

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

CRIMINAL APPEAL NO.AAU 42 of 2021
[In the High Court at Suva Criminal Case No. HAC 111 of 2019]

BETWEEN : **JONE CAMA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **26 October 2021**

Date of Ruling : **27 October 2021**

RULING

[1] The appellant had been charged in the High Court of Suva with another on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and seven counts of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 06 March 2019 at Suva in the Central Division.

[2] The charges were as follows:

'COUNT 1
Statement of Offence

Aggravated Burglary: contrary to Section 313 (1) of the Crimes Act, 2009.

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, entered into the property of FIJI BUREAU OF STATISTICS, as trespassers with intent to commit theft.

COUNT 2
Statement of Offence

Theft: *contrary to Section 291 (1) of the Crimes Act, 2009.*

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x pair of Nike canvas, 1x Nike bag, 1x electronic dictionary, 1x HP laptop with charger, the properties of MELI NADAKUCA with the intention of permanently depriving MELI NADAKUCA of the said properties.

COUNT 3
Statement of Offence

Theft: *contrary to Section 291 (1) of the Crimes Act, 2009.*

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x HP laptop and 1x pair of Puma canvas, the properties of VACISEVA DRAVI with the intention of permanently depriving VACISEVA DRAVI of the said properties.

COUNT 4
Statement of Offence

Theft: *contrary to Section 291 (1) of the Crimes Act, 2009.*

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x Dell laptop, the property of SALANIETA TUBUDUADUA with the intention of permanently depriving SALANIETA TUBUDUADUA of the said property.

COUNT 5
Statement of Offence

Theft: *contrary to Section 291 (1) of the Crimes Act, 2009.*

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x Rip Curl Cap, the property of JOSESE RAGIGIA with the intention of permanently depriving JOSESE RAGIGIA of the said property.

COUNT 6

Statement of Offence

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

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x Sony Camera, 1x pair of Reebok canvas, 1x CCC jacket, 1x carton of Rewa powdered milk, assorted food items and \$100.00 cash the properties of FILOMENA BROWNE with the intention of permanently depriving FILIMENA BROWNE of the said properties.

COUNT 7

Statement of Offence

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

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x Kenwin radio and 1x torch, the properties of NIRAJ CHANDRA with the intention of permanently depriving NIRAJ CHANDRA of the said properties.

COUNT 8

Statement of Offence

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

Particulars of Offence

JONE CAMA & SETOKI GALUVAKADUA in the company of each other, on the 6th day of March 2019 at Suva in the Central Division, dishonestly appropriated 1x Dell laptop, the property of POASA NAIMILA with the intention of permanently depriving POASA NAIMILA of the said property.'

[3] After the appellant had pleaded guilty to all counts having accepted the summary of facts, the learned High Court judge had convicted the appellant on his own plea of guilty and sentenced him on 14 October 2019 to an aggregate sentence of 06 years (effectively 05 years 04 months and 23 days after deducting the period of remand) subject to a non-parole period of 03 years 04 months and 23 days.

[4] The relevant portion of summary of facts is as follows:

Brief Facts:

1. *The accused person is charged with another and he has voluntarily pleaded guilty to one count of Aggravated Burglary, contrary to Section 313 (1) (a) of the Crimes Act 2009 and 7 counts of Theft, contrary to section (1) of the Crimes Act 2009.*
2. *On the 6th March 2019 between 12am – 4am, the accused person and his accomplice in the company of each other entered into the Fiji Bureau of Statistics (FBS) office at Sukuna House, Suva and dishonestly, appropriated a number of items.*
3. *To simplify this, a tabular form is created on the next page to illustrate what items were dishonestly appropriated, from whom were they dishonestly appropriated in the premises of FBS and what items were recovered.*

| <i>Prosecution Witness</i> | <i>Items Stolen from FBS</i> | <i>Items Recovered</i> |
|-----------------------------|--|--|
| <i>Meli Nadakuca</i> | <i>1x Pair of Nike canvas (blue & yellow in colour), 1x Nike Bag, 1x Electronic dictionary, 1x HP Laptop (grey in colour) with charger</i> | <i>1x Nike Bag</i> |
| <i>Vaciseva Dravi</i> | <i>1x HP Laptop (Black in colour), 1x Pair of Puma canvas (Black & pink in colour).</i> | <i>1x HP Laptop (black in colour).</i> |
| <i>Salanieta Tubuduadua</i> | <i>1x Dell Laptop (black in colour).</i> | <i>1x Dell Laptop (black in colour).</i> |
| <i>Josese Ragigia</i> | <i>1x Rip Curl Cap</i> | <i>-</i> |

| | | |
|------------------------|---|----------------------------------|
| <i>Filomena Browne</i> | <i>1x Sony Camera (black in colour), 1x Pair of Reebok canvas, 1x CCC Jacket (black in colour), 1x Carton of Rewa Powdered Milk (24 packets) and \$100.00 cash.</i> | <i>1x Pair of Reebok canvas.</i> |
| <i>Niraj Chandra</i> | <i>1x Kenwin Radio (black in colour), 1x torch (Yellow in colour).</i> | - |
| <i>Poasa Nimila</i> | <i>1x Dell Laptop.</i> | - |

4. *In addition to the above items recovered as tabulated above, another HP Laptop belonging to the Fiji Bureau of Statistics was also recovered from PW11.*
5. *A CCTV footage was uplifted from the crime scene by police in which PW17 identified the accused person as one of the persons who had committed the alleged offence.*
6. *On the 7th of March 2019, at around 3pm, PW8 received information that PW10 had bought 3 laptop's from the accused person. PW8 then left with a team of police officers to conduct a search at PW10's residence. PW10 in his statement stated that the accused whom he also knew as "Small Dee" came with another i-Taukei youth to sell him four laptops.*
7. *PW10 then called PW11 and asked if he was interested in buying the laptops. PW10 then went to PW11's house with the four laptops. From there, PW10 and PW11 then went to PW12's house to sell PW12 the laptops.*
8. *PW12 bought two of the laptops whilst PW11 kept one of the laptops. The fourth laptops was not recovered.*
9. *Police officers upon receiving information from PW10 then made their way to PW11's residence whereby PW9 then seized 1x HP Laptop from PW11.*
10. *Police officers upon receiving information from PW11 then made their way to PW12's residence whereby PW12 voluntarily handed over 1x Dell Laptop (black in colour) and 1x HP Laptop (black in colour) with both chargers.*
11. *On the 7th of March 2019, PW13 arrested the accused. The accused was then caution interviewed and charged. The accused person did not make any admissions in his record of interview as he chose to answer in court.*

- [5] An untimely application for leave to appeal against sentence had been lodged in person by the appellant on 12 March 2021 (resubmitted on 07 April 2021). He had filed an application for enlargement of time on 03 September 2021. All his appeal papers contain submissions on the two grounds of appeal urged. The State submissions had been tendered on 15 October 2021. The appellant participated at the hearing *via* Skype.
- [6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?
- [7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100].
- [8] The delay of the sentence appeal is almost 01 year and 04 months. His explanation for the delay is that his trial counsel from Legal Aid Commission promised to file an appeal but failed to do so within time. However, even if it is true, that is hardly an excuse for the extraordinary delay. Thus, there is no acceptable explanation. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[9] 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.*

[10] The grounds of appeal raised by the appellant are as follows:

Ground 1

THAT the appellant's matter engenders a critical question of law i.e. 'whether the Learned Sentencing Judge reliance in the new tariff in Prasad [2017] FJ761, HAC 254.2016 [12 October 2017] whilst sentencing the appellant was incompatible with the court of appeal decision in Kumar v State FJCA 148 [2018] AAU 165.2017 [4 October 2018] which adopted the old tariff and whether the sentencing court being a subordinate (sic) court exceeded its jurisdiction by declining to follow Kumar?'

Ground 2

The Learned Sentencing Judge erred in failing to take into account the one transaction rule as a factor before arriving to the sentence of six years. The fact that the offences was committed in singular building on the same day and time ought to have necessitated (sic) a consideration on the above factors. The failure to do so constitute an error of principle as established by the Supreme Court vide Naisua v State CAV0010/2013 FJSC 14 and in KIM NAM BAE AAU 0013.

01st ground of appeal

[11] 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.

[12] 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 pronouncement 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 pronouncement 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 06 March 2019 and sentenced on 14 October 2019 after the decision in **Prasad**.

[13] A Similar ground 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), **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Naulivou v State** [2020] FJCA 166; AAU0043.2019 (9 September 2020).

[14] 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:

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

[15] 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 confusion 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.

[16] Therefore, to that extent the appellant is entitled to argue that he should be given enlargement of time to appeal to canvass his sentence before the full court. What is at stake could be considered a question of law as well.

[17] 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 02 years on account of aggravating factors and the discount of 02 years for the early guilty plea. This is undoubtedly a serious case of aggravated burglary of an important government institution namely Fiji Bureau of Statistics (FBS).

[18] The appellant who has 04 previous convictions against his name should 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)].

[19] The appellate court may also consider if the aggravating 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 06 years should be interfered with and if so, to what extent.

[20] However, more 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 am inclined to grant enlargement of time to appeal against sentence.

02nd ground of appeal

[21] The appellant submits that the trial judge had ignored one transaction rule and committed a sentencing error.

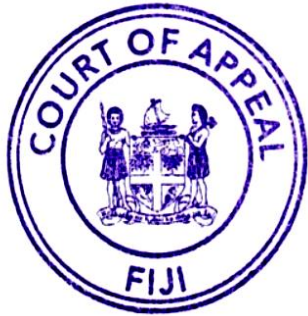
[22] Where two or more offences are committed in the course of a 'single transaction', all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive, the underlying principle being that all the offences taken together constitute a single invasion of the same legally protected interests. This is the gist of one transaction rule [see **Suguturaga v State** [2014] FJCA 206; AAU0084.2010 (5 December 2014)].

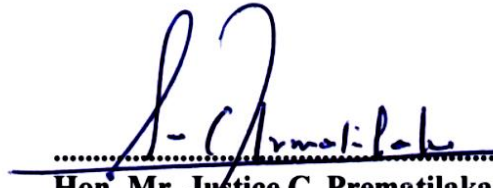
[23] The trial judge had correctly acted under section 17 of the sentencing and Penalties Act and imposed 06 years as an aggregated sentence in respect of all offences. There is no departure from one transaction rule.

[24] This ground of appeal has no merits at all.

Order

1. Enlargement of time to appeal against sentence is allowed.




.....
Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL