

IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 0030 of 2019
[In the Magistrates Court at Labasa Criminal Case No. CF73/18]
(Extended jurisdiction no, HC 68/18)

BETWEEN : **KALO JEREMAIA**
JONE BIU

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **21 December 2020**

Date of Ruling : **23 December 2020**

RULING

- [1] The appellant had been arraigned in the Magistrates court of Suva exercising extended jurisdiction on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 04 August 2018 at Labasa.
- [2] In the presence of his counsel from Legal Aid Commission the appellant had pleaded guilty to the information on their own freewill on 19 December 2018. After the appellants had accepted the summary of facts, the learned Magistrate had convicted the appellant on their own plea of guilty and sentenced them on 31 December 2018 to an aggregate sentence of 07 years and 04 months and 22 days of imprisonments with a non-parole period of 06 years.

[3] The facts as narrated in the summary of facts are follows,

**The appellants had planned and/or intended to break into the house of the complainant, Chand Ching Tang, a 62 year old businessman living in Labasa operating a restaurant. On 04 August 2018, the appellants had gained forced entry into the complainant's house through a window, using an iron rod they found at the complainant's home, while the complainant was away at his restaurant. No one was at home. As soon as they broke into the house, the appellants ransacked the complainant's home hunting for money and valuables.*

The 62 year old complainant returned from work to his home at around 5 p.m. and noticed that the window had been broken and theft had occurred. The appellants admitted that they stole the following items and cash from house:

(a) About \$30,000.00 (b) 4x \$100 USD (c) 1,500 yen (d) 2 x whales tooth (e) 1x24 caret gold chain

The appellants admitted that the following were recovered.

(a) 1x gold chain (b) 2 x whales tooth (c) Cash of \$4024.00'

[4] An untimely applications for leave to appeal against conviction and sentence had been forwarded to the Court of Appeal registry by the 02nd appellant on 15 March 2019 and 09 April 2019. The 01st appellant had tendered his appeal against sentence on 09 May 2019. Both appellants had jointly submitted grounds of appeal against sentence on 29 October 2019. The 02nd appellant had tendered reasons for the late appeal on 19 November 2019. Both appellants had filed written submissions on 12 February 2020. The 01st appellant had filed an application for enlargement of time and an affidavit explaining the reasons for the late appeal on 02 April 2020. The state had informed this court on 05 August 2020 that it would not object to the delay as papers had been filed by the appellants in person. The Legal Aid Commission had filed an amended notice of appeal and written submissions on 14 October 2020. The State submissions had been filed on 21 December 2020. On 21 December 2020 both counsel invited this court to make a ruling on the written submissions filed.

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellants could appeal against sentence only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucu v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and

State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

- [6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No. AAU0015 and Chirk King Yam v The State Criminal Appeal No. AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (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.*

- [7] Ground of appeal:

Ground 1 – *THAT the learned Sentencing Magistrate may have fallen into an error by acting upon a wrong principle when sentencing the Appellant as the sentence is deemed manifestly harsh and excessive and did not reflect the circumstances and facts of the case.*

Ground of appeal

- [8] In sentencing the appellant, the learned Magistrate had followed State v Naulu - Sentence [2018] FJHC 548 (25 June 2018) which in turn had reiterated the sentencing tariff for aggravated burglary set out in State v Prasad [2017] FJHC 761; HAC254.2016 (**12 October 2017**) to be between 06 to 14 years of imprisonment

(“new tariff”). In setting this new tariff the learned High Court judge had *inter alia* stated as follows.

‘In view of the tariff of 2 years to 7 years for the offence of robbery which carries a maximum penalty of 15 years, in my view the tariff for burglary which carries a maximum penalty of 13 years should be an imprisonment term within the range of 20 months to 6 years. Further, based on the tariff established by the Supreme Court for the offence of aggravated robbery, the tariff for the offence of aggravated burglary which carries a maximum sentence of 17 years should be an imprisonment term within the range of 6 years to 14 years.’

[9] The appellant argues that he should have been sentenced according to the sentencing tariff for aggravated burglary i.e. 18 months to 03 years (“old tariff”).

[10] In the face of a similar challenge to the sentence, I had the occasion to discuss this matter in detail in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) where I identified two issues to be resolved by the Court of Appeal or the Supreme Court in the future as important questions of law.

(i) *Whether the principle of non-retrospectivity is applicable to sentencing tariff; i.e. as to whether an accused is entitled as a matter of law to be sentenced according to the sentencing tariff prevalent at the time of the commission of the offence or whether the accused should be sentenced according to the sentencing tariff at the time he is sentenced.*

(ii) *Identifying and setting a sentencing tariff for aggravated burglary in the light of some High Court judges and Magistrates applying the ‘old tariff’ of 18 months – 03 years of imprisonment while other High Court judges and Magistrates applying the ‘new tariff’ of 06 to 14 years of imprisonment for aggravated burglary, in order to resolve the ongoing and rather disturbing sentencing practice of lack uniformity in cases of aggravated burglary.*

[11] I do not propose to repeat the same discussion once again here. I cited some High Court cases in **Vakatawa**, **Kumar** and **Daunivalu** submitted to me by both parties where this unhealthy practice of lack uniformity in sentencing and polarisation of opinion on the sentencing tariff for aggravated burglary had been evidenced. This

appeal is yet another example that a similar trend can be observed among Magistrates as well.

- [12] However, it appears that lately even some of the High Court judges who have adopted the 'new tariff' have admirably kept their final sentences within the 'old tariff' for the sake of uniformity of sentencing until the issue is resolved by the Court of Appeal or the Supreme Court. Hopefully, the Magistrates too may follow suit. However, some Magistrates who have exercised extended jurisdiction have followed the 'new tariff', then applied the full force of it and ended up sentences within the range of the 'new tariff' while other Magistrates continue to apply the 'old tariff'. As a result, appeals keep coming up in the Court of Appeal against those sentences based on the 'new tariff'.
- [13] I think it would not be inapt to repeat my remarks in Vakatawa, Kumar and Daunivalu on the adverse consequences of this dual system of sentencing tariff for aggravated burglary practised in courts.

'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'

- [14] The learned High Court judge in State v Mudu - Sentence [2020] FJHC 609; HAC116.2020 (30 July 2020) had recognised the problem and remarked as follows.

'Even after the introduction of the new tariff, majority of judges appear to prefer the old tariff and the end result is that there are two sentencing tariff

regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end.

[15] I had the occasion to remark in Daunivalu as follows.

[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may inter alia be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.

[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.

[17] State v Prasad [2017] FJHC 761; HAC254.2016 (12 October 2017) was not an appeal from the Magistrates court on sentence and the High Court was dealing with one count of burglary and one count of theft. In any event, the learned High Court judge does not appear to have followed the procedure in the Sentencing and Penalties Act in setting the 'new tariff' for aggravated burglary. The situation in State v Naulu - Sentence [2018] FJHC 548 (25 June 2018) was also the same except that it was a case of aggravated burglary and theft and the appellant was unrepresented. Therefore, there is a fundamental question of legal validity of the 'new tariff'.

[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the


Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition the doctrine of stare decisis requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.

- [16] It would appear that the Court of Appeal in **Legavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the ‘old tariff’ to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the birth of the ‘new tariff’ in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the ‘old tariff’ to the appellant who had been sentenced on 13 November 2017 (after the birth of the ‘new tariff’ in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases, however, the question of setting a tariff specifically for aggravated burglary had not been considered as it was not a matter urged before Court.
- [17] In the circumstances, because of the legal issue to be resolved on the appropriate sentencing tariff for aggravated burglary I grant leave to appeal to the appellant on their sentence appeal.
- [18] Once the proper sentencing tariff is set by the Court of Appeal or the Supreme Court in the future the appellate court would decide what the suitable sentence that should be imposed on the appellants. I make no comments on the existing sentence.
- [19] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

Order

1. Leave to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL