

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE MAGISTRATES COURT  
*exercising extended jurisdiction of the High Court*

CRIMINAL APPEAL AAU 165 of 2017  
(High Court HAC 40 of 2015)  
(Magistrates Court No.5 of 2016 at Nasinu)

BETWEEN : SAMEER KUMAR

*Appellant*

AND : THE STATE

*Respondent*

Coram : Calanchini P

Counsel : Mr M Yunus for the Appellant  
Mr R Kumar for the Respondent

Date of Hearing : 9 July 2018

Date of Ruling : 13 July 2018

RULING

[1] The appellant and two others were charged with one count of aggravated burglary and one count of theft contrary to sections 313(1)(a) and 291(1) respectively of the Crimes Act 2009. The appellant pleaded guilty on 23 October 2017 in the Magistrates Court at

Nasinu exercising extended jurisdiction of the High Court. On 13 November 2017 the appellant was sentenced to 5 years imprisonment with a non-parole term of 1 year. The appellant filed a timely notice of appeal against sentence on 5 December 2017.

[2] The appeal is brought under section 21(1)(c) of the Court of Appeal Act 1949 (the Act). Leave to appeal is required. Under section 35(1) of the Act a single judge of the Court has the jurisdiction to grant leave to appeal. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] The background facts may be stated briefly. Sometime between 6.00pm on 31 December 2015 and 6.00pm on 1 January 2016 the appellant entered the complainant’s residence and stole a Sony Brand Playstation valued at \$1,300.00, a Sharp Brand Led TV valued at \$1,300.00, a Philips Home Theatre system valued at \$1,500.00 and 1 pair of Puma canvas valued at \$200.00. The total value of goods stolen was \$4,300.00 belonging to the complainant. At the time of the burglary and theft the complainant and his family were away and the residence was vacant. The appellant and the two others entered the premises by breaking the padlock and entering through the front door.

[4] The appellant was arrested and interviewed under caution. The appellant admitted committing the offences. At the hearing in the Magistrates Court the appellant admitted the summary of the facts.

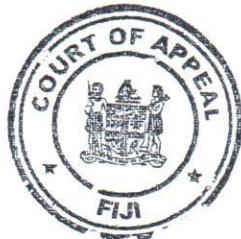
[5] The appellant relies on two grounds of appeal:

- “1. *The learned sentencing Magistrate erred in his sentencing discretion to direct himself to the sentencing tariff of the offence of aggravated robbery while sentencing the appellant for the offence of burglary.*
2. *The sentence is harsh and excessive taking into account all the circumstances of the matter.”*

- [6] It is apparent from the sentencing decision that the learned Magistrate has proceeded to sentence the appellant for the offence of aggravated robbery when he had been charged with aggravated burglary and had pleaded guilty to that offence. It is arguable that the sentencing discretion has miscarried.
- [7] The tariff for aggravated burglary is regarded as being between 18 months and 3 years. The Magistrate has not given cogent reasons for the sentence being well above the accepted tariff. It is arguable that the sentencing discretion has miscarried on the second ground. [State –v- Aumaile [2018] FJHC 196; HAC 8 of 2018, 16 March 2018]. The appellant’s application for bail pending appeal was not pursued and is marked as withdrawn and dismissed.
- [8] Leave to appeal against sentence is granted and the appeal is to be listed for callover on 6 August 2018 for a hearing date in the September session of the Court.

Orders

1. *Leave to appeal against sentence is granted.*
2. *Application for bail pending appeal is dismissed.*
3. *Appeal listed for callover on 6 August 2018.*
4. *Appeal to be listed for hearing in September session of the Court.*



*W. Calanchini*  
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Hon Mr Justice W. D. Calanchini  
PRESIDENT, COURT OF APPEAL