**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO. HAA 026 OF 2019**

**BETWEEN:** **JOSAIA USUMAKI** **APPELLANT**

**A N D:** **THE STATE** **RESPONDENT**

**Counsel:** Appellant In Person
Ms. S. Tivao for Respondent

**Date of Hearing:** 22nd October 2019

**Date of Judgment:** 06th December 2019

# J U D G M E N T

1. The Appellant with few others had been charged in the Magistrate's Court in Suva with one count of Escaping From Lawful Custody, contrary to Section 196 of the Crimes Act. The Appellant had pleaded guilty to the said offence. The learned Magistrate had then convicted and sentenced the Appellant to a period of nine (9) months imprisonment on the 21st of August 2019. Aggrieved with the said sentence, the Appellant filed this appeal on the following grounds *inter alia*;

***Grounds of Appeal***

*1. The Learned Sentencing Magistrate erred in law and in his sentencing guideline, when not property observing the guilty pleas, difficulties with authorities faced*

*in custody, Appellant regrets his actions when addressing the Court on "Crucial" mitigations.*

2. *That the Sentencing Magistrate highly erred in principles of law, in further imposing a 9 months term to be consecutively served with his (17) years current present sentence, which surely appears too harsh and excessive to cope with Appellant.*

3. *Furthermore, the Sentencing Magistrate did seriously failed in law to analyse more deeper, that the Appellant had saved the Court's time and expenses, also for the prosecutions as well, for their ample time in not taking a stand for trial.*

4. *The Learned Sentencing Magistrate erred in law and in fact, when not reminding himself that there must be a (yellow ribbon) giving a serving inmate a second chance for rehabilitation and a concurrent sentence which should be suitable or appropriate for Appellant serving (17) year term.*

5. *That moreover, the Appellant kindly raises that he had no legal knowledge and understanding in law, which resulted in his unassisted and lack of representation. Thus, the Appellant now wishes to submit that there is also a further ground of evidence, in relation to being assaulted, brutalized and tortured during and after the time of my recaptured by the Emergency Correction Officers and the Fiji Police Force.*

2. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** has discussed the scope of the appellate jurisdiction in respect of the sentences imposed by the lower courts, where it was 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."*

3. Accordingly, even if there is an error in the exercise of the sentencing discretion, the Appellate Court still could dismiss the appeal if the Appellate Court considers that the sentence falls with the permissible range.

4. The Supreme Court of Fiji in **Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006)** held that:

*"It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence."*

5. Accordingly, the Appellate Court focuses on the correctness and the appropriateness of the final sentence and not much on the each step in the reasoning process. Hence, Appellate Court does not usually intervene to the sentence imposed by the lower court, if the final sentence falls within the acceptable sentencing range.

6. The grounds of appeal filled by the Appellant can be compressed into three main grounds, that:

   i) The learned Magistrate has failed to give a substantive discount for the early plea of guilty,
   ii) The learned Magistrate erred in law by imposing a consecutive sentence,
   iii) The lack of legal representation in the Magistrate's Court.

7. The one of the main contentions of the Appellant is that the learned Magistrate has not given him an adequate discount for his early plea of guilty.

8. Section 4 (2) (f) of the Sentencing and Penalties Act 2009 states that the sentencing court has to take into consideration the plea of guilty and the stage in the proceedings at which the accused did it when sentencing an offender. Section 4 (2) (f) of the Sentencing and Penalties Act states that:

> *"whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so."*

9. The approach on the issue of the early plea of guilty in sentencing has discussed in **Mataunitoga –v- The State [2015] FJCA 70; AAU125 of 2013 (28 May 2015)**, where Goundar JA found that:

> *"In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a*

*matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment."*

10. The remorse is the genuine feeling of sorry of the accused for what he had done. Accepting the guilt for a case by recognizing the inevitable conviction based on the available strong evidence against him, is not same as of expressing genuine feeling of sorry by entering of early plea of guilty. Therefore, the sentencing court must take into consideration the early plea with other factors of the offending, in order to determine the genuine remorse of the accused.

11. The Supreme Court of Fiji in **Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018)** upheld the approach adopted in **Mataunitoga (supra)** and held that:

*"The principle in Rainima must be considered with more flexibility as Mataunitoga indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably."*

12. The Fiji Court of Appeal in **Tuibua v State [2008] FJCA 77; AAU0116.2007S (7 November 2008)** has observed most of the offenders who are charged with the offence of escaping from lawful custody plead guilty due to the existence of a strong case of the prosecution against them.

13. The Appellant had been serving a prison term at Naboro Maximum Prison facility when he escaped from the same and committed this crime. He was arrested by the Authorities on the

same day, few hours after the alleged escaped. Hence, it is obvious the case of the prosecution was strong and powerful against the appellant.

14. Regardless of the existence of the strong case for the prosecution, the learned Magistrate has given three (3) months discount for the early plea of guilty, which I find is sufficiently adequate. Therefore, I do not find any merits on this contention.

15. The second contention is formed on the basis that the learned Magistrate had erred in imposing a consecutive sentence.

16. Section 22 of the Sentencing and Penalties Act provides the procedure to impose concurrent and consecutive sentences, where it states that:

> *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.*
>
> *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.*

17. The learned Magistrate has accurately applied Section 22 (2) (b) of the Sentencing and Penalties Act by imposing a consecutive imprisonment period as the Appellant was sentence for an offence of escape from custody. Therefore, I do not find any error in imposing a consecutive sentence.

18. The last ground is formed on the contention that the Appellant had no legal knowledge or understanding, thus, making lack of legal representation in the proceedings in the Magistrate's Court.

19. According to the record of the proceedings in the Magistrate's Court, the Appellant was explained the right to counsel. He had choose not to obtain any assistance. It was a choice of the accused, hence, he could not raise the issue of lack of legal representation at this stage. I accordingly find no merits in this ground as well.

20. In conclusion, I refuse this grounds of appeal and dismiss the appeal accordingly.

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


R.D.R.T. Rajasinghe
**Judge**

**At Suva**
06th December 2019

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