IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 43 OF 2014

BETWEEN: **CARL FOX**

Appellant

AND: **STATE**

Respondent

Counsels: **The Appellant in person**
Mr. Josaia B. Niudamu for the Respondent

Date of Hearing: **15 January 2015**
Date of Judgment: **16 January 2015**

JUDGMENT

1. The appellant was charged before the Lautoka Magistrate Court with one count of Burglary contrary to Section 312 (1) of the Crimes Decree No. 44 of 2009 and one count of Theft contrary Section 291(1) of the Crimes Decree.

2. The facts of the case are that on 13th March 2013, appellant broke into the house of the complainant and had stolen items to the total value of $5,300.00.

3. He pleaded guilty to the 1st count on 5.8.2013 and was convicted of the 2nd count on 8.8.2014.

4. The appellant was sentenced for 2 years imprisonment for the 1st count and 12 months imprisonment for the 2nd count to serve concurrently.

5. This is an appeal against the sentence filed within time.

6. The grounds of appeal against the sentence are:

   i. That the appellant is aggrieved against the 2 years sentence which is harsh and excessive in all the circumstances.

   ii. That, the learned sentencing Magistrate had in fact erred in law and in fact in denying the appellant a fair trial since the appellant was unrepresented by legal

counsel, and unlearned in regards to the law, this the conviction is unsafe and unsatisfactory.

iii. That the appellant could not defend himself adequately of the professional being learned of the law as the prosecution this renders the trial being one-side.

iv. That, the learned Magistrate had erred in law and in fact who disregarding the previous good character of the appellant when passing the sentences, his first time offences, mitigation of remorse.

v. That the learned Magistrate had erred in fact when it had declined to allow the appellant when he had said for restitution to the complainant.

vi. That the learned Magistrate had erred in law and in fact by taking proper principle on the sentencing guide lines.

vii. That, the learned Magistrate had erred in law when disallowing all other mitigatory factors.

viii. That, the learned Magistrate had erred in law and fact when taking a starting point of the tariff on both the offence on a higher range for a first offender.

ix. That the learned Magistrate had erred in law and fact when taking into account the element of offence itself as aggravating factors.

x. That the learned Magistrate had failed to notify or inform the appellant the principle on restitution of the stolen items.

xi. That, the learned Magistrate had further failed to inform the appellant to allow any other third party to have stand to mitigate on his behalf also.

7. Both parties have filed written submissions.

8. The learned Magistrate had followed the correct guideline judgments and identified correct tariff for each charge.
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.

Tariff for the offence of theft was discussed in several cases. In **Saukilagi v State** the Court accepted between 2 to 9 months as tariff for simple theft.

*'The tariff for simple larceny on first conviction is 2-9 months (**Ronald Vikash Singh v. State** HAA 035 of 2002) and on second conviction a sentence in excess of 9 months. In cases of the larceny of large amounts of money sentences of 1 ½ years imprisonment*

*(**Isoa Codrokadroka v. State** Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (**Sevanaia Via Koroi v. State** Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between victim and the defendant. The method of stealing is also relevant.'*

In **Ratusili v State** [2012] FJHC 1249; HAA 011.2012(1 August 2012) Hon. Mr. Justice Paul Madigan summarized the tariff judgments.

'From the cases then the following sentencing principles are established:

(i) For an offence of simple theft the sentencing range should be between 2 and 9 months

(ii) Any subsequent offence should attract a penalty of at least 9 months

(iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences up to three years

(iv) Regard should be had to nature of the relationship between offender and the victim

(v) Planned thefts will attract greater sentences than opportunistic thefts.

9. The learned Magistrate had taken starting points of 3 years for the 1st count and 12 months for the 2nd count.

10. In ***Koroivuki v State*** [2013] FJXCA 15; AAU 0018.2010 (5th March 2013) it was held:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls outside either below or higher than the tariff, then the sentencing Court should provide reasons why the sentence is outside the range."

11. Further in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) it was held:

"22. 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."

12. The learned Magistrate had added 3 years for the aggravating circumstances for the 1st count. Two years were deducted for the guilty plea and another two years for the mitigation. The final sentence was 2 years.

13. For the 2nd count 2 years were added for the aggravating factors. Then 2 years were deducted for the mitigating factors and the final sentence was 1 year.

14. The learned Magistrate had considered the suspension of the sentence and decided against it considering the following.

"You have become a threat to the community at the very young age and you have chosen to live outside the law, invaded people's home, and steal their properties. I thought it fit that you are not entitled to get the benefit of Section 26 of the Sentencing and Penalties Decree."

15. The state in their submissions had conceded that the learned Magistrate had selected starting point at the highest end for the 1st count and out of tariff for the 2nd count (for first offenders).

16. The appellant only seeks a suspended sentence as submitted at the hearing. The appellant is only relying on the grounds (i) and (vi) above.

17. The learned Magistrate had erred by not following the good practice as given in ***Koroivuki v State.*** The learned Magistrate had erred in selecting a starting point for both counts.

18. 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 sentences which reflects the gravity of the offence within the acceptable range of tariff.

19. I take a starting point of 2 years for the 1st count and add 1 year for the aggravating factors. I deduct 1 year for the guilty plea and further 9 months for the mitigating factors. The final sentence for the 1st count is 1 year and 3 months.

20. For the 2nd count, considering all the aggravating and mitigating factors, I order a sentence of 8 months.

21. I order both sentences to run concurrently.

22. The appellant is a first offender. He had served 4 ½ months of his sentence. He is a father of a child and sole bread winner. Considering Section 26 of Sentencing and Penalties Decree, I suspend the balance of the sentence for a period of 3 years.

23. The suspended sentence is explained to the appellant.

24. Appeal allowed. Sentence varied.

Sudharshana De Silva
JUDGE

At Lautoka
16th January 2015

Solicitors: The Appellant in person
Office of the Director of Public Prosecutions for the Respondent