IN THE SUPREME COURT OF FIJI

APPELLATE CRIMINAL JURISDICTION

Criminal Petition No. CAV 0026 Of 2014
(On appeal from the Court of Appeal
Criminal Appeal No. AAU 0086 of 2014)

BETWEEN : **JOSAIA USUMAKI**

Petitioner

AND : **THE STATE**

Respondent

CORAM : **Hon. Justice Sathyaa Hettige, Judge of the Supreme Court**
Hon. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Justice William Calanchini, Judge of the Supreme Court

COUNSEL : **Petitioner in person**
Ms. Jayaneeta Prasad for the Respondent

Date of Hearing : **Monday, 13 April 2015**

Date of Judgment : **Thursday, 23 April 2015**

JUDGMENT OF THE COURT

Aluwihare JA

Introduction

1. This is a Petition for Special Leave to Appeal against the decision of the Court of Appeal dated 25th September 2014, by which order, the Court of Appeal reduced the 10 year term of imprisonment imposed on the Petitioner by the High Court of Suva exercising criminal jurisdiction, to a term of 8 years imprisonment with a single non-parole period of 9 years.

2. It must be noted at the outset that the Petitioner moved the Court of Appeal by way of Leave to Appeal only to canvass the legality of the sentence imposed on him by the High Court.

3. The grounds of appeal urged by the Petitioner as stated in his petition dated 25th September 2014 are reproduced below;

"(1) That the new fix non-parole sentence for all the sentences that I must serve of nine years is unconstituted.

(a) The fixed term is over my eight (8) year sentence which is concurrent to my existing sentence of five (5) years.

(b) new non-parole sentence of nine years is unwarranted.

(2) That the application of Section 19 of the Sentencing and Penalties Decree when sentencing the Petitioner on the charge of Robbery with Violence under Section 293 (1) (a) of the Penal Code Chapter 17 is unconstituted.

(a) Section 392 of the Crimes Decree clearly outlines "if the petitioner is charged under the Penal Code, he must be tried and sentenced under the Penal Code.

(b) Section 391 (1) of the Penal Code is repealed.

(c) The Sentencing and the Penalties Decree was not applicable during the time the offence was committed.

(3) That the fixed term of nine years of non parole sentence on the eight years imprisonment imposed on the petitioner was wrong in law."

Factual and Procedural background

4. The petitioner pleaded guilty before the High Court to the following charge:

(1) Robbery with Violence: contrary to section 293 (1) (a) of the Penal Code Cap17.

JOSAIA USUMAKI with others on the 24th day September 2009 at Nabua in the Central Division robbed TANSEEN ALI of her assorted gold jewellery valued at $20,000.00 cash F$1500.00, US$ 6,800.00, Aus $ 3,360.00 Thai baht $4,800.00 Euro 200.00 Indonesian rupiah 6000.00 Solomon $1800, computer hard drive valued at $300.00, Toshiba brand laptop valued at $380.00, Apple brand lap top valued at $3000.00, 2 Dell brand lap tops valued at $6400.00, Acer laptop valued at $1800.00, Samsung mobile phone valued at $4800.00, 3 Nokia mobile phones valued at $1,120.00, 2 Sony mega pixel digital cameras valued at $2050.00, one Olympus mega pixel Digital camera valued at $800.00 and ladies wallet valued at $150.00 all to the total value of $61,480.00

(2) Unlawful use of Motor vehicle: contrary to section 292 of the Penal Code, Cap 17

JOSAIA USUMAKI WITH OTHERS ON THE 24TH DAY OF September 2009 at Nabua in the Central Division unlawfully and without colour of right but not so as to be guilty of stealing took to their own use a private vehicle registration number FM 424 the property of TANSEEN ALI.

5. The Petitioner had seven unrelated previous convictions that were put to him and which he admitted.The offences of which the petitioner had been previously convicted were, three offences of Larceny, two Burglary offences, one House Breaking, Entering and Larceny and one Dining Room Breaking, Entering and Larceny.

6. Upon the Petitioner pleading to the aforesaid charges, the High Court having proceeded to convict the Petitioner, imposed a sentence of 10 years imprisonment, with a non-parole period of 9 years. However the Learned High Court Judge had not referred to any of the terms of imprisonment the petitioner may have been serving at that point of time, in relation to the convictions referred to in the preceding paragraph.

7. The Petitioner filed an application for Leave to Appeal out of time against the decision of the High Court, dated 16th October 2010, which was filed with the Registry of the Court of Appeal on 2nd November 2010.

8. The application for Leave to Appeal out of time against the sentence came up before Chandra J in the Court of Appeal on 20th March 2013 and by the Ruling dated 7th June 2013 the application for leave to appeal out of time as well as leave to appeal against the sentence were allowed.

9. Before the Court of Appeal, the Petitioner based his appeal on the following grounds of appeal:

   (i) Failure to consider the prompt guilty plea

   (ii) Failure to consider the totality principle.

   (iii) Failure to consider the matters in respect of the Petitioner's history and

   (iv) The sentence is harsh and excessive.

10. Having considered the grounds of appeal referred to above, the Court of Appeal was of the opinion that the credit given to the Petitioner in considering the prompt plea of guilty as a mitigratory factor was inadequate and held that the Petitioner deserved more discount than one year accorded to him by the High Court.

11. Accordingly, the Court of Appeal by its judgment dated 25 September 2014, substituted the one year discount given to the Petitioner for the prompt plea of guilty with a discount of three years and imposed a term of 8 years imprisonment in lieu of the 10 year term of imprisonment imposed on the petitioner by the High Court.

12. The Court of Appeal having noted that the petitioner was already serving a sentence of 13 ½ years in connection with unrelated offences, made order that the sentence of 8 years imposed in the instant case should run concurrently with the sentence of 13 ½ years the Petitioner is serving. In addition, the Court of Appeal acting in terms of Section 19 of the Sentencing and Penalties Decree, fixed a single non-parole period of nine years.

13. At the hearing before the Supreme Court in the present Leave to Appeal application, the Petitioner raised two grounds of appeal and intimated to the court that he is confining himself to those grounds of appeal only.

14. The grounds of appeal raised by the Petitioner are:

    (i) The court of appeal erred by failing to consider section 392 of the Crimes Decree when fixing the non-parole period, the applicable provision that was in force on the date of offence, which was the 24th September 2009.

(ii) The non-parole period fixed by the Court of Appeal exceeded the head sentence he is required to serve.

15. The main point of contention of the Petitioner as to the first ground of appeal is that the Court of Appeal erred in fixing the non-parole period in terms of Section 19 of the Sentencing and Penalties Decree, whereas the Court of appeal ought to have fixed the non-parole period in terms of section 392 of the Crimes Decree.

16. I see no merit in this argument in view of the transitional provisions embodied in section 61 of the Sentencing and Penalties Decree of 2009. Section 61 (1) reads thus: - " *A court hearing any proceedings for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of the Decree if no sentence has been imposed on the offender prior to the commencement of this Decree".* (Emphasis added).

Further, Section 61 (2) of the Decree makes provision to apply the provisions of the Decree by a court exercising appellate jurisdiction in relation to a sentence even in instances where the sentence has been imposed by a court prior to the commencement of the Decree.

Section 61 (2) of the Decree stipulates that:-

"On the hearing of any appeal against the sentence imposed by a court prior to the commencement of this Decree, the court hearing the appeal may-

(a).....

(b) vary the original sentence and impose any sentence in accordance with this Decree" (Emphasis added)

17. Thus, I conclude that the Court of Appeal did not err in fixing the non-parole period in terms of the applicable provisions of the Sentencing and Penalties Decree of 2009.

18. As far as the second ground of appeal is concerned, it transpired in the course of the hearing that the 13 ½ year term of imprisonment which was imposed on the Petitioner consisted of two sentences of 5 years and 8 ½ years, imposed by the magistrates court.

19. The Petitioner had been imposed a cumulative sentence of 8 ½ years by the learned magistrate of Nausori magistrates' court in case No.s 126 of 2010, 127of 2010, 128 of 2010 and 130 of 2010, the Petitioner having pleaded guilty to the charges on the 14th of April 2010.

20. The Petitioner being aggrieved by the sentence so imposed by the magistrate, appealed to the High Court of Suva and by judgement dated 29th June 2012, the learned High Court judge exercising appellate jurisdiction quashed the convictions and sentences imposed under the case numbers referred to in the preceding paragraph and the High Court made a further order directing that the said cases be sent back to the Nausori magistrates' court for a re-hearing.

21. When this matter came up for hearing before the Court of Appeal, the order made by the High Court of Suva, quashing the 8 ½ year sentence imposed on the Petitioner does not appear to have been brought to the notice of the Court of Appeal.

22. It must be noted that even in the written submission dated 25th February 2013 tendered by the Petitioner to the Court of Appeal, the Petitioner has not referred to the fact that the 8 ½ year sentence imposed on him by the Nasouri magistrates' court now stands quashed. Thus, it appears that the Court of Appeal has acted on the premise that the said term of imprisonment is still in operation.

23. Upon perusal of the order made by the High Court of Suva in the Criminal Appeal case number HAA 020 of 2012, it is apparent that the 8 ½ years term of imprisonment now stands quashed.The sentence of 5 years imprisonment imposed on the Petitioner in an unrelated case and the 8 year term of imprisonment imposed in the instant case are the only sentences that are in operation against the Petitioner and by virtue of an order made by the Court of Appeal,these terms are to run concurrently.

24. In essence the Petitioner has now only to serve a 8 year term of imprisonment and in this context the non-parole period of 9 years does exceed the term of imprisonment and the said non parole period fixed by the Court of Appeal is bad in law as it violates Section 18 (4) of the Sentencing and the Penalties Decree of 2009.
Section 18 (4) of the Decree stipulates that *"Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence."*

25. Considering the above, I am of the view that the second ground of appeal put forward by the Petitioner warrants granting of Special leave as substantial and grave injustice may otherwise occur to the Petitioner and accordingly leave is granted pursuant to Section 7 (2) of the Supreme Court Act no 14 of 98.

The Orders of the Court are:

1. Special Leave is granted.
2. Appeal is allowed in part.
3. The 9 year non-parole period fixed by the Court of Appeal is hereby set aside and in lieu, a non-parole period of 7 years is fixed.

Hettige JA

I agree with the reasoning and conclusion of the judgment of Aluwihare JA.

Calanchini JA

I also agree with the reasoning and conclusion of the judgment of Aluwihare JA.

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Hon. Justice Sathyaa Hettige

Justice of the Supreme Court

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Hon. Justice Buwaneka Aluwihare

Justice of the Supreme Court

SUPREME COURT OF FIJI FIJI

.....

Hon. Justice William Calanchini

Justice of the Supreme Court

Solicitors:

Petitioner in Person.

Office of the Director of Public Prosecutions for the Respondent.