IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO: HAA 48 OF 2016

BETWEEN : **EREMASI TASOVA**

Appellant

AND : **STATE**

Respondent

Counsel : **Appellant in Person**
Mr. A. Singh for Respondent

Date of Hearing : **29th November, 2016**
Date of Judgment : **06th December, 2016**

JUDGMENT

Introduction

1. The Appellant pleaded guilty in the Magistrates Court at Nadi to one count of Escaping from Lawful Custody contrary to Section 196 of the Crimes Decree No. 44 of 2009.

2. Upon conviction, Appellant was sentenced on the 5th August, 2016, to 13 months' imprisonment to be served concurrently with an existing sentence of 12 years' imprisonment.

3. Being dissatisfied with his sentence, Appellant, appearing in person, filed this timely appeal on following grounds:

Grounds of Appeal

a) The learned Magistrate eared in law in imposing a sentence of 13 months' imprisonment which was outside the scope of the tariff guideline of 6-12 months as defined in paragraph 7 and 8 of the sentencing ruling.

b) The learned Magistrate eared in law in taking irrelevant matters and aggravating features not recognized by law and not supported by evidence into consideration to enhance the sentence.

c) The learned Magistrate eared in law in considering previous conviction which affected his sentencing especially when adopting a starting point at the highest side of the tariff which resulted in the sentence of 13 months which is harsh and excessive.

Law

4. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

5. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55*

CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

Summary of Facts agreed by the Appellant is as follows:

6. *On the 12th day of May, 2014, the Appellant was granted bail by the Magistrates Court at Nadi and for him to get one of his sureties to sign his bail bond requested him to be escorted to the Agriculture Office to check his surety, namely Atelini. At the house of Atelini he was informed that she had gone to Lautoka. The Appellant then came back with the escorting police officer. On the way back, he escaped through Naitova Lane with his handcuff. Escorting officer who gave a chase failed to apprehend the Appellant. At the interview, he stated that he ran away because he wanted to evade his sentencing at the High Court in Lautoka.*

Analysis

Ground (a)
Imposition of sentence outside the tariff band

7. The sentencing Magistrate at paragraph 9 of his Sentencing Ruling picked a starting point of one year and imposed a sentence of 13 months' imprisonment.

8. The sentencing tariff for the offence of Escaping from Lawful Custody is well settled. In ***Sakiusa Basa v The State*** Crim. App.No. HAA 12 of 2007, it was established that the tariff for the offence of Escaping from Lawful Custody is a sentence between 6-12 months' imprisonment. The learned Magistrate correctly identified the said tariff at Paragraph 7 of his Sentencing Ruling. Nevertheless, he imposed a sentence of 13 months' imprisonment going out of the established tariff.

9. When a tariff is established, sentencing magistrates and judges are expected to follow the same to ensure uniformity of sentencing practice. If the sentence falls out of tariff, then the sentencing judge or magistrate must give reasons.

10. Suresh Chandra J, in ***Laisiasa Koroivuki v State*** (Criminal Appeal AAU 0018 of 2010) observed:

> *"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 time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff.* ***If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".*** *(emphasis added).*

11. The learned Magistrate failed to give any reason why the sentence fell higher than the established tariff. Therefore, this ground of appeal succeeds.

Ground (b)
Consideration of the Fact that Government Resources were Used to Arrest the Appellant as an Aggravating Factor

12. The learned Magistrate considered the fact that the government resources were used to arrest the Appellant as an aggravating factor and enhanced the sentence by one year.

13. When gaging aggravating factors courts are generally guided by harm factor and culpability factor. If the government resources were used to arrest the Appellant, one can argue that there is a harm caused to the tax payer. However, there was no evidence before the sentencing Magistrate to come to the conclusion that tax payer's money had specifically been used to arrest the Appellant. In my opinion, the learned

Magistrate took an irrelevant matter into consideration to enhance the sentence by one year. Therefore, this ground of appeal succeeds.

Ground (C)

Consideration of Extraneous and Irrelevant Matters (previous convictions) to Guide Sentencing

14. The Appellant alleges that the learned Magistrate took an irrelevant matter, namely, his previous convictions into account when determining the starting point.

15. At paragraph 9 of the Sentencing Ruling, the learned Magistrate states:
"In view of the facts and repeated offender, I impose 1 year as my starting point".

16. In picking the starting point, the learned Magistrate has apparently directed his mind to previous convictions of the Appellant. In doing so he started the sentencing process from the zenith of the tariff band which is one year.

17. One of the most contested questions in the field of criminal sentencing is the question of whether previous convictions should be taken into account when deciding the quantum of punishment.

18. Before the Sentencing and Penalties Decree came into effect, Courts in Fiji, applying the Common Law principles, held that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. This view is reflected in number of decisions.

19. In ***Singh v State*** *Criminal Appeal No. AAU0004/97S decided on 12 February 1998; [1998] FJCA 6* the Court of Appeal laid down the position prior to the Sentencing and Penalties Decree, 2009 came into effect as follows:

> *"It is now well settled that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. In other words his sentence is not to be increased because of his earlier*

offending - see ***O'Donnel v Perkins*** *1908 VLR 537. As was said by the English Court of Appeal in* ***R v Queen*** *[1982] Crim. L.R. 56 the proper way to look at the matter is to decide a sentence which is appropriate to the offence for which the prisoner is before the Court and then to consider whether the Court can extend some leniency to the offender having regard among other things to his record of previous convictions."*

20. In ***Tuisavusavu v State*** *Criminal Appeal No. AAU0064 of 2004S decided on 03 April 2009; [2009] FJCA 50,* the Court of Appeal held:

> *"Secondly, the sentencing judge used as an aggravating feature the fact that the 1st appellant had 14 previous convictions and the 2nd appellant one previous conviction. The common law is that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. It seems to us that the sentencing judge has erred in using the appellants' prior criminal records as an aggravating feature."*

21. Section 4(2) of the Sentencing and Penalties Decree, 2009 prescribes that, in sentencing offenders, a court must have regard to the offender's good character. Section 5(a) allows a court to consider *inter alia* the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an of an offender.

22. As can be seen above, statute law offers little guidance on the significance and weight to be attributed to previous convictions at sentencing and it has been left to the courts to fashion the authoritative guidance on the matter.

23. After the Sentencing and Penaltics Decree came into effect, the courts, adopting the Common Law position, have taken the view that previous convictions are relevant only to assess the offender's character and therefore, taking them into consideration as an aggravating factor is obnoxious to the sentencing principles.

24. In ***Waqalevu v State*** [2010] FJHC 468; HAA044.2010 (25 October 2010) Gounder J stated:

> *"It is settled law that an offender should not be sentenced twice for the same offence. Therefore, it follows that when an offender is sentenced for a new offence, his previous convictions have limited relevance. An offender's previous convictions deprive him of any discount based on previous good character. Previous convictions cannot be used as a matter of aggravation to enhance the sentence for the new offence. To do so will be punishing the offender twice for the same offence. (para 8)*
>
> *The learned Magistrate considered the fact that the appellant was not a first time offender as an aggravating factor to enhance the sentence by 1 year. This was an error of law in the sentence of the appellant. (para 9)*

25. In ***Waini v State*** [2009] FJHC 202; HAA006.2009 (10 September 2009) the same view was expressed by Gounder J.

> *"It is settled law that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community"*

26. However, at least two decisions have left the law regarding the use of previous convictions at sentencing, to say the least, relatively unsettled. In ***Ratusili v State*** [2012] FJHC 1249; HAA011.2012 (1 August 2012) the High Court decided to treat previous convictions as an aggravating factor at sentencing when it recommended a higher tariff for Theft cases where the offender had previous convictions. In doing so, the Court seems to have suggested that previous convictions could be taken into account as contributing to the aggravation of the offending of a particular offender.

27. In ***Ratusili v State*** *(supr)* Madigan J, having quoted Shameem J, observed:

> *"The dicta of Shameem J. in Jone Saukilagi HAC21. 2004 are most helpful. Her Ladyship said this:*

"the tariff for simple larceny on a first conviction is from two to nine months and on a second conviction a sentence in excess of nine months. In cases of larceny of large amounts of money sentences of 18 months to three years have been upheld by the High Court. (Sevanaia Via Koroi HAA31.2001). Much depends on the value of the money stolen and the nature of the victim and defendant. The method of stealing is also relevant."

From the cases then the following sentencing principles are established:

(i) for a first offence of simple theft the sentencing range should be between 2 and 9 months.

(ii) any subsequent offence should attract a penalty of at least 9 months".

28. Nevertheless, if the Courts should decide to continue to treat previous convictions as an aggravating factor it is necessary to put forward a retributivist justification for doing so. However, it is not certain whether the Courts will continue to regard previous convictions as such; indeed, it seemed unlikely after the recent decision of the Court of Appeal in ***Chand v State*** [2016] FJCA 65; AAU0063.2012 (27 May 2016) where it was stated:

"Therefore it is clear that the Sentencing and Penalties Decree, 2009 was promulgated for a wider purpose than only codifying the common law principles on sentencing. In my opinion, in view of this legislation the common law principles developed by courts over the years on sentencing should be applied only in so far as they are caught up within the specific provisions of the Decree or not inconsistent with the provisions of said Sentencing and Penalties Decree, 2009 or where there is a lacuna in the said Decree to cater to a specific situation or to fill in gaps, if any, in the Decree or as persuasive guidance, where relevant, to interpret the provisions thereof.(para 15)

It appears that provisions in section 4 (2) (i) read with section 5 (a) of the Sentencing and Penalties Decree, 2009 have been interpreted in a number of judicial decisions. Section 4 (2) (i) prescribes that in sentencing offenders a

court must have regard to the offender's previous character. Section 5(a) allows a court to consider inter alia the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an offender. The contention of the Appellant is that the Learned Trial Judge could not have considered his previous convictions as an aggravating factor despite the above provisions (para 16).....

...I am inclined to agree with the above sentiments on what purpose previous convictions should be used in the matter of sentence as they could be accommodated within the 'current sentencing practice' under section 4(2) (a) of the Sentencing and Penalties Decree, 2009. Thus, it is clear that the Learned High Court Judge was wrong to have categorised and considered the Appellant's previous convictions under aggravating factors. However, it is equally clear that the Appellant was liable to forfeit any discount or leniency he would otherwise have been entitled to on account of the long list of previous convictions adversely affecting his character. (para20)

29. In view of this unsettled scenario in Fiji, and considering the large number of appeals coming before this Court challenging the sentencing in similar fashion, it is pertinent to examine jurisprudence of other jurisdictions before coming to a final conclusion in respect of the matter in hand.

30. Departing from the Common Law position, the United Kingdom Sentencing Guidelines appear to have taken a contrasting view on the relevance of previous convictions and advocated taking previous convictions into consideration not only to evaluate character of the offender but also as a statutory aggravating factor.

31. According to the UK Guidelines, the defendant's previous convictions and sentences (commonly referred to as his "antecedents") are relevant to the sentencing exercise in the following ways:

I. *They may go to the seriousness of the instant offences (Section 143 (2) (4) and (5) Criminal justice Act 2003);*

II. *They may be indicative of the dangerousness of the offender, and the need for the public to be protected from him;*

III. *They may provide evidence of the effectiveness of a particular method of disposal adopted previously in the case of the offender; or alternatively a particular measure was unsuccessful;*

IV. *They may provide an insight into the individual's criminal career, and, in particular, that he has made a real effort over a period of years to put a previous pattern of offending behind him.*

32. In Ireland, the Irish Court of Criminal Appeal in ***People (DPP) v. GK*** [2008] IEC CA 110 while continuing to declare its allegiance to proportionality went on to "controversially" state that while previous good character may be held to be a mitigating factor relevant to the character and circumstances of the accused, previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence. The Court declared:

> *"This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence, previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence. Accordingly in determining an appropriate sentence in this case it follows that the learned trial judge was entitled to have regard to the two previous convictions of rape, the fact that the offence was committed within six months of having been released from prison for an offence of rape and the matters disclosed in the Probation Service report. These circumstances are relevant not just in terms of their absence in mitigation of sentence but also in terms of assessing an appropriate sentence in terms of the seriousness of the offence, which sentence will be proportionately more severe than would be the case were these circumstances absent".*

33. The above reasoning is a clear departure from what was considered to be the dominant approach to dealing with previous convictions at sentencing and that the

presence of previous convictions no longer just reduced any deserved mitigation. According to the Court, previous convictions could now go towards the assessment of the gravity of the offence. However, later in its judgment, the Court stated that the previous convictions must be for "like offences". The Court also importantly stated that fear of future offending is not a sufficient ground for increasing punishment.

34. In Australia, statutes and Courts have adopted a similar approach albeit with some differences. They take the view that prior criminal record is not restricted only to an offender's claim for leniency. However, the Courts have rejected to treat previous criminal record of an offender as a matter that goes to the seriousness of the instant offence. (The statement by Howie J in *R v Wickham* [2004] NSWCCA 193 at [24], that "[o]n its face [s 21A(2)(d)] would indicate that a prior criminal record is a matter of aggravation by making the offence more serious", confines s 21A(2) to objective considerations and is therefore disapproved. The court in *Hillier v DPP* (2009) 198 A Crim R 565 and *Van der Baan v R* [2012] NSWCCA 5 at [34] reiterated the above approach).

35. Section 21A (2) of the New South Wales Crimes (Sentencing Procedure) Act 1999 provides:

> *"The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:*
>
> *.....(d) the offender has a record of previous convictions".*

36. Section 21A (4) provides:

> *"The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so".*

37. The Court of Criminal Appeal NSW sat a bench of five in ***R v McNaughton*** (2006) 66 NSWLR 566 to settle how prior criminal record should be used against an offender in light of the Common Law and the terms of s 21A (2).

38. The following sequential propositions can be extracted from the case with reference

to the principle of proportionality:

i. The Common Law principle of proportionality requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: ***R v McNaughton*** *(supra)* at [15]; ***Veen v The Queen*** (1988) 164 CLR 465; ***Hoare v The Queen*** (1989) 167 CLR 348 at 354.

ii. Prior offending is not an "objective circumstance" for the purposes of the application of the proportionality principle: ***R v McNaughton*** at [25]; ***Veen v The Queen*** *(supra)*; ***Baumer v The Queen*** (1988) 166 CLR 51. It is not open for a court to use prior convictions to determine the upper boundary of a proportionate sentence.

iii. Prior convictions are pertinent to deciding where, within the boundary set by the objective circumstances, a sentence should lie: ***R v McNaughton*** at [26].

iv. Prior record is not restricted only to an offender's claim for leniency: ***R v McNaughton*** at [20]; ***Veen v The Queen*** *(supra)* at 477. As stated in ***Veen v The Queen***, prior record is also relevant:

> *... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.*

v. Taking into account in sentencing for an offence all aspects, both positive and negative, of an offender's known character and antecedents, is **not to punish the offender again for those earlier matters**: ***R v McNaughton*** at [28]. As Gleeson CJ, McHugh, Gummow and Hayne JJ explained in ***Weininger v The Queen*** (2003) 212 CLR 629 at [32]:

39. The approach taken by Australian Courts emphasizes that a person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

40. Having examined the jurisprudence developed in the United Kingdom, Ireland and Australia, I am of the considered opinion that prior criminal record may be used in Fiji in the manner set out in ***Veen v The Queen*** *(at 477) (supra para33(iv),* as a subjective matter averse to an offender.

41. An examination of Fiji case law reveals that proportionality is the most fundamental principle of sentencing so far developed by the courts. This principle seems not only to be a rule of law but also a constitutional imperative. The selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. A constitutional protection to exist in determining that the punishment must first be proportionate to the offence but also proportionate to the personal circumstances of the offender. In essence, this principle demands that a sentencing court should first locate the specific offence on the overall scale of gravity and then proceed to make any necessary allowance for relevant personal circumstances. It is within this cardinal principle that criminal record must be assessed in affecting the quantum of punishment to be imposed on the offender.

42. The aggravating factors are intended to encompass both subjective and objective considerations, as that distinction has been developed at Common Law. Therefore, Section 4 (2) (i) and Section 5(a) of the Sentencing and Penalties Decree should be interpreted to give effect to the constitutional principle of proportionality.

43. Said that, I now have a look at the Sentencing Ruling to see whether the sentencing Magistrate had applied the said principle correctly when he aggravated the sentence on account of the Appellant's past criminal record.

44. In his Sentencing Ruling the learned Magistrate stated:

> *"You have 10 relevant previous convictions and a serving prisoner for twelve years with 1 previous case of similar nature in Lautoka"....(para 5)...*
> *"In view of the facts and repeated offender, I impose 1 year as my starting point" (para 9)*

45. According to legal principle discussed above, the sentencing Magistrate could have considered previous criminal record of the offender as an aggravating factor. However, the approach he took was obnoxious to the said principle and it fell into error in two ways.

46. Firstly, the learned Magistrate took previous convictions of the Appellant into account in selecting the starting point. It is trite Common Law principle that in selecting the starting point Courts ought only to consider objective seriousness of the offence and prior offending is not an "objective circumstance" for the purposes of the application of the proportionality principle.

47. In ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) Justice Gounder observed:

> *"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.*

48. The same approach was observed in ***Naikelekelevesi v State*** [2008] FJCA 11; AAU0061.2007 (27 June 2008) as follows;

> *"In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case".*

49. Secondly, the learned sentencing Magistrate fell into error when he failed to explain the basis upon which he took previous criminal record of the Appellant into consideration. It was incumbent upon the sentencing Magistrate to explain the manner in which the factor (previous criminal record of the offender) was taken into account. A passing reference to previous convictions is unsatisfactory. He must show that the instant offence was not an uncharacteristic aberration of the offender but a manifestation of continuing attitude of disobedience of the law. If he was satisfied as to the latter, he would have been justified in imposing a harsher punishment on the basis of retribution, deterrence and protection of society. Therefore, I accept this ground of appeal albeit not on the basis of the submission of the Counsel for Respondent.

50. Based on the above reasons, an interference with the sentencing discretion of the sentencing Magistrate is warranted. I therefore, in exercising powers conferred on this Court under Section 256(3) of the Criminal Procedure Decree, quash the sentence handed down by the sentencing Magistrate and proceed to sentence the Appellant afresh.

51. I select a starting point of eight months. There are no aggravating factors. I deduct two months for mitigating factors recorded by the sentencing Magistrate to arrive at a sentence of six months' imprisonment.

52. The sentencing Magistrate ordered the sentence of imprisonment to be served concurrently with the existing 12 years' prison term. This order is not in conformity with sentiments expressed by Shameem J in ***Tavuraniqiwa v State*** *[2008] FJHC 15; HAA 008.2008 (8 February 2008)* where it was stated:

> *"The State opposes the appeal, saying that the tariff for escaping is 6 to 12 months' imprisonment (**Nemani Kaverevere v. State** HAC 16/03) and that such sentences should always be served consecutively. I agree. If terms of imprisonment for escaping were to be made concurrent, there would be no deterrent value in them at all. As a matter of principle, sentences for escaping from lawful custody should have the effect of lengthening the term of imprisonment served"*

53. Having considered the lengthy prison term the Appellant is already serving; I am not inclined to interfere with the discretion of the sentencing Magistrate although it was not in conformity with aforementioned sentiments.

54. Appeal is allowed. The sentence imposed by the learned Magistrate is quashed. A sentence of six months' imprisonment is imposed afresh to be served concurrently with the existing prison term.

Aruna Aluthge
Judge

At Lautoka
06th December, 2016

Solicitors: **Appellant in Person**
Office of the Director of Public Prosecution for Respondent