

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 19 of 2018
[Magistrates' Court Criminal Case No. 1377 of 2017]

BETWEEN : IOSEFA NAIVALU

APPELLANT

AND : STATE

RESPONDENT

Counsel : Appellant in Person
Ms S Lodhia for the Respondent

Date of Hearing : 7 & 17 May 2018

Date of Judgment : 31 May 2018

JUDGMENT

[1] This is an untimely appeal against both conviction and sentence. On 5 February 2018, the appellant was sentenced to 2 years' imprisonment after he pleaded guilty to a charge of robbery in the Magistrates' Court at Nasinu. The appeal was filed on 14 March 2018. The appeal is late by nine days. No reasons have been provided for the delay.

[2] The grounds of appeal have been formulated by the appellant in person. They are vague. The main complaint is that a non-custodial sentence should have been imposed to reflect the principle of rehabilitation. In his written submission, the appellant raises

a number of challenges to his conviction. The hurdle for him is section 247 of the Criminal Procedure Act. Section 247 states:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

- [3] Similar limitation existed in the repealed Criminal Procedure Code (see, s 309). In giving effect to the limitation, the Court of Appeal in *Bogiwalu v State* [1998] FJCA 16; AAU0006u.96s (15 May 1998) said:

If it can be demonstrated that an unrepresented accused has pleaded guilty in a manner that is in any way equivocal or uncertain, or that the accused entered the plea when he did not have a full understanding of the effect of the plea, namely that he was admitting that he committed the offence with which he has been charged, an appeal against conviction may be entertained despite the guilty plea. In that event, s 309 (1) will not apply, because there has not been an effective and binding plea of guilty.

- [4] In a later judgment, the Court of Appeal summarized the principles in *Nalave v State* [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) at [23]:

It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (*Rex v Golathan* (1915) 84 L.J.K.B 758, *R v Griffiths* (1932) 23 Cr. App. R. 153, *R v Vent* (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (*R v Murphy* [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (*Meissner v The Queen* [1995] HCA 41; (1995) 184 CLR 132).

- [5] In his submission, the appellant claims that he was advised by his fellow remand prisoners that if he would plead guilty to the charge he would be given a suspended sentence. According to the court records, the appellant was charged on 25 December 2017 and presented in the Magistrates' Court on the same day. When he appeared

before the learned magistrate, he waived his right to counsel and elected to be tried in the High Court. The appellant was remanded in custody.

[6] On 22 January 2018, the appellant appeared before the same magistrate and changed his election. He elected to be tried in the Magistrates' Court and pleaded guilty to the charge. He informed the learned magistrate that he was pleading guilty freely and without pressure or promise. He admitted facts that alleged that he punched a 60-year old man and stole his mobile phone, torch and slippers at Khalsa Road. In mitigation, the appellant informed the learned magistrate that he was a first time and a young offender. He worked as a foreman at Several Delta Builders and earned \$400.00 per week. He was married with a child and his wife was expecting their second child. He sought clemency from the court. The learned magistrate convicted the appellant on his plea of guilty and sentenced him to 2 years' imprisonment.

[7] According to the proceedings in the Magistrates' Court, the appellant had entered his plea of guilty with the full understanding that he had committed the alleged robbery. The facts that he admitted disclosed the alleged offence of robbery. The plea of guilty was unambiguous and the appellant himself informed the learned magistrate that he was pleading guilty in the exercise of his own free will. The matters that the appellant now are raising on appeal were never brought to the attention of the learned magistrate. Those matters are now being raised for the first time in the submission of the appellant. As far as the court records are concerned, the appellant's plea of guilty reflects a true admission of guilt. The appeal against conviction fails.

[8] The maximum penalty prescribed for robbery is 15 years imprisonment. The learned magistrate referred to several cases and said that the tariff for robbery without use of physical violence was between 2-7 years imprisonment. She said the aggravating factor was that street mugging was prevalent offence in the society. She used 2 years as a starting point and added another 2 years to reflect the aggravating factor. She gave generous discounts for the appellant's early guilty plea and mitigating factors and brought the sentence down to 2 years' imprisonment. The time spent in custody

was considered and the appellant was ordered to serve the remaining 1 year and 9 ½ months imprisonment effective from 5 February 2018. There is no error in the exercise of the sentencing discretion and the appeal against sentence fails.

[9] Extension of time is granted but the appeal is dismissed.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions for the State