

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA02 OF 2018

(Magistrates' Court Case No. 316 of 2015)

BETWEEN: **MOSESE CAGILABA**

APPELLANT

AND: **THE STATE**

RESPONDENT

Counsel: **Appellant in Person**
 Mr R Kumar for the Respondent

Date of Hearing: **23 February 2018**

Date of Judgment: **02 March 2018**

JUDGMENT

- [1] This is an application to re-instate an appeal that the appellant had earlier abandoned.
- [2] On 7 November 2015, the appellant was arrested on an allegation of burglary. On 9 November 2015, the appellant was charged with burglary and theft and produced in the Magistrates' Court at Savusavu. The appellant was remanded in custody and the case was adjourned to 19 November 2015. On 19 November 2015, the appellant elected to be tried in the Magistrates' Court. He was released on bail. The case was adjourned to 12 January 2016.

- [3] On 12 January 2016, the appellant waived his right to counsel and pleaded guilty to the charges. He admitted the facts that he entered the dwelling house of the victim and stole items to a total value of \$8,110.00. \$3,900 worth of items were recovered upon arrest.
- [4] In mitigation, the appellant said he was 33 years old, married and unemployed. He had previous convictions but had not re-offended for the last 7 years. The sentencing was adjourned to 13 April 2016 and the appellant's bail was extended.
- [5] On 13 April 2016, the appellant did not appear in court for sentencing. A bench warrant was issued for his arrest and the sentencing was postponed.
- [6] On 24 December 2016, the appellant was arrested. He remained in custody until 3 March 2017, when he was sentenced to a total term of 17 months and 20 days imprisonment with a non-parole period of 10 months.
- [7] The appellant's only complaint is that the learned Magistrate had miscalculated his remand period when giving him a discount in the sentence.
- [8] In sentencing the appellant, the learned Magistrate gave him a discount of 10 days to reflect the remand period. Counsel for the State concedes that the appellant had been in custody on remand for about 81 days before he was sentenced.
- [9] The appellant was remanded in custody from 7 November 2015 to 19 November 2015 and 24 December 2016 to 2 March 2017. The remand period is about 2 months and 3 weeks.
- [10] Section 24 of the Sentencing and Penalties Act 2009 requires the court to take into account any period that the accused had spent in custody while on remand. While the courts are obliged to consider the time spent in custody while on remand, no precise formula is required to discount the remand period (*Maya v State* unreported Cr App No. AAU0085 of 2013; 14 September 2017 at [13]).

- [11] In the present case, the appellant's remand period was taken into account by the sentencing court. The complaint is that the actual period the appellant had spent in custody while on remand was not discounted.
- [12] After the sentence was pronounced on 3 March 2017, the appellant filed an appeal against sentence on 12 May 2017. The handwritten Notice of Appeal is dated 27 April 2017. But by the time the Department of Corrections forwarded that Notice to court registry, the appeal was out of time by about one month.
- [13] On 20 July 2017, the case was called in the High Court for hearing. The appellant appeared in person and the following exchanges took place between the appellant and the judge according to the audio recordings:

Criminal Appeal No. 10 of 2017

Between: Mosese Cagilaba and State

Judge : *Thank you*

Mr. Kumar : May I please record counsel Kumar initial R for the Respondent in this matter my Lord.

Judge : *Right, thank you.*

Mr. Cagilaba is anyone appearing for you.

Appellant : In person my Lord.

Judge : *In Person - What is his appeal about? Has he got a copy of the court record?*

Mr. Kumar : Yes my Lord both parties received – were provided with the copies and the last two pages...

Judge : *The submissions been received.*

Mr. Kumar : No my Lord, today was for Mr. Cagilaba's submissions. On the last two pages uh Respondent object to leave being allowed my Lord and leave was granted.

Judge : *And he was sentenced to how long.*

Mr. Kumar : My Lord, he was sentenced for Burglary – 17 months and 20 days and Theft – 8 months imprisonment non-parole period of 10 months, my Lord.

Judge : *Mr. Cagilaba, appeal – it's my duty to advise you, right. An appeal is a - it's like a gamble you making a gamble.*

1. *That's favourable to you is the conviction overturn alternatively the sentence reduced that is with the one upstairs listens to your prayers the other option is this, with the one upstairs doesn't listen to your prayers your sentence could be increased, right. So when you appeal a judgment from the Magistrate Court you really taking a risk. I'm sure you've gone to a hibiscus festival where this gambling, appeal is a bit like that you are gambling. A result that's favourable to you, a result that is not favourable to you. So I'm obliged to advise you of that because I don't want people who appeal to have the mistaken belief that just because you appeal your sentence may be reduced. Should be like when you appealing it should be like you kicking a rugby ball. Sometimes when you kick it will lands go sideways or it goes up, right. Do you understand what I'm talking about?*

Appellant : Yes, my Lord.

Judge : *Okay- My advice to you is not meant to threaten you, is meant to put you in a proper perspective of the process of appeal.*

Okay, you want to continue or you do not want to continue.

Appellant : My Lord the very reason why I would like to appeal is because the 2 months in my remand was not being considered.

Judge : *That will all be taken into account. It can re-considered, it also if I look at the facts I haven't look at it yet, right. Once I open the file and look at it, if I think the Magistrate is too lenient on you I can increase the sentence, right. If I see the Magistrate is too hard on you I can decrease the sentence, right. Uh you see in Fiji, in Suva particularly the business of breaking to houses very common. A lot of people in Fiji now is not only in Vanua Levu is also very prevalent in Suva*

where I sit. The breaking of houses and stealing is becoming a everyday problem, right. It appears that respect for people property no longer there. Some people are caught some people are not caught. For those who are caught who are brought into the court house must realise. In my court no mercy is given to them if they are found guilty because I believe that if you want property you got to work for it, work hard, sweat, earn your life the honest way, right. Vanua Levu is very rich in soil. Just hearing now some youths somewhere in Vanua Levu planting yaqona reaping the benefit. Here I come to court every day I see the opposite side of the story. A lot of people steal easy way of living.

Now up to you, prosecutor were any of these property recovered.

Mr. Kumar : My Lord there were a recovery of \$3,900 was approximately...

Judge : \$3,000?

Mr. Kumar : \$3,900 my Lord.

Judge : *And the sentencing principle applied by the learned Magistrate is correct.*

Mr. Kumar : My Lord we do have some points to concede to Mr Cagilaba's appeal.

Judge : *Right*

Mr. Kumar : The aggravating factors point my Lord, uh on page 2 of the sentence.

Judge : *Okay, uh okay Mr Cagilaba no need for papers to be filed. Obviously you want to proceed with your appeal. You're given 17 months, is it?*

Appellant : Yes my Lord.

Judge : *You want to appeal.*

Appellant : Withdraw

Judge : *You want to withdraw.*

Appellant : Yes my Lord.

Judge : *You know the consequences of your withdrawal that you cannot re-open this matter.*

Appellant : *Yes*

Judge : *Right – Appellant you doing so voluntarily and out of your own free will.*

Appellant : *Yes my Lord.*

Judge : *So I have recorded you, you'd like to withdraw your appeal after you listening to the High Court's advice, correct?*

Appellant : *Yes, my Lord.*

Judge : *You are doing so out of your own free will.*

Appellant : *Yes my Lord.*

Judge : *And no one force you to do so.*

Appellant : *Yes my Lord*

Judge : *Right, you understand you will not be able to re-open your case.*

Appellant : *Yes my Lord.*

Judge : *Right, thank you.*

Respondent you have any objection?

Mr. Kumar : *I don't have any objection my Lord.*

Judge : *No objection*

Leave is granted to the appellant to withdraw his appeal.

Right, case dismissed. You have done the right decision Mr Cagilaba, right- thank you.

Stand down

Next case

[14] It is clear that the appellant made the decision to withdraw his appeal after the learned judge advised him of the possibility of his sentence being enhanced on appeal. The

advice was unfortunate as the appellant had a legitimate complaint regarding incorrect discounting of his remand period.

[15] But the hurdle now is the jurisdiction to re-open an appeal that was dismissed after the appeal was withdrawn. After the learned judge gave the appellant leave to withdraw his appeal, he dismissed the appeal. Once the appeal is dismissed, there is no jurisdiction to re-open the appeal (*Masirewa v State* [2010] FJSC 5; CAV0014.2008S (17 August 2010)). For these reasons, the present application is dismissed for want of jurisdiction.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions for the Respondent