

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

CRIMINAL APPEAL NO.AAU 0043 of 2019
[In the High Court at Suva Criminal Case No. HAC 276 of 2018]

BETWEEN : **MALELI NAULIVOU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 September 2020**

Date of Ruling : **09 September 2020**

RULING

[1] The appellant had been charged in the High Court of Suva along with two others on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and six counts of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 30 June 2018 at Samabula in the Central Division. The charges were as follows.

'COUNT 1

Statement of Offence

Aggravated Burglary: contrary to section 313 (1)(a) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other broke and entered into a dwelling house at 34 Bakshi Street, as a trespasser, with intent to commit theft.

COUNT 2

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x black iPhone valued at \$6,000.00 Yuen (\$1,896.97 FJD), 1 x Vivo mobile phone valued at \$1,200.00 Yuen (\$379.62 FJD), 1 x Lenovo Laptop valued at \$3,000.00 Yuen (\$949.05 FJD), 1 x Lenovo Hard Drive valued at \$500.00 Yuen (\$158.08), Cash \$1,800.00 FJD, all to the total value of \$5,183.72 FJD the property of Liu Dezhi with the intention of permanently depriving Liu Dezhi of the said properties.

COUNT 3

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 2 x Vivo mobile phones valued at \$6,000.00 Yuen (\$1,896.87 FJD), 1 x Huawei mobile phone valued at \$1,000.00 Yuen (\$316.16 FJD), assorted clothes valued at \$1,500.00 Yuen (\$474.24 FJD), Cash \$450.00 FJD, all to the total value of \$3,137.27 FJD, the property of Singhtang Song with the intention of permanently depriving Singhtang Song of the said properties.

COUNT 4

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) currency of \$500.00 Yuen (\$158.08 FJD) the property of Yuen Yongschao with the intention of permanently depriving Yuen Yongschao of the said property.

COUNT 5

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x Safe containing cash of \$20,000.00 FJD, the property of Shan Dong Li Dao Fishing Company with the intention of permanently depriving Shan Dong Li Dao of the said property.

COUNT 6

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) \$1,100.00 Yuen currency (\$347.78 FJD), 2 x Superbji Chinese diamond necklace valued at \$4,000.00 Yuen (\$1,264.65 FJD), 1 x Chinese Gold Necklace valued at \$2,000.00 Yuen (\$632.32 FJD), Pandora bracelet valued at \$1,500.00 FJD, Black pearl pendant valued at \$699.00 FJD, Cash of \$700.00 FJD, Cash of \$1,000 Taiwan currency (\$68.89 FJD) \$3,500.00 USD currency (\$7346.85 FJD), \$40.00 NZD currency ((\$56.53 FJD), all to the total value of \$12,616.02 the property of Liu Hui Song with the intention of permanently depriving Liu Hui Song of the said properties.

COUNT 7

Statement of Offence

Theft: contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

K.B.K, MALELI NAULIVOU and EREMASI RAILEQE on the 30th day of June 2018 at Samabula in the Central Division, in the company of each other dishonestly appropriated (stole) 1 x phone charger valued at \$50.00 FJD, Cash of \$8,000.00 FJD, 1 x black Air Max bag valued at \$100.00, 4 x shorts valued at \$300.00, 1 x brown leather belt valued at \$300.00, 1 x NZ Driver's license card valued at \$100.00, 1 x NZ Visa card valued at \$20.00, 1 x cable charger valued at \$10.00, 1 x sunglass valued at \$700.00, 1 x pair eye glass valued at \$200.00, 1 x Go-Pro Camera valued at \$1,900.00, 1 x Chinese Passport valued at \$150.00, 2 x unused Vodafone sim cards valued at \$14.00, 1 x key tag valued at \$300.00, Cash of \$11,000.00 NZD (\$15,612.38 FJD), all to the total value of \$28,656.38, the property of Zou Zhiming with the intention of permanently depriving Zou Zhiming of the said properties.

[2] After some prevarication initially, the appellant had pleaded guilty to all counts having accepted the summary of facts and the learned High Court judge had convicted the appellant on his own plea of guilty and sentenced him on 22 March 2019 to an aggregate sentence of 03 years and 11 months of imprisonments with a non-parole period of 01 year and 11 months.

[3] The summary of facts is as follows.

'The Complainants are:

1. ***Liu Dezhi (hereafter PW1), 53 years, Director of Shan Dong Li Dao Fishing Company residing at 34 Bakshi Street, Samabula.***
2. ***Singhtang Song (hereafter PW2), 28 years, Manager at Shan Dong Li Dao Fishing Company, residing at 34 Bakshi Street, Samabula.***
3. ***Yuen Yongschao (hereafter PW3) 39 years, Accountant at Shan Dong Li Dao Fishing Company, residing at 34 Bakshi Street.***
4. ***Zou Zhiming (hereafter PW4), 31 years Unemployed of 34 Bakshi Street, Samabula.***
5. ***Liu Hui Song (hereafter PW5), 45 years, Unemployed of 34 Bakshi Street, Samabula.***

Accused Details:

The Accused is MALELI NAULIVOU also known as Male (hereafter Accused), 24 years, labourer of Lot 16 Sarosaro Rd, Kinoya.

Relationship: No relationship.

1. On 30th June 2018 at about 4.30pm at 34 Bakshi Street, Samabula PW1 securely locked his flat and went to work. PW2 and PW3 rented in the same flat with PW1 which was a 3 bedroom house.

2. When PW1, PW2 & PW3 came back from work at about 8.00pm, they noticed the porch grill forced opened with the front door opened. PW1 checked the house and noticed his bedroom ransacked and the following items stolen:

1. 1xblack Iphone valued at (\$6,000.00 Yuen) \$1,896.97 FJD
2. 1xVivo phone valued at (\$1,200.00 Yuen) \$ 379.62 FJD
3. 1xblack Lenovo brand laptop (\$3,000.00 Yuen) \$ 949.05 FJD
4. 1xLenovo Portable Hard Drive (\$500.00 Yuen) \$ 158.08 FJD
5. Cash \$1,800.00

All to the total value of \$5,183.72

3. PW2 checked his room and noticed the following items stolen:

1. 2 x Vivo mobile phones \$6,000.00 (Yuen) \$1,896.87 FJD
2. 1 x Huawei mobile phone \$1,000.00 (Yuen) \$ 316.16 FJD
3. Assorted clothes \$1,500.00 (Yuen) \$ 474.24 FJD
4. Cash \$ 450.00 FJD

All to the total value of \$3,137.27

4. PW3 checked his room and noticed the following items stolen:

1. 1 x safe containing cash \$20,000.00 FJD
2. Cash \$ 158.08 FJD

All to the total value of \$20,158.08

5. PW4 was having dinner with his other friends in the top front flat when he came to know about what happened with PW1, PW2 & PW3 at the top back flat. PW4 then ran down to check his flat and saw that his bedroom was ransacked. He saw that PW5's bedroom was also ransacked. PW4 and PW5

were renting together in the bottom flat which had 2 bedrooms. PW4 then rang PW5 and informed her about the incident. PW4 checked his room and noticed following items stolen:

1. 1xphone charger \$ 50.00
 2. Cash \$8,000.00
 3. 1xblack air max bag \$ 100.00
 4. 4x shorts \$ 300.00
 5. 1xbrown leather belt \$ 300.00
 6. 1xNZ Driver's license card \$ 100.00
 7. 1x NZ Visa card \$ 20.00
 8. 1x cable charger \$ 10.00
 9. 1x sunglass \$ 700.00
 10. 1x pair eye glass \$ 200.00
 11. 1xgo-pro camera \$1,900.00
 12. 1xChinese passport \$ 150.00
 13. 2xunused Vodafone sim cards \$ 14.00
 14. 1xkey tag \$ 300.00
 15. Cash (NZD \$15,612.38) \$15,612.38
- All to the Total value of \$28,656.38**

6. PW5 noticed the following items stolen from her bedroom:

1. Cash (\$1,100.00 Yuen) \$ 347.78
2. Cash \$ 700.00
3. Cash (\$1,000.00 Taiwan currency) \$ 68.89
4. 1 x superbji Chinese diamond necklace (\$4,000.00 Yuen)\$1,264.65
5. 1 x Chines gold necklace (\$2,000.00 Yuen) \$ 632.32

6. 1 x Pandora bracelet \$1,500.00

7. 1 x Black pearl pendant \$ 699.00

All to the total value of \$5,212.64

7. Around 7pm to pm some police officers were patrolling along Rewa Street whereby they saw the Accused with 2 others boarding a taxi. The police officers approached the Accused with his accomplices whereby they evaded them and ran away. The police officers chased the Accused and accomplices; however they managed to escape. In the chase, Accused dropped a black Nike bag which he was carrying and it was confiscated by the police officers and taken to Samabula Police Station.

8. Police officers checked the Nike bag valued of \$100.00 which contained 4 x shorts valued at \$300.00, 1 x brown leather belt valued at \$300.00, 1 x NZ Driver's license card valued at \$100.00, 1 x NZ Visa card valued at \$20.00, 1 x cable charger valued at \$10.00, 1 x sunglasses valued at \$700.00, 1 x pair eye glass valued at \$200.00, 1 x go-pro camera valued at \$1,900.00, 1 x Chinese passport valued at \$1,50.00, 2 x unused Vodafone sim cards valued at \$14.00, 1 x key tag valued at \$300.00, cash of \$1,000.00 Taiwan currency (FJD \$68.89), \$100.00 Yuen.

9. The recovered items were worth \$4,194.48. The items were positively identified by PW4 & PW5.

10. The Accused was later arrested and interviewed under caution whereby he admitted to the following:

- He met Bola and Masi (accomplices) at Leys road to plan for a house breaking [Q&A – 30-35]
- They were going to break in using a pinch bar which was the Accused's [Q&A 38-39]
- They stole money from a house belonging to some Chinese nationals in Samabula at Bakshi Street [Q7A 47-50]
- They broke through the iron fence from the back [Q&A 54]
- They broke a small window at the back and had levered the window grill by using the pinch bar [Q&A 56-57]
- One of the accomplices entered the house while the Accused was waiting outside with the other accomplice [Q&A 58-59]
- The accomplice spent about one hour inside the house [Q&A 61]
- The items they stole were some cash, 1 laptop, a bag containing assorted clothes and jewellery [Q&A 62]
- After that they went to the main road to look for a taxi [Q&A 63]
- As soon as they got inside the taxi, they saw a police vehicle come and park beside their taxi [Q&A65]
- They jumped out of the taxi and ran away [Q&A 66]
- The Accused was carrying a black bag and he threw it beside the fence when he was being chased by the Police [Q&A 67-70]

- *While being chased by Police they ran across Rewa Street and went into the shortcut to Tawake St [Q&A77]*
- *They climbed over the fence of Jai Narayan College and ran across the ground into the other side of the road towards Brown Street [Q&A79-80]*
- *The Accused clearly admitted that him with his 2 other accomplices was involved in a case of house breaking at Bakshi Street and stole some cash and other items from therein at [Q&A82]*
- *One Nike brand handbag, grey handbag and one different colour handbag was shown to the Accused and the Accused pointed to the Nike brand black bag as the one which he was carrying [Q&A86]*
- *5 different coloured shorts, 1 brown leather belt, 3 double happiness 20's smoke, 1 Chinese passport, 2 mobile phone charger, 2 sunglasses, 2 virgin coconut soap, 1 packet tissue, 1 water camera with handle and 1 black ladies wallet was shown to the Accused to which he admitted were the items that was inside the black bag which they stole from 34 Bakshi Street [Q&A89-91]*
- *Reconstruction was conducted whereby the Accused showed their point of entry into the compound, the window that they had broken into, the place where he threw the bag, the route which they took to Raiwai and the place where they shared the cash themselves (ref to Q&A 103-104)*
- *The Accused received \$600.00 FJD and \$300.00 NZD as his share [Q&A106].*

11. *The Accused is charged and has pleaded guilty to one count of Aggravated Burglary contrary to section 313 (1) (a) of the Crimes Act 2009 and six counts of Theft contrary to section 291 (1) of Crimes Act 2009.'*

[4] A timely application for leave to appeal against sentence had been signed by the appellant on 26 March 2019 (received by the CA registry on 01 April 2019). He had filed amended grounds on 15 July 2019. The Legal Aid Commission had filed an amended notice of appeal and written submissions on 03 September 2020. The State submissions had been tendered on 08 September 2020.

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucu v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua

v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

- [6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No.AAU0015 and Chirk King Yam v The State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

- [7] Ground of appeal:

Ground 1:

The final sentence imposed on the appellant is harsh and excessive.

01st ground of appeal

- [8] The appellant argues in his submissions that the learned High Court judge had erred in applying a tariff of 06 years to 14 years ('new tariff') in sentencing the appellant following State v Prasad [2017] FJHC 761; HAC254.2016 (12 October 2017) and State v Naulu - Sentence [2018] FJHC 548 (25 June 2018) without applying the 'old tariff' of 18 months to 03 years.
- [9] The Court of Appeal in Legavuni v State [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the birth of the 'new tariff' in October 2017). In Kumar v State [2018] FJCA

148; AAU165.2017 (4 October 2018) the Court of Appeal applied the ‘old tariff’ to the appellant who had been sentenced on 13 November 2017 (after the birth of the ‘new tariff’ in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases the offence had been committed prior to the date of the decision in **Prasad** i.e. 12 October 2017. In the current case the offences had been committed on 30 June 2018.

[10] Similar grounds of appeal had been considered in the recent past in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020), **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020) and most recently in **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020).

[11] Therefore, there is no need to reiterate what has already been stated in those decisions regarding the issues relating to the so called ‘new tariff’. For reasons given in detail, it was held in **Daunivalu** in reference to the ‘new tariff’ of 06-14 years of imprisonment for aggravated robbery purportedly set in **Prasad** that

‘.....Therefore, there is a fundamental question of legal validity of the ‘new tariff’.

[12] Unfortunately, far from ensuring uniformity and consistency in sentencing which a sentencing tariff is expected to achieve, the ‘new tariff’ has had the unintended contrary effect on the sentences passed for aggravated burglary since **Prasad** by polarizing the judicial opinion whether to apply the ‘old tariff’ or the ‘new tariff’ among High Court judges and Magistrates; some of whom preferring to follow the former and the others the latter causing a great deal of disarray among offenders and the lawyers as well. This has defeated the underlying rationale of and is in direct conflict with the declared legislative intention behind section 8(2) of the Sentencing Act which compels a court considering the making of a guideline judgment to have regard to (a) the need to promote consistency of approach in sentencing offenders and (b) the need to promote public confidence in the criminal justice system.

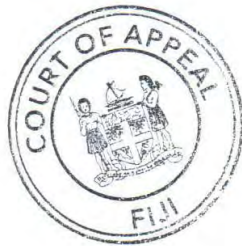
- [13] Therefore, to that extent the appellant is entitled to argue that he should be given leave to appeal to canvass his sentence before the full court. What is at stake could be considered a question of law as well.
- [14] However, though the learned trial judge had applied the ‘new tariff’ in sentencing the appellant and picked 06 years as the starting point, no complaint has been made of the enhancement of the sentence by 03 years on account of aggravating factors and the discount of 02 years for mitigating factors. In fact the trial judge had generously given an additional full discount of 1/3 of the sentence on account of the appellant’s ‘not so early’ guilty plea which, perhaps, he did not deserve. Further, the learned judge had imposed a more than reasonable 01 year and 11 months of non-parole period on the appellant which will boost his chances of an early release.
- [15] Another aspect relevant to the appellant’s complaint is that the decision in **R v Henry** (unreported, NSW Court of Criminal Appeal, 12 May 1999) has established that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated (*Juriscic*:220-22 1; *Henry*). Therefore, the sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure (vide *Juriscic* (1998) 45 NSWLR 209, 220-221; *Henry* and **R v De Havilland** (1983) 5 Cr App R 109, 114)
- [16] The appellant should also be mindful that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The appellate court may also consider if the particular circumstances of the case


justify the departure from the 'old tariff' of 18 months to 03 years of imprisonment to decide whether the appellant's sentence of 03 years and 11 months should be disturbed.

[17] In the circumstances, given the facts revealed in the summary of facts, I am not convinced that the appellant has a reasonable prospect of success in his appeal against the ultimate sentence of 03 years and 11 months which he calls harsh and excessive. However, in view of the question of law on the issue of sentencing tariff for aggravated burglary which is yet to be resolved by the Court of Appeal or the Supreme Court, I grant leave to appeal.

Order

1. Leave to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL