

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**IN THE WESTERN DIVISION**

**CRIMINAL APPEAL NO. HAA 41 OF 2018**

**BETWEEN : MAIKELI MOCETADRA**

**APPELLANT**

**AND : STATE**

**RESPONDENT**

**Counsel : Appellant in Person**  
**Mr Alvin Singh for Respondent**

**Date of Judgment : 7<sup>th</sup> August 2018**

**JUDGMENT**

1. The Appellant has filed this timely appeal against his sentence. His complainant is that the learned Magistrate failed to consider the remand period of 7 months as part of his sentencing.
2. The Appellant pleaded guilty on his own volition to one count of Burglary and one count of Theft. On 6<sup>th</sup> July, 2018, the Appellant was sentenced to a term of 16 months imprisonment to be served concurrently.
3. The Counsel for Respondent has responded to this application and conceded that the Appellant was in remand for Lautoka Criminal Case No. 1036 of 2017 from 25<sup>th</sup> December, 2017 to 15<sup>th</sup> May, 2018. However he has rejected the claim that the Appellant was in remanded for 7 months.

4. The Court records indicate that the Appellant was a serving prisoner when he appeared on the 15th of May, 2018. The Appellant was remanded roughly for 142 days (5 months) for the present case.
5. The time the Appellant had spent in remand as a serving prisoner cannot be regarded as a period of imprisonment already served for the present offending within the meaning of Section 24 of the Sentencing and Penalties Act 2009. Only the period during which he was remanded in custody by court in connection with proceedings relating to that sentence or the offence for which it was passed should be taken into consideration.
6. The Appellant is only entitled to remand days from the point he was refused bail to the time he became a serving prisoner. Therefore he is entitled to get a reduction of his sentence for the actual period of remand.
7. However there is no exact formula in calculating the remand period and the final sentence would generally depend on the circumstances of each case. The sentencing discretion of the sentencer has not been curtailed by Section 24 of the SPA and, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation.
8. In *Vasuca v State* [2015] FJCA 65; AAU011.2011 (28 May 2015) Gounder JA preferred the approach taken in Basa's case, and it was clearly stated that sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation. The relevant part of the judgment is reproduced below:

*".....Section 24 of the Sentencing and Penalties Decree 2009 requires sentencing courts to regard any pre-trial detention as a period of imprisonment already served by the offender. In this jurisdiction, the practice has been discounting or subtracting the remand period instead of backdating the sentence. There is no exact formula on how the discounting should be made. Some judges incorporate the discounting in the combined quantification for all the mitigating factors while some judges turn to give separate discounting for pre-trial detention. The length of the remand period may vary from case to case, and in each case the discretion lies with the sentencing court to comply with section 24 of the Sentencing and Penalties Decree 2009. In Basa v State (unreported Criminal Appeal No. AAU0024 of 2005; 24 March 20006), the offender had spent one year, one month*

*and fourteen days in custody before the trial but the judge only allowed for one year on remand. On appeal this Court said at para. [12]:*

*"The appellant also points out that he had spent one year, one month and 14 days in custody before the trial but the Judge only allowed for one year on remand. When calculating the appropriate sentence for any offence, the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount."*

9. The Court further observed at paragraphs [16] and [17]

*"The heading to section 24 states 'time in custody before trial to be deducted'. But the section itself does not use the word deduction. The operative word in section 24 is 'regarded'. To regard means to consider or to take into account (Shorter Oxford English Dictionary, 2nd ed. Vol. 1 p. 1690). The use of the word 'shall' in section 24 literally means that sentencing courts have no option but to consider any remand period, even if it is a few days, as a period of imprisonment already served. If this interpretation is correct, then the offenders will be ending with sentences in terms of years, months and days. But the word 'shall' in section 24, is followed by a comma and a phrase 'unless a court otherwise orders', which can mean that it is discretionary as opposed to mandatory for sentencing courts to consider remand period as a period of imprisonment already served. If the purpose of section 24 is to create a mandatory obligation on sentencing courts to consider any remand period as a period of imprisonment already served, then what is the purpose of giving a residual discretion that defeats the original purpose? The two propositions are clearly in conflict.*

*So how should sentencing courts consider remand period in sentence. In my opinion, the answer lies with how the remand period was considered under the common law as outlined in Basa's case, that is, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation. What is a substantial period, of course, will depend on the facts of each case and the sentence that has been imposed on the offender"*

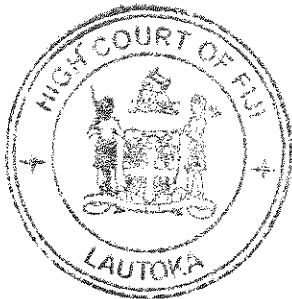
10. In the present matter, the learned Magistrate had not considered the remand period of the Appellant at all. There is no issue about calculation in this case. There is no mention about the remand period at all in the sentencing Ruling. Therefore, it is not clear whether the sentencing Magistrate had ever considered

the remand period in the sentencing process. Unlike mitigating factors, a discount on account of a remand period is a right that a convicted person is entitled to get upon his conviction. Therefore, a sentencing court has to ensure that the remand period was taken into consideration.

11. The remand period of 5 months therefore should be reduced from the sentence.

**Orders:**

12. Sentence of the learned Magistrates is set aside.
13. The Appellant is sentenced afresh to a term of 11 months' imprisonment (to be served concurrently) with effect from 6<sup>th</sup> July, 2018.



**Aruna Aluthge  
Judge**

**AT LAUTOKA  
7<sup>th</sup> August 2018**

**Solicitors: Office of the Director of Public Prosecution for  
Respondent**