IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 027 OF 2019

BETWEEN: **ULAIASI QALOMAI** **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

JUDGMENT

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 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

i) That the learned Magistrate erred as he wrongly applied the mitigatory

pleas of fellow accused one Filipe Delana in my circumstance as the distinctions in age and other factors is clear.

ii) *The Learned Magistrate failed to take into consideration, that the court in July 11 had granted the Appellant to file written mitigation and without considering the same imposed the Sentence on the subsequent date of 21st August 2019.*

iii) *That the Magistrate erred in considering preplanning as an aggravating factor thereby adding 3 months without considering that the 47 year old building was already in a state of dereliction hence, the current major renovation projects.*

iv) *That the Learned Magistrate erred as he did not take into account the Appellant circumstances of continued breaches of fundamental constitutional and Human Rights, being the visiting Magistrate receiving such complaints in the institution 6 months before the escape.*

v) *That the Sentence is harsh and excessive and offends the totality principle taken into account that the Appellant is already a long sentence of 10 years.*

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 first ground of the appeal is formed on the contention that the learned Magistrate has erroneously taken into consideration the mitigatory facts of the co-accused Filipe Delana. There is no co-accused by the name of Filipe Delana in this sentence. Hence, I find this ground of appeal has no merits.

7. The second ground of appeal is based upon the allegation that the learned Magistrate has not given him time to file his written mitigation. The appellant had time to file the mitigation submissions if he wished to do so in the Magistrate's Court. The record of the Magistrate's Court shows that the Appellant had not made any effort to file his written mitigation submissions. As a result of these findings, I find no merits in this ground of appeal as well.

8. The third ground of appeal is founded on the contention that the learned Magistrate has wrongly taken into consideration the preplanning of this crime as an aggravating factor, without properly taking into consideration the dereliction state of the prison building.

9. Having carefully taken into consideration the summary of facts, which the Appellant admitted in the Magistrate's Court, I find no errors in the conclusion made by the learned Magistrate that it was a preplanned crime. Hence, the third ground of appeal also has no merits.

10. The appellant argues in the fourth ground of appeal that the learned Magistrate has not taken into consideration the continuous breaches of fundamental and constitutional rights of the appellant in the prison facilities. The sentencing Magistrate is required to take into consideration the matters pertaining to the offence and the offending circumstances together with any aggravating and mitigatory grounds in the sentencing. If the appellant claims that his constitutional rights have been violated, he could invoke the jurisdiction of the High Court pursuant to Section 45 (1) of the Constitution in order to obtain any relief for such breaches.

11. The fifth ground of appeal stands on the contention that the sentence is harsh and excessive. The maximum penalty for the offence of Escaping from Lawful Custody under the Crimes Act is two years. The applicable tariff for Escaping from Lawful Custody is between six months to twelve months imprisonment. (**Lal v State [2017] FJHC 43; HAA30.2016 (30 January 2017), Tamani v State [2012] FJHC 1306; HAM 029.2012 (7 May 2012)**).

12. Having considered the aggravating and mitigating factors, the learned Magistrate has imposed nine months imprisonment, which is within the above discussed tariff limit.

13. 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,*

14. 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 or an offence of escape from custody.

15. Accordingly, I do not find any merit in the contention that the sentence is harsh and excessive.

16. In conclusion, I refuse and disallow this petition of appeal.

17. 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.