

(17)

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

CRIMINAL APPEAL NO. AAU0012 OF 2007S

(High Court Criminal Action No. HAA 135, 136, 137/2006S)

BETWEEN: PENIASI TIRIKULA

Appellant

AND: THE STATE

Respondent

Coram: Pathik, JA
Goundar, JA
Powell, JA

Hearing: Friday, 4 April 2008, Suva

Counsel: Appellant in Person
W Kurisaqila for the Respondent

Date of Judgment: Tuesday, 8 April 2008, Suva

JUDGMENT OF THE COURT

[1] In these proceedings the appellant is representing himself. There are no written submissions from the State and it is not easy to follow the appellant's chain of criminal convictions from the Court Record.

Criminal Case 2868/02

[2] On 19 December 2002 in criminal case 2868/02 the appellant was charged with House Breaking Entering and Larceny, it being alleged that he had committed two offences

in the one day. Cash bail of \$150 was ordered but the appellant was unable to pay this and was remanded in custody until 2 January 2003 when he was bailed on bonds and the matter adjourned then until 1 April 2003.

[3] The charge in 2868/02 involved stealing jewellery to the value of \$300. Details of the charge in 2869/02 do not appear in the Court Record.

[4] The appellant failed to appear on 1 April 2003. He did appear on 20 June 2003, was fined \$50 for failing to appear on the previous occasion and the matter was adjourned to 30 June 2003. The appellant failed to appear on 30 June 2003 or on the adjourned dates of 4, 5 & 11 November 2003.

Criminal Case 1808/03

[5] On 19 August 2003 in Criminal Case 1808/03 the appellant appeared in the Magistrate's Court at Suva charged with house breaking entering and larceny. \$13,000 worth of property was alleged to have been stolen of which only property to the value of \$385 had been recovered.

[6] The appellant was remanded in custody where he stayed until 11 November 2003 when the trial began, the appellant representing himself. The appellant pleaded not guilty [his failure to appear in 2868/02 & 2869/02 on 4, 5 & 11 November 2003 due, it would seem, to his being in custody and in court in case 1808/03].

[7] The trial in 1808/03 continued on 25 November & 9 December 2003, on these occasions being adjourned on the application of the prosecutor. On 9 December 2003 the matter was adjourned to 9 March 2004. The appellant had been remanded in custody in the period until 9 December 2004 when bail was granted.

[8] Presumably bail was posted because there was no appearance by the appellant on 9 March 2004 and he remained at large in this matter until 3 August 2005 when he pleaded guilty. However he was back in Court on 13 April 2005 in the other matters.

[9] Meanwhile in 2868/02 & 2869/02 the appellant had appeared on 25 November 2003 and was remanded in custody until 23 December 2003 when he was given cash bail of \$100. From February 2004 until April 2005 the matters were mentioned on about eight occasions but there was no appearance by the appellant until 13 April 2005 following his arrest on a bench warrant.

[10] On 13 April 2005 the defendant told the Court he was defending himself and was ready for hearing in matters 2868/02 and 2869/02, and he was, it seems, able to post the \$500 cash bail that was ordered. The trial was set down for hearing on 19 July 2005 but the appellant failed to appear. He was subsequently arrested and appeared before the Court on 3 August 2005.

Criminal Case 1454/05

[11] On 3 August 2005 the appellant was charged with criminal trespass having been accused of entering the compound of the Royal Suva Yatch Club without lawful excuse on 2 August 2005. He was also charged with being found by night in possession of a house breaking implement, being a pair of pliers and a screwdriver.

[12] On 3 August 2005 he pleaded guilty to both these counts and he also pleaded guilty in cases 2868/02, 2869/02 and 1803/03.

[13] On 3 August 2005, for reasons which aren't clear, the Magistrate sentenced the appellant in case 1454/05 to 1 year imprisonment on each of the two counts, to run concurrently to each other, and stood the other three matters over to 31 August 2005.

[14] On 31 August 2005 in cases 2868/02 & 2869/02 the appellant was convicted of "House Breaking Entering and Larceny" and sentenced to 3 years imprisonment to be served concurrently with the sentence in 1803/03 , for which he also convicted and sentenced to 4 years imprisonment to be served concurrently with the sentence in 2868/02.

[15] The appellant pleaded guilty in these all these cases because he wanted to change his image and return to his village and settle down. The appellant had over 20 other previous convictions going back to 1992 and nearly all for housebreaking and larceny though including one conviction for robbery with violence. The Magistrate noted that prison was not something new to the appellant but accepted that the appellant wanted to change for the better and "*for this reason*" was given concurrent sentences in the 2002 and 2003 cases.

Additional Sentences for Forfeiture of Bail

[16] On 22 September 2005 in each of cases 2868/02, 2869/02 and 1808/03 the appellant was convicted of "Forfeiture of Bail" and was sentenced to 9 months imprisonment for each to be served "*consecutive to his current prison term*"

Appeal to the High Court

[17] The effect of the sentences handed down on 3 August, 31 August and 22 September 2005 was that the appellant was to serve 7 years and 3 months in prison (4 years and 27 months). The appellant appealed to the High Court arguing in his written submissions, inter alia, that the three forfeiture of bail sentences should be concurrent, and that the 1 year sentences handed down on 1 August 2005 should have been made concurrent with the 3 & 4 year sentences handed down on 31 August 2005.

[18] The appeal was heard in the High Court on 12 December 2006 and judgment delivered on 15 December 2006. The appeal was upheld in relation to the bail offences, the judge finding that the terms of imprisonment for those offences ought to have been concurrent. There is however no discussion in the judgment as to why the 1 year sentences should not be concurrent with the 3 & 4 year sentences. It is likely that the matter wasn't adverted to in oral argument, the appellant once again being unrepresented.

Leave from the President of the Court of Appeal

[19] On 20 February 2007 the then President of the Court of Appeal, Justice Ward, granted the appellant *"Leave to appeal on the ground that the appellant was unrepresented but was allowed to make submissions against his interest for which he should have had legal advice"*.

[20] No reasons for this decision were given, however the issue that the appellant seems to be articulating in his written submissions to this Court is that because he lacked legal representation he was not in a position to make the point, either at all or adequately, to the Magistrate or on appeal to the High Court, that the 1 year sentences should be concurrent with the longer sentences.

Appeal to the Court of Appeal Should be Allowed

[21] Section 22(1)(a) of the Court of Appeal Act provides that appeals to the Court of Appeal from a decision of the High Court in its criminal appellate jurisdiction shall only lie, in respect of a sentence, if the sentence was an unlawful one or was passed in consequence of an error of law.

[22] In our opinion the error of law in the High Court was the same error of law made by the Magistrate, namely failing to consider whether or not the sentences handed down on 3

August 2005 should be made concurrent with the sentences to be handed down later in the month in cases 2868/02, 2868/03 and 1808/03. If this matter had been considered it would have been incumbent upon the said judicial officers to give reasons for not making the sentences concurrent.

[23] In common law jurisdictions there is a requirement for judges to give reasons for their decisions: English v Emery Reinbold & Strick [2002] 3 All ER 385 at pp 392-394. Failure to give any reasons on reasons adequate to the issue involved will amount to an error of law.

[24] If the Magistrate had considered the matter then in our opinion he would have been bound to make the sentences for Yatch Club offences concurrent with the others. A twelve month prison sentence for criminal trespass is the maximum sentence that could have been imposed even if the appellant had pleaded not guilty. The failure of the Magistrate to consider the issue and the failure of the High Court to deal with it on appeal, are likely to have been inadvertent, an inadvertence contributed to in large part by the fact that the appellant was representing himself.

[25] State Counsel before this Court properly concedes that if an error of law has been made by the Court below in failing to consider this issue or to give reasons, then the proper course for this Court is to uphold the appeal and direct that the 1 year sentences in proceedings 1454/05 be served concurrently with the sentences in proceeding 2868/02, 2869/03 and 1808/03. The effect is that, following the effective reduction of the sentence by 18 months by the High Court, the total sentence is further reduced by 1 year to 4 years and 9 months.

[26] In these proceedings the appellant did not advance the proposition that the 9 month sentence for the bail breaches should be served concurrently with the other sentences and nor could he. Not only is it usual for bail offence sentences to be in addition to the

sentences for the primary offence, the matter was not argued in the High Court and no error of law was made in not dealing with it.

[27] The orders of the Court are:

1. Appeal allowed.
2. In criminal case 1454/2005 the sentence of the Court is to be: *"The Accused is sentenced to 1 year imprisonment on each of the two counts, to run concurrently to each other and concurrently with the sentences in criminal cases 2868/02, 2869/02 and 1808/03."*



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Pathik, JA

A handwritten signature in dark ink, appearing to read "Goundar", written over a horizontal line.

Goundar, JA

A handwritten signature in dark ink, appearing to read "Randall Powell", written over a horizontal line.

Powell, JA

Solicitors:

Appellant in Person

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