

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

**CRIMINAL APPEAL NO. HAA 73 OF 2019**

**BETWEEN** : **ALIPATE CAVEI**  
**APPELLANT**

**AND** : **STATE**  
**RESPONDENT**

*Counsel* : *Ms. Vulimainadave for the Appellant*  
: *Mr. T. Tuenuku for the Respondent.*

*Date of Hearing* : *24<sup>th</sup> of September, 2020*

*Date of Judgement* : *22<sup>nd</sup> of October, 2020*

**JUDGMENT**

**Background**

1. This is an appeal by the Accused Appellant (who will be referred to as the appellant hereinafter) against a sentence imposed on him by the Learned Magistrate of Lautoka.
2. The Appellant was charged in the Magistrates' Court of Lautoka with the following offence;

**COUNT**

***Statement of offence***

**ESCAPING FROM LAWFUL CUSTODY**: Contrary to Section 196 of the Crimes Act.

### ***Particulars of Offence***

**Alipate Cavei**, on the 25<sup>th</sup> day of July, 2019 at Lautoka in the Western Division whilst being in the lawful custody of Corrections Officer Biau Sosiceni, escaped from such lawful custody.

3. The Appellant has pleaded guilty to the said charge and was accordingly sentenced on the 23<sup>rd</sup> of October 2019, for a term of imprisonment for 4 months to be operative consecutively to the term of imprisonment he is already serving.
4. The appellant being dissatisfied of the said sentence has made this timely appeal on the 04<sup>th</sup> of November 2019 on two grounds. However he has filed amended grounds on two occasions thereafter and final amended grounds were on filed on the 12<sup>th</sup> of February 2020.
5. Though the Appellant has sought Legal Aid and was represented by a counsel, he has always filed his grounds and submissions in person. However, I would consider it to be probable that he has done so having proper legal assistance from the Legal Aid. Therefore, I have to consider that he has abandoned his previous grounds of appeal and stands by his grounds filed on the said 12<sup>th</sup> of February 2020.

### **Grounds of Appeal**

6. The grounds of appeal relied upon by the Appellant is as follows;
  - i) That the learned trial Magistrate made a pure error of law when he failed to consider that the appellant has already been penalised by the Fiji Corrections Service on the 25<sup>th</sup> day of July 2019, and was consequently sentenced by the Corrections Tribunal for two months, which is to be reduced from the appellants entitled remission, and;
  - ii) That the Appellant has been double jeopardized when again being sentenced for four months consecutive imprisonment.

7. The Appellant has submitted a copy of the Prison Charge Sheet and the Respondent has filed his submissions in writing. I have carefully considered all the available material before me and the submissions made by the parties.

### **Analysis**

8. The first alleged ground is on the failure by the Learned Magistrate to consider that he has already been sentenced by the Fiji Corrections service for a period of two months.

First, it should be noted that neither the Appellant nor the state has brought that to the attention of the learned Magistrate that he has been dealt before for the same offence. Even after a careful perusal of all the available material, the learned Magistrate had no way of knowing such and as it was well within the knowledge of the Appellant and he should have brought it to the attention of the learned Magistrate.

Secondly, on perusal of the proceedings held against him on the 25<sup>th</sup> of July 2019 at the Corrections Tribunal, he has been deprived of only 1 month of remission and not two months as alleged.

Therefore, I do not consider that the learned Magistrate has erred in law or facts, when he did not consider his depriving of remission, as it was never brought to his attention.

9. The second alleged ground of appeal is on double jeopardy and the consecutive operation of the imposed sentence. In dealing with the latter first, as for the provisions of section 22 (2) (b) and 22 (4) of the Sentencing and Penalties Act, it is mandatory for such imprisonment to be made operational consecutively. Therefore, I do not find any error of law committed by the learned Magistrate as alleged.

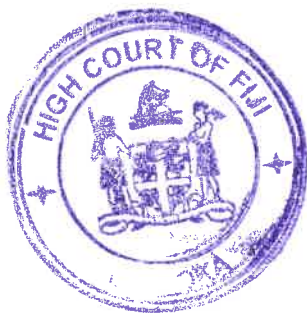
10. Now, I will consider the issue of double jeopardy. The Appellant has cited the case of **Joeli Tawatatau v State** (AAU0002 of 2007) in support of his contention. I have carefully considered the submitted.

11. It should be noted that section 37 (2) of the Prisons and Corrections Act of 2006 provides that;

*37. (2) When a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances, but a court shall take into*

*account any penalty imposed under this Act, when sentencing a prisoner for the criminal offence.*

12. Though this Act was enacted in 2006 and the above judgment was pronounced in 2007, it should be regrettably noted that the court was not invited to consider the above provision in the Prisons and Corrections Act of 2006. It may be due to the fact that the alleged offence in the case of Joeli Tawatatau v State (supra) was committed in 2005, before the operation of the present Prisons and Corrections Act of 2006.
13. Therefore, I find as the law stands today, that section 37 (2) of the Prisons and Corrections Act of 2006, should be given effect and subject to that it would not be double jeopardy to deal with an already dealt with prisoner.
14. In the light of the above when considered the facts before me, the law requires for the month of reduced remission, to be deducted from the sentence of the learned Magistrate. Therefore, I partially allow this appeal in regards to the sentence imposed by the learned Magistrate and impose a 3 months of imprisonment instead of the 4 months of imprisonment ordered by the learned Magistrate. As I have mentioned above I do not see any reason to make it operative concurrently. Therefore the above term of 3 months of imprisonment should be operative consecutively to the term of imprisonment, the Appellant is serving, presently.



A handwritten signature in black ink, appearing to read "Chamath S. Morais".

**Chamath S. Morais**  
**Judge**

**At Lautoka**  
22<sup>nd</sup> of October, 2020

*Solicitors: The Legal Aid Commission, Lautoka for the Appellant*  
*Office of the Director of Public Prosecutions, for the Respondent*