

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 102 OF 2014

BETWEEN: ILISONI KUNAGASAU
Applicant

AND: STATE
Respondent

Counsels: Applicant in person
Mr. F. Lacanivalu for the Respondent

Date of Judgment: 30 June 2014

RULING

1. The appellant was charged before the Sigatoka Magistrate Court for the offence of Burglary contrary to Section 312 (1) of the Crimes Decree No. 44 of 2009 and for the offence of Theft contrary Section 291 (1) of the Crimes Decree No. 44 of 2009.
2. The facts of the case are that on 26th June 2013, appellant with another entered the dwelling house of the complainant as a trespasser with intent to steal and dishonestly appropriated items to the total value of \$13,535.00. This was in night when complainant was away from his house. Entry into the house was by removing louver blades. Matter was reported to the police and appellant admitted the offences in his caution interview and later assorted items were recovered.
3. He pleaded guilty to both charges on 4.7.2013 on the first date.
4. The appellant was sentenced for 2 years 10 months and 28 days imprisonment for the 1st count and 8 months imprisonment for the 2nd count with both sentences to run concurrently and non-parole period of 2 years on 6.8.2013.
5. The co-accused had earlier filed an appeal (HAA 26 of 2013). This court had allowed that appeal and his sentence were varied.
6. 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 or 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 not represented at the trial. There is substantial delay, nonetheless there is a ground of appeal that will succeed as already decided by this court.

10. The state had conceded for leave to appeal and to treat this application as an appeal against the sentence. Further, they have no objection for the same sentence being given to the applicant. I thank the State counsel for upholding the traditions of the DPP office.

11. The Magistrate had correctly identified maximum penalty for the offence of Burglary according to Section 312 (1) as 13 years imprisonment and 10 years imprisonment for the offence of Theft according to Section 291 (1).

12. The Magistrate had accepted a tariff of 3 years for the offence of Burglary citing cases of **Tabekusi** HAC 95-113 of 2010 and **Isei Donumaivanua** HAC 259 of 2012.

13. Although the learned Magistrate had followed correct Guide line judgment **Tabekusi v State** the tariff given there is 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.

14. The learned Magistrate had identified following aggravating factors.

- (i) Burglary at night
- (ii) Damage of louver blades to gain access into the house.

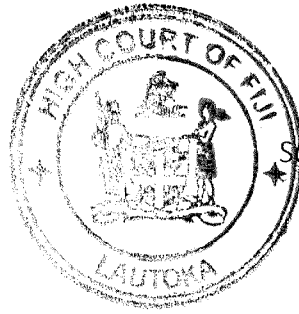
He had added 2 years for the above.

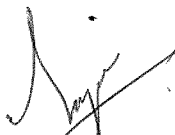
15. Then for mitigating factors of personal circumstances and remorse 2 years are deducted arriving at a sentence of 3 years for the 1st count.

16. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

"The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably."

17. It was held in **Naikellekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that *"Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case."*
18. The learned Magistrate had erred by not awarding the appellant separate deduction for his guilty plea. There is merit in this ground and it succeeds.
19. 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.
20. Accordingly, I take a starting point of 2 years and add 6 months for the aggravating factors. I deduct 6 months for the mitigating factors of personal circumstances, recovery of all items and remorse. Further, 10 months to be deducted for the Guilty plea. Final sentence is 14 months.
21. The sentence for the 2nd count is appropriate and within the tariff.
22. According to the totality principle both sentences to run concurrently.
23. Appellant had served 10 months and 16 days and he was in remand for 32 days. Therefore, period of 11 months and 16 days to be deducted from the final sentence.
24. Appellant is not a first offender. He had admitted 30 previous convictions. Therefore, a suspension of the sentence is not appropriate.
25. Appellant to serve 2 months and 15 days imprisonment from today.
26. Appeal is allowed. Sentence is varied.




Sudharshana De Silva
JUDGE

At Lautoka
30th June 2014

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