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

CRIMINAL APPEAL NO.AAU 110 of 2015
High Court Criminal Case No. HAC 118 of 2013]

BETWEEN : **PENI VULISOKO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

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

Date of Hearing : **8 November, 2018**

Date of Ruling : **6 December, 2018**

RULING

[1] The Appellant was charged with another for five counts of Aggravated Burglary and five counts of theft.

[2] The Appellant pleaded guilty and he was convicted and sentenced on 12th July 2013 to 2 years imprisonment on each count, the first five sentences were to run consecutively making up a total sentence of 10 years imprisonment and the next five sentences to run concurrently so that the final sentence was 10 years imprisonment with a non-parole term of 8 years.

[3] The offences that were committed by the Appellant and the other were by breaking into houses at night when the inmates had gone out.

[4] The Appellant filed a motion seeking an extension of time to appeal against his sentence with an affidavit explaining the delay. In his application the following grounds were proposed:

1. The learned Trial Judge erred in law and in fact when he took into account in his sentence an irrelevant factor of terrorizing home owners in the Nasinu area when that did not happen as the said owners were not present in the houses at the material time.

2. The learned Trial Judge erred in law when he did not separately consider and give the appropriate 1/3 discount to the early guilty plea.

3. The learned Trial Judge erred in law when he did not separately deduct any period spent in remand.

4. The learned Trial Judge erred in law when he did not properly give a reasoned justification for ordering the sentences for counts 1 to 5 consecutive to each other.

[5] In an application for leave seeking extension of time, the principles set out in **Kumar v. State** Criminal Appeal No. CAV0001/09 21st August 2012) have to be considered. They are:

1. The reason for the failure to file within time;
2. The length of the delay.
3. Whether there is a ground of merit justifying the Appellate Court's consideration.
4. Where there has been substantial delay, nonetheless is a there a ground of appeal that will probably succeed? And
5. If time is enlarged, will the Respondent be unfairly prejudiced?

[6] The Applicant in his affidavit has deposed to the fact that he was not aware that he could appeal against his sentence until he was advised by the legal aid commission that he could do so. He apologises for the delay. It is a substantial delay as it is I year and 8 months late. Usually a period of about three months is excused specially in relation to an incarcerated person but the delay here is rather substantial.

[7] When the delay is substantial it is necessary to see not only whether the grounds of appeal have any merit but also whether they would probably succeed which is of a higher standard than the requirement of merit only.

[8] The first ground of appeal is in relation to the learned trial Judge stating that the Appellant and his co-accused had been terrorizing home owners and families in the Nasinu area during the period within which the offences were committed. The complaint is that it was an irrelevant factor taken into account by the learned trial Judge in sentencing the Appellant and his co-accused when in fact the breaking into the houses had been when the inmates were away. It has been submitted that the learned Judge mistook the facts which warrant the intervention of the Court.

[9] The submission has been made taking into account what the learned Judge has stated in a different context as what appears to have been meant was that the acts of the Appellant and his co-accused would have had an effect on the residents in that area which had a terrorizing effect when a series of breaking ins at night had occurred and not that the items were stolen by terrorizing the inmates in the houses. This ground of appeal therefore has no merit.

[10] The second ground of appeal is that the learned trial Judge had not separately considered and given the 1/3 discount to the early guilty plea.

[11] The learned trial Judge adopted a process which was common to all ten offences committed by the Appellant and his co-accused. He had taken each count separately, given a starting point of 2 years imprisonment, added 3 years for the aggravating factors and discounted 3

years for the mitigating factors and reaching a sentence of 2 years imprisonment for each offence.

[12] In adopting that process, the early guilty plea had been included in the mitigating factors. The question therefore is whether there was an error in sentencing when early guilty plea was not dealt with separately from the mitigating factors.

[13] Counsel for the Appellant cited the decision in **Rainima v. The State** criminal Appeal No. AAU 022/2012 (22 February 2015) where it was held by the Court of Appeal that the discount for a plea of guilty should be the last component of a sentence after addition and deductions are made for aggravating and mitigating circumstances respectively.

[14] Although the learned Judge has not dealt with the guilty plea separately as the last component of a sentence, what has to be seen is whether there was any prejudice caused to the Appellant.

[15] The learned Judge granted a discount of 3 years for the mitigating factors in respect of each count which included the guilty plea which discount was quite substantial and therefore would not cause any prejudice to the Appellant.

[16] Therefore this ground of appeal has no merit and would probably not be successful.

[17] The third ground of appeal is regarding the failure of the learned trial Judge to deduct the period of 4 months spent in remand when sentencing the Appellant.

[18] The period spent in remand by an accused has to be deducted when sentencing in terms of section 24 of the Sentencing and Penalties Act, 2009 (**Koroitavalena v. The State** [2014] FJCA 185; Criminal Appeal No. AAU 51/2010 (5 December 2014).

[19] In the present case, the period spent in remand had been taken into account among the mitigating factors when granting a discount of 3 years on account of all the mitigating factors.

[20] Here too, taking into account all the circumstances of the case, a separate discount for the period spent in remand not being given would not have caused any prejudice to the Appellant as that factor was also taken into account in granting the discount for all the mitigating factors. This ground too therefore lacks merit.

[21] The fourth ground of appeal is in respect of the learned trial Judge not properly giving reasoned justification for ordering the sentences for counts 1 to 5 consecutive to each other.

[22] The learned trial Judge in his sentencing judgment stated as follows after setting the sentences for each of the 10 counts:

> *"[16] I will consider the totality principle of sentencing and Part III of the Sentencing and Penalties Decree, 2009 together. Part III deals with Habitual Offenders. The two accuseds' offending involved offences of "housebreaking", and thus come within the ambit of section 10 (c) of the Sentencing and Penalties Decree,2009. In my view, on the facts of this case, the two accuseds are threats to the community. They have chosen to live outside the law, invaded peoples' homes on numerous occasions, and steal their properties. In my view, they are habitual offenders, given the facts of this case.*
>
> *[17] I bear in mind the totality principle of sentencing, but in sentencing the two accuseds, I consider the protection of the community as the principal purpose of my sentences (Section 12 of the Sentencing and Penalties Decree 2009). On each of the accuseds, I make the following orders:*
>
> *(i) The sentences in counts nos.1 to 5, are made consecutive to each other, making a total sentence of 10 years imprisonment.*
>
> *(ii) The sentences in counts nos.6 to 10, are made concurrent to each other, making a total sentence of 2 years imprisonment.*
>
> *(iii) The total sentence in paragraph 17(i) above, are made concurrent to the sentence in paragraph 17(ii) above, making a total sentence of 10 years imprisonment for each accused, effective forthwith."*

[23] The above paragraphs in the sentencing judgment of the learned Trial Judge clearly indicate the manner in which he had reasoned out the imposing of the final sentences on the Appellant. He has taken into account the statutory positions and the totality principle in imposing the final sentences and has given reasons justifying same.

[24] In those circumstances there is no merit in this ground of appeal.

[25] Therefore since the grounds of appeal proposed on behalf of the Appellant have no merit and in this case since there has been a substantial delay in appeal the higher threshold of the grounds being of such a nature that are likely to succeed in appeal have not been met, the application for extension of time seeking leave to appeal is refused.

Orders of Court:

Application for extension of time seeking leave to appeal is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL