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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0020 OF 2008
(HIGH COURT CRIMINAL ACTION NO.: HAC 115 OF 2006(L)

BETWEEN:

1. NILESH GOUNDAR
2. AMIT KUMAR
3. UMESH CHAND

-APPELLANTS-

AND:

THE STATE

-RESPONDENT-

Counsel: Appellants in Person
Mr. A. Elliot for the State

Date of Hearing: 22nd and 29th May, 2008
Date of Ruling: Monday 30th June, 2008

RULING

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[1] The appellants were jointly charged with three counts of robbery with violence arising from the same transaction but involving three different complainants. The first and third appellants were convicted following trial. The second appellant was convicted on pleas of guilty.

[2] The first and third appellants were sentenced to a term of 5½ years imprisonment on each count to be served concurrently. The third appellant's overall sentence of 5½ years imprisonment was ordered to be served consecutively to an existing imprisonment sentence for an unrelated offence. The second appellant was sentenced to an overall term of 4 years imprisonment, which was made partially concurrent and partially consecutive to existing sentences for unrelated offences.

[3] The appellants have filed timely appeals. They also seek bail pending appeal.

[4] The first appellant appeals against conviction and sentence. In his own words the grounds are:

> "1. That the learned trial judge erred in law in failing to give an adequate direction regarding the alternative verdict of robbery with violence.
>
> 2. That the learned trial judge erred in law and in fact in breaching my right to have the case determined within a reasonable time as my right time as required under section 29(3) of the Constitution. As far as I am concerned reasonable time has been detained by one of the former chief justice Tuivaqa's practice directions to mean 12 (twelve) months.
>
> 3. That the learned trial judge erred in law and in fact in breaching and violating my rights to a fair trial in light of properly direct himself as to the standard of proof required in order to safely secure the convictions of the defendant as under.
>
> 4. That there is no direct evidence to prove that I was the person who rob the complainant and that the complainant did also witness that I did not robe him – and also I denied in my statement of any robbery.
>
> 5. That I was denied of my constitutional right to elect the court I desire for proper and fair trial as I was also unrepresented.
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> 6. That the learned trial judge fail to call the state witness listed in the disclosure including my witness were not summoned.
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> 7. That there was no credited given to the shown evidence I gave in the trial within trial and that there was no proper trial after the trial with in trial.
>
> 8. That there was no martial evidence found with me and that the complainant did witness in favor of saying that I did not rob any of them.

9. That the charge is wrong according to the fact of the case and the evidence against me doesn't prove that I intentionally or by any means took part in any robbery.

10. That the sentence is totally harsh and excessive comparing to similar nature case and sentence."

[5] The second appellant appeals against sentence only. In his own words, the second appellant advances the following grounds:

"A. That the Learned Sentencing Judge erred that count (1) should not have been directed to be served consecutively to the prison term of 4 years 2 months which I was convicted for in 2006.

B. That there was an error of law that the sentence should have been directed to be served concurrently to my present term convicted in 2006, since they arose out a single episode of criminality, citing the general proposition, referred to in decision such as Henry Kalfau v The Public Prosecutions [1990] V.U. Cr. 9, that separate offences that form part of the same overall event or transaction should normally attract concurrent sentences.

C. That the Learned Sentencing Judge's judgment failed to contain general observation as to the principle of sentencing particularly in relation to the need for the sentencing court to ensure that where immediate custodial sentence is called for, it should be short as possible consistent only with the duty of the court to protect and deter criminals. It should also consider the four class principle of sentencing (please see R v Sargent [1974] 60, Cr. App. 74 Lawton, L.J.)

D. That the sentence was harsh and excessive in circumstances, I was serving a longer prison term, my mitigation was not considered, 1/3 of my sentence was not properly deducted which I was credited for."

[6] The third appellant appeals against conviction and sentence. He advances, in his own words, the following grounds:

"A. That there was no clear or any direct evidence to prove the offence I am charged with. See R v Clay, 3 CV. App. R.92; R v Pearson, 4 CV App.R.40, R v Jhonson, 6 CR. App.c.82.

B. That the trial Judge erred in law and infact, in convicting the appellant by relying on circumstantial evidence which was address by the Prosecution, giving them much weight and today ignored the fact and defence evidence that the appellant did not at any time play an active role in the commission of the crime. Please see the written statement of Amit Kumar and Nilesh Goundar.

C. That the trial Judge erred in law and infact, in convicting the appellant by relying on circumstantial and inadmissible evidence.

D. That the trial Judge erred in law and infact, by misdirecting himself on the issue of the burden and standard of proof.

E. That the Prosecution failed to prove the elements of the crime the appellant is charged with beyond reasonable doubt.

F. That the conviction cannot stand against the appellant on the evidence that the offence of this nature was committed by each of them independently, willingly and intentionally. Please see R v Scrammage [1963] 2 QB 807, 47 CR. App. R.215."

[7] The appeal is governed by Section 21 of the Court of Appeal Act. Section 21 provides:

(1) A person convicted on a trial held before the High Court may appeal under this Part of the Court of Appeal - -
(a) against his conviction on any ground of appeal which involves a question of law alone;
(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[8] The appellants were charged on 11 August 2006. They appeared in person in the Magistrates' Court at Lautoka and entered pleas of not guilty. The matter was then adjourned on a few occasions to secure legal representation and for disclosures. Eventually, the third appellant was represented by counsel. All appellants elected High Court for trial and, on 16 October 2006, the matter was transferred to the

High Court. The appellants appeared in the High Court on 27 October 2006. After four adjournments, on 21 May 2007, pleas were taken from the appellants on an amended information filed by the Director of Public Prosecutions.

[9] On 23 May 2007, the trial commenced within a reasonable time. The trial commenced with a trial within trial to determine the admissibility of the caution interviews of the appellants. The trial within trial could not be completed until 16 November 2007 because of the unavailability of the trial judge from 30 July 2007. The trial re-commenced on 16 November 2007 and concluded on 1 February 2008. It took nearly 9 months to conclude the trial after it had commenced, which gives me some cause for concern but, after reviewing the record of the proceedings, I am satisfied the proceedings were conducted fairly and the appellants were not prejudiced by the delay in the conclusion of the trial.

[10] At trial of the first and third appellants, the prosecution relied on the principle of joint enterprise to prove the charges against them. It was the prosecution case that whilst the second appellant was the principal offender, the first appellant and third appellant knowingly assisted and encouraged him during the robbery by holding a stick and a stone respectively, which caused fear in the complainants.

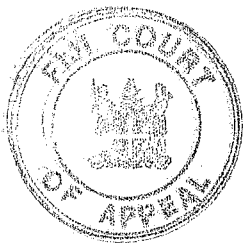
[11] The trial judge directed the assessors on the principle of joint enterprise. His Lordship further directed the assessors to consider the evidence against each accused separately.

[12] His Lordship then outlined to the assessors the evidence against each appellant and reminded them that the burden of proof rests on the prosecution and the standard was proof beyond a reasonable doubt. The guilty verdict means that the assessors and the trial judge were satisfied beyond a reasonable doubt that the appellants were guilty of the charged offences.

[13] After convicting the first and third appellants on the evidence and the second appellant on his pleas of guilty, the learned judge gave proper consideration to all the relevant factors before arriving at the respective sentences. The sentences are neither manifestly excessive nor wrong in principle.

[14] I have carefully considered the individual grounds of appeal advanced by the appellants, the summing up of the trial judge and the reasons given by the trial judge for the respective sentences of the appellants. I am satisfied none of the grounds have any substance. Their appeal is bound to fail.

[15] Leave to appeal is refused. In these circumstances, bail is refused as well.



Daniel Goundar
JUDGE OF APPEAL

At Suva
Monday 30th June, 2008

Solicitors:
In Person for all Appellants
Office of the Director of Public Prosecutions, Suva for the State