

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 24 OF 2014

BETWEEN: ILAITIA KOROI

Applicant

AND: STATE

Respondent

Counsels: Applicant in person
Mr. Josaia B. Niudamu for the Respondent

Date of Judgment: 05th June, 2014

JUDGMENT

1. The applicant was charged before the Nadi Magistrate Court with one count of Burglary contrary to Section 312 (1) of the Crimes Decree and second count of Theft contrary to Section 291 (1) of the Crimes Decree.
2. The appellant pleaded guilty and admitted the summary of facts. He was convicted and sentenced for 2 years imprisonment for each count with both sentences to run concurrent and appellant not eligible for parole unless he had served 18 months imprisonment.
3. The facts of the case are that between 27.4.2013 and 28.4.2013, appellant broke and entered into dwelling house of Mr. William Fong and stole therein assorted items including LCD 40 inch TV, three laptops all to the value of \$9,750.00.
4. This application for leave to appeal out of time was filed on 19.12.2013 and was 7 months out of time.
5. The Section 248 of the Criminal Procedure Decree provides:
 - (1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-
 - (a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;

- (b) a copy of the petition shall be filed at the registry of the High Court; and
 - (c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.
- (2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.
- (3) For the purposes of this section and without prejudice to its generality, “good cause” shall be deemed to include-
- (a) a case where the appellant’s lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;
 - (b) any case in which a question of law of unusual difficulty is involved;
 - (c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner or the Fiji Independent Commission Against Corruption is required by any law;
 - (d) the inability of the appellant or the appellant’s lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.
6. The principles for an extension of time to appeal are settled. The Supreme Court in **Kumar v State; Sinu v State** [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

- (i) The reason for the failure to file within time.*
- (ii) The length of the delay.*
- (iii) Whether there is a ground of merit justifying the appellate courts consideration.*
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- (v) If time is enlarged, will the respondent be unfairly prejudiced?”*

7. More recently, in **Rasaku v State** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

“ These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court. “

8. The applicant was not represented at the trial or at this leave to appeal out of time application. There is substantial delay, nonetheless there is a ground of appeal that will succeed as conceded by the state.
9. When these facts were brought to the notice of the state they conceded for leave to appeal and to treat this application as an appeal against the sentence. I thank the State counsel for upholding the traditions of the DPP office.
10. The learned magistrate had identified the tariff for the first offence as 18 months to 3 years. He had also identified the tariff for the second offence as 2-9 months.
11. 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.
12. Tariff for the offence of theft was discussed in several cases. In **Saukilagi v State** the Court accepted between 2 to 9 months as tariff for simple theft.

*'The tariff for simple larceny on first conviction is 2-9 months (**Ronald Vikash Singh v. State** HAA 035 of 2002) and on second conviction a sentence in excess of 9 months. In cases of the larceny of large amounts of money sentences of 1 ½ years imprisonment (**Isoa Codrokadroka v. State** Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (**Sevanaia Via Koroi v. State** Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between victim and the defendant. The method of stealing is also relevant.'*

13. In **Ratusili v State** [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Hon. Mr. Justice Paul Madigan summarized the tariff judgments.

'From the cases then the following sentencing principles are established:

- (i) *For an offence of simple theft the sentencing range should be between 2 and 9 months*
- (ii) *Any subsequent offence should attract a penalty of at least 9 months*
- (iii) *Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences up to three years*
- (iv) *Regard should be had to nature of the relationship between offender and the victim*
- (v) *Planned thefts will attract greater sentences than opportunistic thefts.*

14. However, the learned Magistrate had selected a starting point of 2 years for each count.

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

- (i) Premeditated invasion of dwelling house by opening the back door with pinch bar

- (ii) Loss caused to the complainant nearly \$10,000
- (iii) Total lack of respect towards the victim's property and enjoyment of property rights

Two years were added for the above.

16. The following were identified as mitigating factors by the learned Magistrate:

- (i) Applicant was 20 years old
- (ii) Early guilty plea on the first available opportunity
- (iii) Apologetic
- (iv) First offender.

One year was deducted for the mitigating factors and further one year for the early guilty plea.

17. The final sentence was 2 years for each charge and the learned Magistrate had given reasons why the sentence is not suspended. Both the sentences to run concurrently with a non-parole period of 18 months.

18. Although the learned Magistrate had identified the correct tariff for each offence he fell in to error when he selected 2 years as starting point for each charge. That is well outside the tariff for the second offence and in the highest range in the tariff for the 1st offence. All the items were recovered and this has not been considered by the learned Magistrate.

19. 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 both counts and pass other sentence which reflects the gravity of the offences within the acceptable range of tariff.

20. Accordingly, I take a starting point of 18 months for the 1st charge and add one year for the aggravating factors. I deduct 6 months for the mitigating factors. I deduct 8 months for the early guilty plea. Final sentence for the 1st charge is 16 months.

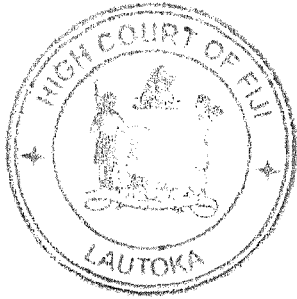
21. For the second count of Theft considering all aggravating and mitigating factors, I order a sentence of 9 months.

22. According to the totality principle, both sentences to run concurrently.

23. Applicant was in remand since 7.5.2013 and had served 13 months. I suspend the balance period of 3 months for a period of 3 years.

24. Applicant is explained the suspended sentence.

25. Application is allowed, treated as an appeal against the sentence. Sentence is varied.
Prison authorities directed to release the applicant forthwith.




Sudharshana De Silva
JUDGE

At Lautoka
05th June 2014

Solicitors : Applicant in Person
Office of the Director of Public Prosecution for Respondent