IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 110 OF 2017

BETWEEN: **ARE WAITUI**

Appellant

A N D: **STATE**

Respondent

Counsel: Appellant In Person
Ms. Latu for Respondent

Hearing: 04th January 2018

Judgment: 23rd January 2018

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrate's Court in Rakiraki for 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. The Appellant had pleaded guilty for all of these three counts on the 19th of July 2017, when he was first produced in the Magistrate's Court. The learned Magistrate has then convicted and sentenced the Appellant for a period of twenty one (21) months of imprisonment for the offence of Burglary and ten (10) months of imprisonment for each counts of Theft on the 26th of July 2017. The learned Magistrate has further ordered that all of these three sentences to be served concurrently, with a non-parole period of fifteen (15) months. Aggrieved with the said sentence, the Appellant appeal to this court on the following grounds, *inter alia;*

i) *That the sentencing Magistrate failed and did not consider that the complainant of this matter had already been reconciled, and withdrawn the matter,*

ii) *That the sentencing Magistrate failed and did not carry weight in considering the mitigating factors,*

iii) *That the sentencing Magistrate failed and did not carry weight in considering the one- third deduction of my early plea,*

iv) *That the sentence is harsh and excessive,*

v) *That the sentencing Magistrate failed and did not carry weight in considering that all items has been recovered.*

Ground I

2. The first ground is founded on the contention that the learned Magistrate in his sentence has failed to consider the fact that the complainant has already reconciled with the Appellant and had withdrawn the complaint.

3. According to the record of the proceedings in the Magistrate's Court, I do not find any record that could suggest that there was an application made before the learned Magistrate, informing that the complainant had already been reconciled with the Appellant. Moreover, none of these three offences fall within the scope of the Section 154 of the Criminal Procedure Act, where the court is given a discretionary power to promote reconciliation for an offences of common assault, assault occasioning actual bodily harm, criminal trespass or damaging property.

4. In view of these reasons, I do not find any merits in this ground of appeal.

Ground II & V

5. The Appellant contends that the learned Magistrate has not properly taken into consideration the mitigating factors in his favour. Moreover, the Appellant argues that the learned Magistrate has failed to give a discount appropriately for the recovery of the stolen items.

6. Accordingly, to the paragraphs 5 and 6 of the Sentence, the learned Magistrate has taken into consideration about the personal and family background of the Appellant and other mitigating grounds as follows, that:

   i) You are a first offender and you have offer a plea in mitigation. You are 34 years of age, married with 2 children. You are the sole breadwinner for your family, working for the complainant and earring $60 per week.

   ii) The mitigating factors in this case are your early guilty plea and have saved court's time and resources. This is indication of remorse on your part. You seeking court's mercy and forgiveness for the suffering you have caused to the complainant.

7. Having considered the above factors, the learned Magistrate in paragraph 12 of the sentence, has given 4 months for the mitigation and recovery of the stolen items for the burglary. Likewise, the learned Magistrate has given 3 months discount for the mitigating factors for the two counts of theft.

8. In view of these reasons, I find the learned Magistrate has appropriately taken into consideration the mitigating factors including the recovery of the stolen items in his sentence. Therefore, I do not find any merits in ground II and V of this appeal.

Ground III & IV

9. For the convenience, I consider ground III and IV together, as both of them are founded on the contention that the sentence is harsh and excessive.

10. Section 4 (2) (f) of the Sentencing and Penalties Act states that the sentencing court has to take into consideration the plea of guilty and the stage of proceedings at which the accused pleaded guilty in sentencing, where it states that:

    "whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;"

11. According to the record of the proceedings in the Magistrate's Court, the Appellant had pleaded guilty for these three offences on the first available opportunity. Accordingly, he is entitled to a substantive discount for his plea of guilty as it reflects his remorse and acceptance of his criminal responsibility. It has been a practice in sentencing courts, to give a substantive discount, sometimes closer to 1/3 of the interim sentencing period for the early plea of guilt. It is always appropriate to consider the early plea of guilty separately from other mitigating factors, though there is no such strict rule or directions. However, such a practice provides a clarity in sentencing.

12. In this case, having reached to a period of thirty two (32) months of interim imprisonment, the learned Magistrate has given six (6) months discount for the early plea of guilty. In respect of the two counts of theft, the learned Magistrate has given four (4) months of discount after reaching to eighteen (18) months of interim imprisonment period.

13. Justice Madigan in **Soko v State [2011] FJHC 777; HAA031.2011 (29 November 2011)** found that a discount of six (6) months for early plea of guilty, when the interim term was thirty six (36) months is not sufficient. His Lordship held that:

> *"The Magistrate has not said as much but he did allow 6 months for mitigation which he claimed to be a plea of guilty and his remorse. Six months for a very early plea of guilty is not enough discount on the interim sentence the Magistrate had arrived at (that is 36 months). Twelve months would have been far more appropriate. Pleas at first opportunity are very valuable to the administration of justice – Court time is saved, witnesses are spared and the case is disposed of immediately. Very early pleas should attract a discount of one third and later pleas discounts of proportionately less."*

14. In view of these reasons, I find six (6) months and four (4) months discounts given for the early plea of guilty at the first available opportunity is not a substantive discount that the Appellant is entitled. Accordingly, I find this ground of appeal has merits and succeed.

15. Be that as it may, I now draw my attention to consider whether the sentence imposed by the learned Magistrate is manifestly harsh and excessive.

16. The learned Magistrate has correctly identified the respective maximum sentences for the burglary and theft in paragraph eight (8) of the sentence. In order to determine the applicable tariff for burglary, the learned Magistrate has relied on **State v Tabeusi (2010) FJHC 426; HAC095-113.2010L (16 September 2010)** and **State v Vinakasigaduwa (2011) FJHC 77. HAC156.2010 (18 February 2011).** Having considered these two judicial precedents, the learned Magistrate has concluded that the tariff for burglary and theft is between 1 to 4 years imprisonment. ***(vide; para 9 and 10 of the sentence).***

17. In **Vinakasigaduwa (supra),** the court has considered the tariff for "aggravated burglary" contrary to Section 313 (1) of the Crimes Act, and not for burglary under Section 312 of the Crimes Act. In doing that, Justice Nawana in **Vinakasigaduwa (supra)** has discussed the tariff applied for Burglary as defined under the old regime of Penal Code. Therefore, the judicial precedent set out in **Vinakasigaduwa (supra)** has no relevancy in determining the tariff for the offences of burglary and theft.

18. The offence of Burglary that had been stipulated under the repealed Penal Code carried a maximum penalty of life imprisonment. However, the new regime under the Crimes Act, has established the offence of Burglary in two phases. Section 312 of the Crimes Act has established the offence of Burglary, that carries a maximum penalty of thirteen (13) years imprisonment. The aggravated form of the offence of burglary has been introduced under Section 313 of the Crimes Act. The maximum penalty for Aggravated Burglary is seventeen (17) years imprisonment period.

19. According to the recent sentencing approaches adopted by the courts in this jurisdiction, the appropriate tariff for the offence of burglary under the regime of Crimes Act is between one (1) year to three (3) years. **(Waqavanua v State [2011] FJHC 247; HAA013.2011 (6 May 2011) ,Ratu v State [2018] FJHC 1; HAA95.2017 (5 January 2018).**

20. Justice Madigan in **Ratusili v State [2012] FJHC 1249; HAA011.2012 (1 August 2012)** has discussed the acceptable tariff for theft, where his Lordship held that:

a. *For a first offence of simple theft the sentencing range should be between 2 and 9 months.*
b. *Any subsequent offence should attract a penalty of at least 9 months.*
c. *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.*
d. *Regard should be had to the nature of the relationship between offender and victim.*
e. *Planned thefts will attract greater sentences than opportunistic thefts.*

21. Having considered the value of the stolen items and the level of culpability, the learned Magistrate has selected twenty four (24) months as the starting point for burglary, which is within the tariff limit of one (1) year to three (3) years. He then added eight (8) months for aggravating factors. The Appellant was given six (6) months discount for his early plea of guilty and another four (4) months for other mitigating grounds. The learned Magistrate has given a further discount of one month for the unblemished record of the Appellant. The final sentence of twenty one (21) months imprisonment is within the tariff limit.

22. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

> *"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."

23. In view of the above observation made by the Fiji Court of Appeal in **Sharma (supra)** regarding the suitable approach of the Appellate court in intervening into the sentence imposed by a lower court, I do not think this sentence of twenty one (21) months imprisonment for burglary is manifestly harsh and excessive as it falls within the acceptable tariff limit. Therefore, I find that it is not necessary for this court to intervene into the sentence imposed by the learned Magistrate for the offence of Burglary.

24. The learned Magistrate has selected twelve (12) months as the starting point for theft, which is above the tariff limit as stipulated in **Ratusili (supra).** The learned Magistrate has not given any reason for selecting such a higher starting point in his sentence.

25. Goundar JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his Lordship found that:

"The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

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. Having adjusted the aggravating and mitigating factors, the learned Magistrate has reached to a period of ten (10) months of imprisonment for the offence of theft, which is higher than the tariff limit as set down in **Ratusili (supra)**. Once again the learned Magistrate has failed to provide reasons for reaching such a higher sentence for theft in his sentence.

27. In view of these reasons, I find the sentence imposed for the offence of Theft by the learned Magistrate is not founded on correct sentencing principle and approaches. Therefore, it is my opinion that this court should intervene and set an appropriate sentence for the offence of theft pursuant to Section 256 (3) of the Criminal Procedure Act.

28. I find the learned Magistrate has properly considered the seriousness of the offence, the level of culpability, aggravating and mitigating factors in his sentence. Therefore, I adopt the same reasons in imposing an appropriate sentence for Theft. Having considered the circumstances of the offence, aggravating and mitigating factors, and the early plea of guilty, I find a period of six (6) months imprisonment would adequately appropriate for each count of theft.

29. I accordingly, sentence the Appellant for a period of six (6) months imprisonment for each of the two counts of theft, contrary to Section 291 of the Crimes Act.

30. In conclusion, I allow the ground III & IV of this appeal with following orders, that:

    i) Grounds I, II and V of the appeal are refused and dismissed.
    ii) The sentence of ten (10) months imprisonment for the each count of Theft imposed by the learned Magistrate on the 26th of July 2017 is quashed,

iii) The Appellant is sentenced for a period of six (6) months imprisonment for each of the two counts of Theft, contrary to Section 291 (1) of the Crime Act, with effect from 26th of July 2017.

31. Thirty (30) days to appeal to the Fiji Court of Appeal.

Judgment delivered by Sharma J in Court on 23.01.18

R.D.R.T. Rajasinghe
Judge

At Lautoka
23rd January 2018

Solicitors
Appellant In Person.
Office of the Director of Public Prosecutions for the Respondent.