IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 95 OF 2017

BETWEEN : PENAIA RATU

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant in person
Ms. L. Latu for Respondent

Date of Hearing : 2nd January, 2018
Date of Judgment : 5th January, 2018

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrates' court of Tavua for one count of Burglary, contrary to Section 312 of the Crimes Act and one count of Theft, contrary to Section 291 (1) of the Crimes Act. The Appellant was first produced in the Magistrates' court on the 22nd of March 2017. The Appellant pleaded not guilty for these two counts on the 9th of May 2107. Subsequent to several adjournments, the Appellant, while changing his previous position, pleaded guilty for the two counts on the 4th of July 2017. The learned Magistrate then convicted and sentenced the Appellant for twenty one (21) months of imprisonment for the

count of Burglary and ten (10) months imprisonment for the count of Theft. Both sentences to be served concurrently. The learned Magistrate has imposed a non-parole period of fifteen (15) months. Aggrieved with the said sentence, the Appellant appeals to this court on the following grounds which I reproduce verbatim as follows that;

i) *That, the learned Magistrate erred in law when he the Appellant for 21 months imprisonment and you will be eligible for parole after serving 15 months imprisonment.*

ii) *That, the learned Magistrate erred in law when he failed to give the Appellant 1/3 discount in first available opportunity thus, saving the courts time and resources,*

iii) *That, the learned Magistrate erred in law when he failed to consider the time spent in remand,*

iv) *That the sentence is imposed on me is manifestly harsh and excessive,*

v) *That, the learned Magistrate fell into an error when he did not give much weight and attention to the mitigating factors. And failed to direct the law principles of sentence and offenders but he direct himself,*

vi) *That the learned Magistrate erred in law when he mistook the fact and imposed the sentence which is wrong in principle and all the facts of law,*

2. The Appellant is appearing in person. Hence, the drafting of the above grounds of appeal are not perfect and precise as of the drafting of a trained lawyer. Therefore, I would summarise the above grounds into following main grounds, that;

i) *The learned Magistrate erred in law by imposing a non-parole period of fifteen (15) months,*

ii) *The learned Magistrate erred in law not giving the Appellant 1/3 discount for the early plea of guilty,*

iii) *The learned Magistrate has failed to consider the time spent in remand custody prior to the sentencing as a period that has already been served by the Appellant pursuant to Section 24 of the Sentencing and Penalties Act,*

iv) *The learned Magistrate has taken into consideration irrelevant facts and failed to consider the mitigating factors in favour of the Appellant,*

v) *The sentence is manifestly harsh and excessive.*

3. The Appellant and the learned counsel for the Respondent first appeared in the High Court on the 15th of December 2017, where the court has directed the parties to file their respective written submissions. Subsequent to the filing of the respective written submissions of the parties, the matter proceeded to hearing on the 2nd of January 2018. The Appellant and the learned Counsel for the Respondent informed the court that they rely on the written submissions and do not wish to make any oral submissions. Having carefully considered the record of the proceedings in the Magistrates' court, the grounds of appeal and the respective written submissions of the parties, I now proceed to pronounce the judgment as follows.

Ground I

4. The first ground of appeal is founded on the contention that the learned Magistrate has erroneously imposed a non-parole period of fifteen (15) months.

5. According to the sentence imposed by the learned Magistrate, the Appellant was sentenced for a period of twenty one (21) months imprisonment with fifteen (15) months of non-parole period. Section 18 (3) of the Sentencing and Penalties Act allows the sentencing court to fix a non-parole period for a sentence which is less than two years but not below one year. Section 18 (4) of the Sentencing and Penalties Act has stipulated that any non-parole period fixed under Section 18, must be at least six months less than the term of the sentence.

6. In view the Section 18 (3) and (4) of the Sentencing and Penalties Act, the learned Magistrate has correctly fixed a non-parole period of fifteen (15) months, which is exactly six months less than the sentencing period of twenty one (21) months. Therefore, I do not find any merits in this ground of appeal. Hence, I refuse and dismiss the first ground of appeal.

Ground II

7. Section 4 (2) (f) of the Sentencing and Penalties Act states that the sentencing court has to take into consideration the plea of guilty and the stage of proceedings at which the accused pleaded guilty in sentencing, where it states that;

> *"whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*

8. According to the record of the proceedings in the Magistrates' court, the Appellant has pleaded not guilty for these offences on the 25th of April 2017. However, on the 4th of July 2017, the Appellant has changed his previous position and pleaded guilty for these offences. Accordingly, the Appellant has not pleaded guilty at the first available opportunity, but has done so before the commencement of the hearing. Therefore, he is entitled for separate discount for his plea of guilty, which the learned Magistrate has correctly given in paragraph 12 and 13 of the sentence. The learned Magistrate has given the Appellant six (6) months discount for the burglary and four (4) months discount for Theft.

9. In view of these reasons, I do not find any merit in the second ground of appeal.

Ground IV & V

10. For the convenience, I now draw my attention to ground IV and V together, as both of them are founded on the contention that the sentence is wrong, and manifestly harsh and excessive.

11. The learned Magistrate has correctly identified the respective maximum sentences for the burglary and theft in paragraph eight (8) of the sentence. In order to determine the applicable tariff for burglary and theft, the learned Magistrate has relied on **State v Tabeusi (2010) FJHC 426; HAC095-113.2010L (16 September 2010)** and **State v Vinakasigaduwa (2011) FJHC 77. HAC156.2010 (18 February 2011).** Having considered these two judicial precedents, the learned Magistrate has concluded that the tariff for burglary and theft is between 1 to 4 years imprisonment. ***(vide; para 9 and 10 of the sentence).***

12. In **Vinakasigaduwa (supra)**, the court has considered the tariff for "aggravated burglary" contrary to Section 313 (1) of the Crimes Act, and not for burglary under Section 312 of the Crimes Act. In doing that, Justice Nawana in **Vinakasigaduwa (supra)** has discussed the tariff applied for Burglary as defined under the old regime of Penal Code. Therefore, the judicial precedent set out in **Vinakasigaduwa (supra)** has no relevancy in determining the tariff for the offences of burglary and theft.

13. The offence of Burglary that had been stipulated under the repealed Penal Code carried a maximum penalty of life imprisonment. However, the new regime under the Crimes Act, has established the offence of Burglary in two phases. Section 312 of the Crimes Act has established the offence of Burglary that carries a maximum penalty of thirteen years imprisonment. The aggravated form of the offence of burglary has been introduced under Section 313 of the Crimes Act. The maximum penalty for Aggravated Burglary is seventeen (17) years imprisonment period.

14. Justice Madigan in **Waqavanua v State [2011] FJHC 247; HAA013.2011 (6 May 2011)** held that the acceptable tariff limit for burglary under the Crimes Act should be between one year to three years.

> *"The maximum penalty for burglary is thirteen years imprisonment and not life as the Magistrate stated and the accepted tariff band for the offence set down under the old Penal Code is between 18 months to three years imprisonment (Tomasi Turuturuvesi – HAA 06/02S). Given that life imprisonment was the maximum penalty under the Penal Code, and the maximum is now thirteen years, then a proper tariff band for the offence of burglary under the Crimes Decree should be between twelve months to three years.*

15. However, Justice Madigan in **Gonerogo v State - [2013] FJHC 163; HAA22.2012 (5 April 2013)** has outlined another tariff limit for burglary, where his lordship held that;

> *"The maximum penalty for burglary is now 13 years imprisonment. Under the Penal Code it was life imprisonment and the accepted tariff then pertaining was two to three years imprisonment. If that was the tariff when the maximum was life imprisonment, the tariff should now be somewhat less perhaps 18 months to 36 months".*

16. Justice De Silva in **Samuela Ramagimagi [2014] FJHC 116; HAA28.2013 (5 March 2014)** has selected two years as the starting point for the offence of Burglary under the Crimes Act.

17. In **Uluicicia v State [2015] FJHC 61; HAA028.2014 (30 January 2015),** Justice Madigan found that the acceptable tariff for domestic burglary is between one year and two years with the usual sentence being fifteen months, where his lordship held that;

> *"The tariff for domestic burglary is now between one year and two years with the usual sentence being 15 months. (see Tabeusi [2010]FJHC 426). If the burglary is in breach of trust, such as invading the premises of an employer then a higher sentence could be justified (see Gonerogo HAA 22 of 2012)".*

18. Justice Aluthge in **Talakubu v State [2016] FJHC 1121; HAA37.2016 (13 December 2016)** has found the acceptable tariff limit for Burglary as between eighteen months and three years, where his lordship held that;

"Under the Crimes Decree, the maximum sentence for Burglary is imprisonment of 13 years. In State v. Taito Seninawanawa HAC 138 0f 2012 (22 April 2015) Madigan J set out the tariff for Burglary between 18 months and 3 years with three years being the standard sentence for burglary of domestic premises".

19. In view of sentencing approaches adopted by the courts in Fiji, the tariff for the offence of aggravated burglary under the Crimes Act is between eighteen (18) months to three (3) years imprisonment. **State v Nasara [2011] FJHC 677; HAC143.2010 (31 October 2011), State v Seninawanawa [2015] FJHC 261; HAC138.2012 (22 April 2015), Leqavuni v State [2016] FJCA 31; AAU0106.2014 (26 February 2016)**

20. Having considered the sentencing approaches adopted by the Fiji Court of Appeal and the High Court in relation to offences of Burglary and Aggravated Burglary under the Crimes Act, and the respective maximum penalties for these offences, I find that the tariff of one (1) year to three (3) years adopted by Justice Madigan in **Waqavanua v State (Supra)** is the most appropriate tariff for the offence of Burglary.

21. Justice Madigan in **Ratusili v State [2012] FJHC 1249; HAA011.2012 (1 August 2012)** has discussed the acceptable tariff for theft, where his lordship held that;

    a. *For a first offence of simple theft the sentencing range should be between 2 and 9 months.*

    b. *Any subsequent offence should attract a penalty of at least 9 months.*

c. *Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*

d. *Regard should be had to the nature of the relationship between offender and victim.*

e. *Planned thefts will attract greater sentences than opportunistic thefts .*

22. Having considered the value of the stolen items and the level of culpability, The learned Magistrate has selected twenty four (24) months as the starting point for burglary, which is within the tariff limit of one (1) year to three (3) years. He then added eight (8) months for aggravating factors. The Appellant was given six (6) months discount for his early plea of guilt and another four (4) months for other mitigating grounds. The learned Magistrate has given a discount of one more month for the unblemished record of the Appellant, though he is adversely recorded with three previous convictions. The final sentence of twenty one (21) months imprisonment is within the tariff limit. Hence, I do not find the sentence of twenty one (21) months imprisonment for burglary is manifestly harsh and excessive.

23. The learned Magistrate has selected twelve (12) months as the starting point for theft, which is above the tariff limit as stipulated in **Ratusili (supra).** The learned Magistrate has not given any reason for selecting such a higher starting point in his sentence.

24. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found that;

"The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

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"

25. Having adjusted the aggravating and mitigating factors, the learned Magistrate has reached to ten (10) months of imprisonment for the offence of theft, which is higher than the tariff limit as set down in **Ratusili (supra)**. Once again the learned Magistrate has failed to provide reasons for reaching such a higher sentence for theft in his sentence.

26. In view of this reasons, I find the sentence imposed for the offence of Theft by the learned Magistrate is not founded on correct sentencing principle and approaches. Therefore, it is my opinion that this court should intervene and set an appropriate sentence for the offence of theft pursuant to Section 256(3) of the Criminal Procedure Act.

27. I find the learned Magistrate has properly considered the seriousness of the offence, the level of culpability, aggravating and mitigating factors in his sentence.

Therefore, I adopt the same reasons in imposing an appropriate sentence for Theft. However, I disregard the finding of learned Magistrate that the Appellant has unblemished record. Having considered the circumstances of the offence, aggravating and mitigating factors, and the early plea of guilty, I find a period of eight (8) months imprisonment would adequately appropriate for the offence of theft.

28. I accordingly, sentence the Appellant for a period of eight (8) months imprisonment for the offence of theft, contrary to Section 291 of the Crimes Act.

Ground III

29. The third ground of appeal is founded on the contention that the learned Magistrate has failed to consider the time spent in remand custody as the period of imprisonment that has already been served by the Appellant pursuant to Section 24 of the Sentencing and Penalties Act.

30. Section 24 of the Sentencing and Penalties Act states that;

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender".*

31. According to the record of the proceedings in the Magistrates' court, the Appellant was held in remand custody for a period of nearly three (3) months. He was initially granted bail, but later failed to appear in court. The learned Magistrate then issued a bench warrant to arrest the Appellant. He was produced before the

learned Magistrate upon execution of the said bench warrant on the 25th of Appeal 2017. The Appellant was then remanded till the day he was sentenced on the 18th of July 2017. The Appellant was separately charged for absconding of bail pursuant to the provisions of Bail Act and sentenced accordingly. In view of these facts, the Appellant is entitled to have the period that he spent in remand custody as a period of imprisonment that he has already been served. However, the learned Magistrate has failed to consider this period that he spend in remand custody in his sentence. Therefore, I find this ground of appeal has merits.

32. In view of the above findings, the Appellant had been in remand custody for this case for a period of nearly three (3) months as he was not granted bail by the court. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of three (3) months as a period of imprisonment that has already been served by the Appellant.

33. Accordingly the actual sentencing period is **eighteen (18) months** of imprisonment, with **twelve (12) months** of non-parole period with effect from 18th of July 2017.

34. In conclusion, I allow the ground III, IV and V of the appeal with following orders, that;

    i) The sentence of ten (10) months imprisonment for the offence of Theft imposed by the learned Magistrate on the 18th of July 2017 is quashed,

    ii) The Appellant is sentenced for a period of eight (8) months imprisonment for the offence of Theft, contrary to Section 291 of the Crime Act, with effect from 18th of July 2017.

iii) The actual sentencing period is Eighteen (18) months of imprisonment with Twelve (12) months of non-parole period, with effect from 18th of July 2017.

35. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe
Judge

At Lautoka
5th January, 2018

Solicitors : **Office of the Director of Public Prosecutions**