

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 09 OF 2015

BETWEEN: LIVAI NAVOLO

Appellant

AND: STATE

Respondent

Counsels : Appellant in person
Ms. J. M. Fatiaki for the Respondent

Date of Hearing: 25 March 2015

Date of Judgment: 31 March 2015

JUDGMENT

1. The Appellant was charged before the Sigatoka Magistrate under the following counts:
 - (i) Count 1- Burglary contrary to Section 312 (1) of the Crimes Decree No.44 of 2009
 - (ii) Count 2-Theft contrary to Section 291(1) of the Crimes Decree No. 44 of 2009
 - (iii) Count 3- Breach of Order Suspending sentence contrary to Section 28 (1) of the Sentencing and Penalties Decree 2009

2. The Appellant pleaded guilty to all there charges convicted and sentenced on 21.11.2014 as follows:
 - (i) Count 1-2 years 2 months and 21 days imprisonment
 - (ii) Count 2-13 months imprisonment
 - (iii) Count 3- to serve concurrent to above sentences

All three sentences to serve concurrently with a non- parole period of 20 months.

3. This appeal against the sentence was filed within time on 9.12.2014.

4. The grounds of appeal against the sentence are:

That the Learned Magistrate sentence for 28 months which is very harsh and excessive.

That the Learned Magistrate also error in taking into consideration by starting a "Starting Point" which was 2 years and by adding the aggravating factors of 18 months. It should be 3 years 6 months (42 months).

That the Learned Magistrate wrote in paragraph 18 and made error in calculation of "one year" where as he put 4 years 6 months (54 months) where it should be 3 years 6 months (42 months).

That the Learned Magistrate also note in paragraph 19 "That I am giving 18 months deduction on your early plea" 'Guilty'. As it should come to 24 months (2 years) where it is also an error in calculation as written "36 months" (3 years).

That the Learned Magistrate also noted and made error after giving 8 months deduction my other mitigating factors. Where it should be 16 months (1 year 4 months).

That the Learned Magistrate also error in taking into account where the said "Nokia mobile phone" was also recovered. It is in the search list. As the Learned Magistrate noted, it was "not recovered" on paragraph 2 verse 4.

THAT the Learned Magistrate should not take into account as I was charged in count 3 "Breach of suspending sentence whereas my suspended sentence was not, in force".

That the Learned Magistrate also error in giving the right to the Appellant as he ask for the time to be given as he wants to reconcile with the complainant as the Appellant was given forgiveness by the complainant as it is marked in paragraph 7 that the complainant "refused to accept" which is totally wrong.

THAT the right sentence for the complainant should be given by the Learned Magistrate is: 2 years as a starting point, add 18 months for aggravating factors which comes to 3 years 6 months. By giving deduction for early plea and saving Court's time, the total of sentence to be stand at 24 months and it is also a deduction of 8 months for other mitigating factors for recovered items, as the sentence should stand for 16 months. If deducting the remand period for 41 days, the final sentence should be 14 months 19 days.

5. The state in their submissions has conceded that there is error in the calculation of the sentence. This is the main ground of appeal.
6. The learned Magistrate had followed the correct tariff for the 1st count and selected a correct starting point of 2 years.

7. Then 18 months was added for the aggravating factors. Then he had stated that the interim sentence is 4 years and 6 months (54 months). This is clear error of calculation and it should be 3 years and 6 months (42 months).
8. Then he had deducted 18 months for the Guilty plea. This is 1/3 from 54 months.
9. 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 and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff in respect of the 1st count.
10. I take a starting point of 2 years and add 18 months for the aggravating factors. I deduct 9 months for the mitigating factors and further 11 months for the Guilty plea. The final sentence for the 1st count is 22 months. When the time period in remand (41 days) is deducted the final sentence is 20 months and 20 days.
11. The sentence of 13 months for the 2nd count of theft is appropriate as the Appellant is not a first offender.
12. The two sentences were made to run concurrent. That is correct considering the totality principle and one transaction rule.
13. The learned Magistrate had made the sentence for the 3rd count to run concurrently with the sentences for the 1st and 2nd counts. The Appellant was sentenced for Burglary and Theft on 15.11.2012 (Suva 1165/12) for 15 months imprisonment with 6 months to be served imprisonment and remaining 9 months suspended for 2 years. This offence was committed on 29.9.2014 within the operational period of the suspended sentence.
14. The Section 28 of the Sentencing and Penalties Decree is as follows.

28. — (1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.

(2) A proceeding for an offence under sub-section (1) may be commenced at any time up to 3 years after the date on which the offence is alleged to have been committed.

(3) Upon charging an offender with an offence under sub-section (1) a warrant to arrest the offender may be issued.

(4) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held

in suspense and order the offender to serve it, but of the court considers that exceptional circumstances exist that make this unjust, the court may instead—

- (a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
- (b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or
- (c) make no order with respect to the suspended sentence.

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served —

- (a) immediately; and
- (b) unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.

15. The learned Magistrate had not given any reasons for making the sentence for the 3rd count to run concurrently with the sentences for the 1st and 2nd counts. This is in violation of Section 28 (5) of the Sentencing and Penalties Decree.

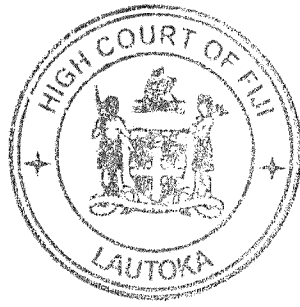
16. In **Tamani v State** [2008] FJHC 328; HAA090.2008 (28 November 2008) Hon. Mr. Justice Daniel Goundar held:

*'The proper approach, where a fresh offence has been committed during the period of the suspension of an earlier sentence and the accused is brought before the court was laid down in **R v Ithell** (1969) 2 AER 449 and followed by Pathik J in **Matai v the State** (1993) Criminal Appeal No 23 of 1993. The procedure is that the court should first sentence the offender in respect of the fresh offence by punishment appropriate to that offence, and thereafter address itself to the question of the suspended sentence. The court should then direct its mind to the issue of concurrency of sentences. In considering this issue the court should bear in mind that unless there are some quite exceptional circumstances, the suspended sentence should be ordered to run consecutively to the sentence given for the fresh offence.'*

17. Therefore the sentence for the 3rd count (9 months) to run consecutively to the sentence of 20 months and 20 days.

18. The sentences to run from the date of sentence that is 21.11.2014.

19. Appeal is allowed. Sentence is varied.




Sudharshana De Silva
JUDGE

At Lautoka
31 March 2015

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