PITA NAROGO and Anor v STATE (AAU0040 of 2006 and AAU0037 of 2006)

COURT OF APPEAL — CRIMINAL JURISDICTION

ELLIS, PENLINGTON and MCPHERSON JJA

20, 25 June 2007

Criminal law — sentencing — appeals against conviction and sentence — appeal against sentences imposed by High Court appellate jurisdiction from the Magistrate's Court — substituted sentence — totality principle — whether or not re-sentencing was carried out in accordance with the proper legal principles — Court of Appeal Act (Cap 12) ss 22(1), 22(1A), 22(1A)(a).

The Appellants pleaded guilty to the offence of robbery. The Magistrate's Court sentenced both the second (A2) and third Appellants (A3) to imprisonment for 11 years. They appealed against their sentences to the High Court. Taking into account the totality principle, the High Court re-sentenced the A2 to an effective term of imprisonment for 7 years while the A3 was re-sentenced to 8 years. The Appellants appealed on the issue the competency of the High Court's re-sentencing.

Held — (1) The High Court judge properly took into account the totality principle. The re-sentencing carried out was performed in accordance with the proper legal principles and it gave effect to established rules of sentencing.

(2) Appeals to the Court of Appeal by a party to an appeal from a Magistrate's Court to the High Court against the ensuing decision given by the High Court are regulated by s 22(1) of the Court of Appeal Act (Cap 12). Section 22(1) permits such an appeal to the Court of Appeal "on a ground of appeal which involves a question of law only". The present case involves no question of law but only a question that was entirely a matter of fact. The sentences do not in any instance exceed the maximum allowed by law and do not involve inconsistency with any other principle of law.

Appeal dismissed.

Cases referred to

Parmit Singh v State 1998] CA AAU028/1998S; [1999] FJCA 9[, cited.

Appellants in person

Kurisaqila for the Respondent

[1] Ellis, Penlington and McPherson JJA. Sione Pupunu and Pita Narogo (who are conveniently referred to respectively as the second (A2) and the third Appellant (A3)) were part of a group of men who during the fortnight from 15–28 July 2005 engaged in a series of robberies of taxi drivers. Four men participated in the total of offences committed although the A3 was not involved in the first offence of the series (file 143/05), while only he, and not the other three, committed the last offence (file 146/05).

[2] Most of the occasions in respect of which the Appellants were charged involved the commission of a number of different offences: such as robbery with violence, unlawful use of a motor vehicle, abduction, wrongful confinement, larceny, and in one instance damaging property and resisting arrest. The learned judge who sentenced the Appellants in the High Court described the method used by the offenders as being robbery with violence or threats of violence to taxi drivers, usually by menaces exerted by means of a kitchen knife; the taxi driver was tied up and blindfolded before being taken away and abandoned somewhere

else. The offenders would steal what money there was, before driving off in the taxi, and removing items such as number plates, car radio and illuminated taxi sign. In one case the taxi driver's ATM card was used to withdraw money from his account.

[3] The Appellants together with their co-offenders pleaded guilty and were sentenced in the Magistrate's Court. The sentencing magistrate formed a most unfavourable view of the offences, and sentenced each of the A2 and the A3 to imprisonment for 11 years and the first Appellant (A1) to 8 years. They appealed against their sentences to the High Court, where the learned judge set aside the sentences and re-sentenced the offenders afresh. The upshot was that the A2 (Pupunu) was sentenced to an effective term of imprisonment for 7 years for all the offences committed by him, while the A3 (Narogo) was sentenced to 8 years for his part in all this criminal activity.

[4] In arriving at those substituted sentences, the learned judge properly took account of the totality principle, and distinguished between the first, second and third offenders according to their records, if any, of previous offending, of which third Appellant's record included various housebreaking offences, larceny, and a conviction for assault occasioning bodily harm. He has previously been sentenced to periods of imprisonment of varying duration. Proper regard was given to the requirement of proportionality among the various offenders.

[5] For what relevance it has, we consider that the re-sentencing carried out by the High Court judge was performed in accordance with the proper legal principles and that it gave effect to established rules of sentencing. We say "what relevance it has" only because we are satisfied that the two Appellants now before this court have in law no right of appeal to the Court of Appeal, and that their appeals must for that reason be dismissed.

[6] Appeals to the Court of Appeal by a party to an appeal from a Magistrate's Court to the High Court against the ensuing decision given by the High Court are regulated by s 22(1) of the Court of Appeal Act (Cap 12). Section 22(1) permits such an appeal to the Court of Appeal "on a ground of appeal which involves a question of law only". For good measure this was elucidated by an amendment in 1998, which added the following further provision:

> (1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground —
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> (a) that the sentence was an unlawful one or was passed in consequence of an error of law;
>
> or
>
> (b) …

[7] The matters before us now purport to be appeals against the sentences imposed by the High Court exercising its appellate jurisdiction from the Magistrate's Court. They are therefore comprehended by s 22(1) as well as by the specific prohibition in s 22(1A). It follows that the present appeals are incompetent under s 22(1) unless a question of law is involved; the same is true under s 22(1A)(a) unless the sentence was an unlawful one or was passed in consequence of an error of law.

[8] From what we have said about the sentences, it is plain that there was no error of law in the exercise by the learned judge of High Court of her discretion in the course of imposing the new or substituted sentences on these two Appellants. The process involved no question of law but only one that was entirely a matter of fact, in which her Ladyship's approach was, as we have

already said, correctly based. Equally, the sentences imposed upon those appeals were not passed "in consequence of an error of law". The sentences did not in any instance exceed the maximum allowed by law and did not involve inconsistency with any other principle of law.

[9] The appeals by these two Appellants are therefore incompetent, as being contrary to ss 22(1) and 22(1A)(a) of the Court of Appeal Act. See *Parmit Singh v State* [1998] CA AAU028/1998S; [1999] FJCA 9. As such they must be dismissed.

Appeal dismissed.