IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 013 OF 2022

BETWEEN:	**PENI RASALATUBALEVU**	**APPELLANT**
A N D:	**STATE**	**RESPONDENT**

Counsel: Ms. E. Radrole for Appellant
Ms. L. Latu for Respondent

Date of Hearing: 07th November 2022

Date of Judgment: 23rd November 2022

JUDGMENT

1. The Appellant was charged in the Magistrate's Court in Savusavu with one count of Burglary, contrary to 312 (1) of the Crimes Act and one count of Theft, contrary to Section 291 (1) of the Crimes Act. The Appellant pleaded guilty to the said two counts; hence, the learned Magistrate on the 31st of May 2022 sentenced him to 12 months and 11 days imprisonment for these two offences as an aggregate sentence. The learned Magistrate further ordered this sentence to be served consecutive to the sentence the Appellant was

serving. Aggrieved with the sentence, the Appellant filed this Appeal on the following grounds:

a) *That the sentencing Magistrate erred in law while imposing a consecutive sentence on serving convicted person who was sentenced by the Savusavu Magistrate's Court.*

b) *That the sentencing Magistrate erred in law and in fact in not suspending the trial sentencing to 12 months and 11 days as it is far below 2 years imprisonment as dictated in Section 26 (2) (b) of the Sentencing Penalties Act 2009.*

2. During the hearing of this Appeal, the learned Counsel for the Appellant abandoned the second ground of Appeal and pursued only the first ground. The first ground of Appeal is founded on the contention that the learned Magistrate erred in law in imposing a consecutive sentence without properly providing reasons for doing so. The Court received the written submissions filed by the learned Counsel for the Appellant and the Respondent. Having carefully pursued the record of the proceedings in the Magistrate's Court, the sentence imposed by the learned Magistrate and the respective written submissions filed by the parties, I now proceed to pronounce the judgment of this Appeal.

3. Section 22 (1) of the Sentencing and Penalties Act deals with the concurrent and consecutive sentences.

> *"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"*

4. According to Section 22 (1) of the Sentencing and Penalties Act, every sentence imposed by the Court must be served concurrent with any pending sentence of imprisonment. However, Section 22 (1) has allowed the Court to decide otherwise. The Supreme Court in **Vaqewa v**

State [2016] FJSC 12; CAV0016.2015 (22 April 2016) has outlined the proper construction of Section 22 (1) of the Sentencing and Penalties Act, where Keith J held that:

> *"In my opinion, the proper construction of these provisions is as follows. The default position is that any term of imprisonment passed on someone by a court has to be served concurrently with any sentence of imprisonment he is currently serving. There are two situations in which the default position must or may be disapplied. It must be disapplied in any of the five circumstances set out in section 22(2). That is the effect of the opening words of section 22(1) – "Subject to sub-section (2) ..." – and the opening words of section 22(2) – "Sub-section (1) does not apply ..." In addition, though, even in a case which does not come within any of the five circumstances set out in section 22(2), the default position may be disapplied. That is the effect of the words "unless otherwise directed by the Court" in section 22(1)."*

5. Accordingly, the words "*unless otherwise directed by the Court*" in Section 22 (1) have given discretion to the sentencing Court to depart from the default position of imposing concurrent sentences if it finds the consecutive sentence is the appropriate punishment.

6. The Fiji Court of Appeal in **Tuibua v State [2008] FJCA 77; AAU0116.2007S** (7 November 2008) has discussed the applicable approach in imposing consecutive sentences. The Fiji Court of Appeal in **Tuibua (supra)** said that:

> *"The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A sentencer who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentencer must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced (Mill v The Queen*

[1988] HCA 70; (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.) 180). When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones [1995] UKPC 3; (1996) 1 Cr.App.R. (S.) 153, R v Millen (1980) 2 Cr.App.R. (S.) 357 and Nollen v Police [2001] SASC 13; (2001) 120 A Crim R 64)."

7. Considering the principles enunciated in **Tuibua (supra)**, the Court has to consider the propriety of the aggregate sentence as a whole when the Court is imposing a consecutive sentence to an Accused who is already serving a term of imprisonment in relation to another matter. Accordingly, the Court is required to consider the totality of the aggregate sentence. The totality principle in sentencing encompasses two main elements. The first is proportionality between the sentence and the offence. The second element is that the Court should not impose a crushing sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: (**Martino v Western Australia [2006] WASCA 78 [16]**).

8. The Supreme Court in **Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC) [2018] FJSC 4; CAV0014.2017** (26 April 2018), discussed the totality principle and one transaction rule within the context of imposing consecutive sentence, where Marsoof J held that:

"[68] The learned judge has given consideration to the theories involved in the imposition of consecutive sentences as stated by Pathik J in Visa Waga v The State [2003] FJHC 138 (23 September 2003) that, "The power to order sentences to run concurrently is subject to two major limiting principles, which may be called the "one transaction rule" and the "totality principle" (Thomas; Principles of Sentencing 2nd Ed pg. 53). It does not mean that consecutive sentences cannot be imposed, so long as the overall

sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of the aggravating features (Regina v Johnson, The Times 22 May 1995).

[69] The totality principle basically means that when a court passes a sentence with a number of consecutive sentences, it should review the aggregate or the totality of the sentences and consider whether the "total" is just appropriate when considering the "offences" as a whole. As Jiten Singh J said in Namma v The State [2002] FHHC 171 (6 September 2002), the application of this principle does not mean that there is judicial conduct offering for "multiple offending" or encourages offenders to continue offending, after a serious crime, with the impression that there is little to lose. It must always be made clear that the more the number of crimes and the more the gravity of those crimes, the longer the sentence is to be recorded.

[70] The totality principle is that consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences viewed as a whole (R v Bradley [1979] NZCA 33; (1979) 2 NZLR 262 at 263). When a Judge is faced with the task of sentencing for multiple offences, as an initial step he is required to identify the appropriate sentence for each offence and then as the final step, to achieve a total sentence appropriate to the overall culpability of the accused (HKSAR v Ngai Yiu Ching [2011] 5 HLRD 690, par 13).

9. In this case, the learned Magistrate did not give any reasons why he decided to deviate from the default position stipulated under Section 21 (1) of the Sentencing and Penalty Act. The learned Magistrate merely ordered the sentence to run consecutively to the current sentence the Appellant was serving.

10. Since the learned Magistrate gives no reasons in the sentence, this Court is not in a position to properly consider whether the learned Magistrate had considered and applied the

principles pertaining to the totality principle and the one transaction rule accurately in imposing consecutive sentences.

11. Taking into consideration the above-discussed reasons, it is my opinion that this is an appropriate case for this Court to intervene in exercising its appellate jurisdiction under Section 256 (2) of the Criminal Procedure Act.

12. I accordingly make the following orders:

    i) The Appeal is allowed,

    ii) The Appellant is to serve the sentence imposed by the learned Magistrate on the 31st of May 2022, concurrent to the sentence that he was/is serving on the 31st of May 2022.

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

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

At Suva
23rd November 2022

Solicitors
Office of the Legal Aid Commission for Appellant.
Office of the Director of Public Prosecutions for the Respondent.