

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

**CRIMINAL APPEAL NO. AAU 031 of 2024**

**BETWEEN** : **STEVEN BEVERLY KALISEWAQA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Mataitoga, RJA

**Counsel** : Varinava T for the Appellant [LAC]

: Nasa J for the Respondent [ODPP]

**Date of Hearing** : 4 October 2024

**Date of Ruling** : 15 October 2024

**RULING**

1. The appellant (Steven Beverly Kalisewaqa) was charged with the following offences in the High Court at Lautoka.

**COUNT ONE**

*Statement of Offence*

***AGGRAVATED BURGLARY: Contrary to section 313(1) (a) of the Crimes Act 2009.***

*Particulars of Offence*

**STEVEN BEVERLY KALISEWAQA** in the company of another, on the 11<sup>th</sup> day of June, 2023 at Nasinu in the Central Division, entered into the property of SHARITA DEVI SEN, namely, SEN'S MEDICAL CENTRE as trespassers, with the intention to commit theft therein.

**COUNT TWO**

*Statement of Offence*

**THEFT**: Contrary to Section 291(1) of the Crimes Act, 2009.

*Particulars of Offence*

**STEVEN BEVERLY KALISEWAQA** in the company of another, on the 11<sup>th</sup> day of June, 2023 at Nasinu in the Central Division, dishonestly appropriated 1 blacked coloured Lenovo branded Micro CPU, 1 blacked coloured Sony 32 inch TV, 1 Walesi setup box, 1 pink coloured Narita branded fan, 1 white and green coloured Sunbeam branded steam iron, 1 white coloured Orpal branded fan and 1 coin box containing \$50 cash monies, the property of SHARITA DEVI SEN, with the intention of permanently depriving SHARITA DEVI SEN of the said properties.

2. The appellant was represented by Ms.Kinivuwai of the Legal Aid Commission (LAC) at the trial. He pleaded guilty to both counts, voluntarily and unequivocally. Following this guilty plea, the appellant was convicted as charged.
3. Then on 11 August 2023 the appellant admitted the Summary of Facts presented by the Prosecution and with no prior conviction, which admission was duly confirmed by the Appellant's counsel. The appellant was sentenced on 25 April 2024 to 2 years and 1 month with a non-parole period of 18 months imprisonment.

**Appeal Against Sentence**

4. The appellant appealed against sentence and submitted Notice of Leave to Appeal against sentence dated 11 June 2024. This appeal is untimely.

5. The sentence appeal was untimely by 6 weeks. Appellant through counsel has applied for Enlargement of Time to appeal and has submitted relevant application on 12 June 2024. In light of the errors in the sentence ruling, and the fact that the delay is not substantial, I will treat this matter as an Application for Leave to Appeal.

### **Leave Application**

#### **Ground of Appeal Against Sentence**

6. The appellant has submitted the following grounds of appeal against sentence:
  - i) Trial judge erred in law and fact by not considering the time spent in remand from 30 August 2023 to 25 April 2024 as time served pursuant to section 24 of the Sentencing and Penalties Act

### **Governing Principles**

7. The guidelines to be followed when a sentence is challenged on appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide: **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** [1999] FJCA 29 (AAU0015)]

### **Assessment Grounds of Appeal**

8. Section 24 of the Sentencing & Penalties Act [S&PA] states:

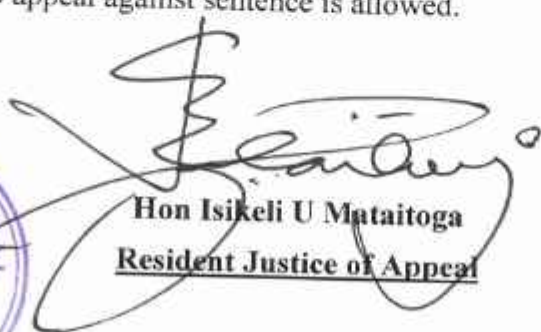
*“if an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to trial of the matter or matters shall, unless the court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”*

9. Section 24 S&PA endorses the principle for making allowance for remand period in a sentence and failure to do so amount to an error of law: **Tevita Banuve v State [2014] FJCA 209; Basa v State [2006] FJCA 23; Ledua v State [2008] FJSC 31.**
10. In terms of the **Kim Nam Bae** (supra) principles, the appellant has established by his ground of appeal, an error of law, namely, that under section 24 of the Sentencing and Penalties Act the trial judge SHALL take into consideration the remand period and deduct from the final sentence, not as an aggravating factor.
11. In this case the sentence ruling does not reflect that the judge considered the remand period and he did not deduct the remand period as required under section 24 of the Sentencing & Penalties Act.
12. This ground of appeal succeeds and leave is granted.
13. A totally new issue I observed to both parties at the hearing was the judge's assessment at paragraph 16 of sentence Ruling, where he considered several factors, namely, considerable loss to the complainant, extent of damage done and minimal recovery of stolen property. In the absence of evidence normally adduced in a trial which will reference these matters, what evidence is the judge relying on to make the claim for aggravating factors he referred to.
14. This Leave to appeal against sentence is allowed for the reasons discussed above.

### **ORDER**

1. Leave to appeal against sentence is allowed.



  
**Hon Isikeli U Maitaitoga**  
**Resident Justice of Appeal**