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

**CRIMINAL APPEAL NO.AAU 125 of 2019**
**[In the High Court at Suva Criminal Case No. 301 of 2018]**

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| **BETWEEN** | **:** | **JIMI TOLIVA** |
| | | ***Appellant*** |
| **AND** | **:** | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, ARJA** |
| **Counsel** | **:** | **Mr. M. Fesaitu for the Appellant** |
| | : | **Mr. R. Kumar for the Respondent** |
| **Date of Hearing** | **:** | **20 July 2021** |
| **Date of Ruling** | **:** | **23 July 2021** |

# RULING

[1] The appellant had been charged in the High Court at Suva with one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and one count of theft contrary to section 291(1)(a) of the Crimes Act, 2009 committed on 20 May 2018 at Gordon Street, Suva in the Central Division.

[2] The information read as follows:

'***COUNT 1'***

***Statement of Offence***

***Aggravated Burglary:*** *Contrary to section 313(1)(a) of the Crimes Act 2009.*

***Particulars of Offence***

***JIMI TOLIVA*** *and another on the 20th day of May 2018 at Gordon Street, Suva in the Central Division, entered into Pisces Hostel as trespassers, with intent to commit theft therein.*

***'COUNT 2'***

***Statement of Offence***

***Theft:*** *Contrary to section 291(1)(a) of the Crimes Act 2009.*

***Particulars of Offence***

***JIMI TOLIVA*** *and another on the 20th day of May 2018 at Gordon Street, Suva in the Central Division, dishonestly appropriated $267.00 cash, 1 x Wi-fi valued at $320.00, 2 x pairs of Shoes valued at $500.00, 1 x Hard Drive valued at $280.00, 1 x Hard Drive valued at $220.00 and 1 x pair of slippers valued at $50.00 all to the value of $1637, the properties of Pisces Hostel as trespassers, with intention of permanently depriving Pisces Hostel of its properties.*

[3] At the end of the summing-up, the assessors had in unanimity opined that the appellant was guilty of both counts as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of rape and sentenced him on 04 July 2019 to an aggregate sentence of 11 years of imprisonment which had finally got adjusted to 10 years on account of the period of remand. The trial judge had also imposed a non-parole period of 09 years.

[4] The appellant had appealed in person against conviction out of time (29 August 2019) but the state indicated to this court that it would not resist the conviction appeal due to the delay of about 15 days. Accordingly, this court would treat the conviction appeal as timely. His sentence appeal filed in person had reached the registry on 21 July 2020. Thereafter, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence along with an application for enlargement of time and written submissions on 29 December 2020. The state had tendered its written submissions on 29 January 2021. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or via Skype.

[5] The facts as narrated by the appellant's counsel are follows:

*'In summary of the evidence, the complainant is a businessman who is operating Pisces Hostel. On 21st of May, 2018 whilst trying to connect to the*

*wifi he notice the wifi router was missing. Having viewed the CCTV footage, he saw that two iTaukei men had entered the hostel on the previous day and stole some items. The remaining two witnesses are police officers, WDC 4195 Varisila testified to have received a report of burglary and theft. She was tasked to be the investigating officer and had received a USB from the complainant that contained CCTV footage, Detective Constable Viliame had testified to be in the police force fir 10 years. He had viewed the CCTV footage and had identified the Appellant to be one of the persons whom he had known since he was attached with the Market Police Post in his first year of service. He had met the Appellant about 50 to 60 times before since the days he joined the police force.*

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[8] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[9] It is clear that the delay in the sentence appeal is nearly a year and substantial. The appellant's explanation is that he did not think of appealing the sentence Thus, the appellant has not satisfactorily explained the delay. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time to the state.

[10] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

***01st ground of appeal***

[11] The counsel for the appellant complains that the trial judge had not adequately addressed the assessors on his *alibi.*

[12] The appellant had not only not given *alibi* notice in terms of section 125 of the Criminal Procedure Act, 2009 but also not testified or called other evidence at all in support of *alibi* defense. The only reference to an *alibi* came from prosecution witness WDC Varisila who had recorded the appellant's cautioned interview and who under

cross-examination had stated that the appellant had said in the cautioned statement that he was in Ba during the time of the incident (see paragraph 22(j) of the summing-up). However, neither the prosecution nor the defense had led the appellant's cautioned interview in evidence. It was not before the assessors and the trial judge as part of the trial proceedings. Therefore, any questions seeking to elicit the contents of the cautioned interview should not have been allowed by the learned High Court judge. Thus, there was no proper factual basis for the trial judge to have directed the assessors on *alibi*.

[13] However, possibly due the above evidence elicited from WDC Varisila under cross-examination, the trial judge had addressed the assessors on *alibi* at paragraph 33 of the summing-up in an absolutely fair manner. In the circumstances, where there was no factual basis to sustain a defense of *alibi*, no further directions strictly in terms of **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Bese v State** [2013] FJCA 76; AAU0067.2011 (10 July 2013) were required.

[14] Further, any claim that the appellant was in Ba at the relevant time had been completely disproved by the prosecution by the evidence of CCTV footage where he had been identified as one of the burglars by the prosecution witness Detective Constable Viliame who had known and met the appellant 50-60 times before. This court (single judge) dealt with several aspects of and legal principles applicable to CCTV evidence in **Qaqanivalu v State** [2020] FJCA 142; AAU0092.2016 (21 August 2020).

[15] Therefore, there is no reasonable prospect of success in the first ground of appeal.

***02nd ground of appeal (on sentence)***

[16] The counsel for the appellant submits that the trial judge had erred in picking the starting point at 08 years outside the long followed sentencing tariff of 18 months to 03 years for aggravated burglary referred for the purpose of differentiation as the 'old' tariff [see **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) and **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) and

**Batimudramudra v State** [2021] FJCA 96; AAU113.2015 (27 May 2021)]. The trial judge had, however, adopted what is known as the 'new' tariff of 06-14 years for aggravated burglary in sentencing the appellant and picked 08 years as the starting point.

[17] The state has submitted that 05 out of 07 currently serving High Court judges presiding over criminal trials still follow the well-established 'old' tariff whereas only two High Court judges apply the 'new' tariff. This court (single judge) has dealt with the existence and application of two contrasting sentencing regimes for aggravated burglary among High Court judges in a number of previous rulings, and pointed out the debilitating effect this practice has on the judicial system and also the need for the Court of Appeal or the Supreme Court to establish one sentencing tariff for aggravated burglary as a matter of urgency in a guideline judgment [see for e.g. **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) and **Jeremaia v State** [2020] FJCA 259; AAU030.2019 (23 December 2020)].

[18] At the same time, it is clear from the sentencing order that 18 previous convictions had been recorded against the appellant and 08 out of them were for similar offences as per section 10 of the Sentencing and Penalties Act. The trial judge had accordingly declared him to be a habitual offender in terms of section 11 of the Sentencing and Penalties Act. There had been aggravating features but none had been observed as far as the mitigating factors were concerned. Once an accused is declared a habitual offender it automaticity triggers section 12 of the Sentencing and Penalties Act and the sentencing judge is legally obliged to regard the protection of the community from the offender as the principal purpose for which the sentence is imposed and the judge may, in order to achieve that purpose, impose a sentence longer than what is proportionate to the gravity of the offence [see also **Batimudramudra v State** [2021] FJCA 96; AAU113.2015 (27 May 2021) for a detailed discussion on declaring 'habitual offenders'].

[19] Therefore, while the correctness of the sentencing tariff adopted by the trial judge still remains an unresolved issue yet to be addressed by the Court of Appeal or the Supreme Court the appellant certainly could have been visited with a much longer sentence, irrespective of the tariff applied, than this particular offending warranted in view of the fact that he was declared a habitual offender.

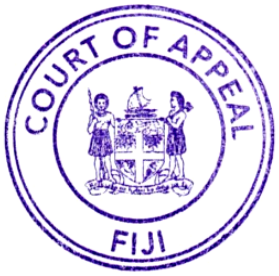
[20] The counsel has also raised a complaint based on double counting in as much as the trial judge having taken 08 years (instead of 06 years) as the starting point still added 03 more years for aggravating features. However, one cannot forget that the trial judge was entitled to impose a sentence disproportionate to the current offending in terms of section 12 of the Sentencing and Penalties Act. Thus, this complaint in the end may be only of academic value.

[21] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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). It cannot be said that the sentence is harsh or excessive. The sentence imposed on the appellant does fit the crime.

[22] In the circumstances, given the issue concerning as to what the tariff for aggravated burglary should be, I am inclined to grant enlargement of time to appeal against sentence so as to enable the full court to resolve that issue and impose an appropriate sentence on the appellant.

**Orders**

1. Leave to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed.

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**Hon. Mr. Justice C. Prematilaka**
**ACTING RESIDENT JUSTICE OF APPEAL**