IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 86 OF 2017

BETWEEN : **SETAREKI NAQICA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. V. Narara [LAC] for the Appellant.
: Ms. R. Uce for the Respondent.

Date of Hearing : 16 February, 2018
Date of Judgment : 21 February, 2018

JUDGMENT

BACKGROUND INFORMATION

1. The Appellant was charged with one count of Burglary contrary to section 312 (1) of the Crimes Act and one count of Theft contrary to section 291 of the Crimes Act.

2. For count one it was alleged that the Appellant between the 29th day of April, 2017 and the 30th day of April, 2017 at Vatukoula Gold Mine,

Vatukoula entered into the Cooperate Services Office of Vatukoula Gold Mine as a trespasser with intent to commit theft of a particular item of property in the building.

3. For count two it was alleged that the Appellant between the 29th day of April, 2017 and the 30th day of April, 2017 at Vatukoula Gold Mine, stole 1 green Dell branded laptop valued at $5020.00, 1 Grey Dell branded laptop valued at $2102.00, 2 USB valued at $50.00, 1 pocket WIFI valued at $99.00, 2 pair uniform valued at $70.00, 1 portable mouse valued at $65.00 and 1 gross Chinese cigarettes valued at $65.00 to the total value of $7417.00 the property of Tommy Zeng.

4. The Appellant pleaded guilty to both counts after he elected to be tried by the Magistrate's Court.

SUMMARY OF FACTS

5. The following summary of facts was admitted by the Appellant:

"One Setareki Naqica (Accused), 23 yrs, unemployed, of Nasivi Vatukoula, broke into the V.G.M.L Cooperate Services Office at Power house and stole 1 green Dell branded laptop valued at $5020.00, 1 Grey Dell branded laptop valued at $2102.00, 2 USB valued at $50.00, 1 pocket W.I.F.I valued at $99.00, 2 pair Uniform valued at $70.00, 1 portable mouse valued at $65.00 and 1 gross Sequaio Cigarettes valued at $65.00 to the total value of $7417.00 the property of Tommy Zeng (PW-1), 25 yrs, Chinese National, 25 yrs, HFO Project Manager of Vatukoula Gold Mine between 29/04/17 to 30/04/17 from 1800hrs to 0600hrs.

At about 0645hrs on 30/04/17 the complainant (PW-1), went to work where he noticed that the padlock of his office was broken and upon

checking he found 1 green Dell branded laptop, 1 Grey Dell branded laptop, 2 USB, 1 pocket W.I.F.I, 2 pair Uniform, 1 portable mouse and 1 gross Sequaio Cigarettes missing. Also a steel hammer was found at the scene. Then the [PW-1] reported the matter at Vatukoula Police Station. Upon receiving some information from one Senitiki Vueti Jnr [PW-2], 22 yrs, Handyman V.G.M.L of Nabelavu, Tavua, that he was approached by [Accused] to assist him in breaking of Cooperate Service office at Power house and to steal the laptop. Upon that information (accused) dwelling house were searched in which the said items to be stolen were found.

The (accused) was then arrested, interviewed under caution where he admitted of breaking into the V.G.M.L Cooperate Services Office and stealing the following items. He was then charged for Count 1: ***BURGLARY:*** *Contrary to Section 312(1) of Crimes Act No. 44 of 2009. Count 2:* ***THEFT:*** *Contrary to Section 291 of the Crimes Act No. 44 of 2009. Accused to be produced in custody at Tavua Magistrates Court on 02/05/17 at 9am.*

That is the case for Prosecutions."

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

7. After hearing mitigation the Appellant was sentenced on 11th July, 2017 as follows:

   (a) Count one - 21 months imprisonment;

   (b) Count two - 10 months imprisonment;

   (c) Sentences on both counts to be served concurrently.

   (d) Final sentence – 21 months imprisonment with a non-parole period of 15 months.

8. The Appellant being dissatisfied with the sentence filed a timely appeal which was later amended by the legal aid counsel who now appears for the Appellant. The amended grounds of appeal are as follows:

"1. The learned Trial Magistrate erred in law and in fact when he failed to give 1/3 discount for the Appellant's guilty plea on the first available opportunity.

2. The learned Magistrate erred in law when he failed to consider the time spent in remand."

9. Both counsel filed written submissions and also made oral submissions during the hearing for which the court is grateful.

10. During the hearing, counsel for the Appellant informed the court that this appeal will be against the sentence of Burglary only.

LAW

11. 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."

GROUND ONE

"The learned Trial Magistrate erred in law and in fact when he failed to give 1/3 discount for the Appellant's guilty plea on the first available opportunity."

12. The Appellant submits that since he had pleaded guilty at the first available opportunity he should have received full one third discount for his guilty plea. The discount of 6 months given to him for early guilty plea was not sufficient

13. In *Poate Rainima vs. State, Criminal Appeal No. AAU 0022 of 2012* (27 February, 2015) the Court of Appeal at paragraph 46 stated that for an early guilty plea a one third discount is to be allowed during sentencing:-

> *"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".*

14. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties

Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:

"(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes."

15. Section 4(2)(f) and (g) of the Sentencing and Penalties Act states that the Sentencing Court must have regard to whether the offender pleaded guilty to the offence, the stage of the proceedings when the offender pleaded guilty and whether the offender's conduct was an indication of remorse or lack of remorse.

16. In paragraph 12 of the sentence the learned Magistrate stated:

"... the court have considered the value of the stolen items and your culpability and will take a starting point of 24 months imprisonment and will add 8 months for the aggravating factors to the total of 32 months imprisonment. I will reduce your sentence by 6 months for your early guilty plea, 4 months for mitigation ... and 1 month for your unblemished record and left with 21 months imprisonment."

17. This court accepts that a discount for early guilty plea was given to the Appellant, however, the question before this court sitting in its appellate

jurisdiction is whether the failure by the learned Magistrate to allow a full one third discount for the early guilty plea has been due to an error in the exercise of sentencing discretion resulting in a substantial miscarriage of justice to the Appellant.

18. The maximum punishment for the offence of Burglary under the Crimes Act is 13 years imprisonment. The accepted tariff for the offence of Burglary at the time of sentence was between 18 months and 36 months imprisonment *(see Sefanaia Mosi vs. The State, Criminal Appeal No. HAA 138 of 2012 (1 October, 2012).*

19. In this case the Appellant had forcefully entered an office which was very well planned. The learned Magistrate had correctly allowed a reduction for early guilty plea (although not one third) the sentence was a correct reflection of the criminality involved. It was open to the learned Magistrate what weight he gave to the early guilty plea *(see Viliame Daunabuna vs. The State, Criminal Appeal no. AAU 120 of 2007).*

20. The above proposition was further strengthened by the Court of Appeal in *Alfaz Khan vs. The State, Criminal Appeal no. AAU 105 of 2011 (2 June, 2014)* where it was observed at paragraph 9 that the Sentencing and Penalties Act had left it to the decision of the Sentencing Court to give an appropriate weight to a guilty plea when sentencing an offender.

21. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 had stated that an Appellate Court does not use the same methodology of sentencing as the Sentencing Court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by

determining the facts the sentence was unreasonable or unjust in the following words:

"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."

22. In view of the above, there is no error made by the learned Magistrate in the exercise of his discretion or any substantial miscarriage of justice has been caused to the Appellant when the learned Magistrate did not allow a full discount of one third for the early guilty plea. The final sentence was within the accepted tariff.

23. A sentence is not based on a mathematical calculation 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 the appropriate sentence in all the circumstances of the case.

24. The learned Magistrate in this case had complied with the purposes of sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2) (b) and (f) of the Sentencing and Penalties Act.

25. This ground of appeal fails.

GROUND TWO

The learned Magistrate erred in law when he failed to consider the time spent in remand.

26. The Appellant submits that he was remanded from 27th June, 2017 to 11th July 2017 for 14 days and no reduction was given for the remand period in the sentence.

27. Section 24 of the Sentencing and Penalties Act states that any period of time during which an offender was held in custody be regarded as a period of imprisonment already served.

28. This court agrees that there was no reduction given for the remand period by the learned Magistrate which is an entitlement accrued to the Appellant as a period of imprisonment already served.

29. This ground of appeal is allowed. In the interest of justice this court exercises its powers under section 256 (2) of the Criminal Procedure Act to vary the sentence of the Appellant to the extent that the sentence is reduced by 14 days.

ORDERS

1. The appeal against sentence is allowed.

2. The Appellant is sentenced to 20 months and 14 days imprisonment with a non-parole period of 14 months to be served before the Appellant is eligible for parole with effect from 11th July, 2017.

3. The sentence of Theft remains unchanged and is to be served concurrently with the above sentence.

4. 30 days to appeal to the Court of Appeal.

HIGH COURT OF FIJI LAUTOKA

Sunil Sharma
Judge

At Lautoka
21st February, 2018

Solicitors
Office of the Legal Aid Commission, Lautoka for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.