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

CRIMINAL APPEAL NO.AAU 101 of 2019
[In the High Court at Lautoka Case No. HAC 201 of 2018]

BETWEEN : **SITIVENI NAUCUSOU**

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. A. Jack for the Respondent**

Date of Hearing : **28 May 2020**

Date of Ruling : **09 June 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of arson contrary to section 362(a) of the Crimes Decree, 2009.

[2] The appellant had pleaded guilty on 23 January 2019 and the learned High Court judge had convicted the appellant and sentenced him on 20 May 2019 to 04 years and 10 months of imprisonment with a non-parole term of 02 years.

[3] The appellant being dissatisfied with the sentence had signed a timely notice of leave to appeal against sentence on 27 May 2019. Legal Aid Commission on 08 May 2020 had submitted an amended notice of appeal containing two grounds of appeal against sentence and written submissions on 05 May 2020. The respondent's written submissions had been tendered on 26 May 2020.

[4] According to the summary of facts (as stated in the sentencing order) the appellant's involvement was as follows. The complainant is the appellant's wife. On 28 October 2018 he had come home after consuming alcohol. He had got angry about his son, Bale who was away in Nadi. The appellant had started talking harshly to the complainant who got scared and asked him not to yell. The appellant had then started striking the louver blades. The complainant had run to the neighbour's house. The appellant had poured kerosene in the sitting room and set the complainant's house on fire. On 29 October 2018 at about 12.30 am he had been arrested by the police while he was drinking grog at a house in another settlement. He had admitted to the offence in his cautioned interview. The house was completely damaged. The total value of the damages to property had been estimated at $ 13,034.00

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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 timely leave to appeal applications against conviction as well as sentence.

[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 timely ground of appeal 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.

Ground of appeal

'*1. That the learned Sentencing Judge erred in sentencing the Appellant to a wholly custodial sentence without considering and exercising his discretion in granting a partially suspended sentence and in failing to consider or exercise this discretion also failed to take into account relevant consideration which would have warranted a partially suspended sentence.'*

'2. That the learned Sentencing Judge erred in failing to give a separate discount towards the appellant's early guilty plea.

01st ground of appeal

[7] The appellant's complaint under this ground has to be considered in the light of the following sentiments expressed by the learned judge amounting to aggravating factors. The learned trial judge had viewed that the act of setting fire to the house involved a domestic violence offence though the appellant was not formally charged with an offence under Domestic Violence Act, 2009 (amended by Act No 31 of 2016) and that the severity of the offence of arson had become greater as it had been committed in a domestic context. The trial judge had further explained the gravity of the appellant's offending behaviour as follows.

'6……. It was submitted that you set fire to the house out of frustration for the things you have done for the betterment of the children. However, it should be noted that violence cannot arise out of love and care and it is not an excuse to say that one has unleashed violence because of the of love and care for the other person.

'7. There is no tolerance for domestic violence in our society anymore. Instead of providing protection and care for your children and spouse you have set fire to their house. This is a clear case of violation of the trust and security that exist between the parties in a domestic relationship. Although the previous approach of the courts was that offences in domestic context should be seen as no less serious than others, now the UK Sentencing guidelines emphasize that domestic context of offending makes it more serious as it represents a violation of trust and security that normally exist between people in an intimate relationship or family relationship.'

'8. The damage you caused to the complainant's property is substantial. Before setting fire to the house you damaged the louver blades. You verbally abused the complainant and she had to run to the neighbour's house for her safety. You were under the influence of liquor. You committed a domestic violence offence. I consider those as aggravating factors in this case.'

[8] The learned judge had then summarised the mitigating factors in the following paragraphs

> *9. 'In the mitigation submissions filed on your behalf it is stated that you committed this offence out of frustration as your son was not at home to prepare for exams. It is also submitted that you have purchased building material to build a new concrete house. You are 53 years old and you have three children. Two of them are minors.*
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> *10. You pleaded guilty at the first available opportunity and demonstrated remorse for your actions. You have maintained clean records for more than two decades. It was also submitted that you have reconciled with the complainant soon after the matter was reported. A letter written by the complainant to withdraw the case was also tendered.*
>
> *11. Reconciliation after unleashing violence at home does not bear much significance in sentencing a perpetrator of a domestic violence offence. The courts have always looked at forgiveness and reconciliation in domestic violence offences with skepticism….'*

[9] Following **Nakato v State** [2018] FJCA 129; AAU74.2014 (24 August 2018) the trial judge had identified the sentencing tariff for arson under section 362(a) of the Crimes Act, 2009 as between 05 and 12 years of imprisonment. The maximum punishment for arson is life imprisonment. Having taken 06 years at the lower end of the range of tariff as the starting point and after adding and subtracting aggravating and mitigating factors and the period of remand the learned judge had arrived at the final sentence of 04 years and 10 months which, to me by looking at it objectively, is a lenient sentence mainly due to only 02 years being added for aggravating factors.

[10] Section 26 of the Sentencing and Penalties Act, 2009 deals with the suspended sentences.

> *'26. — (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

(c).....'

[11] In this instance, there was no authority for the learned trial judge to have considered acting under section 26 of the Sentencing and Penalties Act, 2009 in as much as the sentence imposed on the appellant exceeded 03 years (see also ***Nakato***).

[12] **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Goundar J said

'[20] Neither under the common law, nor under the Sentencing and Penalties Decree, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is – whether the punishment fits the crime committed by the offender?

[13] The learned trial judge has carefully weighed all aggravating and mitigating circumstances in arriving at the final sentence. In the light of all of them I do not think that this is a fit case to consider suspending the custodial sentence either fully or partially.

[14] This ground of appeal has no merits.

02nd ground of appeal

[15] The appellant complains that the learned judge has erred in failing to give a separate discount towards the appellant's early guilty plea. He had given a discount of 03 years for all the mitigating factors, previous good character and the early plea.

[16] In ***Balaggan*** Gounder J had the occasion to state on 1/3 discount for an early guilty plea as follows.

> *'[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikelekelevesi State [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.*
>
> *[11] The weight that is given to a guilty plea depends on a number of factors……..*
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> *'Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed.* ***That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown****; that was the point of this Court's decision in Beavan at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor."*
>
> *[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.'*

[17] As argued by the appellant, a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was earlier considered as the 'high water mark' in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015). The Supreme Court dealing with ***Ranima*** said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)

> *'[15] The principle in* ***Rainima*** *must be considered with more flexibility as* ***Mataunitoga*** *indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[18] In ***Mataunitoga*** Goundar J held

> *'[18] In considering the weight of a guilty plea, **sentencing courts are encouraged** to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*

[19] The current judicial thinking that has developed progressively over the years is that it is a not a *sine qua none* for a sentencing judge to give a separate discount for an early guilty plea though it should be accorded some discount depending on the circumstances of each case with even no discount for an inevitable and totally belated plea. As a matter of good practice the sentencing judges may do so but not showing a separate discount for the early guilty plea *ipso facto* does not constitute an error of law as long as it had been taken into account as a mitigating factor.

[20] Therefore, I conclude that there is no merit in this ground of appeal either.

[21] I may also state that the following observations in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) should be applicable to any complaint on the sentencing process.

> *'[13] The Petitioner's argument as to his sentence points to the fact that the learned Magistrate adopted a starting point of 8 years and after considering both aggravating and mitigating circumstances awarded a total sentence of 7 years, whereas Shameem J considered that an appropriate starting point was 7 years and nonetheless concluded that after adjustments a total sentence of 7 years imprisonment was not excessive. The Petitioner argues that as the Magistrate in effect discounted the starting pointing by one year, Shameem J should also have done so. This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. **When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered.** Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.*

[22] Therefore, the grounds of appeal above discussed demonstrate no reasonable prospect of success in appeal regarding the sentence.

[23] Accordingly, leave to appeal against sentence is refused.

Order

1. Leave to appeal against sentence is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL