IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL NO: HAA 22 OF 2018

Nadi Magistrates Court Criminal Case No. 766/2009

BETWEEN	:	**KELEMEDI TURAGA**	**Appellant**
AND	:	**STATE**	**Respondent**
Counsel	:	**Ms N. Sharma for Appellant** **Mr A. Singh for Respondent**	
Date of Hearing	:	**16th October, 2018**	
Date of Judgment	:	**22nd October, 2018**	

JUDGMENT

1. This is an appeal filed by the Appellant against his sentence.

2. The Appellant was charged in the Magistrates Court at Nadi with one count of Burglary and one count of Larceny from Dwelling House under the Penal Code Cap 17. The charge reads as follows:

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to Section 299 (a) of Penal Code Cap 17.

Particulars of Offence

Kelemedi Turaga, on 9th day of August, 2009 at Nadi in the Western Division by night broke and entered into the dwelling house of Sudesh Kumar with intent to commit felony namely Larceny.

SECOND COUNT

Statement of Offence

LARCENY FROM DWELLING HOUSE: Contrary to Section 270 (a) of Penal Code Cap 17.

Particulars of Offence

Kelemedi Turaga, on 9th day of August, 2009 at Nadi in the Western Division stole from the dwelling house of Sudesh Kumar assorted jewelleries valued $10,700.00, 1 x Sony video camera (40x) valued $2,000.00, 1 x Grey Dell Laptop valued $3,000.00, assorted liquor valued $1,425.00, 1 x cap valued $10.00, 1 x Apple brand iPod valued $100.00, 3 x mobile phones valued $1,000.00, all to the value of $18,115.00, the property of Sudesh Kumar.

3. The Appellant pleaded guilty on his own free will to the above charges along with charges filed in four other cases of similar offences namely, case nos. 764, 957, 958 and 959.

4. On the 10th of November 2010, the Appellant was sentenced to 10 years' imprisonment with a non-parole period of 7 years' imprisonment.

5. For the offence of Burglary he was sentenced to 5 years' imprisonment and for the offence of Larceny from Dwelling House, the Appellant was sentenced to 2 years imprisonment to be served concurrently. The total sentence arrived at was 23 years imprisonment. Considering the totality principle, the Learned Magistrate imposed a final sentence of 10 years' imprisonment with a non-parole of 7 years.

6. The Appellant being aggrieved by the said sentence filed an appeal which was out of time by approximately eight months. This appeal was dismissed on 11th August 2011 by the High Court without considering the merits of the grounds of appeal. Being dissatisfied with the dismissal, he then challenged the dismissal in the Court of Appeal. The Court of Appeal quashed the decision of this court and sent the file back to review the previous decision.

7. Upon the matter being reinstated, the State conceded to the grounds hence leave was granted.

8. As per the petition of appeal filed on the 20th of July, 2018, counsel for Appellant has filed the following appeal grounds:

1. The Learned Trial Magistrate passed a sentence in consequences of an error after he failed to:

   a. give appropriate discount for the Appellant's guilty plea although late in time;
   b. give any discount for mitigation when it was obvious that the guilty plea by the Appellant was a show of remorse and that item worth $8,000.00 had been recovered.

2. The Learned Magistrate erred in law when he added the deprivation of stolen property as an aggravating factor.

3. The Learned Magistrate passed a sentence in consequences of an error of law since the totality principle of sentencing has not been properly taken into account.

Law

9. 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 (Bae v State [1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499).

Facts

10. The Appellant agreed the following summary of facts read by the Prosecution:

"Arrested and charged KELEMEDI TURAGA (ACC-1), 31 years unemployed of Laucala Beach Estate for one count of Burglary contrary to Section 299 of Penal Code Cap 17 and one count of Larceny from Dwelling House contrary to

Section 272 of Penal Code Cap 17. (ACC-1) broke into the Dwelling House of Sudesh Kumar (PW-1), 30 years Bank Officer of Namaka Park and stole assorted jewelry, Laptops, video camera, liquors, Ipods, head caps, mobile phones, bags, all to the total of $18,115.00 at Namaka Park on 09/08/09 between 2.00 pm to 11.55 pm.

On above date and place at about 2.00 pm (PW-1) locked his house and went with his wife Anjita (PW-2) and children to Lautoka. They returned home at about 11.55 pm and discovered the bedroom's windows broken and the following items stolen are as follows, 9 x sony video camera (40x) valued $2000, 01 x grey dell laptop valued $3000, 7 x bottles of red label valued $945.00, 9 x bottles gin valued $80.00, 2 x bottles of black label valued $400.00, bangles valued $1,700.00, 1 x diamond gold ring valued $500.00, 3 x mohar valued $400.00, 1 x manglsuite valued $1,000, 2 x chains valued $500.00, 1 x pendants valued $500.00, 1 x earlips valued $1,000, 1 x nose stud valued $4100, caps valued $10.00, Ipod valued $100.00, 3 x mobile phones, V3 Motorolla valued $500.00. Nokia 6200 valued $500 all to the total value of $18,115.00. (PW-1) reported the matter to Police at Namaka.

DC 3975 Inoke was appointed the Investigation Officer. During the investigation (ACC-1) was arrested from Lautoka and brought to Namaka Police Station. (ACC-1) admitted the offence and told the Police where he sold the stolen items. Laptop was recovered from one Albert Wong (PW-4) which he sold for $3000, a video camera was recovered from Josese Lusio where he sold it for $300.00. Total of value items recovered is $8000.00. (Accused) charged and kept in custody to appear at Nadi Magistrate Court on 16/09/09"

Analysis

Ground 1A - Early Guilty Plea

11. Before the charge was filed, the Appellant admitted the allegation at his caution interview. The Record shows that the Appellant, when he first appeared before the learned Magistrate on 16th September, 2009, had indicated his intention to plead guilty to both counts. He pleaded guilty when the charge was read on 19th October, 2010 after a lapse of more than 1 year from the initial charge was filed.

12. The Learned Magistrate has considered the guilty plea albeit late as a mitigating circumstance and deducted 7 months. The grievance of the Appellant is that the discount given is not adequate.

13. It is a long established principle in common law that when an offender pleads guilty, his or her plea of guilt must be taken into account in sentencing. This principle is now codified in the Sentencing and Penalties Act 2009. Section (4) (2) (f) of this Decree states:

> *"In sentencing offenders a court must have regard to-*
>
> *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,"*

14. The rationale for this practice was highlighted in number of cases. In ***Navuniani Koroi v State*** (Criminal Appeal No. AAU 0037 of 2002), the Court of Appeal, noted as follows:

> *"In most cases that is a recognition of his contrition as expressed by an early admission and the fact that it will save the witnesses and the court a great deal of time and expenses"...*
>
> *..."an early guilty plea would show to the court that the accused person has shown remorse for the offence that he has committed.*

15. Hunt CJ in ***R v Winchester*** (1992) 58 A Crim. R 345 at 350 stated as follows:

> *"A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some case be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: Shannon (1979) 21 SASR 442 at 452: Ellis (1986) 6 NSWLR 603 at 604. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in trial. Obviously enough the extension to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected)*

16. While it is mandatory for a court to have regard to a guilty plea, the discount or allowance to be given to a guilty plea involves an exercise of discretion by sentencing court. In ***(Basa v State,*** unreported Criminal Appeal No. AAU0024 of 2005; 24 March 2006 at para 14) the court observed:

> *"The circumstances of a guilty plea may vary from case to case. An offender may enter an early guilty plea as a sign of remorse for his crime, while a late plea may be entered to escape the inevitable after realizing the strength of the evidence against him. Therefore, a late guilty plea may not attract the same discount that an early guilty plea attracts"*

17. The Supreme Court in ***Wallace Wise v The State*** (unreported Criminal Appeal No. CAV0004/2015; 24 April 2015) said at para [15]:

> *"That first opportunity plea was accepted as a substantial sign of remorse. Accordingly he received a substantial discount for the early plea, a long standing practice followed by sentencing courts. (per Gates CJ).*

18. In the present case, it is clear that the Learned Magistrate as required by Section 4 (2) (f) of the Sentencing and Penalties Act 2009 did have regard to the Appellant's guilty plea and gave a discount of 7 months. The sentencing discretion has been exercised lawfully by the court hence there is no error of law. This ground has no merit.

Ground 1B- Remorse

19. There is no expression of remorse in this case although the Appellant pleaded guilty almost a year after the charge was filed. Some of the stolen items were recovered as a result of police investigations. The Appellant had 15 previous convictions and 4 previous convictions were within the operational period. In situations as such courts are reluctant to take the guilty pleas as a genuine expression of remorse. The Learned Magistrate has directed his mind accordingly and granted 7 months reduction. There is no error of law or in principle.

Ground 2- Recovery of Stolen Items as an Aggravating Factor

20. It is trite law that, for offences involving theft and robbery, recovery of stolen items acts as a mitigating factor. However, the non-recovery of stolen items is not considered as an aggravating factor to enhance the sentence.

21. In ***Sairusi Soko v State,*** *Criminal Appeal Case No. HAA 031 of 2011 (29 November, 2011) Madigan J.* at paragraph 7 stated:

> *"Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature."*

22. It appears that the non-recovery of stolen property is not the only aggravating feature that was identified by the Learned Magistrate. His worship has increased the sentence by one year for all the aggravating features mentioned at paragraph 8 of the Sentencing Ruling. Even though the Learned Magistrate has taken some irrelevant matters into consideration, inclusion of non-recovery of stolen property in the list has not had a substantial impact on the final sentence. The value of property stolen is substantial and therefore, the increase of 1 year for the aggravating factors is not obnoxious to sentencing principles. There is no merit for this ground.

Ground 3- Totality Principle

23. The Appellant submits that the Learned Magistrate has failed to take the totality principle into account in arriving at the final sentence.

24. The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for multiple offences.

25. In ***Mill v The Queen*** *[1988] HCA 70* the High Court of Australia in its judgment cited D. A. Thomas, Principles of Sentencing (2nded.1979) pp. 56-57 as follows:

> *"The effect of the totality principle is to require a sentence who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The prin-*

ciple has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; "when...cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences."

26. The Court further cited Ruby, Sentencing (3rd ed.1987), pp. 38-41.

> *"Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise by appropriate in order to reflect the fact that a number of sentences being imposed. Where practicable, the former is to be preferred."*

27. In ***Knight*** (1981) 26 SASR 575 the Full Court of the Supreme Court of South Australia (Walters, Zelling and Williams JJ) said, in a joint judgment (at 576):

> *""It seems to us that when regard is had to the totality of the sentences which the applicant is required to undergo, it cannot be said that in all the circumstances of the case, the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven criminal conduct or with the gravity of the whole of his proven criminal conduct or with his due deserts. To use the language of Lord Parker LCJ in Faulkner (1972) 56 Cr App R 594, at the end of the day as one always must, one looks at the totality and asks whether it was too much".*

28. In Fiji in ***Tuibua v The State*** [2008] FJCA 77 the Court approved of the principles set out in ***Mill v The Queen*** (supra). Further in ***Taito Rawaqa v The State*** (2009] FJCA 7 in a case where the accused was charged similarly as in the present case the totality principle was discussed and at page 3 of the Judgment stated:

> *"That the totality principle is so well known now that it is necessary only to make a passing reference to it. It requires a sentence who is considering whether to impose consecutive sentences for a number of offences to pause for*

a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interests of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct."

29. In the present matter, the Learned Magistrate sentenced the Appellant to 10 years' imprisonment considering the convictions entered in five separate files. The sentence imposed in each case is as follows:

766/9 -	5 years' imprisonment
764/9 -	5years' imprisonment
957/9 -	5 years' imprisonment
958/9 -	5 years' imprisonment
959/9 -	3 years' imprisonment

30. Accordingly, the total sentence is 23 years' imprisonment if the sentences were to be served consecutively. However, the Learned Magistrate at paragraph 22 of his Ruling considered the totality principle and imposed an aggregate sentence of 10 years' imprisonment.

31. Although the Learned Magistrate had considered the totality principle in coming to his final sentence, the sentence imposed in each individual case is excessive because he had applied a wrong tariff for Burglary count.

32. The accepted tariff at that time for Burglary ranged from 18 months to 3 years' imprisonment. ***Tomasi Turuturuvesi v The State*** [2002] HAA 086 of 2002; ***Mesake Ratabua v The State*** [2004] HAA 026 0f 2004).

33. The learned Magistrate identified a wrong tariff and picked a starting point of 5 years' imprisonment as the starting point for Burglary. He cited ***State v Volivale*** [2009] HAC 30 (A) 05s (18 June 2009) which concerned a joint enterprise of Burglary and Robbery with Violence.

34. The Learned Magistrate gave a deduction 7 months for the guilty plea and further deducted 3 months for the remand period. He increased the sentence by one year to reflect aggravating circumstances. Having done necessary adjustments for aggra-

vating and mitigating features, the Learned Magistrate, arrived at a sentence of 5 years' imprisonment for Burglary count in case No. 766/9. It is not clear as to how he arrived at the final sentence in each of other four cases. It can be assumed that the Learned Magistrate applied the same wrong tariff for all other cases as well.

35. The aggregate sentence of 10 years' imprisonment is excessive because the Learned Magistrate had identified a wrong tariff in each individual case. Therefore the sentence must be quashed and a fresh sentence should be imposed.

36. Having considered the applicable tariff for Burglary at the time of the sentence, I reduce the sentence by two years to arrive at an aggregate sentence of 8 years' imprisonment for all five cases. The non-parole period is also reduced by one year. In the result, I impose a sentence of 8 years' imprisonment with a non-parole period of 7 years.

Following Orders are made:

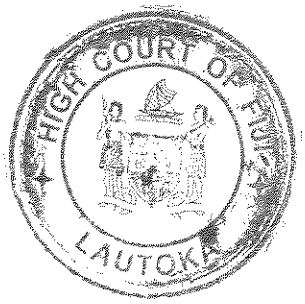
i. Appeal against the sentence is allowed;

ii. The sentence imposed by the Learned Magistrate at Nadi in criminal case No. 766/2009. is set aside.

iii. An imprisonment term of 8 years is substituted;

iv. A non- parole period of 7 years is imposed.

Accordingly, the Appellant is sentenced to 8 years' imprisonment with a non-parole period of 7 years with effect from 10th of November 2010.



Aruna Aluthge

Judge

At Lautoka

22nd October, 2018

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent