

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0106 of 2014
[High Court Case No: HAC 018 of 2013

BETWEEN : **MELI LEQAVUNI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake JA**
A. Fernando JA
Temo JA

Counsel : **Mr. M. Yunus for the Appellant**
Ms. D. Kumar for the Respondent

Date of Hearing : **8 February 2016**

Date of Judgment : **26 February 2016**

JUDGMENT

Basnayake JA

- [1] This is an appeal against the sentence. The appellant in this case was charged with one count of aggravated burglary and one count of theft under sections 313 (1) (a) and 291 (1) of the Crimes Decree 2009. The appellant having pleaded guilty was sentenced by the learned Magistrate, exercising the extended jurisdiction of the High Court, to a term of 6 years imprisonment with a non-parole term of 4 ½ years. In a leave to appeal application by the appellant, leave was granted to appeal against the sentence on the ground that in the sentencing decision the learned Magistrate had considered the guidelines relating to robbery and aggravated robbery.

The Facts

- [2] The appellant aged 19 years had entered into the complainant's house with another. It was in the early hours on 23 December 2012. The appellant, armed with a pinch bar, forced open the grill to enter. Having entered, he stole goods to the value of \$9039.00. The appellant was arrested on the same day. However the police was able to recover only a fraction of the goods stolen. At the cautioned interview the appellant had admitted to the commission of the crime.

The Impugned Sentence

- [3] The learned Magistrate in her sentencing (pgs. 14-17 of the Record of the High Court (RHC)) stated that the maximum penalty for aggravated burglary is 17 years imprisonment. The tariff is between 18 months and 3 years (State v Buliruarua [2010] FJHC 384, Tomasi Turuturuvesi v State [2002] HAA 86/02S). However the learned Magistrate having considered the cases of State v Banivalu [2012] FJHC 1060; HAC 114.2011 (3 May 2012), State v Rokonabete [2008] FJHC 226, HAC 118.2007 (15 September 2008) and State v Manoa [2010] FJHC 409. HAC 061.2010 (6 August 2010) fixed the sentence at a starting point of 8 years. The sentence was increased by 2 years on the ground that it was well planned. It was reduced by 4 years on the guilty plea and other mitigating factors to make it finally 6 years with a non-parole period of 4 ½ years. No sentence was imposed on the theft charge.

Submission of the Learned Counsel for the Appellant

- [4] The learned counsel submitted that the learned Magistrate whilst sentencing the appellant for the offence of aggravated burglary used the tariff for the offence of robbery and aggravated robbery. As such the learned Magistrate had acted upon wrong guiding

principles. The appellate courts will interfere with a sentence if it is demonstrated that the trial Judge made one of the following errors:

- i. Acted upon wrong principles;
- ii. Allowed extraneous or irrelevant matters to guide or affect him;
- iii. Mistook the facts;
- iv. Failed to take into account some relevant considerations (Simeli Bili Naisua v State (CAV 0010 of 2013 (20 November 2013) citing the principles as set out in House v The King (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State (Criminal Appeal No. AAU 0015).

- [5] The learned counsel submitted that the appropriate tariff for the offence of burglary and/or aggravated burglary is set in State v Seninawanawa [2015] FJHC 261; HAC 138.2012 (22 April 2015). Madigan J stated in that case as follows, “The maximum penalty for aggravated burglary is a term of imprisonment for 17 years...The accepted tariff for aggravated burglary is a sentence of between 18 months and 3 years, with 3 years being standard sentence for burglary of domestic premises”. Madigan J having fixed a term of 24 months as starting point increased it up to 42 months on the aggravated features. He reduced 7 months for the guilty plea and further 17 months for the period incarcerated and fixed a term of 18 months imprisonment. He also sentenced the accused for another 18 months for theft and made it run concurrently. The accused in that case having forced open the rear entrance of a hotel room of a tourist, robbed his belongings.

Legal Matrix

- [6] The learned Magistrate having mentioned the tariff for burglary as 18 months to 3 years fixed the starting point in the instant case at 8 years. By so doing it became abundantly clear that the learned Judge was misled by the cases of robbery and aggravated robbery that was referred to. No reason was given for fixing 8 years as starting point, which is

much above the tariff that the learned Magistrate has herself referred to. The 3 year period had been considered by the learned Magistrate as the upper limit of the tariff. Fixing the starting point at 8 years shows that the leaned Magistrate had not been following the guide lines that she herself had mentioned in her sentencing with regard to burglary.

- [7] The learned Magistrate referred to the following passage of Justice Goundar in Rokonabete (supra) as cited in Bainivalu (supra):

“The dominant factor in assessing seriousness for any types of robbery is the degree of force used or threatened. The degree of injury to the victim or the nature of and duration of the threats are also relevant in assessing the seriousness of an offence of robbery with violence. If a weapon is involved in the use or threat of force that will always be an important aggravating feature. Group offending will aggravate an offence because the level of intimidation and fear caused to the victim will be greater. It may also indicate planning and gang activity. Being the ring leader in a group is an aggravating factor. If the victims are vulnerable, such as elderly people and person providing public transport that will be an aggravating factor. Other aggravating factors may include the volume of items taken and the fact that an offence was committed whist the offender was on bail.

The seriousness of an offence of robbery is mitigated by factors such as timely guilty plea, clear evidence of remorse, ready co-operation with the police, response to previous sentence, personal circumstances of the offender, first offender of violence, volume of property taken, a minor part, and lack of planning involved”

- [8] The learned Magistrate also quoted from State v Manoa (supra) as follows:

“The maximum penalty for robbery with violence under Penal Code is life imprisonment while the maximum penalty for aggravated robbery under the Crimes Decree is 20 years imprisonment. Although the maximum sentence under the Decree has been reduced to 20 years imprisonment, in my judgment, the tariff of 8-14 years imprisonment established under the old law can continue to apply under the new law. I hold this for two reasons. Firstly, the established tariff of 8-14 years under the old law falls below the maximum sentence of 20 years under the new law. Secondly, under the new

law, aggravated robbery is made an indictable offence, triable only in the High Court, which means the Executive's intention is to continue to treat the offence seriously".

- [9] Immediately after quoting the above passages when learned Magistrate stated that, "I too apply the above sentencing tariffs for this case", it becomes abundantly clear that the learned Magistrate blindly followed the tariff set for the robbery and aggravated robbery and not the tariff set out for burglary or aggravated burglary. Thus the learned Magistrate has erred in the sentence which I believe should be set aside.
- [10] At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years. Considering the fact that the appellant was charged for the offence of aggravated burglary, I am of the view that the point to start should be at the highest level. Hence I start with 3 years and considering the aggravating factors I too would add 2 years as done by the learned Magistrate. No questions were raised by any counsel with regard to the years added and subtracted. The submissions were made on the starting point. However considering the other mitigating factors namely the early guilty plea, period incarcerated and the previous good character etc., I am of the view that the number of years reduced should be 2 years. Now the sentence would remain at 3 years. It appears that the appellant was sentenced on 31 May 2013. Hence the sentence of 3 years would be spent from 31 May 2013. In view of the short period remain to be spent I would refrain from fixing a parole period.

A.Fernando JA

- [11] I agree with the reasons and the conclusions arrived at by Basnayake JA.

Temo JA

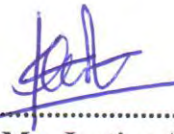
- [12] I too agree with the reasons and the conclusions of Basnayake JA.

The Orders of the Court are:

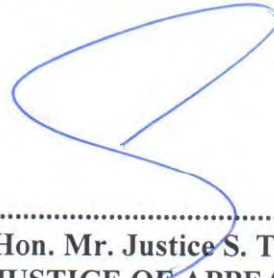
1. *The appeal against the sentence is allowed.*
2. *The sentence of 6 years is substituted with 3 years effective from 31 May 2013.*
3. *Period of parole not fixed.*



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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL



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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL