IN THE COURT OF APPEAL
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0058 OF 2011

BETWEEN	:	**1. NIKO LESU**
		2. SUNIA VOSATAKI
		APPLICANTS
AND	:	**THE STATE**
		RESPONDENT
COUNSEL	:	**Applicants in Person**
	:	**Ms M. Fong for Respondent**
Date of Hearing	:	**28 June 2013**
Date of Ruling	:	**03 July 2013**

RULING

[1] This is an application for leave to appeal against sentence pursuant to section 21 (1) (c) of the Court of Appeal Act.

[2] On 7 April 2011, the applicants pleaded guilty to a charge of arson contrary to section 362 (a) of the Crimes Decree in the High Court at Suva. On 6 May 2011, both were sentenced to 4 years' imprisonment.

[3] Their grounds of appeal can be summarised as follows:

1. The learned judge erred in using a disputed fact as an aggravating factor to enhance sentence.

2. The learned judge gave insufficient weight to the early guilty plea and the previous good character of the applicants.

3. The sentence was harsh and excessive and exceeded the tariff for arson.

[4] The facts were that the appellants were disappointed with the complainant's decision to allow a new church denomination into their village without consulting the members of the village. The complainant was the chief of the village. He further permitted the new denomination to use his old house which had been deserted for many years for the church service. According to the village rumours the chief's old house was used for the purpose of witchcraft and that was the reason the chief allowed the new church denomination to come into the village. According to the applicants the house was not fit for human habitation and as a show of disapproval to the chief's decision, they torched the house.

[5] In the High Court, the applicants were represented by counsel from the Legal Aid Commission. On instructions from the applicants, counsel disputed the estimated value of the property tendered by the

prosecution. According to the prosecution the estimated value of the house was $7000.00.

[6] Section 244 of the Criminal Procedure Decree (previously section 306 of the Criminal Procedure Code) provides:

> Before passing sentence the court may receive such evidence as it thinks fit, in order to inform itself as to the appropriate sentence to be passed in accordance with the sentencing guidelines and sentencing options provided for in the Sentencing and Penalties Decree 2009.

[7] This provision conforms to the common law on the hearing of disputed facts that would affect sentence. In *R v Tolera* (1999) 1 Cr. App. R. 29, Lord Bingham C.J said that where the defendant disputed some part of the prosecution facts it was for the defendant to clearly state the matters in dispute and the grounds for such dispute. If the prosecution did not accept the defence version and if the discrepancy was significant in that the level of sentence depended on which version the court accepted then the court could hold a *Newton* hearing to resolve the issue.

[8] In *R v Newton* 77 Cr. App. R. 13, Lord Lane C.J said that where there was a dispute about the facts which would affect sentence, the judge could either accept the defence version, or hear the evidence and come to his own conclusion. Defence counsel does not need to agree to a *Newton* hearing (*R v Smith* (P.A.) 8 Cr. App. R(s) 169) and where such a hearing is held evidence must be led in the ordinary way by counsel. The judge must direct himself or herself on the ordinary standard of proof before accepting any version of the facts. Any appeal

from such a finding will only succeed in clear cases which would be rare where there have been findings of credibility, especially on the basis of the defendant's evidence (*R v Nabil Ahmed* 6 Cr. App. R(s) 391).

[9] A *Newton* hearing is unnecessary where the dispute is irrelevant to sentence, where the judge and prosecution accept the defence version, where the defence version is "manifestly false" or "wholly implausible" (*R v Hawkins* 7 Cr. App. R(s) 351) and where the defence put forward matters in mitigation which are outside the knowledge of the prosecution.

[10] The courts in Fiji have accepted the *Newton* hearing as part of the criminal procedure on disputed fact affecting sentence (see, *Kumar v State* [2001] FJCA 46; [2001] 1 FLR 207 (24 May 2001) *Hefferman v The State* [2003] FJHC 163; HAA0051J.2003S (12 December 2003); *Naidu v The State* [2002] FJHC 137; HAA0012J.2002B (23 July 2002)).

[11] Counsel for the applicants applied for a *Newton* hearing to determine the disputed value of the property by tendering a copy of the *Newton's* case, but that request was declined by the learned judge. Instead the learned judge shifted the burden to the applicants to disprove the amount tendered by the prosecution. Without ascertaining the actual value of the property, the learned judge further directed the applicants to come up with a payment of $15,000 each as compensation for the complainant.

[12] In her written sentencing submissions, counsel for the applicants took strong objection to the course adopted by the learned judge regarding the disputed value of the property. Counsel submitted:

> It is our respectful submission that the value of the property cannot be plucked out of thin air. There should be a valuation done to determine the value of the property. In this matter, this was a house that was vacant and was not in a position to be occupied by anyone.

[13] Earlier submissions of counsel read:

- The house that was burnt has been vacant for almost two decades and it is not located within the boundaries of the village. In fact, it was built by one of the previous estate owners. The condition of the house before it was burned was not even fit for human habitation. It had no flooring, no iron roofing and therefore, it was a damaged property prior to the burning of the house.

- In light of the above, both the accused persons are disputing the value of the house to be $7,000. On that ground they wish to have a Newtown trial conducted to determine the value of the house. In determining the value of the house, it is our respectful submission that the court will then be able to justly and fairly determine the length of sentencing in this matter.

- On the previous occasion on 7th April 2011, counsel appearing as Duty Solicitor raised the above issue to which the Court declined it and stated that the accused persons when disputing the value of the property are to bring the valuation of the property.

- In fact, it for the Prosecution to prove that the value of the house is $7,000. It is not for the accused persons to prove that the value of the property is $7,000.

[14] Without determining the disputed value of the property, the learned judge used the fact as an aggravating factor to enhance the applicants' sentences. Furthermore the learned judge used the disputed fact to diminish the weight he gave to the remorse expressed by the applicants from their guilty pleas. At paragraph 9 of the sentencing remarks, the learned judge said.

> It should be noted that both of you are given a considerable period of time to pay the damage to the victim but you have not shown any effort to raise any money to compensate. It shows that you are not truly remorseful.

[15] The tariff for arson was first established by the High Court in *Lagi v The State* [2004] FJHC 69; HAA0004J.2004S (12 March 2004). The tariff is 2 to 4 years imprisonment. This tariff has been applied in subsequent cases of arson in the High Court (State *v Kata* [2008] FJHC 219; HAC126.2008 (12 September 2008); *State v Lakaia* [2010] FJHC 366; HAC023.2010 (27 August 2010); *State v Raicebe* [2011] FJHC 729; HAC208.2011 (17 November 2011) *State v Taqainakoro* [2013] FJHC 23; HAC100.2012 (30 January 2013).

[16] In sentencing the applicants, the learned judge adopted a new tariff for arson. At paragraph 4 of the sentencing remarks, the learned judge said the tariff was 9 months and 6 years. Using this new tariff, the learned judge picked 5 years as his starting point. He then increased the sentence by 3 years to reflect the following aggravating factors he identified:

a) You have burnt the house of the Chief in the village

b) Severe breach of respect.

c) The value of the house was $7000 (which was admitted by both of you by admitting summary of facts and disputed subsequently).

d) You claim you are remorseful, both of you were given time from October 2010 to April 2011 to raise money to compensate the victim but you have not shown any interest to collect a red cent. It shows you are not remorseful of your act.

e) You had no regard to the religious rights of the victim.

[17] It could be argued that none of the above factors aggravated the offence in this case.

[18] The sentence was then reduced by 4 years to reflect the following mitigating factors:

a) Both of you are 1st offenders.

b) You have pleaded guilty.

c) You claim you are remorseful.

d) The house which was burnt was an abandoned and not occupied by the Chief.

e) The house was an old house.

f) Your Counsel submits that both of you are married.

g) You are the bread winners of your families.

[19] No reduction was made for the time the applicants spent in custody on remand.

[20] I am satisfied that there are arguable grounds regarding the manner in which the learned judge exercised his discretion to arrive at a sentence of 4 years' imprisonment. In coming to this conclusion, I am guided by the judgment of the Full Court in *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999) at paragraph 2:

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936)55 CLR 499)).

[21] For these reasons, the applicants are granted leave to appeal against their sentences.

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DANIEL GOUNDAR
JUDGE

Solicitors:
Applicants in Person
Office of the Director of Public Prosecutions for Respondent.