IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 28 OF 2013

BETWEEN: **SAMUELA RAMAGIMAGI**

Appellant

AND: **STATE**

Respondent

Counsels : **Mr. R. Kumar for the Appellant**
Mr. S. Babitu for the Respondent

Date of Judgment : **05th March 2014**

JUDGMENT

1. The appellant was charged before the Lautoka Magistrate under following counts:

First Count

Statement of Offence

BURGLARY:- Contrary to Section 312 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Samuela Ramagimagi between 14th day of January 2013 to 15th day of January 2013 at Lautoka in the Western Division, broke and entered into the Sahay Bulk Store of Janendra Sahay and remains as a trespasser, with intent to commit theft therein.

Second Count

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the offence

Samuela Ramagimagi between 14th day of January 2013 to 15th day of January 2013 at Lautoka in the Western Division, dishonestly appropriate 1 Lenovo 14 inch full set computer valued $2500.00, 1 Nokia dual sim mobile phone valued $300.00, 1 Samsung mobile phone valued $300.00, 1 Galaxy mobile phone valued $300.00, 1 Alcatel phone valued $65, 1 bolt cutter valued $300.00, 1 battery tester valued $300.00, 1 carton Fiji bitter valued at $45.00, 9 white emergency light valued $153, assorted stationeries valued $70 all to the total value of $4333.00 the property of **Janendra Sahay** with intention of permanently depriving the said **Janendra Sahay.**

2. The appellant pleaded guilty on 02.07.2013 and admitted the summary of facts the same day. He was convicted and sentenced for 3 years 6 months imprisonment for the first count, 18 months imprisonment for the 2nd count on 13th August 2013. Both sentences to run concurrent and appellant not eligible for parole unless he had served 3 years imprisonment.

3. The facts of the case are:

   Between 1700hrs, 14/01/13 to 0800hrs, 15/01/13, Samuela Ramagimagi, (Accused) broke into the Sahay Brothers Limited Bulk Store at Bouwalu Street, Lautoka and stole 1 Lenovo 14 inch full set computer valued $2,500.00, 1 Nokia dual sim mobile phone valued $300.00, 1 Samsung mobile phone valued $300.00, 1 Galaxy mobile phone valued $300.00, 1 Alcatel phone valued $65, 1 bolt cutter valued $300.00, 1 battery tester valued $300.00, 1 carton Fiji bitter valued at $45.00, 9 white emergency light valued $153, assorted stationeries valued $70, all to the total value of $4,333.00, the property of Janendra Sahay, (PW-1).

   On the 15/1/13, PW-1 opened the bulk store and discovered that all the items inside were ransacked. Later PW-1 discovered that unknown person broke the back bulk store window and found the above mention items stolen.

   PW-1 reported the matter to the Police whereby DC 3830 Apenisa was appointed to be the investigating officer.

   Investigation conducted where Accused was brought for questioning and admitted that he committed the offence. Accused was formally charged.

   Battery Tester, bolt cutter, 2 umbrellas, 1 white emergency light and a Nokia mobile phone was recovered.

4. This appeal against the sentence was filed on 4.9.2013 within time.

5. The grounds of appeal are :

   (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive.
   (ii) That the learned Magistrate failed to consider the early Guilty plea properly.

6. Both parties have filed written submissions.

7. The learned Magistrate had selected a starting point of 2 years for the first count. He had mentioned following guideline judgment.

   '*In* ***Navithalai Seru v The State*** *Crim. App. No. 84/05 the Court accepted the tariff for the offence of Burglary as 2-3 years imprisonment.'*

8. In **State v Tabeusi** [2010] FJHC 426; HAC 095-113.2010L (16 September 2010) the tariff for the offence of Burglary was discussed with accepted tariff being 2 years to 3 years after trial. In ***State v Mucunabitu*** [2010] FJHC 151; HAC 017.2010 (15 April 2010) it is held that the accepted tariff is 18 months to 3 years.

9. Then the learned Magistrate had identified following aggravating factors:

   (i) Complainant is being put in a state of fear and insecurity for his property, incurring further costs in upgrading security for his premises.
   (ii) Appellant's utter disrespect to the complainant's right to property.
   (iii) The value of items is quite high and non recovery of all items.

   Three years were added for the above.

10. Then for mitigation lacking evidence of remorse 6 months were deducted. For early guilty plea 12 months were deducted. For the time period spent in remand since 21st May 2013, 3 months were deducted only from the sentence for Theft count.

11. The learned Magistrate had erred in arriving at the above sentence on following grounds:

    (i) He had erred by adding three years for the aggravating factors, one of which cannot be recognized as an aggravating factor.
    (ii) He had erred by not giving sufficient deduction for the early Guilty plea.
    (iii) The time period spent in remand should have been deducted from the final sentence.

12. State in their submissions had conceded that the learned Magistrate had erred by mentioning all items not recovered as an aggravating factor. Further, State had

conceded that noting lack of remorse is an error by the learned Magistrate. State had conceded that sufficient deduction was not given for the Guilty plea of the appellant.

13. The fact that all items not recovered cannot be considered as an aggravating factor.

14. This position was affirmed by Hon. Mr. Justice Paul Madigan in **Soko v State,** [2011] FJHC 777; HAA 031.2011 (29 November 2011) where he held that:

'*Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature.'*

15. This point was also highlighted by Hon. Mr. Justice Priyantha Nawana in **Vasuca v State** [2012] FJHC 1244; HAA 03.2012(31 July 2012):

'As regards 'not all items were recovered', it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently the fact that all or some items of property were not recovered cannot be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa.'

16. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

"*The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.'"*

17. It was held in **Naikelekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that '*Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.'*

18. In **Ratubalavu v State** [2009] FJHC 199; HAA 063.2008 (10 September 2009) Hon. Mr. Justice Daniel Grounder held that '*It has been a practice of the courts of Fiji to give a reduction of one third in the sentence for an early plea of guilty by an accused. (**Mahendra Singh v State** Criminal Appeal No. AAU0036 of 2008S)*

19. Section 24 of the Sentencing and penalties Decree provides:

'*If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.'*

20. Further, according to Section 15 (4) of the Sentencing and penalties Decree '*As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into consideration all matters stated in this part.'*

21. The learned Magistrate had deducted a period of 3 months only from the sentence of the theft count and thereby erred in not following the Section 24 and 15 (4) of the Sentencing and Penalties Decree properly.

22. This background warrants this court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate in respect of the 1st count and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.

23. Accordingly I take a starting point of 2 years and add 1 year for the aggravating factors excluding the non recovery of all stolen items. I deduct 6 months for the mitigating factors mentioned above. Further 1 year to be deducted for the Guilty plea. Final sentence is 1 year and 6 months.

24. The sentence for the 2nd count is appropriate and within the tariff as the appellant is not a first offender.

25. According to the totality principle both sentences to run concurrently.

26. Appellant had served 6 months and 20 days. He was in remand for 3 months. Therefore period of 9 months and 20 days to be deducted from the final sentence.

27. Appellant is not a first offender. He has 9 previous convictions. Eight of them are for similar offences. Therefore a suspension of the sentence is not appropriate.

28. Appellant to serve 8 months and 10 days imprisonment from today.

29. Appeal is allowed. Sentence is varied.

Sudharshana De Silva
JUDGE

AT LAUTOKA
05TH March 2014

Solicitors: **Office of the Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent