

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.AAU0026 OF 2009

BETWEEN: PITA VIRIKIWAQA
Appellant

AND: THE STATE
Respondent

Date of Hearing: Monday, 25th October 2010

Counsel: Appellant in Person
Ms. J. Cokanasiga for the Respondent

Date of Ruling: Monday, 1st November 2010

RULING

1. On 25th October 2010, I heard an application for leave to appeal to the Court of Appeal from Pita Virikiwaqa who was sentenced on 4th October 2007 to seven years imprisonment by Magistrate Mr. Salesi Temo as he then was for one offence of robbery with violence.
2. In his reply before me Pita Virikiwaqa submitted that he had not used violence because the shop owner and his daughter had fled the scene when he and five or six others entered a Chinese Grocery store on 29th August 2007 in the evening.

3. As the following extract from the brief facts shows this was not his best point in his application

"On the date and time mentioned the complainant was inside his shop doing business when accused one and accused two accompanied by six others, armed with a cane knife, pinch bar and iron rods broke open the lock for the security grills inside of the shop and threatened the complainant of being injured by shouting at the complainant that he would be harm if he tried to stop them. The complainant fearing for his life ran up the stairs to his home which is located on the upper floor of the shop and told his daughter to call out for help whilst he call the police.

Constable Niumaia, a police officer living beside the complainant's house heard the complainant's daughter's cries for help and with the assistance of another neighbour went to the shop. Arriving at the shop they were confronted by accused one and accused two and six others who threw them with bottle of soya sauce and fled the scene."

4. Pita Virikiwaqa's best point is his claim that his sentence of seven years was disproportionate to that of his co-accused in Criminal Case No. 1081/07, Lewis John Tuqaqa. He submits upon the principle of disparity of sentences. While he received seven years his co-accused received only two years.
5. But the reasoning of Magistrate Salesi Temo must be taken into account. He finds that Tuqaqa was of previous good character and at 21 was probably the youngest of the group. Magistrate Temo found he was merely following his friends and that his role was of lookout. In comparison the role of Pita Virikiwaqa then as admitted in his caution statement was that of leader of the robbery with violence event. Also while Tuqaqa had no previous conviction, Pita Virikiwaqa had four previous offences. Robbery with violence was not among them but theft was. He had served a sentence of imprisonment but in the view of Magistrate Salesi Temo he had not learned a lesson from that. Pita Virikiwaqa had carried a pinch bar to the scene and broken open a padlock to gain entry to the shop.

6. There was a special feature of leniency in this ruling in as much as Pita Virikiwaqa had very recently been sentenced to five years imprisonment on Case No. 1063/06. Again it was an offence of robbery with violence. Instead of making the seven years consecutive in part to the five year sentence, as would have been within the applicable principles, Magistrate Temo made the five years wholly concurrent with the seven years. Magistrate Temo decided that the totality for the two offences should be seven years.
7. On 18 September 2008 an appeal against the seven year sentence was heard before Mataitoga J. Mr. Justice Mataitoga dismissed the appeal. His principal reasoning was centred on two points. The first was that leniency had been shown in making to the five year sentence wholly concurrent. The second point was that recent authorities showed that a starting point of 7 years for this offence was appropriate. Magistrate Temo had erred on the lenient side by making his starting point in relation to Pita Virikiwaqa six years. Since the sentence of seven years was perhaps more lenient than it should have been Mr Justice Mataitoga saw no merit in the appeal and dismissed it.
8. In my opinion in relation to tariff and in relation to the effect of mitigating and aggravating factors Magistrate Salesi Temo did not err on the side of severity. If anything for the reasons stated by Mataitoga J it was, if anything, on the lenient side.
9. As to the parity principle it was stated thus by the Court of Appeal (Ward P, Wood JA and Ford JA) in Bote v. The State 2005 FJCA 58 :

“The parity principle applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the longer sentence with a justifiable sense of grievance (Lowe v. The Queen [1984], 154 CLR and R v. Yawcett [1983] 5 Cr. App. R(5) 158).”
10. In my judgment the factor of having the earlier 5 year sentence made concurrent is relevant to disparity. It is not just a case of sentences of 7 years as against a sentence of

two years for armed robbery. In reality Pita Virikiwaqa was being dealt with for two separate offences of robbery with violence. Lewis John Tuqaqa was facing sentence at the age of 21 in respect of a first conviction for crime. The disparity principle is at best only partially applicable.

11. In addition, in my judgment, the factors taken into account by Magistrate Temo that made the position of the two men quite different were appropriate.
12. For these two reasons I do not think there was any breach of the disparity principle in sentencing Pita Virikiwaqa to seven years while sentencing Lewis John Tuqaqa to two years.
13. Having concluded that there is no error of law I would refuse leave to appeal.
14. But in fact this appeal was more than one year out of time. On principle, time can be extended if the period is three months or so.
15. The order of the Court is
 1. Application to extend time for appealing refused.
 2. Application for leave to appeal to the Court of Appeal dismissed being made out of time.



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William R. Marshall
Resident Justice of Appeal