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

CRIMINAL APPEAL NO. HAA 14 OF 2019

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Suva in Criminal Case No. 250 of 2019.

BETWEEN : **JOSAIA USUMAKI**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Appellant appears in person
Mr. Rajneel Kumar for the Respondent

Date of Hearing : 13 November 2019

Judgment : 19 December 2019

JUDGMENT

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

[2] The Appellant was charged in the Magistrate's Court of Suva with one count of Escaping From Lawful Custody, contrary to Section 196 of the Crimes Act No. 44 of 2009 (Crimes Act).

[3] The Charge Sheet filed against the Appellant had the following Charge:

Statement of Offence (a)

ESCAPING FROM LAWFUL CUSTODY: Contrary to Section 196 of the Crimes Act Number 44 of 2009.

Particulars of Offence (b)

JOSAIA USUMAKI, on the 23rd day of September 2018, at Lami, in the Central Division, being in the lawful custody of **T/COC SAKEASI NADROGE** escaped from the said **T/COC SAKEASI NADROGE**.

[4] Even in the proceedings before the Magistrate's Court the Appellant had waived his right to counsel and appeared in person.

[5] On 17 April 2019, the Appellant pleaded guilty to the charge. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been convicted of the charge.

[6] On the same day, the Appellant had made his own submissions in mitigation and the sentence had been fixed for 23 April 2019.

[7] However, on 23 April 2019, the Appellant had wanted to change his plea. This was on the basis that he had also been punished by the Corrections Department for Escaping from Lawful Custody. The Learned Resident Magistrate had granted time to the Appellant until 7 May 2019 to make relevant submissions in this regard. The prosecution was granted an opportunity to reply.

[8] On 21 May 2019, the Learned Resident Magistrate delivered his "Ruling on Change of Plea", rejecting the application made by the Appellant for changing of his plea of guilt. Accordingly, the Appellant's guilty plea was confirmed.

[9] On the same day, the Appellant was sentenced to 7 months' imprisonment. The Learned Resident Magistrate ordered that the sentence is to be consecutive to any other sentence the Appellant is serving.

[10] Aggrieved by this Order the Appellant filed an appeal against his sentence. The said appeal was filed within time and was filed in person by the Appellant.

GROUNDS OF APPEAL

[11] The Grounds of Appeal, which was filed by the Appellant, are as follows (the Grounds stated below are as framed by the Appellant):

Grounds of Appeal

1. *"That the sentencing Magistrate erred when he failed to invite the prosecution to withdraw the charge of escape from lawful custody since the Applicant was already punished by the Prison Tribunal (reference to the case of* ***Peni Gonemaituba & Others v. State*** *(2007) FJCA 28: AAU 0007 & AAU 0066 of 2006 at paragraph 45)."*
2. *"That the sentencing Magistrate erred by imposing further punishment causing the Applicant to be punished twice for the same offence violating Section 14(1)(b) of the 2013 Fiji Constitution (reference in* ***Joeli Tawatatau v. The State*** *(2007) Crim Appeal AAU 2/07, 23 March 2007)."*
3. *"That the sentence was excessive and in the high starting point".*

[12] From the above Grounds of Appeal filed it is evident that the first two Grounds of Appeal could be considered as Grounds of Appeal against the conviction, and only the third Ground as a Ground of Appeal against sentence.

[13] During the hearing of this matter both the Appellant and the Learned State Counsel were heard. The Respondent also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

THE LAW AND ANALYSIS

[14] 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.

[15] 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.*"

[16] 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

[17] As I have stated before, the first two Grounds of Appeal are against conviction and refers to the principle of *autrefois convict*.

[18] Section 37 of the Corrections Service Act 2006 provides as follows:

37.(1) Prison offences shall be prescribed by Regulations and in Commissioners Orders, and shall be prominently displayed at all prisons at a place or places where prisoners have access, and shall be in the English, Fijian and Hindustani languages.

(2) When a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances, but a court shall take into account any penalty imposed under this Act, when sentencing a prisoner for the criminal offence.

[19] It is clear from the above, that the Corrections Service Act does not prevent further criminal proceedings being taken against a prisoner who is charged and punished for a prison offence arising from the same circumstances. However, it is stipulated that a Court shall take into account any penalty that has been imposed under the provisions of the Corrections Service Act, when sentencing the prisoner for criminal offence.

[20] The Learned Resident Magistrate has duly considered this factor when making his Ruling on Change of Plea. Further, when passing sentence on the Appellant, he has

duly deducted one month from the sentence (which was in lieu of the sentence imposed on the Appellant by the Prisons Tribunal).

[21] Considering all the above, I am of the opinion that the first two Grounds of Appeal are without merit.

THE GROUNDS OF APPEAL AGAINST SENTENCE

[22] 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)."*

[23] 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:*
>
> *(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."*

[24] 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.

[25] 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:*
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> *"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."

[26] The Appellant alleges that the sentence of 7 months imprisonment imposed on him is excessive and that the starting point taken by the Learned Magistrate was high.

[27] The Appellant was charged for Escaping from Lawful Custody in terms of the provisions of Section 196 of the Crimes Act. The Section provides "A person commits a summary offence if he or she, being in lawful custody, escapes from lawful custody." The maximum penalty for the offence is imprisonment for a period of 2 years.

[28] In ***Tuibua v. State*** [2008] FJCA 77; AAU0116.2007S (7 November 2008); the Fiji Court of Appeal observed that the sentencing tariff for escaping from custody to range from 6-12 months imprisonment.

"*[13] Counsel for both the parties to this appeal have helpfully provided us with copies of dozens of previous cases from the present time and well into the past where judges in Fiji have sentenced offenders for the offence of escaping from lawful custody. We feel there is little to be gained in exhaustively reviewing these cases because the facts and circumstances of each case are quite obviously different. Nevertheless, it is quite clear from these previous cases that High Court judges and magistrates regard the usual tariff for the offence of escaping from lawful custody as between 6 and 12 months*

imprisonment. Apparently this Court has not before been called upon to consider the appropriateness of this usual tariff. In order to assist uniformity and consistency in sentencing for the offence of escape from lawful custody, we feel it appropriate to state that a sentence of between 6 and 12 months imprisonment is an appropriate usual tariff for this type of offence. But as with all tariffs for all offences there will always be cases which because of their peculiar facts fall outside the usual permissible range of sentences for this type of offence. In approving the usual tariff we are in no way intending to put a straight jacket on sentencing judges and magistrates."

[29] It must be mentioned that Escaping from Lawful Custody was an offence (misdemeanor) under the provisions of Section 138 of the Penal Code, with the maximum penalty being 2 years imprisonment. Therefore, I agree with the contention of the Learned State Counsel that this tariff is applicable even today as the maximum punishment under Section 196 of the Crimes Act is also 2 years imprisonment.

[30] I concede that the Learned Magistrate has not referred to any particular case authority or to any sentencing tariff while passing his sentence. However, he has adopted a starting point of 12 months imprisonment. He has granted a discount of one month for mitigation and a further three months for the guilty plea made by the Appellant. As stated before, in terms of the provisions of Section 37(2) of the Corrections Service Act 2006, the Learned Magistrate has a granted a further discount of one month to the Appellant. The final sentence imposed on the Appellant is 7 months imprisonment.

[31] It has been consistently followed by the Courts of Fiji that deterrent sentences should be imposed on offenders who attempt to escape from lawful custody. It was held in ***Tuibua v. State*** (supra)

*"[8]….. As stated recently by the Fiji Supreme Court in **<u>Alifereti Misioka v The State</u>** (FJSC CAV 12/2007) there is simply no basis for a sentencing principle to the effect that a sentence for escaping from lawful custody should ordinarily be made concurrent with any sentences already being served. As stated by Shameem J in the earlier proceedings in the High Court concerning **Alifereti Misioka** and as adopted by the Supreme Court:*

> ***"If sentences for escaping are to have any deterrent effect at all, they must be served consecutive to existing terms, so that the result is to lengthen the incarceration period".***

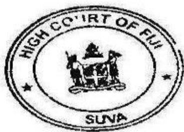
[32] Considering all the above, I am of the opinion that the Ground of Appeal against sentence is also without merit.

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

CONCLUSION

[34] 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 Suva is affirmed.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 19th Day of December 2019

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