IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO: HAA 132 OF 2017

Nadi Magistrates Court Case Nos. 785/10, 786/10, 801/10

BETWEEN : VIKATORE TABEUSI

Appellant

AND : STATE

Respondent

Counsel : Ms L. Volau for Appellant

Mr A. Singh for Respondent

Date of Hearing : 18th July, 2018

Date of Judgment : 06th September, 2018

JUDGMENT

1. This is an appeal filed by the Appellant against his sentence handed down by the learned Magistrate at Nadi.

2. The Appellant pleaded guilty to 4 counts of Burglary and 5 counts of Theft in three different cases (Criminal case No. 785/10, 786/10 and 801) on his own free will. Upon conviction, he was sentenced on 6th December, 2010 to 10 years' imprisonment to be served consecutively with all existing sentences. The Appellant was serving an existing sentence of 8 years' imprisonment imposed by this court on 16th September, 2010 when the learned Magistrate imposed this sentence.

3. Being dissatisfied with his sentence, the Appellant had filed an appeal to this court. However, he was not granted leave to appeal out of time by a Ruling of this court dated 20 July, 2011. He then challenged this decision in the Court of Appeal. The Court of Appeal quashed the decision of this court and sent the file back to review the previous decision. This court having considered the grounds of appeal, granted leave to file the appeal.

Grounds of Appeal

4. The Appellant, filed this appeal on following grounds:

    i. The learned Magistrate eared in law and in principle when he considered the Appellant's previous convictions as an aggravating factor in the deliberation of his sentence.

    ii. The learned Magistrate eared in law and in principle in not making sentence of the various offences that was passed on 6th December 2010 concurrent and also not making the latter total sentence concurrent to the High Court sentence that was imposed on 16th September, 2010

Law

5. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

6. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in Bae (supra):

> *"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 "

7. The Appellant agreed the following summary of facts filed by the State:

i) *For Case No. 785/10: Between the 10th and 11th day of May, 2010, 2230 hours to 0200 hours at Aralevu, Nadi you (Accused 1), broke and entered into the dwelling house of Dinesh Prasad and stole therein, cash of $500.00, 1 gold chain valued at $4,200.00, 1 x gold ear ring valued at $89.00 and corona wrist watch valued at $70.00 all to the value of $859.00 the property of Dinesh Prasad.*

ii) *For Case No. 786/10: Between the 10th and 11th day of May 2010, 1900 hours to 0530 hrs at Aralevu, Nadi you (Accused) used the vehicle registration number AI 508, model Datsun 120Y, colored light green, valued at $1,800.00 the property of Rakesh Chand. On the day in question the complainant parked his vehicle inside the compound. He had his dinner and went to sleep. On or about 11th May 2010 at about 0530 hours the complainant woke up and found out the car was missing from the place where he had parked the car. Later it was abandoned at Togo Lavusa, Nadi using it for transport after you breaking into the complainant's neighbour's house.*

iii) *For Case No. 801/10: Between the 2nd and 3rd day of April 2010, 2330 hours to 0700 hours at Nalovo, Nadi, you (Accused) broke into the dwelling house of Yangamma Naicker, farmer of Nalovo, Nadi and stole the assorted food valued at $13.00 also broke into the dwelling house of Bal Krishna aged 57 years, Farmer of Nalovo, Nadi and stole therein 1 x kg of powdered grog valued at $35.00, cash of $12.00 from the wardrobe, jewelleries box valued at $10.00 containing cash $10.00, 1 x Nokia mobile phone coloured black, model BL-5CA valued at $40.00 and also broke into the dwelling house of Anand Vijay Kumar Archari), aged 50 years, Farmer of Nalovo, Nadi and stole therein cash of $15.00 and after such*

robbery unlawfully used the vehicle registration number EO 644, model K 70 coloured white valued at $5,000.00, all to the total value of $5,135.00.

Analysis

Ground 1- previous convictions as an aggravating factor

8. At paragraph 8 of the sentencing Ruling the learned Magistrate identified 110 previous convictions ranging from Drinking Liquor in a Public Place to Burglary. The Appellant submits that the learned Magistrate fell into error when he considered previous convictions as an aggravating factor.

9. One of the most contested questions in the field of criminal sentencing is the question of whether prior criminal record is a relevant factor that should be taken into account when deciding the quantum of punishment. Before the Sentencing and Penalties Act (SPA) came into effect, courts in Fiji, applying the Common Law principles, held that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency.

10. In ***Singh v State*** Criminal Appeal No. AAU0004/97S decided on 12 February 1998; [1998] FJCA 6 the Court of Appeal exemplified the approach taken by courts in Fiji prior to the SPA came into effect.

> *"It is now well settled that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. In other words his sentence is not to be increased because of his earlier offending - see O'Donnel v Perkins 1908 VLR 537. As was said by the English Court of Appeal in R v Queen [1982] Crim. L.R. 56 the proper*

way to look at the matter is to decide a sentence which is appropriate to the offence for which the prisoner is before the Court and then to consider whether the Court can extend some leniency to the offender having regard among other things to his record of previous convictions."

11. Further in ***Tuisavusavu v State*** Criminal Appeal No. AAU0064 of 2004S, decided on 03 April 2009; [2009] FJCA 50, the Court of Appeal held:

> *"Secondly, the sentencing judge used as an aggravating feature the fact that the 1st appellant had 14 previous convictions and the 2nd appellant one previous conviction. The common law is that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. It seems to us that the sentencing judge has erred in using the appellants' prior criminal records as an aggravating feature."*

12. This position has not changed even after the SPA came into force. The courts, adopting the Common Law position, have taken the view that previous convictions are relevant only to assess the offender's character and therefore, taking them into consideration as an aggravating factor is obnoxious to the sentencing principles.

13. Section 4(2) of the SPA prescribes that, in sentencing offenders, a court must have regard to the offender's good character. Section 5(a) allows a court to consider *inter alia* the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an offender.

14. In ***Waqalevu v State*** [2010] FJHC 468; HAA044.2010 (25 October 2010) Gounder J at paragraphs 8 and 9 stated:

> *"It is settled law that an offender should not be sentenced twice for the same offence. Therefore, it follows that when an offender is sentenced for a new offence, his previous convictions have limited relevance. An offender's previous convictions deprive him of any discount based on previous good character. Previous convictions cannot be used as a matter of aggravation to enhance the sentence for the new offence. To do so will be punishing the offender twice for the same offence.*
>
> *The learned Magistrate considered the fact that the appellant was not a first time offender as an aggravating factor to enhance the sentence by 1 year. This was an error of law in the sentence of the appellant"*

15. Similarly Madigan J in ***State v Yasa*** Criminal Case No: HAC44 of 2012 decided on 08 March 2013; 2013] FJHC 101 said:

> *"Detail of an offender's previous record is not for the purposes of meting out additional punishment if he has committed the same crime before; it is to prove for or against the instant offender whether he is of good character or not. A person with a completely clear record will be afforded some discount in regard to that fact because the presumption must be that he has never come to the attention of the authorities before and is therefore of good character."*

16. This court in ***Tasova v State*** Criminal Appeal No. 48 of 2016 (6 December 2016) however took a different view. Having examined the jurisprudence developed in the UK, Ireland and Australia, took the view that prior criminal record may be used in Fiji in the manner set out in ***Veen v The Queen*** (1988) 164 CLR 465 (at 477), as a subjective matter averse to an offender.

17. In ***Veen v The Queen***, the court held that prior record is relevant:

> *"... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted"*

18. When reviewing the case law in Fiji, it appears that the notion that previous convictions cannot be used as a matter of aggravation has been founded on the principle of protection against 'double jeopardy' that has been developed by Common Law which provides that 'no person shall be prosecuted and punished for the same offence more than once'.

19. In England, the Common Law position with regard to the effect of a criminal record in general has been stated in Griffiths [1932], 23 CR. App. R. 153, at p. 156:

> *"This court has said again and again, and I repeat it now, that a man is not to be twice punished for the same offence, and it does not in the least follow that a subsequent sentence must be heavier than the sentence which preceded it."*

20. However, after the promulgation of the CPA, the limited application in Fiji of Common Law principles of sentencing was discussed by the Court of Appeal in ***Chand v State*** [2016] FJCA 65; AAU0063.2012 (27 May 2016). The Court at paragraph 15 stated:

> *"Therefore it is clear that the Sentencing and Penalties Decree, 2009 was promulgated for a wider purpose than only codifying the common law principles on sentencing. In my opinion, in view of this legislation the common law principles developed by courts over the years on sentencing should be applied only in so far as they are caught up within the specific provisions of the Decree or not inconsistent with the provisions of said Sentencing and Penalties Decree, 2009 or where there is a lacuna in the said Decree to cater to a specific situation or to fill in gaps, if any, in the Decree or as persuasive guidance, where relevant, to interpret the provisions thereof"*

21. Having said that, the Court of Appeal took the view that the Common Law principle that previous convictions cannot be used as a matter of aggravation could be accommodated within the 'current sentencing practice' under section 4(2) (a) of the Sentencing and Penalties Decree, 2009 (now Act).

> *"It appears that provisions in section 4 (2) (i) read with section 5 (a) of the Sentencing and Penalties Decree, 2009 have been interpreted in a number of judicial decisions. Section 4 (2) (i) prescribes that in sentencing offenders a court must have regard to the offender's previous character. Section 5(a) allows a court to consider inter alia the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an offender. The contention of the Appellant is that the Learned Trial Judge could not have considered his previous convictions as an aggravating factor despite the above provisions (paragraph 16).....*
>
> ... *I am inclined to agree with the above sentiments on what purpose previous convictions should be used in the matter of sentence as they could be accommodated within the 'current sentencing practice' under section 4(2) (a) of the Sentencing and Penalties Decree, 2009. Thus, it is clear that the*

Learned High Court Judge was wrong to have categorised and considered the Appellant's previous convictions under aggravating factors. However, it is equally clear that the Appellant was liable to forfeit any discount or leniency he would otherwise have been entitled to on account of the long list of previous convictions adversely affecting his character" (paragraph 20)

22. It is my considered view that while this notion (the notion that previous convictions cannot be used as a matter of aggravation) represents the current sentencing practice in Fiji, it rather underpins the principle of proportionality entrenched in the Constitution. Article 11(1) of the Constitution of the Republic of Fiji recognises the principle of proportionality in sentencing in following terms:

> *"Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment"*

23. Section 4 (1) (a) of the SPA further emphasises the appropriateness or fitness of the sentence to the gravity of the offending and the personal circumstances of the offender when it states: *'to punish offenders to an extent and in a manner which is just in all the circumstances'*

24. The common law principle of proportionality is now firmly established in this country. This principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: R v McNaughton (2006) 66 NSWLR 566) at [15]; Veen v The Queen (1988) 164 CLR 465; Hoare v The Queen (1989) 167 CLR 348 at 354.

25. However, it has to be accepted that there is always a tension between the principle of proportionality and other purposes to be achieved in a sentencing process, particularly the protection of the community from offenders and deterrence, both personal and general.

26. Section 4 (1) of the SPA states the following purposes for which a sentence may be imposed:

> *"(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"*

27. The tension that exists between the proportionality principle and other purposes of sentencing and the relevance of a criminal record, particularly for the same or a similar offence, were discussed by the Supreme Court of Newfoundland and Labrador (Canada) in ***R. v. H.J.P.*** (1995), 1995 CanLII 9875 (NL CA), at paragraphs 14 to 21. Steele J.A., for the court, summarized:

> *"I understand the position to be simply this: a fit sentence anticipates punishment commensurate to the seriousness of the offence, to be*

determined, firstly, by recourse to the appropriate "range of sentence" and, secondly, attuned by heedful reference to the generally accepted principles of sentencing. If the offender has a criminal record, particularly for offences that are the same or similar as the offence for which he is again to be sentenced, reasons for leniency ordinarily applicable (e.g. youth, guilty plea, rehabilitation possibilities, and the like) fade and vanish, the recidivist having forfeited prospects for compassion, the emphasis shifting more to the primary objective of protecting society. A criminal record will frequently invite a more stringent punishment, not because of the criminal record per se, but to reinforce the deterrent factor, it being apparent that previous discipline and penalties failed. That being said, the proportionality principle – that the sentence be proportionate to the crime – still prevails, if for no reason other than it is essentially fair. ***In truth, it is assumed that the so called "range of sentence" and "fitness of sentence" are sufficiently adaptable and flexible in scope to permit, even encourage, sentences that will adequately protect the general public from repeat offenders who have become a menace to society"*** *(emphasis added)*

28. It should be born in mind that constitutional imperatives always take precedence over other purposes and the judicial mind of the sentencer should always be driven by the importance of achieving the primary purpose of sentencing that is to punish offenders to an extent and in a manner which is just in all the circumstances.

29. An inordinately long sentence, one that is disproportionate, admittedly imposed for the commendable purpose of protecting society, is not permissible. I agree with the following statements by the Ontario Court of Appeal in Legere *at pp. 556-557* that reaffirms the proportionality principle:

> *"But I do not think that a judge can use his or her sentencing powers in the Criminal Code to impose a sentence disproportionate to the gravity of the offence on the ground that such a sentence is required to protect the public. I agree with the following passages from the majority judgment of the High Court of Australia in R. v. Veen (No. 2) (1988), 33 A. Crim. R. 230 at p. 235:*
>
> > *'The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in Veen (No. 1) that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender ...*
> >
> > *'It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.'*
> >
> > *and at p. 236:*
> >
> > *'It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.'"*

30. A review of case law in other common law jurisdictions makes it clear that a criminal record ought not to be the inducement to impose a harsh sentence out of proportion to the gravity of the offence. It is equally proper to point out that a

criminal record, in particular for similar offences that makes an accused a high risk offender, is a burden and an impediment he inevitably carries creating an aggravating circumstance at a subsequent sentence hearing. If a fit sentence is one that entails a punishment proportionate to the crime committed, it is also one that encompasses the maxim that the sentence must befit the criminal.

31. It is in this context that Section 12 of the SPA should be given effect to. When sentencing a person who had been determined to be a habitual offender under Section 11 for an offence of a nature stated in section 10 of the of the SPA, this section mandates a sentencing court to have regard to the protection of community and, in order to achieve this purpose, permits to impose a sentence **longer than that which is proportionate to the gravity of the offence**. The Section 12 of the SPA states:

> " *Where any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court, in determining the length of the sentence —*
>
> *(a) shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and*
>
> *(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence*"

32. This Section obviously comes into to conflict with Article 11 (1) of the Constitution that guarantees the right to freedom from disproportionately severe treatment or punishment, and at the end of the day, the constitutional imperative must take precedence.

33. When the learned Magistrate imposed the impugned sentence on 6th December, 2010, the Appellant had been declared a habitual offender by this court under Section 11 (in case No. HAC 095-113.2010L), with effect from 16th September 2010 for offences of a nature stated in Section 10 of the APA. However, in the sentencing Ruling of the learned Magistrate, there is neither a mention of Section 12 of the SPA nor any reference to the prior sentence passed by this court. Therefore, it is not clear if the learned Magistrate was driven by the sections relevant to habitual offenders.

34. The learned Magistrate at paragraphs 25 and 26 states;

> *"The duty cast upon this court is not only be fair as an accused as urged by you, but also to serve justice to the society at large as expressed by Winter J, in the case of Viliame Cavuilagi v State [Crim. App. HAA 0031 of 2004]*
>
> *..Repetitive, recidivist offending must inevitably lead to longer sentences of imprisonment unless the offender can demonstrate special circumstances that motivate me to sentence otherwise"*

35. I am certain the sentencing Magistrate, in imposing the very harsh sentence he did, was not thinking of punishing the Appellant for past transgressions. I assume his intention was to protect the community by incarcerating the Appellant and curbing his liberty for as long as he thought possible. The difficulty is not with his consideration of previous convictions but with the fact that the sentence imposed was clearly excessive, not proportionate to the offence committed, and consequently not a fit sentence. Therefore, I would dismiss the first ground of Appeal and proceed to examine the second ground advanced by the Appellant.

Ground (ii) – Consecutive Sentence

36. At paragraph 23 of the sentencing Ruling the learned Magistrate arrived at an aggregate sentence of 10 years and ordered that this sentence to be served ***consecutive to other serving sentences.*** It is against the imposition of a consecutive sentence that the Appellant has mounted his second ground of appeal.

37. The Counsel for Appellant submits that the Appellant was already serving a sentence of 8 years imprisonment imposed by this court on 16th September, 2010, when the impugned sentence was passed by the learned Magistrate. Accordingly, the Appellant has to serve nearly 18 years' imprisonment if the sentences were to be served consecutively. On behalf of the Appellant it was submitted that the SPA in Section 22 provides that every term or imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence of imprisonment and that therefore the sentence imposed in the present case should have been made concurrent to the sentence that he was already serving.

38. Section 22 (1) stipulates the law relating to consecutive and concurrent sentences:

> *"Subject to sub-section (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) Sub-section (1) does not apply to a term of imprisonment imposed—*
>
> *(a) in default of payment of a fine or sum of money;*
>
> *(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;*

(c) on a habitual offender under Part III;

(d) on any person for an offence committed while released on parole; or

(e) on any person for an offence committed while released on bail in relation to another offence"…..

39. The SPA reversed the law in this regard that prevailed under the Penal Code. In ***Vukitoga v State*** [2013] FJCA 19; AAU0049.2008 (13 March 2013) the Court of Appeal at paragraphs 20 – 23 observed:

> *"Section 22 of the Sentencing and Penalties Decree completely reverses the "default" position imposed by section 28(4) of the Penal Code. The Penal Code provision stipulated that any subsequent sentence to one being served shall be "executed after the expiration of the former sentence" (unless the Court otherwise directs): now the Sentencing and Penalties Decree stipulates that a new sentence must be served concurrently (unless the Court otherwise directs).*
>
> *Such a reversal of sentencing policy would mean that the Supreme Court decision in Joji Waqasawa (Supra) can no longer be regarded as applicable law although it was correctly decided according to the law then pertaining.*
>
> *The situation that presents itself to the Court therefore, and a proposition advanced by Counsel for the appellant is this: there being no guidance from authorities of higher courts on concurrent or consecutive sentencing, we are left only with the legislation (Sentencing and Penalties Decree) which states that subsequent sentences must be served concurrently with existing sentences.*
>
> *Guidance for this situation can still be gleaned from the earlier decision of the Supreme Court in Joji Waqasaqa (supra) by analogy. If the Court said (and it did) that where the "default" position was consecutive, then a Court would have to give "reasoned justification" to depart from that*

position in making sentences concurrent, then 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.

40. This section was interpreted by the Supreme Court in ***Vaqewa v State*** [2016] FJSC 12; CAV0016.2015 (22 April 2016) where Keith J states:

> *"In my opinion, the proper construction of these provisions is as follows. The default position is that any term of imprisonment passed on someone by a court has to be served concurrently with any sentence of imprisonment he is currently serving. There are two situations in which the default position must or may be disapplied. It must be disapplied in any of the five circumstances set out in section 22 (2). That is the effect of the opening words of section 22 (1) –"Subject to sub- section (2) ..." – and the opening words of section 22 (2) – "Sub- section (1) does not apply ..." In addition, though, even in a case which does not come within any of the five circumstances set out in section 22(2), the default position may be disapplied. That is the effect of the words "unless otherwise directed by the Court" in section 22 (1).*

41. It is therefore clear that Section 22 of the SPA gives the sentencer a discretion to choose between concurrent and consecutive sentences even in a case which does not come within any of the five circumstances set out in section 22 (2), and impose a consecutive sentence if the circumstances justify such a sentence. The discretion however should be exercised in a judicial manner. In this exercise, the sentencer is required to consider the proportionality and totality principles before making an order for a consecutive sentence. Reasons should also be given if he chooses to impose a consecutive sentence.

42. In the present matter, the Appellant had been declared a habitual offender by this court in a previous matter although the learned Magistrate did not seem to know that. In any event, Section 22(2)(c) of the SPC permitted the learned Magistrate to impose a consecutive sentence because the Appellant had been declared a habitual offender. Furthermore, Section 12 of the SPC permitted the learned Magistrate to impose a sentence longer than that which is proportionate to the gravity of the offence because the protection of the community is the principal purpose in sentencing a habitual offender.

43. However, the learned Magistrate was still bound by the totality and proportionality principles. As I have already said the constitutional principle of proportionality should take precedence over any another purposes of sentencing even in cases of habitual offenders.

44. In ***Visawaqa v. The State*** [2003] FJHC 138, 23rd September 2003; Pathik J said that:

> *"The power to order sentences to run consecutively is subject to two major limiting principles, which may be called the "one transaction rule" and the "totality principle" (Thomas: Principles of Sentencing 2nd ED.p.53). It does not mean that consecutive sentences cannot be imposed, so long as the overall sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of aggravating features (Regina v. Johnson (Thomas), The Times 22.5.95)".*

45. In ***Taito Rawaqa v The State*** [2009] FJCA 7 the totality principle was discussed and at page 3 *(para 12)* of the judgment it is stated:

"That the totality principle is so well known now that it is necessary only to make a passing reference to it. It requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interests of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct."

46. In ***Chand v State*** [2016] FJCA 65; AAU0063.2012 (27 May 2016) the Court of Appeal at paragraph 27 referred to ***Tuibua v The State*** [2008] FJCA 77 AAU0116.2007S (7 November 2008) where the court observed:

" The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A sentencer who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentence must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced (Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.)180).When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones [1995] UKPC 3; (1996) 1 Cr.App.R. (S.) 153, R v Millen (1980) 2 Cr.App.R. (S.) 357 and Nollen v Police (2001) 120 A Crim R 64."

47. In view of the case law discussed above, I have come to the conclusion that although the learned Magistrate had power to impose a consecutive sentence, he was not justified in arriving at a manifestly harsh and excessive sentence disregarding the totality and proportionality principles. The learned Magistrate must have decided to impose the sentence pursuant to his power to do so under Section 22 (2) and 12 of the SPA. However the learned Magistrate did not give any reasons for doing that. I agree that there was no legal requirement on him to do that, but best practice makes the giving of reasons highly desirable.

48. The maximum sentence for Burglary under the Crimes Act is 13 years' imprisonment. The accepted tariff at that time for burglary ranged from 18 months to 3 years' imprisonment. ***Tomasi Turuturuvesi v The State*** [2002] HAA 086 of 2002; ***Mesake Ratabua v The State*** [2004] HAA 026 0f 2004).

49. The learned Magistrate identified a wrong tariff and picked a starting point of 5 years imprisonment as the starting point for Burglary. He cited ***State v Volivale*** [2009] HAC 30 (A) 05s (18 June 2009) which concerned a joint enterprise of Burglary and Robbery with Violence.

50. The maximum sentence for Theft under the Crimes Act is 10 years imprisonment. The tariff for Theft for a recidivist at that time was 9 months to 3 years' imprisonment [***Jone Saukilagi*** (HAC 21 of 2004). The learned Magistrate had selected 2 years as the starting point.

51. At paragraph 8 of the Ruling, the learned The Magistrate identified following aggravating features:

(i) *You invaded dwelling house of the victim by night;*

(ii) *You caused loss of property worth of $ 859.00 to the complainant;*

(iii) *You violated the privacy of the victim's family by home invasion; total lack of respect towards the victim's property and personal enjoyment of property rights;*

(iv) *You have 110 previous convictions*

52. He found mitigating features to be:

(i) *You are 48 years old single;*

(ii) *You are a serving prisoner and sought leniency of the court.*

53. The learned Magistrate gave a deduction only of one year for the guilty plea because the Appellant failed to tender the guilty plea at the first available opportunity. Having done necessary adjustments for above mentioned aggravating and mitigating features, the learned Magistrate, in case No. HAC 785/10, arrived at an interim sentence of 5 years' imprisonment for Burglary count and 2 years for Theft count. He made sentence consecutive to the head count to arrive at a final sentence of 7 years' imprisonment.

54. In case No. 786, the learned Magistrate imposed 2 years imprisonment for a single count of Theft and arrived at a sentence of 9 years' imprisonment. However, at paragraph 20 of the Ruling, the learned Magistrate says that *'the total terms in both cases (785/ 10, 786) will be 5 years'.*

55. In case No. 801, for 3 counts of Burglary and 3 counts of Theft, the learned Magistrate imposed a sentence of 5 years' imprisonment to be served concurrently with the sentences of other two cases.

56. The learned Magistrate considered three cases together and ordered an aggregate sentence of 10 years' imprisonment and made it to run consecutively with all existing sentences. He has failed to direct his mind to the totality principle and review the aggregate term. Therefore the second ground of appeal should be allowed.

57. At paragraph 24 the learned Magistrate says : *'You shall not be eligible for parole within that 10 year period'*. However, contrary to this statement, the learned Magistrate at paragraph 31 of the Ruling, orders: *'You are hereby sentenced to 10 years imprisonment without a non- parole period'*

58. The sentence is manifestly harsh and excessive and filled with inconsistencies and irregularities and must necessarily be quashed.

59. I therefore, exercising powers conferred on this court under Section 256(3) of the Criminal Procedure Act, quash the sentence imposed by the learned Magistrate at Nadi on 6th December, 2010 and proceed to sentence the Appellant afresh.

60. Having considered the fact that the Appellant is already serving an imprisonment term of 8 years imposed by this court on the 16th September, 2010, and the seriousness of spate of robberies and thefts in all three cases (785/10, 786/10 and 801/10), and also the circumstances of the Appellant, I impose an aggregate sentence of 8 years to be served concurrently with the existing sentence of 8 years' imprisonment imposed by this court in HAC 095-113.2010L, with effect from 6th December, 2010.

61. As per the orders of this judgment the Appellant must complete his sentence on 6th December, 2018. Therefore, I will not impose a non-parole period.

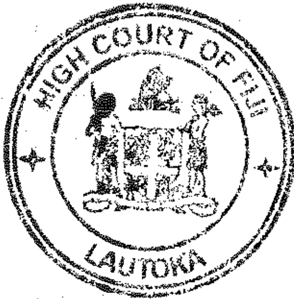
62. The Appellant has already been declared a "habitual offender" by this Court pursuant to Section 11 of the Sentencing and Penalties Decree 2009. Therefore I do not wish to make any orders in this regard but the Appellant is reminded that he has been declared a habitual offender.

63. Following Orders are made:

(1) Appeal against sentence is allowed.

(2) Sentence imposed by the learned Magistrate at Nadi dated 6 December, 2010 (in respect of cases 785/10, 786/10 and 801/10) is quashed.

(3) The Appellant is sentenced to 8 years' imprisonment with effect from 6 December, 2010 to be served concurrently with the sentence imposed in Criminal Case No. HAC 095 – 113 of 2010L.



Aruna Aluthge

Judge

At Lautoka

06 September, 2018

Solicitors: **Legal Aid Commission for Appellant**

Office of the Director of Public Prosecution for Respondent