

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Appeal No. 008 of 2009

BETWEEN:

1. AMINIO VETAUKULA
2. TIMOCI DUNA
3. SEMI MADIGI

Appellants

AND:

THE STATE

Respondent

Counsel: Mr. A Sen for all Appellants
Mr. T Muloilagi for State

Date of Hearing: 28 August 2009
Date of Judgment: 4 September 2009

JUDGMENT

[1] On 9 January 2009, all three appellants were convicted on their pleas of guilty to an offence of robbery with violence.

- [2] On 23 January 2009, each appellant was sentenced to a term 5 years and 2 months imprisonment. The appeal is against sentence alone.
- [3] The robbery was committed in a rural farming settlement. On 29 December 2008 at about 7.00p.m., the appellants and one other co-accused entered the home of the victim and his family. The victim had come out of shower when the intruders confronted him. The victim was punched in his face. He fell down. The victim's wife was in the house but she was helpless. One intruder had a cane knife. The second appellant guarded the victim, while the others ransacked the house. They fled the house after stealing cash and properties to the total value of \$1698.00, of which \$1200.00 cash was recovered by the victim about 40 meters from his house. Following the arrests of the appellants, a mobile phone was recovered from the first appellant's possession.
- [4] Under caution the appellants confessed to the robbery.
- [5] The victim was 48 years old and lived with his wife. There was evidence that the victim suffered from some form of disability but the nature of disability was not disclosed to the sentencing Magistrate. On 30 December 2008, the victim was medically examined. The medical report revealed that the victim was depressed. He received a 2 centimeter laceration on his right eye and his eye was swollen.
- [6] The first appellant was 27 years old, single and a student of Fiji Institute of Technology. He was studying Diploma in Civil Engineering.

- [7] The second appellant was 23 years old, single and a farmer by profession.
- [8] The third appellant was 26 years old, single and a farmer. The third appellant told the court that he wanted to reconcile with the victim but the learned Magistrate correctly advised him that robbery with violence was not a reconcilable offence.
- [9] All three appellants were first time offenders.
- [10] The principal complaint of the appellants is found on the ground of disparity in the sentence imposed on the co-accused.
- [11] The co-accused was apprehended later and dealt by a different Magistrate. The personal circumstances of the co-accused were similar to the appellants. The co-accused was 26 years old, married and a farmer. He was a first time offender like the appellants. The co-accused was sentenced to 2 years and 4 months imprisonment. The sentencing Magistrate used the role of the co-accused in the commission of the offence to justify the disparity in the sentences imposed on him and on the appellants.
- [12] In ***Bote v State Criminal Appeal No. AAU0011 of 2005***, the Court of Appeal said:
- “The parity principle applies when the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence with a justifiable sense of grievance”.

[13] In ***Ratumaiya v State*** *Criminal Appeal No. AAU0060/05S*, the Court of Appeal held that an appellant court will intervene with a sentence on the ground of disparity between the sentences only where the disparity is unjustifiable and gross. The Court of Appeal adopted the dicta by the New Zealand Court of Appeal in ***R v Lawson*** [1982] 2 NZLR 214:

“Sentencing is not an exact science and the circumstances of one offender can rarely be alone compared with those of another. The sentencing judge must not only consider the relative involvement of the individuals in the offence but also the mitigating factors affecting each. But a marked difference in the sentences imposed on co-offenders, and for which no justification can be shown, may be of importance to the administration of justice generally in that such a marked and unjustified difference will tend to bring the administration of justice into disrepute. The courts must bear in mind that public confidence in the administration of justice is best preserved if justice appears to be administered even-handedly. It is for this reason that the disparity in sentences imposed on co-offenders may justify a reduction in the sentence imposed on one which would otherwise be appropriate.”

[14] There is a marked difference in the sentences of the appellants and the co-accused. The difference is of 2 years and 10 months.

[15] In the sentencing remarks of the co-accused, the learned Magistrate said:

“You played a rather minimal role in that you only stood guard over the victims whilst your colleagues ransacked the house and removed the loot.”

[16] Later in the remarks, the learned Magistrate said:

“In my view, after taking into account that you played a rather minimal role in the offence, the 2 years and 4 months sentence I give you today, though less than what your friends are now serving, justified.”

- [17] The Magistrate sentencing the co-accused clearly misunderstood the position where an offence is carried out jointly by a number of offenders.
- [18] This was a planned joint enterprise in which the various participants took different parts within the overall plan.
- [19] Although the co-accused’s role was to act as a look out, he clearly knew of the plan to rob the victim in advance. He entered the house of the victim with the appellants, who were armed with a cane knife. The co-accused was as responsible for the offence as the appellants. Therefore, the learned Magistrate erred in finding the co-accused played a minimum role to justify a lesser sentence for him.
- [20] The personal circumstances of all four offenders were similar. They all entered early guilty pleas and showed remorse. They were of similar age and first time offenders. The aggravating features applied to all four offenders.
- [21] The appellants feel aggrieved by the fact that the co-accused has received substantially lesser term of imprisonment. Their grievances are justified. Why should the co-accused get a lesser sentence when he is equally responsible for the offence?

- [22] The appellant's grievances are further aggravated by the fact that the State has not seen fit to appeal against the sentence imposed on the co-accused. The State was well aware of the lenient sentence imposed on the co-accused. They had ample opportunity to appeal the sentence. But for reasons known best to the State, no appeal has been filed against the sentence of the co-accused as of to date. As a result justice was not administered even-handedly in this case.
- [23] Although the sentences of the appellants are appropriate and within the tariff for this kind of offending, but when compared to the sentence imposed on their co-accused, the disparity is unjustifiable and gross.
- [24] The appeal is allowed. The sentence of 5 years and 2 months imposed on each appellant is quashed and a sentence of 2 years and 4 months imprisonment is substituted effective from 23 January 2009.

Daniel Goundar
JUDGE

At Labasa
Friday September 2009

Solicitors:

Mr. A Sen for all Appellants
Office of the DPP for State