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

CRIMINAL APPEAL NO. AAU 0070 OF 2016
(High Court Action No: HAC 87 of 2014)

BETWEEN : **SHAMMI KAPOOR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Ms S Nasedra for the Appellant**

Ms S Kiran for the Respondent

Date of Hearing : **25 April, 2019**

Date of Ruling : **14 June, 2019**

RULING

[1] The Appellant was charged with one count each of arson, damaging property and manslaughter contrary to sections 362(a), 369 (1) and 239 of the Crimes Act 2009.

[2] The Appellant pleaded guilty and accepted the summary of facts submitted in Court by the prosecution. He was convicted and sentenced on 27th May 2016 as follows:

a) Arson – 5 years imprisonment;

b) Damaging property – 1 year Imprisonment

c) Manslaughter – 5 years imprisonment.

Two years from the arson sentence to be served consecutively with manslaughter sentence. Ultimate sentence being 7 years with a non-parole term of 6 years.

[3] The Appellant filed a timely appeal against his sentence urging the following ground of appeal:

> *"The learned sentencing judge erred in fact and in law when disallowing the appellant's sentence to be served wholly concurrent which is in contravention of the totality principle. "*

[4] The Appellant had visited the house of the complainant between 3.30 a.m. and 4.00 a.m. to buy kava. He had thrown a lighted match stick on the tarpaulin which was in front of the house and it was burning. As a result the entire house was destroyed, damaged the complainant's car and also caused the death of the complainant's son who died of 100 per cent third degree burns.

[5] The ground of appeal to be arguable should satisfy the principles set out in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), namely whether the sentence is wrong in law. The errors to be considered are whether the trial Judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, and failed to take into account some relevant consideration.

[6] The learned trial Judge when sentencing the Appellant referred to section 4(1) of the Sentencing and Penalties Decree 2009 and stated that the section requires the Court to punish the accused in a manner which was just in all the circumstances, to protect the community, to deter other would be offenders, to rehabilitate the accused and to signify the court and community denouncing these types of offences.

[7] In the present case the Appellant was charged with three different offences. It is necessary to consider whether the totality principle was considered when the Appellant was imposed consecutive and concurrent sentences.

[8] In **Tuibua v The State** Criminal Appeal No.AAU0116 of 2007 decided on 07 November 2007; [2008] FJCA 77 it was stated:

> *"The totality principle is a recognized principle of sentencing formulated to assist a sentence when sentencing an offender for multiple offences. A sentence who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentence must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced."*

[9] The Appellant was sentenced to 5 years imprisonment on Count 1 which was Arson. The tariff for Arson is 7 to 10 years. On Count 2, for damaging of property he was imposed a sentence of 1 years, for which the maximum sentence is 2 years. And on Count 3, Manslaughter he was sentenced to 5 years imprisonment where the tariff is between 5 and 12 years. When arriving at the final sentence, the learned trial Judge, made 2 years of the sentence for arson consecutive to the sentence of arson of 5 years making up a total of 7 years. The balance 3 years and 1 year for count 2 was made concurrent to the total sentence in count 3 which made the head sentence 7 years.

[10] Section 22(1) of the Sentencing and Penalties Act, 2009 requires the sentencing court to make sentences concurrent unless it thinks otherwise. That position is seen from the fact that the learned trial Judge by referring to section 4(1) had considered the punishment of the Appellant as well as rehabilitation while also having in mind the deterrent effect the punishment should have. Therefore there was no error in the sentencing exercise which would make this ground of appeal arguable.

[11] When taking into account the entire exercise of sentencing whether the final sentence would accord with the totality principle what is necessary to consider is whether the

aggregate term when looked at as a whole is just and appropriate. A further consideration is to see whether the aggregate sentence is not disproportionate to the totality of the criminality of the offences for which the sentence is imposed as stated in **Tuibua v State** (Supra).

[12] Taking into account the fact that the sentences for the 1st count and the 2nd count were at the lower end of the tariff the aggregate sentence arrived at the by learned trial Judge would be just and appropriate.

[12] In these circumstances the appeal against sentence is not arguable.

Order of Court:

Leave to appeal against sentence is refused.

.....

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL