IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 138 of 2018
[In the Magistrates Court at Suva Criminal Case No. 1518 of 2017]
(Extended jurisdiction no. 126 of 2017)

BETWEEN	:	**WAISEA DAUNIVALU**	
			Appellant
AND	:	**THE STATE**	***Respondent***

Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**07 August 2020**
Date of Ruling	:	**10 August 2020**

RULING

[1] The appellant had been arraigned in the Magistrates court of Suva exercising extended jurisdiction on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) of the Crimes Act, 2009 committed between 17 and 18 April 2017 at Samabula in the Central Division. The charges were as follows.

'Count One

Aggravated Burglary contrary to Section 313(1)(a) of the Crimes Act 2009 in that he, between 17 and 18 April 2017 at Samabula, in the Central Division, broke into and entered the home of Emi Raloa as a trespasser with the intent to commit theft;

Count Two

> *Theft contrary to Section 291(1) of the Crimes Act 2009 in that he, between 17 and 18 April 2017 at Samabula, in the Central Division, dishonestly appropriated (stole) one Kawasaki brush cutter worth $800.00; one 32 inch Hisense television screen worth $1,500.00; one brown and black ladies hand bag worth $20.00 the properties of Emi Raloa with the intention to deprive the owner of her properties.*

[2] In the presence of his counsel the appellant had pleaded guilty on 11 October 2018 having accepted the summary of facts and the learned Magistrate had convicted the appellant on his own plea of guilty and sentenced him on 06 December 2018 to 06 years of imprisonments on count 01 and 06 months of imprisonment on count 02 without fixing a non-parole period.

[3] The facts as narrated in the sentencing order as follows.

> *'On 17 April the victim left her home to visit her daughter at Narere. That same day a witness saw the defendant walk by the victim's home with a brush cutter with some other boys. The witness called the victim to report that her home had been burgled. The victim returned home to find her door opened with three missing louvre blades. She also noticed her missing items. She lodged a complaint with the Police. The defendant was arrested by the Police and subsequently charged for this offence.'*

[4] A timely application for leave to appeal against sentence had been signed by the appellant on 12 December 2018 (received by the CA registry on 19 December 2018). Having had time from 23 July 2019, the Legal Aid Commission had finally filed an amended notice of appeal and written submissions on the day of the LA hearing on 07 August 2020. The State submissions were filed after the LA hearing.

[5] The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with leave to appeal applications against sentence as well.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(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] Grounds of appeal:

> ***Ground 1*** *: THAT the learned Sentencing Magistrate may have fallen into an error by acting upon a wrong principle when sentencing the Appellant as the sentence is deemed manifestly harsh and excessive and did not reflect the circumstances and facts of the case.*
>
> ***Ground 2*** *: THAT the learned Sentencing Magistrate may have fallen into an error by failing to take into account some relevant considerations.*

01st ground of appeal

[8] In sentencing the appellant, the learned Magistrate had followed **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018) which in turn had reiterated the sentencing tariff for aggravated burglary set out in **State v Prasad** [2017] FJHC 761; HAC254.2016 (**12 October 2017**) to be between 06 to 14 years of imprisonment ('new tariff'). In setting this new tariff the learned High Court judge had *inter alia* stated as follows.

> *'In view of the tariff of 2 years to 7 years for the offence of robbery which carries a maximum penalty of 15 years, in my view the tariff for burglary which carries a maximum penalty of 13 years should be an imprisonment term within the range of 20 months to 6 years. Further, based on the tariff*

established by the Supreme Court for the offence of aggravated robbery, the tariff for the offence of aggravated burglary which carries a maximum sentence of 17 years should be an imprisonment term within the range of 6 years to 14 years.'

[9] The appellant argues that he should have been sentenced according to the sentencing tariff for aggravated burglary *i.e.* 18 months to 03 years ('old tariff') existing at the time he committed the offence in **April 2017**.

[10] In the face of a similar challenge to the sentence, I had the occasion to discuss this matter in detail in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020) and **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and identified two issues to be resolved by the Court of Appeal or the Supreme Court in the future.

(i) Whether the principle of non-retrospectivity is applicable to sentencing tariff; *i.e.* as to whether an accused is entitled as a matter of law to be sentenced according to the sentencing tariff prevalent at the time of the commission of the offence or whether the accused should be sentenced according to the sentencing tariff at the time he is sentenced.

(ii) Identifying and setting a sentencing tariff for aggravated burglary in the light of some High Court judges and Magistrates applying the 'old tariff' of 18 months – 03 years of imprisonment while other High Court judges and Magistrates applying the 'new tariff' of 06 to 14 years of imprisonment for aggravated burglary, in order to resolve the ongoing and rather disturbing sentencing practice of lack uniformity in cases of aggravated burglary.

[11] I do not propose to repeat the same discussion once again here. I cited some cases in ***Vakatawa*** and ***Kumar*** submitted to me by both parties where this unhealthy practice had been evidenced. The counsel for the appellant and the respondent had provided me with some more recent cases where this two-pronged approach to sentencing in aggravated burglary had been observed depending on different judges. They are as follows.

Cases where 'old tariff' of 18 months – 03 years of imprisonment applied.

(i) **State v SB & JHB;** Lautoka HAC 208 of 2018 (29 April 2020) – followed **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016): by High Court judge A.

(ii) **The State v Douglas Matakibau**; Suva HAC 379 of 2019 (03 July 2020) – By High Court judge B.

(iii) **State v Eroni Sadrugu**; Lautoka HAC 188 of 2019 (14 July 2020) followed ***Leqavuni*** – By High Court judge A.

(iv) **State v Viliame Mudu & Mesake Tamani**; Suva HAC 116 of 2020 (30 July 2020) – Referred to ***Leqavuni***. By High Court judge C.

(v) **State v Taniela Tabuakula**; Suva HAC 106 of 2020 (23 June 2020) - followed ***Leqavuni.*** By High Court judge D.

Cases where 'new tariff' of 06 – 14 years of imprisonment applied.

(vi) **State v Asaeli Naqa**; Suva HAC 47 of 2020 (30 July 2020) – By High Court judge E - 02 years imprisonment.

(vii) **State v Tawake**; Suva HAC 264 of 2019 (31 July 2020) - By High Court judge E - 02 years imprisonment.

(vii) **State v Simiona J Volatbu & Puale Qasenivuli;** Lautoka HAC 182 of 2019 (24 July 2020); By High Court judge F - 03 years imprisonment.

(viii) **State v Orisi Qiolevu & Isei Yacakuru;** Lautoka HAC 129 of 2019 (10 July 2020) – By High Court Judge F- 03 years imprisonment.

(ix) **State v Jonacani Qalova & Ledua Tikotani** (Suva HAC 132 of 2019S (10 July 2020) – By High Court judge G - 02 years & 03 months imprisonment.

(x) **State v Etuate Kaulotu & Emosi Doidoi** (Lautoka HAC 129 of 2019 (10 July 2020) – By High Court Judge F- 03 years imprisonment.

[12] Thus, it appears that even the High Court judges who have followed the 'new tariff' have paid only lip service to the new tariff and kept their final sentences within the 'old tariff'. However, some Magistrates who have exercised extended jurisdiction have followed the 'new tariff', then applied the full force of it and ended up sentences within the range of the 'new tariff' while other Magistrates continue to apply the 'old tariff'. As a result, appeals keep coming up in the Court of Appeal against those sentences based on the 'new tariff'.

[13] I made the following remarks in ***Vakatawa*** and ***Kumar.***

> *'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.*

[14] Perhaps, in recognition of the serious problem that I sought to highlight the High Court Judges who have adopted the 'new tariff' seem to have taken care to limit the sentences within the range of the 'old tariff'. In fact the learned High Court judge in

State v Mudu - Sentence [2020] FJHC 609; HAC116.2020 (30 July 2020) had recognised the problem I highlighted and remarked as follows.

> *'Even after the introduction of the new tariff, majority of judges appear to prefer the old tariff and the end result is that there are two sentencing tariff regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end.*

[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may *inter alia* be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.

[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.

[17] **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) was not an appeal from the Magistrates court on sentence and the High Court was dealing with one count of burglary and one count of theft. In any event, the learned High Court judge does not appear to have followed the procedure in the Sentencing and Penalties Act in setting the 'new tariff' for aggravated burglary. The situation in **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018) was also the same except that it was a case of aggravated burglary and theft and the appellant was unrepresented. Therefore, there is a fundamental question of legal validity of the 'new tariff'.

[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition the doctrine of *stare decisis* requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.

[19] Finally, I may also place on record that the Court of Appeal in **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the birth of the 'new tariff' in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the 'old tariff' to the appellant who had been sentenced on 13 November 2017 (after the birth of the 'new tariff' in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases, however, the question of setting a tariff specifically for aggravated robbery had not been considered as it was not a matter urged before Court.

[20] In the circumstances, there is a reasonable prospect of success in the appellant's sentence appeal and I grant leave to appeal. In addition there are a couple of questions of law that require no leave to appeal.

02nd ground of appeal

[21] The appellant complains that the learned Magistrate had given discount for his early guilty plea, cooperation with the police, being first offender and remorse but no other mitigating factors such as his age of 25 and the time in remand (period not certain). The Magistrate had taken 07 years of imprisonment as the starting point and deducted 02 months for mitigating factors and another 10 months for the early guilty plea.

[22] The Magistrate had set down all the above features highlighted by the appellant under mitigating factors. No aggravating features had been mentioned.

[23] Since I have already allowed leave to appeal on the first ground of appeal, the second ground of appeal could be considered by the full court along with the first ground of appeal. When the 'old tariff' is applied the appellant's sentence without mitigating factors is likely to be reduced considerably and the full court would consider what discount he should be granted in respect all mitigating factors in that context.

[24] Therefore, I make no determination on the second ground of appeal at this stage as the Court of Appeal would consider the ultimate sentence rather than each step in the reasoning process leading to it and assess whether in all the circumstances of the case the sentence is one that could reasonably have been imposed by the sentencing judge (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] .

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL