

11

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 10 OF 1990

Between:

AISAKE TAWAKE

Appellant

- and -

S T A T E

Respondent

Appellant in Person
Mr I. Mataitoga for the Respondent

Date of Hearing: 10 October, 1990
Delivery of Judgment: 10 October, 1990

JUDGMENT

This is an appeal against sentence only. On 11 November, 1986 the Appellant and one Jona Saukilagi were sentenced to 6 years' imprisonment by Cullinan J. in the Supreme Court (now called High Court) at Suva for the offence of Robbery contrary to Section 293(1)(a) of the Penal Code Cap. 17. They were jointly charged with the offence and they both had pleaded not guilty.

In 1987 Jona Saukilagi appealed against his sentence and conviction - See Criminal Appeal No. 7 of 1989. Although Jona Saukilagi's appeal against conviction was dismissed his sentence was reduced to 5 years by the Court of Appeal on 9 May, 1988. In allowing the appeal against sentence the Court stated, inter alia, as follows -

2.

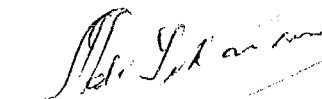
"It is clear from the perusal of the learned trial Judge's expressed comments when sentencing the accused that he was deeply concerned about the violence used by the accused and others involved. There can be little doubt that the accused was convicted under subsection (a) but sentenced under subsection (b) on facts which were not in the statement of offence on which the accused was convicted.

.....

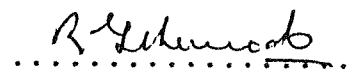
He was not charged with any other offence than robbery and the court is not entitled to take into consideration when sentencing a convicted person facts which would have supported other offences with which he could have been charged. In the instance case all that had to be considered were the elements of the offence of robbery not alleged to have been attended by the production or use of a weapon or actual or threatened violence."

The present Appellant was granted leave to appeal out of time and was released on bail on 14.6.90. Having regard to his entitlement to 1/3 remission the appellant would have been released from prison on 10.11.90 had he still been in custody.

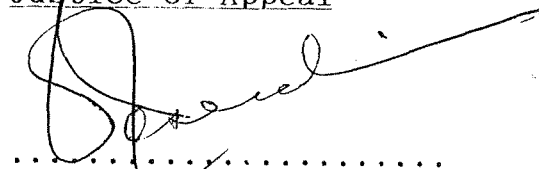
The reasons given in Criminal Appeal No. 7 of 1989 apply to the instant appeal also. We therefore allow the appeal, set aside the sentence of 6 years imposed on the Appellant and in lieu thereof impose a sentence that would entitle him to an immediate release as if he had been in prison. He and his surety are discharged from their bail obligation.



.....
Sir Moti Tikaram
Justice of Appeal



.....
Sir Ronald Kermode
Justice of Appeal



.....
M.D. Jesuratnam
Justice of Appeal