IN THE COURT OF APPEAL
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0063 OF 2011

BETWEEN : **PAULA TORA**

APPLICANT

AND : **THE STATE**

RESPONDENT

COUNSEL : **Applicant in Person**

Mr. M. Korovou for Respondent

Date of Hearing : **25 June 2013**

Date of Ruling : **1 July 2013**

RULING

[1] On 31 January 2011, the applicant was sentenced to 8 years' imprisonment by the High Court at Lautoka, after he pleaded guilty to a charge of aggravated robbery contrary to section 311(1) (b) of the Crimes Decree of 2009.

[2] On 20 June 2011, the applicant filed an untimely application for leave to appeal against his sentence. Since this appeal falls within the ambit of section 21 of the Court of Appeal Act, the applicant is required to seek leave from the Court of Appeal to appeal his sentence. Section 26 (1) of the Act provides that notice of application for leave must be given within 30 days from the decision appealed against. Section 35 (1) (b) of the Act gives a single judge of appeal the power to extend the time within which notice of an application for leave may be given.

[3] The principles governing an application for extension of time to appeal were summarised by the Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012) at paragraph [4]:

> "Appellate courts examine five factors by way of a principled approach to such applications. These factors are:
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> (i) The reason for the failure to file within time.
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> (ii) The length of the delay.
>
> (iii) Whether there is a ground of merit justifying the appellate courts consideration.
>
> (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
>
> (v) If time is enlarged, will the respondent be unfairly prejudiced?

[4] More recently, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009(24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

> These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.

[5] At the hearing of this application, the applicant was invited to explain the delay. He told the court that he submitted his application for leave within the appeal period to the Department of Corrections. Later, he was told that his application was lost and that he has to do another application. The current application is his second application filed some 3 ½ months after the appeal period had expired under section 26(1) of the Court of Appeal Act. In most cases of delay, prejudice to the opponent can be presumed from the length and the reasons for the delay.

[6] In assessing merits of the appeal against sentence, I am guided by the judgment of the Full Court in *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999) at paragraph 2:

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be

> apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936)55 CLR 499)).

[7] The first ground of appeal is that the sentence is harsh and excessive in the circumstances of this case. At the time of the offending, the applicant was 32 years old and self-employed as a grass cutter. The victim, Pochaia Naidu was a bus driver, employed by the Pacific Transport Ltd. On 11 November 2010, the victim was assigned to drive Natabua route in Lautoka. At around 11 am, the applicant got on the bus with two other female passengers. When the victim stretched out his hand for the bus fare, the applicant pushed his hand away. The victim got suspicious and pulled the till containing cash towards himself. At this point, the applicant struck the victim's hand with the blunt side of a chopper and hit the victim's head with his hand. The applicant grabbed the till containing $150.00 cash and ran away.

[8] The facts show that the applicant committed a serious offence, calling for a deterrent sentence. The victim was attacked inside a public transport in the course of his employment and in the plain view of the passengers who were inside the bus. Although the victim was not seriously injured, the use of a chopper made the threat of violence real. The facts indicate that the victim was traumatised by the incident.

[9] It is apparent from the sentencing remarks of the learned judge that the term of 8 years was imposed on the applicant after due regard was given to the guideline judgments for sentences on robbery with violence. Counsel for the State submits, which I accept, that the term

of 8 years is within the tariff for robbery with violence as established by cases like *State v Rasaqio* [2010] FJHC 287; HAC155.2007 (9 August 2010); *Basa v State* [2006] FJCA 23; AAU0024.2005 (24 March 2006); *Wainiqolo v The State* [2006] FJCA 70; AAU0027.2006 (24 November 2006); *State v Rokonabete* [2008] FJHC 226; HAC118.2007 (15 September 2008); *State v Singh* [2010] FJHC 535; HAC022.2010 (24 November 2010); and *State v Volau* [2011] FJHC 6; HAC085.2009 (24 January 2011).

[10] The second ground of appeal is that the learned judge erred in law and fact in taking irrelevant matters into consideration while sentencing the applicant. When invited to provide the particulars of the irrelevant matters, the applicant was not able to point out to any matters in the sentencing remarks of the learned judge that could support this ground.

[11] The third ground of appeal is that the applicant was made a 'scapegoat' by the sentence imposed on him. At the hearing, the applicant was unable to explain what he meant by this ground of appeal.

[12] The fourth ground of appeal sets out his mitigating factors, all of which the learned judge took into account in sentencing the applicant.

[13] The fifth ground of appeal is that the sentence imposed on the applicant is harsher than the sentences imposed in three other cases of robbery with violence. It must be borne in mind that each case is considered on its own facts. The circumstances of the offending and

the personal circumstances of the offenders may vary in each case. No legitimate complaint can arise by comparing different cases.

[14] The sixth ground of appeal is that the learned judge took impermissible aggravating factors to enhance the sentence. The learned judge identified the following as the aggravating factors:

> (i) The offence was committed on a passenger transport bus and robbed its driver;
>
> (ii) You used violence on the complainant driver when the bus was on a highway with commuters on board; and,
>
> (iii) Your act of assault on the complainant-driver really had posed a threat on the commuters, pedestrians and other road-users albeit no injuries were sustained by the complainant- driver.

[15] Section 311(1) (b) of the Crimes Decree defines the offence of aggravated robbery as follows:

> A person commits an indictable offence if he or she –
>
> (b) commits a robbery and, at the time of the robbery, has an offensive weapon with him or her.
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> Subsection (3) defines an "offensive weapon" as:
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> (a) an article made or adapted for use for causing injury to, or incapacitating, a person; or
>
> (b) an article where the person who has the article intends, or threatens to use, the article to cause injury to, or to incapacitate, another person.

[16] The chopper that the applicant used in the course of the robbery falls within the definition of an offensive weapon. The use of an offensive weapon to threaten and assault the victim was an essential element of the offence of aggravated robbery under section 311 (1) (b) of the Crimes Decree.

[17] Although there is some overlap of elements of the offence with the aggravating factors identified by the learned judge, such as the use of violence and assault in the course of the robbery, the learned judge correctly pointed out that the victim's position as a public transport driver and the commission of the offence in the presence of the passengers were the aggravating factors.

[18] If the learned judge had correctly identified the aggravating features, an increase of 4 years to the sentence would have fairly reflected the aggravating factors. Since the learned judge did in fact increase the sentence by 4 years to reflect the aggravating factors, no arguable cause for concern can arise from this ground.

[19] The seventh ground of appeal is that the learned judge erred in using 10 years as a starting point. Clearly the starting point was picked from within the tariff for robbing with violence, and therefore, no complaint can be made on this issue.

[20] The final ground of appeal is that the learned judge erred in backdating the sentence to the date the applicant entered his guilty plea. The applicant pleaded guilty on 19 January 2011. He was sentenced on 31 January 2011. The learned judge backdated the

commencement of sentence to 19 January 2011. Furthermore, the learned judge reduced the sentence by 6 months to reflect the remand period of 2 ½ months. The reduction of 6 months and the further backdating of the commencement of sentence was a generous reduction in sentence by the learned judge. There cannot be an arguable ground for complaint on this issue.

[21] The grounds of appeal lack merits. The grounds such as they are, do not meet the criteria for leave under section 21 (c) of the Court of Appeal Act and the application for enlargement must be refused.

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DANIEL GOUNDAR

JUDGE

Solicitor:

Applicant in Person
Office of the Director of Public Prosecutions for Respondent