

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 Case No. HAC 030 of 2018]

BETWEEN : **JIMI TOLIVA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**
Andrews, JA
Winter, JA

Counsel : **Mr. M. Fesaitu for the Appellant**
Mr. R. Kumar for the Respondent

Date of Hearing : **14 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Mataitoga, RJA

1. I concur with the reasons and conclusion of this judgment.

Andrews, JA

2. I agree with the judgment of Winter, JA.

Winter, JA

Introduction

3. The appellant was convicted for aggravated burglary¹ and theft² on the 30 May 2019 following trial in the High Court at Suva. He was sentenced on the 4th of July 2019. He originally appealed both conviction and sentence. The single Justice of Appeal refused leave to appeal conviction but granted leave on sentence. No renewal application being made this is an appeal against sentence only where it is submitted the sentence of 11 years, reduced by time served on remand awaiting trial to 10 years, with a non-parole period of 9 years is harsh and excessive as:
 - a) A starting point outside the correct tariff was used and
 - b) The sentence ‘double counted’ aggravating circumstances for both the offence and offender.
4. The parties submit, and the court agrees, both grounds are well founded. As the trial sentence cannot stand this is now a resentencing exercise. In a responsible and professional way, counsel are agreed on the facts, accept the appellant’s grounds and applicable sentence appeal principles, the correct tariff, the aggravating and mitigating circumstances of both the offence and offender, and the starting and endpoint of a corrected sentence.
5. This decision will briefly describe the facts and restate the test for a sentence appeal, consider the correct tariff, emphasis the utility of a two-step process in sentencing, comment upon the declaration of habitual offenders and identify where any increase on sentence to protect the community from harm is best placed, and by application of principle then consider resentencing.

¹ Crimes Act, 2009 section 313(1) a maximum term 17 years.

² Crimes Act, 2009 section 291 -maximum term 10 years.

Facts

6. The complainant owned the Pisces Hostel. When trying to reconnect internet services on the 21st of May 2018 he noticed a Wi-Fi router was missing. When re-viewing the hostels CCTV footage, he saw two *iTaukei* men entering the hostel reception area the previous day and take \$267.00 cash and other items: two pairs of black shoes, one pair of slippers, one Wi-Fi modem and two hard drives. All to an agreed total value of \$1637.00. The investigating officer uplifted the CCTV footage from the complainant. A detective was able to recognise the offending appellant as he had met him 50 or 60 times before in his many years as a police officer. The state case against the accused was strong.

Sentence appeal principles

7. No statutory criteria for allowing an appeal are specified in section 23 (3) of the Court of Appeal Act. Appellate courts will interfere with the exercise of the trial Judge's discretion only where the sentence is based on an error of principle or reasoning, not just because it would have chosen a different sentence. The Supreme Court in *Naisua v State*³ suggested these grounds for allowing an appeal where the sentencing Judge had:
 - Acted upon a wrong principle.
 - Allowed extraneous or irrelevant matters to guide or affect the sentence.
 - Mistook the facts.
 - Failed to consider something relevant to the sentencing.
8. The approach 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 is consistent with statutory sentencing purposes and lies within the permissible range.⁴ When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered.⁵

³ *Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013)

⁴ *Sharma v State* [2015] FJCA 178; AAU48.2011 (3 December 2015). See also *Navuki v State* [2022] FJCA 25 at [25], Prematilaka RJA explained these purposes.

⁵ *Koroicakau v The State* [2006] FJSC 5; CAV0006U.2005S (4 May 2006)

Effect of guideline judgments

9. It is not always easy to establish the appropriate sentencing patterns when an offence was committed. It might be that over the time between offence and sentence a different approach to assessing the criminality and prevalence of the offence may have changed. For that reason, guideline judgments with only one exception apply to sentencing decisions occurring after the delivery of the guideline judgment regardless of when the offending took place.
10. Confirming this approach this court in *Seru v State*⁶, adopted the New Zealand decision of *Zhang v R*⁷, a sentencing in methamphetamine dealing cases which held the guidelines provided in that sentence appeal applied:
 - (1) to sentencing that took place after the date of the guideline judgment, regardless of the date of the offence; and
 - (2) to sentences imposed before the date of the guideline judgment if an appeal against sentence had been filed before the date of the guideline judgment and the application of the guideline judgment would result in a more favourable outcome for the appellant.
11. Based upon earlier sentencing described in *Turuturuvesi v State*⁸, the applicable tariff at sentence on the 4th May 2019 was for an end sentence between 18 months to 3 years for aggravated burglary. We accept the trial Judge erred in this sentencing by adopting what is known as the ‘new’ tariff of 06-14 years erroneously derived, it appears, from sentences for aggravated robbery rather than aggravated burglary⁹ and where the guideline was

⁶ *Seru v State* [2023] FJCA 67; AAU115.2017 (25 May 2023)

⁷ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, (2019) 29 CRNZ 282

⁸ *Turuturuvesi v State* [2002] FJHC 190; HAA0086J2002S (23 December 2002)

⁹ *State v Prasad* [2017] FJHC 761; HAC 254.2016 (12 October 2017)

created following an unlawful statutory process. The Judge in sentencing the appellant chose a starting point of 08 years clearly well outside the correct sentencing tariff¹⁰ range.

12. That applicable starting point and range of end sentence has now been overtaken by this court's decision in November of 2022 in, *Kumar v State*¹¹. As a result of “*a drastic increase in aggravated burglary offences from 2017-2021*” the State submitted, the ‘old tariff’ was inadequate and successfully obtained a guideline judgment as the court agreed revisiting the ‘old tariff’ appeared timely and inevitable.
13. In this resentencing regardless of the offending in May of 2018 we find the court must use the ‘Kumar’ guideline. The exception cannot apply as whether the applicable tariff or the Kumar guideline is used the result will not be more favourable for the appellant. In addition, by using the Kumar guideline a transparent methodology will add consistency to sentencing.
14. The methodology, starting points, aggravating, and mitigating circumstances and tariff are described in this way:

“[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium, or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.”

Determining the offence category

The court should determine the offence category among 01-03 using inter alia the factors. Given in the table below:

- ***Category 1 - Greater harm (High)***

¹⁰ 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).

¹¹ *Kumar v State* [2022] FJCA 164; AAU117.2019 (24 November 2022)

- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

<i>Factors indicating greater harm</i>
<i>Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental, or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>Restraint, detention or gratuitous degradation of the victim, which is greater than is necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>
<i>Context of general public disorder</i>
<i>Factors indicating lesser harm</i>
<i>Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[76] *Once the level of harm has been identified, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of*

previous convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.

<i>LEVEL OF HARM (CATEGORY)</i>	<i>BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER AND WITH A WEAPON)</i>
<i>HIGH</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>	<i>Starting Point: 07 years Sentencing Range: 05–10 years</i>	<i>Starting Point: 09 years Sentencing Range: 08–12 years</i>
<i>MEDIUM</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>	<i>Starting Point: 07 years Sentencing Range: 05–10 years</i>
<i>LOW</i>	<i>Starting Point: 01 year Sentencing Range: 06 months – 03 years</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>

[77] *The following table contains a **non-exhaustive** list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.*

<i>Factors indicating higher culpability</i>
<i>Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence). Child or the elderly, the sick or disabled at home (or return home) when offence committed</i>
<i>A significant degree of planning, or organization or execution. Offence committed at night.</i>
<i>Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.</i>
<i>Equipped for burglary (for example, implements carried and/or use of vehicle)</i>
<i>Member of a group or gang</i>
<i>Factors indicating lower culpability</i>
<i>Offence committed on impulse, with limited intrusion into property or little or no planning</i>
<i>Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure</i>
<i>Mental disorder or learning disability, where linked to the commission of the offence</i>

[78] The following table contains a **non-exhaustive** list of aggravating and mitigating factors relating to the offender. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

<i>Factors increasing seriousness</i>	<i>Factors reducing seriousness or reflecting personal mitigation</i>
<i>Statutory aggravating factors:</i>	<i>Genuine remorse displayed, for example the offender has made voluntary reparation to the victim.</i>
<i>Previous convictions, having regard to:</i>	<i>Subordinate role in a group or gang.</i>
<i>a) the nature of the offence to which the conviction relates and its relevance to the current offence; and</i>	<i>No previous convictions or no relevant/recent convictions.</i>
<i>b) the time that has elapsed since the conviction.</i>	
<i>Offence committed whilst on bail or parole.</i>	<i>Cooperation with the police or assistance to the Prosecution.</i>
<i>Other aggravating factors include:</i>	<i>Good character and/or exemplary conduct.</i>
<i>Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution.</i>	<i>Determination, and/or demonstration of steps taken to address addiction or offending behavior.</i>
<i>Established evidence of community impact.</i>	<i>Serious medical conditions requiring urgent, intensive or long-term treatment.</i>
<i>Commission of offence whilst under the influence of alcohol or drugs.</i>	<i>Age and/or lack of maturity where it affects the culpability and responsibility of the offender.</i>
<i>Failure to comply with current court orders.</i>	<i>Lapse of time since the offence where this is not the fault of the offender.</i>

<i>Offence committed whilst on license.</i>	<i>Mental disorder or learning disability, where not linked to the commission of the offence.</i>
<i>Offences Taken Into Consideration (TICs)</i>	<i>Any other relevant personal considerations such as the offender being sole or primary care giver for dependent relatives or has a learning disability or mental disorder which reduces the culpability.</i>

15. Guidelines are not binding rules. Guideline judgments are intended to assist the Judge arrive at the correct sentence and one that respects the importance of consistency in sentencing. In *R v Millberry*¹², the English Court of Appeal said: *It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances.*

The two-step process.

16. An important part of any sentencing is equality of outcome as between offenders before the courts for similar offending. Uniformity in sentences reflects equality before the law. Offenders committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are equally given to offenders, the public's confidence in the criminal justice system is maintained.
17. However, equality before the law is quite different from sentencing every offender in exactly the same way for similar offending. That is an impossible task. The Sentencing and Penalties Act 2009 and the common law certainly do not demand that. Equality does not mean sameness. Equality rather requires a respect across difference and a two-step process

¹²*R v Millberry* [2003] 1 WLR 546; [2003] 2 All. ER 939 (CA) at [34]

in sentencing if carefully used, to avoid double counting for both aggravating circumstances inherent in both the offence and the offender, assures that outcome.

18. In *Quray v State*¹³ the Supreme Court endorsed the 'two-step' process for sentencing and since 2015 while the use of the methodology is not mandatory it is preferred as best sentencing practice by this court.
19. The process commences by calculating the starting point, incorporating the aggravating, and mitigating factors of the offence. Here the sentencing Judge must ask how serious the offending is compared to other offending of that type by considering relevant guideline judgments and other consistent authorities.
20. In this resentencing, there is a guideline judgment available. Identifying and weighing the aggravating and mitigating factors of the offence with the assistance of the guidance provided, based as it is on other comparable cases, will reliably place the offending within the range for a particular category of offending.
21. Then, by adjusting the starting point to incorporate the aggravating and mitigating factors personal to the offender a proportionate "end sentence" can be found. Thereafter final adjustments may be made for any other relevant factors, such as for the totality principle on aggregated sentencing and lastly time spent in custody awaiting trial.
22. However, the question remains where does any increase in sentence for a habitual offender declaration best fit into that process? Section 12 of the Sentencing and Penalties Act 2009 provides that to protect the community from the offender the court may impose a sentence that is longer than that which is proportionate to the gravity of the offence. Using the methodology described above the proportionate sentence is found after steps one and two have been completed and any final adjustments made to respect the totality principle.

¹³ *Quray v State* [2015] FJSC 15; CAV24.2014 (20 August 2015) at [48] – [49]

23. If the sentencing court is following the preferred two-step process, then in our view it is at this final stage the court may, provided it gives proper reasons, add on to the proportionate sentence such time as required to achieve protection of the community from the offender. This before finally deducting any time served on remand awaiting trial and sentence upon those crimes and imposing any required non parole period for the sentence then achieved.

Re-sentencing

24. Using the aggravated burglary as the lead offence applying the Kumar tariff, the appellant's offending had these features. He used a cloth to disguise his face, otherwise with little planning, he and his co-offender committed what might best be described as an opportunistic 'walk in' burglary of commercial premises with no additional damage done to effect entry to the premises. No weapons were used, there was an absence of violence. There was negligible risk of victim confrontation during this swift burglary of the reception area in an empty hostel. A small economic loss was caused to a humble commercial property owner to the total value of \$1637.00. We agree with counsel that this must fall in the low to medium category attracting a 01–05-year range with a starting point of 3 years. For completeness we note, absent the *Kumar* guideline, a similar starting point would be justified if the sentencing Judge had used the correct tariff at the time of sentence and not double counted an uplift for previous offending.
25. Aggravating that starting point is the appellant's criminal history. It is clear from the sentencing order that eighteen of his previous convictions are recorded against the appellant and eight out of those were for similar offences. Against that starting point an uplift of 1 year is justified. That brings the total to 4 years. We could find no mitigating circumstances for the appellant's resentence. We find that aggregate sentence is the least restrictive option and a proportionate sentence which respects the principles of totality.
26. However, the trial Judge's declaration of the appellant as a habitual offender in terms of section 11 of the Sentencing and Penalties Act 2009 was correct. The community must be protected from habitual burglars. To achieve this an uplift of a further 6 months is required

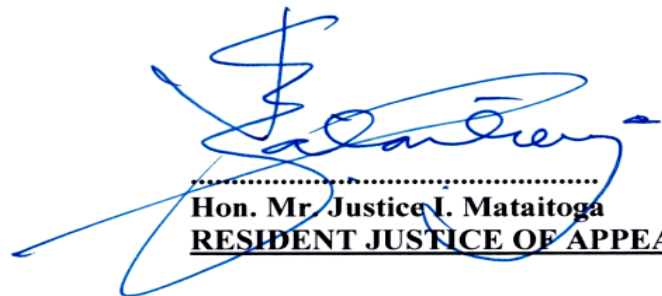
taking the total sentence to 4 years and 6 months imprisonment. The appellant has already served some 5 years, 7 months, and 24 days in custody.

Result


27. The appeal against sentence is allowed.

Orders of the Court:

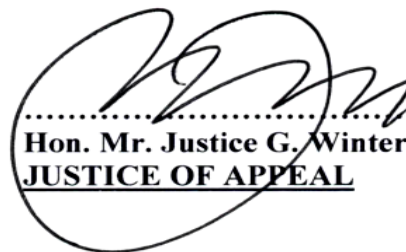
1. *The sentence imposed on the appellant of ten years, imprisonment, with a non-parole period of nine is quashed.*
2. *A sentence of four years' and six month's imprisonment, with a non-parole period of four years is imposed on the appellant with effect from 4th July 2019.*
3. *His sentence is fully served and with the appeal granted save as to the declaration of habitual offender status the court directs Mr. Jimi Tolivia's immediate processing and release.*



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Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL



.....
Hon. Madam Justice P. Andrews
JUSTICE OF APPEAL



.....
Hon. Mr. Justice G. Winter
JUSTICE OF APPEAL

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent