IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO: HAM 200 OF 2013

BETWEEN	:	**SAVENACA RAQAUQAU**	**APPELLANT**
AND	:	**THE STATE**	**RESPONDENT**
Counsel	:	Appellant in Person Ms. Prasad J for the Respondent	
Judgment	:	29th November 2013	

JUDGMENT

1. The appellant was sentenced to 21 months imprisonment by a learned Magistrate in the Magistrate's Courts at Suva on his own plea of guilty to one count of "Aiding Prisoners to Escape", contrary to section 197 (a) of the Crimes Decree 2009. The particulars of the offence read as follows:

Charge
(Complainant by Public Officer)

Statement of Offence [a]
Aiding Prisoners To Escape:-Contrary to Section 197 (a) of Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

> **SAVENACA RAQAUQAU**, on the 18th day of November, 2012, at Suva in the Central Division, aided prisoners to escape namely **SANAILA TABUAVALU, FRANK KONAVE**, and **VILIAME TUIBUA** from the custody of Sergeant Major Eliki Raloka.

2. This appeal is against the above mentioned sentence of 21 months imprisonment, ordered by the learned Magistrate. The appellant had raised five grounds of appeal.

   (i) 21 months sentence is harsh and severe.
   (ii) The Magistrate erred by selecting 3 years imprisonment as the starting point,
   (iii) The Magistrate erred by failing to consider that this is the 1st offence of this nature despite the long list of previous convictions,
   (iv) The Magistrate penalized the applicant twice by selecting a very high starting point as he is not a first offender and without giving any discount for the mitigation,
   (v) The Magistrate erred by fixing a non-parole period.

3. The admitted Summary of Facts in the Magistrate's Court states that the appellant had accompanied four escapees of Suva Correctional Centre, from Reservoir Road, opposite Pacific Station to Sukanaivalu Road, Nabua, by a taxi arranged for their transportation after their escape.

4. Before proceeding any further, it has to be noted that the appellant was sentenced by the Magistrate's Court on 29th of November 2012 and he had submitted his Petition of Appeal to Prison Authorities on 19th of December 2012, though it was filed in court on 22nd of August 2013. The prosecution conceded that the misplacement of the 'Appeal papers' is out of appellant's control. Thus, the respondent did not have any objection to leave being granted to the appellant to appeal out of time. Since granting leave out of time to appeal was not a disputed fact, this court proceeded to focus on the substantive issues raised in the petition of appeal.

5. The learned Magistrate in his written sentence has correctly identified that there is no set tariff for the offence of 'Aiding Prisoners to Escape' in this jurisdiction. It attracts a maximum penalty of 7 years imprisonment. In this backdrop, the learned Magistrate had taken up a tariff limit of 9 months to 3 years on his own volition and selected a starting point of 3 years. This is the remark of the learned Magistrate on the 'starting point'.

> *"This Court has not found any set tariff for this Offence. This Court takes the tariff to be between 9 months to 3 years."*
>
> *"Having considered the relevant provisions of the Sentencing and Penalties Decree. This Court takes 3 years (36 months) (Higher end of the scale) as an appropriate starting point for the offence that you have committed. The Higher end is taken for the fact that you are not a 1st offender. This Court has also noted and carefully considered the facts and notes a good deal of planning went into effecting the escape of the prisoners."*

6. First of all, it is better to address the issue on 'tariff' for the offence of 'aiding prisoners to escape'. The maximum sentence for the offence is 7 years imprisonment. There is no laid 'tariff' for this offence. It is in this back-drop, this court thought fit to pursue section 141 of the Criminal Code of Queensland on the offence of "aiding to escape from legal custody" which is similar in context to section 197 (a) of the Crimes Decree. Both sections carry a maximum punishment of 7 years imprisonment.

7. In **R. v. SGB** [2008] Queensland Court of Appeal CA 286/2007 (20th March 2008), the Appeal Court upheld a sentence of 6 months imprisonment for aiding to escape from lawful custody. The Queensland Court of Appeal in **R v Campbell** [2006] Queensland Court of Appeal CA 229/2006 (26th September 2006), brought down a sentence of 12 months imprisonment to 3 months imprisonment for assisting escape from prison, to reconcile the disparity of sentence received by the main perpetrator/the prisoner. It has to be noted that in Queensland, the maximum sentences for the 'escape' and 'aiding to escape' are in conformity. It is different from our jurisdiction as the maximum penalty for 'escaping lawful custody' is only 2 years imprisonment.

8. **Section 39 of the Prison Act 1952 in England** focuses on 'assisting a prisoner to escape' from a prison. It contains a maximum punishment up to 10 years imprisonment on conviction on indictment. In **John Williams**, (1992) 13 CR. App. R. (S) 236, England Court of Appeal brought down a sentence of 2 years imprisonment to 15 months imprisonment for assisting a prisoner of an 'open prison' to escape by substituting the said prisoner for one night. In the case of **Gary Walker** (1990) 12 CR. App. R.(S) 65, a 9 months imprisonment was upheld for assisting a prisoner to escape from an 'open prison' by transporting the prisoner by a car.

9. **Simon John Bowman** [1997] 1 CR. App. R. (S) 282, is a decision of the England Court of Appeal, which upheld a sentence of 7 years imprisonment. In that case, the applicant was convicted of conspiracy to assist prisoners to escape from H.M. Prison of Durham by smuggling a double barrelled pistol and ammunition into the prison. It was held that,

> *"It was difficult to imagine a graver example of the crime, and a sentence closer to the maximum term of 10 years would have been justified. Smuggling into prison a lethal weapon with a view to freeing two dangerous and resourceful criminals was a grave offence. The sentence of seven years was not excessive, and manifestly had to be imposed consecutively to the other sentences."*

10. There is no doubt that the legislation has viewed the offence of 'aiding prisoners to escape' much seriously when compared to the offence of 'escape' from legal custody. The intention of the legislature would have been the public to refrain such anti-social behaviours of this nature and to unite with the law enforcement authorities to combat crime. The line of case authorities cited from other jurisdictions shows that the offence of 'aiding prisoners to escape' calls for an immediate imprisonment. In this back ground, this court sees no impediment in selecting a 'tariff' of 9 months to 3 years imprisonment by the learned Magistrate to the offence of 'aiding prisoners to escape'.

11. Nevertheless, the learned Magistrate had unfortunately failed to apply the proper principles when selecting the starting point from the identified tariff. The higher courts have time and again laid down the accepted criteria to

select a 'starting point' to any offence. This court, in the case of **Suresh Lal v. State** (Crim. App. Case No.: HAA020 of 2013) made the following comments on the issue of 'starting point'.

> *"It is trite law that the 'starting point' of a sentence to be within the range of tariff of a particular offence. If the sentencing court deviates from this principle, it should only be in exceptional circumstances. Reasons for such a deviation must be provided as it would be clear to the public, prosecution and the accused as to why the court took a different approach in a given scenario. It is an objective approach towards the offence and the offending background when selecting a 'starting point'. That will preclude the sentencer from using the 'aggravating factors' once again to enhance the sentence and punish the offender twice for the same facts. Therefore it is important to select a 'starting point' irrespective of aggravating and mitigating factors. Identification of the correct 'tariff' and the selection of a proper 'starting point' play a pivotal role in the sentencing process."*

12. It is clear from the decision of the Fiji Court of Appeal in **Naikelekelevesi v. State** [2008] FCA Crim. App. AAU 0061/2007 (27th of June 2008) that it is not the aggravating features of the "offender", but the 'offence', the sentencing court has to consider when articulating the 'starting point'. It is only at the next step, when analyzing the 'aggravating factors' to increase the 'starting point', the aggravating features of the 'offender' have to be taken into account.

> *"In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case."*

13. The learned Magistrate, quite correctly, had given his reasons to select a starting point at the higher end. The two reasons are: first, the accused is not a 1st offender and, second, a "good deal of planning" went into effecting the escape of the prisoners. The learned Magistrate had then given a one third discount for the appellant's early plea of guilt (12 months) and reduced 3 more months for the other mitigating factors. That is how the final sentence stands at 21 months imprisonment.

14. I see nowhere in the sentence of the learned Magistrate addressed the aggravating factors to increase the 'starting point'. Instead, he had chosen the aggravating factor of 'good deal of planning' to have the 'starting point' at the higher end of the 'tariff'. This approach is fundamentally wrong. 'Starting Point' should purely be based on the objective seriousness of the 'offence'. As recommended by their Lordships of the Court of Appeal in **Koroivuki v. State** [2013] FJCA15; AAU 0018.2010 (5th March 2013), "as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff".

15. The other reason considered by the learned Magistrate to have a starting point at the higher level is that the appellant has previous convictions. It is true that the appellant has 55 previous convictions. Unblemished character with a crime free record is definitely a strong mitigating ground. The absence of such character does not warrant a sentencing court to select a higher starting point. Once again, the starting point is totally distracted from the 'offender'. D.A. Thomas (2nd Edition at page 46) in The Principles of Sentencing made the following observations on the 'previous character'.

> *"The final step in the process of calculating the length of a tariff sentence is to make allowance for mitigation, reducing the sentence from the level indicated by the facts of the offence by an amount appropriate to reflect such mitigating factors as may be present. Mitigating factors exist in great variety, but some are more common and more effective than others. They include such matters as the youth and previous character of the offender."*

In this context, the learned Magistrate erred in law when opting to have the higher end of the tariff based on the above two reasons.

16. The next procedural error the learned Magistrate had done was to grant a reduction of a third before deducting the period for the mitigating factors. It should have been other way around. Nevertheless, the learned Magistrate had considered the mitigating factors and the early guilty plea and given due reductions, with 3 months and 12 months respectively.

17. Now, at this juncture, this court has to determine whether the learned Magistrate would have imposed a different sentence after considering all the aggravating and mitigating factors. It is the appellant who has to demonstrate to this appellate forum that the learned Magistrate fell into error when exercising his sentencing discretion. Even though, this court found the learned Magistrate erred in law when considered a 'good deal of planning' to go to the higher end of the 'tariff', that is surely a serious aggravating factor. On the other hand, the absence of crime free record does not attract any concession when weighing the mitigating factors. Had the starting point was chosen within the middle range of the tariff, that is 9 months to 3 years, and the true aggravating value was given to the amount of pre-planning or the 'prior concert' between the appellant and the four escapees, the final sentence would have reached the same level where it stands now.

18. Therefore, I see no reason to interfere with the final sentence imposed by the lower court. The offenders who are willing participants to this kind of offences, must know that they will receive an immediate custodial sentence. The length of the sentence, as it is accepted in the other instances as well, will entirely depend on the aggravating and mitigating factors in a given scenario.

19. Having decided that a sentence of 21 months imprisonment for aiding four prisoners to escape is not harsh or severe, this court does not find any procedural error when the learned Magistrate imposed a non-parole period of 15 months. Section 18 (3) and (4) of the Sentencing and Penalties Decree 2009, states as follows:

> *18__ (3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.*
>
> *(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.*

Since the learned Magistrate had followed the provisions correctly when imposing the 'non-parole' period, there is no necessity for this court to interfere with that.

20. In the light of the above discussed factual and legal background, the appeal is dismissed. The appellant's sentence of 21 months imprisonment with a non-parole period of 15 months dated 29th of November 2012 remains unchanged.

Janaka Bandara
Judge

At Suva
Appellant in Person
Office of the Director of Public Prosecution for the Respondent