

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 79 OF 2023

BETWEEN : **LUSIANA LEWATU RATULEVU**
APPELLANT

AND : **THE STATE**
RESPONDENT

Counsel : Ms. L. Taukei for the Appellant.
Ms. R. Uce for the Respondent.

Date of Hearing : 23 May, 2024
Date of Judgment : 23 May, 2024

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi for one count of burglary contrary to section 312 (1) of the Crimes Act, 2009.
2. The brief facts were as follows:
 - a) On 11 October 2023 at about 1845 hours at Northern Press road, Nadi the victim locked his home and left for church at Kerebula.

There was some leftover food in the kitchen of boiled fish and cassava.

- b) At around 2200 hours the victim returned home to find the food disturbed, his house door and windows were damaged. He was in the kitchen when the appellant came in wearing a bra and shorts. The victim told the appellant to sit on the couch and wait for the police.
 - c) The appellant was arrested, caution interviewed and charged for one count of burglary. In her caution interview the appellant admitted breaking open the door and eating the food.
3. When the appellant appeared in the Magistrate's Court she elected a Magistrate's Court trial. On the first day of her appearance on 13th October, 2023 the appellant pleaded guilty after waiving her right to counsel. Thereafter the appellant admitted the summary of facts read by the prosecution. Upon being satisfied that the guilty plea was unequivocal the learned Magistrate found the appellant guilty and convicted her accordingly.
 4. After hearing mitigation on 10th November, 2023 the appellant was sentenced in absentia to 2 years imprisonment.
 5. The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely appeal against sentence which was amended by the amended petition of appeal filed on 2nd May, 2024 by the Legal Aid Counsel who now appears for the appellant. The amended grounds of appeal are as follows:

APPEAL AGAINST SENTENCE

1. *The learned sentencing Magistrate erred in principle and law when failing to apply the tariff in Kumar & Another vs. State [2022] FJCA 164; AAU 117 of 2019 (24 November, 2022).*
 2. *The learned sentencing Magistrate erred in principle in exercising his discretion when failing to consider that the appellant was a first offender.*
6. Both counsel filed helpful written submissions and also made oral submissions during the hearing for which this court is grateful.

LAW

7. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the Appellate Court that the sentencing court fell in error whilst exercising its sentence discretion.
8. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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. AAU0015 at [2]. 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.”*

GROUND OF APPEAL

9. Both grounds are taken together since the appellant’s primary argument in this appeal is that the sentence is harsh and excessive for the following reasons:
- a) Incorrect tariff taken for the offence of burglary resulting in a high starting point;
 - b) Low category of offending as per *Kumar’s* case (supra).

DETERMINATION

INCORRECT TARIFF

10. The appellant’s counsel submits that the learned Magistrate had relied on an incorrect tariff for the offence of burglary to be a sentence between 2 to 3 years imprisonment. Had the learned Magistrate relied on the correct tariff the end result of the sentence would have been a suspended sentence.
11. The maximum penalty for the offence of burglary is 13 years imprisonment. There is no doubt that the learned Magistrate took an incorrect tariff. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of

Appeal in *Laisiasa Koroivuki v The State*, criminal Appeal No: AAU0018 of 2010 at paragraphs 26 and 27 the following is stated:

“[26] 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.

[27] 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.

12. In *Suresh Lal v State*, Criminal Appeal Case No. HAA 020 of 2013 at paragraph 17 it was stated:-

“It is trite law that the ‘starting point’ of a sentence to be within the range of tariff of a particular offence. If the sentencing court deviates from this principle, it should only be in exceptional circumstances. Reasons for such a deviation must be provided as it would be clear to the public, prosecution and the accused as to why the court took a different approach in a given scenario. It is an objective approach towards the offence and the offending background when selecting a ‘starting point’.... Identification of the correct

tariff and the selection of a proper 'starting point' play a pivotal role in the sentencing process."

13. The learned Magistrate took a starting point of 2 years and 6 months imprisonment for the sentence this in my view was in the higher range of the established tariff. There were no aggravating factors so the sentence was not increased but were reduced for mitigating factors and early guilty plea. The appellant was not in remand so no further reduction was given. In the end the appellant was sentenced to 2 years imprisonment.

14. The Court of Appeal in *Avishkar Rohinesh Kumar and Another vs. The State* [2022] FJCA 164; AAU 117 of 2019 (24 November, 2022) has established a new tariff for the offence of burglary by dividing the harm caused or intended in three categories from paragraphs 74 and 77 of its judgment as follows:

[74] In terms of section 125(1) of the Coroners and Justice Act 2009 (UK) every court must, in sentencing an offender, follow any sentencing guideline and must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so. However, in Fiji section 4(2)(b) states that a sentencing court must have regard to inter alia any applicable guideline judgment. Therefore, the sentencing judges in Fiji are not compelled by law to follow sentencing guidelines but is obliged to have regard to them. Therefore, the sentencing judges in Fiji enjoy greater freedom and wider discretion in sentencing offenders after having regard to the guidelines.

[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower

culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.

Determining the offence category

The court should determine the offence category among 01-03 using *inter alia* the factors given in the table below:

- **Category 1** - Greater harm (High)
- **Category 2** - Between greater harm **and** lesser harm (Medium)
- **Category 3** - Lesser harm (Low)

Factors indicating greater harm
<i>Theft of/ damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>Restraint, detention or gratuitous degradation of the victim, which is greater than is necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>
<i>Context of general public disorder</i>
Factors indicating lesser harm
<i>Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[76] Once the level of harm has been identified, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous

convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.

<i>LEVEL OF HARM (CATEGORY)</i>	<i>BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)</i>	<i>AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER AND WITH A WEAPON)</i>
<i>HIGH</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>	<i>Starting Point: 07 years Sentencing Range: 05–10 years</i>	<i>Starting Point: 09 years Sentencing Range: 08–12 years</i>
<i>MEDIUM</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>	<i>Starting Point: 07 years Sentencing Range: 05–10 years</i>
<i>LOW</i>	<i>Starting Point: 01 year Sentencing Range: 06 months – 03 years</i>	<i>Starting Point: 03 years Sentencing Range: 01–05 years</i>	<i>Starting Point: 05 years Sentencing Range: 03–08 years</i>

[77] The following table contains a **non-exhaustive** list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors indicating higher culpability
<i>Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence).</i>
<i>Child or the elderly, the sick or disabled at home (or return home) when offence committed</i>
<i>A significant degree of planning, or organization or execution. Offence committed at night.</i>
<i>Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.</i>
<i>Equipped for burglary (for example, implements carried and/or use of vehicle)</i>
<i>Member of a group or gang</i>
Factors indicating lower culpability
<i>Offence committed on impulse, with limited intrusion into property or little or no planning</i>
<i>Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure</i>
<i>Mental disorder or learning disability, where linked to the commission of the offence</i>

[78] The following table contains a **non-exhaustive** list of aggravating and mitigating factors relating to the offender. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
Statutory aggravating factors:	<i>Genuine remorse displayed, for example the offender has made voluntary reparation to the victim</i>
<i>Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current</i>	<i>Subordinate role in a group or gang</i>
	<i>No previous convictions or no relevant/recent convictions.</i>

<i>offence; and b) the time that has elapsed since the conviction</i>	
<i>Offence committed whilst on bail or parole.</i>	<i>Cooperation with the police or assistance to the prosecution</i>
Other aggravating factors include:	<i>Good character and/or exemplary conduct</i>
<i>Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution</i>	<i>Determination, and/or demonstration of steps taken to address addiction or offending behavior</i>
<i>Established evidence of community impact</i>	<i>Serious medical conditions requiring urgent, intensive or long-term treatment</i>
<i>Commission of offence whilst under the influence of alcohol or drugs</i>	<i>Age and/or lack of maturity where it affects the culpability and responsibility of the offender</i>
<i>Failure to comply with current court orders</i>	<i>Lapse of time since the offence where this is not the fault of the offender</i>
<i>Offence committed whilst on licence</i>	<i>Mental disorder or learning disability, where not linked to the commission of the offence</i>
<i>Offences Taken Into Consideration (TICs)</i>	<i>Any other relevant personal considerations such as the offender being sole or primary care giver for dependent relatives or has a learning disability or mental disorder which reduces the culpability</i>

15. When the above case authority is taken into consideration the final sentence is within the tariff but on a higher scale. A perusal of the sentence shows that the appellant was a first offender, had pleaded guilty at the earliest opportunity and was remorseful of what she had done. Considering the harm caused to the victim the offending falls under low category which has a sentence range of 6 months to 3 years imprisonment.

16. This court has also taken into account the observations made by the Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 of the judgment that an appellate court does not use the same methodology of sentencing as the sentencing court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by determining the facts the sentence was unreasonable or unjust. The court made the following observations:

“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 being 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.”

17. In this case the learned Magistrate relied on a wrong tariff which led to an excessive sentence considering all the circumstances of the offending. Furthermore, there was no specific reason given as to why the sentence of 2 years imprisonment was not suspended. The appeal against sentence is allowed.

18. In the interest of justice and in accordance with section 256 (3) of the Criminal Procedure Act it is only fair and justified to quash the sentence ordered by the Magistrate's Court and vary it to 1 year and 8 months imprisonment being low category of offending as per *Kumar's* case (supra) after taking into account the appellant's early guilty plea, remorse shown, good character and other mitigating factors.
19. It is to be noted that this case has an unusual factual matrix with nothing stolen, the appellant did not leave the house of the victim when the victim told her to sit and wait for the police to come. The appellant continued the same cooperation with the police during her caution interview. The purpose of a sentence in such a scenario is not to destroy the offender but to allow for rehabilitation. What the appellant did was no doubt out of character, by pleading guilty she had shown a genuine desire to reform herself, keeping her incarcerated is not the answer in such circumstances.
20. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
21. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by

the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7: "Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

22. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.


23. The appellant is a young offender (21 years of age at the time of the offending), is of good character, isolated offence was committed by her due to her sheer stupidity, had pleaded guilty at the earliest opportunity, is remorseful, cooperated with police and she takes full responsibility of her actions. These special reasons render an immediate imprisonment term inappropriate.

24. The appellant has served more than six months imprisonment which is enough punishment for her wrong doing and a lesson for the appellant to respect the law at all times. In view of the above, this court has taken rehabilitation over and above retribution. The appellant is lucky that the learned Magistrate did not take breach of trust by the appellant as an aggravating factor. The appellant and the victim were known to each other and on one occasion whilst it was raining he had provided her and her 2 year old son with one night shelter at the same house where the offending took place and had also purchased groceries for her to take home.
25. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a suspended sentence is just in all the circumstances of this case.
26. In summary the appellant is sentenced to 1 year and 8 months imprisonment which is suspended for 3 years. The effect of the suspended sentence is explained to the appellant. The following orders are to take effect immediately.

ORDERS

1. The appeal against sentence is allowed.
2. The sentence of the Magistrate's Court is quashed and set aside.
3. The appellant is sentenced to 1 year and 8 months imprisonment which is suspended for 3 years;
4. The appellant is to be immediately released from the Corrections Center.

5. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

23 May, 2024

Solicitors

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.