IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0120/07

BETWEEN:

VILIAME DAUNABUNA

Appellant

AND:

THE STATE

Respondent

Coram: Byrne P
Goundar JA
Wati JA

Hearing: 17th November 2009

Counsel: Appellant in Person
Mr. P. Bulamainaivalu for State

Date of Judgment: 4th December 2009

JUDGMENT OF THE COURT

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[1] On 19 July 2007, the appellant pleaded guilty in the Magistrates' Court to the following offences:

FIRST COUNT

Statement of Offence

LARCENY: Contrary to Section 259(1) and 262(2) of the Penal Code Act 17.

Particulars of Offence

VILIAME DAUNIBUNA, on the 5th day of May 2006 at Samabula in the Central Division, stole a hedge cutter valued $22.00 the property of PRATAP SINGH s/o CHARAN SINGH.

SECOND COUNT

HOUSE BREAKING, ENTERING AND LARCENY: Contrary to Section 300(a) of the Penal Code Act 17.

Particulars of Offence

VILIAME DAUNIBUNA, on the 5th day of May 2006 at Samabula in the Central Division, broke and entered into the dwelling house of Dr. BIU SIKIVOU and stole therein, a set of play station with 4 CD games valued $700.00, a pair of 'Sacony' canvas valued $90.00, 2 silver necklace valued $20.00, a black school bag valued $20.00, a pair of shorts valued $15.00 and cash $30.00 to the total value of $875.00 the property of the said Dr BIU SIKIVOU.

[2] On the first count, the appellant was sentenced to 12 months imprisonment, while on the second count he was sentenced to 2½ years imprisonment, to be served concurrently. At the time these sentences were imposed, the appellant was serving a pre-existing sentence of 3 years imprisonment for another offence. The overall sentence of 2½ years imprisonment was ordered to be served consecutively with the pre-existing sentence of 3 years imprisonment.

[3] He appealed against sentence to the High Court, saying the consecutive sentence was excessive and offended the totality principle.

[4] On 2 November 2007, Shameem J dismissed the appeal by giving the following reasons:

> "In 2004/5 he committed a total of 12 burglary and larceny offences. In 2004, he had committed two such offences. In 2006 he committed further such offences. He is clearly a habitual offender who has learnt nothing from his terms of imprisonment. People who make a living from breaking into the homes of others cannot expect leniency. Whether or not statistics show an increase in such crimes, offenders cannot commit home invasion offences with impunity. The order that the sentences be served consecutively was correct in principle and does not offend the totality principle."

[5] The appellant applied before a single judge, seeking leave from this Court to appeal against sentence out of time on a number of grounds. Scutt J considered the application for leave and dismissed all the grounds except the following:

> "Mr. Daunabuna has raised a question of law in respect of his sentence and hence has an 'as of right' appeal to the Court of Appeal, solely on the question of credit for a guilty plea where 'lateness' not within his control was attributed to him."

[6] At the hearing, the appellant relied on his written submissions. In his submissions, the appellant renewed his earlier grounds of appeal that were rejected by Scutt J. Scutt J in a detailed ruling considered those grounds of appeal and found them to be without merits. We see no reason to disagree with Scutt J and therefore we do not grant leave to the appellant to raise fresh grounds of appeal.

Consideration of Ground of Appeal

[7] The issue presented by the ground of appeal is whether the appellant was entitled to more credit than what he received for his guilty plea. The appellant does not contend that his guilty plea was not considered by the Magistrates' Court. His contention is that the Magistrates' Court gave insufficient weight to his guilty plea because it was late. His further contention is that the delay in pleading guilty cannot be attributed to him.

[8] The appellant was arraigned on the charges on 8 May 2006. He entered a plea of not guilty.

[9] The case was adjourned on five occasions until 17 July 2006, when the appellant was released on bail. After release, the appellant did not appear in court. The reason the appellant failed to appear in court was because he was committed to serve a sentence in another unrelated matter. On 13 December 2006, the prosecution learnt that the appellant was in prison. The Magistrates' Court issued an order to produce the appellant in court but for reasons not clear in the record, the order was not served on the prison for six months. Regrettably, the Magistrates' Court did not seek any explanation from the bailiff as to why the production order was not timely served on the prison. Subsequently, when the production order was served and the appellant appeared in court on 19 July 2007, the court proposed to set an early hearing date. It was then the appellant informed the court that he wished to change his plea. He pleaded guilty after waiving his right to counsel.

[10] In his sentencing remarks, the learned Magistrate took into account the appellant's guilty plea but said it was 1 year late. For the offence of house breaking entering and larceny, the learned Magistrate picked 3½ years as a starting point and reduced it by 1 year to reflect the guilty plea and recovery of stolen items. The appellant was sentenced to a total sentence of 2½ years imprisonment for two separate theft related offences.

[11] In his appeal to the High Court, the appellant did not complain about the discount he received for his guilty plea. Although not an issue before the High Court, Shameem J considered the lateness of the appellant's guilty plea in her judgment as follows:

> "When the case was first called on the 8th of May 2006, he pleaded not guilty. He was remanded in custody. There were several adjournments to allow him to seek representation and a hearing date was set for the 13th of October 2006. He was granted bail. On the 30th of October he did not appear. This is not surprising as the date given to him on the 17th of July 2006 was the 28th of October. By the 13th of December he was a serving prisoner and no production order had been served. He was not produced until the 19th of July 2007 when he changed his plea."

[12] Despite the delay, which was not attributed to the appellant, the High Court found the sentence imposed on the appellant was correct in principle and was not excessive. We agree.

[13] We bear in mind that sentencing is not a process that leads to a single correct answer using some arithmetical formula. The factors bearing on the sentence will vary from case to case. The task of the sentencing court is not to add and subtract from an objectively determined sentence but to balance the various factors and make a value judgment as what is the appropriate sentence in all the circumstances of the case. In this regard, the Supreme Court in ***Maciu Koroicakau v. The State*** *[2006] FJSC 5; CAV0006U.2005S (4 May 2006)* held:

> "It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending .... Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process."

[14] It has been a well recognized practice in common law to take into account a plea of guilty in the sentence. Most common law jurisdictions have codified the practice in sentencing statutes. In Fiji, the practice is part of the common law.

[15] In ***Navuniani Koroi v. The State*** *Criminal Appeal No. AAU0037 of 2002S*, the Court said:

> "It has long been the practice of the courts to reduce a sentence where the accused person has pleaded guilty. In most cases that is a recognition of his contrition as expressed by an early admission and the fact that it will save the witnesses and the court a great deal of time and expense. In offences of a sexual nature, the amount of reduction is generally more because the plea saves the victim from having to attend the trial and relieve her experience in the witness box."

[16] The weight to be given to a guilty plea depends on a number of factors. Some of these factors were identified by Hunt CJ at CL in ***R v. Winchester*** *(1992) 58 A Crim R 345 at 350:*

> "A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some cases be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: *Shannon* (1979) 21 SASR 442 at 452; *Ellis* (1986) 6 NSWLR 603 at 604. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in a trial. Obviously enough, the extent to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected): *Beavan* (unreported, Court of Criminal

> Appeal, NSW, Hunt, Badgery-Parker and Abadee JJ, 22 August 1991), at p.12.
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> The important point to be made is that leniency is afforded upon the second ground as a result of purely utilitarian considerations, as with the 'discount' allowed for assistance given to the authorities: *Cartwright* (1989) 17 NSWLR 243; *Gallagher* (1991) 23 NSWLR 220; 53 A Crim R 248. The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay.
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> Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed. That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown; that was the point of this Court's decision in *Beavan* at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor."

[17] The first reasonable opportunity available to the appellant to plead guilty was the date of the arraignment. At the arraignment, the appellant entered a plea of not guilty. From the date of the arraignment, the appellant made five appearances in the Magistrates' Court and maintained his plea of not guilty. If the appellant wanted, he could have pleaded guilty in one of these appearances.

[18] We also note that on 15 June 2006, the appellant appeared for trial. On this date, he applied for bail and an adjournment to secure legal counsel. The Magistrates' Court refused bail but granted an adjournment. On a later date the appellant was granted bail and while he was bail, his case was called on a wrong date. During the period the appellant was on bail in this case, he was sentenced to 3 years imprisonment by a different magistrate in another case. When the appellant appeared in court after a year in this case, he pleaded guilty after the Magistrates' Court proposed to give an

early trial date. In these circumstances, the appellant's guilty plea could hardly be considered a sign of contrition. The appellant knew he was facing a strong prosecution case. The police found the stolen items in his possession. He committed the offences during an operation period of a suspended sentence. What weight was to be given to the appellant's guilty plea was a matter for the discretion of the sentencing court, taking into account the matters we have mentioned. We are satisfied that no error of law was made in the exercise of discretion of the Magistrates' Court regarding the appellant's guilty plea.

Result

[19] The appeal against sentence is dismissed.

Hon. Justice John Byrne
President, Court of Appeal

Hon. Justice Daniel Goundar
Judge of Appeal

Hon. Justice Anjala Wati
Judge of Appeal

Solicitors:
Appellant in Person
Office of the DPP for State