IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 53 OF 2016

BETWEEN : AUTIKO VULI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : The Appellant in person
Mr J Niudamu for the Respondent

Date of Judgment : 23rd of January 2017

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrates Court of 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 the 19th of April 2016. The learned Magistrate had then sentenced him for a period of eighteen months imprisonment for the first count and four months imprisonment for the second count. Aggrieved with the said sentence, the Appellant appeal to this court on the following grounds, *inter alia;*

i) *The sentence of 18 months is manifestly harsh and excessive in all circumstance of the case,*

ii) *The learned Magistrate erred in law by giving other deduction as the sentence was below 2 years which could be given as a suspended sentence,*

iii) *The learned Magistrate erred in law and in fact took into consideration when sentencing the appellant the relevant matters but in fact took irrelevant matters into consideration,*

iv) *The learned Sentencing magistrate erred in law in giving a non parole period which is in breach of Section 18 (4) of the Sentencing and Penalties Decree 2009,*

2. Pursuant to the service of the petition of appeal, the Appellant and the Respondent appeared in court on the 14th of October 2016. The Appellant and the learned counsel for the Respondent agreed to conduct the hearing by way of written submissions. Accordingly, directions were given to the parties to file their respective written submissions, which they filed as per the directions. Having carefully considered the respective written submissions filed by the parties and the record of the proceedings of the Magistrates Court, I now proceed to pronounce my Judgment as follows.

Ground I & III

3. I first turn onto the first and third grounds of appeal, founded on the contentions that the sentence of 18 months is manifestly harsh and excessive and the learned Magistrate has taken into consideration irrelevant matters in reaching his conclusion.

4. Having considered the sentencing principle as enunciated in **Turuturuvesi v State 9 2002 (FJHC 190; HAA00861J.2002s (23 December 2002) and Mosi v State (2012) FJHC 1348, Criminal Appeal 138.2012 (1 October 2012)**, the Learned Magistrate had found in his sentence the tariff for Burglary is between eighteen months to thirty-six months imprisonment period.

5. I now turn onto consider whether the judicial precedents that have been considered by the learned Magistrate in his Sentence are actually relevant to the offence of Burglary as stipulated under the Crimes Decree.

6. In **Turuturuvesi (supra)** the Appellant had been charged in the Magistrate Court for one count of House Breaking and Committing a Felony, contrary to Section 300 of the repealed Penal Code, that carried a maximum penalty of fourteen years imprisonment period.

7. In **Mosi (supra),** the Appellant had been charged in the Magistrate Court for seven separate counts of Burglary, Theft, Assaulting a police Officer, Resisting Arrest and Escaping from Lawful Custody under the repealed Penal Code. Aggrieved with the sentence imposed by the Learned Magistrate, the Appellant had appeal to the High Court, where Justice Madigan held that:

"The tariff for burglary simpliciter (i.e. not aggravated burglary) is between 18 months and 36 months (Mucunabitu HAC 17.10). The accepted tariff for burglary of domestic premises is three years (Tabeusi HAC 095 of 2010 Ltk).

8. The offences that had been considered in **State v Mucunabitu [2010] FJHC 151; HAC017.2010 (15 April 2010)** were one count of Aggravated Burglary, contrary to Section 313 (1) of the Crimes Decree and one count of Theft, contrary to

Section 291 (1) of the Crimes Decree. Justice Madigan in **Mucunabitu (supra)** held that;

"The offence of aggravated burglary is newly created in this jurisdiction by the Crimes Decree of 2009. It carries a maximum penalty of 17 years (whereas burglary simpliciter has a maximum of 13 years). The aggravation charged is that the burglary was committed by more than one person.

Under the old Penal Code, the maximum penalty was life imprisonment, but the accepted tariff was between 18 months to 3 years imprisonment (Tomasi Turuturuvesi v State – HAA 86/2002).

9. Accordingly, it appears that the judicial precedents that has been considered by the Learned Magistrate in his Sentence have no direct relevancy to the offence of Robbery under the Crimes Decree.

10. The offence of Burglary, that had been stipulated under the repealed Penal Code carried a maximum penalty of life imprisonment. However, the new regime under the Crimes Decree, has established the offence of Burglary in two phases. Section 312 of the Crimes Decree has established the offence of Burglary, that carries a maximum penalty of thirteen years imprisonment. The aggravated form of the offence of burglary has been introduced under Section 313 of the Criminal Procedure Decree. The maximum penalty for Aggravated Burglary is seventeen (17) years imprisonment period.

11. Justice Madigan in **Waqavanua v State [2011] FJHC 247; HAA013.2011 (6 May 2011)** held that the acceptable tariff limit for burglary under the Crimes Decree should be between one year to three years.

"The maximum penalty for burglary is thirteen years imprisonment and not life as the Magistrate stated and the accepted tariff band for the offence set down under the old Penal Code is between 18 months to three years imprisonment (Tomasi Turuturuvesi – HAA 06/02S). Given that life imprisonment was the maximum penalty under the Penal Code, and the maximum is now thirteen years, then a proper tariff band for the offence of burglary under the Crimes Decree should be between twelve months to three years.

12. However, Justice Madigan in **Gonerogo v State - [2013] FJHC 163; HAA22.2012 (5 April 2013)** has outlined another tariff limit for burglary, where his lordship held that;

"The maximum penalty for burglary is now 13 years imprisonment. Under the Penal Code it was life imprisonment and the accepted tariff then pertaining was two to three years imprisonment. If that was the tariff when the maximum was life imprisonment, the tariff should now be somewhat less perhaps 18 months to 36 months".

13. Justice De Silva in **Samuela Ramagimagi [2014] FJHC 116; HAA28.2013 (5 March 2014)** has selected two years as the starting point for the offence of Burglary under the Crimes Decree.

14. In **Uluicicia v State [2015] FJHC 61; HAA028.2014 (30 January 2015),** Justice Madigan found that the acceptable tariff for domestic burglary is between one year and two years with the usual sentence being fifteen months, where his lordship held that;

"The tariff for domestic burglary is now between one year and two years with the usual sentence being 15 months. (see Tabeusi [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)".

15. Justice Aluthge in **Talakubu v State [2016] FJHC 1121; HAA37.2016 (13 December 2016)** has found the acceptable tariff limit for Burglary as between eighteen months and three years, where his lordship held that;

"Under the Crimes Decree, the maximum sentence for Burglary is imprisonment of 13 years. In State v. Taito Seninawanawa HAC 138 0f 2012 (22 April 2015) Madigan J set out the tariff for Burglary between 18 months and 3 years with three years being the standard sentence for burglary of domestic premises".

16. I now draw my attention to the sentencing approach adopted by the High Court in sentencing offender in relation to the offence of Aggravated Burglary.

17. Justice Nawana in **State v Nasara [2011] FJHC 677; HAC143.2010 (31 October 2011)** has expounded that the tariff for aggravated burglary is eighteen months to three years, where his lordship found that;

"The offence of 'Aggravated Burglary', which is indictable, attracts a punishment of 17 year-term of imprisonment, while the summarily triable offence of 'Theft' mandates a punishment up to a 10 year-term of imprisonment under the Decree.

The tariff for the offence of 'Burglary', as founded on the basis of the provisions of the old Penal Code, was 18 months to 3 years in imprisonment (Tomasi Turuturuvesi v State) [2002] HAA 086/02. The tariff set for the offences involving burglary and larceny under the Penal Code was 1-4 years in imprisonment (Cavuilagi v State [2004] FJHC 92).

In State v Mikaele Buliruarua) [2010] FJHC 384, the tariff set for the offence of 'Burglary' under the Penal Code, was made applicable in relation to the offence of 'Aggravated Burglary' under the Decree.

I would accordingly adopt the same tariffs for the offences of 'Aggravated Burglary' and of 'Theft' under the Decree in this case.

18. The High Court in **State v Seninawanawa [2015] FJHC 261; HAC138.2012 (22 April 2015)** has endorsed the tariff limit expounded by Justice Nawana in **Nasara (supra)**, where Justice Madigan held that;

"The maximum penalty for aggravated burglary is a term of imprisonment for seventeen (17) years. The aggravation in this case is that the accused committed the burglary in the company of two other persons. The accepted tariff for aggravated burglary is a sentence of between 18 months and three years, with three years being the standard sentence for burglary of domestic premises"

19. The Fiji Court of Appeal in **Leqavuni v State [2016] FJCA 31; AAU0106.2014 (26 February 2016)** has accepted the tariff for the Aggravated Burglary is between eighteen months and three years. Basnayake JA in **Leqavuni (supra)** found that;

"At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years. Considering the fact that the appellant was charged for the offence of aggravated burglary, I am of the view that the point to start should be at the highest level"

20. Having considered the sentencing approaches adopted by the Fiji Court of Appeal and the High Court in relation to offences of Burglary and Aggravated

Burglary under the Crimes Decree, and the respective maximum penalties for these offences, it is my considered opinion that the tariff of one (1) year to three (3) years adopted by Justice Madigan in **Waqavanua v State (Supra)** is the most appropriate tariff for the offence of Burglary.

21. Justice Madigan in **Ratusili v State [2012] FJHC 1249; HAA011.2012 (1 August 2012)** has discussed the acceptable tariff for theft, where his lordship held that;

a. *For a first offence of simple theft the sentencing range should be between 2 and 9 months.*

b. *Any subsequent offence should attract a penalty of at least 9 months.*

c. *Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*

d. *Regard should be had to the nature of the relationship between offender and victim.*

e. *Planned thefts will attract greater sentences than opportunistic thefts .*

22. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found that;

"The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When

punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

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. 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"

23. The learned Magistrate has selected thirty (30) months as the starting point for Burglary and seven (7) months for Theft, which fall within the acceptable tariff limit. He has considered the level of culpability and the objective seriousness of the offence in reaching above starting points, which I find a correct and acceptable approach in doing such. The learned magistrate has not found any aggravating circumstances of this offending.

24. The learned Magistrate has then taken into consideration the early plea of guilty and the character of the Appellant, concluding that they are compelling and impressive mitigating factors. He has given a discount of eleven months for the offence of burglary and three months for the offence of Theft. The learned Magistrate has further reduced one month for the time the Appellant had spent in remand custody prior to the sentence, reaching the final sentence of eighteen (18) months imprisonment period for Burglary and four months imprisonment period for Theft.

25. The final sentence of eighteen months imprisonment for Burglary and four months imprisonment for Theft are within the acceptable tariff limits of the respective offences. Hence, I do not find the Sentence of eighteen months is excessive and harsh.

26. In view of the above discussed grounds, I do not find the first and third grounds of appeal have any merit and fall accordingly.

Ground II

27. I now draw my attention to the second ground of appeal, that is founded on the contention that the learned Magistrate erred in law by failing to suspend the sentence.

28. Section 26 (1) of the Sentencing and Penalties Decree states that;

"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"

29. Section 26 (2) (b) of the Sentencing and Penalties Decree defines the jurisdiction of the Magistrates court in respect of imposing suspended sentence, where it states that;

"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,—

b) Does not exceed 2 years in the case of the Magistrate's Court.

30. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

31. The learned Magistrate has extensively and elaborately taken into consideration whether the sentence could be suspended. Having carefully considered the seriousness of the offence, the impact on the community, and personal mitigating factors of the Appellant, the learned Magistrate has concluded that this case does not warrant a suspended sentence. Hence, I find the learned Magistrate has appropriately and correctly exercised his discretion in not imposing a suspended sentence. Accordingly, I find no merit in the second ground of appeal.

Ground IV

32. The Appellant contends that the learned Magistrate erred in law by imposing a non-parole period that is in breach of Section 18 (4) of the Sentencing and Penalties Decree.

33. Section 18 (3) and (4) of the Sentencing and Penalties Decree states that;

i) 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.

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

34. The learned Magistrate has fixed a non-parole period of twelve months, which is not less than six months of the final sentence. Accordingly, I do not find any merit in the fourth ground of appeal.

Conclusion

35. In conclusion, I refused and disallow this appeal.

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

R. D. R. Thushara Rajasinghe

Judge

Judgment delivered by Madigan J 23.01.17

At Lautoka

23rd of January 2017

HIGH COURT OF FIJI LAUTOKA

Solicitors : Office of the Director of Public Prosecutions