IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 36 of 2024

BETWEEN : MANASA RAYASIDAMU
Appellant

AND : STATE
Respondent

Counsel : Mr S Ravu for Appellant
Mr L Tuivuya for the Respondent

Hearing : 24 January 2025
Judgment : 13 March 2025

JUDGMENT

[1] Mr. Rayasidamu appeals from his sentence. He received custodial sentences of 23 months and 9 days, and 27 months and 9 days, the two sentences to be served consecutively. Mr Rayasidamu claims that he ought to serve the two sentences concurrently.

Background

[2] On 11 May 2024, Mr. Rayasidamu broke into the home of the three victims (a husband and wife and their teenage daughter). The victims were not home at the time. Mr Rayasidamu proceeded to steal a considerable number of expensive items, being mainly jewelry and computer equipment. The occupants returned home later to find that their property stolen. The matter was reported to the police. Only a matter of days later, Mr.

Rayasidamu was discovered selling the stolen property. He was arrested and charged. A number of the stolen items were recovered. Mr Rayasidamu made full admissions in the police interview.

[3] On 20 May 2024, Mr Rayasidamu was charged with four counts, the first count being burglary while the second, third and fourth counts were for theft in respect to the stolen items – each count pertaining to the theft of each of the 3 victims. Mr. Rayasidamu was produced before the Magistrates Court the same day, on 20 May, and pleaded guilty to counts 1 and 2. He was sentenced on 17 June 2024 on the two counts to 23 months and 9 days imprisonment (1 year, 11 months and 9 days).

[4] The charge for counts 3 and 4 was amended on 4 July 2024 – the total value of the items stolen for these two counts was reduced. Mr. Rayasidamu pleaded guilty to the two counts in the amended charge and was sentenced on 8 August 2024 to 27 months and 9 days imprisonment (2 years 3 months and 9 days). The learned Magistrate determined that the sentence should be served consecutively to the sentence on 17 June 2024. The learned Magistrate also imposed a non-parole period of 2 years.

[5] The present appeal was filed on 3 September 2024.

Sentences delivered by learned Magistrate

[6] The first sentence was delivered on 17 June 2024. The learned Magistrate noted that the total value of the items stolen was $8,120 – 1 Apple MacBook had been recovered. The learned Magistrate referred to the fact that the appellant had 22 previous convictions, 12 of which were for similar offending. After setting out the tariff for burglary and theft, the learned Magistrate identified a starting point of 36 months for each count (ie 1 and 2), adding 6 months for each for aggravating factors, being '*the non-recovery of the items*', resulting in a figure of 42 months.

[7] With respect to mitigating factors, the learned Magistrate referred to the age of the appellant (31 years) and the fact that he had cooperated with the police and admitted his offending. Six months was deducted, taking the sentence to 36 months for each count - a further 12 months (one third) deduction was made for the early guilty plea. The

result was a sentence of 24 months which was further reduced for time spent in remand, being 21 days, resulting in a sentence of 23 months and 9 days imprisonment for each count. The two counts were to be served concurrently. The learned Magistrate considered whether to suspend the sentence but declined to do so due to the appellant's previous offending.

[8] The sentence delivered on 8 August 2024 was in respect to counts 3 and 4 – the theft of the property from the other two occupants of the house. The items stolen in count 2 had a total value of $13,599. The items stolen in count 4 had a total value of $4,770. The items that were recovered had a total value of $6,260. Thus, the total value of the items stolen and not recovered was about $12,200. Again, the learned Magistrate identified a starting point of 3 years. On this occasion 12 months was added for non-recovery of items (aggravating factors) taking the sentence to 48 months. Mitigating factors reduced the sentence by six months to 42 months and then a further third remission of 14 months for the early guilty plea - resulting in a sentence of 28 months imprisonment (2 years and 4 months). The period of 21 days for time spent in remand reduced the final sentence to 27 months and 9 days imprisonment (2 years, 3 months and 9 days). Counts 3 and 4 were to be served concurrently but the sentence was to be served consecutively with the earlier sentence on 17 June 2024.

Appeal – law and principles

[9] This Court's powers on an appeal are set out at s 256(2). It may confirm, reverse or vary the Magistrates Court's decision. It may remit the matter back to the Magistrates Court or make such order as it considers just, including exercising any power that the Magistrate might have exercised. It may quash the sentence of the Magistrates Court and impose another sentence warranted in law. Finally, the Court may also receive additional evidence on appeal if considered necessary.[1]

[10] The approach that a court must apply to appeals on sentence was set out as follows by the Supreme Court in *Naisua v State* [2013] FJSC 14 [20 November 2013]:

[1] Section 257(1).

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 number AAU 0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that 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.

[11] In *Sharma v State* [2015] FJCA 178 (3 December 2015), the Court of Appeal stated at [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.

Decision

[12] The issue in this appeal is narrow. Mr Rayasidamu's appeal is against the sentence and confined to the order of the learned Magistrate that his two sentences are to be served consecutively. He contends that the learned Magistrate erred in doing so and ought to have ordered that the sentences be served concurrently.

[13] Before considering the issue raised by the appellant, two matters require addressing. These are:

i. The learned Magistrate added 6 months[2] and 12 months[3] to the appellant's sentence for non-recovery of the stolen property on the basis that these are aggravating factors. As Aluthge J stated in *Turaga v State* [2018] FJHC 1021 (22 October 2018):

> *20. It is trite law that, for offences involving theft and robbery, recovery of stolen items acts as a mitigating factor. However, the non-recovery of stolen items is not considered as an aggravating factor to enhance the sentence.*
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> *21. In **Sairusi Soko v State,** Criminal Appeal Case No. HAA 031 of 2011 (29 November, 2011) Madigan J. at paragraph 7 stated:*
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> > *"Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature."*

The non-recovery of stolen property is not an aggravating factor and should not have led to an increase in the appellant's sentence.

ii. The learned Magistrate made a deduction of 21 days for time already spent on remand from the time of arrest up to the date of the first sentence on 17 June 2024. It is not clear how this time was arrived. By my calculation, the time on remand was either 27 days or 30 days, running from 17 May or 20 May to 17

[2] To the sentence on 17 June 2024.
[3] To the sentence on 8 August 2024.

June 2024. The appellant was interviewed by the police on 17 May 2024 and it is unlikely he will have been released between that date and the date he was first produced in the Magistrates Court on 20 May 2024. I am, therefore, inclined to calculate the time in remand as being 30 days (1 month).

[14] I turn to the issue raised by the appellant. Did the learned Magistrate err in deciding that the two sentences should be served consecutively?

[15] Section 22 of the Sentencing and Penalties Act 2009 requires the court to order a sentence to be served concurrently with a sentence already being served. There are two exceptions. Firstly, where the offender comes within s 22(2) – Mr Rayasidamu does not. Secondly, '*unless otherwise directed by the court*'. The learned Magistrate exercised her discretion here to require the two sentences be served consecutively. Was the power under s 22(1) exercised appropriately?

[16] The Supreme Court considered the provision in *Vaqewa v State* [2016] FJSC 12 (22 April 2016). Gates P stated:

> *[31] I have set out earlier section 22(1) of the Sentencing and Penalties Decree. In deciding to direct otherwise from the purport of that section, a court ought to state its reasons for doing so. That at least would be the best practice approach, if not a requirement under the section. Here the single judge found reason enough in that "the consecutive sentence was justified to protect the community."*
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> *[32] Ground (ii) raises the question of the* ***totality principle****. This aspect of the case was not weighed in the sentencing judgment of the learned Magistrate.* ***It is an important consideration not least when considering whether to depart from the new norm of ordering concurrent sentences under section 22 unless there are reasons to do otherwise.***[4]

[17] Keith J further noted, in the same decision, at [42]:

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[4] My emphasis.

... the magistrate did not give any reasons for doing that. I agree with the Chief Justice that there was no legal requirement on him to do that, but best practice makes the giving of reasons highly desirable, and I hope that magistrates will do so in every case.

[18] Rajasinghe J provided the following remarks on the exercise of the discretion under s 22(1) in *Rasalatubalevu v State* [2022] FJHC 737 (23 November 2022):

> 6. *The Fiji Court of Appeal in Tuibua v State [2008] FJCA 77; AAU0116.2007S (7 November 2008) has discussed the applicable approach in imposing consecutive sentences. The Fiji Court of Appeal in Tuibua (supra) said that:*
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> > *"The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. A* ***sentencer who imposes consecutive sentences for a number of offences must always review the aggregate term and consider whether it is just and appropriate when the offences are looked at as a whole. A sentencer must always have regard to the totality of the sentence that is going to be served so as to ensure it is not disproportionate to the totality of the criminality of the offences for which the offender is to be sentenced*** *(Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59; R v Stevens (1997) 2 Cr.App.R. (S.) 180). When a sentencer imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentencer should also consider the propriety of the aggregate sentence taken as a whole (R v Jones [1995] UKPC 3; (1996) 1 Cr.App.R. (S.) 153, R v Millen (1980) 2 Cr.App.R. (S.) 357 and Nollen v Police [2001] SASC 13; (2001) 120 A Crim R 64)."*

7. *Considering the principles enunciated in Tuibua (supra), the Court has to consider the propriety of the aggregate sentence as a whole when the Court is imposing a consecutive sentence to an Accused who is already serving a term of imprisonment in relation to another matter. Accordingly, the Court is required to consider the totality of the aggregate sentence.* ***The totality principle in sentencing encompasses two main elements. The first is proportionality between the sentence and the offence. The second element is that the Court should not impose a crushing sentence****. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: (Martino v Western Australia [2006] WASCA 78 [16]).*

8. *The Supreme Court in Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC) [2018] FJSC 4: CAV0014.2017 (26 April 2018), discussed the totality principle and one transaction rule within the context of imposing consecutive sentence, where Marsoof J held that:*

> *"[68] The learned judge has given consideration to the theories involved in the imposition of consecutive sentences as stated by Pathik J in Visa Waga v The State [2003] FJHC 138 (23 September 2003) that, "The power to order sentences to run concurrently is subject to two major limiting principles, which may be called the "one transaction rule" and the "totality principle" (Thomas; Principles of Sentencing 2nd Ed pg. 53).* ***It does not mean that consecutive sentences cannot be imposed, so long as the overall sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of the aggravating features*** *(Regina v Johnson, The Times 22 May 1995).*
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> *[69] The totality principle basically means that when a court passes a sentence with a number of consecutive sentences, it should review the aggregate or the totality of the sentences and consider whether the "total" is just appropriate when*

> *considering the "offences" as a whole. As Jiten Singh J said in Namma v The State [2002] FHHC 171 (6 September 2002), the application of this principle does not mean that there is judicial conduct offering for "multiple offending" or encourages offenders to continue offending, after a serious crime, with the impression that there is little to lose. It must always be made clear that the more the number of crimes and the more the gravity of those crimes, the longer the sentence is to be recorded.*
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> *[70] **The totality principle is that consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences viewed as a whole** (R v Bradley [1979] NZCA 33; (1979) 2 NZLR 262 at 263). When a Judge is faced with the task of sentencing for multiple offences, as an initial step he is required to identify the appropriate sentence for each offence and then as the final step, to **achieve a total sentence appropriate to the overall culpability of the accused** (HKSAR v Ngai Yiu Ching [2011] 5 HLRD 690, par 13).*[5]

[19] The learned Magistrate provided the following reasons in her Sentence of 8 August 2024 for requiring the appellant to serve the two sentences consecutively:

> *I also order that this term be served consecutively to the current serving term. The reason I make this order is to ensure rehabilitation. You had pleaded guilty to count 1 and 2 to which you are currently serving but I consider the seriousness of what you did. The value of the items that you stole from the two complainants' amounts to a total of $31,868 out of which only $6,260 value of items recovered, a balance of $25,608 not recovered. You have deprived the two complainants of their personal belongings and items purchased from their hard work. I also consider that the term is the bare minimum to the tariff of Ratusuli v State (supra) for large and opportunistic thefts. Your previous conviction*

[5] My emphasis.

record dated back to 2016 shows that you have been charged and sentenced for theft and burglary continuously in 6 consecutive years. Last conviction was in 2020. Some 4 years later you have re-offended, which shows that you are a threat to the community.

[20] There are, in my view, several problems with the learned Magistrate's reasoning. These are:

i. The Magistrate relied on inaccurate facts. The total value of the items stolen from the two complainants in counts 3 and 4 was about $18,400, not $31,868. Less the value of the items recovered, the amount was about $12,200, not $25,608. The correct value was about half that identified by the learned Magistrate, a significant difference.

ii. The learned Magistrate indicated that one of the reasons justifying the order was '*to ensure rehabilitation*'. In the usual course, where a court desires to encourage rehabilitation, it does so to exercise leniency. Similarly, where the court describes the offending as opportunistic as opposed to planned, it is to show that the offender's culpability is at the lower end. The short point being, that these are factors supporting a concurrent order, not a consecutive order.

iii. There is no consideration of the totality principle, ie whether the total sentence of 4 years 4 months imprisonment is appropriate for the offending.

iv. It also bears noting that it is somewhat incongruous for a sentence to involve concurrent sentences between counts 1 and 2 and between counts 3 and 4 yet consecutive sentences between the first 2 counts and second 2 counts. This is no doubt a consequence of delivering two separate sentencing decisions on the same charge rather than sentencing the offender once the outcome is known for all the counts.

[21] In my view, the learned Magistrate erred in acting on a wrong principle (applying factors that did not support a consecutive order), mistaking the facts (being the value of

the items stolen) and failing to take into account relevant considerations (the totality principle).

[22] Ultimately, the totality principle is the most important consideration in determining whether to interfere with the learned Magistrate's sentence. The net effect of the learned Magistrates' order is that the two sentences are be served consecutively, resulting in a total sentence of 4 years 4 months imprisonment. There is no getting past the fact that all 4 counts pertain to the one criminal transaction, the burglary of one house, stealing personal property from the 3 occupants of that house. A sentence of 4 years 4 months imprisonment is at the high end on the facts of this case and, in my view, outside of the permissible range.

[23] In light of the above, it is necessary for this Court to consider afresh the sentence for the appellant. I will consider all 4 counts together. Given the 4 counts are founded on the same facts I will take an aggregate sentence.[6] I concur with the learned Magistrate that a starting point of 36 months imprisonment is reasonable – it is in line with the medium category for harm for burglary. The main aggravating factor here is the appellant's previous convictions for similar offending (12 convictions over 5 years). An additional 12 months is reasonable, taking the sentence to 48 months. Mitigating factors include the appellant's relatively young age (31 years) and his cooperation with the police. The figure of 6 months, used by the learned Magistrate, is fair resulting in a sentence of 42 months. The one third remission for the early guilty plea (14 months) takes the sentence to 2 years and 4 months imprisonment.[7] Deducting 1 month for time already spent in remand takes the sentence to 2 years and 3 months imprisonment. In my view, this is an appropriate sentence for Mr Rayasidamu's offending on 11 May 2024.

[24] Finally, I agree with the learned Magistrate that this is not a suitable case to suspend the appellant's sentence. The fact of his numerous previous offending is reason enough. He has already been the beneficiary of multiple suspended sentences yet has not learned his lesson.

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[6] Section 17 of Sentencing and Penalties Act 2009.

[7] I note that this is the sentence arrived at by the learned Magistrate on 8 August 2024, albeit erroneously using non-recovery of stolen property as an aggravating factor.

Orders

[25] My orders are as follows:

i. The appeal is allowed and the learned Magistrates' sentences of 17 June 2024 and 8 August 2024 are quashed.

ii. I substitute my own sentence for Mr Rayasidamu on the 4 counts. He is sentenced to 2 years and 3 months imprisonment with a non-parole period of 1 year and 9 months. The sentence is to commence from 17 June 2024.

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

D. K. L. Tuiqereqere

JUDGE

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent