

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 41 of 2019

BETWEEN : **KORESI TARANUKU**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. G. Henao for the Appellant.
: Mr. J.B. Niudamu for the Respondent.

Date of Hearing : 25 September, 2019

Date of Judgment : 27 September, 2019

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Tavua for one count of Burglary contrary to section 312(1) of the Crimes Act and one count of Theft contrary to section 291 (1) of the Crimes Act.
2. It was alleged that the appellant between the 29th day of January, 2019 and the 30th day of January, 2019 at Draunivi Village, Tavua entered

into the canteen of Vive Leni Savu as a trespasser, with intent to commit theft.

3. It was also alleged that between the 29th day of January, 2019 and the 30th day of January, 2019 the appellant dishonestly appropriated cash \$20.00 the property of Vive Leni Savu, with the intention of permanently depriving the said Vive Leni Savu.
4. On 13th February, 2019 the appellant elected to be tried by the Magistrate's Court in respect of the first count.
5. On 14th May, 2019 the appellant pleaded guilty to both the counts after it was read and explained to him. Thereafter the summary of facts was read to the appellant who admitted the same.

SUMMARY OF FACTS

"Between 29/01/19 2030 hours and 30/01/19 0730 hours at Draunivi Village Koresi Taranuku (Accused) 20 years, Farmer of Draunivi Village broke and entered into the canteen of Vive Leni Savu (Victim) 56 years self-employed of Draunivi Village and stole cash \$20.00 from there in with the intention of permanently depriving the said (Victim).

(Victim) has a small canteen in the village which she operates as her daily source of income. On 29/01/19 at about 2130 hours, (Victim) closed the canteen and locked it with tower bolt and padlock. During the night (Accused) forced open the padlock, entered the canteen and stole cash (\$20.00) in coins from the drawer. On 30/01/19 at about 0300 hours Josefata Yagena (PW-1) 50 years retired of the same village came out of his house to relieve himself when he identified the (accused) inside the canteen. The kitchen light of (PW-1) was switched on and he positively identified the (Accused) as both are from the same village.

On 30/01/19 (PW-1) informed the (Victim) about the (Accused) and she reported the matter to police. (Accused) was checked in the village but was not at home. On 12/02/19 (Accused) came himself to Tavua Police

Station, he was arrested and caution interviewed whereby he admitted the allegation put on him. He stated that he has used the stolen money. He was charged for the offence of Burglary and Theft. He was kept in custody for Tavua M/C on 13/02/19.”

6. Upon being satisfied that the appellant had entered an unequivocal plea the learned Magistrate found the accused guilty and convicted him.
7. After hearing mitigation on 18th June, 2019 the appellant was given an aggregate sentence of 2 years and 1 month imprisonment for the two counts without any non-parole period.

AMENDED GROUNDS OF APPEAL

8. The appellant filed a timely appeal in person which was later amended by the Legal Aid Counsel who now appears for the appellant.
9. The following amended grounds of appeal against sentence were filed by the appellant’s counsel:
 - “1. *The learned Magistrate erred in principle by relying on erroneous factors which resulted in enhancing the sentence.*
 2. *The learned Magistrate erred in principle when he mistook the facts;*
 3. *The sentenced passed by the learned Magistrate is manifestly harsh and excessive in law and in principle in all the circumstances of the case.*
10. The above grounds of appeal can be dealt with together the main complaint raised by the appellant is that the sentence is excessive considering the circumstances of the offending.

11. Both counsel filed helpful written submissions and also made oral submissions during the hearing for which this court is grateful.

LAW

12. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.
13. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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.”*

14. Counsel for the appellant submits that the learned Magistrate relied on an incorrect tariff of 20 months to 6 years imprisonment which has resulted in an excessive sentence. The starting point of 2 years and 4 months imprisonment was picked from the middle range of the incorrect tariff and with the addition of aggravating factors the appellant has been

punished twice which is wrong in principle. Counsel further submits that a suspended sentence will meet the ends of justice.

15. State counsel Mr. Niudamu in his usual fairness concedes the appeal on the basis that the incorrect tariff relied upon by the learned Magistrate has resulted in a harsh sentence.
16. This court agrees with both counsel that the learned Magistrate fell in error when he took the wrong tariff for the offence of burglary. The starting point chosen was on the higher side of the accepted tariff and by adding the aggravating factors the appellant got punished twice.
17. In accordance with section 256 (3) of the Criminal Procedure Act and in the interest of justice this court quashes the sentence of the appellant and proceeds to sentence the appellant afresh.

TARIFF

18. The maximum penalty for the offence of burglary is 13 years imprisonment. The accepted tariff for this offence is a sentence between 1 year and 3 years imprisonment (*see Viliame Waqavanua vs. State, Criminal Appeal No. HAA 013 of 2011, 6th May, 2011*), *Penaia Ratu vs. State, Criminal Case No. HAA 95 of 2017*).
19. For the offence of theft the maximum penalty is 10 years imprisonment.
20. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:

- “(i) For the first offence of simple theft the sentencing range should be between 2 and 9 months.*
- (ii) any subsequent offence should attract a penalty of at least 9 months.*
- (iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*
- (iv) regard should be had to the nature of the relationship between offender and victim.*
- (v) planned thefts will attract greater sentences than opportunistic thefts.”*

AGGRAVATING FEATURES

21. The following aggravating factors are obvious in this case:

a) Night time Invasion

The accused had committed the offences in the night going into early morning. There is some degree of planning involved considering the circumstances and the manner of the offending. The accused was bold and undeterred when he entered the canteen.

b) A canteen was targeted

A village canteen was targeted (which belonged to the appellant's cousin sister) and also such offences are becoming very prevalent in the community.

MITIGATION

22. There is no issue raised by the appellant in respect of the mitigation mentioned in the sentence hence I accept the mitigation noted by the

learned Magistrate and adopt the same with the reductions allowed for early guilty plea and other mitigating factors.

23. Considering the objective seriousness of the offending, I select 18 months imprisonment as the aggregate sentence for both the offences (lower range of the tariff) in accordance with section 17 of the Sentencing and Penalties Act.
24. For the aggravating factors I increase the sentence by 2 years and 7 months. The interim sentence of imprisonment now stands at 4 years and 1 month imprisonment, for the early guilty plea (in the absence of genuine remorse as found by the Magistrate's Court) I reduce the sentence by 1 year and 1 month and for the other mitigating factors I reduce the sentence by 1 year bringing the term of imprisonment to 2 years. The appellant has not spent any time in remand.
25. The final aggregate sentence for both offences is 2 years. Under section 26 (2) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
26. In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012)*, Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

"[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.

[23] In **DPP v Jolame Pita** (1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

27. The following circumstances or reasons for the offending needs to be weighed in choosing an immediate imprisonment or a suspended sentence.
28. The appellant is 20 years of age, he pleaded guilty at the earliest opportunity, cooperated with the police during investigations, is a person of generally good character and the amount of money stolen was a small

sum. On the other hand the offences committed are serious and prevalent which were committed after some planning on a village canteen.

29. In view of the above, I consider there are no special reasons which would convince this court to impose a wholly suspended sentence. The offences committed are very prevalent nowadays instead of doing something meaningful and productive in life the appellant made a wrong choice in taking a short cut by committing the offences which is unacceptable and must be denounced in every sense of the word.
30. This court has to balance rehabilitation with specific and general deterrence. In considering a partial suspended sentence this court has taken into account rehabilitation over and above retribution and deterrence. The appellant is a young offender who pleaded guilty at the earliest opportunity, the amount stolen was not substantial and that this was his first offending. In my judgment the appellant ought to be given a chance to get back into the society and make some positive contributions which will go a long way. As it is the appellant has endured enough punishment to serve as a reminder not to be in conflict with the law.

CONCLUSION

31. The appeal is allowed. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a partial suspended sentence is just in all the circumstances of the offending.
32. In summary the appellant is sentenced afresh to 2 years imprisonment with effect from 18th June, 2019 as an aggregate sentence for the offence of burglary and theft. The term of imprisonment is partially suspended after the accused serves 1 year imprisonment the balance term of

imprisonment of 1 year is suspended for 3 years which will come into effect from the time the accused is released from the Corrections Centre. The effect of suspended sentence is explained to the accused.

33. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

27 September, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.