IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 46 OF 2018

LAUTOKA MAGISTRATES COURT NO. 333 OF 2018

BETWEEN 1. JONE NAISARA

2. ETIKA USA

APPELLANTS

AND

STATE

RESPONDENT

Counsel: Appellants in Person

Mr J. Niudamu for Respondent

Date of Hearing: 14 September, 2018

Date of Judgment: 21 September, 2018

JUDGMENT

1. The Appellants filed this appeal against the sentence imposed by the Learned Magistrate at Lautoka in the Criminal case No. 333 of 2018.

2. The Appellants were charged under Section 196 of the Crimes Act, 2009 with one count of Escaping from Lawful Custody. The first Appellant was also charged with an additional count of Serious Assault under Section 277(b) of the Crimes Act, 2009.

3. Both Appellants pleaded guilty to the count of Escaping from Lawful Custody on their own free will. The learned Magistrate convicted the Appellants and, on 29th, May 2018, sentenced each Appellant to 7 months' imprisonment.

4. The ground of appeal is that the Learned Magistrate failed to take into account the time spend in remand.

Law

5. In ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999) the Court of Appeal described the law relating to an appeal against sentence. The court said;

> *"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 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 Appellants agreed the following facts read in the Magistrates Court:

> *"On the 26th day of March, 2018 at about 10.30 am at Lautoka Police Station, Charge Room, Accused-1 Jone Naisara aged 28 years, unemployed of Natokowaqa, Lautoka and Accused-2 Etika Usa aged 24 years, unemployed of Waiyavi Stage II, Lautoka escaped from lawful custody of DC 4943 Netava and DC 4933 Timoci both Police Officers of Lautoka Police Station.*
>
> *On the above mentioned date, time and place, both the accused persons were in Police custody for the offence of Burglary. Both Accused persons were escorted from cell block to Charge Room for them to be interviewed when both escaped from Charge Room from custody of both Police Officers.*
>
> *Matter was reported and both Accused persons were later arrested, interviewed under caution where both stated that they will answer in Court. Subsequently, both were charged for a count of Escaping from Lawful Custody contrary to Section 196 of the Crimes Act 2009"*

Analysis

7. The Appellants submit that the Learned Magistrate, when sentencing the Appellants, had erred in law by failing to take into account the period they spent in remand.

8. The provision of Section 24 of the Sentencing & Penalties Act 2009 (SPA) states:-

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender"

9. According to the above provision, a sentencing court must have regard to any period spent by an offender in remand before trial as a period already served in prison. The proper way to give effect to section 24 of the Sentencing and Penalties Decree is to order that the time spent in custody by the offender shall be considered as a period of imprisonment already served from the final sentence. Therefore, that order should be made after the sentencer determines the appropriate sentence. [Sowane v State [2016] FJSC 8; CAV0038.2015 (21 April 2016)] Unless the court otherwise orders, the time spent in remand must be deducted from the final sentence.

10. In the present case, the Appellants were first produced before the Lautoka Magistrates Court on the 3rd April, 2018 and were remanded in custody until the sentence was passed on 29th May 2018. This is reflected on the Court Record. Accordingly, the Respondent had spent roughly for a period of two months in remand.

11. There is nothing in the Sentencing Ruling to indicate that the time spent in remand by the Appellants was considered by the Learned Magistrate.

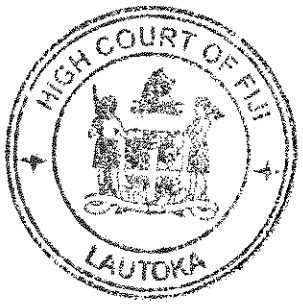
12. The Learned Magistrate has failed to comply with the provision of Section 24 and has erred in law. Therefore, there is merit to this ground of appeal.

13. 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 Lautoka on 29th May, 2018 and proceed to sentence the Appellant afresh.

14. Appellants had spent nearly 2 months in remand before they were sentenced. The remand period of 2 months should be deducted from the sentence of 7 months' imprisonment imposed by the Learned Magistrate. Each Appellant is accordingly sentenced to 5 months imprisonment with effective from 29th May, 2018.

15. Following Orders are made:

i. The appeal is allowed;
ii. The sentence imposed by the learned Magistrate at Lautoka in respect of the first count is quashed;
iii. The Appellant is sentenced afresh to 5 months' imprisonment with effect from 29th May, 2018.



Aruna Aluthge

Judge

At Lautoka

21st September, 2018

Counsel:

- **Appellants in Person**
- **Director of Public Prosecution for Respondent**