IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
exercising extended jurisdiction

CRIMINAL APPEAL AAU 122 OF 2014
(Magistrates Court No. CF 777 of 2013 at Nasinu)

BETWEEN : **THE STATE**

Appellant

AND : **RAJNEEL RITESH PRASAD**

Respondent

Coram : **Calanchini P**
Chandra JA
Aluthge JA

Counsel : **Ms P Madanavosa for the Appellant**
Ms S Nasedra for the Respondent

Date of Hearing : **2 July 2018**

Date of Judgment : **30 August 2018**

JUDGMENT

Calanchini P

[1] The respondent Rajneel Ritesh Prasad (Prasad) was charged with one count of aggravated burglary contrary to section 313(1) (a) of the Crimes Act 2009 and one count of theft

contrary to section 291 of the Crimes Act. The matter was transferred to the Magistrates Court to exercise extended jurisdiction pursuant to section 4(2) of the Criminal Procedure Act 2009.

[2] The particulars of the burglary count were that the respondent with one other on 12 June 2013 at Nasinu broke and entered into the dwelling house of Subash Chandar as a trespasser with intent to steal. The particulars of the theft count were that the respondent with one other on 12 June 2013 stole one wrist watch valued at $300.00, one Fuji brand digital camera valued at $600.00 and one ladies gold ring valued at $200.00, all to the total value of $1,100.00 from the dwelling of and belonging to Subash Chandar.

[3] The respondent pleaded guilty to the charges and on 26 September 2014 the Court, without entering a conviction, dismissed the charges and ordered Prasad to pay $200.00 compensation to the victim in default of which he was sentenced to 20 days imprisonment.

[4] The appellant filed a timely notice of appeal against sentence on 24 October 2014 pursuant to section 21(2) (c) of the Court of Appeal Act 1949 on the following grounds:

> *"1. That the learned Magistrate erred in law and in fact when exercising his discretion to order a non-conviction, when the criteria in section 16 of the Sentencing and Penalties [Act 2009] was not met;*
>
> *2. That the learned Magistrate erred in law and in fact when exercising his sentencing discretion by failing to provide reasons when sentencing the respondent below the tariff for both offences."*

[5] In a Ruling delivered on 1 March 2016 a single judge of the Court granted leave to the appellant (the State) to appeal against sentence.

[6] The summary of the facts to which the respondent agreed and which formed the basis of his guilty plea are on pages 33 – 34 of the appeal record as follows:

"Rajneel Ritesh Prasad (Accused) with one of his co-accused on the 12 June 2013 broke and entered into the house of Mr Subash Chandar [Complainant] located at Lot 34, Ikadroka Place, Naveiwakau, Valelevu.

On the above alleged date during the day, Mr Subash Chandar [Complainant] was not at home when the accused and his co-accused removed the complainant wall which was of ply board and entered the house. The accused and his accomplish after entering the complainant's house then stole the following items:

1. *1 x Fuji brand digital camera valued at $600.00*
2. *1 x wrist watch valued at $300.00*
3. *1 x ladies ring valued at $200.00*

The total value of property stolen was $1,100.00. The accused then sold the Fuji brand digital camera to one Ravendra Kumar (PW2) which was later seized as part of the police investigation.

The accused admits to the charges that he and his accomplice broke into the complainant's house and stole the above items (refer to caution interview questions and answers 37 to 46).

The accused was interviewed under caution and he has admitted the allegation. The accused was charged for the offence of Aggravated Robbery contrary to Section 311(1) (a) of the Crimes Decree Number 44 of 2009."

[7] It is noted that the respondent had made full admissions during the course of his caution interview on 26 June 2013 which was just two weeks after the offences were committed. It was a clear indication of his intention to plead guilty at the earliest opportunity.

[8] In relation to the first ground, the State submits that the sentencing court failed to consider the nature of the offence when it sentenced the respondent under section 15(1) of the Sentencing and Penalties Act 2009 (the Act) and decided not to record a conviction although there was a finding of guilt upon the respondent's plea of guilty. The State points out that the offence was aggravated burglary being an indictable offence for which a maximum penalty of 17 years imprisonment is prescribed. The State also points out that the tariff is 18 months to 3 years.

[9] Apart from failing to consider the nature of the offence the State submits that the sentencing court failed to take into account that some of the items stolen with a value of

$500.00 were not recovered. In relation to the second ground the State submits that the learned Magistrate failed to give reasons for imposing sentences that were well below the tariff in each case.

[10] The Respondent was not present in Court for the appeal hearing although Counsel appeared on his behalf and indicated that the appeal could proceed in the absence of the respondent. The respondent did not file written submissions prior to the appeal. Counsel presented oral submissions that in part replicated the written mitigation submissions filed in the Magistrates Court prior to sentencing. Counsel submitted that the appellant was of good character and only 19 years old at the time of offending. His future employment prospects at the time of sentencing would be at risk. He should be given the full discount of his plea of guilty on account of his admission in the caution interview. His early plea was consistent with his remorse for committing the offence.

[11] During the course of the sentencing decision the learned Magistrate considered the mitigating factors working in favour of the appellant. There is no reference to aggravating factors in the decision. Although the penalties and the tariffs are correctly stated, the Magistrate has not drawn the obvious conclusion that the offence of aggravated burglary is a serious offence for which a sentence of imprisonment is within the tariff.

[12] The first issue raised by the grounds of appeal is whether the Magistrate erred when he exercised his discretion to impose a sentence without recording a conviction. Section 15(1) of the Sentencing and Penalties Act 2009 (the Act) sets out the sentencing options that are available when a court finds a person guilty of an offence (i.e. the change is proved). For the purposes of this appeal, the following are relevant:

> *"(a) record a conviction and order that the offender serve a term of imprisonment,*
>
> *(b) - (c)* ___

(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

(e) - (f) _ _ _

(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the Court,

(h) record a conviction and order the discharge of the offender,

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court,
(j) without recording a conviction order the dismissal of the charge; or

(k) _ _ _"

[13] Whether a conviction should be recorded involves the exercise of a discretion by the sentencing court. However in the exercise of that discretion the court must consider pursuant to section 16 of the Act all the circumstances of the case including (a) the nature of the offence, (b) the character and past history of the offender and (c) the impact of a conviction on the offender's economic or social well being and on his or her employment prospects. It would seem that these are matters that are generally relevant to the exercise of any sentencing discretion.

[14] The failure to record a conviction is only one part of this ground of appeal. Not only has the Magistrate sentenced the appellant without recording a conviction, he has then proceeded to dismiss the charge under section 45(1) of the Act which states:

"1. A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction."

[15] Of course section 41(5) of the Act is simply a restatement of the sentencing option set out in section 15(1)(j) of the Act.

[16] The decision of **State –v- Nayacalagilagi** [2009] FJHC 73; HAC 165 of 2007, 17 March 2009 is relevant to the issues in this appeal. In that decision Goundar J noted that the authorities support the view that:

> *"discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law _ _ _. The power should be exercised sparingly where direct or indirect consequences of conviction are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."*

[17] In **State –v- Batiratu** [2012] FJHC 864; HAR 1 of 2012, 13 February 2012 Gates CJ had cause to consider a sentence imposed by the Magistrates Court on an offender who had assaulted a police constable in the execution of duty. The Magistrate had sentenced the accused to enter into a bond in the sum of $500.00 to keep the peace and to be of good behavior for 2 years without recording a conviction. It was a sentence passed under section 45(2) of the Act. At paragraph 29 of his judgment the Chief Justice summarized the matters that in my opinion should be considered by a court in determining whether it should either dismiss a charge without conviction under 45(1) or adjourn the proceedings and release the accused on conditions without recording a conviction under section 45(2) of the Act. The Chief Justice stated:

> *"The effect of the cases and the purport of the more detailed provisions of the [Act] with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider whether:*
>
> *(a) Whether the offender is morally blameless*
> *(b) Whether only a technical breach of the law has occurred*
> *(c) Whether the offence is of a trivial or minor nature*
> *(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*
> *(e) Whether circumstances exist in which it is appropriate to record a conviction, or merely to impose nominal punishment*
> *(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."*

[18] It is apparent from the sentencing remarks in the present case that the one significant matter that the court has not considered is the seriousness of the offence. Aggravated burglary is an indictable offence for which the maximum penalty is 17 years. The tariff for sentencing purposes is between 18 months and 3 years. The offence was planned, it was not a mere technical breach of the law and it cannot be described as an offence of a trivial or minor nature. The victim was the appellant's landlord.

[19] In my opinion the nature and the circumstances of the offence called for a conviction to be recorded together with a small term of imprisonment. The sentences imposed in the Magistrates Court should be quashed. The appellant should be sentenced to 12 months imprisonment for the offence of aggravated burglary and 3 months imprisonment for the theft offence. These sentences take into account the mitigating factors which the learned Magistrate had referred in his sentencing decision, the early guilty plea and the 41 days that both Counsel agreed had been spent in remand.

[20] It should be noted that almost four years have elapsed since the sentence was imposed by the Magistrates Court on 26 September 2014. In my view the sentences should be wholly suspended for 2 years with effect from the date of this judgment. In reaching this conclusion I have taken into account that the appellant was young and had up to that time been of good character. The value of the property not recovered was about $500.00 and the damage to the landlord's property (if any) appears not to have been raised by the State in its sentencing submission. Although aggravated burglary is a serious indictable offence, the circumstances of this case place it at the lower end of gravity. The revised sentence is sufficient to ensure that the appellant and other would be offenders will realise that they will not be dealt with leniently for the commission of such offences. I consider that this approach is consistent with the views expressed by this Court in **State v Chand** [2002] FJCA 50; AAU 27 of 2000, 1 March 2002. It is not necessary to consider in detail ground 2 which raises issues similar to the issues in ground 1.

Chandra JA

[23] I agree with the judgment, reasons and the orders proposed by Calanchini P.

Aluthge JA

[24] I have read the draft judgment of Calanchini P and agree with the conclusions and proposed orders.

Orders:

1. *Appeal against sentence is allowed.*
2. *Sentence passed in court below is quashed.*
3. *The respondent is convicted on both charges.*
4. *The respondent is sentenced to 12 months imprisonment on the aggravated burglary count and six months imprisonment for the theft count to be served concurrently.*
5. *The sentences are wholly suspended for a period of 2 years from the date of this judgment.*

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

Hon Mr Justice S Chandra
JUSTICE OF APPEAL

Hon Mr Justice A Aluthge
JUSTICE OF APPEAL