

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 028 of 2014

BETWEEN : **MOSESE ULUICICIA**
Appellant

AND : **STATE**
Respondent

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Appellant in person
Ms. M. Khan for the State

Date of hearing : 14 November 2014 & 16 December 2014

Date of Judgment : 30 January 2015

JUDGMENT

1. In the Magistrate Court at Suva on the 20th August 2014, the Appellant was convicted on his own plea of one count of burglary of domestic premises and three counts of theft of first \$200 cash, secondly of property to the value of \$1450 and thirdly of property to the value of \$5,717.
2. He was sentenced on the 22nd August 2014 to 10 months imprisonment for the first count, and 8 months for each of the theft counts. All sentences to be served consecutively making a total sentence of 34 months imprisonment with a non-parole term of 28 months.

3. The appellant appeals this sentence timeously on the grounds that

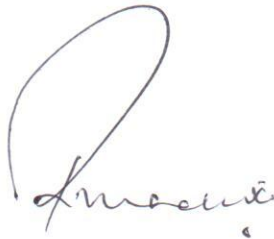
“the learned Magistrate erred in applying the totality principle when imposing a sentence that is consecutive to each count.”
4. The facts of the case, which are of no consequence to the ground pleaded were that on the 18th May 2013 at about 2.30a.m the appellant broke into and entered the home of a Zhu Pehiu with intent to commit theft. Whilst in the premises he stole cash of \$200 belonging to the said Zhu Pehiu, he stole property worth \$1450 belonging to Liu Jue and property worth \$5717 belonging to Luo Mingming.
5. In her sentence the Magistrate referred to relevant sentencing authorities and fixed appropriate starting points within the tariffs. She increased these sentences by nine months to each count because of the “pre-planned commission of offence and the three gentlemen losing valuable items”. She then reduced the sentences for his personal circumstances, including he being a young offender and then deducted a full third for his early guilty plea. She made each sentence consecutive to the others without saying why.
6. The appellant appeals this imposition of consecutive sentences as his sole ground, but the Court notes in addition that the aggravating factors used to enhance the sentence are unjustifiable.
7. There was no evidence before the Court that the appellant had planned to enter this house and steal the items. It may well have been an opportunistic invasion taking the opportunity when passing. Nor can the loss of the victims’ items be aggravating. In a theft the victim always loses an item.
8. In a very fair and accurate concession, counsel for the State has pointed out the one transaction Rule should apply to his case considering that the burglary and the three thefts were all committed in one incident.
9. In the old Penal Code, section 28(4) stipulated that unless otherwise ordered, sentences for different offences were to be served consecutively. Despite that however the Supreme Court in **Wong Kam Hong** CAV0002 of 2003 said this:

“where two or more offences are committed in the course of a “single transaction” all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive. The underlying principle is that all the offences taken together constitute a single invasion of the same legally protected interests”.

10. Section 22 of the Sentencing and Penalties Decree 2009 now reverses the earlier position stipulated in s.28(4) of the Penal Code, making terms of imprisonment Concurrent unless otherwise directed.
11. This “default” position is of course still bolstered by the words of the Supreme Court in **Wong Kam Hong**.
12. The Magistrate never gave reasons to her odd finding that these sentences be consecutive and I suspect that it may have been an error as to the word used. The appeal must succeed to the extent that the sentences are to be served concurrently. When going against the default position of concurrency it is incumbent on a court to state reasons.
13. The appeal must go further than that however with the removal of the aggravating elements which can not be justified.
14. I now set aside the sentences passed below and sentence afresh using the Magistrate’s original terms which are in fact quite lenient. The starting point for burglary is not within tariff so that must be further adjusted.
15. The tariff for domestic burglary is now between one year and two years with the usual sentence being 15 months. (see **Tabekusi** [2010]FJHC 426). If the burglary is in breach of trust, such as invading the premises of an employer then a higher sentence could be justified (see **Gonerogo** HAA 22 of 2012).
16. For the burglary in this case, there are no aggravating features and I adopt the usual tariff for domestic burglary of 15 months imprisonment.
17. For each of the thefts, and for theft by a person previously convicted of theft, I take a starting point of 12 months imprisonment. For the mitigating features recognized by the Magistrate I deduct 3 months from each sentence; making 12 months for the burglary and 9 months for each of the thefts. I deduct a full third for the pleas of guilty and the final sentences then will be;

Burglary: 9 months imprisonment
Theft 1: 6 months imprisonment
Theft 2: 6 months imprisonment
Theft 3: 6 months imprisonment

18. All terms are to be served concurrently.
19. The appeal is allowed to the extent itemized.



**P.K. Madigan
Judge**



At Suva
30 January 2015