IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 0042 OF 2013
(High Court HAA 23 of 2012 at Lautoka)
(Magistrates Court 183 of 2012 at Lautoka)

BETWEEN : **ISOA NAUSA**

Appellant

AND : **THE STATE**

Respondent

Coram	:	**Calanchini P** **Gamalath JA** **Goundar JA**
Counsel	:	**Mr S Waqainabete for the Appellant** **Mr S Babitu for the Respondent**
Date of Hearing	:	**8 May 2018**
Date of Judgment	:	**1 June 2018**

JUDGMENT

Calanchini P

[1] The Appellant was charged with one count of burglary contrary to section 312(1) of the Crimes Act 2009 and one count of theft contrary to section 291(1) and (2) of the same

Act. The appellant was convicted on his plea of guilty in the Magistrates Court at Lautoka and on 6 June 2012 was sentenced to terms of imprisonment of 20 months on count one and 16 months on count 2 to be served concurrently.

[2] By letter dated 14 June 2012 the appellant filed an appeal against sentence in the High Court at Lautoka. The grounds of appeal upon which the appellant relied were (a) that the 20 months sentence imposed by the Magistrate was manifestly excessive, (b) that it was wrong to impose on a man with a record of previous convictions a sentence which is disproportionate to the offences and (c) that the Magistrate had not applied the right principle in sentencing. The respondent opposed the appeal and invited the High Court to revisit the sentence.

[3] At the hearing of the appeal in the High Court the respondent submitted that, considering the previous convictions of the appellant, the Court should determine that he be declared a habitual offender and that the sentence should be enhanced. The learned Judge warned the appellant of the consequences for him should he proceed with the sentence appeal. The appellant informed the Court that he knew the consequences but wished to pursue the appeal against sentence.

[4] The learned Judge, after considering each ground and the relevant law, concluded that each ground of appeal failed on its merit. The Judge then went on to consider the State's submission in relation to the issue of the appellant as a habitual offender. Part III of the Sentencing and Penalties Act 2009 sets out the provisions relating to habitual offenders. Section 10 states that Part III will apply when sentencing a person for offences involving, amongst others, in (c) robbery or housebreaking. Section 11 provides that a judge may determine that an offender is a habitual offender for the purposes of Part III if three conditions are satisfied. First, the Judge must be sentencing an offender for an offence of the nature described in section 10. Secondly, the previous convictions being considered are for offences of a like nature. Thirdly, the Court needs to be satisfied that the offender constitutes a threat to the community. The learned Judge considered section 11 and accepted that the offence of burglary came within the offence of house-breaking under

section 10 of the Act. An element of the offence of burglary is entering a building as a trespasser which is sufficiently wide to include "*housebreaking.*" The Judge then considered the appellant's previous convictions for offences of a like manner listed in the appellant's criminal history sheet. There were convictions for a number of burglary and theft offences. The Judge concluded that the appellant constituted a threat to the community and as a result the appellant was determined to be a habitual offender.

[5] The Judge then proceeded to sentence the appellant relying on section 256(3) of the Criminal Procedure Act 2009 which states:

> *"At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence it thinks ought to have been passed."*

[6] Exercising that power the Court proceeded to quash the sentence imposed by the Magistrates Court and on 26 October 2012 substituted a concurrent sentence of six years imprisonment with a non-parole term of 5 years from 6 June 2012. In increasing the sentence the learned Judge applied section 12 of the Sentencing and Penalties Act which state:

> *"12 When any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court in determining the length of the sentence:*
>
> *(a) shall regard the protection of the community from the offender as the principal purpose for which sentence is imposed; and*
> *(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence."*

[7] The Appellant drafted an initial notice of appeal dated 21 March 2013 that was filed on 26 April 2013. It was out of time by about 4 months. He subsequently filed on 31 March 2014 a formal application for an enlargement of time to appeal.

[8] At this stage it is appropriate to indicate that the appeal filed by the appellant faced two obstacles as preliminary issues. The first, as already noted, was that the appeal was out of time by about four months and that as a result leave to appeal out of time must be obtained before the appeal itself could be considered. The second is that as a second tier appeal the jurisdiction of this Court to hear an appeal against sentence is restricted under section 22(1A) to an appeal on the grounds that:

> *"(a) the sentence was an unlawful one or was passed in consequence of an error of law; or*
>
> *(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence."*

[9] In this appeal only paragraph (a) needs to be considered for the purposes of determining the issue of jurisdiction.

[10] In a ruling delivered on 19 Mach 2015 a judge of the Court granted the appellant leave to appeal. For the purposes of the present appeal that decision may be regarded as granting to the appellant leave to appeal out of time. The issue of jurisdiction was not considered by the judge.

[11] The grounds of appeal against sentence upon which the appellant relies in this Court are:

> *"1. <u>THAT</u> the learned appellate judge erred in law in choosing my status as an habitual offender to determine the starting point of sentencing.*
>
> *2. <u>THAT</u> the learned appellate judge erred in law in using a wrong sentence tariff for the offence of Burglary therefore failed to apply the correct principle.*

3. *THAT the learned appellate judge erred in law in appreciating the material laid before him relating to the appellants history.*

4. *THAT the sentence is manifestly excessive and wrong in principle.*

5. *THAT the learned appellate judge erred in law in improperly taken into account irrelevant matters and failed to take relevant matters in to consideration."*

[12] In order for the Court to determine the appeal against sentence it is necessary for the appellant to establish that the sentence was an unlawful one or that the sentence was passed in consequence of an error of law. It should be recalled that it is not sufficient for the notice of appeal to describe a particular ground as involving a question of law alone. Before a right of appeal on a question of law can be asserted, a question of law alone must be shown at the appeal stage to have arisen and has remained undetermined: **R v Hinds** (1962) 46 Cr. App. R. 327.

[13] When the hearing date for the appeal was fixed, Counsel for the appellant indicated that the appellant would rely on the submissions filed for the hearing of the leave to appeal application. It was submitted that the grounds of appeal can be consolidated into one ground being that the learned Judge erred in imposing a sentence that is manifestly harsh and excessive by selecting a starting point outside of the acknowledged tariffs for both burglary and theft. Unfortunately the submissions do not refer to the threshold jurisdictional issue whether that consolidated ground involves an allegation that the sentence passed was unlawful or was passed in consequence of an error of law. Furthermore the submissions made no reference to the issue of the appellant having been determined to be a habitual offender.

[14] Having read the appeal decision of the learned High Court Judge and having considered the grounds of appeal I have concluded that the grounds of appeal do not satisfy the threshold prescribed by section 22(1A) of the Act. As a result I have concluded that this Court has no jurisdiction to hear the appeal. Furthermore in the event that the

jurisdictional issue were to be decided in the appellant's favour, then I am satisfied that the appellant has not established that the sentence was unlawful or was passed in consequence of an error of law. In either case the appeal should be dismissed.

Gamalath JA

[15] I agree.

Goundar JA

[16] I agree.

Orders:

Appeal against sentence dismissed.

Hon. Mr. Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice D. Goundar
JUSTICE OF APPEAL