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

CRIMINAL APPEAL NO.AAU 141 of 2019
[In the Magistrates Court at Lautoka Case No. CF 283 of 2016]

BETWEEN	:	**JOSAIA MOCESARA LEONE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in Person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**16 June 2020**
Date of Ruling	:	**19 June 2020**

RULING

[1] The appellant had been arraigned in the Magistrates court of Lautoka exercising extended jurisdiction on five counts of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and five counts of theft contrary to section 44(1) and 291(1) of the Crimes Act, 2009 committed with three others.

[2] The appellant pleaded guilty to all charges and the learned Magistrate had convicted the appellant on his own plea and he had been sentenced on 12 July 2019 to an aggregate imprisonment of 65 months (05 years and 05 months) with a non-parole period of 04 years.

[3] The summary of facts is not before me and the learned Magistrate's sentencing order too does not set out the facts even briefly.

[4] An untimely notice to appeal against sentence had been signed by the appellant containing five grounds of appeal on 25 September 2019 followed by written submissions dated 12 March 2020. The State had tendered its submissions on 16 June 2020. The delay is about 1 ½ months and the State had not objected to the appeal on the basis of delay. Since the appellant has settled 'out of time' notice of appeal and written submissions in person and the delay is not substantial, I would treat his appeal as a timely one.

[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.*

***Grounds of appeal* against Sentence**

1. *THAT the Learned Sentencing Magistrate erred in law and in fact when he considered irrelevant guidelines to guide his sentencing (please refer to para: 08 of the Sentencing) when he took his guideline from misguided case references.*

2. *THAT the Learned Magistrate erred in law and in fact when he failed to consider the Koroivuki guidelines (Laisiasa Koroivuki v State (2013) FJCA 15; AAU 0018.2012 (5 March 2013) when he failed to give a starting point within the tariff of aggravated burglary.*

3. *THAT the Learned Magistrate erred in law and in fact when in paragraph 09 of his sentencing remarks stated that he found that the offence being committed in company of another is an aggravating factor which is already embedded in the offence creating an error in sentencing principles.*

4. *THAT the Learned Magistrate erred in law and in fact when he started his sentencing above the tariff without giving a cogent reason thus creating the error in sentencing principles.*

5. *THAT the Learned Magistrate erred in law and in fact when he sentenced the appellant to a period of 60 months for the charge of theft which is out of the tariff and with no cogent reasons provide thus creating an error in law.*

01st and 02nd grounds of appeal

[7] The appellant complains that the learned Magistrate had failed to adhere to guidelines set out in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013)] in selecting a starting point in the sentencing process. He must be referring to the following paragraph in ***Koroivuki***.

> *'[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.'*

[8] He also complains that in sentencing the appellant, the learned Magistrate had followed the sentencing tariff set in **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) for aggravated burglary as between 06 to 14 years ('new tariff') and taken 90 months or 7 ½ years as the starting point. This is despite the learned Magistrate having referred in paragraph 04 of the sentencing order to the tariff for aggravated burglary as being 18 months to 03 years.

[9] I encountered the same complaint in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020) and **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) where I dealt with in detail the current state of uncertainty arising from some High Courts following the 'old tariff' of 18 months to 03 years and other High Courts applying the 'new tariff' of 06 to 14 years for the offence of aggravated burglary. This appeal is an example that the same lack of uniformity may well be present among the Magistrates as well.

[10] Another issue I considered in those two Rulings was the question of retrospective application of sentencing tariffs as opposed to sentences *per se*. The same issue arises in this appeal as well, for the appellant had committed the offence in 2016 or earlier prior to the 'new tariff' was set in ***Prasad*** in 2017. However, he had been sentenced according to the 'new tariff'. Without any arguments from both sides the Court of Appeal had expressed disapproval of applying the 'new tariff' to offences committed prior to the 'new tariff' was set in **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018).

[11] I do not wish to repeat all what I had stated in ***Vakatawa*** and ***Kumar*** on both issues except to say that sooner the Court of Appeal or the Supreme Court resolves the issue of retrospective application of tariffs as a general principle of law or procedure or *sue generis* practice and the applicable tariff in aggravated robbery cases the better it for our legal system and administration of justice.

[12] The sentence imposed on the appellant can be significantly affected by the answers to the above two vital questions of law.

[13] These two matters involve questions of law and need no leave to appeal for the appellant's appeal to be taken up before the Court of Appeal. However, as a matter of formality I grant leave to appal.

03rd ground of appeal

[14] There is merit in the submission of the appellant that the learned Magistrate had committed a sentencing error in taking into account the fact that more than one person was involved in the aggravated robbery as an aggravating factor in adding further 18 months to the starting point of 7 ½ years of imprisonment. It is clear from section 313(1)(a) of the Crimes Act, 2009 that one of the ways in which the offence of burglary becomes aggravated burglary is when it is committed by an accused in company with one or more persons. Therefore, it is a well-established principle of sentencing that an element of the offence cannot be reckoned as an aggravating factor as the sentencing tariff set for an offence is deemed to have taken into account all elements of the offence.

[15] There is a reasonable prospect of success in this appeal ground and leave to appeal should be granted.

04th ground of appeal

[16] Considering that the learned Magistrate had applied the 'new tariff' of 6-14 years for aggravated burglary I cannot find fault with him for having taken 7 ½ years as the starting point. Therefore, the argument that the starting point should be considered to have incorporated the aggravating factors cannot be sustained in this instance. Similarly, it cannot be argued that the learned Magistrate had taken the starting point beyond the tariff. Had the learned Magistrate applied the 'old tariff' of 18 months to 03 years this argument would have been successful.

05th ground of appeal

[17] There is seems to be merit in the contention of the appellant that the learned Magistrate erred in sentencing principles when he had decided on an imprisonment of 60 months (05 years) as the starting point and the final sentence on two theft counts

simply based on 'the more serious aggravated burglary counts'. It is an important question of law whether a sentencing judge could consider the more serious offence on the charge sheet or the information in fixing the starting point and the sentence for the less serious offence the accused is charged with. Should not the starting point and the final sentence on the less serious offence be based only on the tariff and other aggravating and mitigating features relevant to that offence? I consider this to be a question of law and therefore, no leave to appeal is required.

[18] In addition, I find that the mitigating factors considered by the learned Magistrate are all personal circumstances which cannot be taken as mitigating factors, except 'being remorseful'. He had not pleaded guilty at the earliest opportunity and I cannot understand how he could have been considered as showing remorse either.

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