IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 14 OF 2020

BETWEEN: **MAIKA BAVORO** **APPELLANT**

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

Counsel: Appellant In Person
Mr. R. Kumar for Respondent

Date of Hearing: 23rd October 2020

Date of Judgment: 10th December 2020

JUDGMENT

---

1. The Appellant had been charged in the Magistrate's Court in Suva with one count of Attempted Burglary, contrary to Section 44 (1) and 312 (1) of the Crimes Act and one count of Resisting Arrest, contrary to Section 277 (b) of the Crimes Act. As a consequence of the plea of not guilty entered by the Appellant, the matter had proceeded to the hearing. The Prosecution had presented the evidence of two witnesses, while the Defence had exercised his right to remain silent. Subsequent to the hearing, the learned Magistrate, in his judgment dated 14th of August 2019 had found the Appellant guilty of the two offences

as charged. The learned Magistrate had then sentenced the Appellant for twenty-five months imprisonment for the offence of Attempted Burglary and eight months imprisonment for the offence of Resisting Arrest. The learned Magistrate had further ordered that both sentences be served concurrently, with a non-parole period of 15 months. Aggrieved with the said conviction and the sentence the Appellant filed this Appeal on the following grounds:

Grounds of Appeal Against Conviction

(i) *That the Learned Magistrate erred in law and in fact when he failed consider the charge of "Attempted Burglary" is defective and Prosecution had failed to prove the fault elements of the offence.*

(ii) *That the Learned Magistrate erred in law and in fact when he failed to consider the lesser alternative charge of "Damaging Property" as the physical an fault elements were not present to complete and fulfill the legal requirement for the charge of Attempted Burglary thus rendering the conviction unsafe and a miscarriage of justice against the Appellant.*

(iii) *That the Learned Magistrate erred in law and in fact when he accepted the uncorroborated evidence of DC 4643 Vilikesa to establish the identification of the Appellant. Whereby the evidence of DC 4643 Vilikesa did not confirm that the Appellant was seen by the same witness consideration of such evidence has caused a substantial miscarriage of justice.*

(iv) *That the Learned Magistrate erred in law and in fact when he failed to consider that the Appellant was brought to the scene of crime after being arrested by the Complainants thus creating a reasonable doubt over the whole offence.*

Grounds of Appeal Against Sentence

(i) *That the Sentence passed by the Learned Magistrate is harsh and excessive considering that the conviction is unsupported by the evidence considered as a whole.*

(ii) *That the Learned Magistrate erred in law and in fact when he imposed a non-parole period of 16 months whereas there is no parole board provided by the Fiji Corrections Services.*

2. In his written submissions, the Appellant had raised eight grounds against the conviction and four grounds against the sentence. The learned Counsel for the Respondent also made her written submissions, based on those twelve grounds; they are that:

Grounds of Appeal Against Conviction

(i) *That the Learned Magistrate erred in law and in fact when he failed to consider the charge of 'Attempted Burglary' is defective and Prosecution had failed to prove the fault elements of the offence.*

(ii) *That the Learned Magistrate erred in law and in fact when he failed to consider the lesser alternative charge of 'damaging property' as the physical an fault elements were not present to complete and fulfil the legal requirement for the charge of attempted burglary thus rendering the conviction unsafe and a miscarriage of justice against the Appellant*

(iii) *That the Learned Magistrate erred in law and in fact when he accepted the uncorroborated evidence of DC 4643 Vilikesa to establish the identification of the appellant. Whereby the evidence of DC 4643 Vilikesa did not confirm that the appellant was seen by the same witness. Consideration of such evidence has caused a substantial miscarriage of justice.*

(iv) *That the Learned Magistrate erred in law an in fact when he failed to consider that the appellant was brought to the scene of Crime after being arrested by the complainants, thus creating a reasonable doubt over the whole offence.*

(v) *That the Learned Trial Magistrate erred in law to consider inconsistency and contradiction evidence in his Judgment page (33) of Court Record paragraph (11)*

(A) *The evidence of Vilikesa testified he heard sound of glass breaking.*

(B) *Eminoni evidence said that he heard a loud bang.*

(vi) *That the Learned Trial Magistrate erred in law in allowing the accused person to remain silent while closing of Prosecution's case.*

(vii) *That the Learned Trial Magistrate erred in law and failed to inform the Defence rights to call a Defence witness after closing of Prosecution's case.*

(viii) *That the Learned Trial Magistrate erred in law in allowing Prosecution's witness to identify the accused person; in dock, thus failed to warn himself and to give Turnbull Warning in his Judgment.*

Grounds of Appeal Against Sentence

(i) *That sentence passed by the Learned Magistrate is harsh and excessive considering:*

(a) *That the conviction is unsupported by the evidence considered as a whole.*

(ii) *That: the Learned Magistrate erred in law and in fact when he imposed a non-parole period of (16) months, whereas there is no parole board provided by the Fiji Corrections Services.*

(iii) *That: the Sentencing Magistrate failed to give discount on mitigating factors thus considering the accused's previous conviction punishing the accused as DOUBLE JEOPARDY.*

(iv) *That the Learned Sentencing Magistrate failed to impose a partial sentence suspended under Section 26 of Sentencing Penalty Act.*

The First and Second Grounds

3. The first and the second grounds are based upon the contention that the learned Magistrate had erred in law and fact in failing to consider that the prosecution had failed to prove the physical and the fault elements of the offence of Attempted Burglary.

4. The Appellant argues in his written submissions, the charge of Attempted Burglary is defective, and he should have been charged with or convicted for a lesser offence of damaging property.

5. According to Section 312 of the Crimes Act, a person commits the offence of burglary, if a person enters or remains in a building as a trespasser, with intent to commit theft. In this matter, the Prosecution had presented evidence to establish that the Appellant had entered a property of another and then tried to open the door of the house by breaking it with a stone. The first and second witnesses, who were neighbours of the said property, had heard the sound of the breaking and gone to check it. They had then found the Appellant, whom the two witnesses had known before, was trying to break the glass door of the house with a stone. Upon seeing the two witnesses, the Appellant had thrown the stone at them and

tried to flee from the scene. The two witnesses had chased him after and managed to overpower his resistance and arrested the Appellant.

6. According to the evidence presented, the Prosecution had established that the Appellant had the intention to commit the offence of burglary. With that intention, the Appellant had engaged in conduct, that was entering into the compound and breaking the glass door, which amounts to more than mere preparation to commit the said offence. Hence, it is clear that the Prosecution had established both the physical and fault elements of the offence of attempted burglary. Accordingly, I do not find any merits in the first and second grounds of Appeal.

The Third and Eight Grounds

7. Grounds three and eight against the conviction are founded on the argument that the learned Magistrate had relied on the uncorroborated evidence of Vilikesa without adequately considering the Turnbull guidelines of identification.

8. Vilikesa's evidence had been corroborated and supported by the evidence of Eminoni as both of them had witnessed the Appellant committing this crime. Vilikesa and Eminoni had known the Appellant as he used to live in the same street with them. They had then asked the Appellant to stop, but he had tried to run away. Vilikesa and Eminoni then chased after him and managed to arrest him overpowering the Appellant's resistance. Hence, this is not a case of identifying the suspect for first time at the dock. It was the two Prosecution witnesses who had arrested the Appellant and handed him over to the Police. They knew the Appellant before this incident as they all lived in the same street. Hence, I do not find any merits in these two grounds.

The Fourth Ground

9. I do not find any relevancy of this ground to this Appeal. Hence, I do not wish to discuss this ground and dismiss it accordingly.

The Fifth Ground

10. The Appellant contends that the learned Magistrate had failed to consider the inconsistent nature of the evidence given by the two witnesses of the Prosecution. Vilikesa had stated in his evidence that he heard a sound of glass breaking, while Eminoni said that he heard a loud bang.

11. The Learned Magistrate in paragraph 11 of his judgment had discussed this issue and found that inconsistence nature had not affected the credibility of the evidence of the Prosecution witnesses. Accordingly, I find the Learned Magistrate had accurately considered the inconsistency described above in making his judgment. Hence, I find no merits in this ground.

The Sixth and Seventh Grounds

12. These two grounds are based upon the allegation that the Learned Magistrate had erred in law, allowing the Appellant to exercise his right to remain silent. A lawyer had represented the Appellant during the hearing in the Magistrate's Court. It was the decision that the Appellant and his lawyer had to make, but not the Learned Magistrate, whether the Appellant exercises his right to remain silent. I accordingly do not find any merits in these two grounds.

Appeal Against the Sentence

13. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (the 3rd of December 2015)** 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."

14. The Fiji Court of Appeal in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (the 3rd of December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where it was held that:

> *"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v. The State, unreported Cr. App. No. CAV0010 of 2013; the 20th of November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:*
>
> *i) Whether the sentencing judge acted upon a wrong principle;*
> *ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
> *iii) Whether the sentencing judge mistook the facts*
> *iv) Whether the sentencing judge failed to take into account some relevant consideration.*
>
> *Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for*

the appellate Court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)."

15. The Learned Magistrate had correctly adopted the applicable tariff for the offence of burglary as a period of imprisonment between 1 to 3 years. (*vide Paragraph 5 of the Sentence*) . The final sentence of twenty five months is within the applicable tariff limit. Furthermore, he had accurately adopted the tariff for the offence of resisting arrest as six months to twelfth months imprisonment. The final sentence of eight months is within the applicable tariff limit.

16. Section 18 (1) of the Sentencing and Penalties Act requires the sentencing court to fix a non-parole period if the period of imprisonment is two years or more. The final sentence in this matter is 25 months, which is over two years; hence, the Learned Magistrate is required, under Section 18 (1) of the Sentencing and Penalties Act, to impose a non-parole period.

17. The Learned Magistrate has not taken the previous convictions of the Appellant as an aggravating fact to increase his sentence. Section 4 (2) (i) of the Sentencing and Penalties Act allows the sentencing court to consider the previous character of the accused. The previous conviction of the accused is one of the factors that the Court could take into consideration in determining the previous character of the accused. (*vide Section 5 of the Sentencing and Penalties Act*)

18. The Learned Magistrate had correctly considered the previous convictions of the Appellant in determining the previous character of the Appellant and concluded that he is not entitled to any discount for his previous character.

19. The final sentence is above two years imprisonment; hence, the Learned Magistrate has no jurisdiction to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Act.

20. In view of the reasons discussed above, I do not find any merits in the four grounds of Appeal against the sentence.

21. The orders of the Court:

    a) The Appeal against the conviction and the sentence is dismissed.

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

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva
10th December 2020

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