

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

**CRIMINAL APPEAL NO. HAA 18 OF 2023**

**IN THE MATTER** of an Appeal against the decision of the Magistrate's Court of Ba, in Criminal Case No. 29 of 2023.

**BETWEEN** : **SAMUELA DAUNABOU**

**APPELLANT**

**AND** : **STATE**

**RESPONDENT**

**Counsel** : The Appellant Appears in Person  
Ms. Saini Naibe for the Respondent

**Date of Hearing** : 9 April 2024

**Judgment** : 8 May 2024

**JUDGMENT**

- [1] This is an Appeal made by the Appellant against the sentence imposed against him by the Magistrate's Court of Ba, in Criminal Case No. 29 of 2023.
- [2] In the Magistrate's Court of Ba, Criminal Case No. 29 of 2023, the Appellant was charged with one count of Burglary, contrary to Section 312 (1) of the Crimes Act No. 44 of 2009 (Crimes Act) and one count of Theft, contrary to Section 291 (1) of the Crimes Act. The full details of the charges read as follows:

**COUNT 1**

**Statement of Offence (a)**

**BURGLARY**: Contrary to Section 312 (1) of the Crimes Act of 2009.

**Particulars of Offence (b)**

Samuela Daunabou, between the 11<sup>th</sup> to 12<sup>th</sup> days of January 2023, at Valele, Ba, in the Western Division, entered the house of Asad Ali as a trespasser with intent to commit Theft.

**COUNT 2**

**Statement of Offence (a)**

**THEFT**: Contrary to Section 291 (1) of the Crimes Act of 2009.

**Particulars of Offence (b)**

Samuela Daunabou, between the 11<sup>th</sup> to 12<sup>th</sup> days of January 2023, at Valele, Ba, in the Western Division, dishonestly misappropriated 1 x LG 42 inch flat screen valued at \$1,200.00, 1 x Samsung A13 mobile phone valued at \$400.00 and 1 x Nokia button phone valued at \$45.00 to the total value of \$1,645.00, the property of Asad Ali with the intent to permanently deprive the said Asad Ali of his properties.

- [3] The Appellant was first produced in the Magistrate's Court of Ba for this matter on 20 January 2023. On 1 February 2023, the Appellant pleaded not guilty to the charges. However, subsequently the Appellant had taken a progressive approach in the matter and pleaded guilty to the two charges, on 17 March 2023.
- [4] On 31 March 2023, the sentence was pronounced [Vide Sentence from pages 7-10 of the Magistrate's Court Record]. The Appellant had been imposed an aggregate sentence of 3 years and 10 months imprisonment, with a non-parole period of 2 years imprisonment.
- [5] Aggrieved by the said Order made by the Learned Magistrate, Ba, on 31 March 2023, the Appellant has filed this appeal in the High Court.

- [6] This Appeal was received in the High Court on 25 April 2023 and, as such, was a timely appeal.
- [7] The Appeal filed was originally in respect of both the conviction and sentence. However, on 7 December 2023, the Appellant submitted that he only wishes to pursue the appeal in respect of the sentence.
- [8] This matter was taken up for hearing before me on 9 April 2024. The Appellant (who appeared in person) and the Learned Counsel for the Respondent were heard. Both parties have filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [9] As per the Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

#### **Grounds of Appeal against Sentence**

1. That the Sentence is harsh and excessive.
2. That the Sentencing Magistrate did not consider the progressive approach that was entertained by the Appellant.

#### **The Law and Analysis**

- [10] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced 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."*

**[11]** 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 Sentence

- [12] 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).”*

- [13] 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.”*

- [14] 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.

- [15] 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 **Naikелеkelevesi –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."*

### **The Grounds of Appeal against Sentence**

- [16] The first Ground of Appeal against Sentence is that the Sentence is harsh and excessive. The second Ground of Appeal against Sentence is that the Learned Sentencing Magistrate failed to consider the progressive approach taken by the Appellant.
- [17] I am of the opinion that the two Grounds of Appeal are inter connected. Thus they will be addressed together.
- [18] With regard to the offence of Burglary, the Learned Magistrate has correctly identified the maximum sentence for the offence as 13 years imprisonment. As to the tariff for Burglary the Learned Magistrate has made reference to the decision of **(Avishkar Rohinesh) Kumar & Another (Sirino Vakatawa) v State** [2022] FJCA 164; AAU117.2019 (24 November 2022), where the Fiji Court of Appeal has formulated a new tariff for the offences of Burglary and Aggravated Burglary.
- [19] With regard to the offence of Theft, the Learned Magistrate has correctly identified the maximum sentence for the offence as 10 years imprisonment. As to the tariff for Theft he has *inter-alia* made reference to the case of **Ratusili v. State** [2012] FJHC 1249; HAA011.2012 (1 August 2012); where His Lordship Justice Madigan established the tariff for the offence of Theft.
- [20] Thereafter, the Learned Magistrate has gone on to set out the aggravating factors and mitigating factors in the case. He has also stated that he has taken into account Sections

4 (1), 4 (2), 15, 16 and 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act).

- [21] The Learned Magistrate has stated that taking into account the circumstances of offending and that both offences were committed in the same transaction, imposing an aggregate sentence for the two counts pursuant to Section 17 of the Sentencing and Penalties Act was appropriate.
- [22] The Learned Magistrate has considered that the level of harm in this matter was high since the Complainant, who was the owner of the house, was sleeping inside his home when the offence was committed by the Appellant.
- [23] Having duly considered the aggravating factors and mitigating factors in the case, the Learned Magistrate has concluded that the aggregate sentence to be imposed on the Appellant was 4 years imprisonment. Thereafter, in terms of Section 24 of the Sentencing and Penalties Act, he has deducted 2 months from the sentence for the time the Appellant had spent in remand and arrived at a final aggregate sentence of 3 years and 10 months imprisonment.
- [24] Although the Appellant contends that the Learned Magistrate has failed to consider the progressive approach taken by the Appellant, this is incorrect. At paragraph 14 of the Sentence, it is clearly stated that the Learned Magistrate has given a discount of 2 years to the Appellant for pleading guilty in the matter.
- [25] Furthermore, the Learned Magistrate has stated that he cannot extend any leniency towards the Appellant considering the fact that the Appellant was not a first offender. The record of previous convictions is found at page 24 of the Magistrate's Court Record. Therein, it is recorded that the Appellant has two previous convictions for similar offences. On 19 January 2021, the Appellant had been sentenced to 16 months imprisonment for one count of Burglary, one count of Theft and one count of Breach of Bail Conditions, in Magistrate's Court of Ba, Criminal Case No. CF 634 of 2020. On 10 May 2021, the Appellant had been sentenced to 3 months imprisonment for one count of Failure to Comply with Orders, in Magistrate's Court of Ba, Criminal Case No. CF 627



of 2020. This sentence of imprisonment was to be served concurrently with the 16 months imprisonment the Appellant was already serving.

[26] The Appellant has made reference to certain similar cases of Burglary and Theft where he states that a lesser term of imprisonment had been imposed on the offenders in those matters. As a result, he contends that there is no consistency in the sentences imposed by Judicial Officers with regard to property offences. However, it must be noted that the facts and circumstances of each case differs and it is entirely at the discretion of the Judicial Officer to impose a sentence that in his or her opinion is just and reasonable considering all facts of that particular case.

[27] In the circumstances, I find that the Learned Sentencing Magistrate has duly exercised his sentencing discretion in this matter. Considering all factors, the final sentence imposed on the Appellant cannot be considered as harsh and excessive. Therefore, I am of the opinion that these Grounds of Appeal against Sentence have no merit.

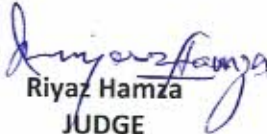
#### Conclusion

[28] Accordingly, I conclude that this Appeal against sentence should be dismissed.

#### FINAL ORDERS

[29] 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 Ba, in Criminal Case No. 29 of 2023 is affirmed.

  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI



AT LAUTOKA

Dated this 8<sup>th</sup> Day of May 2024

**Solicitors for the Appellant :**  
**Solicitors for the Respondent:**

**Appellant Appears in Person.**  
**Office of the Director of Public Prosecutions, Lautoka.**