IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO: HAA 37 OF 2016

BETWEEN : EPELI TALAKUBU

Appellant

AND : STATE

Respondent

Counsel : Appellant in Person

Mr. A. Singh for Respondent

Date of Hearing : 01st December, 2016

Date of Judgment : 13th December, 2016

JUDGMENT

Introduction

1. The Appellant pleaded guilty in the Magistrates Court at Nadi to one count of Burglary contrary to Section 312 (1) and one count of Serious Assault contrary to Section 277 (a) respectively of the Crimes Decree No. 44 of 2009.

2. Upon conviction, Appellant was sentenced on the 30th May, 2016 to two years and twenty days' imprisonment to be served concurrently with a non parole period of sixteen months.

3. Being dissatisfied with his sentence, Appellant, appearing in person, filed this timely appeal on following grounds:

Grounds of Appeal

(i) The Learned Sentencing Magistrate erred in law and principle when he allowed extraneous and irrelevant matters to guide in his sentencing.

(ii) The Learned Sentencing Magistrate erred in that he acted upon wrong principle.

(iii) The Learned Sentencing Magistrate erred in law when he mistook the facts.

(iv) The Learned Sentencing Magistrate erred in law and in fact when he failed to take into account some relevant considerations.

Law

4. This Court will approach an appeal against sentence using 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].

5. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"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 he 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 Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"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.

7. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed the approach to be taken when exercising appellate jurisdiction in reviewing a sentencing discretion of a lower court. The Court observed:

> *"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".*

8. **Summary of Facts agreed by the Appellant is as follows:**

On the 1st day of May, 2016 at about 0330 hrs at the Capricon Hotel, Martintar, Nadi, one Epeli Talakubu (Accused), 23 years, labourer of Megania, Nadi entered into Room 216 of Capricon Hotel and assaulted Naaz Ali, (PW-1), 39 years, cashier of Varoko, Ba.

PW-1 was with one of her friends namely Ravinesh Reddy (PW-2), 26 years, Salesboy of Solovi, Nadi at Ice Bar. PW-1 and PW-2 then went to their Room 216 for PW-1 to use the washroom. PW-2 then came back to the club again while PW-1 was inside the room as she was not feeling well. PW-1 was lying on the bed calling PW-2 on her phone when she saw a reflection of a Fijian boy on the mirror. She then told PW-2 as she was talking to him on the phone that someone is inside the room. The accused then choked PW-1's neck to stop her from yelling. Accused was still choking PW-1's neck when PW-2 came inside the room and punched accused. The accused also punched PW-2 and ran out of the room, jumped over the railing and ran away leaving his bag inside the room.

A report was lodged and accused was arrested and interviewed under caution. Accused admitted committing the offence in his answers from Q.33 to Q. 50.

Analysis

Ground (i)

Allowing Extraneous and Irrelevant Matters to Guide Sentencing

9. The Appellant alleges that the learned Magistrate took into account an irrelevant matter namely his previous convictions in selecting the starting point and in so doing the learned Magistrate picked a starting point from the top end of the tariff without giving any reasonable justification.

10. The sentencing Magistrate at paragraph 20 of his Sentencing Ruling picked a starting point of three years for the 1st count of Burglary and one year for the 2nd count of Serious Assault.

11. In selecting the starting point for Burglary, the learned Magistrate observed at paragraph 20 the following:

> *"I adopt 3 years for count 1 on Burglary since accused has previous cases for breaking of tool room and Larceny".*

12. The learned Magistrate took previous convictions of the Appellant into account in selecting the starting point. It is trite Common Law principle that in selecting the starting point Courts ought only to consider objective seriousness of the offence and prior offending is not an "objective circumstance" for the purposes of selecting the starting point.

13. In ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) Justice Gounder observed:

> *"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.*

14. The same approach was observed in ***Naikelekelevesi v State*** [2008] FJCA 11; AAU0061.2007 (27 June 2008) as follows;

> *"In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case".*

15. The courts in Fiji have taken the view that previous convictions are relevant only to assess the offender's character and therefore, taking them into consideration as an aggravating factor is obnoxious to the sentencing principles.

16. Section 4(2) of the Sentencing and Penalties Decree, 2009 prescribes that, in sentencing offenders, a court must have regard to the offender's good character. Section 5(a) allows a court to consider inter alia the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender in determining the character of an of an offender. As can be seen above, statute law offers little guidance on the significance and weight to be attributed to previous convictions at sentencing and it has been left to the courts to fashion the authoritative guidance on the matter.

17. In ***Waqalevu v State*** [2010] FJHC 468; HAA044.2010 (25 October 2010) Gounder J stated:

> *"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. (para 8)*
>
> *The learned Magistrate considered the fact that the appellant was not a first time offender as an aggravating factor to enhance the sentence by 1 year. This was an error of law in the sentence of the appellant. (para 9)*

18. In ***Waini v State*** [2009] FJHC 202; HAA006.2009 (10 September 2009) the same view was expressed by Gounder J.

> *"It is settled law 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"*

19. Under the Crimes Decree, the maximum sentence for Burglary is imprisonment of 13 years. In ***State v. Taito Seninawanawa*** HAC 138 0f 2012 (22 April 2015) Madigan J set out the tariff for Burglary between 18 months and 3 years with three years being the standard sentence for burglary of domestic premises. The sentencing Magistrate fell into error when he picked a starting point from the top end of the tariff without any justification.

20. The maximum sentence for Serious Assault is five years imprisonment. The Chief justice Anthony Gates in ***State v Batiratu*** (2012) FJHC 864; 2012 (13 February 2012) held that the tariff for Serious Assault should be 6-9 months' imprisonment. His Lordship observed:

> *"The sentence ordered of binding over, the discharge without conviction, was not within the range and type of sentencing suitable for the offence of assault on police. The range is between 6-9 months imprisonment. The perversity of the offence is its violent challenge to lawful action taken by State servants, not in the extent of the assault. Of course the greater the violence and the injuries caused will lead to enhancement of sentence"*

21. The sentencing Magistrate selected one year as the starting point for the 2nd count which is outside the tariff band. He took into account an irrelevant matter into consideration when he cited ***Sanjeev v State*** Criminal Appeal HAA 005 of 2011 (13 March 2014) to justify his selection of the starting point and tariff. In ***Sanjeev,*** the charge was Assault Causing Actual Bodily Harm and not Serious Assault.

22. Suresh Chandra J, in ***Laisiasa Koroivuki v State*** (Criminal Appeal AAU 0018 of 2010) observed:

> *"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 time.* ***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". (emphasis added)

23. 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. Therefore, this ground of appeal succeeds.

Ground (ii)

Mistook the Facts

24. The Appellant alleges that the sentencing Magistrate erred when he took the medical report of the victim into consideration.

25. The sentencing Magistrate cited ***State v Tevita Alafi*** 2004 HAA 073/04S where it was observed that *'it is the extent of the injury that determines the sentence'* and took the nature of the injury into consideration as an aggravating factor. However, there was no mention of an injury suffered by the victim in the facts admitted by the Appellant. Nor was there any mention that the medical report was part and parcel of the summary of facts read over to the Appellant. Therefore, taking the nature of the injury suffered by the victim into consideration as an aggravating factor is wrong. I accept this ground of appeal.

Ground (iii)

Acted Upon Wrong Principle

26. The Appellant argues that the sentencing Magistrate applied wrong guideline judgments at paragraphs 7, 8 and 11.

27. In selecting the starting point and tariff for Burglary, the sentencing Magistrate at paragraph 7 of his sentencing Ruling cited ***State v Seninawanawa*** [2015] FJHC 261; HAC138.2012 (22 April 2015). However, the offence under consideration in ***Seninawanawa*** was not Burglary but Aggravated Burglary. The maximum penalty for

aggravated burglary is a term of imprisonment for seventeen (17) years. The aggravation in that case was that the accused committed the burglary in the company of two other persons. Madigan J observed:

> *"The accepted tariff for aggravated burglary is a sentence of between 18 months and three years, with three years being the standard sentence for burglary of domestic premises".*

28. Therefore, the sentencing Magistrate cited a wrong guideline judgment at paragraph 7. However, he has cited number of judgments in paragraph 8 of his Ruling to justify the tariff he selected. In ***Nawakula v State*** [2014] FJHC 115; HAM410.2013 (4 March 2014) De Silva J observed:

> *"The tariff for the offence of burglary as founded on the basis of the provisions of the old Penal Code, was 18 months to 3 years in imprisonment (State v Mikaele Buliruarua[2010] FJHC 384; Tomasi Turuturuvesi v State [2002] HAA 086/2002. The tariff set for the offences involving burglary and larceny under the Penal Code was 1-4 years in imprisonment (Cavuilagi v State [2004] FJHC 92). In State v Mikaele Buliruarua[2010] FJHC 384 case, the tariff set for the offence of burglary under the Penal Code, was made applicable in relation to the offences of burglary under the Decree."*
>
> *Then the learned Magistrate had stated that 'The accepted tariff for burglary of domestic premises is three years imprisonment as held in Tabeusi HAC 95-113 of 2010 and Isei Donumaivanua HAC 259 of 2012, both Lautoka matters.'*
>
> *Although the learned Magistrate had followed correct guide line judgment Tabeusi v State the tariff given there is 2 years to 3 years after trial. In State v Mucunabitu [2010] FJHC 151; HAC 017.2010 (15 April 2010) it is held that the accepted tariff is 18 months to 3 years.*

29. In view of these judgments, starting point of three years is not outside the tariff for Burglary. However, the sentencing Magistrate fell into error when he failed to give a valid reason as to why he selected 3 years as the starting point from the top end of the tariff.

30. In paragraph 11, the sentencing Magistrate identified the tariff for Assault Causing Actual Bodily Harm from suspended sentence to 9 months imprisonment by referring to ***State v Anjula Devi*** Criminal Case No. 4 of 1998. However, the Appellant was convicted for Serious Assault. The learned Magistrate failed to consider the tariff for Serious Assault when dealing with the sentence. As stated above in paragraph 20, tariff for Serious Assault is in the range of 6-9 months' imprisonment. Therefore this ground succeeds.

Ground (iv)

Failure to Take Into Account Some Relevant Considerations

31. The Appellant alleges that the learned Magistrate failed to give a proper and sufficient discount for the remand period.

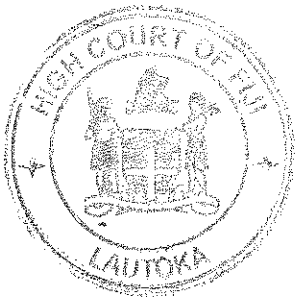
32. The Counsel for Respondent having gathered information from the Fiji Correction Service concedes that the Appellant was remanded from 5th May to 30th May, 2016. The learned sentencing Magistrate in paragraph 31 discounted only 11 days. Therefore, I accept this ground of appeal.

33. Based on the above reasons, an interference with the sentencing discretion of the sentencing Magistrate is warranted. I therefore, in exercising powers conferred on this Court under Section 256(3) of the Criminal Procedure Decree, quash the sentence handed down by the sentencing Magistrate and proceed to sentence the Appellant afresh.

34. I select a starting point of 18 months for the 1st Count of Burglary. For the aggravating factor recorded by the sentencing Magistrate at paragraph 21 (fear caused to a lady victim), I add 12 months bringing the interim sentence to 30 months' imprisonment. For mitigating factors, recorded by the sentencing Magistrate at paragraph 6 of the sentencing Ruing, I deduct 3 months. For the early guilty plea, I deduct further 09 months to arrive at a sentence of 18 months' imprisonment. For remand period I deduct 25 days bringing the final sentence to 17 months and 5 days' imprisonment.

35. Pursuant to Section 18 (3) and 18 (4) of the Sentencing and Penalties Decree I fix a non-parole period of 12 months.

36. Appeal is allowed to that extent.



Aruna Aluthge

Judge

At Lautoka

13th December 2016

Solicitors: **Appellant in Person**

Office of the Director of Public Prosecution for Respondent