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IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CRIMINAL APPEAL NO. 94 OF 1980

Between:

1. JOSESE NADUVA
2. DEVI VUNUQA
3. JIMI GALE
4. PITA BAU
5. INOKE TUILOALOA
6. DIAU ILU

APPELLANTS

- AND -

R E G I N A M

RESPONDENT

J U D G M E N T

The six appellants were on the 19th June, 1980 convicted of the offence of shop breaking, entering and larceny contrary to section 333(a) of the Penal Code by the Magistrate's Court Suva. A charge in the alternative of shop breaking with intent to commit a felony was ordered to be left on file.

The first appellant was sentenced to 2 years imprisonment, the second to 2½ years and the remaining appellants to 3 years each.

They appeal against sentence only.

The first five appellants at first pleaded guilty to the substantive offence. There was no appearance by the sixth appellant. When the first five appellants did not admit the facts related by the prosecution were correct the Magistrate entered a plea of not guilty for all of them.

Later after the sixth accused appeared all six appellants pleaded not guilty to the offences. After a

trial of the appellants the Magistrate found all six appellants guilty of the substantive offence and convicted them and imposed the sentences from which all appellants now appeal on the ground that they are harsh and excessive.

I am in no doubt that the sentences are harsh and excessive and Mr. Lindsay for the Director of Public Prosecutions is also of that view.

The complainant was a Chinese shopkeeper who on the 4th April, 1980 had to vacate his shop at Wailoku because of a flood. He locked his premises. On his return he found they had been broken into and money and goods to the total value of $743.80 were missing.

One prosecution witness testified that he saw the second, third, fifth and sixth appellants in the store on the day in question. The Chinese had given him the key to the premises. He found a window open with the inside wire mesh pushed inwards. He found the four appellants searching the premises. He went away leaving them on the premises.

The only other evidence against the six appellants were the statements made by each of them to the police.

Mr. Lindsay mentioned that a perusal of these statements raised doubts whether some of the appellants were properly convicted of the offence as charged. It may be that some of them should have been convicted of the alternative offence.

There is no doubt however in my mind that all the appellants were involved in the breaking into the store. Four appellants were seen inside the premises and could only have obtained entry through the window. The first appellant admitted in his statement breaking into the store and stealing some goods but not those stated in the charge. The sixth appellant also admitted entering the store through the window and taking some chewing gum.

Five of the appellants originally pleaded guilty to the offence. While they were not represented either in

the Court below or on this appeal they appeal only against sentence. As I propose to very substantially reduce the sentences I do not consider any injustice is done to any of the appellants by not substituting convictions for the alternative offence.

The fifth appellant was said to have had a previous conviction for a similar offence committed in 1969. The Magistrate ignored this conviction as it was 11 years old. He should have noticed that the previous conviction, which the fifth appellant denied, could not have referred to the fifth appellant who was 21 years of age and would have been 10 years of age in 1969 !

The looting of premises is a despicable act and the learned Magistrate was correct to comment on this fact and impose deterrent sentences. However, the sentences he did hand down for first offenders were in my view harsh and excessive.

The appellants have been in prison for a little over four months which should, it is hoped impress on the appellants that crime does not pay.

I allow the appeal against sentence and set aside all sentences and substitute therefor a sentence of 9 months imprisonment in respect of each appellant. If the Controller of Prisons is so minded he may allow the appellants to serve the balance of their terms extramurally in which event the appellants may be released in a few weeks time. That however is a matter for the Controller to decide.

(R.G. KERMODE)

JUDGE

SUVA,

6 10 , 1980.