IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 55 OF 2018

IN THE MATTER of an Appeal from the Judgment and Sentence of the Magistrate's Court, Nausori, in Criminal Case No. 260 of 2014.

BETWEEN : **AJAY SHASHIKANT PALA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. Iqbal Khan for the Appellant
Ms. Susan Serukai for the Respondent

Date of Hearing : 25 January 2019

Judgment : 8 May 2019

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Nausori.

[2] The Appellant was charged in the Magistrate's Court of Nausori for the following offence:

Statement of Offence (a)

RECEIVING STOLEN PROPERTY: Contrary to Section 306 of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

AJAY SHASHIKANT PALA, between the 30th day of November 2013 and 8th day of February 2014, at Nausori, in the Central Division, dishonestly obtained stolen property namely assorted jewelleries valued at $52,900.00 believing the said to be stolen.

[3] The Appellant pleaded not guilty to the charge and the matter proceeded to trial.

[4] At the conclusion of the trial, on 28 September 2018, the Appellant was found guilty and convicted of the said charge.

[5] Thereafter, on 5 October 2018, he was sentenced to 26 months imprisonment, with a non-parole period of 20 months imprisonment.

[6] Aggrieved by the said Order the Appellant filed a Petition of Appeal in the High Court on 5 October 2018. It appears that the said Petition of Appeal was only filed against the conviction.

[7] Therefore, an Amended Petition of Appeal was filed in Court on 8 October 2018. When this matter was first called in the High Court, on 24 October 2018, His Lordship Justice Rajasinghe, had noted that the Amended Petition of Appeal had not been filed in compliance with the provisions of Section 249 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), as no application had been made to obtain the leave of Court. Accordingly, he had made Order to disregard the Amended Grounds of Appeal filed.

[8] The Order made by His Lordship Justice Rajasinghe was not brought to my notice by either Counsel for the Appellant or the State. Thus, the matter proceeded for hearing on the basis that leave had been obtained for the Amended Grounds of Appeal to be filed in Court.

[9] Accordingly, this matter was taken up for hearing on 25 January 2019. Counsel for both the Appellant and the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing. Thereafter, the matter was fixed for my Judgment on 4 March 2019 and postponed to 26 March 2019.

[10] The fact that no leave had been sought to file the Amended Grounds of Appeal only came to my attention at the time I was examining the file in preparation for my Judgment.

[11] Accordingly, when the matter came up for Judgment on 26 March 2019, I informed parties of same. Counsel appearing for the Appellant then moved to formally seek leave to file the Amended Grounds of Appeal, which leave was granted.

[12] As per the Amended Petition of Appeal the Grounds of Appeal taken up by the Appellant are as follows:

APPEAL AGAINST CONVICTION

1. That the Learned Trial Magistrate erred in law and in fact in not giving me opportunity to make submission on No Case to Answer at the end of the Prosecution case.

2. That the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.

3. That the Learned Trial Magistrate whilst directing himself on the question of burden of proof in that the Prosecution has to prove all the allegations against the Appellant's beyond all reasonable doubts did not apply same to the evidence

before the Honourable Court and such failure to do so caused a substantial miscarriage of justice.

4. That the Learned Trial Magistrate erred in law and in fact in not properly analysing all the facts before him before he made a decision that the Appellant was guilty as charged on the charges of receiving stolen property.

5. That the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.

6. That the Learned Trial Magistrate erred in law and in fact in not considering and/or rejecting the evidence of Defence Witnesses that were called by the Defence.

7. That the Learned Trial Magistrate erred in law and in fact in not attaching appropriate weight to the receipts that were given by the Appellant when he purchased the property in question.

8. That the Learned Trial Magistrate erred in law and in fact and without any evidence before him to state that the Appellant was receiving the properties in question knowing and believing the same to be stolen property when there was no reliable evidence whatsoever to support such a finding.

9. That the Learned Trial Magistrate erred in law and in fact in not warning himself about the danger of convicting the Appellant upon the evidence of accomplice (Prosecution Witness Delana, who was an accomplice), unless that evidence is corroborated and failure to do so caused a substantial miscarriage of justice.

10. That the Learned Trial Magistrate erred in law and in fact not ordering a mistrial and the evidence tendered in Court by the State were tainted and which was contrary to the disclosures given to the Appellant.

11. That the Appellant's Trial counsel erred in conducting the trial to the extent those such errors affected the outcome of the trial and contributed to a miscarriage of justice. Such errors or omissions were:

(i) That the Appellant's Trial Counsel's did not object to the receipts with alterations being tendered in evidence.

(ii) Failing to submit to the Court that the receipts with alterations were contrary to the receipts that were disclosed to the Defence.

APPEAL AGAINST SENTENCE

1. That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

2. That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

3. That the Learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment Contrary to Section 25 of the Constitution of Fiji (1998) (Section 11 (1) of the 2013 Constitution of Fiji).

4. That the Learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

[13] On 6 December 2018, the Counsel for the Appellant had sought leave to file an additional Ground of Appeal against the conviction. Court granted the Appellant leave to do so. Accordingly, the additional Ground of Appeal urged is that:

> "The Learned Trial Magistrate erred in law and in fact in not complying with Section 179 of the Criminal Procedure Act and as such there was a substantial miscarriage of justice."

[14] For ease of reference, I have considered this additional Ground of Appeal as the 12th Ground of Appeal against conviction. Accordingly, there are 12 Grounds of Appeal against the conviction; and 4 Grounds of Appeal against the Sentence.

The Law and Analysis

[15] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*
>
> *(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*
>
> *(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*
>
> *(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*
>
> *(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*
>
> *(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*
>
> *(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

[16] Section 247 of the Criminal Procedure Act stipulates that "*No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[17] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

> "*(2) The High Court may —*
>
> *(a) confirm, reverse or vary the decision of the Magistrates Court; or*
>
> *(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*
>
> *(c) order a new trial; or*
>
> *(d) order trial by a court of competent jurisdiction; or*
>
> *(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*
>
> *(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*
>
> *(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

The Grounds of Appeal against Conviction

Grounds 1 & 12

[18] I deem it appropriate to discuss the aforesaid Grounds of Appeal against conviction together.

[19] The 1st Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not giving the Appellant an opportunity to make submission on No Case to Answer at the end of the Prosecution case. The 12th Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not complying with Section 179 of the Criminal Procedure Act and as such there was a substantial miscarriage of justice.

[20] In terms of Section 178 of the Criminal Procedure Act it is stated thus:

> *"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."*

[21] Section 179 of the Criminal Procedure Act reads as follows:

> *179. — (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall —*
>
> *(a) again explain the substance of the charge to the accused; and*
>
> *(b) inform the accused of the right to —*
>
> > *(i) give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or*
> >
> > *(ii) make a statement to the court that is not on oath; and*
>
> *(c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and*
>
> *(d) the court shall then hear the accused and his witnesses, and other evidence (if any).*
>
> *(2) If the accused person states that he or she has witnesses to call but that they are not present in court, and the court is satisfied that —*
>
> *(a) the absence of the witnesses is not due to any fault or neglect of the accused person; and*
>
> *(b) there is a likelihood that they could, if present, give material evidence on behalf of the accused person —*
>
> *the court may adjourn the trial and issue process, or take other steps in accordance with this Decree to compel the attendance of the witnesses.*

[22] Section 178 of the Criminal Procedure Act is very clear. An opportunity to make submissions on No Case to Answer at the close of the Prosecution evidence (or close of the Prosecution case), would only be given "…. *if it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence."* An opportunity to make submissions on No Case to Answer is usually

granted where Court is of the opinion that no prima facie case has been made out by the Prosecution. In this case, it would not have appeared so to the Learned Magistrate.

[23] I have perused the case records sent by the Magistrate's Court (page 29). I find that there is no record to indicate that the Learned Magistrate complied with Section 179 of the Criminal Procedure Act prior to calling for the defence. However, I find that the Appellant and another witness on his behalf (Sonam Swastika Devi) has testified in Court. I also note that the Appellant was represented by a Counsel during the entirety of the trial in the Magistrate's Court.

[24] In ***Firoz v. State*** [2018] FJHC 802; HAA10.2015 (28 August 2018); His Lordship Justice Madigan held non-compliance with Section 179 of the Criminal Procedure Act is not fatal to the conviction. His Lordship held as follows:

> *"30. Counsel claims that the accused's rights in defence were not put to him as mandated by section 179(1) of the Criminal Procedure Act 2009.*
>
> *31. This appears to be true, however it is not fatal to the conviction.*
>
> *32. This matter has been dealt with previously by the Court of Appeal in **Ovini Tuitoga** [2007] AAU63/06 (25 June 2007) (Ward, P. Ellis J.A. and Penlington JA) in discussing the same section (s.211) in the then Criminal Procedure Code.*
>
> *33. The Court held:*
>
> *"We are of the opinion that a failure to comply with s.211 does not of itself necessarily invalidate the trial. That would be so, however if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction"*
>
> *and later....." While there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice"*
>
> *34. There being no other unsatisfactory manner relating to these proceedings these dicta must prevail."*

[25] For the aforesaid reasons, I find that the 1st and 12th Grounds of Appeal against the conviction is without merit.

Grounds 2, 3 & 4

[26] I deem it appropriate to discuss the aforesaid Grounds of Appeal against conviction together.

[27] The 2nd Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not adequately directing himself to the fact that the Prosecution evidence presented before the Court had serious doubts and as such the benefit of such doubt ought to have been given to the Appellant. The 3rd Ground of Appeal is that the Learned Trial Magistrate whilst directing himself on the question of burden of proof, in that the Prosecution has to prove all the allegations against the Appellant beyond all reasonable doubts, did not apply the same standard of proof to the evidence before Court and such failure to do so caused a substantial miscarriage of justice. The 4th Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not properly analysing all the facts before him before he made a decision that the Appellant was guilty as charged on the charges of receiving stolen property.

[28] In determining the merits of the above Grounds of Appeal it is important to analyze the evidence presented in this case before the Magistrate's Court.

[29] The Prosecution called 3 witnesses, namely Pravin Chandra, the complainant in the case, Kushma Manorma Khan, the sister of the complainant, and Viliame Delana, who worked as a house boy for Pravin Chandra between June 2013 and February 2014. Viliame Delana was convicted (separately) for the Theft of the jewelry. The Defence called Sonam Swastika Devi, who worked as a Sales Person at Radhe Krishna Jewelers and the Appellant.

[30] In terms of Section 306 (1) of the Crimes Act No. 44 of 2009 (Crimes Act), *"A person commits a summary offence if he or she dishonestly receives stolen property, knowing or believing the property to be stolen."*

[31] Section 306 (3) provides:

"for the purposes of this section, property is stolen property if, and only if —

*(a) it is **original stolen property** (as defined by sub-section(5)); or*

*(b) it is **previously received property** (as defined by sub-section (6)); or*

*(c) it is **tainted property** (as defined by sub-section (8)).*

This sub-section has effect subject to sub-sections (4) and (7)."

[Emphasis is mine].

[32] For a proper understanding of sub-section 306 (3), the remaining sub-sections of Section 306 are reproduced below:

(4) for the purposes of this section, stolen property does not include land obtained in the course of an offence against sections 317.

*(5) for the purposes of this section, **original stolen property** is —*

(a) property, or a part of property, that —

(i) was appropriated in the course of theft (whether or not the property, or the part of the property, is in the state it was in when it was so appropriated); and

(ii) is in the possession or custody of the person who so appropriated the property; or

(b) property, or a part of property, that —

(i) was obtained in the course of an offence against section 317 (whether or not the property, or the part of the property, is in the state it was in when it was so obtained); and

(ii) is in the possession or custody of the person who so obtained the property or the person for whom the property was so obtained.

*(6) for the purposes of this section, **previously received property** is property that —*

(a) was received in the course of an offence against sub-section (1); and

(b) is in the possession or custody of the person who received the property in the course of that offence.

(7) for the purposes of this section, property ceases to be original stolen property or previously received property —

(a) after the property is restored —

(i) to the person from whom it was appropriated or obtained; or

(ii) to other lawful possession or custody; or

(b) after —

(i) the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property; or

(ii) a person claiming through the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property.

(8) for the purposes of this section, ***tainted property*** *is property that —*

(a) is (in whole or in part) the proceeds of sale of, or property exchanged for

(i) original stolen property; or

(ii) previously received property; and

(b) if sub-paragraph (a)(i) applies — is in the possession or custody of —

(i) if the original stolen property was appropriated in the course of theft — the person who so appropriated the original stolen property; or

(ii) if the original stolen property was obtained in the course of an offence against section 317 - the person who so obtained the property or the person for whom the property was so obtained; and

(c) if sub-paragraph (a)(ii) applies -is in the possession or custody of the person who received the previously received property in the course of an offence against sub-section (1).

(9) for the purposes of this section, if, as a result of the application of sub-section 317(9) or (10), an amount credited to an account held by a person is property obtained in the course of an offence against section 317 —

(a) while the whole or any part of the amount remains credited to the account, the property is taken to be in the possession of the person; and

(b) if the person fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled — the person is taken to have received the property; and

(c) sub-section (7) of this section does not apply to the property.

[Emphasis is mine].

[33] The Learned Magistrate has duly identified the elements of the offence and that the Prosecution is bound to prove the said elements beyond reasonable doubt. The fault element relevant to Section 306 (1) of the Crimes Act is either knowledge or belief that the property was stolen property at the time of receiving. In the particulars of offence (in the charge sheet), it is stated that the Appellant dishonestly obtained stolen property, namely assorted jewelries valued at $52,900.00, "believing" the said to be stolen. Therefore, in this case, the fault element the Prosecution has to prove is only one of belief.

[34] However, in this case the Learned Magistrate has stated thus (at paragraph 53 of his Judgment): "As I have already said the accused was receiving these properties knowing **and** believing these to be stolen properties. He had no intention to return them to the rightful owner and was melting them for his own business. Hence I am satisfied also that the accused dishonestly received these properties." As can be seen, the Learned Magistrate has used the term knowing and believing these properties to be stolen properties. This is a higher threshold than what the Prosecution was required to prove with regard to the fault element in this case.

[35] Therefore, it is my opinion that in his Judgment, the Learned Magistrate has duly considered and analyzed all the evidence led at the trial and come to a proper finding that the Appellant was guilty of receiving stolen property.

[36] For the aforesaid reasons, I find that the 2nd, 3rd and 4th Grounds of Appeal against the conviction are without merit.

Grounds 5, 6 & 7

[37] I deem it appropriate to discuss the aforesaid Grounds of Appeal against conviction together.

[38] The 5th Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice. The 6th Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not considering and/or rejecting the evidence of Defence Witnesses that were called by the Defence. The 7th Ground of

Appeal is that the Learned Trial Magistrate erred in law and in fact in not attaching appropriate weight to the receipts that were given by the Appellant when he purchased the property in question.

[39] Analysing the Judgment of the Learned Magistrate, it is clear that the Magistrate has given due weight to the evidence elicited in this case by the two Defence witnesses, namely the Appellant himself and Sonam Swastika Devi. It is wrong in law to state that the Learned Magistrate has erred in law and in fact in now directing himself on the evidence provided by the Defence.

[40] For the aforesaid reasons, I find that the 5th, 6th and 7th Grounds of Appeal against the conviction are without merit.

Ground 8

[41] This Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact and without any evidence before him to state that the Appellant was receiving the properties in question knowing and believing the same to be stolen property when there was no reliable evidence whatsoever to support such a finding.

[42] It is the opinion of this Court that this Ground of Appeal is inter-related to the 2nd, 3rd and 4th Grounds of Appeal discussed above. For the said reason, this Ground of Appeal is also rejected.

Ground 9

[43] This Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact in not warning himself about the danger of convincing the Appellant upon the evidence of an accomplice (Prosecution Witness Villiame Delana), unless that evidence is corroborated and failure to do so caused a substantial miscarriage of justice.

[44] At paragraph 42 of his Judgment, the Learned Magistrate has stated as follows:

> "Whilst giving evidence, the Counsel for the Accused informed Delana that he was already sentenced and he did not need to be concerned about giving evidence. This Court also advised the witness the same thing. I am also mindful that he has been already sentenced by the Court for stealing

these properties in 2014. He has no reason to favour the Prosecution witnesses in this case or prejudice the accused. Accordingly, I accept this witness also as a credible witness."

[45] From the above, it is evident that the Learned Magistrate has given his mind to the fact that Prosecution witness, Viliame Delana, had already been convicted and sentenced for the offence of Theft of the stolen properties. Accordingly, the Learned Magistrate has not considered Delana as an accomplice in relation to the offence of Receiving Stolen Property.

[46] For the said reason, this Ground of Appeal is also rejected.

Ground 10

[47] The 10th Ground of Appeal is that the Learned Trial Magistrate erred in law and in fact not ordering a mistrial and the evidence tendered in Court by the State were tainted and which was contrary to the disclosures given to the Appellant.

[48] Having considered all the evidence led in this case, and also having considered the Judgment of the Learned Magistrate, this Court is of the view that there was no basis for the Learned Magistrate to order a mistrial in this matter.

[49] In any event, at paragraph 3 of his Judgment, the Learned Magistrate has stated: "Today the Defence made an application for mistrial which has been rejected by this Court. Then the Defence filed the closing submission which I have considered for this Judgment."

[50] For the aforesaid reasons, I find that this Ground of Appeal is also without merit.

Ground 11

[51] This Ground of Appeal is that the Appellant's Trial counsel erred in conducting the trial to the extent that such errors affected the outcome of the trial and contributed to a miscarriage of justice. Namely:

(i) That the Appellant's Trial Counsel's did not object to the receipts with alterations being tendered in evidence.

(ii) Failing to submit to the Court that the receipts with alterations were contrary to the receipts that were disclosed to the Defence.

[52] I find that the Appellant in this case was represented during the trial by private counsel of his choice. The said counsel was appearing on the instructions of the Appellant. Thus, this Court cannot conclude that any miscarriage of justice was caused to the Appellant during the course of the trial.

[53] For the aforesaid reasons, I find that this Ground of Appeal is also without merit and is rejected.

The Grounds of Appeal against Sentence

[54] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"…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)."*

[55] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

> *"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. AAU 0015 of 1998. 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."*

[56] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[57] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

> *"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*
>
> *" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*
>
> *[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*
>
> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers*

all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

……..

[45] 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."

[58] In this case the Appellant takes up the position that the sentence imposed on him is manifestly harsh and excessive and wrong in principal considering all the circumstances of the case. He also states that the Learned Trial Magistrate erred in law and in fact by taking irrelevant matters into consideration and not taking relevant matters into consideration, when sentencing the Appellant. The Appellant also urges that the Learned Trial Magistrate erred in law and in fact in not taking into consideration adequately the relevant provisions of the Constitution and the Sentencing and Penalties Act 42 of 2009 (Sentencing and Penalties Act).

[59] The maximum penalty for Receiving of Stolen Property, in terms of Section 306 (1) of the Crimes Act is 10 years imprisonment.

[60] In passing his sentence the Learned Magistrate has referred to the maximum penalty for the offence of Receiving of Stolen Property and also considered the established tariff for the offence as one to three years imprisonment.

[61] In determining the starting point within the said tariff, the Court of Appeal, in ***Laisiasa Koroivuki v. State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[62] Having considered this judgment and based on the objective seriousness of the offence, the Learned Magistrate has selected 16 months imprisonment as the starting point of the sentence.

[63] The Learned Magistrate has duly considered all the aggravating factors relevant to this case and added a further 20 months imprisonment to the sentence. For the Appellant's previous good character and other mitigating factors he has reduced 6 months imprisonment from the sentence and arrived at a sentence of 30 months imprisonment.

[64] Furthermore, the Learned Magistrate has acknowledged the fact that this matter was pending in Court since 2014. For the delay in concluding the case, the Learned Magistrate has deducted a further 4 months imprisonment to arrive at the final sentence of 26 months imprisonment.

[65] Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, the Learned Magistrate has ordered that the Appellant is not eligible to be released on parole until he serves 20 months imprisonment.

[66] Therefore, this Court of the opinion that the Learned Magistrate has considered all the relevant factors in arriving at his Sentence. The Sentence imposed is within the tariff of one to three years imprisonment. Considering the value of the stolen properties involved and period of time during which the Appellant had received the said stolen properties, it cannot be said that the Sentence imposed was harsh or excessive.

[67] Considering all the above, I am of the opinion that the grounds of appeal against Sentence are also without merit.

Conclusion

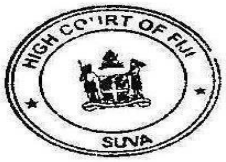
[68] For all the reasons aforesaid, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

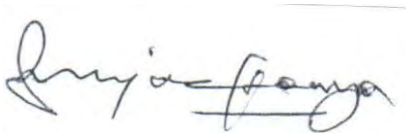
FINAL ORDERS

[69] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Nausori is affirmed.





Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 8th Day of May 2019

Solicitors for the Appellant : Iqbal Khan & Associates, Lautoka.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Nausori.