

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISELENIUS JURISDICTION
CRIMINAL MISELENIUS CASE NO.: HAM 1 OF 2014

BETWEEN: JIMILAI VUETI

Appellant

AND: STATE

Respondent

Counsels: Applicant in person
Mr. Josaia B. Niudamu for the Respondent

Date of Judgment: 12.5.2014

JUDGMENT

1. The applicant 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. The applicant had earlier filed an application for leave to appeal out of time (HAM 55 of 2013). This court had refused that application by the ruling dated 2.7.2013. Since then co-accused Mohammed Imitiaz Ali successfully appealed against the same sentence and got his sentence varied. **Ali v State [2014] FJHC 144; HAA 36.2013 (13 March 2014)**. It was brought to the notice of this Court in that case the learned Magistrate had erred in

calculation of the sentence. However, this was not brought to the notice of Court in HAM 55 of 2013.

5. The state had filed their objections and taken up the position that since this Court had already decided on the issue of leave to appeal out of time, this Court is ***Functus officio*** to consider this application.
6. The Section 248 of the Criminal Procedure Decree provides:
 - (1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-
 - (a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;
 - (b) a copy of the petition shall be filed at the registry of the High Court; and
 - (c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.
 - (2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.
 - (3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include-
 - (a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;
 - (b) any case in which a question of law of unusual difficulty is involved;
 - (c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;
 - (d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.
7. The principles for an extension of time to appeal are settled. The Supreme Court in ***Kumar v State; Sinu v State*** [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These factors 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 courts 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. More recently, in **Rasaku v State** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

“ These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court. “

9. The applicant was represented at the trial or the earlier leave to appeal out of time application. There is substantial delay, nonetheless there is a ground of appeal that will succeed as already decided by this court in **Ali v State** [2014] FJHC 144; HAA 36.2013 (13 March 2014).
10. When these facts were brought to the notice of the state they conceded for leave to appeal and to treat this application as an appeal against the sentence. I thank the State counsel for upholding the traditions of the office of DPP.
11. 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.

12. 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.
13. Then the learned Magistrate had identified following aggravating factors:
- (i) Invasion of dwelling house
 - (ii) Loss caused to the complainant (items worth \$1,800 not recovered)

- (iii) Total lack of respect towards the victim's property and enjoyment of property rights

One year was added for the above.

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

- (i) Applicant was 24 years old farmer and married. His wife was pregnant at that time.
- (ii) Applicant sought forgiveness and leniency.
- (iii) Applicant had co-operated with the police and promised that he will not re-offend.

15. 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.

16. 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.

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

18. 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:

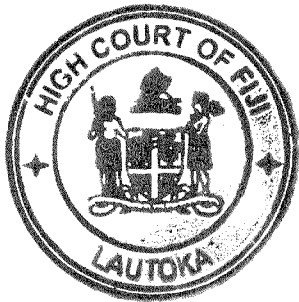
'Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature.'


19. 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.'

20. 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.
21. 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.
22. For the second count of Theft considering all aggravating and mitigating factors, I order a sentence of 12 months.
23. According to the totality principle both sentences to run concurrently.
24. Appellant had already served the full sentence. Thus the prison authorities are directed to release the appellant forthwith.
25. Application is allowed, treated as an appeal against the sentence. Sentence is varied.




Sudharshana De Silva
JUDGE

At Lautoka
09th May 2014

Solicitors: **Applicant in Person**
 Office of the Director of Public Prosecution for the Respondent