1. **SHIU PRASAD**
2. **DHIRENDRA PRASAD**
3. **DHARMESH RAJU**
4. **AVINASH ANAND**

A

v

STATE

B

[HIGH COURT, 1994 (Kepa J), 30 September]

Appellate Jurisdiction

Crime-sentence-bulk store breaking-first offenders.

C The appellants who were first offenders had been sentenced to terms of imprisonment. On appeal to the High Court HELD: (i) In the absence of compelling reasons young first offenders should not be imprisoned (ii) Resident Magistrates must give adequate reasons for their decisions.

Cases cited:

D *Malakai Saki v State* Cr. App. Nos. 28 29 and 35 of 1993
Queen v Radich [1954] N.Z.L.R. 86
Tevita Jone Rami v Reginam 9 FLR 69
The State v Serevi Sereki and Kameli Ulunikoro, Revision No. 7/90

Appeal against sentence imposed in the Magistrates Court.

E *S. Sharma* for Appellants
D. Tuiqereqere for Respondent

Kepa J:

The four appellants were convicted on their own plea by the Navua Magistrate's
F Court on 22 September, 1993, of Bulk Store Breaking Entering and Larceny at Navua and were each sentenced to 18 months imprisonment.

The facts disclosed that the Bulk Store broken into belonged to Karim Buksh s/o Madar Buksh, and that ten sheets of roofing iron valued at $200 and timber valued $150 were stolen from the store.

G The Appellants initially lodged their Appeal against both Conviction and Sentence, but at the hearing Mr. Sharma on their behalf, abandoned their appeal against conviction.

Mr.Sharma argued that the sentence of 18 months imprisonment imposed against the 4 appellants was harsh and excessive in view of the fact that all appellants are young and first offenders. All items stolen have been returned to the Police

by the first appellant. The Bulk Store in question was really a tin and wood shed situated on the complainants farm. In support of his argument he referred the Court to two cases namely:-

(1) The State v. Serevi Sereki and Kameli Ulunikoro, Revision No.7/90 and;

(2) Malakai Saki v. State, Cr. App. Nos. 28,29 and 35 of 1993.

In Revision No.7/90 both Serevi Sereki and Kameli Ulunikoro were sentenced to one year imprisonment for Shopbreaking and Larceny. Tuivaga C.J., in ordering their immediate release from prison said:

> " Young first offenders should not be sent to prison unless there are compelling reasons to do so."

In that case both respondents were aged 18 and 19 years respectively.

In Malakai Saki v. State, the appellant was 18 years of age when he was convicted on his own plea in three cases in the Magistrate's Court, Nausori with having committed:

(1) housebreaking and larceny in respect of articles to the total value of $246 in one case;

(2) larceny of a bicycle valued at $300 in the second case; and

(3) burglary and larceny of articles to the total value of $314 in the third case.

He was sentenced by the learned Magistrate to 2 years imprisonment in the first case, 2 years in the second case and 9 months in the final case on the same day and the sentences to run consecutively, thus making a total of 4 years 9 months. At page 3 Jesuratnam. J, said this -

> " The appellant had not used any force or any show of force on anyone. All the articles had been recovered except in one case. Above all the appellant was a young first offender which is an aspect that has been repeatedly emphasised by this Court as a vital factor which magistrates should take into account when sentencing. This is a clear case in which the offender should never have been sent to prison. Probation or binding over should have been explored as alternatives failing which a short suspended sentence could have been given to keep him in check if he was over 18 years of age."

Mr. Sharma urged the Court to set aside the 18 months sentence of imprisonment and impose a more lenient non-custodial sentence, in view of the appellants'

youth and being first offenders.

A Mr. Tuiqereqere for the State agreed that the sentence may be on the high side, he, however, argued that appellants should be given a short period of incarceration instead, in view of the prevalence of the offence.

He referred to the case of Tevita Jone Rami v. Reginam 9 FLR 69. At page 70, in the penultimate paragraph, the late Macduff C.J., said,

B

> " In the event of the Learned Trial Magistrate deciding that it was a case for imprisonment then consideration would require to be given to the alternative of, in the case of a first offender, a short sharp shock as against the effect a longer term in company with hardened criminals would have on the appellant himself. "

C

In the same case the late Macduff C.J., said at page 70. "The purpose of punishment and the principles which should guide an appellate court in considering a reduction of sentence are expressed in clear terms in the headnote of the report of the Queen v. Radich [1954] N.Z.L.R.86 in these words" -

D

> "One of the main purposes of punishment is to protect the public from the commission of crime by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of

E

> severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as

F

> to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily

G

> subsidiary to the main considerations that determine the appropriate amount of punishment.
>
> The Court of Appeal, in considering an application for reduction of sentence, must be reasonably satisfied that the sentence is manifestly excessive or wrong in principle, or there must be exceptional circumstances calling for its revision.

> Little help is gained by considering other sentences in respect of the same type of offence, for the whole of the surrounding circumstances and the situation of the offender, and others, have to be taken into account; and these factors vary infinitely. "

A

The record of the proceedings in the Court below does not show that the trial Magistrate had taken into account the fact that the appellants were first offenders. The record only shows,

B

> " The Accuseds have got together and after liquor being under the influence had broken and stolen items when the owner had locked up and gone away. I sentence each accused to 18 months imprisonment. "

C

Magistrates Courts are courts of record and it is therefore incumbent on Magistrates to record full reasons of their decision, more so in cases like this one, where the appellants were not legally represented. This will lend great assistance to an appellate court at the hearing of the appeal because it will only act on the record of the court below.

D

In my view the fact that Appellants are first offenders ought to be a very strong mitigating factor in their favour. A prison sentence ought to be the last resort after the court has explored and exhausted all other alternative sentences. At the time of the offence the first appellant was 31 years of age, second appellant was 24 years of age and both third and fourth appellants were 19 years of age.

E

In the "Principles of Sentencing" Second Edition by D.A Thomas at page 46, the learned author said this on "Mitigation":

> " The final step in the process of calculating the length of a tariff sentence is to make allowance for mitigation, reducing the sentence from the level indicated by the facts of the offence by an amount appropriate to reflect such mitigating factors as may be present. Mitigating factors exist in great variety, but some are more common and more effective than others. They include such matters as the youth and previous character of the offender."

F

The offence of housebreaking and other kindred offences may be prevalent, but no two cases are alike and each case must be decided on its own merit. In my view the sentence of 18 months is a little on the high side, when the youth and previous good record of the appellants, and the fact that all stolen items have been recovered, are taken into account. I am mindful of the authorities cited above and I am persuaded by the decisions and statements made by Tuivaga C.J., and Jesuratnam, J. in the two cases cited by Counsel for Appellants and

G

I believe that in all the circumstances of this case the sentence of 18 months imprisonment

A

imposed by the court below is too harsh and excessive. I will therefore allow the appeal against sentence of 18 months imprisonment and set it aside, and in substitution therefor, I impose a sentence of 12 months imprisonment suspended for 18 months against each of the Appellant.

B

(Appeals allowed; sentences varied.)

C

D

E

F

G