

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU0089 OF 2014
(High Court Criminal Case No. HAC211 of 2013)

BETWEEN : **THE STATE** *Appellant*

AND : **KULINIO NASILOKIA** *Respondent*

Before : The Hon. Justice Daniel Goundar

Counsel : Mr. L. J. Burney for the Appellant
Mr. M. Yunus for the Respondent

Date of Hearing : 27 July 2016

Date of Ruling : 5 August 2016

RULING

- [1] On 17 June 2014, the respondent was sentenced to a total term of 9 months' imprisonment suspended for 3 years after he pleaded guilty to one count of burglary and two counts of theft in the High Court at Lautoka. On 17 July 2014, the State filed a timely application for leave to appeal against that sentence. The State's right of appeal against sentence is governed by section 21 (2) (c) of the Court of Appeal Act, Cap. 12. Under section 21 (2) (c) the State may appeal against sentence with the leave of the Court of Appeal. Section 35 (1) of the Court of Appeal Act, Cap. 12 gives a single justice of appeal power to grant leave to appeal against sentence. The test for leave to appeal against sentence is whether there is an arguable error in the sentencing discretion. The arguable error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*Bae v State* unreported Cr App No AAU0015/98S; 26 February 1999).

- [2] The sole ground of appeal advanced by the State is that "the sentence passed by the learned sentencing Judge is manifestly lenient that the learned sentencing judge overrated the mitigating that were advanced by the respondent".
- [3] While the ground of appeal could have been drafted with more clarity, it appears that the State's complaint is that the learned High Court judge erred in suspending the respondent's sentence.
- [4] The facts of the case were that the respondent entered the dwelling house occupied by the victims and stole a laptop computer, a mobile phone and \$115.00 cash. The entry to the house was made by removing the louvre blades in the living room while the occupants were asleep in their bedrooms. The laptop computer was recovered after the respondent was arrested. The respondent admitted the allegation under caution.
- [5] The respondent entered an early guilty plea to the charges. The learned High Court judge used the two-tiered approach to sentence the respondent. He identified the appropriate range for each individual offence and then using a starting point the sentence was adjusted for the mitigating and aggravating factors. The maximum sentence for burglary is 13 years imprisonment. The maximum sentence for theft is 10 years imprisonment. The identified tariff for burglary was 18 months - 3 years imprisonment. The identified tariff for theft was 2-9 months imprisonment.
- [6] The aggravating feature identified by the learned High Court judge was that a domestic dwelling was burgled at night while the occupants were asleep. The learned High Court judge also noted that the respondent had six previous convictions. The nature of these convictions were not made clear in the sentencing remarks of the learned High Court judge. The mitigating factors identified by the learned High Court judge were:
- (a) You are married and wife is 9 months pregnant.
 - (b) You are remorseful.
 - (c) Items to the value of \$2306.94 were recovered (para. 14).

- [7] The learned High Court judge considered the guilty plea and the remand period separately from the mitigating factors and made a further deduction of 8 months for the guilty plea and 7 months for the remand period. After arriving at the individual terms, the learned High Court ordered the terms to be served concurrently. In effect the total sentence was 9 months imprisonment. The learned High Court judge then suspended the sentence for the reasons he gave in paragraph 21:

“Although you do not deserve a suspended sentence considering your previous convictions considering the fact that your wife is 9 months pregnant and you are the sole bread winner, this Court will give you a final chance to rehabilitate by suspending the operation of all these sentences for a period of 3 years.”

- [8] At the leave hearing, counsel for the State expressed some reluctance to continue with the appeal. Counsel submits that even if leave is granted, the appeal is unlikely to be heard until next year, by which time the respondent would serve his suspended sentence. In these circumstances, counsel submits that the Full Court is unlikely to impose an immediate custodial sentence. I accept this fair concession made by the State.
- [9] In my judgment, although the suspended is sentence is arguably lenient, I am not convinced that the Full Court would impose a different sentence.

Result

- [10] Leave refused



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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Director of Public Prosecutions for Appellant
Office of the Legal Aid Commission for Respondent