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

CRIMINAL APPEAL NO. AAU 05 of 2023
[In the High Court at Suva Case No. HAC 357 of 2017]

BETWEEN	**:**	**INOKE GADRE**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. Unaisi M. Ratukalou for Respondent**
Date of Hearing	**:**	**05 August 2024**
Date of Ruling	**:**	**06 August 2024**

RULING

[1] The appellant had been charged with two counts of aggravated burglary and two counts of theft under the Crimes Act 2009 in the High Court at Suva. The charges were as follows:

"Count One

Statement of Offence

AGGRAVATED BURGLARY: *Contrary to section 313 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

INOKE GADRE *with another on the 3rd day of July, 2015 at Nasinu, Suva in the Central Division entered United Pacific (Fiji) Limited, the property of* ***FARAAZ KHALIL*** *as trespassers with intent to commit theft in the said United Pacific (Fiji) Limited.*

Count Two

Statement of Offence

THEFT: *Contrary to section 291 (1) of the Crimes Act 2009.*

Particulars of Offence

INOKE GADRE *with another on the 3rd da1y of July, 2015 at Nasinu, Suva in the Central Division dishonestly appropriated properties belonging to* ***FARAAZ KHALIL*** *namely $550.00 worth of coins, the property of* ***FARAAZ KHALIL*** *with the intention to permanently deprive* ***FARAAZ KHALIL*** *of the said property.*

Count Three

Statement of Offence

AGGRAVATED BURGLARY: *Contrary to section 313 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

INOKE GADRE *with another on the 12th day of June, 2017 at Nasinu, Suva in the Central Division entered into the property of* ***MERESEINI NAVELA*** *as trespasser with intent to commit theft.*

Count Four

Statement of Offence

THEFT: *Contrary to section 291 (1) of the Crimes Act 2009.*

Particulars of Offence

INOKE GADRE *with another on the 12th day of June, 2017 at Nasinu, Suva in the Central Division dishonestly appropriated 1 x Samsung Note 5 mobile phone valued at $2,000.00, 2 x Whales tooth valued at $800.00, 1 x ladies handbag valued at $80.00, 1 x Nokia mobile phone valued at $159.00, $240.00 cash and 1 x spare key valued at $500.00, all the total value of $3, 779.00, the property of* ***MERESEINI NAVELA*** *with the intention to permanently deprive* ***MERESEINI NAVELA*** *of the said property."*

[2] The appellant had pleaded guilty to all four counts on 23 March 2020 and admitted the summary of facts on 08 May 2020. The High Court judge sentenced him on 22 November 2022 to 10 years of imprisonment each for aggravated burglary and 04 years each for theft. The judge also directed that the sentences for theft should run consecutive to the sentences for aggravated burglary which meant that the total sentence the appellant was expected serve was 14 years with a non-parole period of 10 years.

[3] The appellant's appeal against sentence is untimely.

[4] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)]

[5] The guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The summary of facts admitted by the appellant states as follows:

> *3. Briefly the facts were as follows. The complainant in count no. 1 and 2 was Mr. Faraaz Khalil. He was 29 years old and a director of United Pacific (Fiji) Limited, of Aurora Avenue, Makoi. The accused was 25 years old, unemployed of Reba Circle, Nadera. According to the prosecution, the accused went to the United Pacific (Fiji) Limited office at 1 pm on 2 July 2015. The accused used to work there in 2008. He went to the office to check out the layout of the same before he broke into the same.*
>
> *4. According to the prosecution, he was planning to break into the office that night. Between 8 pm on 2 July and early morning on 3 July 2015, the accused and another broke into the office. The accused broke into a window and climbed into the office with his friend. According to the prosecution, the accused and his friend ransacked the office and stole $550 therefrom. They later fled from the crime scene. At 8.10 am on 3 July 2015, the complainant discovered that his office had been broken into and $550 was stolen. The matter was reported to the police. An investigation was carried out. On 6 July,*

2015, the accused was arrested and caution interviewed by police. He admitted the offences to police. However, the $550 were not recovered.

5. *As for count no. 3 and 4, the complainant was Ms. Mereseini Navela. She was 29 years old. She was also a director of United Pacific (Fiji) Limited of Aurora Avenue, Makoi. According to the prosecution, the complainant awoke in her residence in the early hours of the morning on 12 June 2017. Her residence was at Maqbool Road, Nadera. She noticed that her bedroom window had been broken into and someone had entered her house through the window. The window was also the point of exit for the person. She later found that her house was ransacked and the items listed in count no. 4 of the information had been stolen. She reported the matter to police. An investigation was carried out. On 28 June 2017, the accused was arrested by police. He was caution interviewed by police on 1 July 2017 at Valelevu Police Station. During the interview, he admitted the offences to the police. It appeared the complainant's stolen properties were not recovered.*

[7] The grounds of appeal on sentence urged by the appellant are as follows:

Ground 1

THAT *the Learned Trial (Sentencing) Judge erred in law and in fact when he:*

a. *Failed to promptly sentence the appellant soon after the appellant had pleaded (23 March 2020) guilty;*
b. *During the sentencing failed to impose a sentence effective from the 23rd March 2020;*
c. *Sentenced the appellant 2 years 8 months 2 days after he (appellant) entered a guilty plea and thereby depriving the appellant a chance for a concurrent sentence, to a sentence of 25 months which he was serving at the time when he entered his plea for a similar offence.*

Ground 2

THAT *the Learned Sentencing Judge erred in law when he failed to consider (at all) section 14 (2) (n) of the 2013 Constitution of Fiji whilst sentencing the appellant.*

Ground 3

THAT *the given the nature of the offence, amount ($4,329.00) involved; co-operation by the appellant to the police together with his guilty plea, the sentence imposed (14 years) by the learned sentencing judge is:*

a. *Too harsh and excessive;*
b. *Disproportionate, contrary to section 11 – (1) of the 2013 Constitution.*

Ground 4

THAT *since the "established tariff for aggravated burglary is 18 months to 3 years". (Vakatawa v State [2020] FJCA 63; AAU 0117.2018 (28 May 2020);*

Kumar v State [2020] FJCA 64; AAU033.18 (28 May 2020); Leone v State [2020] FJCA 85; AAU 141.2019 (19 June 2020); Daunivalu v State [2020] FJCA 127; AAU 138.2018 (10 August 2018) and Naivalurua v State [2020] FJCA 166; AAU 0043.2019 (9 September 2020) – the learned sentencing judge erred in law by applying an unauthorised tariff of 6 to 14 years whilst sentencing the appellant and by failing to follow the decision made by the Fiji Court of Appeal in Kumar v State [2018] FJCA 148; AAU 165.2017 (4 October 2018)

Ground 5

THAT *the Learned Sentencing Judge erred in law by failing to deduct 15 months (time already spent in remand custody) from the appellants final sentence – contrary to section 24 of the Sentencing Penalty Act (2009).*

Ground 1

[8] The trial judge had not made the appellant's current sentence to run consecutively to the sentence that he was serving at the time of sentencing (15 months of imprisonment imposed on 11 July 2019) which meant that had he been sentenced on or around the time he admitted the summary of facts, his current sentence would have started running from that time leaving him with the prospect of completing the sentence nearly 02 years and 07 months earlier than he is expected to do now (assuming, of course that the judge would not have made it consecutive to his earlier sentence).

[9] There is no reason or justification found in the sentencing order for the inordinate delay in sentencing the appellant. However, there is no reason why the trial judge should have made the effective commencement date of the sentence to 23 March 2020, for the appellant admitted the summary of facts only on 08 May 2020. Had the sentence commenced on or around 08 May 2020, the hardship caused by the unexplained delay would have been mitigated. There is no mention whatsoever that the trial judge had taken into account the delay on the part of court to deliver a prompt sentence in the calculations leading to the final sentence.

Ground 2, 3 and 4

[10] The real substance of the appellant's complaint seems to be that the trial judge had failed to sentence him according to the correct tariff for aggravated burglary. The

Court of Appeal on 24 November 2022 delivered a guideline judgment for burglary and aggravated burglary in **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022). The judge sentenced him on 25 November 2022. It is quite possible that the trial judge was not aware of the guideline judgment by the time he imposed the sentence on the appellant. However, the appellant had a right to be sentenced according to the new guidelines even on 25 November 2022. The guideline judgment effectively overruled the two High Court cases the trial judge had followed in imposing the current sentence.

[11] The new guidelines for burglary and aggravated burglary are as follows:

LEVEL OF HARM (CATEGORY)	BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)	**AGGRAVATED BURGLARY** (OFFENDER EITHER WITH ANOTHER OR WITH A WEAPON)	**AGGRAVATED BURGLARY** (OFFENDER WITH ANOTHER AND WITH A WEAPON)
HIGH	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years	Starting Point: 09 years Sentencing Range: 08–12 years
MEDIUM	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years
LOW	Starting Point: 01 year Sentencing Range: 06 months – 03 years	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years

[12] The appellant's offending committed with one or more persons for which he pleaded guilty most likely falls within the medium category and the sentence range would have been 03-08 years with a starting point of 05 years. Higher culpability and ***either*** the previous convictions as statuary aggravating factors ***or*** the fact that the judge declared him as a habitual offender considering the same 05 previous convictions would have enhanced the sentence further. Still, the ultimate sentence might arguably not have come to 10 years of imprisonment for aggravated burglary. New tariffs did not affect the sentence on theft offences.

[13] On the matter of making the two sentences for aggravated burglary and theft consecutive by the trial judge, section 22 of the Sentencing and Penalties Act allows a sentencing court to depart from the default position of concurrency in the case of a habitual offender. Section 11 (b) of the Sentencing and Penalties Act allows a judge to impose a sentence longer than proportionate to the gravity of the offence on a habitual offender.

[14] Therefore, I am inclined to allow the Full Court is to determine the appropriate sentence considering not only the new tariff but also the provisions relating to concurrent and consecutive sentences[1] under the Sentencing and Penalties Act. 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 and even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence 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 [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[15] It is for the Full Court to decide whether the ultimate sentence irrespective of the errors or the methodology applied in the sentencing process is harsh or excessive (though

[1] **Donu v State** [2021] FJCA 81; AAU0005.2020 (25 March 2021)

disproportionate to the offending) in all the circumstances. Since sentencing is for more than one offence, totality principle[2] should also be considered before recording the actual sentence to be served.

Grounds 5

[16] The trial judge had recorded his guilty plea but does not appear to have given a discount for it as the plea was offered at a very late stage.[3] If at all, the appellant would not be entitled to a substantial reduction for guilty plea due to the delay. The remand period of 01 year and 03 months may have been considered when the appellant was sentenced to 15 months' imprisonment previously. If not, he is entitled for his period of remand to be deducted. These are matters that could be considered when the Full Court considers an appropriate sentence to be imposed on the appellant.

Orders of the Court:

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent

[2] **Sharma v State** (2015) FLR 883; AAU 48/2011 (03 December 2015
[3] See **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) for a full discussion.