IN THE HIGH COURT OF FIJI

AT LAUTOKA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL CASE NO. HAA 85 of 2016

BETWEEN	:	RAJNEEL PRASAD
		APPELLANT
AND	:	THE STATE
		RESPONDENT

Counsel	:	Ms. S. Kiran
Date of hearing	:	27th February, 2017
Date of sentence	:	13th March, 2017

JUDGMENT

INTRODUCTION

1. Rajneel Prasad ("the Appellant") filed this appeal against the sentence imposed by the learned Magistrate at Lautoka.

2. The Appellant was charged with 1 count of 'Burglary' contrary to Section 312 (1) of the Crimes Decree 2009 for breaking and entering into Tigers Restaurant and two Counts of "Theft" contrary to Section 291 of the Crimes Decree 2009 for stealing cash of $6,505.60 from Tigers Restaurant and also stealing a passport valued $80.00 and a BSP ATM card valued $10.00 from Damyanti Mala.

3. The Appellant was convicted on his own plea of guilty at the Lautoka Magistrates' Court.

4. On 27.10.2016, the learned Magistrate sentenced the Appellant to 25 months' imprisonment for all counts. He ordered 20 months' to be served and remaining 5 months to be suspended for 2 years.

5. Notice of Appeal against the sentence was filed within time.

GROUNDS OF APPEAL

I. Learned Magistrate erred in law when he failed to give him 1/3 discount for his guilty plea on the first available opportunity;

II. Sentence is harsh and excessive and wrong in principle;

III. Learned Magistrate erred when he did not give much weight to mitigating factors;

IV. Learned Magistrate erred in law when he failed to consider the time spent in remand.

LAW

6. This Court will approach an appeal against sentence using 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].*

7. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Fiji Appeal Court 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)".*

8. 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.

FACTS

9. On the 8th October, 2016, between 23 Hrs. and 23.50 Hrs. the Appellant broke into Tiger's Restaurant and stole $ 6505 in cash a Fiji passport and a BSP ATM card. Appellant was arrested and interviewed under caution. He admitted committing the offence.

ANALYSIS

10. Grounds raised by the Appellant are based on the premise that the sentence is harsh and excessive and wrong in principle. Therefore, all the grounds can be dealt with together.

11. Maximum sentence for Burglary under the Crimes Decree is 13 years' imprisonment.

12. After analyzing series of authorities, Rajasinghe J in ***Vuli v State*** [2017] FJHC 17; HAA53.2016 [23 January 20217] concluded the tariff for Burglary should be between 1 and 3 years' imprisonment.

13. The Maximum sentence for Theft is ten year's imprisonment. Tariff for Theft is now settled. In ***Ratusili v State*** [Criminal Appeal No. HAA 11 of 2012, 1 August 2012] Madigan J set out the new tariff for Theft, He said:

> *..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.*
>
> *(iii) 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.*
>
> *(iv) regard should be had to the nature of the relationship between offender and victim.*
>
> *(v) planned thefts will attract greater sentences than opportunistic thefts.*

14. The learned Magistrate took a starting point of 30 months for the first count of Burglary and 10 months each for other 2 counts of Theft.

15. In ***Koroivuki v State*** [2013] FJCA 15: AAU 0018. 2010 [5th March 2013] the Court of Appeal observed the following in respect of the starting point:

> *"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".

16. The learned Magistrate in his discretion took 30 months as the starting point which is in the upper range of the tariff. In identifying the tariff for Burglary, the learned Magistrate considered ***Petero Baleiwaiyevo v The State*** [2008] HAM 002/08, a house breaking case decided under the repealed Penal Code. At that time, the maximum sentence for Burglary was imprisonment for life and the tariff ranged from 18 months to 4 years. Now the maximum sentence being reduced to 13 years and the tariff is between 1 and 3 years, the picking of a starting point from the upper range of the tariff is obnoxious to the principle enunciated in ***Koroivuki*** *(supra)*. Therefore, the learned Magistrate acted upon a wrong principle.

17. The learned Magistrate added 6 months for aggravating factors. However, when identifying the aggravating factors at paragraph 6 of the sentence, he stated *'there are no really aggravating factors'*. Therefore, the learned Magistrate fell into error when he added six months to the starting point to account for aggravating factors.

18. After all adjustments for aggravating and mitigating factors, the Appellant received a discount of 6 months for his early guilty plea from a sentence of 36 months' imprisonment. The usual practice of a sentencing court is, after all adjustments, to grant a 1/3 discount to reflect the accused's early guilty plea.

Although this practice is not elevated to the level of legally binding principle, sentencing courts in my opinion should give reasons if they want to deviate from the established principle.

19. In ***Qurai v State*** [2015] FJSC 15; CAV24. 2014 [20 August 2015]. The Supreme Court held:

> *"[54] There is no pronouncement of this Court in the question of the discount to be given for a guilty plea made a very early stage, although this aspect of the matter was discussed by Madigan JA in his concurring opinion in Rainima v The State [2015] FJCA 17; AAU0022.2012 (27 February 2015) at paragraph [46] where his Lordship was constrained to observe as follows:-*
>
> *"[46] Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance. "(Emphasis added)*
>
> *[55] Having said that, his Lordship agreed with the other Justices of Appeal of the Court of Appeal (Calanchini P and Jayasuriya JA) that, given the very lenient sentence already passed on the appellant in that case, the appeal against sentence should be dismissed.*
>
> ***[56] This Court takes cognizance, as it is bound to in terms of section 4(2) (b) of the Sentencing Decree, the existence in Fiji of a sentencing practice***

of allowing a discount of one third of the sentence for an early guilty plea. (emphasis added)

20. The learned Magistrate did not give any reason for not giving a discount of 1/3 for the early guilty plea. It is quite obvious from the copy record that the Appellant admitted the offence at the caution interview and pleaded guilty on the first call. He saved court's time and resources and also manifested his remorse. Therefore, he is eligible to receive a third discount.

21. Furthermore, the learned Magistrate did not consider the remand period of 14 days whilst sentencing the Appellant. Section 24 of the Sentencing and Penalties Decree 2009 requires the sentencing court to 'regard' the period in remand. Unfortunately, the learned Magistrate altogether disregarded the remand period.

22. In light of these, an intervention of this court is warranted to rectify the errors made by the learned Magistrate in sentencing the Appellant. It is therefore appropriate in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the learned Magistrate and substitute another sentence which reflects the gravity of the offence and circumstances of the case.

ORDER

23. I quash the sentence passed by the learned Magistrate and substitute the following sentence.

24. I select a starting point of 24 months' imprisonment for Burglary count in the middle range of the tariff. There are no aggravating circumstances. I deduct 6

months for mitigating circumstances. I give a further discount of 6 months to reflect the early guilty plea. The final sentence for Burglary count is 12 months' imprisonment. I further deduct the remand period of two weeks. Now the final sentence for Burglary count is 11 months and 14 days.

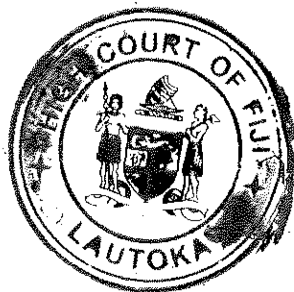
25. To two Theft counts, I do not make any adjustment as the sentence of the learned Magistrate was well within the range.

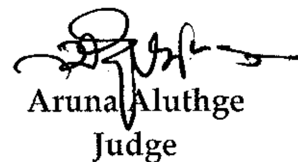
26. The Appellant was 22 years old at the time of sentencing. He is a first offender and pleaded guilty to the offence at the first available opportunity. The stolen property was partly recovered and he expressed his willingness to restitute fully manifesting a genuine remorse.

27. The Appellant has already served approximately five months of his sentence.

28. Having considered the Appellant's youth, early guilty plea, genuine remorse, value of the property stolen and partial recovery of stolen property, I suspend rest of the sentence for a period of two years.

29. Appeal succeeds to that extent. Effects and consequences of breach of terms of suspended sentence explained to the Appellant.





Aruna Aluthge
Judge

At Lautoka
13th March, 2017

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