

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.: HAA 007 OF 2014

BETWEEN : 1. PENE ERENIO  
2. TOMU RADUA

APPELLANTS

AND : THE STATE

RESPONDENT

COUNSEL : Ms. S. Tarai for First Appellant  
Second Appellant in Person  
Mr. M. Maitava for the Respondent

Date of Hearing : 30/07/2014

Date of Judgment : 01/08/2014

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## JUDGMENT

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[01] Pene Erenio and Tomu Radua (hereinafter “the appellants”) was charged for one count of Burglary contrary to section 312(1) of the Crimes Decree No: 44 of 2009 and one count of Theft contrary to section 291(1) of the Crimes Decree No: 44 of 2009. The Charges were filed at the Labasa Magistrates’ Court on 05/12/2013.

[02] The particulars of offences were:

01. Pene Erenio and Tomu Radua on the 17<sup>th</sup> day of November, 2013 at Labasa in the Northern Division entered into the dwelling house of Basrat Dean as a trespasser with intent to steal.
02. Pene Erenio and Tomu Radua on the 17<sup>th</sup> day of November, 2013 at Labasa in the Northern Division stole a cooking pot valued at \$20.00, the property of Basrat Dean.

[03] On 18/02/2014, the charges in respect of Criminal Case No: 701/2014 was read out to the Appellants. Both pleaded guilty to the charges and admitted the summary of facts.

[04] On 20/02/2014, both accused were sentenced to a prison term of 16 months and 28 days. At paragraph 16 of the sentence the Learned Magistrate had said that the sentence to run consecutively.

[05] The Appellants filed his appeal grounds against then sentence within the time limit. The grounds of appeal against the sentence are that;

1. Error in the totality principle.
2. The Magistrate had regarded inappropriate aggravating factors.
3. The Magistrate erroneously imposed consecutive sentences.
4. That the sentence ordered was harsh and excessive.

#### Appeal ground- 01 Totality Principle

[06] In *Tuibau v State* [2008] FJCA 77; AAU0116.2007S (7<sup>th</sup> November 2008) the court of Appeal commented on the totality principle in that:

*"the totality principle is a recognised principle of sentencing formulated to assist a sentence when sentencing on offender for multiple offences. A sentencer who impose consecutive sentence for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole"*

[07] Upon perusal of the Sentence the learned Magistrate has not considered the factors relating to the application of consecutive sentence and the totality principle before making orders for consecutive sentence. However section 22 of Sentencing and Penalties Decree 2009 does give discretion to the Magistrate to exercise the same in a judicial manner and this would require an enquiry into per case whether the circumstances warrant a consecutive sentence or a concurrent sentence. In this case the Appellant had break into the house, stole a pot of curry and ate it. Therefore, this ground has some merits.

#### **Appeal ground 02- In Appropriate Aggravating Factors**

[08] The Learned Magistrate stated that the offence was planned by the Appellants. In the summary of facts however, it clearly stated that the offenders were only roaming around the area and noticed that the victim's house was vacant. The wording in the summary of facts suggest that this offending was rather opportunistic in nature. There is nothing to suggest that the Appellants were monitoring the victim's movements and waited for him to leave the house before they committed the offence. Considering the summary of facts this ground too has some merits.

#### **Appeal ground 03- Erroneous Consecutive Sentence**

[09] I agree with Respondent's submission that it is not clear from the court record where and when did the sentencing Court imposed a consecutive sentences for the Appellants. But at paragraph 16 of the sentence the learned Magistrate mentioned that the sentences to run consecutive. However the learned Magistrate decided to

impose only 1 sentence at the end of his sentence. This ground also succeeds as the final sentence passed in this case is not clear.

**Appeal ground 04- The Sentence was Extremely Harsh and Excessive**

[10] The tariff for Burglary offences is 2-3 years imprisonment. (*Viliame Gukisuva v State* HAA 117/07) and simple Theft offences would attract a sentence of 6-18 months. (*Kaloumaira v State* (2008)). In this case the Learned Magistrate has taken 24 months starting point for Burglary and 12 months starting point for Theft. The 12 months starting point for Theft is picked up from higher end of the tariff.

[11] The Court of Appeal in *Koroivuki v State* Criminal Appeal No: AAU0018 of 2010 (5 March 2013) said at Paragraph [27]:

*"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff".*

[12] In this case the Learned Magistrate failed to apply the principle of good practice as stipulated in *Koroivuki v State*.

[13] At the time of offending the 1<sup>st</sup> Appellant was 18 years and the 2<sup>nd</sup> Appellant was 17 years and 11 months old. As per section 30 of the Juvenile Act Cap 56 and the amendment in section 57 of the Prisons and Corrections Act 2006, the second Appellant was a juvenile at that time. This was not taken in to consideration at the time of passing the sentence.

[14] The Appellants are first offenders. Both of them had break in to the complainant's house and took a pot of curry, with their intention to eat its contents.

[15] The Appellants were sentence to 16 months and 28 days on 20/02/2014. They have already served nearly 5 months and 15 days. Further they were in remand since their arrest on 05/12/2013. Considering Section 256(3) of the Criminal Procedure Decree, I quash the sentence passed by Learned Magistrate on 20/02/2014.

[16] Now I proceed to sentence the Appellants as follows:

- For the First Count I take 24 months as the starting point and add 06 months for the aggravating factors and deduct 15 months for their mitigating factors. Final sentence is 15 months imprisonment.
- For the Second Count I take 6 months as the starting point and add 03 months for the aggravating factors and deduct 03 months for the mitigating factors. Final sentence is 06 months imprisonment.

[17] I order both sentence to run concurrent to each other. Hence their final sentence is 15 months imprisonment.

[18] In **Nariva v The State** [2006] FJHC 6; HHA148].2005S (9 February 2006) where the learned Judge Nazhat Shameem stated:

*"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."*

[19] From the date of offence and up to now the Appellants have spent in the remand just 04 days short to 08 months. Considering all the circumstances, especially Appellants age at the time offending I suspend the balance period of sentence for a period of 02 years from today. Suspended sentence is explained to both Appellants.

[20] You have 30 days to appeal.



P. Kumararatnam

JUDGE



At Labasa

01/08/2014