IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 37 OF 2018

BETWEEN:	**ISITI TEMO**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel:	Mr. T. Lee for the Appellant Ms. S. Tivao for the State
Date of Hearing:	13th August 2018
Date of Judgment:	04th October 2018

JUDGMENT

Introduction

1. The Appellant had been charged in the Magistrate's Court in Lakeba for one count of Criminal Intimidation, contrary to Section 375 (1) (a) (ii) (b) (ii) (2) (b) of the Crimes Act. The particulars of the offence are that:

Statement of Offence (a)

CRIMINAL INTIMIDATION: Contrary to Section 375 (1) (a) (ii) (b) (ii) (2) (b) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

ISITI TEMO on the 24th day of May 2018, at Lakeba, Lau in the Central Division, without lawful excuse threatened to burn down the dwelling house **of JOJI TAKAPE**, knowingly causes a threat to destroy the said property by fire.

2. On the 18 of June 2018 the Appellant pleaded guilty for this offence. Accordingly, the learned Magistrate has convicted and sentenced the Appellant to 12 months imprisonment. Aggrieved with the said sentence, the Appellant filed this appeal on the following grounds;

   (i) The Learned Magistrate erred in principal by neither choosing nor (even) considering a starting point.
   (ii) The Learned Magistrate erred in law and in fact by failing to consider the mitigating factors to adequately decrease the sentence.
   (iii) That the Learned Trial Judge erred in law and fact in imposing a sentence that is harsh and excessive.
   (iv) That the Learned Magistrate erred in law by failing to give a cogent reason for not suspending the sentence.

The Law

3. 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."

4. 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."*

5. 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)."

First and Second Grounds of Appeal

6. I will deal with the first and second grounds of appeal together as both of the grounds are based upon the contention that the learned Magistrate has not taken into consideration the starting point and the mitigation grounds.

7. The Supreme Court of Fiji in **Qurai v State [2015] FJSC 15; CAV24.2014 (20 August 2015)** has extensively discussed the sentencing methodology, where Justice Marsoof 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."

8. In view of the above findings by the Supreme Court of Fiji in **Qurai (supra)**, it is the discretion of the sentencing Magistrate to adopt the sentencing methodology. In this case, it is clear that the learned Magistrate has not adopted the two- tiered methodology in sentencing. Instead he has considered the elements of offence, mitigation factors given by the Appellant, the sentencing tariff in order to reach his final sentence. Therefore, I do not find the principle adopted by the learned Magistrate in sentencing is wrong in principle.

9. Moreover, I find that the learned Magistrate has properly taken into consideration the mitigating grounds given by the Appellant in the fourth paragraph of the sentence. Therefore I do not find the grounds one and two have any merits.

Third Ground of the Appeal

10. The third ground of appeal is founded on the contention that the sentence is harsh and excessive.

11. The learned Magistrate has found that the tariff for the offence of Criminal Intimidation is 12 months to 4 years imprisonment period.

12. Justice Temo in **State v Baleinabodua and Tevita Seru (HAC 145 of 2010S)** found that the acceptable tariff limit for the offence of Criminal Intimidation would be a sentence between 12 months to 4 years imprisonment. However, Justice Sharma in **Sadriu v State [2017] FJHC 216; HAA65.2016 (15 March 2017)** found that the acceptable tariff for the offence of Criminal Intimidation is between 6 months to 2 years imprisonment.

> *"I note that there is no tariff fixed for the offence of Criminal Intimidation under section 375 (1) (a) of the Crimes Decree and the parties have not been able to provide any case authorities on the tariff for this offence. In my view an acceptable tariff would be a sentence between 6 months and 2 years imprisonment. Serious cases should be given a sentence in the upper range whilst less serious cases should be given a sentence at the lower end of the scale."*

13. I do not wish to proceed to discuss the difference of these two sets of tariff and determine which one is the most suitable tariff limits. However, I find that the 12 months imprisonment is at the lowest range of the tariff limit as set out in **Baleinabodua (supra)** and also in the middle range of the tariff limit as set out in **Sadriu (supra)**. Having taken into consideration the sentencing practices in respect of the offence of criminal intimidation, I do not find the final sentence of 12 month imprisonment is excessive and harsh in this case. I accordingly find that the third ground of appeal has no merit.

Fourth ground of Appeal

14. The fourth ground is founded on the contention that the learned Magistrate erred in law by failing to give cogent reasons for not suspending the sentence.

15. Section 26 (1) of the Sentencing and Penalties Decree states that:

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances."

16. Section 26 (2) of the Sentencing and Penalties Act has stipulated the jurisdictional limitation of the court in suspending sentences, where it states that:

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

a) Does not exceed 3 years in the case of the High Court; or
b) Does not exceed 2 years in the case of the Magistrate's Court."

17. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the Court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so. Accordingly the Court could suspend a sentence only if the Court is satisfied that there are appropriate circumstances to do so. Therefore, the Magistrate is not required to give cogent reasons, if he imposes a custodial sentence.

18. In view of the paragraph six of the sentence, the learned Magistrate has taken into consideration the previous behaviour of the Appellant in making his mind to impose an immediate custodial sentence of 12 months. Accordingly I do not find any merit in the fourth ground of Appeal.

19. In conclusion, I refuse this appeal and dismiss it accordingly.

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

R.D.R.T. Rajasinghe
Judge

At Suva
04th October 2018

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