

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. 38 of
2018 (on appeal from Sigatoka
CC67/16)

KAMINIELI SALITAVA

Appellant

V

STATE

Respondent

Miss K. Vulimainadave (L.A.C.) for the Appellant
Mr. S. Babitu for the State

Date of Hearing : 8 November 2018

Date of Judgment : 16 November 2018

JUDGMENT

- 1.] On the 30th May 2018 the Appellant was convicted after trial in the Magistrates Court at Sigatoka of one count of burglary contrary to section 312(1) of the Crimes Act 2009, one count of theft contrary to section 291(1) of that Act and one count of Breach of Bail Condition contrary to section 2 of the Bail (Amendment) Act of 2012.

- 2.] On the 11th June 2018, he was sentenced to a term of imprisonment of 3 years and 2 months. No minimum term was imposed.
- 3.] The Appellant now appeals that sentence on the grounds that he was not afforded a discount for the time he had already spent in custody before sentence. In reply, the State concedes the remand period omission but asks in return that a minimum term be imposed.
- 4.] It is stipulated in s.24 of the Sentencing and Penalties Act 2009 that anytime a convict has spent in custody prior to conviction shall be regarded by the Court as a period of imprisonment already served.
- 5.] It is common practice in the Criminal Courts to deduct such a period in custody as a final discount in the sentencing process. This practice has been approved of by the Supreme Court in **Apakuki Sowane** CAV 0038/15.
- 6.] This concession to the Appellant was not made when he was sentenced and it must be remedied. The appellant submits that the period in question is 17 days and the State in conceding this ground submits that it was 31 days.
- 7.] This Court gives the Appellant the benefit of the longer period submitted and his sentence is accordingly reduced from 3 years and 2 months to 3 years and one month.
- 8.] To that extent this appeal against sentence succeeds.
- 9.] Counsel for the State asks that a non-parole period be imposed. The Magistrate did not impose one and he failed to address the matter at all.

10.] Section 18(1) of the Sentencing and Penalties Act 2009 provides that after passing a sentence of 2 years or more the Court **must** fix a period during which the offender is not eligible to be released on parole. (Emphasis added). A proviso stated in subsection (2) is that if the Court is of the opinion that the nature of the offence or the past history of the offender would make the fixing of a non-parole period inappropriate, the Court may decline to fix such a period.

11.] It is appropriate at this point to rehearse the terms of section 19(1) of the Sentencing and Penalties Act 2009.

19-(1) The failure of the sentencing court to fix a non-parole period under s.18 does not invalidate the sentence but any court hearing an appeal against the sentence may fix a non-parole period in accordance with section 18.-(2) (irrelevant to this appeal).

12.] The sentencing court did not fix a non-parole term and did not give any reasons why the nature of the offence or the history of the offender would preclude him from doing so. This Court therefore in terms of s.19(1) of the Act proceeds to set such a term.

13.] The new sentence of the Appellant is a term of imprisonment of 3 years and one month and he will serve a minimum term of 2 years and 6 months before he is eligible for parole.

14.] Orders:

1. This appeal against sentence succeeds.
2. The Appellant is to serve a new sentence of imprisonment of 3 years and one month dated from 11 June 2018.
3. He is to serve a minimum term of 2 years and 6 months before being eligible for parole.



A handwritten signature in blue ink, appearing to read "P.K. Madigan".

.....

P.K. Madigan
Judge
High Court Lautoka

16th November 2018