

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 58 of 2018

MELI NAISAU

Appellant

VS

STATE

Respondent

Appellant in person
Miss S. Kiran for the State

Date of Hearing : 2 November 2018
Date of Judgment : 8 November 2018

JUDGMENT

- 1.) On the 23rd day of July 2018, the appellant was convicted on his own plea in the Magistrates' Court at Ba of one charge of robbery contrary to section 310(1) (a)(i) of the Crimes Act 2009.
- 2.) He was sentenced to s term of imprisonment of 7 years and 7 days with a minimum term to serve of 6 years.
- 3.) He told the Court at the hearing that he was appealing sentence only but his notice of appeal submits grounds for both conviction and sentence. The Court will address both limbs of appeal.

4.) The grounds filed are:

- That he was not given the right of election as to venue
- That the Magistrate failed to follow the **Turnbull** guidelines resulting in a miscarriage of justice.
- The Magistrate failed to direct his mind to the burden and standard of proof.
- The Magistrate failed to consider the lack of direct evidence of robbery
- The sentence is harsh and excessive
- The Magistrate failed to say why he was sentencing for robbery with violence rather than robbery simpliciter.

5.) **Facts**

At about 6pm on the 23rd May 2016 in Ba Town, the victim a middle aged Indo Fijian lady was driving out of a supermarket parking lot after buying goods there. She slowed down to check visibility when the Appellant opened her passenger door and went to grab her handbag which was on the passenger seat. A struggle over the bag ensued during which the Appellant punched the lady's face. She punched him in return. The Appellant managed to get the bag in the struggle and run with it into some bushes by the river. From the bag he removed two mobile phones, cash and assorted cards. The total value of items stolen was \$3,943. He sold the 2 phones for cash.

6.) The appellant admitted the offence when interviewed under caution.

7.) The Court Record provides details of the proceeding below. It is recorded that on first appearance on the 23rd July 2018, the charge was read to the accused (appellant) and explained to him. He elected to be tried in the Magistrates' Court and he requested that the plea be taken immediately. He entered a plea of guilty and told the learned Magistrate that it was a plea given of his own free will. The facts were read to him and he admitted them whereupon he was convicted.

- 8.) In mitigation, he told the Court that he is 24 years old and married. His wife was pregnant at that time. He worked at a petrol station earning \$120 per week. It was revealed that he had 4 previous convictions for burglary and theft for which he had served a short term of imprisonment.
- 9.) In casting his sentence the Magistrate took a starting point of 8 years and increased it by three years for factors which he said were aggravating but in reality were not aggravating at all. He deducted three years for the plea of guilty, and 23 days for the time spent in custody arriving at an arithmetically wrong total of 7 years and 7 days. (It should have been 7 years, 11 months and 7 days).

10.) The appeal

The appellant entered a plea to the charge and the plea appears to be unequivocal. As such he is not permitted to appeal pursuant to section 247 of the Criminal Procedure Act, however in the interests of justice being seen to be done, this Court will deal in turn with his grounds of appeal against conviction as if he were allowed to appeal.

- 11.) The first ground prays that he was not afforded to the right of election to be tried in the High Court. The offence is an indictable offence, triable in the Magistrates Court. The record clearly states that the election was given and that the Appellant chose to be tried in the Magistrate's Court. It was immediately after that election that he asked for his plea to be taken. There is nothing to suggest, either in the record nor in the Appellants lengthy hand written submissions, that he was hoping to have his case heard in the High Court.
- 12.) The first ground of appeal against conviction fails.
- 13.) The second ground prays that the learned Magistrate failed to consider and apply the Turnbull guidelines when deciding on identification, leading to a miscarriage of justice.
- 14.) When an accused person enters a plea of guilty and admits a relevant summary of facts identification is not in issue and

there is no need for the learned Magistrate to address the matter.

- 15.) This ground is frivolous and fails.
- 16.) The two remaining grounds of appeal against conviction are equally frivolous and are dismissed. Again the Magistrate does not need to turn his mind to the burden of proof and there is no better evidence of robbery than a guilty plea and agreement to the Summary of Facts.
- 17.) The appeal against conviction is dismissed

18.) Sentence

- I. This Court decided in **Rarawa** [2015]FJHC324 that the tariff for robbery accompanied by violence would be a sentence within the range of 8 to 14 years.
- II. This was indeed the authority relied upon by the learned Magistrate in crafting his sentence. He enhanced the sentence for the aggravating features and discounted it for the guilty plea. The Appellant of course was not able to benefit from further discount for a clear record.
- III. This Court follows the dicta of the Court of Appeal in **Sharma** AAU48.2011 in which it was said:

*“Even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether [the Appellate Court] if it had been in the position of the sentencing Judge would have imposed a different sentence. **It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust**” (emphasis added)*

- 19.) In this case the Court does not agree with the Magistrate's view of aggravating features, and in addition, he has made an error of subtraction in determining the final sentence. Nevertheless the sentence passed is below the accepted tariff and as such is extremely lenient in the circumstances.
- 20.) There has been no miscarriage of justice.
- 21.) The appellant is fortunate not to be serving a further 11 months.
- 22.) The appeal against sentence is dismissed.



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P.K. Madigan

Judge

08/11/18

High Court Lautoka