IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 126 OF 2017

BETWEEN: **AVIYASHNI VANDHANA NAIDU**

Appellant

A N D: **STATE**

Respondent

Counsel: Ms. V. Narara for Appellant
Mr A. Singh for Respondent

Hearing: 04th January 2018

Judgment: 05th March 2018

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrate's Court at Lautoka with another for one count of Escaping From Lawful Custody, contrary to Section 196 of the Crimes Act. Consequent upon the plea of not guilty entered by the Appellant and the co-accused, the matter proceeded to the hearing. At the conclusion of the hearing, the learned Magistrate delivered his Judgment on the 5th of October 2017, finding the Appellant and the co-accused guilty for the offence. The learned Magistrate then convicted and sentenced the Appellant for a period of fifteen (15) months imprisonment, that to be served consecutive to any other sentence or sentences that the Appellant has been serving. Aggrieved with the said sentence, the Appellant filed this Petition of Appeal on following grounds, *inter alia;*

    i) That learned trail Magistrate erred in law and in fact when he picked the starting point at the higher end of the tariff,

ii) *The learned Magistrate erred in law and in fact when he reached the final sentence which was outside the tariff,*

iii) *The learned Magistrate erred in law and in fact when he failed to deduct the remand period,*

iv) *The learned Magistrate erred in law and in fact when he reached the final sentence by double counting the aggravating factors.*

2. During the hearing of this appeal, the learned counsel for the Appellant informs the court that the Appellant wishes to abandon the third ground of appeal, which was allowed by the court.

Factual Background

3. The Appellant and two other individuals had been detained in the cell block at the Lautoka Police Station in the night of 28th of June 2015. At about 10.45 p.m. in the night, the Police Officer, who was in charge of the detainees at the Police Station, found that the Appellant and two other individuals had escaped from the custody of the Police. The Appellant was later arrested and charged for this offence.

The Law

4. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** found that:

> *"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 of the relevant considerations, then the appellate court may impose a different sentence."*

5. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

> *"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."*

6. Goundar JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that:

> *"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:*
>
> i) Whether the sentencing judge acted upon a wrong principle;
> ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;
> iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)".

Ground I

7. The first ground of appeal is founded on the contention that the learned Magistrate has erroneously picked the starting point at the higher end of the tariff. The Tariff for the offence of Escaping From Lawful Custody is 6 to 12 months imprisonment **(Tuibua v State AAU0116.2007).** The learned Magistrate in his sentence has selected twelve (12) months as the starting point.

8. Section 4 (2) of the Sentencing and Penalties Act has provided the factors that must be considered by the sentencing court in sentencing offenders, where it states that:

In sentencing offenders a court must have regard to —

a) the maximum penalty prescribed for the offence;

b) current sentencing practice and the terms of any applicable guideline judgment;

c) the nature and gravity of the particular offence;

d) the offender's culpability and degree of responsibility for the offence;

e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

f) 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;

g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

i) the offender's previous character;

j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

9. The Supreme Court of Fiji in **Qurai v State [2015] FJSC 15; CAV24.2014 (20 August 2015)** has discussed the methodologies adopted by the Courts in Fiji in sentencing the offenders in an elaborative manner. The Supreme Court of Fiji in **Qurai v State (supra)** held that:

> *"Guidelines for sentencing contained in the Sentencing and Penalties Decree of 2009 require a sentencing court to have regard to, amongst other things, the current sentencing practice and the terms of any applicable guideline judgment (section 4(2)(b) of the Decree), 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 (section 4(2)(f) of the Decree), the conduct of the offender during the trial as an indication of remorse or the lack of remorse (section 4(2)(g) of the Decree) and the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence (section 4(2)(j) of the Decree).*

The Sentencing and Penalties Decree does not provide any specific guideline 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.

In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate 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. This is the methodology adopted by the High Court in this case.

It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that

proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

10. According to the above elaborative views expressed by the Supreme Court of Fiji in **Qurai v State (supra)**, the courts in Fiji have adopted two schools of sentencing methodology. The first methodology is the two-tiered methodology, which consists with two stages. In the first stage the court considers the objective circumstances of the offence in order to reflect the gravity or the seriousness of the offence. The court then proceeds to consider the subjective circumstances of the offence in order to reflect the aggravating and mitigating factors pertaining to the offender. In doing that, the court has to consider the factors that have been stipulated under Section 4 (2) of the Sentencing and Penalties Act.

11. In this sentence, the learned Magistrate has adopted the two-tiered methodology. He has first identified the applicable tariff limit for the offence, before proceed to determine the starting point.

12. Goundar JA in **Kotobalavu v State [2014] FJCA 224; AAU0007.2012 (7 April 2014)** has expounded that the court must take into consideration the objective seriousness of the offence in order to determine the starting point. His Lordship has further held that, as a matter of good practice, the starting point should pick from the lower or middle range of the applicable tariff, where his Lordship held that:

"The starting point is selected from the established tariff for the offence. The tariff is established to achieve uniformity in sentencing. Generally, the starting point is picked from the lower or the middle range of the tariff, depending on the objective seriousness of an offence. But there is no hard and fast rule regarding the selection of the starting point. Sentencing requires exercise of judicial discretion to arrive at a punishment that fits the crime. This is called the proportionality principle. When a sentence is challenged on an appeal, the ultimate question for the appellate court is whether the sentence complies with the proportionality principle".

13. Goundar JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has outlined the same view with much elaborative manner, where his Lordship held 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.

14. In view of the above judicial precedents, the courts as a matter of good practice usually pick the starting point from the lower or middle range of the tariff. However, there are no strict rules or principles stating that the court must select the starting point from the lower

or the middle range of the tariff. Furthermore, the court has to take into consideration the objective seriousness or the objective circumstances of the offence in order to determine the starting point.

15. Having correctly identified the appropriate tariff limit, the learned Magistrate has selected the 12 months as the starting point. He has stated in his sentence, that he picked this starting point having considered the circumstances of this case. (***vide; paragraph 11 of the Sentence***). The learned Magistrate has not specifically stated whether he has considered the objective circumstances of the offending in order to reach the above starting point. It is the correct practice to explain with reasons every step taken in reaching the final sentence. (***Madigan J in Naidu v State [2017] FJHC 85; HAA70.2016 (9 February 2017)***)

16. Regardless of the above failure, the 12 months starting point is still within the acceptable tariff limit. Therefore, I do not wish to intervene into the starting point picked by the learned Magistrate at this stage of my judgment.

Ground IV

17. For the convenience of determination, I will now proceed to determine the fourth grounds of appeal, which is founded on the contention that the learned Magistrate has double counted the aggravating factors in reaching the final sentence.

18. In paragraphs five and six of the sentence, the learned Magistrate has discussed the conduct of the Appellant during the course of the proceedings in the Magistrate's Court, which, I reproduce verbatim as follow:

> *"Later you had stopped appearing in court from the 4th of February 2016 as per the journal entries in this case. Further, it appears that you absconded court in this case when you were granted bail by the Suva Magistrate Court in another case. You went to the extent of misleading the Legal Aid Counsel who appeared at that time to inform the Court that you were granted bail by the Chief Magistrate for all your cases. For more than*

two months you evaded the Court under the guise that you had been granted bail in all your cases. On you instructions the Counsel too misled this court by saying that you have been granted bail. Finally it was confirmed that you were not granted bail for this case by any other Court.

You counsel withdrew from appearing for you as a result of your misleading conduct. Further I have taken into account that you have wasted the time of the court and the time of the police by evading the court when the case was to be taken up for hearing on the 25th of February 2016."

19. Having discussed the conduct of the Appellant, the learned Magistrate has then outlined the aggravating factors in paragraph seven as follows:

"As per UK sentencing guidelines willful delay and obstruction of course of justice and determined attempt to avoid the jurisdiction of the court are considered as aggravating factors. In this case you evaded Court by giving false and baseless excuses through your counsel. Due to your conduct the hearing of this case was delayed unreasonably. Further, your escape has forced the Police Officers to look for you in the middle of the night. In Naidu v State (2017) FJHC 85;HAA70.2016 (9 February 2017) Justice Madigan considered the escape in the early hours before dawn, forcing the Police Officers on duty to leave their post and search for escapee in the town as an aggravating factors. Therefore, I consider those as aggravating factors in this case"

20. Accordingly, the learned Magistrate has considered the following grounds as aggravating factor, that:

i) The Appellant has evaded the Court by giving false and baseless excuses through her counsel,

ii) Due to the conduct of the Appellant during the hearing, the case was delayed unreasonably,

iii) The Police Officers were forced to look for the Appellant in the middle of the night.

21. Section 9 (1) (a) of the Constitution of the Republic of Fiji has stipulated that the personal liberty of a person can be deprived for the purpose of executing of a sentence in respect of the offence of which the person had been convicted, where it states that:

A person must not be deprived of personal liberty expect;

a. for the purpose of executing the sentence or order of a court, whether handed down or made in Fiji or elsewhere, in respect of an offence of which the person had been convicted.

22. Section 4 (1) of the Sentencing and Penalties Act has stipulated that:

The only purposes for which sentencing may be imposed by a court are-

a) To punish offenders to an extend and in a manner which is just in all the circumstances,

b) To protect the community from offenders,

c) To deter offenders or other persons from committing offences of the same or similar nature,

d) To establish conditions so that rehabilitation of offenders may be promoted or facilitated,

e) To signify that the court and the community denounce the commission of such offences; or

f) Any combination of these purposes.

23. In view of the Section 4 (1) of the Sentencing and Penalties Act, the sentence of the court must be founded on one or many or all of the purposes stipulated under Section 4 (1) of the Act.

24. Section 4 (2) (j) of the Sentencing and Penalties Act states that:

> *"The presence of any aggravating or mitigating factors concerning the offender or any other circumstances relevant to the commission of the offence;"*

25. Accordingly, Section 4 (2) (j) has specifically demarcated the scope of the aggravating factors. Therefore, the court could only consider the factors concerning the offender or any other circumstance relevant to the commissions of the offence. The court could not consider any other factors concerning the offenders as aggravating grounds, if they are not relevant to the commission of the offence.

26. Perera JA in his dissenting observation in **Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016)** found that:

> *"The aggravating or mitigating factors the sentencing court should have regard to, should be relevant to the commission of the offence. It stands to reason that the factors that are not relevant to the commission of the offence cannot be taken into account to increase or decrease the sentence imposed on an offender. Therefore, in my view, the above provisions of the Sentencing and Penalties Decree make it plain that the conduct of an offender after the commission of the offence cannot be considered as an aggravating factor".*

27. The learned Magistrate has considered the conduct of the Appellant during the course of the proceedings as aggravating grounds in order to increase the sentence. The first ground is that the Appellant had evaded the Court during the course of the proceeding by giving

false and baseless excuses. Such conduct of the Appellant had forced the court to delay the hearing unreasonably. It is obvious that the conduct of the Appellant during the course of the proceedings has no relevancy to the commission of the offence of Escaping From Lawful Custody.

28. According to Section 4 (2) of the Sentencing and Penalties Act, the court is allowed to consider the conduct of the accused during the course of the proceeding only on two instances. The first instance is that if the offender pleaded guilty, then court can consider the stage of the proceedings at which the offender pleaded guilty pursuant to Section 4 (2) (f). The second instance is that, the court could consider the conduct of the offender during the trial, in order to determine whether he has expressed any remorse or not. However, the lack of remorsefulness or failure to plead guilty, should not be considered in order to increase the sentence.

29. Therefore, it is my considered opinion that the first two aggravating factors that the learned Magistrate has relied on in order to increase the sentence are founded on irrelevant consideration and wrong principles of law.

30. The third aggravating ground is that the Police Officers were forced to look for the Appellant in the middle of the night due to this offending. The learned Magistrate has relied upon the observation made by Justice Madigan in **Naidu v State (supra)** in order to substantiate this ground.

31. Upon careful perusal of the record of the proceedings in the Magistrate's Court, I do not find any evidence or any information confirming that the Police Officers had to conduct a search operation in order to look for the Appellant in the night. The two Police Officers, who gave evidence during the hearing in the Magistrate's Court, have not stated that they had conducted such a search operation in the night. Both of them have only testified that they went to the cell block at the Police Station and found that the Appellant and two others had escaped. Therefore, I find that the above conclusion of the learned Magistrate is

founded on a speculation than any evidence. Accordingly, I find that the third aggravating factor is also founded on irrelevant consideration and wrong principles.

Ground III

32. It is clear that the final sentence of fifteen months is higher than the tariff limit of 6 to 12 months imprisonment. Under such circumstances, the learned Magistrate is required to give reasons for reaching a sentence higher than the tariff limit **(Koroivuki v State (supra)**. However, the learned Magistrate has not given any reasons.

33. It is in that context, I find there is a reason for me to intervene into the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Act. I accordingly set aside the sentence of the learned Magistrate and consider an appropriate sentence in order to reflect the objective and subjective circumstances of the offending and the offender.

34. It has been proved at the hearing in the Magistrate's Court that the Appellant and two other individuals had escaped from the custody in the might. The Police had given them an opportunity to have their shower and meal. Then they were locked up in their respective cell rooms. The Police Officer Mr. James Swamy in his evidence confirmed that he properly locked the cell doors before he went back. However, there is no evidence to establish who had actually opened the locks of the door and the manner the Appellant came out from the cell room. In view of this evidence, it appears that this was a pre-planned crime.

35. There is no specific victim in this crime. However, crimes of this nature undoubtedly affect the law and order and its implementation. The lack of evidence of the impact of a certain crime on the society from an external source does not necessarily mean that the courts cannot take notice of the prevalence of a particular crime and its impact on the society as a whole. **(Koroivuki v State (supra)**. I accordingly find that the crimes in this nature adversely effect on the society, specially the maintenance of law and order.

36. Apart from the above reasons, I do not find any subjective circumstances of this offending and the offenders.

37. Having considered the seriousness of this offence and the objective and subject circumstances of this offence, I imposed a period of **ten (10) months** imprisonment for this offence.

38. The Orders of the Court are:

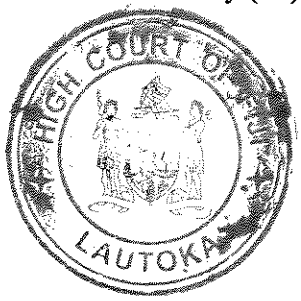
i) The Appeal is allowed,

ii) The sentence dated 14th of November 2017 is set aside,

iii) The Appellant is sentenced for a period of ten (10) months imprisonment, effective from 14th of November 2017,

iv) This Sentence to be served consecutive to any other sentence or sentences that the Appellant has been serving on the 14th of November 2017.

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



R.D.R.T. Rajasinghe
Judge

At Lautoka
05th March 2018

Judgment delivered by me on 05th March 2018

Solicitors
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent.