

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 5 of 1984

BETWEEN : SURESHLAL s/o Mohan Lal Appellant

A N D : R E G I N A M Respondent

Mr. Anu Patel Counsel for the Appellant

Mr. M. Raza Counsel for the Respondent

J U D G M E N T

The appellant was convicted by the magistrate's court at Ra of robbery with violence and was sentenced to 3½ years. He appeals against the sentence.

The learned counsel for the appellant Mr. A. Patel has urged certain aspects in mitigation: although the appellant did have three previous convictions for dishonesty, recorded within two days some seven years' ago; he has peacefully rehabilitated in the lapse of time; he is married, has a child and apparently his wife is expecting another child; at that time he was employed as a labourer with the Fiji Sugar Corporation Ltd.

In passing sentence, the learned trial magistrate recorded that he had taken into account the matters which have been urged before this Court. An appellate court is not at liberty to disturb a sentence imposed by the court below simply because it is a sentence which perhaps the appellate court might not have imposed in the circumstances: it can only set aside a sentence where it comes to it with a sense of shock as being manifestly excessive or inadequate, or where the court below has erred in principle in imposing the sentence. In the present case the sentence does not come to me with a sense of shock.

The learned counsel for the prosecution Mr. Raza has referred me to the case of Wagavesi Bogitini (Criminal Appeal No. 73/83) before my learned brother Kermode, J. In that case the learned trial magistrate imposed a sentence of 4 years' imprisonment for the offence of robbery

with violence. As I understand it, the offence in that case was particularly vicious, as a knife was used. In the present case the learned trial magistrate recorded that he took into account the fact that the appellant had gone to the "bedroom of a woman to obtain money", and again that the Court should impose a deterrent sentence in respect of "people who are prepared to use violence in another person's house." Again, the learned trial magistrate recorded that the appellant's actions were 'vicious and violent'. Violent they were, there is no doubt, but I do not necessarily agree that they were vicious. In any event, the learned trial magistrate obviously placed some reliance on the aspect that the offence was committed in the bedroom of a woman and in another person's home. I do not necessarily see that such aspects are relevant to sentence. The learned counsel for the prosecution Mr. Raza submits in effect that a person's home is his castle. I agree, but the appellant was not charged with burglary or larceny in a dwelling-house: he was charged with robbery with violence and whether the offence was committed in a bedroom or outside the complainant's house is not relevant to sentence.

In my view the learned trial magistrate's observations as to the location of the offence amount to a misdirection and this Court is therefore at large in the matter of sentence. The appeal is allowed and the sentence of the court below is set aside. In all the circumstances, considering the appellant's efforts over a period of seven years to rehabilitate, considering that violence was not preplanned and that no more than \$50 was stolen, I substitute a sentence of two years and six months' imprisonment with effect from 19th August, 1983.

Delivered in Open Court at Lautoka This 6th Day of April, 1984



(B. P. Cullinan)

Judge