

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NOs. HAA 7 of 2017, 08 of 2017, 09 of 2017, 10 of 2017, 11 of 2017 and 12 of 2017

BETWEEN : **ISEI DONUMAIVANUA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. V.T. Narara for the Appellant.
: Ms. S. Kiran for the Respondent.

Date of Hearing : 5 December, 2017
Date of Judgment : 19 December, 2017

JUDGMENT

BACKGROUND INFORMATION

1. The Appellant was charged in the Magistrate's Court for one count of Burglary contrary to section 312 (1) of the Crimes Act and one count of Theft contrary to section 291 (1) of the Crimes Act in six separate files.

2. On 4th October, 2016 the Appellant who was represented by counsel pleaded guilty to both counts in criminal case nos. 529, 533 and 534 of 2016.

a). Criminal case no. 529 of 2016

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 5th day of May, 2016 at Nadi in the Western Division, entered into the dwelling house of Roneel Singh as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 5th day of May, 2016 at Nadi in the Western Division dishonestly appropriated 1 x pair Nike canvas valued \$170.00, 1 x 22ct gold chain valued at \$150.00, 1 x 1 gram gold Mangal Sutra valued \$150.00, 8 piece kitchen knife valued \$23.92, 1 x crystal gold chain valued at \$270.00, 1 x Mums wedding band 9ct valued at \$170.00, 1 x 18ct bracelet valued \$220.00, grey laptop bag valued \$35.00, assorted clothes valued at \$150.00 and \$470.00 cash all to the total value of \$1788.92 the property of Roneel Singh.

Summary of Facts

The following summary of facts was admitted by the Appellant:

“Count 1

On the 05th day of May, 2016 between 7.40am to 7pm Isei Donumaivanua 35 yrs [Accused] unemployed of Utulei settlement, Korovuto broke and entered into the dwelling house of Roneel Singh 27 years [Complainant] security officer of Korovuto, Nadi as a trespasser with intent to steal.

Count 2

On the 5th day of May, 2016 between 7.40am to 7pm Isei Donumaivanua 35 yrs [Accused] unemployed of Utulei Settlement, Korovuto broke and entered into the dwelling house of Roneel Singh 27 years [Complainant] security officer of Korovuto, Nadi stole 1 x pair Nike canvas valued \$170.00, 1 x 22ct gold chain valued at \$150.00, 1 x 1 gram gold Mangal Sutra valued \$150.00, 8 piece kitchen knife valued \$23.92, 1 x crystal gold chain valued at \$270.00, 1 x Mums wedding band 9ct valued at \$170.00, 1 x 18ct bracelet valued \$200.00, 1 x grey laptop bag valued \$35.00, assorted clothes valued at \$150.00 and \$470.00 cash all to the total value of \$1788.92 the property of Roneel Singh.

On the above mentioned date complainant left out for work together with his wife and there was no one at home. Upon his return from work he saw that his bedroom window screen was forcefully opened. Complainant went inside his house and found that the house has been ransacked, kitchen door damaged and the above mentioned items stolen.

Recovery: 1 x pair Nike canvas, assorted clothes, grey laptop bag

Accused was interviewed under caution whereby he admitted the allegation ref to questions and answers 63 to 105. He is charged with one count of Burglary and Theft.

b). Criminal case no. 533 of 2016

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 13th day of May, 2016 at Nadi in the Western Division, entered into the dwelling house of Jiteshni Mala as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 13th day of May, 2016 at Nadi in the Western Division dishonestly appropriated 1 x HP Laptop valued at \$2000.00, 1 x Cordless Mouse valued at \$50.00, 1 x Vodafone 4G WIFI valued at \$125.00, 1 x Gold Necklace valued at \$2000.00 and \$200.00 cash all to the total value of \$4, 375.00 the property of Jiteshni Mala.

Summary of Facts

The following summary of facts was admitted by the Appellant:

“Count 1

On the 13th day of May, 2016, at Nadi in the Western Division, one Isei Donumaivanua [B-1] 35 years unemployed of Korovuto Nadi broke and entered in to the dwelling house of Jiteshni Mala [A-1] 37 years, School Teacher of Navo, Nadi as a trespasser with intent to commit Theft.

Count 2

“On the 13th day of May, 2016 at Nadi in the Western Division, one Isei Donumaivavua [B-1] 35 years, unemployed of Korovuto, Nadi dishonestly appropriated 1 x HP Laptop valued at \$2000.00, 1 x Cordless Mouse valued at \$50.00, 1 x Vodafone 4G Pocket WIFI valued at \$125.00, 1 x Gold Necklace valued at \$2000.00 and \$200.00 cash of \$200.00 all to the total value of \$4, 375.00 the property of Jiteshni Mala.

On the 13th day of May, 2016 at about 4pm [A-1] left her home and went to Suva before she left, she send her two sons to stay with her mother which [was] not far from her place, and as a result her house was vacant.

At about 8.30pm [A-1] received a phone call from one of her son that [their] house had been broken into. On 14th day of May, 2016 at about 12am [A-1] returned home where she noticed that the kitchen window had been broken in to and the above mentioned items stolen.

Investigation in this matter conducted where through information received [B-1] was located and during interrogation he stated that he sold the HP Laptop together with its bag containing the cordless Mouse and the Vodafone Pocket WIFI to Peni Lotawa [A-2] 40 years labourer of Togo Lavusa, Nadi.

Sub- recovery

1 x HP Laptop valued at \$2000.00.

1 x cordless Mouse valued at \$50.00.

1 x Vodafone Pocket WIFI valued \$125.00.

All the above mention recovery was positively identified by [A-1].

[B-1] was interviewed under caution where he admitted breaking the house of [A-1] in reference to question and answers 41 to 61 of his caution interview. [B-1] was formally charge one count of Burglary and one count of Theft and appears in custody for court.”

c). Criminal case no. 534 of 2016

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 3rd day of May, 2016 at Nadi in the Western Division, entered the dwelling house of Roshni Devi as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 3rd day of May, 2016 at Nadi in the Western Division dishonestly appropriated 1 x 22ct gold ring valued \$200.00 and \$50.00 cash all to the total value of \$250.00 the property of Roshni Devi.

Summary of Facts

The following summary of facts was admitted by the Appellant:

“Count 1

On the 3rd day of May, 2016 between 9am to 3 am Isei Donumaivanua 35 yrs [Accused] unemployed of Utulei Settlement, Korovuto broke and entered into the dwelling house of Roshni Devi 49 years [Complainant] Unemployed of Malolo, Nadi as a trespasser with intent to steal.

Count 2

On the 3rd day of May, 2016 Isei Donumaivanua 35 years [Accused] unemployed of Utulei settlement, Korovuto broke and entered into the dwelling house of Roshni Devi 49 years [Complainant] Unemployed of Malolo, Nadi stole 1 x 22ct gold ring valued \$200.00 and \$50.00 cash in coins all to the total value of \$250.00 the property of Roshni Devi.

On the above mentioned date complainant left out to Nadi Hospital to visit her father. Upon entering the main door of her house she could see that the dining room was scattered. She then checked the rest of the house and found the same. Complainant further checked her house and found that the abovementioned items stolen. Complainant then reported the matter to police.

Recovery: Nil

Accused was interviewed under caution whereby he admitted the allegation ref to questions and answers 61 to 96. He is charged with one count of Burglary and Theft.

3. In criminal case nos. 530, 531, 532 of 2016 the Appellant pleaded guilty to first count of Burglary but not guilty to second count of Theft. However, when the file was called on 18 October, 2016 the Appellant pleaded guilty to the second count of Theft as well.

a). **Criminal case no. 530 of 2016**

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 24th day of May, 2016 at Nadi in the Western Division, entered into the dwelling house of Shelvin Vikash as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 24th day of May, 2016 at Nadi in the Western Division dishonestly appropriated cash of \$9050.00, 1 x black Akita Portable player valued at \$299.00, 1 x black HP Laptop valued at \$400.00, 1 x 22ct Gold chain valued at \$500.00, 1 x 22ct gold ring valued at \$300.00, car key with handle valued at \$12.00 and 1 x silver chain valued at \$120.00 all to the total value of \$10, 681.00 the property of Shelvin Vikash.

Summary of Facts

The following summary of facts was admitted by the Appellant:

Count 1

On the 24th day of May 2016, at Nadi in the Western Division one Isei Donumaivanua [B-1] 35 years unemployed of Korovuto, Nadi broke and entered in to the dwelling house of Shelvin Vikash [A-1] 26 years market Vendor of Lavusa, Nadi as a trespasser with intent to commit Theft.

Count 2

On the 24th day of May, 2016 at Nadi in the Western Division one Isei Donumaivanua [B-1] 35 years unemployed of Korovuto, Nadi dishonestly appropriated cash of \$9050.00, 1 x black Akita Portable player valued at \$299.00, 1 x black HP Laptop valued at \$400.00, 1 x 22ct Gold chain valued at \$500.00, 1 x 22ct gold Ring valued at \$300.00, car key with handle valued at \$12.00 and 1 x Silver Chain valued at \$120.00 all to the total value of \$10, 681.00 the property of Shelvin Vikash.

Facts

On the above mentioned date at about 6.30am [A-1] left his home to his stall at Nadi Market. At this time his house was vacant. At about 5.30pm he came home after work where he discovered that all his stuff had been ransacked and his belongings scattered all over the place. [A-1] had reported the matter to the police.

Investigation into this matter conducted and upon information received [B-1] was located and was questioned by police in regards to this case. During his interrogation he stated that he bought 9 x 11 feet corrugated iron from Vinod Patel from the cash that he stole from [A-1] and gave it to

Marica Tinai [A-2] 36 years of Utelei Settlement where 1 x Silver Chain and Car Key with handle was recovered from [B-1]'s bag.

Sub Recovery

- 9 x 11 feet corrugated iron valued at \$250.00
- 1 x Car Key with handle valued at \$12.00
- 1 x Silver Chain valued at \$120.00

The silver chain and car key with handle was positively identified by [A-1].

[B-1] was interviewed under caution where he admitted breaking the house of [A-1] in reference to question and answer to of his caution interview. [B-1] was formally charge one count of Burglary and one count of Theft and appears in custody for court.

b). Criminal case no. 531 of 2016

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 13th day of March, 2016 at Nadi in the Western Division, entered into the dwelling house of Bob Achari as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 13th day of March, 2016 at Nadi in the Western Division dishonestly appropriated 1 x HP Laptop valued at \$1000.00, 1 x red Ink mobile phone valued at \$50.00, 1 x 22ct Gold earring valued at \$120.00, 1 x Phone charger valued at \$25.00, 1 x black Torch valued at \$100.00 and cash of \$500.00 all to the total value of \$1795.00 the property of Bob Achari.

Summary of Facts

The following summary of facts was admitted by the Appellant:

Count 1

On the 13th day of March, 2016 at Nadi in the Western Division, one Isei Donumaivanua [B-1] 35 years, unemployed of Korovuto, Nadi broke and entered in to the dwelling house of Bob Archari [A-1], 52 years taxi driver of Navo, Nadi as a trespasser with intent to commit Theft.

Count 2

On the 13th day of March, 2016 at Nadi in the Western Division, one Isei Donumaivanua dishonestly appropriated 1 x Black HP Laptop valued at \$1000, 1 x Red Inkk mobile phone valued at \$50.00, 1 x 22ct Gold earring valued at \$120.00, 1 x Phone Charger valued at \$25.00, 1 x black Torch valued at \$100.00 and cash of \$500.00 all to the total value of \$1795.00 the property of Bob Achari.

Facts

On the 13th day of March, 2016 at about 6pm [A-1] left his home to attend a wedding. At about 9.45pm [A-1] came back home where he noticed that

8 louver blades been removed from the kitchen side and household items scattered inside the house where the above mentioned items stolen. Investigation in this matter conducted where through information received [B-1] was located and during the course of investigation he stated that he gave the Black HP Laptop together with its bag to Sitiveni Naqiri [A-2], 40 years, labourer of Tunalia, Nadi and the black Torch was recovered by DC 3845 Jese [A-2] 30 years police officer at Nadi Police Station during the search at [B-1]'s house.

Sub Recovery

1 x Black HP Laptop valued at \$1000.00

1 x Black Torch valued at \$100.00

All the above mentioned recovery was positively identified by [A-1].

[B-1] was interviewed under caution where he admitted breaking the house of [A-1] in reference to question and answer 63 to 86 of his caution interview. [B-1] was formally charge one count of Burglary and one count of Theft and appears in custody for court.

c). Criminal case no. 532 of 2016

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 24th day of April, 2016 at Nadi in the Western Division, entered into True Value Food Town Store as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

ISEI DONUMAIVANUA on the 24th day of April, 2016 at Nadi in the Western Division dishonestly appropriated 1 x Samsung Tablet valued at \$1700.00, assorted Jewelleries valued at \$4500.00, 1 x 22ct gold necklace valued at \$400.00, 2 x Pkt BH Cigarettes valued at \$24.00, 15 x Sprint Cola Juice valued at \$30.00, 20 x Sun Bell Tuna valued at \$432.00, assorted Biscuit valued at \$25.00, 2 x pkt Lollies valued at \$36.72, 10kg Potatoes valued at \$20.00, 1 x Vido mobile Phone valued at \$99.00 and cash of \$600.00 all to the total value of \$7466.72 the property of True Value Food Town.

Summary of Facts

The following summary of facts was admitted by the Appellant:

“Count 1

On the 24th day of April, 2016 at Nadi in the Western Division one Isei Donumaivanua [B-1] 35 years, unemployed of Korovuto, Nadi broke and entered into True Value Food Store owned by Manjula Devi [A-1] 51 years, Market Vendor of Lavusa, Nadi as a trespasser with intent to commit Theft.

Count 2

On the 24th day of April, 2016 at Nadi in the Western Division one Isei Donumaivanua [B-1] 35 years, unemployed at Korovuto, Nadi dishonestly appropriated 1 x Samsung Tablet valued at \$1700.00, assorted

Jewelleries valued at \$4500.00, 1 x 22ct gold necklace valued at \$400.00, 2 x Pkt BH Cigarettes valued at \$24.00, 15 x Sprint Cola Juice valued at \$30.00, 20 x Sun Bell Tuna valued at \$432.00, assorted Biscuit valued at \$25.00, 2 x pkt Lollies valued at \$36.72, 10kg Potatoes valued at \$20.00, 1 x Vido mobile Phone valued at \$99.00 and cash of \$600.00 all to the total value of \$7466.72 the property of True Value Food Town.

Facts

[A-1]'s shop and her dwelling house is adjacent to each other and are separated by the walls.

On the above mention date at about 3.15pm [A-1] left her with her family to visit one of her relatives admitted at Nadi Hospital. The house and the shop were closed and vacant. At about 4.10pm [A-1] with her family member came back from the hospital where she noticed that 3 louver blades had been removed and above mentioned items stolen from the shop.

Investigation in to this matter conducted and upon information received [B-1] was located and was questioned by police in regards to this case. During the course of investigation [B-1] stated that he gave the Vido mobile Phone to Sololoni Lotawa [A-2], 58 years farmer of Tunalia, Nadi [A-2] then later sold the Vido Mobile Phone to Star Pawn shop for \$20.00 [Receipt attached] to Amrish Maharaj 38 years [A-3] businessman of Votualevu, Nadi.

Sub Recovery

1 x White colour Vido mobile phone valued at \$99.00

[A-1] had positively identified the Vido mobile Phone.

[B-1] was interviewed under caution where he admitted breaking the house of [A-1] in reference to question and answer 44 to 84 of his caution interview. [B-1] was formally charge one count of Burglary and one count of Theft and appears in custody for court.

4. After the summary of facts was admitted by the Appellant and the learned Magistrate being satisfied that the Appellant had entered an unequivocal plea convicted the Appellant as charged on all the counts in the six separate files.
5. The Appellant also admitted his previous convictions. After hearing mitigation the learned Magistrate sentenced the Appellant as follows:-

Criminal case no. 529 of 2016

- (a) 30 months imprisonment for the count of burglary; and
 - (b) 14 months imprisonment for the count of theft;
 - (c) Both the counts were to be served concurrent to each other.
6. The other files also have the above sentencing regime. In accordance with section 22 of the Sentencing and Penalties Act, a sentence is to be served concurrently with any other sentences of imprisonment unless otherwise directed by the court.
 7. The sentence in file no. 529 of 2016 is on its own. There is no mention of the other files in this sentence. This means the sentence in this file is to be served concurrently with the other files that is file nos. of 530/2016, 531/2016, 532/2016, 533/2016 and 534/2016. In files 530/2016 and thereafter the learned Magistrate has made the sentences consecutive.

8. The Appellant will therefore serve a total sentence of 150 months imprisonment which equates to 12 years and 6 months imprisonment with effect from 6 December, 2016.
9. The Appellant being dissatisfied with the sentence of the Magistrate's Court filed a timely appeal against sentence which was further amended by Petition of Appeal dated 26 July, 2017 by the Legal Aid Counsel who now appears for the Appellant. The amended grounds of appeal are as follows:-
 - “1. *That the learned Magistrate erred in law when imposing a sentence that was beyond his jurisdiction as such was in contravention of section 7 (2) of the Criminal Procedure Act.*
 2. *That the learned Magistrate erred in law when he commenced his starting point at the higher end of the tariff.*
 3. *That the learned Magistrate erred in Law and in fact when he did not take the early guilty plea as a separate mitigating factor and accordingly allow an appropriate discount.*
 4. *That the learned Magistrate erred in law and fact when the non – recovery of property was wrongly found to be an aggravating feature in his sentence.*
 5. *That the learned Magistrate erred in law when he reached the final sentence by double counting the aggravating factors.*
10. Both counsel filed helpful written submissions and also made oral submissions during the hearing for which the court is grateful. Ms.

Narara counsel for the Appellant, informed the court that the fifth ground of appeal will not be argued and was abandoned. Furthermore, counsel informed the court that the appeal will only concentrate on the sentence of burglary and not for theft.

LAW

11. 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.
12. 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

GROUND ONE

That the learned Magistrate erred in law when imposing a sentence that was beyond his jurisdiction as such was in contravention of section 7 (2) of the Criminal Procedure Act.

13. The Appellant submits that the total sentence imposed by the learned Magistrate exceeds his jurisdiction of sentencing since the total sentence resulted in 180 months or 15 years imprisonment. For the count of burglary the Appellant was sentenced to 30 months imprisonment which was to be served concurrently with the count of theft.
14. Section 7 (2) of the Criminal Procedure Act states:-

“A Magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years...”

15. On 6th December, 2016, the Learned Magistrate pronounced his sentence and sentenced the Appellant as follows:
 - a. **Criminal Case No. 529/16**
Count 1 - 30 months imprisonment
Count 2 - 14 months imprisonment
Count 2 to be made concurrent to the sentence of Count 1
 - b. **Criminal Case No. 530/16**
Count 1 - 30 months imprisonment
Count 2 - 14 months imprisonment
Count 2 to be made concurrent to the sentence of Count 1
 - c. **Criminal Case No. 531/16**

Count 1 - 30 months imprisonment

Count 2 - 14 months imprisonment

Count 2 to be made concurrent to the sentence of Count 1

d. Criminal Case No. 532/16

Count 1 - 30 months imprisonment

Count 2 - 14 months imprisonment

Count 2 to be made concurrent to the sentence of Count 1

e. Criminal Case No. 533/16

Count 1 - 30 months imprisonment

Count 2 - 14 months imprisonment

Count 2 to be made concurrent to the sentence of Count 1

f. Criminal Case No. 534/16

Count 1 - 30 months imprisonment

Count 2 - 14 months imprisonment

Count 2 to be made concurrent to the sentence of Count 1

16. It is to be noted that out of the 6 files for which the Appellant was convicted and sentenced, the sentence in five files were made consecutive to each other (after counts one and two were to be served concurrently). The effect of the consecutive sentence upon the total sentence is that he will be serving a term of 12 years and 6 months imprisonment.
17. The sentence in criminal case nos. 530/16, 531/16, 532/16, 533/16, 534/16 were to run consecutively there is nothing in the sentence of criminal case no. 529/16 which suggests that the sentence in that file is to be served consecutively with the other files.
18. I am not satisfied that the learned Magistrate had exceeded his jurisdiction when he sentenced the Appellant to 12 years and 6 months

imprisonment for multiple offences which was within the jurisdiction of the Magistrate's Court.

19. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

That the learned Magistrate erred in law when he commenced his starting point at the higher end of the tariff.

20. For the selection of a starting point, I am guided by the Court of Appeal in *Laisiasa Koroivuki vs. The State, Criminal Appeal No. AAU 0018 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.

21. The tariff for the offence of burglary under the Crimes Act is between 1 year to 3 years imprisonment (see *Viliame Waqavanua vs. State*, criminal appeal no. HAA 013 of 2011 and *Autiko Vuli vs. The State*, criminal appeal no. HAA 53 of 2016). The learned Magistrate had selected the higher end of the tariff of three years as a starting point for the offence of burglary after assessing the objective seriousness of the offences committed (which included a majority of domestic premises and a rural shop).

22. 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.”

23. Counsel for the Appellant relies on the decision in *Epeli Talakubu vs. State*, criminal appeal no. HAA 37 of 2016, where Aluthge J. at paragraph 23 had stated the following about the importance of reasons to be given by the sentencing court when selecting a starting point:

“A starting point of three years picked by the sentencing Magistrate for the Burglary count from the top end of the tariff without justifiable reason is obnoxious to the established sentencing practice. The starting point he picked for the 2nd count fell outside the tariff. The learned Magistrate failed to give any reason why he selected a starting point from the top end of the tariff band for the 1st count and fell outside the tariff for the 2nd count...”

24. The *Koroivuki* principles in my view does not seek a justified reasoning when selecting a starting point as long as the starting point was within the tariff. Although it is a good sentencing practice that the starting point should be picked from the lower or middle range of the tariff, however, it cannot always be possible to maintain such an adherence since each case is dependent upon its own facts.
25. A sentencer exercises his or her discretion in selecting a starting point based on an objective assessment of the seriousness of the offending. There is no requirement in my view for a sentencing court to provide a reason for selecting a starting point if within the sentencing tariff. The learned Magistrate was correct in selecting a 3 years starting point after an objective assessment of the seriousness of the offences committed although at the higher end of the tariff for the offence of burglary.
26. This ground of appeal is dismissed due to lack of merits.

GROUND THREE

That the learned Magistrate erred in law and in fact when he did not take the early guilty plea as a separate mitigating factor and accordingly allow an appropriate discount.

27. The Appellant submits that since he had pleaded guilty at the earliest opportunity he should have been accorded one third discount separately in his sentence.
28. In *Poate Rainima vs. State*, Criminal Appeal No. AAU 0022 of 2012 (27 February, 2015) the Court of Appeal at paragraph 46 stated that for an early guilty plea one third discount is to be allowed during sentencing:-

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not be authoritative judgment) that the “high water mark” of discount one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance”.

29. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the sentencing court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court.

“(a) to punish offenders to an extent and in a manner which is just in and the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) ...”

30. Section 4(2)(f) and (g) of the Sentencing and Penalties Act states that the sentencing court must have regard to whether the offender pleaded guilty to the offence, the stage of the proceedings when the offender pleaded guilty and whether the offender’s conduct was an indication of remorse or lack of remorse.

31. This court in exercising its appellate jurisdiction will have to determine whether the learned Magistrate failed to allow one third discount to the Appellant for early guilty plea and his failure to mention it separately was erroneous or had resulted in a substantial miscarriage of justice to the Appellant.
32. In this case the Appellant was charged for a spate of burglary and theft offences. Section 4 (2) (b) of the Sentencing and Penalties Act allows the sentencing court to have regard to the sentencing practice and to the applicable guideline judgment.
33. Although the learned Magistrate did not indicate the quantum of reduction for the guilty plea separately from other mitigating factors in his sentencing, however, the reduction allowed for guilty plea and plea in mitigation was correctly allowed. The learned Magistrate allowed a discount of 2 years for early guilty plea and other mitigating factors. In my view the learned Magistrate complied with the purposes of sentencing guidelines stated in section 4(1) of the Sentencing and Penalties Act and the factors that must be taken into account when sentencing an offender under section 4(2) (b) and (f) of the Sentencing and Penalties Act.
34. The reduction of 2 years for mitigation and early guilty plea was sufficiently taken into account simply put, a third discount of 20 months for guilty plea is incorporated in the entire mitigation. It does not matter if the discount for early guilty plea was not indicated separately.
35. In view of the above, there is no substantial miscarriage of justice caused to the Appellant by not showing the reduction of the guilty plea separately from the other mitigating factors.

36. Any further reduction of the sentence imposed by the learned Magistrate would fail to deter offenders or other persons from committing offences of the same or similar nature and will also fail to signify that the court and the community denounce the commission of such offences.
37. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 of the Judgment had stated 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 in the following words:

“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.”

38. There is no error made by the learned Magistrate, this ground of appeal is also dismissed due to lack of merits.

GROUND FOUR

That the learned Magistrate erred in law and fact when the non – recovery of property was wrongly found to be an aggravating feature in his sentence.

39. The Appellant submits that the learned Magistrate took the non-recovery of stolen items as an aggravating factor in respect of criminal case numbers 529, 530, 532, 533 and 534 at paragraph 14 of all the sentences.

40. The learned Magistrate at paragraph 14 of the above files stated the following in respect of the non-recovery of stolen items as follows:

“There are several aggravating factors in this case, Firstly, there is significant degree of loss to the victim as only few items were recovered. Secondly, vandalism of property as you damaged the window and kitchen door and ransacked the house. Thirdly, there is significant degree of planning. Fourthly, you deliberately targeted the premises whilst the victims were away from the house during the daytime. Fifthly, the previous convictions and the time elapsed since last conviction as described in the UK Sentencing guidelines. Hence I add 02 years to the sentence for burglary and 01 year for the theft. The interim total is 05 years for the burglary and 02 years for the theft.”

41. It is trite law that for offences involving theft and robbery recovery of stolen items act as mitigation, however, the non-recovery of such items cannot be considered as an aggravating factor to enhance the sentence.

42. In *Sairusi Soko vs. State, Criminal Appeal Case no. HAA 031 of 2011 (29 November, 2011)* Madigan J. at paragraph 7 stated:

“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.”

43. Also in *Vilitati Vasuca vs. State*, criminal appeal case no. HAA 03 of 2012 (31 July, 2012) Nawana J. at paragraph 13 mentioned the above in the following words:

“... As regards ‘[n]ot all items were recovered’, it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently, the fact that all or some items of property were not recovered cannot not be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa.”

44. The non-recovery of stolen items is not applicable to the offence of burglary as an aggravating factor yet the learned Magistrate erroneously took this aspect as an aggravating factor.

45. I also note that the learned Magistrate took the previous conviction of the Appellant as an aggravating factor at paragraph 14 of the sentence in the following words:

“...Fifthly, the previous convictions and the time elapsed since last conviction as described in the UK Sentencing guidelines...”

46. It is trite law that in sentencing an offender the previous criminal record does not have the effect of aggravating the sentence but it deprives the offender of a discount for good character in mitigating the sentence.

47. In *Vetaia Waqalevu v State, Criminal Appeal No. HAA 44 of 2010* (25 October, 2010) Goundar J. at paragraph 8 had this to say:

“It is settled law that an offender should not be sentenced twice for the same offence. Therefore, it follows that when an offender is sentenced for a new offence, his previous convictions have limited relevance. An offender’s previous convictions deprive him of any discount based on previous good character. Previous convictions cannot be used as a matter of aggravation to enhance the sentence for the new offence to do so will be punishing the offender twice for the same offence.”

48. In *Tevita Tuisavusavu and another vs. The State, Criminal Appeal No. AAU 0064 of 2004* (3 April, 2009) the Court of Appeal at paragraph 17 held that:

“... the sentencing judge used as an aggravating feature the fact that the first appellant had 14 previous convictions... The common law is that a prior criminal record does not have the effect of aggravating an offence, but it may deprive an offender of leniency or indicate more weight is to be given to retribution, personal deterrence and the protection of the community. It seems to us that the sentencing judge has erred in using the appellant’s prior criminal records as an aggravating feature.” (Emphasis is mine)

49. Section 4(2)(i) of the Sentencing and Penalties Act states that in sentencing offenders the court must have regard to the offender’s previous character.

50. Furthermore, section 5 of the Sentencing and Penalties Act lists the factors to be considered in determining the offender's character.
51. The learned Magistrate fell in error when he took into account the previous convictions of the Appellant in sentencing him to 30 months imprisonment, however, 2 years for the aggravating factors was justified and therefore there is no error by the learned Magistrate in this regard.
52. This ground of appeal succeeds.
53. Having allowed the above ground of appeal and in view of the totality principle of sentencing it is in the interest of justice that this court should sentence the Appellant afresh. The sentence of the Magistrate's Court of 6th December, 2016 is hereby quashed.
54. Section 256(3) of the Criminal Procedure Act states:
- "At the hearing of an appeal whether against a conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence should have been passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*
55. Before this court proceeds to consider the sentence of the Appellant, it is of utmost importance that the totality principle of sentencing is taken into account. The Appellant had pleaded guilty in six different files for the offence of burglary.
56. The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences.

57. In *Mill v The Queen* [1988] HCA 70 the High Court of Australia in its judgment cited D.A. Thomas, *Principles of Sentencing* (2nd ed. 1979) pp. 56-57 as follows:

“the effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms; ‘when a number of offences are being dealt with and specific punishment in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; “when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences’.”

58. In Fiji the above principles have been approved and applied by the court (see *Tuibua v The State*, [2008] FJCA 77, *Taito Raiwaqa v The State*, [2009] FJCA 7) and *Asaeli Vukitoga v The State*, Criminal Appeal No: AAU 0049 of 2008.

HABITUAL OFFENDER

59. From the facts of this case, it is obvious that the Appellant has been involved in targeting properties that were vacant. There are five dwellings and one rural shop which were broken into by the Appellant within a short span of time (from 13 March 2016 to 24 May, 2016). I note that the Appellant had already been declared an habitual offender in criminal case no. HAC 259 of 2012, however, such a declaration will have no bearing on this sentence.

60. The previous convictions of the Appellant from 2009 to 2013 total 39 which is mainly Burglary, Theft, House Breaking, Entering and Larceny.

61. Section 10 of the Sentencing and Penalties Act states:-

“This part applies to a court when sentencing a person determined under Section 11 to be a habitual offender for –

- (a) a sexual offence;*
- (b) offences involving violence;*
- (c) offences involving robbery or housebreaking;*
- (d) a serious drug offence; or*
- (e) an arson offence.*

62. Section 11 of the Sentencing and Penalties Act states:-

“ (1) A judge may determine that an offender is a habitual offender for the purposes of this Part-

- (a) when sentencing the offender for an offence or offences of the nature described in section 10;*
- (b) having regard to the offender’s previous convictions for offences of a like nature committed inside or outside Fiji; and*
- (c) if the court is satisfied that the offender constitutes a threat to the community.*

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence.”

63. In accordance with the powers vested upon this court under section 11 of the Sentencing and Penalties Act I declare the Appellant to be a habitual offender.

64. Having declared the Appellant to be a habitual offender it is this court's duty to have regard to the protection of the community and to give effect to this purpose I intend to impose a sentence longer than would otherwise be the case.
65. At the age of 35, the Appellant has left a trail of victims, people should be able to live a life free from uninvited invasions and unexpected thefts.
66. The maximum punishment for Burglary under the Crimes Act is 13 years imprisonment.
67. The accepted tariff for the offence of Burglary is between 1 year and 3 years imprisonment, (*see Mosi vs State [2012] FJHC 1348, Criminal Appeal No. 138 of 2012 (1 October, 2012)*).
68. Considering the objective seriousness of the offending for each of the burglary offences I take a starting point of 3 years imprisonment being in the higher range of the tariff.
69. The aggravating features are as follows:-
 - (a) Invasion during day and night;
 - (b) Destruction of victim's properties;
 - (c) Significant degree of planning;
 - (d) Targeting vacant properties;
 - (e) Substantial value of properties stolen; and
 - (f) Some properties stolen had sentimental values.
70. For the above aggravating factors, I add further 2 years making an interim total of 5 years since the Appellant has been declared to be a habitual offender I add another 2 years making the interim total of 7 years imprisonment.

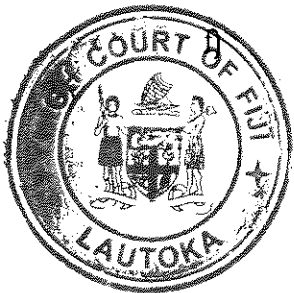
71. The mitigating factors are as follows:-
- (a) Appellant is 35 years of age, married with three children;
 - (b) co-operated with Police;
 - (c) minimum recovery of items.
72. For the above mitigating factors, I deduct 4 months and for the guilty plea a further discount of 1 year and 8 months is allowed.
73. This means the sentence for each count of burglary is 5 years imprisonment. In accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence by 6 months as a period of imprisonment already served by the accused. The final sentence is 4 years and 6 months imprisonment.
74. Bearing in mind the totality principle, I cannot make all the sentences consecutive. To avoid a crushing effect on the Appellant each count of burglary in each file are to be served concurrently except criminal case no. 523 of 2016. The sentence in criminal case no. 523 of 2016 is to be served consecutively. In criminal case no. 523 of 2016 the Appellant had targetted a rural shop. This means the Appellant will serve a total sentence of 9 years imprisonment. The sentence of 14 months imprisonment for the offence of theft in each file is to be served concurrently.
75. Under section 18 (1) of the Sentencing and Penalties Act, I impose 7 years imprisonment as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the Appellant which is just in the circumstances of the offending.

76. In summary the accused is sentenced afresh to a total of 9 years imprisonment with a non-parole period of 7 years to be served before the Appellant is eligible for parole.

ORDERS

- a) The appeal against sentence is allowed.
- b) The sentence of the Magistrate's Court is quashed and set aside.
- c) The Appellant is sentenced to 4 years and 6 months imprisonment for the count of burglary and is sentenced to 14 months imprisonment for the count of theft to be served concurrently in each file. This means the Appellant is to serve a term of 4 years and 6 months imprisonment in each file except criminal case no. 532 of 2016.
- d) The sentence in criminal case no. 532 of 2016 is to be served consecutively with the other files.
- e) The Appellant will serve a total sentence of 9 years imprisonment with effect from 6th December, 2016 with a non-parole period of 7 years to be served before the Appellant is eligible for parole.

30 days to appeal to the Court of Appeal.



At Lautoka

19 December, 2017

Sunil Sharma

Judge

Solicitors

Office of the Legal Aid Commission, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.