IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 27 of 2017

BETWEEN : **ALIFERETI TURAGABECI**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. V. Diroiroi for the Appellant.
: Mr. A. Singh for the Respondent.

Date of Hearing : 5 May, 2017
Date of Judgment : 12 May, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court with one count of Burglary contrary to section 312 (1) of the Crimes Act and two counts of Theft contrary to section 291 (1) of the Crimes Act.

[2] It was alleged that the Appellant on the 12th day of August, 2016 at Nadi entered into Room 103, Palm Hotel, Denarau as a trespasser with intent to commit theft and dishonestly appropriated $3,000.00 (AUS) the

property of Corilaax Barnings and $7,000.00 the property of Sophia Hazeleman.

[3] On 21 October, 2016 the Appellant elected to be tried by the Magistrate's Court in respect of the first count and also pleaded guilty to all the charges after it was understood by the Appellant.

[4] Thereafter the Appellant was read the summary of facts which was understood and admitted by him.

SUMMARY OF FACTS

[5] The summary of facts admitted by the Appellant was as follows:

"On the 12th day of August, 2016 at about 0416hrs at the Palm Hotel, Denarau Alifereti Turagabeci (B-1) 25 yrs of Field 40, Lautoka entered into Room 103 and stole cash of $3,000.00 (AUS) property of Corilaax Barnings (A-1), 74 yrs retired of Queensland, Australia and $7,000.00 (FJ) property of Sophia Hazeleman (A-2), 78 yrs retired of Nasoso, Nadi.

Briefly on the abovementioned date, time and place (B-1) after drinking liquor at Room 202 came down and entered into Room 103 [where] (A-1) and (A-2) [were] sleeping. (B-1) opened the front door walked towards the sitting room and into the sleeping Room and saw (A-1)'s hand bag. (B-1) opened the hand bag and took out cash. (B-1) walked to the other room [where] (A-2) was sleeping and saw the hand bag beside her. (B-1) took the hand bag to the sitting room and took out cash and later left out again from Room 103.

(B-1) walked towards Denarau road and [stopped] a Taxi reg. No: LH858 driven by Rajiv Chandra (A-3) 30 yrs of Waqadra, Nadi and dropped him at ICE BAR Night Club, Martintar.

The matter was reported at Nadi Police Station whereby (B-1) was arrested from WHITE HOUSE Night Club, Martintar, Nadi and escorted to Nadi Police Station as he was heavily smelt of liquor and staggering to his feet. At Nadi Police Station (B-1) was been searched and he was found in possession of cash.

Recovery

5 x $100.00 (AUS)

19 x $50.00 (AUS)

On 12/08/16 at about 1630pm (B-1) was interview and admitted entering into Room 103 and stealing cash. (B-1) also stated that he was buying plenty liquor inside the Night Club using Fiji Dollars as in Q and A from 59 to 60. (B-1) was charged for the offence of Burglary and Theft. (B-1) is in Custody for Court."

[6] Upon being satisfied that the Appellant had entered an unequivocal plea the learned Magistrate convicted the Appellant.

[7] After hearing mitigation on 23rd January, 2017 the Appellant was sentenced as follows:-

(a) Burglary (First count) - 18 months imprisonment with a non-parole period of 12 months;

(b) Theft (Second count) - 12 months imprisonment;

(c) Theft (Third count) - 12 months imprisonment.

All counts were to be served concurrently, this means the Appellant will serve 18 months imprisonment with a non-parole period of 12 months.

[8] The Appellant filed a timely appeal in person which has been relied upon by the Legal Aid Counsel who appears for the Appellant.

[9] Both counsel have filed helpful written submissions and also made oral submissions in support for which the court is grateful.

[10] The Appellant appeals against his sentence upon the following grounds:-

"1. The learned Magistrate had erred in law in that he allowed extraneous or irrelevant matters to guide him in his sentencing.

2. The learned sentencing Magistrate erred in law when he mistook the facts.

3. The learned sentencing Magistrate had erred when he failed to take into account some relevant consideration.

4. The learned Magistrate failed to give regard to other option on the provision of the Sentencing and Penalties [Act] subject to section 4 (2) (k) of Sentencing and Penalties [Act]."

[11] The counsel for the Appellant abandoned ground four of the appeal at the hearing.

LAW

[12] In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

[13] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

> *""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."*

[14] The maximum sentence for Burglary under the Crimes Act is 13 years imprisonment and the maximum sentence for Theft under the Crimes Act is 10 years imprisonment.

[15] For the offence of Burglary the accepted tariff is between 18 months to 36 months imprisonment *(Sefanaia Mosi vs. The State, Criminal Appeal no. 138 of 2012 (1 October 2012).*

[16] For the offence of Theft the tariff is settled. In *Mikaele Ratusili vs. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for Theft as follows:

> *"(i) For the 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."*

GROUNDS OF APPEAL

GROUNDS ONE AND TWO

[17] The learned counsel for the Appellant argued grounds one and two together. The grounds are:-

"The learned Magistrate had erred in law in that he allowed extraneous or irrelevant matters to guide him in his sentencing."

"The learned sentencing Magistrate erred in law when he mistook the facts."

[18] The learned counsel for the Appellant submitted that the learned Magistrate erred when he took extraneous or irrelevant matters to guide him and also mistook the facts at paragraph 14 of the sentence.

[19] At paragraph 14 the learned Magistrate stated the following:-
*"The aggravating factors are **firstly**, there is significant degree of loss to the victim as only few items were recovered. **Secondly,** there is significant degree of planning as you deliberately targeted them while they were sleeping. **Thirdly,** there is a breach of fiduciary duty towards the guests as being the employee of the same hotel. I add 01 year to the sentence for burglary and 01 year for each count of theft. The interim total is 03 years for the burglary and 02 years for the theft."*

[20] Counsel argues that the offences committed were opportunistic since the door of the victims room was open (question and answer 48 of the Appellant's caution interview) therefore it was incorrect of the learned Magistrate to state that there was a significant degree of planning involved.

[21] Counsel further argues that the Appellant was not an employee of the Hotel where the offences were committed so there was no fiduciary duty owed by the Appellant towards the victims (see question and answer 22 of the Appellant's caution interview). The Appellant went to Palm Hotel

after he was invited by some guests in room 202 for a drink with them (see questions and answers 29 to 37 of the Appellant's caution interview).

[22] Counsel finally submits that due to the above errors the learned Magistrate added 1 year each for the offences of Burglary and Theft.

[23] I agree that the learned Magistrate had fallen in error when he mistook the facts and also took into consideration extraneous or irrelevant matters. I also disregard the minimal recovery of items stolen by the Appellant as an aggravating factor.

[24] This court cannot, however, ignore the following aggravating factors such as:

(a) The place of offending was a Hotel;
(b) Both the victims were tourists one a foreigner and the other a local;
(c) Both were sleeping;
(d) The offences were committed by the Appellant during the early hours of the morning;
(e) The amount of money stolen was substantial.

[25] The aggravating factors that I have identified justify the increase in sentence by one year for the offence of Burglary and Theft and in this regard I do not see any reason why this court should intervene.

[26] This ground of appeal is dismissed.

GROUND THREE

"The learned sentencing Magistrate had erred when he failed to take into account some relevant consideration.

[27] The counsel for the Appellant submits that the learned Magistrate did not consider the Appellant's early guilty plea separately from the other mitigating factors.

[28] The Court of Appeal in *Mitieli Naikelekelevesi vs. The State, Criminal Appeal No. AAU 0061 of 2007 (27 June, 2008)* stated that where there was a guilty plea this should be discounted for separately from the mitigating factors in a case.

[29] The Court of Appeal in *Poate Rainima vs. State, Criminal Appeal No. AAU 0022 of 2012 (27 February, 2015)* held that an early guilty plea should receive a discount of one third at paragraph 46 in the following words:-
"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."

[30] Although the learned Magistrate as a matter of principle did not separately show the discount given for early guilty plea from the mitigating factors, however, the cumulative effect is that the Appellant received a substantial reduction of 50% which in my view includes one third discount for early guilty plea. The task of a sentencing court is not

to add and subtract from an objectively determined starting point but to balance the various factors and make a value judgment as to what is appropriate sentence in all the circumstances of the case.

[31] The counsel for the Appellant also submits that the Appellant should have received a suspended sentence as opposed to a custodial sentence considering the fact that the Appellant had pleaded guilty at the earliest, was a first offender, had cooperated with police, a young offender of 27 years of age with a young family. Furthermore counsel submits that at paragraph 19 of the sentence when deciding whether to suspend the final sentence or not the learned Magistrate erroneously took into account pre-planning as a reason not to suspend the sentence.

[32] The final sentence arrived at by the learned Magistrate was 18 months imprisonment for Burglary and 12 months imprisonment for each count of Theft. All sentences were to be served concurrently. Since the sentences were below 2 years the learned Magistrate properly directed his mind to section 26 of the Sentencing and Penalties Act.

[33] The learned Magistrate also took into account section 15 (3) of the Sentencing and Penalties Act that sentences of imprisonment should be regarded as a sanction of last resort.

[34] The learned Magistrate did consider the test whether the punishment fits the crime committed by the offender. In this regard the learned Magistrate took into consideration guidance offered by Goundar J. in *Balaggan vs. State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20:-

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

[35] At paragraph 19 of the sentence the learned Magistrate gives his reasons for not suspending the sentence he had arrived at as follows:-

"You are the first offender. This is the strong mitigating factor on your part. However the offence committed by you is very serious and there is high culpability arising through the pre planning in this case. You invaded the room of the complainants when they were sleeping. There is a greater harm caused to the complainant as only few amount of money is recovered. This offence has serious [effect] on the community as it endangers to the property rights of the people. The tourists whether local or foreign come to the resorts and hotels for the recreation and leisure from the busy life they spent before they come and stealing their properties will definitely have devastating repercussions on them. Thus the civilized community will not tolerate this type of felony. On the other hand this type of offence, if allowed, will have very serious impacts on the tourism industry and in return on the foreign exchange of the country. For these reasons, I decide that a strong message should go that, the courts and community have zero tolerance for this felony. Therefore, the purpose of

sentencing in this case, in my opinion, are the punishment, deterrence both general and specific and denunciation of offence."

[36] I agree with counsel for the Appellant that the learned Magistrate should not have taken pre-planning as part of his reasons when considering whether or not to suspend the sentence arrived at. However, when the circumstances of the offending are taken into account no substantial miscarriage of justice has actually occurred by the error.

[37] People who commit offences which have an impact on the Tourism Industry should expect no mercy from the Courts. Although this was an opportunistic reaction by the Appellant the circumstances of the offending is very serious.

[38] The Appellant is lucky that he has been punished with a lenient sentence at the lower end of the tariff. The victims who were at a local Hotel did not deserve to lose a substantial amount of their money. The consequences of such a loss can have a detrimental impact on one's holiday and it also gives a bad name to the Tourism Industry. The learned Magistrate was correct in not suspending the sentence. The sentence is a deterrent to others signifying that the Court and the community denounces the commission of such offences. Being on the lower scale of the tariff the sentence in my view will assist the Appellant in rehabilitation as well.

[39] As for the two counts of Theft the sentence was within the range as well.

[40] This ground of appeal is also dismissed.

ORDERS

1. The appeal against sentence is dismissed.

2. The sentence of the Magistrate's Court is affirmed.

3. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
12 May, 2017

Solicitors

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.