IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 10 OF 2016

BETWEEN : **LASARUSA WAISALE**

Appellant

AND : **STATE**

Respondent

Counsel : **Ms. P. Chand for the Appellant**
Ms. J. Fatiaki for the Respondent

Date of Hearing : **12th May, 2016**
Date of Judgment : **2nd June, 2016**

JUDGMENT

Background

1. On the 30th of December 2015, the Appellant entered a plea of guilty with respect to one count of Burglary and one count of Theft contrary to Section 312 (1) and 291 respectively of the Crimes Decree 2009. He tendered his plea on the 1st call of the case before the Nadi Magistrates Court.

2. Upon conviction, Appellant was sentenced on the 13th of January 2016 to a term of 23 months and 17 days' imprisonment.

3. Being aggrieved by the sentence, Appellant filed this appeal within time.

4. The grounds of appeal filed by Counsel for the Appellant are as follows:

(i) *The learned Magistrate erred in law and in principle when he sentenced the Petitioner to a term of imprisonment considering the fact that the:*

(a) *Appellant is a first offender*
(b) *Appellant has pleaded guilty at the earliest possible opportunity*
(c) *Appellant is remorseful and seeks the courts forgiveness*

(ii) *The learned Magistrate erred in fact and in law when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellant.*

5. The Summary of Facts was as follows:-

"Between 26/07/15 and 27/07/15 at Sabeto Village, one Lasarusa Waisale (Accused) 30 yrs, unemployed of Valelevu broke into the school quarters of Aloesi Ravonakula (Complainant) 39 yrs school teacher of Sabeto District School and stole a Dell brand laptop valued at $1,000.00, jacket valued at $160.00, Apple brand ipod valued at $350.00, Cap valued at $30.00, 2 x USB valued $52.00 and external hard drive valued at US$1,500.00 to the total value of $4,942.00.

On 26/6/15 the complainant closed her school quarters and left to Sabeto Central with her family to their farm. Complainant spent her time with the family for the night. On 27/6/15, Complainant returned to her quarters and when she entered the house she discovered the HCT Rod stand was placed on the coffee table which was left on the ironing board. Complainant's daughter then discovered the back door was open. Complainant checked her house and discovered above items missing. Matter was reported to Police.

DC 2118 Satendra investigated the case and scene was visited where the entry was gained by removing two louver blades. Statement of complainant was

recorded. Later under investigation information received that one Samu Ratabua (PW-1) 37 yrs self-employed of Banara, Lautoka had bought the Dell brand Laptop for $200.00, who then came to know that it belonged to complainant. The said laptop was identified by complainant and further statement was recorded. Later accused was arrested and caution interviewed who admitted breaking the quarters and stealing the above items as per answers to question numbers 25-44. Accused was charged for one count of Burglary and a count of Theft...."

Law

6. It is well settled that sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

The Fiji Court of Appeal in ***Bae v State*** *[1999] FJCA 21; AAU0015u.98s (26 February 1999) 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).*

7. In ***Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)*** the Fiji Court of Appeal discussed the proper approach to be taken by an appellate court when called upon to review the sentencing discretion of a court below:

In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.

Analysis

Ground (i)

8. The learned Magistrate did in fact consider that the Appellant was a first offender as per paragraph (5) of the sentence whereby he stated:

> *"You have previous convictions but more than 10 years. I will consider you as a first offender for the purpose of your sentencing".*

9. In addition to the above, it is evident that the learned Magistrate in sentencing the Appellant considered his position as a first offender when he selected the relevant tariff/starting points for both the offences charged.

10. Furthermore, the learned Magistrate took into account that the Appellant pleaded guilty at the earliest opportunity and in keeping with sentencing guidelines he deducted 1/3 of the

sentence separately from the appellants mitigating factors which amounted to 14 months imprisonment *(paragraph 15 of the Sentence).*

11. The learned Magistrate also gave some discount for the fact that the laptop was recovered, and this is evident at paragraph (16) of the sentence where he allowed for a deduction of 4 months which included the Appellants other mitigating factors.

Ground (ii): Custodial Sentence & Imposition of a Non-Parole Period

12. The learned Magistrate has not suspended the sentence of imprisonment. He has also imposed a non-parole period. Appellant contends that the learned Magistrate erred when he failed to consider the facts that he was a first offender, he pleaded guilty at the earliest opportunity, recovery of items stolen, and his personal circumstances.

13. Section 26 of the Sentencing & Penalties Decree provides as follows:

26. – (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -

(a) does not exceed 3 years in the case of the High Court; or
(b) does not exceed 2 years in the case of the Magistrate's Court.

14. The term of imprisonment imposed by the learned Magistrate on the Appellant is for a period of 23 months and 17 days. Therefore, in light of the abovementioned provision, the learned Magistrate had discretion to suspend the sentence if he was satisfied, given

the circumstances of the case, that it was appropriate for him to do so. The learned Magistrate in exercising his discretion opted not to suspend the sentence.

15. It is now trite law that a Magistrates' failure to suspend a sentence can only be overturned on an appeal, if it is shown that a magistrate failed to exercise his or her discretion judiciously.

16. In exercising that discretion, magistrate is expected to consider the sentencing guidelines set out at section 4 of the Sentencing and Penalties Decree 2009 as well as various case authorities pertaining to suspended sentences.

17. The learned Magistrate turned his mind to the issue of suspension and decided against it for the following reason:

> *"Court will not condone break in of educational institutions and staff quarters of teacher's because if a lenient sentence is adopted, it will not act as effective deterrence to future offenders" (Para 27).*

18. The Appellant contends that the learned Magistrate erred in the exercise of his discretion by imposing a non-parole period considering the circumstances of this case.

19. Section 2 of the Sentencing and Penalties Decree 2009 defines non-parole period as *"any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole".*

20. In terms of Section 18 of the Sentencing and Penalties Decree, sentencing magistrate has discretion to impose a non-parole period if a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year.
The Section reads as follows:

18(1) Subject to sub section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 year or more the court must fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

21. In **Paula Tora v. The State** Criminal Appeal No. AAU 0063 of 2011 (27 February 2015) it was stated:

> *"[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4 (1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the*

Corrections Service Act, 2006 on the balance of the head sentence after the non-parole term has been served."

22. In ***Maturino Raogo v. State*** Criminal Appeal CAV 003 of 2010 (19th August 2010) the Supreme Court, in considering the imposition of a minimum term under section 33 of the amended Penal Code, expressed the view that a sentencing court which is minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.

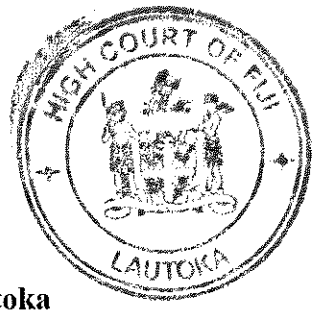
> *"In certain states of Australia and New Zealand legislation has provided the basis on which minimum terms of imprisonment in relation to the head sentence for different offences should be imposed. In Fiji, in the absence of statutory provisions regarding any guidelines for fixing the limits of the non-parole period it would be best to leave it to the discretion of the sentencing judge who should also consider striking a balance between rehabilitation and deterrence when fixing a non-parole period.*
>
> *It would be seen therefore that there is no basis for the imposition of the non-parole period in terms of the statutory provisions as it stands now in Fiji except to say that when fixing a non-parole period it would be six months less than the head sentence. This would indicate that a period which is less than six months than the head sentence would be the maximum limit of the non-parole period. If the remission of one third is to be considered at the end of such a six months' period, it may go against the spirit of section 4 (1) of the Sentencing and Penalties Decree, 2009 in striking a balance between rehabilitation and deterrence".*

23. The sentence imposed by the learned Magistrate in this matter is less than two years but not less than one year. In light of the Section, it is not mandatory for the court to fix a non-parole period. The learned Magistrate fixed a non-parole period at 16 months imprisonment when he imposed a sentence of twenty-three months and seventeen days imprisonment; that is approximately seven months less than the term of the sentence.

24. Pursuant to Section 18 (3) of the Decree the learned Magistrate had a discretion to fix a non-parole period without violating the mandatory provision in Section 18 (4).

25. The learned Magistrate having considered the nature of the offence and the term of imprisonment exercised his discretion judiciously and lawfully when he fixed the non-parole period. He has arrived at the non-parole period considering Section 4(1) of the Sentencing and Penalties Decree, 2009 and in striking a right balance between rehabilitation and deterrence.

26. Sentence imposed by the Learned Magistrate is neither excessive nor unreasonable. Therefore, I affirm the sentence imposed by the learned Magistrate. The appeal against sentence is dismissed.



Aruna Aluthge
Judge

At Lautoka
2nd June, 2016

Solicitors: **Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent