IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 84 OF 2016

BETWEEN : PAULA BETE

APPELLANT

AND : STATE

RESPONDENT

Counsels : Appellant in Person

Mr J. Niudamu for the Respondent

Date of Hearing : 12th April, 2017

Date of Judgment : 02nd May, 2017

## JUDGMENT

1. Appellant was charged with following offences : - Burglary contrary to Section 312 (1) of the Crimes Decree, 2009; Indecent Assault contrary to Section 212 (1) of the Crimes Decree, 2009 and Escaping from Lawful Custody contrary to Section 196 of the Crimes Decree.

2. Appellant pleaded guilty to the above charges on the 19th September 2016 when his plea was taken at the Lautoka Magistrates Court.

3. The Appellant was convicted accordingly of the above charges and was sentenced to 16 months' imprisonment for the offence of Burglary and 9 months imprisonment for Indecent Assault. Both sentences were to run concurrently.

4. However, for the offence of Escaping from Lawful Custody, the Court sentenced the Appellant to 9 months imprisonment and the Court decided that this sentence be served consecutively.

5. Being dissatisfied with the decision of the Magistrates Court, the Appellant filed his amended grounds of appeal against sentence within time.

Grounds of Appeal

6. In summary, the Appellant's grounds of appeal filed are as follows:

(i) That the learned sentencing Magistrate erred in law in acting upon the wrong principle of sentencing.

(ii) That the learned sentencing Magistrate erred in law by allowing extraneous or irrelevant matters to guide him.

(iii) That the learned sentencing Magistrate had mistook the facts.

(iv) That the learned sentencing Magistrate failed to take into account some relevant considerations.

In support of these grounds the Appellant filed handwritten submissions. The Respondent also filed submissions in reply. The principal ground of appeal relates to the issue of sentencing in the Magistracy.

**Facts admitted by the Appellant**

7. Accused and complainant were neighbors. Complainant was living with her husband and children.

8. On the day of incidence, complainant was sleeping inside her house with her two daughters in the living room and her husband was sleeping in the bedroom with the 3 year old son. The door was locked. Accused somehow managed to open the door and entered the house of complainant. As Accused entered the house, the house was in dark so he used his gas lighter to see where complainant was sleeping.

9. Accused saw complainant sleeping with her two daughters on the mattress on the floor then he sat beside complainant and slipped his hand inside complainant's under garment and started fondling with her vagina. Complainant woke up and was unable to see the face of accused because there was no light in the house. She thought it was her husband and started calling her husband's name. Accused replied that "it is me Paula". Hearing this complainant screamed and from this her husband woke up. When complainant's husband entered the living room he saw someone stepping outside the front door. Complainant's husband picked a stick and threw it and it hit accused's left ear. Whilst accused was running away, from the light of house, complainant's husband clearly recognized accused.

## Law Relating to Appeals against Sentence

10. The sentencing Court should be guided by the proportionality principle enshrined in the Constitution of the Republic of Fiji, Sentencing and Penalties Decree, 2009 and guideline judgments, if any, in arriving at an appropriate sentence.

11. Section 11 (1) of the Constitution provides:

> *"Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment"*

12. Section 15 (3) of the Sentencing and Penalties Decree states:

> *"As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part".*

13. 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.

14. 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].*

15. 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)".*

16. 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.*

17. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed approach to be taken when reviewing a sentencing discretion of a lower court. The Court observed:

*"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"*

18. Having considered the aforementioned case law and sentencing principles, I proceed to review the sentence imposed by the learned Magistrate to see if it is harsh or excessive.

Analysis

19. 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 to be dealt with together.

20. Learned sentencing Magistrate at paragraph 9 of his Ruling had correctly identified the maximum penalty for each offence. According to Section 312 [1] of the Crimes Decree, maximum sentence for Burglary is 13 years' imprisonment. Maximum Sentence for the offence of Indecent Assault is 5 years' imprisonment [S 212 (1)] and for the offence of Escaping from Lawful Custody, the maximum sentence is 2 years' imprisonment [S.196].

21. Learned Magistrate took the tariff for Burglary as between 18 months and four years' imprisonment. 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. After promulgation of the Crimes Decree, the maximum sentence was reduced to 13 years' imprisonment.

22. After analyzing series of authorities, Rajasinghe J in ***Vuli v State*** [2017] FJHC 17; HAA 53.2016 [23 January 2017] concluded that the tariff for Burglary under Crimes Decree should be between 1 and 3 year's imprisonment.

23. Therefore, learned sentencing Magistrate fell into error when he considered ***Petero Baleiwaiyevo v The State*** [2008] HAM 002/08, a house breaking case decided under the repealed Penal Code to identify the tariff for Burglary.

24. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff.

25. 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."*

26. Learned Magistrate picked a starting point of 20 months for the first count of Burglary from the upper range of tariff and did not take into account the good

practice advocated in ***Karoivuki*** *(supra).* He also failed to give any reason for selecting a higher starting point.

27. Learned Magistrate correctly identified the tariff for Indecent Assault as between 12 months and 4 years.

28. Tariff for Indecent Assault was set out in ***Rakota v State*** [2002] FJHC 168; HAA0068J.2002S (23 August 2002). Shameem J observed:

> *"Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.*
>
> *These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.*

29. The starting point selected for Indecent Assault was 12 months, from the lower range of tariff and the final sentence (9 months' imprisonment) fell within the tariff in conformity with ***Karoivuki*** (supra) principle.

30. There is no tariff set for Escaping from Lawful Custody. Nine months' imprisonment imposed on this count is not excessive.

31. Having selected the starting point for each count learned Magistrate went on to consider aggravating and mitigating circumstances. However, he took elements of offences when he stated: *"The aggravating factors are that for the unlawfully entered the complainant's house and disturbed the complainant from her sleep and created a perception of insecurity in the village"*. He could better have taken night time invasion as an aggravating factor.

32. Having adjusted the sentence for aggravating and mitigating factors learned Magistrate imposed a final sentence of 16 months' imprisonment for Burglary count which fell within tariff. Final sentences imposed on Indecent Assault count and Escaping from Lawful Custody count were also within permissible range. Therefore, when taken individually, sentence imposed on each count is neither hash nor excessive.

33. The Appellant raised the issue in his submission that his sentence was harsh and excessive when it was made to run consecutively to the existing prison term.

34. However, as per the Court Record no prison term was being served by the Appellant at the time his sentence although he had pleaded guilty to the count of

Escaping from Lawful Custody on an earlier occasion. Therefore, Appellant was not a serving prisoner at the time of his sentence.

35. Learned Magistrate at paragraph 19 of his sentence remarked *"Paula Bete, I have decided to have both sentence(s) to be served consecutively and therefore you are sentence(d) to 25 months imprisonment"*. It appears that learned Magistrate was dealing with two distinct cases namely CF 656/16 and CF 424/16 when he ordered the sentence imposed on Escaping from Lawful Custody (9 months) in CF 424/16 to be served consecutive to sentence imposed in CF 656/19 (16 months)

36. Section 22, of the Sentencing and Penalties Act allows the Court to order sentence to run consecutively or concurrently. Section provides as follows:

> *(1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.*
>
> *(2) Sub-section (1) does not apply to a term of imprisonment imposed—*
>
> *(a) in default of payment of a fine or sum of money;*
>
> *(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;*
>
> *(c) on a habitual offender under Part III;*
>
> *(d) on any person for an offence committed while released on parole; or*

*(e) on any person for an offence committed while released on bail in relation to another offence.*

*(3) .....*

***(4) Every term of imprisonment imposed on a prisoner by a court in respect of a prison offence or an escape offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.***

*(5) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on parole in relation to another sentence of imprisonment imposed on that person must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment which the offender may be required to serve in custody on cancellation of the parole order.*

*(6) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on bail in relation to any other offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.*

37. This provision was discussed by the Fiji Court of Appeal in ***Vukitoga v State*** [2013] FJCA 19; AAU0049.2008 (13 March 2013) which was referred to in ***Dhirendra Nandan v State*** – HAM 162 of 2014. The Court held that a concurrent sentence should be imposed and that if the court intends to impose a consecutive sentence, then the court must give a justifiable reason to do so. In this case, the learned Magistrate imposed a consecutive sentence without giving any reason. Therefore, the Respondent concedes Appellant's argument to be meritorious.

38. In view of section 22(4) of the Sentencing and Penalties Act, the learned Magistrate would have been correct in ordering consecutive sentence even **without giving any reason** if the Appellant was a serving prisoner having an uncompleted prison term at the time of sentence. Since the Appellant was not serving at that time, learned Magistrate was required to give reasons for ordering a consecutive sentence instead of a concurrent sentence.

39. Hence, Section 256 (3) of the Criminal Procedure Act warrants me to exercise powers to quash the order made by the learned Magistrate at paragraph 19 of his sentence Ruling that required Appellant to serve 9 months' consecutive to 16 months' imprisonment imposed in CF 656/16. Accordingly I quash the sentence of 25 months imprisonment and substitute a sentence of 16 months' imprisonment.

40. The Appellant was involved in a night time invasion and the assault was not of fleeting type. Therefore, I do not order a suspended sentence.

Final Order

41. Sentence for Burglary Count is 16 months' imprisonment.

Sentence for Indecent Assault count is 9 months' imprisonment.

Sentence for Escaping from Lawful Custody count is 9 months imprisonment.

All sentences to be served concurrently.

Accordingly, The Appellant is sentenced to 16 months' imprisonment from the date of his original sentence (3rd October, 2016). The Registry is directed to issue a fresh committal warrant to the Correction Service forthwith.

HIGH COURT OF FIJI
LAUTOKA

Aruna Aluthge

Judge

At Lautoka

02nd May, 2017

Solicitors: Appellant in Person

Office of the Director of Public Prosecution for Respondent