IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 36 OF 2013

BETWEEN: **MOHAMMED IMTIAZ ALI**

Appellant

AND:

STATE

Respondent

Counsels: **Mr. R. Kumar for the Appellant**
Mr. Josaia B. Niudamu for the Respondent

Date of Judgment: **13 March 2014**

JUDGMENT

1. The appellant was charged before the Nadi Magistrate Court with count of Burglary contrary to Section 312 (1) of the Crimes Decree and second count of Theft contrary to Section 291 (1) of the Crimes Decree.

2. The appellant pleaded guilty and admitted the summary of facts. He was convicted and sentenced for 3 years imprisonment for the first count, 2 years imprisonment for the 2nd count on 16th March 2012. Both sentences to run concurrent and appellant not eligible for parole unless he had served 18 months imprisonment.

3. The facts of the case are that between 31.1.2012 and 14.2.2012, appellant with company of another broke and entered into dwelling house of Brian Collis and stole therein assorted items including safe, all to the value of $11,300.00. Items worth $9,500.00 were recovered.

4. This appeal against the sentence was filed on 6.12.2013 after leave to appeal was granted by this Court on the same day in HAM 411 of 2013.

5. The ground of appeal are :

(i) That the learned Magistrate erred in law when he failed to come to a correct calculation of the total sentence after taking into consideration of the aggravating factors, mitigating factors and early guilty plea.

6. Both parties have filed written submissions.

7. The learned Magistrate had selected a starting point of 3 years for the first count. He had mentioned following guideline judgment.

   State v Sailosi Ralago Volivale [2009] HAC 30 (A)/05S (18 June 2009).

   However in that case which involved murder, robbery with violence and burglary a term of 2 years imprisonment was given for the burglary count.

8. In **State v Tabeusi** [2010] FJHC 426; HAC 095-113.2010L (16 September 2010) the tariff for the offence of Burglary was discussed with accepted tariff being 2 years to 3 years after trial. In ***State v Mucunabitu*** [2010] FJHC 151; HAC 017.2010 (15 April 2010) it is held that the accepted tariff is 18 months to 3 years.

9. Then the learned Magistrate had identified following aggravating factors:

   (i) Invasion of dwelling house
   (ii) Loss caused to the complainant (items worth $1,800.00 not recovered)
   (iii) Total lack of respect towards the victim's property and enjoyment of property rights.

   One year was added for the above.

10. The following were identified as mitigating factors by the learned Magistrate:

    (i) Appellant was 27 years, part time driver and married with 2 children
    (ii) Appellant sought apology and forgiveness
    (iii) Appellant promised that he will not re-offend.

11. For the early guilty plea the learned Magistrate had deducted 1 ½ years and further 9 months for the other mitigation. Then learned Magistrate had arrived at a sentence of 3 years. This calculation is wrong.

12. The learned Magistrate had erred in arriving at the above sentence on following grounds:

    (i) He had erred by selecting a wrong starting point
    (ii) He had erred in calculating the final sentence.

13. State in their submissions had conceded that the learned Magistrate had erred in selecting the starting points and in calculating the final sentence.

14. Further the fact that items not recovered cannot be considered as an aggravating factor.

15. This position was affirmed by Hon. Mr. Justice Paul Madigan in **Soko v State,** [2011] FJHC 777; HAA 031.2011 (29 November 2011) where he held that:

'*Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature.'*

16. This point was also highlighted by Hon. Mr. Justice Priyantha Nawana in **Vasuca v State** [2012] FJHC 1244; HAA 03.2012(31 July 2012):

'As regards 'not all items were recovered', it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently the fact that all or some items of property were not recovered cannot be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa.'

17. This background warrants this Court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate in respect of the 1st count and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.

18. Accordingly, I take a starting point of 2 years and add 1 year for the aggravating factors excluding the non recovery of stolen items. I deduct 6 months for the mitigating factors mentioned above. Further 1 year to be deducted for the Guilty plea. Final sentence is 1 year and 6 months.

19. For the second count of Theft, considering all aggravating and mitigating factors, I order a sentence of 12 months.

20. According to the totality principle both sentences to run concurrently.

21. Appellant had already served the full sentence. Thus the prison authorities are directed to release the appellant forthwith.

22. Appeal is allowed. Sentence is varied.

Sudharshana De Silva
JUDGE

At Lautoka
13th March 2014

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