IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 02 OF 2016

BETWEEN : **KENI CAWA VUGONEA**

Appellant

AND : **STATE**

Respondent

Counsel : **Appellant in Person**

Mr. A. Singh for the Respondent

Date of Hearing : **21st June, 2016**

Date of Ruling : **8th July, 2016**

JUDGMENT

Introduction

1. The Appellant pleaded guilty in the Magistrates Court to one count of Burglary and one count of Theft contrary to Section 312(1) and Section 291 respectively of the Crimes Decree No. 44 of 2009.

2. Upon conviction, Appellant was sentenced on the 19th of October, 2015 to 21 months' imprisonment on the first count and 8 months' imprisonment on the 2nd count, to be served concurrently. Sentencing magistrate also ordered sentence imposed to be served consecutive to the existing prison term Appellant was already serving in another case.

3. Being dissatisfied with his sentence, Appellant, appearing in person, filed this timely appeal on the following grounds:

Grounds of Appeal

a) Sentence is harsh and excessive

b) Wrong sentencing principles applied

c) Imposition of consecutive sentence is wrong

d) Opportunity for rehabilitation denied

Law

4. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

5. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

Summary of Facts agreed by the Appellant is as follows:

6. *On the 7th day of September, 2014 at Votualevu Stage II, Nadi one Keni Cawa Vugonea (offender) 17 years unemployed of Votualevu, Nadi broke into the house of Sitara Begum (complainant) 49 years self-employed of Votualevu Stage II, Nadi and from therein stole 2 x TFL phone valued at $400.00.*

(Complainant) at about midnight went off to bed and at about 07.00 hrs when she woke up she saw someone removed 2 kitchen louver blades and stole the above mention items which were plugged to the charger and left on the settee at the sitting room. (Complainant) then tried to call on one of the stolen phone by using her personal mobile phone but to no avail. After few minutes (complainant) received call from one of the stolen phone on her personal phone where a male iTaukei Fijian man spoke to her and told her that his cousin, (offender) had stolen the phone and he had caught him. The caller also told (Complainant) that he had informed police about his cousin.

(Complainant) then left to the callers home namely Kalaveti Cawa (witness) 32 years unemployed of Votualevu, Nadi since it was few meters away from her home and brought back the stolen phones from him. (Complainant) then informed Namaka Police and investigation into the matter was conducted. Statement from (witness) was recorded who stated that he saw (offender) who is his cousin and living with him sleeping with the stolen phone and upon question he told him that he stole it from one house. (Witness) also stated that he informed police about the theft but left to church as (complainant) came and took the phone away. (Offender) was then arrested and was cautioned interviewed who admitted breaking into the (complainants) house and stealing the mention items [Q 35-36]. Later he was formally charged for one count of burglary and another count of theft.

Analysis

Grounds I and II

Sentence is harsh and excessive/ Wrong principles applied in sentencing

7. Maximum sentence for burglary is 13 years' imprisonment.

8. The accepted tariff for the offence of Burglary is 18 months to 3 years. In ***State v Mucunabitu*** [2010] FJHC 151; HAC 017.2010 (15 April 2010) it was held that the accepted tariff for Burglary is 18 months to 3 years. The same tariff band was applied in ***State v Yasa*** [HAC 030.2005]

9. In ***Ratusili v State*** [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Justice Paul Madigan analyzed previous case authorities and set the tariff for Theft. His Lordship identified the tariff for simple Theft as between 2-9 months. His Lordship suggested that any subsequent Theft offending should attract a penalty of at least 9 months.

10. The learned Magistrate selected 3 years' imprisonment for Burglary and 1 year for Theft as the starting point. He stated that the starting point was selected in view of the circumstances of the case and previous theft cases.

11. The Appellant's contention under this ground of appeal is that the trial judge erred in selecting a starting point of 3 years imprisonment.

12. Although the selection of starting point for Burglary is within the tariff, the learned Magistrate fell into error when he chose starting point of 3 years for the Burglary offence at the zenith of the tariff band without explaining the circumstances prompted him to select that highest starting point.

13. In ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) Justice Gounder observed:

> *"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 either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".*

14. According to the summary of facts filed by the State, Appellant's case is simple case of burglary and theft. Item stolen was 2x TFL phone valued at $ 400. Appellant was a juvenile (17) at the time of the offending. He had confessed to police and stated that he committed the offence due to peer pressure. There is no evidence of pre planning. Appellant's uncle had discovered the phone in Appellant's custody, and when he became aware that it was stolen, he promptly informed the complainant and police and returned the phone.

15. No reasons were given as to why the trial Magistrate considered the offending in the present case to be the most serious case of burglary involving considerable degree of pre planning or sophistication. The lack of reasoning leads this Court to conclude that the trial Magistrate erred in picking 3 years as his starting point. By selecting 3 years as his starting point, the trial Magistrate was virtually incorporating extraneous circumstances rather than picking a term based on an objective seriousness of the offence.

16. The learned Magistrate identified night time invasion, premeditation and prevalence of burglaries in Nadi area as aggravating factors. He unfortunately fell into error by identifying and applying erroneous aggravating factors. He mistook the fact that it was a night time invasion. According to the summary of facts filed, the offence took place during day time around 7 hrs. when the complainant woke up. There is no evidence of pre

meditation or sophistication. Appellant just removed two louver blades during day time and stole the item. Prevalence of this type of offences in Nadi area can hardly be an aggravating factor although it could have been considered in selecting the starting point.

17. Learned Magistrate also fell into error when he failed to consider following strong mitigating factors.

- Appellant was 18 years old (at the time of the offence he was 17)
- Early guilty plea on the first available opportunity
- Sought forgiveness of the court and promised that he would not re-offend. He had learned a lesson and deeply regretted what he had done and expressed willingness to reform if given an opportunity.
- He expressed remorse and sought forgiveness from the complainant.
- He fully cooperated with police and items were partially recovered.

18. The learned Magistrate mistook the factual scenario and applied wrong principles in determining the sentence. Therefore, this ground of appeal succeeds.

Imposition of consecutive sentence

19. The Appellant raised the issue in his submission that his sentence was harsh and excessive when it was made to run consecutively to the existing prison term.

20. The Learned Magistrate at paragraph 28 remarked "I order that your sentence is consecutive to your present sentence'. He failed to give reasons why he opted to choose a consecutive sentence.

21. The Sentencing and Penalties Decrees allows the Court to order sentence to run consecutively or concurrently as per Section 22. This provision was discussed by the Fiji Court of Appeal in ***Vukitoga v State*** [2013] FJCA 19; AAU0049.2008 (13 March 2013) which was referred to in ***Dhirendra Nandan v State***- HAM 162 of 2014. The Court held that a concurrent sentence should be imposed and that if the Court intends to impose a consecutive sentence, then the Court must give a justifiable reason to do so. In this case, the learned Magistrate imposed a consecutive sentence without giving any reason. Therefore, Appellant's argument is meritorious and succeeds.

22. When imposing a consecutive sentence, sentencing Magistrate is required to apply the totality principle. Application of the said principle needs a proper assessment of the existing prison term. It appears that the learned Magistrate has failed to take into consideration the existing prison term when he imposed a consecutive sentence.

Opportunity for rehabilitation denied

23. The learned Magistrate did not suspend the sentence of imprisonment. Appellant contends that the learned Magistrate erred when he failed to consider his age, the facts that he pleaded guilty at the earliest opportunity, stolen items recovered and his personal circumstances.

24. Section 26 of the Sentencing & Penalties Decree provides as follows:

> 26. – (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.
>
> (2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -
>
> (a) does not exceed 3 years in the case of the High Court; or
>
> (b) does not exceed 2 years in the case of the Magistrate's Court.

25. The term of imprisonment imposed by the learned Magistrate is for a period of 21 months. Therefore, in light of the abovementioned provision, the learned Magistrate had discretion to suspend the sentence if he was satisfied, given the circumstances of the case, that it was appropriate for him to do so. The learned Magistrate in exercising his discretion opted not to suspend the sentence. But he fell into error when he exercised discretion injudiciously without giving any reason for his decision.

26. Given the mitigating circumstances placed before the learned Magistrate, specially the fact that Appellant was a juvenile at the time of offending, he would have been quite justified if he suspended the sentence.

Order

27. Hence, the material placed before this Court warrants me to exercise powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the learned Magistrate and pass another sentence which reflects the gravity of the offence and circumstances of the case.

28. I select the offence of Burglary as the head count and base the sentence imposed on that offence to determine the final sentence.

29. For the Burglary offence, I select a starting point of 18 months' imprisonment in the middle range of the tariff. There are no aggravating circumstances. I deduct six months

for mitigating circumstances and impose a final sentence of 12 months imprisonment for the Burglary count.

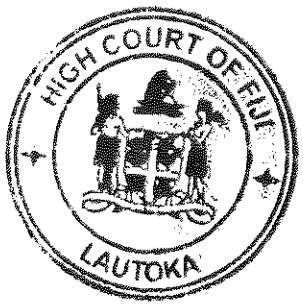
30. For the Theft count, I select a starting point of 12 months. I deduct six months for mitigating circumstances and impose a sentence of 6 months' imprisonment for Theft count to be served concurrent to the head sentence.

31. Having considered the Appellant's youth, early guilty plea, genuine remorse, value of the property stolen and recovery of stolen property, I suspend the sentence for a period of two years from the date of the sentence of the learned Magistrate.

32. Appeal succeeds to that extent. Effects and consequences of breach of terms of suspended sentence explained to the Appellant.

Aruna Aluthge

Judge



At Lautoka

08th July, 2016

Solicitors: **Appellant in Person**

Office of the Director of Public Prosecution for Respondent