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

CRIMINAL APPEAL NO.AAU 033 of 2018
[In the Magistrates Court at Nausori Case No. CF 246 of 2014]

BETWEEN	:	**AVISHKAR ROHINESH KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. S. Singh with Ms. I. Lutu for the Appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**22 May 2020**
Date of Ruling	:	**28 May 2020**

RULING

[1] The appellant had been arraigned in the Magistrates court of Nausori exercising extended jurisdiction on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) (2) of the Crimes Act, 2009 committed with another (Sirino Vakatawa, the appellant in AAU 0117/2019) between 25 April 2014 and 26 April 2014 at Nausori town.

[2] The appellant pleaded guilty on 05 March 2018 and the learned Magistrate had convicted the appellant on his own plea of guilty and he had been sentenced on 19 March 2018 to 06 years of imprisonments with a non-parole period of 05 years.

[3] The appellant had agreed to the following summary of facts as narrated in the sentencing order.

'Between the 25th day of April 2014 at about 1900hrs to the 26th day April 2014 at about 0800hrs one SIRINO VAKATAWA (B-1) aged 25yrs. unemployed of Vunimono. Nausori and AVISHKAR ROHINESH KUMAR(B-2) aged 19yrs, unemployed of Luvuluvu, Nausori broke into the Rups Investment Shop at Nausori Town and stole therein 7suitcase valued at $573.00, 3 blankets valued at $120.00, 4 sandwich maker valued at $159.80, 1 gas burner valued at $39.50, 7 bathing towel valued at $104.65, 10 rechargeable light valued at $249.50, 4 emergency lamp valued at $59.80, 1 iron valued at $19.95 all to the total value of $1326.20 the property of RUPS INVESTMENT SHOP.

On the above time and place Bimal Vikash Deo (A-1) aged 24yrs Assistant Manager, closed the said shop and left home. Upon returning the next day (A-1) noticed that the top floor back door forcefully opened and then he entered the said shop noticed the shop was ransacked.

(A-1) then reported the matter at Nausori Police Station. Upon receiving the report investigation was conducted where information was received from IOWANE DUADRA NAICORI (A-2) aged 26 years driver of Visama Feeder Road that (B-1) approached him and requested to load some stuff into his vehicle Registration No: EY409 and (A-2) notice the suitcase and when dropping (B-1) and (B-2) then (B-1) gave (A-2) a blanket with a case.

(B-1) and (B-2) were arrested interviewed under caution and both admitted the offence. (B-1) in Q&A 11 and (B-2) in Q&A 16 are both stated that they looking for money. One blanket valued at $40.00 has been recovered from (A-2). The electrical iron valued $19.95 was recovered from (B-1). (B-1) and (B-2) charged for Aggravated Burglary and Theft '

[4] A timely notice to appeal against sentence had been filed containing three grounds of appeal on 18 April 2018 followed by written submissions dated 24 July 2019. The respondent had filed the first set of written submissions on 23 September 2019 and another on 21 May 2020. The State placed reliance on the latter at the leave to appeal hearing.

[5] The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau 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). This threshold is the same with leave to appeal applications against sentence as well.

[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.*

Grounds of appeal

Sentence

> *'1. The Learned Magistrate erred in law when he sentenced the Appellant to 06 years imprisonment which is harsh and excessive considering the facts of the offending.'*
>
> *2. The Learned Magistrate failed to consider that most items were recovered.*
>
> *3. The Learned judge erred in law when sentencing the Appellant by failing to take into account and/or consider the Sentencing Guidelines and the General Sentencing Provisions in the Sentencing and Penalties Decree 2009.'*

01st ground of appeal

[7] In sentencing the appellant, the learned Magistrate had followed the sentencing tariff set in **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) for

aggravated burglary as between 06 to 14 years ('new tariff'). In setting this new tariff the learned High Court judge had *inter alia* stated as follows.

> *'In view of the tariff of 2 years to 7 years for the offence of robbery which carries a maximum penalty of 15 years, in my view the tariff for burglary which carries a maximum penalty of 13 years should be an imprisonment term within the range of 20 months to 6 years. Further, based on the tariff established by the Supreme Court for the offence of aggravated robbery, the tariff for the offence of aggravated burglary which carries a maximum sentence of 17 years should be an imprisonment term within the range of 6 years to 14 years.'*

[8] The appellant argues that he should have been sentenced according to the sentencing tariff for aggravated burglary *i.e.* 18 months to 03 years ('old tariff') existing as at the time he committed the offence in 2014. He relies on the decision in **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) as a precedent where the old tariff was applied to an offence committed prior to the new tariff was set in **State v Prasad** (supra).

[9] In ***Kumar*** the Court of Appeal considered an appeal against a sentence imposed on the appellant for aggravated burglary and theft where the appellant had been sentenced to 05 years of imprisonment and he complained that the Magistrate had erred in his sentencing discretion by directing himself on the sentencing tariff for the offence of aggravated robbery while sentencing the appellant for the offence of aggravated burglary. The State had conceded that the judge had adopted the wrong tariff when sentencing the appellant and that the starting point of 8 years adopted by the Magistrate was wrong in principle but had argued that the old tariff for aggravated burglary had been reviewed in ***Prasad*** and tried to justify the sentence of 05 years on that basis. However, when the state counsel's attention was drawn by the court to the fact that the offence had been committed in January 2016, *i.e.* prior to the sentencing decision in ***Prasad*** and other cases that had followed it and to Article 14 (2) (n) of the Constitution of Fiji, he had conceded that the new tariff set by the High Court for aggravated burglary cannot be applied to the case and that he therefore would not proceed with his argument. The court's remarks are in paragraph 9 of the judgment.

> *'[9] The learned Counsel for the State had however in his Written Submissions filed before us tried to argue that the tariff of 18 months – 3 years*

for aggravated burglary had been reviewed recently by the High Court of Fiji in the cases of ***State –v- Prasad – Sentence [2017] FJHC 761, HAC 254.2016 (12 October 2017); State –v- Jone Vonu & Ors – Sentence [2018] FJHC 787, HAC 148.2017S (24 August 2018) and State –v- Tikoivanuabalavu – Sentence [2018] (24 August 2018)*** *and a higher tariff set for aggravated burglary. But when his attention was drawn to the fact that the offence in this case had been committed in January 2016, i.e. prior to the sentencing decisions in those cases, and to Article 14 (2) (n) of the Constitution of Fiji, he conceded that the new tariff set by the High Court for aggravated burglary cannot be applied to this case and that he therefore would not proceed with his argument.* ***Article 14 (2) (n) of the Constitution of Fiji*** *states: "Every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing."*

[10] Therefore, it is clear that there had not been any argument in ***Kumar*** on the part of both counsel; nor had been a serious consideration or deep analysis on the part of court on the issue as to whether an accused is entitled as a matter of law to be sentenced according to the sentencing tariff prevalent at the time of the commission of the offence. In other words, the question is whether an accused should not be sentenced according to the sentencing tariff at the time he is sentenced.

[11] Thus, ***Kumar*** cannot be treated as having made an authoritative pronouncement on this important issue of law. ***Kumar*** is much less an authority to the proposition that the proper sentencing tariff for aggravated burglary is 18 months to 03 years in as much as there was no argument at all as to what the tariff for aggravated burglary should be; be it the old tariff of 18 months to 03 years or the new tariff of 06 to 14 years as set in ***Prasad***. ***Kumar*** simply applied the old tariff as was prevalent when the offence was committed on the assumption that the new tariff could not apply to an offence committed in the past.

[12] A survey of some earlier and subsequent decisions of the Court of Appeal and the Supreme Court revels that there is divergence of views on this important matter of law. Some of them can be identified as follows.

[13] In **Legavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) the Court of Appeal without the benefit of any arguments seems to have adopted the tariff for aggravated burglary that was applicable at the time the offence was committed.

'[10] At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years. Considering the fact that the appellant was charged for the offence of aggravated burglary, I am of the view that the point to start should be at the highest level.... '.

[14] In **Narayan v State** [2018] FJCA 200; AAU107.2016 (29 November 2018) the majority view was expressed in favour of retrospective operation of sentencing tariff in the following paragraphs while the minority view seems to be to the contrary.

'[80] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he committed it. However, could the new tariff set by the Supreme Court, if applied to the instant case, amount to a more severe punishment, than the accused could have been punished at the time of the offence? Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'.

[81] I am also of the view that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. The procedure for determining the appropriate sentence include taking an appropriate starting point and having regard to the aggravating and mitigating circumstances on the merits of each case. Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation..... '.

[15] Gamalath, JA said in ***Narayan***

'[12] Most importantly, the Constitutional Provision under Chapter 2 – Bill of Rights -section 14 which deals with the Rights of accused persons cannot be overlooked in this instance.

Section 14(2) (n) states as follows:

*"14(2) – "Every person charged with an offence has the right_*

(n) to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing...."

[13] In Fiji, the prescribed punishments are contained mainly in the statutory instruments. However, the operation of the Common Law principles as laid down by judicial pronouncements of appellate courts do also play a pivotal role in deciding on the quantum of a punishment, especially in the context of prescribing a minimum sentence of imprisonment, which is almost synonymous with the imposition of the non-parole sentence as per section 18

of the Sentencing and Penalties Act, which is directly referable to the determination of tariff for various offences.'

[16] In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court without discussing the retrospective application of sentencing tariff sentenced the appellant according to the new tariff the court set for the offence of rape in ***Aitcheson*** itself.

[17] However, in **Kumar v State** CAV0017 of 2018: 2 November 2018 [2018] FJSC 30 Keith, J had made the following observations without the benefit of arguments from either counsel. However, it appears from the written submissions filed that the State had not agreed with the proposition of law that had been conceded in ***Kumar*** (CA) but again conceded by the counsel for the State at the hearing before the Supreme Court exactly the same manner it had happened in ***Kumar***(CA).

'That was not altogether surprising. If the Court decided that the current sentencing practice for the rape of children and juveniles should be reviewed, any new sentencing practice would not apply to Kumar. It would only apply to offenders whose offences took place after the promulgation of our judgment. Dato' Alagendra conceded that when the Court put that proposition to her.'

[18] In **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) the State strongly argued in the Court of Appeal that an accused should be sentenced according to the sentencing tariff as at the time of sentencing. The majority of judges agreed with it and stated:

'[66] A sentencing tariff set by common law, which is not static, does not amount to a penalty prescribed by a statute but a mere procedural arrangement. Therefore, even section 14(2) (n) of the Constitution which states 'that every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing', has no application to tariff as the article contemplates a change in the prescribed punishment. As pointed out already the punishment for rape has not changed. If the Appellant's argument is correct in the sense that tariff set by court has the force of a statutory provision the sentencing judges will never be able to go outside the tariff whatever the circumstances of the case may be.

'[67] Setting a tariff is more to do with procedural law rather than substantive law and an exception to the common law rule that a statute ought not to be given a retrospective effect. In ***Singh v State*** *[2004] FJCA 27; AAU0009.2004 (16 July 2004), the Court of Appeal held*

> *"...It inevitably follows from these conclusions that the new section 220 became applicable to the Appellant when the Amendment Act came into force on 13 October 2003. In his case it had a retrospective effect. Plainly the new section 220 is a procedural provision. It prescribes the manner in which the trial of a past offence may be conducted. It is unquestionably, in our view, a provision which is an exception to the common law rule that a statute ought not be given a retrospective effect."*

'[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable

[19] Almeida Guneratne, JA in ***Chand*** in the concurring judgement posed the question whether sentencing tariff could be regarded as mere procedural in the following words.

> *'[2] Prima facie, to my mind, I have my own reservations as to whether the sentencing consequence upon conviction is merely a procedural matter and not a matter of substantive law. Following upon the heels of that query which I posed for myself, I was not able to convince myself that, the Common Law is not part of Substantive Law, given the established Sources of Law in the science of Jurisprudence in all developed jurisdictions.*

[20] In **Yunus v State** CAV 0008 of 2011:24 April 2013 [2013] FJSC 3 the Supreme Court had earlier said that *'there can be no doubt that where an amending legislation related to procedure only, as in The King v Chandra Dharma* (1905) 2 K. B. 335 *it would have retrospective effect.....'*

[21] In **Kreimanis v State** [2020] FJCA 13; AAU109.2013 (27 February 2020) I once again said

> *'4…… In addition an accused cannot claim that as of right he should be dealt with only in terms of the tariff regime under which he was sentenced when his sentence is reviewed in appeal as retrospectivity principle would not apply to tariff set by court [vide the decisions in* ***Narayan v State*** *AAU107 of 2016: 29 November 2018 [2018] FJCA 200 and* ***Chand v State*** *[2019] FJCA 192; AAU0033.2015 (3 October 2019)].*

[22] Therefore, it is still unsettled as to whether the principle of non-retrospectivity is applicable to sentencing tariff. Put it simply, whether an accused should be sentenced according to the sentencing tariff applicable at the time he commits the offence or whether he should be sentenced according to the sentencing tariff applicable at the time of sentencing. This is a question of law that should be decided by the Supreme Court after full arguments. The question whether sentencing tariff is procedural or something *sui generis* might have to be part of the discussion. However, until then the appellant is entitled to canvass his sentence before the Full Court of the Court of Appeal and this being eminently a question of law no leave to appeal is required.

[23] If the above issue is decided in favour of the view that the appellant was correctly sentenced according to the sentencing tariff applicable for aggravated burglary at the time of sentencing (*i.e.* new tariff) the next question is whether the new tariff is being applied across all cases in different divisions of the High Courts in Fiji. The State has submitted that the new tariff set in **State v Prasad** (supra) has received only partial acceptance in the sense that some High Court judges apply the new tariff while the others continue to apply the old tariff.

[24] For example in **State v Tikoivanuabalavu** - Sentence [2018] FJHC 793; HAC207.2018 (24 August 2018) one High Court judge had followed and applied the new tariff while 02 other High Court judges in **State v Tukele** - Sentence [2018] FJHC 558; HAC179.2018 (28 June 2018), **State v Turagakula** - Sentence [2020] FJHC 101; HA416.2018 (19 February 2020) and **State v Toga** - Sentence [2019] FJHC 853; HAC10.2019 (30 August 2019) had applied the old tariff. The High Court judge in **State v Lui** [2018] FJHC 616; HAC017.2018 (20 July 2018) had applied the old tariff, however, stating that there is some uncertainty as to whether the old tariff should be increased following **State v Prasad** (supra). The High Court judge in **State v Ravunaceva** - Sentence [2018] FJHC 1026; HAC152.2018 (25 October 2018) had agreed with the reasons in **State v Prasad** (supra) but not followed the new tariff as

the old tariff had been 'endorsed' in **Legavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) by the Court of Appeal. However, the Court of Appeal in ***Legavuni*** had merely applied the old tariff, as it was, since there was no dispute or contest regarding the applicable tariff; nor was there any application for a guideline judgment regarding sentencing tariff for aggravated burglary before court.

[25] Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose the sentencing tariff is expected to achieve; uniformity. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.

[26] If the Court of Appeal were to set a new sentencing tariff on the same lines as suggested in **State v Prasad** (supra) or a different tariff altogether still whether it could be applied to the appellant is another matter that needs to be decided as a matter of law as highlighted above.

[27] Therefore, though no leave to appeal is required for questions of law alone, since I have heard this matter, as a matter of formality I allow leave to appeal against sentence on the first ground of appeal.

02nd ground of appeal

[28] The second ground of appeal is concerned with recovered items not having been considered for reduction of the sentence. Compared to the total value of items stolen, the value of two items recovered (according to the summary of facts admitted by the appellant) is not substantial and the learned Magistrate had correctly not given any discount for them. This ground of appeal has no merit.

03rd ground of appeal

[29] The third ground of appeal is an omnibus ground and too general in nature and cannot be considered by this court.

Order

1. Leave to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL