the Magistrate was informed of pending disciplinary proceedings against the accused persons and so the case was adjourned to allow the prosecution to provide details of those proceedings.
- [3] On 3 March 2008, the prosecution informed the court that the second accused had been released from the prison.
- [4] On 27 March 2008, pleas were taken from the first accused and the appellant.

- [5] The first accused pleaded guilty to the charges and was sentenced to an overall sentence of one month imprisonment for both offences, to be served consecutively with any pre-existing sentence.
- [6] The appellant pleaded not guilty and his case was adjourned to 24 April 2008.
- [7] On 24 April 2008, the court further adjourned the case to allow the prison to complete its disciplinary proceedings.
- [8] On 3 July 2008, the prosecution sought leave to withdraw the charges against the appellant on the ground that he was facing disciplinary proceedings in the prison. The learned Magistrate refused leave after citing a memorandum from the prison that the disciplinary proceedings related to refusal by the appellant to wear prison clothing and not his escape from prison.
- [9] Meanwhile, the second accused was arrested on a new allegation and returned to prison.
- [10] On 18 December 2008, the trial commenced before a different magistrate. After the first prosecution witness had given evidence, the second accused and the appellant informed the court that they wanted to change their pleas to guilty.
- [11] The charge was read and explained to them. Both the second accused and the appellant pleaded guilty. The facts were that on 30th September 2007 they escaped from prison after cutting open the prison iron bar and fence and that they voluntarily returned to the prison the following day.

- [12] The second accused was 21 years old and had a previous conviction for escape. The appellant was 28 years old and albeit he had previous convictions, none was for escape.
- [13] The learned Magistrate sentenced the second accused and the appellant to two months imprisonment on each count, to be served concurrently. The Magistrate made a further order that the appellant serve his sentence consecutively with his pre-existing sentence. No such order was made against the second accused. The committal warrant of the second accused shows his sentence was made concurrent with his pre-existing sentence.
- [14] On 29 December 2008 the appellant handed his appeal petition to the prison. The petition was not filed until 13 January 2009. However, the appeal is within the twenty eight days limit prescribed by s.310 of the Criminal Procedure Code.
- [15] In his own words, the appellant's grounds of appeal are:
- (i) That the learned sentencing Magistrate did not take into consideration the plea of guilty for which he was entitled to one third off the total sentence.
 - (ii) That the parity of sentencing is unfair and wrong in principle.
 - (iii) That the consecutive sentence was wrong in principle and that a concurrent sentence was right and appropriate.
 - (iv) That he was a first offender in escaping from lawful custody.

- (v) That the appellant received a longer term of imprisonment while co-defendant was given a lighter term of imprisonment.

[16] In a separate appeal hearing, the first accused's convictions were quashed by Govind J on 9 June 2008. The judgment of the learned Judge reads:

"The concession in my view is properly made. Para 45 of judgment in above case says "A magistrate dealing with a charge of escape should ascertain before plea is taken, whether a prison tribunal has already imposed any punishment for escape. If it has, he should invite the prosecution to withdraw the charge." In this case on the 11.2.08 the prosecutor informed the Learned Trial Magistrate that the accused had been dealt with in prison. The matter ought to have ended there. In the outcome the conviction on both counts is set aside and the accused acquitted."

[17] In ***Joeli Tawatatau v. The State*** Criminal Appeal No. AAU0002 of 2007 the prisoner was convicted for escape under s.138 of the Penal Code and for a disciplinary offence under the Prison Regulation 123(3) based on the same facts. The Court of Appeal in quashing the conviction and sentence for escape said the court dealing with an escape charge should first ascertain whether a prison tribunal had already imposed any punishment for the escape. If it had, the court should invite the prosecution to withdraw the charge because double punishment for charges based on the same facts is not permitted by law.

[18] In the present case, the learned Magistrate complied with the judgment in ***Tawatatau***. He allowed time to the prosecution to enquire from the prison regarding the disciplinary proceedings against the accused persons and after being satisfied that the disciplinary proceedings were not for escape or damaging

property, he proceeded with the charges before the court. In this regard the State counsel's concession that the convictions of the first accused could not stand in light of **Tawatatau's** decision, was made in an error. Regrettably, the learned Judge accepted the concession and acquitted the first accused of those charges.

- [19] At the hearing of this appeal, same counsel appeared and conceded that he made the concession in error. While I find the conduct of counsel appalling, I do not think he deliberately misled the court when he made the concession. Counsel should conduct themselves diligently to ensure that any concessions they make are not founded on a mistake of law or fact and that the court is not misled by their conduct.
- [20] In the present appeal the appellant argues that the learned Magistrate failed to take into account his guilty plea and that he was a first time offender.
- [21] In her sentencing remarks the learned Magistrate noted what the appellant said in mitigation and his guilty plea. The Magistrate did not take an issue that the guilty pleas were entered late because the appellant wanted to clarify the prison disciplinary proceedings so as to avoid double punishments for the same conduct.
- [22] The appellant was a serving prisoner when he escaped. He was not entitled to any credit that is generally given to a person with previous good character.

[23] The tariff for the offence of escape is between 6 and 12 months imprisonment (***Viliame Tuibua v. The State*** *Criminal Appeal No. AAU0116 of 2007S*). However, a sentence outside the range may be imposed if special circumstances are present. In ***Tuibua***, the Court of Appeal said:

“Any sentence outside the usual tariff should however be regarded as exceptional and should be justified by the objective facts of the offence (for example, the degree of violence involved; the degree of damage to property; the degree of planning; the length of time at liberty before recapture; the reason for the escape; early guilty plea; voluntary surrender; other offending during the escape and whilst at large; age of the offender) and/or the subjective circumstances of the offender. As a general rule, when there is a joint escape by two or more prisoners, then the appropriate range of sentence will increase in severity to between 9 to 12 months imprisonment.”

[24] The sentence imposed on the appellant was clearly below the tariff for the offence of escape.

[25] The special circumstances present in the case were that the appellant voluntarily returned to the prison within a day from the date of escape.

[26] There can be no legitimate complaint about the sentence being ordered to be served consecutively.

[27] In ***Alifereti Misioka v. The State*** *FJSC CAV 12/2007* the Supreme Court endorsed the following statement by Shameem J:

“if sentences for escaping are to have any deterrent effect at all, they must be served consecutive to existing terms, so that the result is to lengthen the incarceration period.”

[28] In **Tuibua**, the Court of Appeal held that special and compelling reasons must exist to justify a concurrent sentence for escape offences.

[29] My only concern is the appellant’s complaint based on the parity principle. In **Bole v. State Criminal Appeal No. AAU0011 of 2005**, the Court of Appeal said:

“The parity principle applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence with a justifiable sense of grievance.”

[30] An appellate court will interfere with a sentence on the ground of disparity between sentences only where the disparity is unjustifiable and gross (**Sakeasi Ratumaiya v. The State Criminal Appeal No. AAU0060 of 2005S**).

[31] The appellant and the second accused were both sentenced to two months imprisonment for the offence of escape. There is no disparity in their length of imprisonment. The appellant contends that the disparity arose when his sentence was ordered to be served consecutively while the second accused’s sentence was ordered to be served concurrently.

[32] There is merit in the appellant’s ground relating to the disparity in sentences.

- [33] The appellant and the second accused were jointly charged with the same offences. The mitigating and aggravating factors present in their case were not different. In fact, the second accused had a previous conviction for escaping.
- [34] The learned Magistrate gave no reasons for treating the two offenders differently. I am of the view that the disparity is unjustifiable because it leaves the appellant with a sense of unfairness and I find the disparity odd in these circumstances. I am also of the view that making the appellant's sentence concurrent should take away any grievance that may arise from the erroneous setting aside of the conviction and sentence of the first accused.
- [35] For these reasons, the appeal is allowed and the sentences imposed on the appellant are ordered to be served concurrently with his pre-existing prison sentence.

Daniel Goundar
JUDGE

At Lautoka
30th July 2009

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions for State