

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: 12 OF 2013

BETWEEN: **FAIYAZ ALI**

Appellant

AND: **STATE**

Respondent

Counsels : **Ms. M. Tarai for the Appellant**
Mr. Semi Babitu for the Respondent

Date of Hearing : **8 November 2013**
Date of Judgment : **29 November 2013**

JUDGMENT

1. The appellant was charged before the Ba Magistrate under following count:

Statement of Offence

ROBBERY:- Contrary to Section 310 (1) (a) (i) of the Crimes Decree No. 44 of 2009.

Particulars of offence

Faiyaz Ali on the 25th day of October, 2012 at Ba town in the Western Division, stole \$35 cash and mobile phone valued at \$105 all to the total value of \$140 the property of **Anand Sami Naidu**, immediately before stealing, he threatened the said **Anand Sami Naidu**.

2. On 29.10.2012 he had waived the right of counsel and pleaded guilty to the charge. When questioned by the Magistrate whether plea was voluntarily he had stated that “*I don’t know if I rob him. I didn’t touch him.*” Thus guilty plea was vacated by the learned Magistrate and appellant was asked to seek legal advice. Appellant was granted bail.
3. On the next day, 21.11.2012, he had informed that he want to plead guilty. The Magistrate had again questioned him “*Voluntarily? False promise?*” He had replied “*voluntarily*”. He was

explained right of representation again. He had waived the right for counsel and pleaded guilty. The learned Magistrate again had questioned him *“voluntarily? Any force used?”* He had replied *“voluntarily”*.

4. Then summary of facts were read over to him and was admitted by him. The appellant was convicted by the learned Magistrate. In mitigation it was submitted that he is first offender, 27 years old, sole bread winner of the parents who are old. He was drunk and made a mistake and will not repeat this. The sentence was fixed for 20.12.2012.
5. On 29.11.2012 an application for variation of bail was made before the Magistrate with Legal Aid counsel appearing as duty solicitor for the appellant. The application was allowed.
6. The appellant was sentenced on 1.3.2013 for 3 years imprisonment with 2 years as non-parole period.
7. The appellant had appealed against the sentence on 18.3.2013.
8. His grounds of appeal are:
 - (i) That the Magistrate is unfair in sentencing one man for a crime committed (if it did) by appellant and others.
 - (ii) That Magistrate failed to identify the part played by the appellant, if it is not established as to who initiated the threat and who planned the robbery.
 - (iii) That the victim in his statement to Police said he was surrounded by 9 men (2 Indians and rest Fijians) but identification parade had all 10 Indians.
 - (iv) That the victim claimed that he was surrounded by 9 men. Yet Police had not produced one witness to prove to the court that appellant threatened the victim to hand over said items to the appellant.
 - (v) The victim recognize the appellant instantly even knows his name and said this is the person whom he handed the items. This is contradiction to his previous statement.
 - (vi) That in absence of appellant's guilty plea there is no concrete evidence to prove beyond reasonable doubt the offence hence there is no case to answer.
 - (vii) The appellant is a victim of charm and smart influence by DC 2860 Ilario Belo to plead guilty. DC 2860 Ilario Belo told the appellant that a quick plea will guarantee a fine and is a fastest way to dispose a case.
9. On 9.8.2013 amended petition of appeal was filed. The grounds of appeal according to that are:

Appeal against the conviction

The learned Magistrate erred in law and in fact when she recorded a conviction based on an equivocal guilty plea by the appellant who was unrepresented.

Appeal against the sentence

- (i) The learned Magistrate erred in law when she sentenced petitioner to a term of imprisonment which is harsh and excessive for the following reasons

- (a) Appellant did not use any weapon;
 - (b) No physical violence on the victim;
 - (c) Minimal fear caused to the victim;
 - (d) Amount of stolen items were of a minute value;
 - (e) Appellant was a first offender;
 - (f) Appellant was a young offender;
 - (g) Appellant was the sole bread winner and was looking after his elderly parents.
- (ii) The learned Magistrate erred in law when she failed to give proper weight to the previous good character of the appellant and instead used this as an aggravating factor and awarded 2 years non-parole for this factor.
- (iii) The learned Magistrate erred in law when she failed to properly and fully consider provisions under Section 4 (1) (i) of the Sentencing and Penalties Decree 2009 when passing the sentence.
10. The grounds (i) to (vi) in the original appeal, can be only applicable if the appellant had gone to a trial. As the appellant had pleaded guilty there is no merit in those grounds and therefore amended petition of appeal was filed.
11. The ground (vii) in the original appeal and the ground against the conviction in the amended petition of appeal are same. They allege that the plea is equivocal.
12. I have reproduced in paragraph 3 above, what happened on the day plea was taken. Considering that the learned Magistrate had followed the correct procedure in recording the guilty plea of the appellant. Therefore there is no merit in this ground and it fails.
13. Further there is no absolute right for counsel. In **Shankar v The State** [2006] FJHC 14; CAV 0008U.2005S (19 October 2006) it was held that *“the right of counsel under Section 28 (1) of the Constitution is subject to that criterion of reasonableness. To construe Section 28 (1) (d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section the right to counsel conferred thereby is qualified by considerations of reasonableness. The Constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment.”*
14. The appellant was given the opportunity twice and he had waived off that right. That can be reasonably considered as compliance with the requirement.
15. In considering the grounds against the sentence the learned Magistrate had followed the following tariff judgments:

State v Tuiyanawai [2005] FJHC 180; HAC 0022S.2004S (14 July 2005)
State v Nakeli [2012] FJHC 1211; HAC 29.2012 (5 June 2012)

The tariff for robbery is 4 - 7 years according to these judgments.

16. The learned Magistrate had identified and used correct tariff judgments. Then she had considered the provisions of the Sentencing and Penalties Decree and had stated that *'the purpose for sentencing is to punish an offender to an extent that is justifiable. Further the court need to signify that it and the community denounce the commission of such offences.'*
17. The learned Magistrate had chosen a starting point of 3 years which is below the tariff identified by her may be because that she considered the facts of the case.
18. Then she had reduced the sentence by 12 months for the early guilty plea.
19. She had increased the sentence by 18 months for the aggravating factors that the offence was committed under influence of liquor, at night, in a public place when the complaint was waiting for his transport back home.
20. Further 6 months were reduced for the fact that appellant had acknowledged the mistake and promised not to repeat this in future.
21. Considering all above there is no merit in the 1st ground of appeal against the sentence that sentence is harsh and excessive.
22. The learned Magistrate had ordered a period of 2 years as the non-parole period. According to Section 18 (4) of the Sentencing and Penalties Decree a period less than 6 months of the sentence could be ordered as non-parole period. The fact that appellant was a first offender was considered to bring that period down to 2 years. Thus there is no merit in this second ground of appeal against the sentence.
23. His Lordship Mr. Priyantha Nawana in ***State Prosecution v Tilalevu*** [2010] FJHC 258; HAC 081.2010 (20 July 2010) held that:

"I might add that the imposition of suspended terms on first offenders would infect the society with a situation-which I propose to invent as 'First offenders Syndrome' –where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard if self against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule."
24. In ***Koroivuata v The State*** [2004] FJHC 139; HAA 0064.2004 (20 August 2004) His Lordship Mr. Gerald Winter held that:

"The appellant pleads he is a young first offender and that his sentence should be suspended. He is wrong. This is violent offending. It will only be in rare and exceptional circumstances that the Court may be required to consider a suspended term of imprisonment for violent offending. The public need to for deterrence will often outweigh the personal needs of a young but first offender."
25. The third ground of appeal is that the learned Magistrate failed to properly and fully consider provisions under Section 4 (1) (i) of the Sentencing and Penalties Decree. There is no such

subsection. The Section 4 (1) (a) is *'to punish offenders to an extend and in manner which is just in all the circumstances'*

26. Considering all above, I am fully satisfied that the learned Magistrate had given a just sentence in all the circumstances of this case. There is no merit in this ground as well.

27. For the reasons given above the appeal against the conviction and sentence is dismissed.

Sudharshana De Silva

JUDGE

At Lautoka

29th November 2013

Solicitors for the Appellant: Office of the Legal Aid Commission

Solicitors for the Respondent: Office of the Director of Public Prosecution