

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 73 of 2014
(Magistrates Court 2111 of 2013 at Suva (ext. juris))

BETWEEN : THE STATE

Appellant

AND : MALAKAI TOKA
PITA DOMONI
SAMISONI ROKUVA
LOTE TAMANI

Respondents

Coram : Calanchini P

Counsel : Mr M Korovou for the Appellant
Mr M Yunus for the Respondents

Date of Mention : 24 March 2016

Date of Ruling : 15 April 2016

RULING

[1] This is an application by the Appellant for leave to appeal against the sentences imposed on 23 April 2014 on the Respondents by the Magistrates Court at Suva exercising a jurisdiction extended by the High Court under section 4(2) of the Criminal Procedure Decree 2009.

- [2] The Respondents had been charged with one count of aggravated burglary contrary to section 313(1) of the Crimes Decree 2009 and with one count of theft contrary to section 291(1) of the Crimes Decree.
- [3] The four Respondents pleaded guilty and admitted the summary of facts submitted by the Prosecution. The Respondents had entered the premises in question in the middle of the night on 2 November 2013. The premises were a domestic dwelling occupied at the time by several persons whose property valued at approximately \$12,400.00 was stolen. The occupants had slept through the home invasion and there had been no confrontation with the Respondents.
- [4] On 23 April 2014 the Magistrates Court imposed custodial sentences on each of the four Respondents of 14 months imprisonment for the aggravated burglary count and 6 months imprisonment for the theft count. For the first, second and third Respondents the sentences were suspended for 3 years and for the fourth Respondent the sentences were suspended for 2 years on the basis that he was a juvenile with a clear record at the time.
- [5] On 13 June 2014 the Appellant filed a notice of application for leave to appeal in the Court of Appeal Registry. Initially the notice had been filed in error in the High Court Registry on 21 May 2014 which was within the time allowed under section 26(1) of the Court of Appeal Act Cap 12 (the Act). In written submissions filed by the Legal Aid Commission on behalf of the Respondents, it is conceded that the appeal should be regarded as timely under those circumstances.
- [6] It would appear that the Appellant was able to serve the appeal papers on the first Respondent, Malakai Toka at any early stage in the proceedings. He has appeared initially in person and subsequently with Counsel from the Legal Aid Commission on each mention date. The second Respondent appeared in person on 14 August 2015 and subsequently engaged the Legal Aid Commission to represent him in the appeal. The third and fourth Respondents have not been served. On 24 March 2016 the Legal Aid Commission (Mr Yunus) entered an appearance on behalf of all the Respondents.

- [7] In its submissions filed on 15 January 2016 the Appellant concedes that under those circumstances it would not be proper to pursue its appeal against the Respondents who have not been served. The Appellant also acknowledged that it would be unfair to ask the Court to quash the sentences of the first and second Respondents who had been served and pass a different sentence. It is appropriate that the Appellant should make both those concessions.
- [8] However the Appellant maintains its application for leave to appeal against sentence under section 21(2) (c) of the Act for the purpose of seeking an order under section 23(3) of the Act and for the purpose of obtaining a guideline judgment. Pursuant to section 35(1) of the Act the power of the Court of Appeal to grant leave to appeal may be exercised by a judge of the Court.
- [9] Under section 23(3) of the Act the Court may make such other order as it thinks just on any appeal against sentence. The Appellant has indicated that the purpose of seeking an order under section 23(3) related to the issue of the imposition of a suspended sentence in the circumstances of this case.
- [10] The test for granting leave to appeal against sentence is well settled as being whether the Appellant has shown an arguable error in the exercise of the sentencing discretion by the learned Magistrate. In the event that leave is granted and the Court of Appeal agrees with the Appellant that the suspended sentence was not appropriate, the Appellant has indicated that it will not seek an order that the Respondents be re-sentenced.
- [11] In my judgment it is arguable that the imposition of a suspended sentence is not appropriate for aggravated burglary involving the night time invasion of a dwelling in which there are present sleeping occupants and from which items of considerable value are stolen. There has been under those circumstances an arguable error in the exercise of the sentencing discretion and leave is granted.
- [12] The issue of the guideline judgment that is sought by the Appellant is governed by sections 6 to 9 of the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Counsel for the Respondents supports the Appellant's request for a guideline

judgment on the issue of whether and/or when a suspended sentence is appropriate for burglary/aggravated burglary offences. The specific issue is whether a suspended sentence should generally continue to be applied to young or first offenders when the offence involves a domestic dwelling.

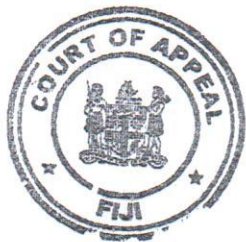
[13] In his written submissions Counsel for the Respondents has submitted that the Court should consider a guideline judgment on the issue of whether it is appropriate to charge an offender with the offences of both burglary and theft committed during the course of the burglary.

[14] It should be noted that under section 6 of the Sentencing Decree it is the Court of Appeal that is required to consider whether to give or review a guideline judgment either on its own initiative or on an application made by a party to the appeal. It is clear that decisions relating to guideline judgments are a matter for the Court. There is no power given to a judge of the court under section 35(1) of the Act to exercise powers in relation to guideline judgments. It is also clear that the powers given to the Court in relation to guideline judgments are exercisable only on hearing and considering an appeal against sentence, in other words, after leave to appeal against sentence has been granted. Furthermore the power to give a guideline judgment under sections 6 – 9 extends to appeals related to sentence. The provisions do not extend the power to give a guideline judgment on the substantive law. Such a judgment may eventuate in the course of an appeal against conviction or acquittal.

[15] As a result the following orders are made:

1. Leave to appeal against sentence is granted.
2. The appeal record is to be lodged for certification within the time prescribed by the Court of Appeal which runs from the date of this Ruling.
3. The Appellant is to file and serve written submissions within 28 days from the date of certification of the Appeal Record by the Registrar.

4. The Respondent is to file and serve written submissions within 28 days thereafter.
5. Written submissions are to address both the question raised by the appeal and the issues that must be considered by the Court in relation to the application for a guideline judgment.



W. Calanchini

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL