

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**MISCELLANEOUS JURISDICTION**

**MISCELLANEOUS CASE NO. HAM 186 OF 2012S**

**ACA KOROI**

**VS**

**STATE**

**Counsels : Mr. J. Savou for Applicant**

**Ms. L. Koto for State**

**Hearing : 3<sup>rd</sup> May, 2013**

**Judgment : 21<sup>st</sup> June, 2013**

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**JUDGMENT**

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1. On 22<sup>nd</sup> July, 2010, the applicant (accused) appeared in the Nasinu Magistrate Court, on the following charges:

**FIRST COUNT**

**Statement of Offence**

**BURGLARY:** Contrary to Section 312 of the Crimes Decree  
Number 44 of 2009.

**Particulars of Offence**

**ACA KOROI**, on the 16<sup>th</sup> day of July, 2010, at Nasinu in the Central Division, entered into the dwelling house of **NILESH PRASAD** as trespasser with intent to steal.

## **SECOND COUNT**

### **Statement of Offence**

**THEFT**: Contrary to Section 291 (1) of the Crimes Decree Number 44 of 2009.

### **Particulars of Offence**

**ACA KOROI** on the 16<sup>th</sup> day of July, 2010, at Nasinu, in the Central Division, stole brush cutter valued \$700, 2 bottle red label rum valued \$200, assorted chocolates valued \$50, assorted tin stuff valued \$50, cash of \$1050, nike jacket valued \$350, cebo sandals valued \$99 and wedding shoes valued \$160 to the total value of \$2709.00 the property of Nilesch Prasad.

2. The court record then went on as follows:

22nd July 2010

Prosecution : PC Sanil

Accused : Present

Preferred Language – Fijian

Right to Counsel – Waived

Charge read, explained and understood – Plead Guilty – Count 1

Plead Guilty – Count 2

Prosecution : Summary of Fact – Read out in Court.

Accused : Summary of Fact – Understood and Admitted.  
Only the brush cutter was recovered – valued \$700.00.  
Previous convictions – first offender.

Accused : Plea in Mitigation.  
28 years old, married with 1 child, unemployed, resides at Nadera, live with my parent, Koro – Tailevu. Asking to be remanded in custody at Korovou. Request to be sentenced today. I have only been interviewed and charged. The only thing prolonged this case is the other co-accomplices. Ask to be locked up in the security cell.

Court : Will not sentence today.  
Adjourn for sentencing – 26/7/10. Accused further remanded in custody at Valelevu Police Station. Production order – 26/7/10.

3. On 4<sup>th</sup> August, 2010, the court found the applicant guilty as charged on both counts, and convicted him accordingly. On count no. 1, the court started with 7 years imprisonment, deducted 2 years for the guilty plea and another 2 years for the other mitigating factors, leaving 3 years as the balance. The court then added 2 years for the aggravating factors, making a total sentence of 5 years imprisonment. On count no. 2, the court started with 5 years imprisonment. For the guilty plea, it deducted 1 year 8 months. For the recovery of the brush cutter, another 6 months was deducted. For the other mitigating factors, 1 year was deducted. Total deduction was 3 years 2 months, leaving a balance of 1 year 10 months. The same was increased by 3 years 2 months for the aggravating factors, making a total sentence of 5 years imprisonment. The sentence in count no. 1 and 2 were made concurrent to each other.
  
4. On 4<sup>th</sup> October, 2012, the applicant applied for leave to appeal out of time on his sentence only. On 15<sup>th</sup> February, 2013, the applicant applied to amend his application to appeal out of time, now to also include an appeal against his conviction. So, he was now applying for leave to appeal out of time, against his conviction and sentence. Every appeal from the Magistrate Court to the High Court on any criminal matter, must be done within 28 days of the decision appeal against. In this case, the sentence was passed on 4<sup>th</sup> August, 2010. So the 28 days appeal period expired on 1<sup>st</sup> September, 2010.

5. The applicant's application for leave to appeal out of time was received on 4<sup>th</sup> October, 2012. It was approximately 2 years out of time. For permission to be granted to extend the appeal period, he must show "good cause". "Good cause" is sometimes taken to mean that his proposed appeal grounds have merit. The applicant advanced three grounds on his proposed appeal against conviction. I will deal with only 1 ground, which, in my view, will determine this application, that is, the Learned Magistrate erred in not putting the election to the accused on 22<sup>nd</sup> July, 2010, before the plea was taken. On his proposed appeal against sentence, he advanced 5 grounds, which could be condensed into one, that is, the sentence was harsh and excessive.
6. In this judgment, I will deal with the application for leave to appeal out of time, and the merits of the applicant's proposed appeal together. This is to avoid wastage of time and resources.
7. Did the Learned Magistrate err in law in not putting the election for a Magistrate Court or High Court trial to the applicant **before** the charge was put to him on 22<sup>nd</sup> July 2010? Burglary, contrary to section 312 (1) of the Crimes Decree 2009 is an indictable offence, which is triable summarily. As such, section 4 (1) (b) of the Criminal Procedure Decree 2009 mandates that the offence shall be tried in the High Court or Magistrate Court **at the election of the accused**. Without the election being put to the accused before the plea was put to him, the Magistrate Court, in this case, did not have the jurisdiction to deal with the matter at all. In proceeding with the matter without complying with the mandatory requirement of section 4 (1) (b) of the Criminal Procedure Decree 2009, the conviction and sentence, were in effect, a nullity. Should the court declare the Magistrate Court proceeding a nullity, and order that the accused be re-tried? This will depend on whether or not, the sentence on the applicant was harsh and excessive, given the circumstance of this case.
8. Was the sentence on the applicant harsh and excessive? In sentencing the accused, the court record went on as follows:
  - (1) Charge: Count 1 - Burglary Contrary to Section 312 of the Crimes Decree No. 44 of 2009.  
Count 2 - Theft Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.
  - (2) Guilty as charged on Count 1 and Count 2.

- (3) Convicted as charged on Count 1 and Count 2.
- (4) Mitigating Factors:
- (a) Plead guilty at first reasonable opportunity – save Court’s time;
  - (b) First offender;
  - (c) Some items recovered;
  - (d) Unemployed.
- (5) Aggravating Factors
- (a) Broke into the complainant victim’s house;
  - (b) Stole \$2709.00 worth of items from the complainant victim’s house;
  - (c) Serious offences.
- (6) The Law – Crimes Decree No. 44 of 2009 – Count 1 Burglary – 13 years  
Count 2 – Theft - 13 years

Starting point – 7 years on Count 1

Deduct 2 years from an early guilty plea – 5 years

Deduct 2 years for the other mitigating factors – 3 years

Add 2 years for the aggravating factors – 5 years

Sentence to 5 years imprisonment with effect from today on Count 1

Sentence – 5 years on Count 2 concurrent to Count 1

28 days to appeal.

Note: Full written sentence in 2 weeks.

9. It was obvious that the Learned Magistrate did not apply the applicable tariff for burglary and theft. Burglary under section 312 (1) of the Crimes Decree 2009 carried a maximum sentence of 13 years imprisonment. In the repealed Penal Code (Chapter 17), burglary carried a maximum sentence of life imprisonment. The accepted tariff for burglary was a sentence between 2 to 3 years imprisonment : see **Viliame Gukisuva v The State**, Criminal Appeal No. HAA 117 of 2007,

High Court, Suva, per Her Ladyship Madam Justice N. Shameem. This tariff is still applicable under the Crimes Decree 2009.

10. Theft under section 291 (1) of the Crimes Decree 2009 carried a maximum penalty of 10 years imprisonment. Under the repealed Penal Code (Chapter 17), for simple larceny, the maximum sentence is 5 years imprisonment (section 262 (1) of Penal Code); for a person with a previous felony conviction, the maximum penalty for larceny was 10 years imprisonment (section 262 (2) of Penal Code). In Navitalai Seru v The State, Criminal Appeal No. HAA 84 and 85 of 2002, High Court, Suva, Her Ladyship Madam Justice Shameen said as follows:

**“...On Count 2, the maximum sentence for simple larceny is (on a second conviction) 10 years imprisonment. The tariff, on a first conviction under sections 259 and 262 of the Penal Code, is two months to nine months imprisonment (Paula Bale v The State, Criminal Appeal No. 27 of 1998, Pauliasi Nadali v The State, Criminal Appeal No. 29 of 1998, lowane Wainigolo v The State, Criminal Appeal No. 44, 45 of 1998, Ronald Vikash Singh, Criminal Appeal No. HAA 035 of 2002). It is logical, that on a second conviction the tariff is doubled to four months to 18 months imprisonment, because the statutory maximum increases from five to ten years. I accept this as the tariff in cases of second convictions for larceny...”**

11. Applying the above cases, to the facts of this case, the Learned Magistrate should have decided as follows. On the burglary matter, she could have started with 3 years, and 1 year for the aggravating factors, making a total of 4 years. She could deduct 2 years for the mitigating factors, leaving a balance of 2 years imprisonment. On the theft matter, she could start with 9 months imprisonment, add another 9 months for the aggravating factors, making a total of 18 months imprisonment. Deduct 6 months for the mitigating factors, leaving a balance of 1 year imprisonment. She could make the above two sentences consecutive to each other, that is, a total

sentence of 3 years imprisonment, with a non-parole period of 2 years 6 months, which the applicant had already served.

12. In the exercise of my discretion, I was going to order a retrial. However, given the above, in my view, the applicant had already served his sentence. I therefore make the following orders and direction:-

- (i) Because the Learned Magistrate did not comply with the mandatory requirement in section 4 (1) (b) of the Criminal Procedure Decree 2009 in putting the election of a Magistrate Court or High Court trial on the burglary charge (Count no. 1) to the applicant, before taking his plea, the proceeding thereof is a nullity;
- (ii) The applicant had already served his sentence, and the justice of the case demands that no re-trial be ordered;
- (iii) The applicant is to be released from Prison forthwith.

**Salesi Temo**  
**JUDGE**

**Solicitor for the Accused** : **Legal Aid Commission, Suva.**  
**Solicitor for State** : **Office of the Director of Public Prosecution, Suva.**