

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATE COURT OF FIJI
Exercising extended jurisdiction

CRIMINAL APPEAL NO: AAU 165 OF 2017
(High Court HAC 40 OF 2016)

BETWEEN : **SAMEER KUMAR**
Appellant

AND : **THE STATE**
Respondent

Coram : **Gamalath JA**
Prematilaka JA
Fernando JA

Counsel : **Mr. M. Yunus for the Appellant**
Mr. M. D. Korovou for the Respondent

Date of Hearing : **19 September 2018**

Date of Judgment : **4 October 2018**

JUDGMENT

Gamalath JA

[1] I have read in draft the judgment of Fernando JA and I agree with the reasons and the conclusions therein.

Prematilaka JA

[2] I agree with the reasons and conclusions of Fernando JA.

Fernando JA

[3] The Appellant had appealed against the sentence of 5 years imprisonment with a non-parole term of 1 year imposed on him on the 13th of November 2017 by the Magistrates Court at Nasinu, exercising extended jurisdiction of the High Court; after having been convicted on his own guilty plea to the offences of aggravated burglary contrary to section 313 (1) (a) and theft contrary to section 291 (1) of the Crimes Act No. 44 of 2009. The Sentencing Order does not make any reference to sentencing the offender for the offence of theft. It is possible that this had been overlooked or in the mind of the Sentencing Judge this was absorbed into the sentence imposed in respect of aggravated burglary. The State had not cross-appealed on this matter. The maximum sentences for the said offences as specified in the Crimes Act 2009, is 17 years imprisonment for aggravated burglary and 10 years for theft. At the time of the commission of the offences, namely in January 2016, the tariff that was in operation for aggravated burglary was between 18 months to 3 years and for theft 2 months to 3 years.

[4] A single Judge of this Court had granted the Appellant leave to appeal against the sentence.

[5] The Appellant has relied on two grounds of appeal, namely:

- i. *“The learned sentencing Magistrate erred in his sentencing discretion to direct himself to the sentencing tariff of the offence of aggravated robbery while sentencing the appellant for the offence of aggravated burglary.*
- ii. *The sentence is harsh and excessive taking into account all the circumstances of the matter.”*

- [6] The background facts have been succinctly stated in the Ruling of the single Judge of this Court as follows: “Sometime between 6.00 pm on 31 December 2015 and 6.00 pm on 1 January 2016 the appellant entered the complainant’s residence and stole a Sony brand play station 3 valued at \$ 1,300.00, a Sharp brand Led TV valued at \$ 1,300.00, a Philips brand Home Theatre system valued at \$ 1,500.00 and 1 pair of Puma canvas valued at \$200.00. The total value of goods stolen was \$ 4,300.00 belonging to the complainant. At the time of the burglary and theft the complainant and his family were away and the residence was vacant. The appellant and the two others entered the premises by breaking the padlock and entering through the front door.” As per the facts stated to court by the Prosecutor, all the items stolen had been recovered and the Appellant in his caution statement admitted to committing the offence.
- [7] In his Sentencing Order the learned Magistrate after having correctly set out the charges and the facts tendered by the State in relation to the offences committed, had in setting out the basis for his sentence stated, at paragraph [5] of his Sentencing Order: “The maximum penalty for Aggravated Robbery is 20 years” and at paragraph [6] “The tariff for such offences ranges between a custodial term of 8 – 16 years”. He had then gone on to discuss the guiding principles for determining the starting point in sentencing the offender and having considered the circumstances of the case had decided on a starting point of 8 years imprisonment.
- [8] In relation to the 1st ground of appeal, the learned Counsel for the State in the highest traditions of the Bar had in his Written Submissions stated that “*The learned Magistrate at paragraphs 5 and 6 of the sentence referred to the tariff for aggravated robbery when the appellant was charged with aggravated burglary and theft*” and conceded that the Sentencing Judge had adopted the wrong tariff when sentencing the Appellant and also stated that the starting point of 8 years adopted by the learned Magistrate was wrong in principle.

- [9] The learned Counsel for the State had however in his Written Submissions filed before us tried to argue that the tariff of 18 months – 3 years for aggravated burglary had been reviewed recently by the High Court of Fiji in the cases of State –v- Prasad – Sentence [2017] FJHC 761, HAC 254.2016 (12 October 2017); State –v- Jone Vonu & Ors – Sentence [2018] FJHC 787, HAC 148.2017S (24 August 2018) and State –v- Tikoivanuabalavu – Sentence [2018] (24 August 2018) and a higher tariff set for aggravated burglary. But when his attention was drawn to the fact that the offence in this case had been committed in January 2016, i.e. prior to the sentencing decisions in those cases, and to Article 14 (2) (n) of the Constitution of Fiji, he conceded that the new tariff set by the High Court for aggravated burglary cannot be applied to this case and that he therefore would not proceed with his argument. **Article 14 (2) (n) of the Constitution of Fiji** states: “*Every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.*”
- [10] The ground of appeal that “*the sentence is harsh and excessive taking all the circumstances of the matter*” necessarily flows from the learned Sentencing Magistrate acting on the basis of a wrong principle in deciding on a starting point of 8 years and the wrong tariff of 8 – 16 years when in fact the tariff should have been 18 months – 3 years.
- [11] The learned Magistrate having fixed the starting point at 8 years, has then gone on to state that “there is no particular aggravating features in this case. In mitigation the accused stated... he is 25 years old. He is now employed. He is earning \$ 190.00 a week. There is not much mitigation. His sentence however, will decrease to reflect the above mitigation. 2 years is reduced. The sentence stands at 6 years. For the early guilty plea an additional year is deducted. The accused sentence is 5 years imprisonment. The accused had to serve a non-parole period of one year before being eligible for parole”. (verbatim)
- [12] Both in his Written Submissions and in his oral submissions before us at the hearing, Counsel for the State, did not take objection to the deduction of 3 years made by the

Sentencing Magistrate from the starting point of 8 years, on the basis of the mitigating factors and for the early guilty plea.

- [13] It is therefore clear that the learned Sentencing Magistrate had erred in determining the starting point of 8 years for aggravated burglary basing himself on the maximum penalty and tariff for aggravated robbery and thus acted upon a wrong principle in sentencing the Appellant which gives this Court a reason to interfere on the basis of the decisions in **Simeli Bili Naisua –v- The State [2013], Criminal appeal No CAV 0010 of 2013** and several other authorities on the matter. I therefore quash the sentence of 5 years imprisonment with a non-parole term of 1 year imposed on the Appellant.
- [14] It has now become necessary to decide on the sentence that needs to be substituted in its place against the Appellant in accordance with section 23 (3) of the Court of Appeal Act. As stated earlier the tariff for aggravated burglary at the time of the commission of the offence was between 18 months to 3 years. It had been held in **Lasiasa Koroivuki –v- The State [2013] Criminal Appeal AAU 0018 of 2010, 5 March 2013**, that in selecting a starting point, the court must have regard to the objective seriousness of the offence and pick a starting point from the lower or middle range of the tariff. Our attention was drawn at the hearing to a recent sentence (16th March 2018) imposed by Justice D. Goundar in the High Court case of **The State –v- Iosefo Aumaile and Rakanace Rabarao, Criminal Case No. HAC 08 of 2018 (Labasa)**, where the facts therein were similar to that of this case and where the two accused were sentenced for aggravated burglary and theft for 18 months imprisonment and suspended for 3 years. I am of the view that taking into consideration that the offence had been committed at a time when there was no one at the residence, a starting point of 22 months of imprisonment would be appropriate.
- [15] Taking into consideration that the Appellant was 25 years of age at the time of the commission of the offence, a first offender, had admitted to the commission of the offence in his caution statement and pleaded guilty at the very first instance and that all the goods stolen had been recovered as stated by his Counsel, without challenge from Counsel for the State, I deduct 10 months and 9 days from that starting point of 22

months and sentence him to a period of 11 months and 21 days of imprisonment. In doing so I bear in mind that the Sentencing Magistrate had deducted 2 years for mitigation and 1 year for early guilty plea making it a total of 3 years. As stated earlier the learned State Counsel had no objection to that reduction made by the Sentencing Magistrate. Since the Appellant has already spent 11 months and 21 days of imprisonment w.e.f. 13th November 2017, I order his release from prison forthwith.

Orders of the Court:

- 1) *Appeal allowed.*
- 2) *Sentence of 5 years imprisonment quashed*
- 3) *Sentence of 11 months and 21 days of imprisonment w.e.f. 13th November 2017, substituted in its place.*
- 4) *Appellant to be released from prison forthwith as he has already served his sentence.*



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Hon Mr Justice S Gamalath
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to be "C. Prematilaka", written over a horizontal line.

Hon Mr Justice C Prematilaka
JUSTICE OF APPEAL

A handwritten signature in black ink, appearing to be "A. Fernando", written over a horizontal line.

Hon Mr Justice A Fernando
JUSTICE OF APPEAL