

IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 53 OF 2018

NADI MAGISTRATES COURT NO. 1220 OF 2016

BETWEEN : AIYAZ ALI DEAN

APPELLANT

AND : STATE

RESPONDENT

Counsel: Appellant in Person

Mr J. Niudamu for Respondent

Date of Hearing: 6 September, 2018

Date of Judgment: 10 September, 2018

JUDGMENT

1. This is an appeal filed by the Appellant against the sentence imposed on the Respondent by the Learned Magistrate at Nadi in the Criminal case No. 1220 of 2016.
2. The Appellant was charged with one count of Escaping from lawful Custody under Section 196 of the Crimes Act, 2009.
3. The Appellant was first produced before the Magistrates Court on 29th November, 2016. He pleaded 'not guilty' when the charge was read on 13th January, 2017 and made an application of transfer the case to the Chief Magistrate. On 28th July, 2017, the Appellant was permitted to withdraw his not guilty plea. When the charge was read again, the Appellant pleaded guilty to the charge on his own free will. The learned Magistrate convicted the Appellant and, on the 23rd July, 2018, sentenced the Appellant to 3 months and 29 days' imprisonment.

Grounds of Appeal

4. The Appellant has filed this timely petition of appeal against the sentence imposed by the learned Magistrate on following two grounds.
 - i. That the sentence of 3 months 29 days imprisonment for an offence of Escaping from Lawful Custody is totally harsh, manifestly excessive and wrong in principle in all the circumstance of this particular case.
 - ii. That the Learned Magistrate erred in law and in fact, in taking irrelevant matters and issues into consideration while sentencing the appellant.
 - iii. That the 8 months 2 days (Remand period) and the final sentence of 3 months 29 days, total sentence of 12 months imprisonment to be served by

the appellant is indeed harsh and wrong in principle as the 12 months sentence is at the highest end of the tariff.

- iv. That the Learned Magistrate totally ignored the "Four Classical Principle of Sentencing" in sentencing the appellant.

Law

5. In *Kim Nam Bae v The State* [AAU0015 of 1998S (26 February 1999) the Court of Appeal described the law relating to an appeal against sentence. The court said;

"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 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)."

6. The Appellant agreed the following facts in the Magistrates Court:

On the 24th day of November, 2016 at about 4.00 pm at the Legal Aid Office, Nadi Town, complainant was escorting accused to the Legal Aid Office through the order of the Resident Magistrate Mr Turaga vide CF 898/16 and 533/16 for ruling on 05/12/16. The accused wanted to use the restroom and after a long time waiting, the Police Officer called accused but there was no response and he forcefully opened the door noted that accused had escaped through the window and jumped on Modern Glass

and Mirror and went out at the industrial area near Tappoos Warehouse. The complainant reported the matter at Nadi Police Station where the search party led by Cpl. 3071 Kini conducted the search for the likely whereabouts of accused with negative results. Later, accused was arrested in Lautoka by the Crime Intelligence team and brought to Nadi Police Station. At Nadi Police Station he was cautioned interviewed by SO/Nadi A/W/IP Savita Naicker and accused admitted escaping from the lawful custody of the complainant. He was charged for the offence of Escaping from Lawful Custody contrary to Section 196 of the Crimes Act.

Analysis

7. All the grounds of appeal can be conveniently considered together.

8. The maximum sentence prescribed for Escape from Lawful Custody under Section 196(1) is 2 years imprisonment. The learned Magistrate at paragraph 4 of his sentencing Ruling wrongly stated that the offence carries 5 years imprisonment.

9. However, the learned Magistrate correctly cited the tariff as being between 6-12 months' imprisonment and picked a starting point of 6 months.

10. In *Tuibua v State* [2008] FJCA 77; AAU0116.2007S (7 November 2008) The Court of Appeal set out the tariff for Escape Offences under the Penal Code. At paragraphs 12 and 13 the Court held:

"Escaping from lawful custody is a misdemeanor. It is an offence under the provisions of s138 of the Penal Code. The maximum penalty is not prescribed in

s138 but by virtue of the provisions of s47 of the Penal Code, which section prescribes penalties for misdemeanors, the maximum penalty for this offence is stated to be two years imprisonment.

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"

11. Having picked a string point at the middle range of tariff, the learned Magistrate increased the sentence by 9 months to account for aggravating factors and reduced 3 months for personal mitigation to arrive at a sentence of one year. He deducted the remand period of 8 months and 2 days to arrive at a sentence of 3 months and 29 days' imprisonment.
12. At paragraph 11 of the sentencing Ruling, the learned Magistrate made the following remark to aggravate the sentence:

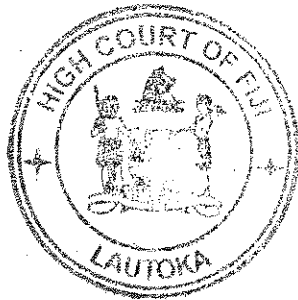
“The aggravating factor were the lack of respect for the judicial system when you were ordered by the court to be escorted to legal Aid to assist your case and you escaped from therein a search was done for your arrest and in doing so, affect the already depleted manpower and financial resources of the police to arrest you”

13. The lack of respect for the judicial system is already subsumed in the offence when a remandee escapes from lawful custody. There was no evidence for the learned Magistrate to conclude that the police had spent manpower and financial resources to arrest the Appellant. Therefore, the learned Magistrate had taken into account some irrelevant matters to increase the sentence by 9 months.
14. The 12 months’ imprisonment at the top end of the tariff without substantial aggravating factors is harsh and excessive.
15. I therefore, exercising powers conferred on this court under Section 256(3) of the Criminal Procedure Act, quash the sentence imposed by the learned Magistrate at Nadi on 23rd July, 2018 and proceed to sentence the Appellant afresh.
16. I pick a starting point of 8 months, having considered the gravity of the offence. The Appellant did not plead guilty to the charge at the first instance and made a frivolous application to transfer the matter to the Chief Magistrate without a valid reason. The matter was called before the learned Magistrate for 21 times and the Appellant eventually decided to plead guilty to the charge. The learned Magistrate disbelieved his claim of remorse. However, he had given a discount of 3 months to account for his personal circumstances, which I think was not warranted in this case. Therefore I would not give any discount for his personal circumstances. His sentence is 8 months’ imprisonment with effect from 23rd July, 2018.

17. The Appellant had already spent 8 months and 2 days in remand from 29th November 2016. Therefore the Appellant is entitled to be released immediately because his remand period should be considered as part of his sentence.

18. Following Orders are made:

- i The appeal is allowed;
- ii The sentence imposed on 23rd July, 2018 by the learned Magistrate at Nadi is quashed;
- iii The Appellant is ordered to be released immediately.





Aruna Aluthge

Judge

At Lautoka

10th September, 2018

Counsel:

- Office of the Director of Public Prosecution for Appellant
- Legal Aid Commission for Respondent