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

CRIMINAL APPEAL NO.AAU 122 of 2019
[In the High Court at Suva Case No. HAC 072 of 2018]

BETWEEN : **RICHARD ALLEN**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. S. Waqainabete for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 November 2021**

Date of Ruling : **09 November 2021**

RULING

[1] The appellant stood indicted in the High Court of Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and on another count of theft contrary to Section 291 (1) of the Crimes Act, 2009 committed on 21 January 2018 at Nasinu in the Central Division. Particulars of the offence read as follows:

COUNT 1

Statement of Offence

Aggravated Burglary: *Contrary to Section 313 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

Richard Allen *together with another, on 21st January 2018 at Nasinu in the Central Division, broke and entered into the dwelling house of Maya Wati Lal 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

Richard Allen *together with another on 21st January 2018 at Nasinu in the Central Division, dishonestly appropriated (stole) 1 x 32 inch JVC brand flat screen valued at $350.00, 1 x Panasonic brand DVD deck valued at $200.00, 1 x Remington brand hair straightener valued at $50.00, 1 x Whale's Tooth valued at $200.00 and 1 x 1 litre Jack Daniel valued at $80.00, 1 x Number 18 Crest Chicken valued at $18.00, assorted Australian Chocolates valued at $50.00 and $800.00 cash all to the total value of $1,748.00, the properties of Maya Wati Lal, with intention of depriving Maya Wati Lal.*

[2] After trial, the assessors had unanimously found the appellant guilty of both counts as charged and delivering his judgment, the learned High Court judge had partially agreed with the assessors and convicted the appellant of theft and burglary instead of aggravated burglary. The appellant had been sentenced on 09 August 2019 to 06 years and 06 months of imprisonment as an aggregate sentence with a non-parole period of 04 years.

[3] The appellant being dissatisfied with the sentence had tendered a timely notice of appeal against conviction. The Legal Aid Commission on 27 February 2021 had submitted amended grounds of appeal against conviction and formal papers for extension of time to appeal against sentence along with written submissions. The respondent had filed its written submissions on 05 November 2021.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test in a timely appeal for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State**

[2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] 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?

[6] 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)].

[7] The delay of the appeal against sentence (over 01 year and 06 months) is very substantial. The appellant had stated that he thought that he had no meritorious grounds to challenge the sentence but decided to do so upon advice by the Legal Aid Commission. In any event, 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.

[8] 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 filed out of time to be considered arguable there must be a real 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.*

[9] ***Ground of appeal***

> ***'Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge may have erred in fact and law to unreasonably convict the appellant without independently assessing and considering the totality of the evidence on the doctrine of recent possession, thereby causing a substantial miscarriage of justice.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge may have erred in fact and law to unreasonably convict the appellant without independently assessing and considering the totality of the evidence without regard to the fault element of possession, thereby causing a substantial miscarriage of justice.*

Sentence

Ground 1

THAT the Learned Trial Judge may have erred in law by imposing a sentence deemed harsh and excessive without having regarding to the sentencing guideline and applicable tariff for the offence of aggravated burglary.

01st ground of appeal

[10] The gist of this ground of appeal urged as the main plank of this appeal by the appellant's counsel is that the verdict is unreasonable or cannot be supported having regard to the evidence on the basis of doctrine of recent possession as that appears to be the only evidence against the appellant. PW2's evidence did not establish the appellant as one of the two passengers in his car.

[11] Admittedly, there had been three persons including the driver in the van when it was stopped by the police. The police had seen part of the loot inside the van but nothing had been recovered from any of the travelers. Even after the police found some money in the appellant's possession both money and he had been released.

[12] Although the State had filed an information against the driver Danial Ashneil Raj for the same offending under CF151/18 & HAC 46/18, later a *nolle prosequi* had been entered and he had been called as a witness (PW2) against the appellant. According to the respondent's submission the state counsel who was in carriage of the case against the driver Danial Ashneil Raj was the same counsel who did the prosecution against the appellant but she had failed to disclose to court that PW2 was an accomplice. The third person who travelled along with the appellant and PW2 had never been charged or called as a witness against the appellant. This bizarre state of affairs is beyond comprehension.

[13] As a result, the learned trial judge was deprived of the opportunity of directing the assessors and himself as to how the evidence of PW2 as an accomplice should be approached with necessary caution [see **Baleilevuka v State** [2019] FJCA 209; AAU58 of 2015 (03 October 2019) that dealt with a similar situation]. Secondly, it is

difficult to understand how criminal liability for the offending could be fixed on the appellant alone on the basis of the doctrine of recent possession while excluding the other two persons completely when three persons were in the van and part of the loot was inside the van but not in the possession of anyone of them.

[14] For the doctrine of recent possession to operate certain prerequisites should be satisfied namely **i**. That the accused was in possession of the property; **ii**. That the property was positively identified by the complainant; **iii**. That the property was recently stolen; **iv**. That the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; **v.** That there are no co-existing circumstances, which point to any other person as having been in possession (see **Boila v State** [2021]; AAU 049.2015 (4 May 2021) and **Batimudramudra v State** [2021] FJCA 96; AAU113.2015 (27 May 2021)]

[15] The state had the option of founding criminal liability on all three of them in the van on the basis of the doctrine of recent possession, had it decided to do so. Such a course of action would have been at least logical and could be explained in the light of Section 4 of the Crimes Act, 2009 and the concept of joint possession. When the respondent decided to charge only the appellant, upon the evidence led in this case it is doubtful whether one could say that the appellant alone was in possession of the property and there were no co-existing circumstances which point to any other person as having been in possession.

[16] The state counsel who appeared for the respondent in appeal following the best traditions of the DPP has conceded that leave to appeal could be granted on this ground of appeal so that the full court may more fully consider the propriety of the appellant's conviction based on the doctrine of recent possession coupled with the absence of any accomplice warning.

02nd ground of appeal

[17] The appellant's counsel submits that the trial judge had failed to consider the fault element of possession causing a substantial miscarriage of justice.

[18] I think this could be, if necessary, part of the discussion under the first ground of appeal and it needs not be separately considered at this stage.

03rd ground of appeal (sentence)

[19] I am mindful that the long-followed and established sentencing tariff ('old tariff') for burglary is 18 months to 03 years. However, some High Court judges and Magistrates do follow the 'new tariff' of 18 months to 06 years following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018). The trial judge had followed the new tariff.

[20] This court has granted leave to appeal and/or enlargement of time to appeal against sentence where the 'new tariff' had been applied as *there is a fundamental question of legal validity of the 'new tariff'* so that the full court may revisit the question of appropriate tariff for aggravated burglary (see **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), **Naulivou v State** [2020] FJCA 166; AAU0043.2019 (9 September 2020) and **Cama v State** AAU 42 of 2021 (27 October 2020)]. I think simultaneously and as part of the same exercise the full court may set the appropriate tariff for burglary as well.

[21] ***Prasad*** and ***Naulu*** are at the centre of the issue in all the above cases. Therefore, there is no need to reiterate what has already been stated in those decisions regarding the issue relating to the so called 'new tariff'. For reasons given in detail in those Rulings, arising out of the 'new tariff' for aggravated burglary and burglary *'……., there is a fundamental question of legal validity of the 'new tariff'* [vide **Daunivalu v State** (supra)].

[22] 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 and 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.

[23] 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.

[24] However, this is undoubtedly a serious case of burglary, if not robbery or at least bordering on robbery. Thus, it is for the full court to decide on the appropriate sentence. 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 **(vide 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)].

Orders

1. Leave to appeal against conviction is allowed.
2. Enlargement of time to appeal against sentence is allowed.

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