

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

CRIMINAL APPEAL NO. HAA 39 OF 2020

IN THE MATTER of an Appeal under Section 246 of the Criminal Procedure Act from the decision of the Magistrate's Court of Labasa, in Criminal Case No. 603 of 2018.

BETWEEN : JAMES ASHWIN RAJ

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Ms. Reema Raj for the Appellant
Ms. Juleen Fatiaki for the Respondent

Dates of Hearing : 29 and 30 March 2021

Judgment : 1 April 2021

JUDGMENT

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

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

FIRST COUNT

Statement of Offence [a]

BURGLARY: Contrary to Section 312 (1) (a) of the Crimes Act of 2009.

Particulars of Offence

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, entered into the dwelling house of **Vishal Naidu** as a trespasser, with the intention to steal therein.

SECOND COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 1 x \$50.00, the property of **Vishal Naidu**, with the intention to permanently deprive the said **Vishal Naidu**.

THIRD COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 1 x Samsung S8 plus valued at \$850.00, the property of **Sharmila Devi**, with the intention to permanently deprive the said **Sharmila Devi**.

FOURTH COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 1 x Samsung J2 mobile phone black in colour valued at \$300.00 and 1 x Madisa branded watch valued at \$40.00 to the total value of \$340.00, the property of **Reshma Raj**, with the intention to permanently deprive the said **Reshma Raj**.

FIFTH COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 1 x J1 mini Prime Samsung phone valued at \$100.00, the property of **Mani Raj**, with the intention to permanently deprive the said **Mani Raj**.

SIXTH COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 1 x Samsung brand mobile phone black in colour valued at \$190.00 a, the property of **Shelvin Raj**, with the intention to permanently deprive the said **Shelvin Raj**.

SEVENTH COUNT

Statement of Offence [a]

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence [b]

James Ashwin Raj, on the 5th day of November 2018, at Labasa, in the Northern Division, dishonestly appropriated 2 x Gold Sovereign valued at \$760.00, the property of **Sherin Devi**, with the intention to permanently deprive the said **Sherin Devi**.

- [3] The Appellant was first produced in the Magistrate's Court of Labasa for this matter, on 8 November 2018. He was ready to take his plea on the same day. Accordingly, the Appellant pleaded guilty to the 7 charges. 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. Since the Appellant had disputed the Summary of Facts, the said Summary of Facts had been amended. Thereafter, the Appellant had been found guilty and convicted of the 7 charges on his own plea and the matter was fixed for sentencing for 12 November 2018.
- [4] It must be mentioned that during these proceedings in the Magistrate's Court, the Appellant had waived his right to Counsel and therefore remained unrepresented.
- [5] Thereafter, as is revealed from the Magistrate's Court record, the delivery of the sentence had been postponed due to numerous reasons. On one occasion the Learned Magistrate had deferred the sentence, as he had transferred the matter to the Labasa High Court for the determination of the Appellant as a habitual offender.
- [6] It is also revealed from the Magistrate's Court record that an Amended Summary of Facts had been filed by the prosecution on 7 July 2020. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant had admitted to the said Summary of Facts.
- [7] Finally, on 27 October 2020, the Appellant was sentenced to 20 months imprisonment, with a non-parole period of 14 months. This sentence was ordered to be consecutive to the sentence of 4 years imprisonment, with a non-parole period of 3 years, imposed on the Appellant by the Suva High Court, in Criminal Case No HAC 299/2018, on 31 January 2020.
- [8] Aggrieved by the said Order, on 9 November 2020, the Appellant filed an Application for Leave to Appeal in the High Court. This Application was only in respect of his sentence.

[9] During these proceedings in the High Court the Appellant was represented by the Office of the Legal Aid Commission. Amended Grounds of Appeal against the sentence were filed on 12 February 2021.

[10] This matter was taken up for hearing before me on 29 and 30 March 2021. The Counsel for the Appellant and Respondent were heard. The Counsel for the Appellant also filed written submissions, which I have had the benefit of perusing.

[11] The Amended Grounds of Appeal against the sentence filed by the Appellant is as follows:

AMENDED GROUNDS OF APPEAL AGAINST SENTENCE

THAT the Learned Trial Magistrate erred in law and in fact when he made the sentence consecutive without considering that:

- (i) The Appellant had been in remand since 08th of November 2018;
- (ii) The prosecution from 20th of November 2018 till 07th of July 2020 had sought time to amend the Summary of Facts;
- (iii) The stolen items were recovered and returned.

The Law and Analysis

[12] 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 reproduced 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."

[13] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the respective charges against him, 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."*

[14] 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 Sentence

[15] 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).”*

[16] 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.”*

[17] 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.

[18] The primary Grounds of Appeal against sentence is that the Learned Magistrate had not deducted the time the Appellant was in remand for this case since 8 November 2018 and also that no concession has been given by the Learned Magistrate for the stolen items that were recovered and returned to the complainants.

[19] In sentencing the Learned Magistrate has stated that since the offending was conducted in one transaction, the Court will impose on the Appellant an aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act). Accordingly, taking into consideration the objective seriousness of the offence of Burglary and the 6 counts of Theft, the Learned Magistrate has taken an aggregate starting point of 24 months imprisonment.

[20] The Learned Magistrate has considered the fact that stealing from 6 victims under one house on one night and the fact that the Appellant is a habitual offender as aggravating factors. Accordingly, he has added a further 8 months for the said aggravating factors, bringing the aggregate sentence to 32 months imprisonment.

[21] The Learned Magistrate has deducted 2 months from the sentence for mitigating factors, bringing the aggregate sentence to 30 months imprisonment. At paragraph 16 of his sentence he has considered the fact that the police had recovered and returned to the complainant all the stolen items as a mitigating factor. Therefore, it is incorrect for the Appellant to state that the Magistrate has not considered this fact in sentencing him.

[22] Thereafter, the Learned Magistrate has reduced a further 10 months for his early guilty plea and arrived at an aggregate sentence of 20 months imprisonment. In terms of Section 18 (1) of the Sentencing and Penalties Act, he has fixed the non-parole period as 14 months imprisonment.

[23] Section 24 of the Sentencing and Penalties Act provides as follows:

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”

[24] However, I find that the Learned Magistrate has not deducted the time the Appellant has spent in remand custody, pursuant to Section 24 of the Sentencing and Penalties Act. Both parties are in agreement that Appellant has been in remand custody for this case from 8 November 2018 until 31 January 2020, the day on which he was sentenced by the Suva High Court, in Criminal Case No HAC 299/2018. This is a period of approximately 15 months.

[25] This is clearly an error of law made by the Learned Magistrate in his sentence. The fact that the Appellant has been deemed a habitual offender should not deprive him of the benefit afforded to him in terms of Section 24 of the Sentencing and Penalties Act. In any event, the Learned Magistrate has considered the fact that the Appellant is a habitual offender and made the sentence imposed for this case, to run consecutive with the sentence imposed in Suva High Court, in Criminal Case No HAC 299/2018.

Conclusion


[26] For the aforesaid reasons, I conclude that this Appeal should be allowed and the sentence imposed against the Appellant is set aside. Accordingly, the aggregate sentence of 20 months imprisonment, with the non-parole period of 14 months imprisonment is set aside. In its place I order a sentence of 5 months imprisonment to be served by the Appellant for this matter. There will be no non-parole period to be served by him. The said 5 months term of imprisonment will be consecutive to the sentence imposed by the Suva High Court, in Criminal Case No HAC 299/2018.

FINAL ORDERS

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

1. Appeal is allowed.
2. The sentence imposed by the Learned Magistrate, Magistrate's Court of Labasa in Criminal Case No. 603 of 2018 is set aside and a sentence of 5 months imprisonment is substituted in its place.
3. This sentence of 5 months imprisonment will be consecutive to the sentence imposed by the Suva High Court, in Criminal Case No HAC 299/2018.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LABASA

This 1st Day of April 2021

**Solicitors for the Appellant :
Solicitors for the Respondent:**

**Office of the Legal Aid Commission, Labasa.
Office of the Director of Public Prosecutions, Labasa.**