IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 04 OF 2018

IN THE MATTER of an Appeal from the decision of the Nausori Magistrate's Court in Criminal Case No. 540 of 2007.

BETWEEN : **ILAI MOLIDUA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Appellant appears in person
Mr. Taitusi Tuenuku for the Respondent

Dates of Hearing : 7 June 2018

Judgment : 30 November 2018

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Nausori.

[2] The Appellant was charged in the Magistrate's Court of Nausori for the following offences:

1st Count

Statement of Offence (a)

BURGLARY: Contrary to Section 312 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

ILAI MOLIDUA, on the 24th day of August 2017, at Dilkusha, Nausori, in the Central Division, entered into the dwelling house of **SHANTI LAL** as a trespasser with intent to commit theft.

2nd Count

Statement of Offence (a)

THEFT: Contrary to Section 291 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

ILAI MOLIDUA, on the 24th day of August 2017, at Dilkusha, Nausori, in the Central Division, dishonestly appropriated (stole) 1 x Apple I-pad valued at $2000.00, 1 x I-pad valued at $8500.00, 1x phone charger valued at $25.00, 1 x gold chain valued at $1500.00, 1 x gold ring valued at $300.00, 1 x pair gold earring valued at $150.00, 1 x diamond necklace valued at $9500.00, FJD $450.00 cash, 1600 pounds equivalent to FJD $4500.00, AUD $650.00 equivalent to FJD $975.00 all to the total value of $27,900.00 the property of **SHANTI LAL** with intention to permanently deprive the said **SHANTI LAL.**

[3] The Appellant pleaded not guilty to the two charges and the matter proceeded to trial.

[4] At the conclusion of the trial, on 18 December 2017, the Appellant was found guilty and convicted of both charges.

[5] On the same day, he was sentenced to 4 years imprisonment with a non-parole period of 3 years.

[6] Aggrieved by this Order the Appellant filed a timely Appeal against his conviction and sentence. The said appeal was filed in person by the Appellant.

Grounds of Appeal

[7] The Grounds of Appeal, which was filed by the Appellant, on 3 January 2018, are as follows (the Grounds stated below are as framed by the Appellant):

APPEAL AGAINST CONVICTION

1. The Learned Magistrate misdirected himself regarding the rights to legal representation of the Appellant, which has resulted in substantial prejudice and a miscarriage of justice.

2. That the prejudicial effect against the Appellant outweighs the probative force of the prosecution evidence.

3. That having regards to all circumstances of the case, the Appellant challenges the adequacy of the trial Magistrate's summing up [Must be a reference to the Judgment of the Learned Magistrate].

4. That PW2, Waisake Wakanitavola, is labelled as a witness for prosecution. How could he probably lie in Court? Which the Learned Magistrate failed to properly analyse with care that he is not a witness for the defence (Please refer to paragraph 32 of the Judgment).

5. That, however, the Learned Magistrate erred in law and in fact when not making a clear finding on the elements of the offence which the Appellant has been charged with (Refer to paragraph 17 of the Judgment).

6. There was no direct evidence to prove that the Appellant entered the dwelling house of PW1 as a trespasser with intent to commit Theft.

7. There was no link to the stolen items being appropriated or confiscated from the Appellant during trial.

8. That the Learned Magistrate was swayed and biased in putting more weight on the prosecution testimonies which he worked out on hearsay and circumstantial evidence.

9. That the Learned Magistrate did not consider and it was highly unfair to rest his assessment on the issue of Doctrine of Recent Possession, as it was not found or possessed with the Appellant.

10. That the Learned Magistrate pre-judged and overruled the Appellant's denial even in not providing an explanation about the stolen items. The Appellant had no answers to those questions and he fully denied the allegations and was unrepresented during the course of the trial.

APPEAL AGAINST SENTENCE

1. The sentence is extremely excessive and too harsh in all circumstances of the case, thereby wrong in principle.

2. That the Learned Magistrate took extraneous and irrelevant matters to guide or affect him thereby erred in principle and in law.

3. That the Learned Magistrate erred in law and in fact in taking irrelevant matters into account and not taking relevant matters into consideration.

[8] During the hearing of this matter both the Appellant and the Respondent were heard. Both parties filed written submissions, and the Respondent referred to case authorities, which I have had the benefit of perusing.

The Law and Analysis

[9] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*
>
> *(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*
>
> *(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*
>
> *(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[10] Section 247 of the Criminal Procedure Act stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Grounds of Appeal against Conviction

Ground 1 - That the Learned Magistrate misdirected himself regarding the rights to legal representation of the Appellant, which has resulted in substantial prejudice and a miscarriage of justice.

[12] Section 14 (2) (d) of the 2013 Constitution of the Republic of Fiji (Constitution) provides as follows:

"(2) Every person charged with an offence has the right-

(d) to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right..."

[13] As per Section 14 (2) (d) of the Constitution, any person charged with an offence (any accused person) has the right to defend himself or herself in person; or to be represented by legal practitioner of his or her own choice or if he or she does not have sufficient means to engage a legal practitioner to be given the services of a legal aid practitioner from the Legal Aid Commission; and to be informed promptly of these rights.

[14] As per the Magistrate's Court record it is clear that on 1 September 2017, the right to counsel had been explained to the Appellant. However, it is also recorded that the Appellant had waived his right to counsel.

[15] Therefore, the Appellant is not entitled now to submit that his right to legal representation was not given to him or that his right to legal representation has been violated. This Ground of Appeal is without merit.

Grounds 2, 3, 4 & 5

[16] I deem it appropriate to discuss the aforesaid Grounds of Appeal against conviction together.

[17] In the trial before the Learned Magistrate the prosecution led the evidence of the following witnesses 7 witnesses: PW1 - Shanti Lal; PW2 - Waisake Wakanitavola; PW3 - Lite Senimoci; PW4 - Yvonne Bale; PW5 – William Premendra Prasad; PW6 – Detective Corporal 4510 Esava; and PW7 – PC Ropate.

[18] At the close of the prosecution case, the defence was called for. The Appellant gave evidence on his own behalf.

[19] The complainant, Shanti Lal, has testified that on 24 August 2017, he was sleeping in his bedroom. He had woken up at 2.00 in the morning and seen someone walking in the passage. He had called for his family members. However, nobody from his family came out. He had then woken up his wife. He saw all the bags were opened and scattered. He found jewellery, cash (including foreign currency), an I-phone and an I-pad missing. The complainant had not identified who had entered the house.

[20] Only one Apple type I-pad, which was black in color, was recovered. The serial number of the I-pad was given to the Police. The I-pad had been recovered based on the said serial number given.

[21] PW2, Waisake Wakanitavola, testified that he was at home with his mum and sister (Lite Senimoci) on 24 August 2017. He had been sleeping, when around 1.00 -3.00 in the morning, the Appellant had come to his home and called to accompany him to town. They went to town by taxi. The Appellant is said to be his cousin brother.

[22] The witness testified that they went to Samabula and picked up a girl. He did not know the name of the girl. The Appellant, the witness and the girl had then gone to the Capital Motel and stayed in a room. They had drinks and then the witness had slept off. When he woke up, the Appellant and the girl were not there. The witness did not know who had paid for the taxi or for the room. He also testified that the Appellant

did not have anything in his possession (at the time he came to pick him up from his home).

[23] In cross examination, the witness had stated that the Appellant had come and called him around 4.00 – 5.00 in the morning.

[24] The Learned Magistrate has stated in his Judgment that since this witness is the cousin brother of the Appellant, he was of the opinion that the witness was not telling the truth in Court. The witness had sufficient reason to save the Appellant from being found guilty of these offences. Hence, he has not accepted the evidence of PW2.

[25] PW3, Lite Senimoci, confirms that she was at home with her mother and brother, Waisake. Around 3.00 – 4.00 in the morning, the Appellant had come to their home and called her brother. Her brother had then left with the Appellant in a car.

[26] PW4, Yvonne Bale, in the view of the Learned Magistrate was the most crucial witness for the prosecution. She testified that she was staying in Samabula with her husband and daughter. Around 6.00 a.m. on 24 August 2017, she had gone to buy cigarettes. On the way, she had met the Appellant and Waisake. They had ordered drinks and had drinks for two hours. They had been roaming in a taxi. The Appellant had paid for the drinks and also paid for the room. They had left Waisake in the room and the witness and the Appellant had left.

[27] Later in the morning the witness had got off with a bag. The said bag had been given to her by the Appellant. She had no idea that the bag contained an I-pad. The said I-pad was an Apple brand. The witness identified the I-pad in Court as the I-pad that was given to her by the Appellant on 24 August 2017.

[28] Yvonne Bale further testified that the Appellant has been her friend for two years.

[29] PW5, William Premendra Prasad, is a Police Officer based at Police Headquarters. He lives in Samabula with his wife and daughter. His wife is Yvonne Bale.

[30] He testified that his wife was not at home when he woke up at 6.00 in the morning, on 24 August 2017. When his wife returned home, she was drunk and had been carrying

a bag. When he checked the bag, he had seen an I-pad inside it. It was an Apple I-pad and black in color. His wife had told him that the I-pad had been given to her by a friend. The witness identified the I-pad in Court.

[31] He further testified that he did not know until the day the daughter of the complainant called, as to whom the I-pad belonged to.

[32] Detective Corporal 4510 Esava (PW6), is a Police Officer based at Nausori Police Station. He had conducted the Caution Interview Statement of the Appellant. He testified that the I-pad that was stolen from Shanti Lal's house (PW1) had been recovered from the possession of Yvonne Bale (PW4).

[33] PC Ropate (PW7), conducted the Charge Statement of the Appellant.

[34] The Appellant denies breaking into the complainant's house or to stealing any items from the said house. He submits that he and the PW4 had got into a taxi and were roaming around in the taxi. The PW4 had found the bag in the taxi and he denies knowing anything about the bag. He also submits that the bag was not found in his possession.

[35] In his Judgment dated 18 December 2017, the Learned Magistrate has duly summarized the evidence led by both parties. He has duly identified the elements the prosecution would have to establish beyond reasonable doubt in order for the Appellant to be found guilty of Burglary (1st count) and Theft (2nd count). He has also adduced sufficient reasons for not relying on the evidence of PW2, Waisake Wakanitavola.

[36] For all the aforesaid reasons, I find that Grounds 2, 3, 4 and 5 of the Grounds of Appeal against conviction are without merit.

Ground 6 - There was no direct evidence to prove that the Appellant entered the dwelling house of PW1 as a trespasser with intent to commit Theft.

[37] It is admitted that there is no direct evidence to prove that the Appellant entered the dwelling house of the complainant as a trespasser with intent to commit theft.

However, direct evidence is not the only basis on which a Court of law can find an accused person guilty of an offence. There can be other relevant evidence based upon which a criminal charge could be proven. This Ground of Appeal is without merit.

Ground 7 - There was no link to the stolen items being appropriated or confiscated from the Appellant during trial.

[38] In this case the prosecution is relying on the Doctrine of Recent Possession to establish the link between the Appellant and the items stolen from the complainant's residence. In ***State v. Cakau*** [2011] FJHC 249; HAC143.2007 (6 May 2011) it was held as follows:

> *"6. The doctrine of 'recent possession' furnishes a legal and factual basis to found a criminal prosecution. The underlying principle in the doctrine is that a person, who is in possession of stolen goods soon after a theft or an associated offence, implicates him in the act of receiving [stolen goods] or in the act of theft itself or in associated offences (R v. Garth [1949] 1 AER 773; R v Raviraj (1986) 85 Cr App R 93).*
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> *7. The prosecution, for it to be benefitted from the application of the doctrine, must prove that:*
>
> *(i) The accused possessed the goods;*
>
> *(ii) The goods possessed by the accused were the subject matter of the offence, as complained to by the complainant; and,*
>
> *(iii) There is no explanation from the accused in regard to his possession of the suspected goods."*

[39] The Learned Magistrate has referred to the Doctrine of Recent Possession in his Judgment and has also referred to relevant case authorities.

[40] The Magistrate has stated that *"According to the Doctrine of Recent Possession, when a person is found in possession of recently stolen property, and cannot provide a reasonable explanation for that fact, the jury (the Court) may infer that he or she either stole the property or received the property knowing that it was stolen..... This principle can be applied for armed robbery and burglary too."*

[41] The Learned Magistrate continues:

> *"Before the Court can draw an adverse inference from the accused's possession of recently stolen property, it must be satisfied of three matters:*
>
> *(a) That the accused was in possession of property;*
>
> *(b) That the property was recently stolen; and*
>
> *(c) That there was no reasonable explanation for the accused's possession of the stolen property."*

[42] The complainant has testified that his house had been burgled around 2.00 in the morning, on 24 August 2017. Yvonne Bale, the PW4, submitted that she had met the Appellant at about 6.00 in the morning, the same day. The Appellant had a bag, which he had given to her. The said bag contained an I-pad that was stolen from the complainant's residence a few hours before.

[43] The Learned Magistrate has held that Yvonne Bale was the crucial witness for the prosecution and found her as a credible and truthful witness. According to him, the PW4 had no reason to implicate the Appellant in this case if she had merely found the bag in the taxi, as alleged by the Appellant. The witness clearly explained that when she got into the taxi, the bag was with the Appellant and it was in his possession. When the witness got out of the taxi the Appellant gave the bag to her. The bag contained the stolen I-pad.

[44] Based on this evidence, the Learned Magistrate has held that the Appellant was in possession of the I-pad stolen early in the morning on the same day. He states that there is no reasonable explanation before him to show how the Appellant came to possess this stolen property shortly after the burglary and the theft. Therefore, the only reasonable inference that could be drawn is that the Appellant broke into the house of the complainant early in the morning of 24 August 2017 and stole the I-pad and other property.

[45] The Magistrate has also held that this explains how the Appellant had money in his possession to spend on food, drinks, motel and taxi fare, soon after the burglary and theft of the complainant's residence.

[46] For all the aforesaid reasons, I find that this Ground of Appeal fails.

Ground 8 - That the Learned Magistrate was swayed and biased in putting more weight on the prosecution testimonies which he worked out on hearsay and circumstantial evidence.

[47] It is factually incorrect to submit that the Learned Magistrate had considered hearsay evidence in coming to his finding in this case. Since it is admitted that there is no direct evidence, the Magistrate has relied on the circumstantial evidence presented before him. He was justified in doing so.

[48] The Appellant states that the Learned Magistrate was biased in putting more weightage to the evidence of prosecution witnesses. However, it is clear that the Learned Magistrate has duly analysed and considered the totality of the evidence led during the proceedings before him.

[49] As such, this Ground of Appeal is also without merit.

Ground 9 - That the Learned Magistrate did not consider and it was highly unfair to rest his assessment on the issue of Doctrine of Recent Possession, as it was not found or possessed with the Appellant.

[50] This Ground of Appeal is inter related to Ground 7 and has already been discussed. Thus, this Ground of Appeal also has no merit.

Ground 10 - That the Learned Magistrate pre-judged and overruled the Appellant's denial even in not providing an explanation about the stolen items. The Appellant had no answers to those questions and he fully denied the allegations and was unrepresented during the course of the trial.

[51] It is true that the Appellant has totally denied any involvement in this incident. However, the Learned Magistrate has given cogent reasons as to why he is rejecting the Appellant's evidence and accepting the evidence of the prosecution as credible and reliable.

[52] Therefore, I am of the opinion that this ground of appeal against conviction is also without merit.

The Grounds of Appeal against Sentence

[53] The Appellant states that the sentence imposed on him was very harsh and excessive due to the given facts that the Appellant was a first offender.

[54] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"...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)."*

[55] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

> *"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. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
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> *(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."*

[56] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[57] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

> *"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*
>
> *" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*
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> *[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*
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> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*
>
> *[41] The Supreme Court then observed in paragraph 51 that:*

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

[58] In this case the Appellant takes up the position that the sentence imposed on him is extremely excessive and too harsh in all circumstances of the case, and thereby wrong in principle. He also states that the Learned Magistrate erred in law and in fact by taking extraneous and irrelevant matters into account and not taking relevant matters into consideration, and thereby erred in principle and in law.

[59] In passing his sentence the Learned Magistrate has referred to the maximum penalty for the offences of Burglary and Theft and also considered the established tariff for the two offences. He has also considered Section 17 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act), which deals with aggregate sentences of imprisonment.

[60] In terms of Section 17 of the Sentencing and Penalties Act: *""If an offender is convicted of more than one offence founded on the same facts, or which form a series*

of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."

[61] Based on the objective seriousness of the offences, the Learned Magistrate has selected 24 months imprisonment as the starting point of the aggregate sentence.

[62] The fact that the offences were committed by the Appellant in the early hours of the morning, and at a time the complainant and his family members were sleeping inside their house, has been considered by the Learned Magistrate as aggravating factors. He has also considered the fact that properties of substantial value were stolen from the complainant's premises. For the aforesaid aggravating factors he has added 3 years imprisonment.

[63] The Learned Magistrate has considered the mitigating factors in the case and has deducted 11 months imprisonment from the sentence and arrived at a sentence of 4 years and 1 month imprisonment.

[64] For the time the Appellant spent in remand custody, the Learned Magistrate has deducted a further 1 month to arrive at a final sentence of 4 years imprisonment.

[65] In conclusion, the Learned Magistrate has stated as follows:

> *"With the increased numbers of unwanted home invasions, public in this country are living in fear. The criminal are brazen enough even to break into the houses whilst the people are staying in their homes like in this case. In my view to protect the public, harsh sentences are warranted presently, disregarding the hardships that would befall the offenders and their families. In this case also, this Court is prepared to give this long custodial sentence to the accused (Appellant) to denounce his behaviour and to protect the public from him in future."*

[66] Considering all the above, I am of the opinion that the grounds of appeal against sentence are also without merit.

[67] Therefore, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

Conclusion

[68] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Nasouri is affirmed.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 30th Day of November 2018

Solicitors for the Appellant : Appellant in Person.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.