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

CRIMINAL APPEAL NO.AAU 114 of 2018 and 130 of 2018
[In the High Court at Suva Case No. HAC 88 of 2018]

BETWEEN	:	**TOUVEA TAUNTEANG OTEN PARERE** **ALIPATE VULAGI**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**Ms. N. Mishra for the Appellants**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**14 September 2022**
Date of Judgment	:	**29 September 2022**

JUDGMENT

[1] The appellants stood indicted in the High Court at Suva on two counts of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and three counts of theft contrary to section 291 (1) of the Crimes Act, 2009 and one count of burglary contrary to section 312(1) of the Crimes Act, 2009 committed at Navua in the Southern Division.

[2] The appellants had pleaded guilty to all charges and the learned High Court judge had convicted them accordingly. They had been sentenced on 23 October 2018 to 04 years of imprisonment as an aggregate sentence subject to a non-parole period of 02 years.

[3] Both appellants had been granted leave to appeal against sentence by the single judge of this court. However, the 01st appellant had submitted a signed Form 3 dated 18

August 2022 under Rule 39 of the Court of Appeal Rules to abandon his appeal. He had served his full term of imprisonment and been released. The Legal Aid Commission representing him was advised on 29 August 2022 to ask him to be present in court on the date of hearing of the appeals by the full court to consider his abandonment application. However, the appellant was not present in court at the hearing and his counsel from the LAC informed court that he was employed elsewhere and unable to be present. Since, the appellant had served the sentence fully, expressed his unqualified desire to abandon his sentence appeal which had anyway become futile and was well aware of the hearing date this court decided to dismiss his appeal and consider only the 02nd appellant's appeal.

[4] The 02nd appellant's sentence appeal is based on the following grounds of appeal:

> ***Ground 1***
>
> *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.*
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> ***Ground 2***
>
> *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.*

01st ground of appeal

[5] The 02nd appellant was 17 years of age when he committed the offences. The trial judge had admitted that he was a juvenile at the time he committed the offending. However, the trial judge had thought that though he was a juvenile at that time, he was no longer a juvenile at the time of sentencing and therefore the 02nd appellant need not be treated as a juvenile for the purpose of sentencing.

[6] 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. **Komaisavai v State** [2017] FJCA 91; AAU154.2015 (20 July 2017) and **Matagasau v State** AAU0120 of 2017:

4 October 2018 [2018] FJCA 161 confirm this unequivocal position. The terms 'juvenile', 'young person' and 'child' are defined in the Juveniles Act. The original definitions of 'juvenile' and 'young person' in section 2 of the Juveniles Act were amended by section 57 of the Prisons and Corrections Act by increasing the upper age limit from 17 years to 18 years. Therefore, a juvenile is now a person who has not attained the age of 18 years and a juvenile includes a child and a young person. A 'young person' is a person who has turned 14 but has not yet reached 18 years. 'Child' means a person who has not attained the age of fourteen years.

[7] Obviously, the 02nd appellant was a young person at the time of the offending. In **Ralulu v State** [2019] FJCA 260; AAU19.2018 (28 November 2019) the Court of Appeal dealt with a similar situation as adverted to by the trial judge as follows:

> *'[14] I further hold that the crucial threshold for sentencing is not the time of sentencing but the time of the commission of the offence. Guilty persons are punished according to the statutory sentencing regime prevalent at the time of the commission of the offence. Unfortunately, the learned Magistrate had fallen into a sentencing error; perhaps, by the fact that appellant was no more a juvenile/young person at the time of sentencing…..Therefore, the appellant being a juvenile/young person at the time of the commission of the offence, sentence of 05 years of imprisonment imposed by the learned Magistrate is illegal.'(emphasis added)'*

[8] In **Komaisavai** (supra) the 02nd appellant was 17 years 03 months old at the time of offending but was 19 years old at the date of sentencing. The Court of Appeal had taken the same stand and stated that he could not have been sentenced to a term of imprisonment of more than 02 years.

[9] Therefore, it is clear that the aggregate sentence of 04 years of imprisonment on the appellant is wrong and constitutes a sentencing error. He could not have been sentenced to a longer term than 02 years of imprisonment. Therefore, the current sentence has to be set aside.

[10] The only question is how this court should resentence the 02nd appellant. Before he was released on bail pending appeal on 22 November 2019, he had served 01 year and 01 month in imprisonment. The 02nd appellant is now supposed to be 22 years of age

and the father of a 06 months old son from a de-facto relationship. He has worked as a laborer with a company on a contract basis and is currently awaiting a new contract. His partner engages in domestic duties. Certain stolen items worth $344.62 had been recovered since the offending. Since released on bail, the 02nd appellant has maintained an unblemished character and obeyed bail conditions dutifully.

[11] His counsel has suggested that this court may act under section 26 of the Sentencing and Penalties Act, 2009 and suspend the balance period of 11 months of his maximum sentence of 02 years that could have been imposed. The court finds that given all the circumstances of the case this is a fit case to under section 26 of the Sentencing and Penalties Act, 2009. In In **Ralulu** (supra) it was held that section 26 does not limit the powers of courts as to the length or the operational period of the suspended sentence. Again, having considered all the circumstances this court is of the view that the balance period should be suspended for 03 years.

02nd ground of appeal

[12] There is no material to show that the appellant was in remand for any length of time prior to pleading guilty. The sentencing order does not make any reference to a pre-trial remand period. The counsel for appellant at the leave stage has submitted that the state had agreed in the High Court that the appellant was in remand for 19 days. Giving the benefit of that remand period I would consider the balance period of the sentence to be 10 months.

[13] The Legal Aid Commission has submitted that the 'old tariff' for domestic burglary under the Penal Code was considered 18 months to 03 years as derived from **Turuturuvesi v State** [2002] FJHC 190; HAA0086J of 2002S) which 'until a new tariff is set' was adopted for aggravated burglary under the Crimes Act, 2009 in **State v Buliruarua** [2010] FJHC 384; HAC157.2010 (6 September 2010). The tariff of 12 months to 03 years was followed for burglary under the Crimes Act, 2009 [see **Waitui v State** [2018] FJHC 19; HAA110.2017 (23 January 2018)]. However, some High Court judges and Magistrates do follow the 'new tariff' of 18 months to 06 years for burglary and 06-14 years of imprisonment for aggravated burglary 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 has followed the new tariff for aggravated burglary.

[14] This court has granted leave to appeal and/or enlargement of time to appeal against sentences 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)].

[15] 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'.*

[16] 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.

[17] The Legal Aid Commission has sought a guideline judgment on aggravated burglary and filed written submissions and tendered several bundles consisting previous sentencing decisions of the High Court in the past. The State too had addressed the question of guidelines in its written submissions. However, the counsel appearing for the State at the hearing sought to withdraw those written submissions and informed court that the State would not be making any submissions for a guideline judgment in this appeal but would do so in another appeal which will shortly be coming up before the full court. Accordingly, this court informed both counsel that no guideline judgment will be given in this appeal but would do so in the near future where both the State and the Legal Aid Commission are expected to assist the court.

Gamalath, JA

[18] I agree with the draft judgment of Prematilaka, RJA.

Bandara, JA

[19] I have read in draft the judgment of Prematilaka, RJA and concur with reasons and proposed orders therein.

Orders of the Court:

1. 01st appellant's (Touvea Tauntesng Oten Parere**)** application to abandon his sentence appeal is allowed and appeal bearing No. 114 of 2018 is dismissed.
2. 02nd appellant's (Alipate Vulagi) appeal against sentence is allowed.
3. 02nd appellant's aggregate sentence of 04 years of imprisonment with a non-parole period of 02 years is quashed.
4. A sentence of 10 months of imprisonment is imposed on the 02nd appellant with effect from 29 September 2022 which is suspended for 03 years from the same date.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL