

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

CRIMINAL APPEAL NO. HAA 09 OF 2025

IN THE MATTER of an Appeal against the Sentence of the Magistrate's Court of Lautoka, in Criminal Case No. CF 542 of 2023 [Extended Jurisdiction No. HAC 127 of 2023].

BETWEEN : POATE BIUTOGA

APPELLANT

AND : STATE

RESPONDENT

Counsel : Appellant Appeared in Person
Mr. Laisiasa Baleilevuka for the Respondent

Date of Hearing : 5 June 2025

Judgment : 19 June 2025

JUDGMENT

- [1] This is an Appeal made by the Appellant against the Sentence imposed against him by the Magistrate's Court of Lautoka, in Criminal Case No. CF 542 of 2023 [Extended Jurisdiction No. HAC 127 of 2023].
- [2] In the Magistrate's Court of Lautoka, Criminal Case No. CF 542 of 2023, the Appellant together with one Jason Goundar, were charged with one count of Aggravated Burglary, contrary to Section 313 (1) (a) 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 [Vide Charge at page 3 of the Magistrate's Court Record]:

First Count

Statement of Offence (a)

AGGRAVATED BURGLARY: Contrary to Section 313 (1) (a) of the Crimes Act of 2009.

Particulars of Offence (b)

POATE BIUTOGA AND JASON GOUNDAR, on the 12th day of August 2023, at Lautoka, in the Western Division, unlawfully entered the dwelling house of **PRAKASH CHAND** as a trespasser with intent to commit theft therein.

Second Count

Statement of Offence (a)

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

Particulars of Offence (b)

POATE BIUTOGA AND JASON GOUNDAR, on the 12th day of August 2023, at Lautoka, in the Western Division, dishonestly appropriated 1 x Grey Ozito Drill valued at \$200.00, 1 x Green Grinder Machine valued at \$150.00, 1 x black Samsung 40 inch screen valued at \$1,200.00, 1 x Grants blended scotch whisky valued at \$170.00 and cash \$250.00, all to the total value of \$1,970.00, the property of **PRAKASH CHAND** with the intention to permanently depriving the said **PRAKASH CHAND**.

- [3] The Appellant and the said Jason Goundar were first produced in the Magistrate's Court of Lautoka for this matter on 15 August 2023. Since Aggravated Burglary is an indictable offence the matter was transferred to the High Court of Lautoka.
- [4] The matter was first called before the High Court of Lautoka on 28 August 2023. The Acting Director of Public Prosecutions (DPP) had filed Information in the High Court, on 7 November 2023 [Vide Information at page 42 of the Magistrate's Court Record]. Even

in the High Court, the Appellant and Jason Goundar were charged with one count of Aggravated Burglary, contrary to Section 313 (1) (a) of the Crimes Act and one count of Theft, contrary to Section 291 (1) of the Crimes Act [The same charges as in the Magistrate's Court of Lautoka]. Both the Appellant and Jason Goundar had pleaded not guilty to the two charges.

- [5] On 27 November 2023, pursuant to Section 4 (2) of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act), the Lautoka High Court had invested extended jurisdiction on the Resident Magistrate, Magistrate's Court of Lautoka, to try this matter according to law [Vide Transfer Order at pages 31-32 of the Magistrate's Court Record].
- [6] Accordingly, the matter was transferred back to the Magistrate's Court of Lautoka and called on 11 December 2023. In the Magistrate's Court of Lautoka, both the Appellant and Jason Goundar maintained their not guilty plea.
- [7] However, on 27 January 2025, the Appellant had indicated to Court that he wishes to change his plea. Accordingly, on that day, he had pleaded guilty to both the charges on his own free will [Vide page 96 of the Magistrate's Court Record].
- [8] On the same day, the Summary of Facts had been read and explained to the Appellant. The Appellant had understood and admitted to the Summary of Facts and had been found guilty and convicted of the two charges [Vide page 97 of the Magistrate's Court Record].

The Summary of Facts reads as follows [Vide page 10 of the Magistrate's Court Record]:

"First Count

On the 12th day of August 2023, POATE BIUTOGA 29 years of Naitasiri, with another at Lautoka, entered into the dwelling house of PRAKASH CHAND (Complainant), 47 years of Natabua, Lautoka with intent to commit theft from said property.

Second Count

On the 12th day of August 2023, Accused at Vitogo Paipai Lautoka dishonestly appropriated 1 x grey Ozito Drill, 1 x Green Grinder Machine, 1 x black Samsung brand 40 inch flat screen TV, 1 x Grants blended scotch whisky, cash amounting to 250 NZD, the properties of Prakash Chand with the intention of permanently depriving the said Prakash Chand.

On the above mentioned date, time and place Complainant received a phone call from his brother PW2 Sudesh Sujit Chand, 36 years of Natabua that his house in Vitogo Paipai had been broken into. Complainant owns a house at Vitogo Paipai whereby every Fridays he visits the house where the PW2 checks on it on the week days. PW2 at about 4.40 p.m. visited the house at Paipai saw that the back door was opened, 2 louver blades from the kitchen window has been removed and saw the things in the house has been scattered. PW2 informed the Complainant. Complainant then went to Vitogo Paipai and noticed the mentioned items missing 1 x grey Ozito Drill, 1 x Green Grinder Machine, 1 x black Samsung brand 40 inch flat screen TV, 1 x Grants blended Scotch whisky and cash amounting to 250 NZD.

Matter was then reported at Lautoka Police Station. Enquiry was conducted whereby PW3 Yogesh Prasad 40 years of Vitogo Paipai sometimes in the morning of 12th day of August 2023, whilst he was sitting on his porch he saw Accused with another crossing the road at Vitogo Paipai. Then later whilst he was returning from the service station in his car he then saw the Accused with another carrying a 1 x flat TV screen on his shoulder.

Accused was then arrested and interviewed under caution whereby he admitted committing the offence and stated that he with another has sold the items. Later Accused with another were charged for One Count of Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act 2009 and Second Count of Theft Contrary to Section 291 (1) of the Crimes Act 2009.

[Partial Recoveries was made. 1 x Samsung flat screen 40 inch TV, 1 x Grey Ozito Drill, 1 x Green Grinder Machine]."

- [9] On 3 February 2025, the Sentence was pronounced [Vide Sentence from pages 6-9 of the Magistrate's Court Record]. The Appellant had been imposed an aggregate sentence of 2 years and 2 months imprisonment (26 months imprisonment). Considering the time spent in remand as 10 months, the remaining sentence the Appellant was ordered to serve was 16 months imprisonment.
- [10] Aggrieved by the said Order made by the Learned Magistrate, Lautoka, the Appellant filed this Appeal in the High Court. The Appeal was filed in person. The Notice of Appeal against Sentence is dated 15 February 2025. This Appeal was received in the High Court on 10 March 2025.
- [11] This matter was taken up for hearing before me on 5 June 2025. The Appellant and the Learned Counsel for the State were heard. Both parties have filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[12] As per the Appeal filed there are two Grounds of Appeal taken up by the Appellant as follows:

Grounds of Appeal against Sentence

1. That the Learned Magistrate erred in law when he failed to impose a partial suspended sentence.
2. That the Learned Magistrate erred in law and in fact when he considered the Appellant's previous convictions to increase the Appellant's imprisonment term.

The Law

[13] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced 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."

[14] Section 247 of the Criminal Procedure Act stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[15] 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."

Appeals against Sentence

[16] 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).”*

- [17] 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.”*

- [18] 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.

- [19] 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

Ground 1

- [20] The first Ground of Appeal against Sentence is that the Learned Magistrate erred in law when he failed to impose a partial suspended sentence.
- [21] With regard to the offence of Aggravated Burglary, contrary to Section 313 of the Crimes Act, the Learned Magistrate has correctly identified the maximum penalty and the relevant tariff for the offence [Paragraphs 10-12 of the Sentence].
- [22] With regard to the offence of Theft, contrary to Section 291 of the Crimes Act, the Learned Magistrate has correctly identified the maximum penalty and the relevant tariff for the offence [Paragraphs 13-14 of the Sentence].
- [23] What must be emphasized is that the Learned Magistrate has considered the aggregate sentence for both offences. Accordingly, the Learned Magistrate has picked an aggregate starting point of 3 years imprisonment. Thereafter, the Learned Magistrate has gone on to increase the sentence by 6 months for the single aggravating factor, which he has identified as prevalence of such offences.
- [24] Thereafter, the Learned Magistrate has identified the mitigating factors-that there were partial recoveries of the stolen items and that the Appellant had made a confession to the Police after he was arrested- and reduced the sentence by 4 months to 3 years and 2 months imprisonment.
- [25] For the guilty plea, the Learned Magistrate has given a discount of 12 months. The final aggregate sentence was 2 years and 2 months imprisonment (26 months imprisonment) [Paragraph 23 of the Sentence].

[26] Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) provides as follows:

(1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[27] As could be observed from the above, a sentence imposed by a Magistrate's Court can only be suspended where the sentence imposed is below 2 years. However, it is manifest that in this case the aggregate sentence imposed by the Learned Magistrate was 2 years and 2 months imprisonment. Therefore, the Learned Magistrate has no jurisdiction to suspend the said sentence imposed on the Appellant.

[28] The Appellant contended that since the time he has to serve was 16 months imprisonment, the sentence could be suspended. This contention is incorrect. The 16 months had been arrived at after the Learned Magistrate had reduced the time spent in remand which he had calculated as 10 months, in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[29] Although the Learned Magistrate has gone on to give reasons as to why he will not suspend the sentence (Due to the Appellant being a repeat offender and that there is no good reason before Court to suspend the sentence), he was not obliged to do so, as the final aggregate sentence (prior to reducing the time spent in remand) was over 2 years imprisonment.

[30] Therefore, I am of the opinion that this Ground of Appeal against Sentence has no merit.

Ground 2

- [31] The second Ground of Appeal against Sentence is that the Learned Magistrate erred in law and in fact when he considered the Appellant's previous convictions to increase the Appellant's imprisonment term.
- [32] The List of Previous Convictions relating to the Appellant can be found at page 26 of the Magistrate's Court Record.
- [33] Although the Learned Magistrate has made reference to the said previous convictions in his Sentence, as he rightly should, I find that he has not considered the fact that the Appellant has previous convictions as an aggravating factor. The only aggravating factor identified by the Learned Magistrate in this case is the prevalence of such property offences.
- [34] Therefore, it is incorrect for the Appellant to submit that Learned Magistrate erred in law and in fact when he considered the Appellant's previous convictions to increase the Appellant's imprisonment term.
- [35] For the aforesaid reasons, I am of the opinion that this Ground of Appeal against Sentence also has no merit.

Conclusion

- [36] Accordingly, I conclude that this Appeal against Sentence should be dismissed.

FINAL ORDERS

- [37] 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 Lautoka, in Criminal Case No. CF 542 of 2023 is affirmed.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LAUTOKA

Dated this 19th Day of June 2025

Solicitors for the Appellant :

Appellant Appeared in Person.

Solicitors for the Respondent:

Office of the Director of Public Prosecutions, Lautoka.