JOJI WAQASAQA v STATE (CAV0009U of 2005S)

SUPREME COURT — CRIMINAL JURISDICTION

FATIAKI CJ, VON DOUSSA and MASON JJ

25, 28 April, 8 June 2006

Criminal law — sentencing — robbery with violence — wrongful confinement — unlawful use of motor vehicle — parity and totality principle — Court of Appeal Act s 35(2) — Penal Code (Cap 17) ss 28(4), 28(5), 293(1) — Supreme Court Act s 7(2)(c).

The Petitioner, who was a taxi driver, drove some of his co-offenders to Lautoka and attended a briefing on the plan to rob the Armourguard office. The plan included hijacking another vehicle. Then, the Petitioner and his co-offenders stole a total of $1,329,487.25 from the Armourguard security officers who were transferring money from the vaults to a van to take it to the airport. They also hijacked the van where they handcuffed the driver at the back of his van and escaped. After the robbery, the Petitioner drove back to Suva with some of his co-offenders after picking them up from Rifle Range. He was arrested and the police searched his house and recovered F$6050 and JPY296,000.

Cakau and Cokanasiga appeared for sentencing in the High Court. They previously pleaded guilty before a magistrate. Cokanasiga kidnapped the driver. Cakau was one of the others who joined in the control of the van. They were convicted on their own plea of unlawful use of a motor vehicle, wrongful confinement and robbery with violence. Cakau's share in the robbery was in excess of $25,000, while Cokanasiga's was in excess of $130,000, all of which were apparently recovered. They had a history of prior serious offences, including robberies with violence by Cokanasiga. The three other men who were involved in the robbery were acquitted. The Petitioner pleaded guilty in the High Court and was convicted of the three offences. He was sentenced to 6 years since the judge noted the plea of guilty. The Court of Appeal refused the leave to appeal and dismissed the Petitioner's appeal. The issues were whether: (1) the parity principle was applicable; and (2) the applicability of the totality principle.

Held — (1) The Petitioner gave significant assistance to the commission of the offence. Thus, applying the parity principle, and taking account of the Petitioner's poor record of earlier offending, the following sentences should be imposed for those offences to which the Petitioner pleaded guilty:

(a) Robbery with violence	—	4 years' imprisonment;
(b) Wrongful confinement	—	1 year imprisonment; and
(c) Wrongful use of motor vehicle	—	4 months' imprisonment

The sentences are to be served concurrently.

(2) The totality principle comes to be applied where a second sentence is imposed upon a prisoner already in custody serving earlier sentences such as in the present case.

The totality principle would not require the court to depart from making the sentences it is about to impose consecutive upon the sentences imposed in the High Court at Suva on 5 March 2004. The greatest of the concurrent sentences then imposed was 7 years' imprisonment, but this was reduced on appeal to 5 years' imprisonment. Since, however, there was no cross-appeal in the present case, it was appropriate in all the circumstances to impose a sentence that was no longer in its effect than the one that the Petitioner came to this court to challenge. The sentences were imposed partly concurrent with the 5-year sentence presently being served that was imposed on 5 March 2004. The sentences shall commence from 5 March 2008.

Appeal allowed.

Cases referred to

Mill v R (1988) 166 CLR 59; 83 ALR 1, applied.

Maciu Koroicakau v State [2005] FJCA 20; *R v Bradley* [1979] 1 NZLR 262; *R v Gilbert* [1975] 1 WLR 1012; *R v Kain* (1985) 38 SASR 309; *R v Richards* [1981] 2 NSWLR 464; *R v Wallace* [1983] NZLR 758; *R v Whitford* (2002) 2 Cr App R (S) 44; [2001] EWCA Crim 3043; *Sakeasi Ratumaiya v State* [2006] FJCA 21; *Sakiusa Basa v State* [2006] FJCA 23; *Wong Kam Hong v State* [2003] FJSC 13, cited.

Director of Public Prosecutions v Rasea [1978] 24 FLR 91, followed.

Petitioner in person

D. Goundar for the Respondent

[1] Fatiaki CJ, Von Doussa and Mason JJ. At about 5 am on 31 July 2003 Armourguard security officers were transferring money from Armourguard vaults at Lautoka to a van to take it to Nadi Airport. They were surprised by five offenders and threatened with a knife and iron rod. One of the guards tried to close the vault door and was hit on the head with a bar. Another was hit on the leg. Money totalling $1,329,487 was stolen.

[2] The robbery was carefully planned by the ring leaders using inside knowledge. Two of the offenders hired a van with driver from Lautoka to Natabua. On the way the driver was overcome, tied up and handcuffed to the back of the van. Five or six other co-offenders later joined the two and the group drove to the Armourguard office where the robbery took place. The group later abandoned the van and escaped with the driver still handcuffed inside. Most or all of them were driven back to Suva.

[3] On 15 August 2003 two of the offenders (Seremaia Cakau and Abramo Cokanasiga) appeared for sentencing in the High Court at Lautoka. They had previously pleaded guilty before a magistrate. Cokanasiga was one of the two who kidnapped the van driver. Cakau was one of the group of five or six who joined the two offenders in control of the van. Each was present assisting at the robbery itself. Each was convicted (on his plea) of the offences of unlawful use of a motor vehicle, wrongful confinement and robbery with violence. Each man had received a share of the robbery, Cakau's being in excess of $25,000, Cokanasiga's being in excess of $130,000, all of which was apparently recovered. Each offender had a history of prior serious offences, including (in Cokanasiga's case) robberies with violence.

[4] Govind J imposed concurrent sentences as follows:

1. Unlawful use of motor vehicle: 6 months' imprisonment.
2. Wrongful confinement: 2 years' imprisonment.
3. Robbery with violence: six-and-a-half years' imprisonment.

[5] In our view, the sentences were very light for a planned armed robbery with violence and stolen property of this magnitude. We note that the Court of Appeal has recently suggested that its earlier decisions may need to be reconsidered in the light of continuing offences of this nature being committed by the same offenders: *Sakiusa Basa v State* [2006] FJCA 23. The statutory maximum for an offence of robbery with violence is imprisonment for life: s 293(1) of the Penal Code. The two principal offenders were fortunate that their sentences were not the subject of an appeal by the State.

[6] Three other men allegedly involved in the robbery were tried before Govind J and assessors in February 2006. They were acquitted.

[7] The Petitioner, Joji Waqasaqa, was not one of the abovementioned. He was a taxi driver resident in Suva.

[8] On 6 September 2004 he came before Connors J in the High Court at Lautoka. He pleaded guilty and was convicted of the three offences referred to above. He was sentenced on the basis of an agreed summary of facts, an antecedent history and a record of previous convictions.

[9] The summary of facts stated:

> On 31st July 2003 at approximately 5.00a.m., the security officers of Armourguard were in the process of transferring money from Armourguard vaults, at Lautoka to a van registration No. DV895, to take to Nadi Airport. The accused's five co-offenders surprised the Armourguard security officers. They were threatened with a knife and iron rod. One of the security guards tried to close the vault door but was hit on the head with a bar, and another security guard in the vault was hit on the leg. Both suffered injuries, one a cut on the head and the other a swelling on the leg.
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> A total of $1,329,487.25 was stolen.
>
> Prior to this, the accused drove some of his co-offenders from Suva to Lautoka in his taxi. At one of his co-offender's residence in Lautoka, the accused attended a briefing on the plan to rob the Armourguard office. The plan included hijacking another vehicle to ferry the actual robbers to and from the Armourguard office.
>
> Before the robbery, two co-offenders hired one Ram Sami Naidu's van reg No DX975 from Lautoka town to Natabua. On the way at Field 40 one of the men asked Mr Naidu to stop whereupon they tied him up and handcuffed him to the back of the van. Five others later joined the two co-offenders. They then drove to the Armourguard office at Veitari in Lautoka. Some time later they abandoned the van with the driver still handcuffed inside the escaped.
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> After the robbery the accused drove back to Suva with some of his co-offenders after picking them up from Rifle Range.
>
> The accused was arrested at his house in Newtown, Suva. A search by the police of his house recovered F$6,050.00 and 296,000 YEN.

[10] The Petitioner's previous convictions included convictions for robbery and robbery with violence committed in the early 1990s. There was also a conviction for robbery with violence for which the Petitioner was sentenced to 7 years' imprisonment on 5 March 2004. This court was informed that the sentence for that offence was reduced to 5 years on appeal.

[11] Connors J sentenced the Petitioner on 13 September 2004. His Lordship set out the facts as above and stated an appropriate "starting point" for sentencing of 9 years. He noted the plea of guilty and gave a discount of 3 years resulting in a sentence of 6 years. His Lordship continued:

> The offence however is aggravated by the wrongful confinement of the van driver, Ram Sami Naidu, the violence used to the Armourguard employees, the pre-planning and the amount of money involved coupled with the small amount of money recovered.
>
> Prior [to] the commission of these offences you have, since 1990 been convicted of 2 charges of robbery with violence and 3 counts of robbery.
>
> I am of the opinion that the aggravating factors warrant a resulting sentence of 8 years imprisonment.
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> In the course of mitigation, you indicated to the court your willingness to co-operate with the prosecution, to assist in your co-offenders being apprehended and brought to justice. I note that you have subsequently reneged on that expressed intention and accordingly, no consideration is given to that in fixing an appropriate sentence.
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> In mitigation, you indicated that your role was merely as a taxi driver conveying some of the co-accused from Suva to Lautoka and from Lautoka to Suva. The facts to

which you have agreed clearly indicate that you participated in the planning meeting at Lautoka prior to the commission of the offence and you received some of the proceeds of the robbery.

You embarked on a joint enterprise and accordingly you are liable for the acts done in pursuance of that joint enterprise by all of your co-offenders. You have acknowledged that to be so by your plea of guilty to the charges of wrongful confinement and unlawful use of a motor vehicle.

You have been in custody since 5 March 2004 and accordingly your sentences will date from that date.

Sentence

With respect to the charge of robbery with violence, you are sentenced to imprisonment for a term of 8 years and on the count of wrongful confinement to imprisonment for a term of 1 year and to the third count of unlawful use of a motor vehicle to imprisonment for a term of 6 months.

The sentences are to be served concurrently and are to date from 5 March 2004.

[12] The Court of Appeal refused leave to appeal and dismissed the appeal pursuant to s 35(2) of the Court of Appeal Act.

[13] The Petitioner was self-represented in this court.

[14] He pressed two broad submissions. The first was that Connors J ignored the fact that he was involved only as a getaway driver. The remarks on sentence show that this is not correct. We also observe that the Petitioner pleaded guilty to all three of the charges, thereby admitting some degree of criminal complicity in the totality of the criminal enterprise on the evening in question. He also received a share of the stolen moneys.

[15] The second submission based on parity has greater substance.

[16] The co-offenders Cakau and Cokanasiga were sentenced on 15 August 2003. Yet for some reason that has never been explained the State omitted (over a year later) to draw to the attention of Connors J the remarks on sentence of Govind J as to the sentences imposed on the co-offenders who played a significantly greater part in the robbery. This omission only came to light during the hearing in this court.

[17] It is clearly established that an unjustified and disproportionate disparity between the sentences imposed upon co-accused may result in an otherwise appropriate sentence being reduced on appeal. The principles were discussed recently by the Court of Appeal (Scott JA, Stein JA, Ford JA) in *Sakeasi Ratumaiya v State* [2006] FJCA 21. Counsel for the State, Mr Goundar, accepted that the Petitioner has a legitimate complaint in this regard; and that the role of the Petitioner was minimal in comparison to the two principal offenders who received an effective sentence of six-and-a-half years' imprisonment. We accept these submissions, despite our strong reservations about the sentences imposed on the co-offenders.

[18] We are satisfied that this makes the case a proper one for the grant of special leave: see s 7(2)(c) of the Supreme Court Act.

[19] After some discussion, the parties joined in requesting this court to re-sentence on the basis of the statement of facts.

[20] The State's decision not to appeal the six-and-a-half years sentences imposed on Cakau and Cokonasiga leaves the Petitioner with a justifiable sense of grievance that should be recognised by an adjustment to the *length* of sentence imposed by Connors J.

[21] The statement of facts discloses the Petitioner's role in the offences to have been assistance in driving some of the major offenders from Lautoka to Suva and back, learning (through presence at a briefing session at the residence of a co-offender) in Lautoka, of the plan to rob the Armourguard office. The plan included the hijacking of another vehicle to ferry the robbers to and from the Armourguard Office. After the robbery the Petitioner picked up some of the offenders from Rifle Range, Lautoka. The Petitioner was paid part of the robbery proceeds for his aid and presumably his silence.

[22] This was significant assistance, although naturally less than that involved in participation in the violence or even as a lookout at the robbery itself. Applying the parity principle and taking account of the Petitioner's poor record of earlier offending, the following sentences should be imposed for those offences to which the Petitioner pleaded guilty:

Robbery with violence: 4 years' imprisonment
Wrongful confinement: 1-year imprisonment
Wrongful use of motor vehicle: 4 months' imprisonment

The sentences are to be served concurrently.

[23] Connors J was aware that the Petitioner had only recently beforehand (on 5 March 2004) been sentenced by the High Court at Suva to 7 years' imprisonment for a robbery with violence committed in Suva. But this recent conviction and sentence seems not to have been taken into account except as providing a backdated starting date for the sentences imposed concurrently by Connors J for the Lautoka crimes.

[24] The earlier starting date should not have been selected, nor should the two sets of sentences for wholly different crimes of robbery with violence have been made largely concurrent, as they were.

Backdating of sentences

[25] The concluding portion of s 28(5) of the Penal Code (Cap 17) states:

> Subject to the provisions of this section every sentence shall be deemed to commence from and to include the whole of the day on which it was pronounced except where otherwise provided in this Code or otherwise ordered by the court.

[26] The English counterpart has been construed as *not* authorising the predating of a sentence, only its taking effect at a future date: *R v Gilbert* [1975] 1 WLR 1012 (*Gilbert*); *R v Whitford* (2002) 2 Cr App R (S) 44; [2001] EWCA Crim 3043. The situation is otherwise in New South Wales, where *Gilbert* was not followed having regard to a different practice in sentencing and additional words in the relevant provision.

[27] The practice in Fiji has long followed the statement of Grant CJ who said in *Director of Public Prosecutions v Rasea* [1978] 24 FLR 91 at 92:

> A Magistrates Court has no power to backdate a sentence of imprisonment or to order it to run from any date earlier than the date on which the sentence is imposed. If a Magistrates Court wishes to take into account the period during which an accused has been in custody, or the time that has elapsed between his plea of guilty and the date of sentence, it may do so by an appropriate reduction in the sentence that otherwise would have been imposed.

See also: *Maciu Koroicakau v State* [2005] FJCA 20.

[28] Even if Connors J had power to backdate the sentences he imposed for the Lautoka robbery, the commencement date of the Suva robbery sentence was not an appropriate starting-point.

[29] There were, however, more fundamental difficulties with the approach taken. In pointing them out, we seek also to explain the structure of the sentences that this court will impose.

Consecutive, concurrent and partly concurrent sentences

[30] Section 28(4) of the Penal Code provides:

> Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be served concurrently with the former sentence or any part hereof …

[31] This provision means that sentences for different offences that are imposed when conviction occurs separately are to be served consecutively unless by directing concurrency or partial concurrency the court otherwise orders. A similar principle applies where conviction of two or more distinct offences occurs at one trial, although in that event there is no option of partial concurrency: see s 12(1) of the Criminal Procedure Code. See also reg 139 of the Prisons Regulations, which also provides for the manner of calculating remissions where there is partial concurrency.

[32] These provisions mean that there should be *no* automatic resort to concurrency where sentences are imposed for separate offences. Indeed, we would go further and state that entire concurrency needs reasoned justification lest the effective punishment for one offence is rendered nugatory due to the prisoner serving it entirely while serving the sentence imposed earlier for a separate offence.

[33] In a case like the present, where the later offence is committed while the prisoner was on bail awaiting trial for the earlier offence, a substantial concurrency of sentences for the two separate escapades would only encourage the prisoner on bail to make (criminal) hay while the sun shines. Sentencing practice in Australia, England and New Zealand reflects these principles by generally imposing consecutive rather than concurrent sentences in these situations: see *R v Richards* [1981] 2 NSWLR 464; and *R v Kain* (1985) 38 SASR 309; *Archbold 2006* s 5-63; *R v Wallace* [1983] NZLR 758.

[34] Of course, the sentencing judge or magistrate is always required to consider the totality of the aggregate sentence in order to ensure that it is just and appropriate. Sentencing is never a mere matter of arithmetic. The court must always step back and take a last look at the total just to see if it looks wrong: *R v Bradley* [1979] 1 NZLR 262; *Mill v R* (1988) 166 CLR 59; 83 ALR 1 (*Mill*); *Wong Kam Hong v State* [2003] FJSC 13.

[35] In *Mill*, Wilson, Deane, Dawson, Toohey and Gaudron JJ said (at CLR 63; ALR 3):

> Where the [totality] principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.

[36] We agree. These principles are also capable of application in a situation like the present, where the totality principle comes to be applied where a second sentence is imposed upon a prisoner already in custody serving earlier sentences.

[37] The totality principle would not require this court to depart from making the sentences it is about to impose consecutive upon the sentences imposed in the High Court at Suva on 5 March 2004. The greatest of the concurrent sentences then imposed was 7 years' imprisonment, but this was reduced on appeal to 5 years' imprisonment. Since, however, there was no cross-appeal in the present case, we think it appropriate in all the circumstances to impose a sentence that is no longer in its effect than the one that the Petitioner came to this court to challenge.

[38] We shall achieve this by making the sentences that we shall impose partly concurrent with the 5-year sentence presently being served that was imposed on 5 March 2004. Our sentences shall commence from 5 March 2008.

Disposition

[39] The following orders should be made:

1. Grant special leave to appeal;
2. Set aside the order of the Court of Appeal and the sentences imposed in the High Court by Connors J;
3. The Petitioner is sentenced as follows for the offences to which he pleaded guilty before Connors J:
   (i) Robbery with violence: 4 years' imprisonment
   (ii) Wrongful confinement: 1-year imprisonment
   (iii) Wrongful use of motor vehicle: 4 months' imprisonment
4. The said sentences are to be served concurrently with each other and commence from 5 March 2008 and are to be partly concurrent to the sentences imposed by the High Court at Suva on 5 March 2004.

Appeal allowed.