IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 12 OF 2016

BETWEEN : ULAIASI RADIKE

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant in person
Mr. S. Babitu for the Respondent

Date of Hearing : 31st of March, 2016
Date of Judgment : 12th of May 2016

JUDGMENT

1. The Appellant had been charged in the Magistrate's Court in Nadi for one count of Burglary, contrary to Section 312 (1) of the Crimes Decree and one count of Theft, contrary to Section 291 (1) of the Crimes Decree. The Appellant pleaded guilty for the two counts on his own free will on 17th of August 2015. Having being satisfied that the Appellant comprehended the consequences of his plea, the learned Magistrate convicted the Appellant for these two counts and sentenced him for 23 months of imprisonment for the first count and 8 months of imprisonment for the second count respectively. The learned Magistrate further ordered that the both sentences were to be served concurrently and the Appellant is not eligible for parole for a period of 16 months.

2. Having being aggrieved with the said sentence of the learned Magistrate, the Appellant filed this appeal on the following grounds, inter alia;

   i) Irrelevant and deceptive case Authorities,

   ii) Exaggerated Sentence,

   iii) Opportunity for Re-Habilitation denied,

   iv) Non- Existence Discretion,

   v) Unconsidered recover items.

3. The Appellant and the learned Counsel for the Respondent agreed to have the hearing by way of written submissions. I accordingly directed them to file their respective written submissions, which they filed as per the direction.

4. Having carefully considered the grounds of appeal and the submissions of the parties, I find that the first, second and fifth grounds could be dealt together. These three grounds are mainly founded on the issue of whether the learned Magistrate has correctly excised his sentencing discretion by selecting the applicable tariff limit, and aggravated and mitigating issues.

5. The learned Magistrate has correctly identified the tariff limit for the offence of theft as between two months to nine months. He has then correctly identified the tariff for burglary of domestic premises is three years. I am satisfied that the learned Magistrate has applied the relevant judicial precedents in order to determine the applicable tariff limits for these two counts.

6. The learned Magistrate has then selected three years as the starting point for the offence of Burglary. The offence was committed at a dwelling house. Hence, the starting point of three years is within the accepted approach. **(State v Tabeusi [2010] FJHC 426; HAC095-113.2010L (16 September 2010)**

7. The learned Magistrate has then considered the following grounds as aggravating factors, that;

   i) Break in domestic premises at night,

   ii) Premeditated act,

   iii) Prevalence of the offence in Nadi,

   iv) Not full recovery,

8. The summary of facts does not reveal that this offence was committed in the night. It states that this offence has committed on the 20th of December 2013, between 09.15 (9.15 a.m.) hours to 19.15 (7.15 p.m.) hours while the occupants were away. The month of December is a summer period, where Fiji is normally having its day time saving time adjustment. In the absence of any evidence that the Appellant had broken into the house in the night, I find the conclusion of the learned Magistrate that this offence was committed at night is founded on the irrelevant consideration.

9. The Fiji Court of Appeal in ***Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008)*** has expounded the applicable approach in

determining the starting point and aggravating factors in sentencing, where it was held that;

> *"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*

10. Accordingly, it appears that the issue of community consideration on the offence is a ground for the selecting of the starting point. It is my view that the issue of the community consideration has been included in the starting point of three years for the offence of burglary of domestic premises. Hence, I find that the consideration of the prevalence of the offences in this nature in Nadi as an aggravating factor is wrong in sentencing principles.

11. Justice Medigan in **Soko v State (2011) FJHC 777; HAA 031.2011 (29 November 2011)** held that;

> *"Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature".*

12. In view of the above judicial precedent, it is my opinion that the learned Magistrate has erroneously considered the fact of non-recovery of stolen items as an aggravating factor.

13. Accordingly, it is my opinion that the learned Magistrate has being guided by irrelevant facts and wrong principles in determining the aggravating factors in this sentencing.

14. Moreover, I find that learned Magistrate, has selected one year as a starting point, though he has correctly identified the tariff limit for theft as 2 months to 9 months.

15. Justice Bandara in **Suresh Lal v State (Crim. App. Case No.: HAA020 of 2013)** has discussed the proper principle of selecting the starting point from the identified tariff limit, where his lordship held that;

> *"It is trite law that the ' starting point ' of a sentence to be within the range of tariff of a particular offence. If the sentencing court deviates from this principle, it should only be in exceptional circumstances. Reasons for such a deviation must be provided as it would be clear to the public, prosecution and the accused as to why the court took a different approach in a given scenario. It is an objective approach towards the offence and the offending background when selecting a ' starting point '. That will preclude the sentence from using the 'aggravating factors' once again to enhance the sentence and punish the offender twice for the same facts. Therefore it is important to select a ' starting point ' irrespective of aggravating and mitigating factors. Identification of the correct 'tariff' and the selection of a proper ' starting point ' play a pivotal role in the sentencing process."*

16. Fiji Court of Appeal in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** states that;

"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". (underline is mine)

17. The learned Magistrate has not given any specific reasons for selecting a starting point of one year by deviating from the accepted tariff limit of 2 months to 9 months. As expounded by Justice Bandara in **Suresh Lal (supra),** it is incumbent upon the sentencing magistrate to provide specific reasons for selecting a starting point deviating from the identified tariff limit. Hence, I find the learned Magistrate has erred in selecting the starting point for the offence of theft.

18. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** held that;

'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 of the relevant considerations, then the appellate court may impose a different sentence.'

19. In view of the reasons discussed above, it is my opinion that there is a reason for me to intervene in to the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Decree. I accordingly quash the sentence of the learned Magistrate and consider an appropriate sentence in order to reflect the gravity and the appropriate culpability of the Appellant in this offence.

20. I consider the offence of Burglary as a base offence in this sentence.

21. The Summary of facts reveals that the Appellant has entered into the house by cutting the roofing iron wall in front of the house. The Appellant has used a tin cutter to cut the roofing iron wall. This is a dwelling house. Offences of this nature are prevalent in the society and has adversely affected the lives and safety of the community. In view of these grounds, I select 3 years as the starting point.

22. The appellant entered into the house while the occupant was away. It indicates that the Appellant had planned this crime and waited for the opportunity to carry it out. The Appellant has stolen a camera, two laptops and some other electronic appliances with some liquor bottles. It is my view that laptops are essential part of a person's life in both personal and professional, specially a sales supervisor as of the complainant of this matter. Hence, I consider the stolen items not only had a financial values, but some professional and personal value to the owner. I consider these grounds as aggravating circumstances of this offence. I accordingly increase 4 months, reaching to an interim sentence of 40 months.

23. You are a young first offender and expressed your apology in mitigation. In view of these mitigating factors, I reduce 10 months to reach 30 months. I further reduce 10 months for the early plea of guilt. The final sentence is now 20 months for the offence of Burglary.

24. Having considered the level of harm and culpability of the Appellant, I sentence the Appellant for seven month for the offence of Theft.

25. Having considered the reasons given by the learned magistrate in imposing a custodial sentence, I do not find there is a valid reason for me to change that conclusion of the learned Magistrate. Hence, I do not suspend this sentence.

26. In consideration of the age and the personal circumstances of the Appellant, I find twelve months of non-parole period would adequately serve the purpose of rehabilitation of the Appellant as a law abiding citizen.

27. In conclusion, I sentence the Appellant for a period of 20 months of imprisonment for the offence of Burglary contrary to Section 312 (1) of the Crimes Decree and 7 months of imprisonment for the offence of Theft, contrary to Section 291 (1) of the Crimes Decree. The Appellant is not eligible for parole for a period of 12 months. Both sentences are to be served concurrently and effecting from 15th of September 2015.

28. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka
12th of May 2016

Solicitors : Office of the Director of Public Prosecutions