

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 27 of 2018**  
**(on appeal from Lautoka CC724.18)**

**SERU ARIVAKISATI**

Appellant

**v**

**STATE**

Respondent

**Ms Narara** (L.A.C.) for the Appellant

**Mr Singh** for the Respondent

**Date of Hearing** : 4 December 2018

**Date of Judgment** : 11 December 2018

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**JUDGMENT**

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- 1.] On the 7<sup>th</sup> December 2017 in the Magistrates Court at Lautoka, the accused was convicted of one count of burglary contrary to section 312(1) of the Crimes Act 2009 and one count of theft contrary to section 291(1) of that Act.
- 2.] He was sentenced on the 5<sup>th</sup> January 2018 to 15 months imprisonment on the first count with 9 months imprisonment to be served concurrently on the second count. The 15 month total

sentence was ordered to be served consecutively to sentences he was currently serving.

- 3.] The appellant appeals his sentence on the sole ground that the Magistrate fell into error by making the sentences for this matter consecutive to any other sentences he was serving.
- 4.] Leave to appeal out of time was granted by Sharma J. on 2 July 2018.
- 5.] Consecutive as opposed to concurrent sentences being the only issue to determine, the facts of this case are irrelevant.
- 6.] Section 22 of the Sentencing and Penalties Decree provides:

*“s22(1) Subject to subsection (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) Subsection (1) does not apply to a term of imprisonment imposed-*

*(a) (irrelevant)*

*(b) (irrelevant)*

*(c) on a habitual offender under Part 3*

*(d) (irrelevant)*

*(e) (irrelevant)”*

- 7.] The law therefore is that a subsequent sentence must be made concurrent to a sentence being served unless otherwise directed by the Court.

- 8.] In this case the learned Magistrate made no reference to the issue and gave no reason why he was making the sentence consecutive. The Court of Appeal in discussing this section in Vukitoga AAU 49 .2008 (13 March 2013) said:

*“A Court must now when the “default” position is concurrency make a reasoned justification to depart from the “default” position in making sentences consecutive or partly consecutive”*

- 9.] It is clear that the learned Magistrate did not do this and for that reason the appeal would succeed.

**10.] HOWEVER**

In the course of this appeal, the Court has had cause to review the previous criminal records and pending matters relating to this appellant.

- 11.] Although the trial Court below had a criminal record showing 3 previous convictions for similar offences in the name of “Arivaikisati” this court has seen another list of previous convictions in the same name. That list contains 18 previous convictions 16 for theft or burglary and one for a breach of suspended sentence. In addition there are now two other appeals from this appellant before me for hearing and judgment for like offences.
- 12.] Pursuant to section 11 of the Sentencing and Penalties Decree 2009 therefore, I am satisfied that the appellant is a threat to the community and having regard to his previous convictions for offences of a like nature I declare him to be a **Habitual Offender.**

13.] In the light of that declaration, I would set aside the erroneous sentence passed below and pursuant to section 256 of the Criminal Procedure Act 2009 and I would order that the consecutive sentence passed below be reinstated as valid in accordance with section 22(2)(c) of the Sentencing and Penalties Act 2009.

14.] To that extent, the appeal against sentence is dismissed.



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**P.K. Madigan**

**Judge**

**High Court Lautoka**