

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

CRIMINAL APPEAL NO. AAU 130 of 2018

(High Court Action No. HAC 88 of 2018)

BETWEEN : ALIPATE VULAGI

Appellant

AND : THE STATE

Respondent

Coram : Chandra, RJA

Counsel : Ms S Nasedra for the Appellant
Ms S Kiran for the Respondent

Date of Hearing : 5 November, 2019

Date of Ruling : 8 November, 2019

RULING

- [1] The Appellant was charged with another for the following offences:
1. 2 Counts of Aggravated Burglary contrary to Section 313(1) (a) of the Crimes Act, 2009.
 2. 2 Counts of Theft contrary to section 29(1) of the Crimes act, 2009.
 3. 1 Count of Burglary contrary to section 312(1)(a) and 1 Count of Theft contrary to Section 291(1) of the Crimes Act, 2009.
- [2] The Appellant pleaded guilty to all the charges on 18th October 2018. He was convicted and sentenced on 23rd October 2018 to a term of 4 years with a non-parole period of 2 years.
- [3] He filed an appeal on 14th December 2018 which was not a timely appeal. On 14th June 2019 leave to file amended grounds of appeal was allowed and the same was filed.
- [4] The grounds of appeal set out in the amended notice of appeal are:
1. That the learned sentencing Judge erred in law and in fact in sentencing the Appellant to imprisonment term of more than 2 years which is in breach of the Juvenile Act with respect to Sections 30(1) and (3) of the Act.
 2. That the sentence of 4 years with a non-parole term of 2 years was an error of law and fact in principle given that his time in remand was not considered and the wrong tariff was used therefore making his sentence excessive.
- [5] Although the appeal is out of time by 3 weeks, the State takes no issue with the same and therefore the appeal is considered in this Ruling.
- [6] When considering an appeal against sentence, it is necessary that the Appellant must demonstrate that the Court fell into error in exercising its sentencing decision, as a result of acting upon a wrong principle, if extraneous or irrelevant matters have been taken into

account, or if there is a mistake of facts, or if relevant considerations are not taken into account. **Kim Nam Bae v. The State** (unreported criminal appeal AAU 15 of 1998; 26 February 1999).

- [7] As regards the 1st ground of appeal, the learned Sentencing Judge while stating that the Appellant was a Juvenile proceeded to sentence him to a term of 4 years imprisonment with a non-parole term of 2 years.
- [8] In terms of Section 30 of the Juveniles Act, a young person shall not be ordered to be imprisoned for more than two years for any offence.
- [9] In **Komaisavai v State** [2017] FJSC 91; Criminal Appeal No. AAU 154 of 2015 (20 July 2017), in a similar situation a sentence of 5 years 6 months imposed on a Juvenile was reduced to 18 months imprisonment.
- [10] The learned Sentencing Judge while acknowledging that the Appellant was a Juvenile had imposed a sentence of 4 years which was erroneous being contrary to Section 30 of the Juveniles Act. Leave to appeal is granted on this ground.
- [11] The Second ground of appeal is regarding the failure to take into account the period in remand when sentencing and the use of the wrong tariff.
- [12] The Appellant was charged with another, and while sentencing the other accused, the period in remand was taken into account but for this Appellant that was not done so. The failure to consider the period in remand was erroneous.
- [13] The learned sentencing Judge had chosen a tariff of 6–14 years which had been set recently in a decision of the High Court, while stating that the tariff for burglary has been 12 months to 3 years according to earlier decisions. He has fixed the starting point at 8 years. In the circumstances of this case it would appear that the sentence was harsh and

excessive in the light of the fact that the Appellant was a Juvenile at the time of offending. I would grant leave on this ground.

Orders of Court:

Leave to appeal against sentence is granted.



Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL