

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO: HAA 042 OF 2013

BETWEEN : ALIFASI KILIKITI

APPELLANT

AND : THE STATE

RESPONDENT

COUNSEL : Appellant in person
Ms M Fatiaki for Respondent

Date of Hearing : 06/08/2014

Date of Judgment : 10/09/2014

JUDGMENT

01. Alifasi Kilikiti (hereinafter "the appellant") was charged for the offence of Escape from Lawful Custody contrary to Section 196 of the Crimes Decree No: 44 of 2009. The Charge was filed at the Suva Magistrates' Court on 23/04/2013.

02. The particulars of offence were:

Alifasi Kilikiti on the 21st day of April 2013 at St Giles Hospital, Suva in the Central Division, being in the lawful custody of Prison Officer Josefa Mapa, escaped from such custody.

03. Due to various reasons the taking up plea had been differed several times. Finally on 05/09/2013, the charge in respect of Criminal Case No: 748/2013 was read out to the Appellant. He pleaded guilty to the charge and admitted the summary of facts.
04. On 28/10/2013, he was sentenced to a prison term of 06 months consecutive to his existing sentence.
05. The Appellant initially filed his appeal grounds in person and applied for Legal Aid.
06. The Appellant filed his appeal grounds against the sentence on 15/11/2013. The grounds of appeal against the sentence are:
 - (i) That the learned sentencing Magistrate has erred when he failed to make a discount that there were no aggravating factors.
 - (ii) That the learned sentencing Magistrate has erred in fact and in law for not taking into deep consideration that the applicant was being “provoked” to commit such offence, and should have made a discount or have passed a concurrent term as it is clearly stated in the Criminal law Book that ‘Provocation is a defence for all criminal cases’.
 - (iii) That the learned sentencing Magistrate erred in law when sentencing the applicant to the same as Tuibua v State (2008) FJCA 78 as the ‘nature of aggravating factors of their cases were both different altogether’.
 - (iv) That the learned Magistrate erred when he failed to give a discount while sentencing the applicant and not directing his mind that the period at large was only a few hours and not one day as he has stated in paragraph 11 of his sentence.
07. On the 28th May 2014 the Appellant informed the Court that he wanted to withdraw the abovementioned grounds of appeal and proceed with his appeal on the following grounds:
 - (i) That the Learned Magistrate failed to take into consideration that the appellant’s escaping from lawful custody was based on inhuman treatment that itself amounted to exceptional circumstances that deserved concurrent sentence in the interest of justice.
 - (ii) Commencement of Sentence
 - (iii) That the Learned Magistrate failed to allow the discount for mitigating factor separately.

- (iv) That the sentence imposed is harsh and excessive in all the circumstances of the case.
08. Section 22 of Sentencing and Penalties Decree states as follows:
- “22 (1) Subject to sub section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentence of imprisonment.
- (2) Sub section (1) does not apply to a term of imprisonment imposed-
- (a) In default of payment of a fine or sum of money;
 - (b) On a prisoner in respect of a prison offence or as a result of an escape from custody;
 - (c) On a habitual offender under Part III;
 - (d) On any person for an offence committed while released on parole; or
 - (e) On any person for an offence committed while released on bail in relation to another offence.
- (4) Every term of imprisonment imposed on a prisoner by a court in respect of a prison offence or an escape offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.

Appeal ground 01

09. That the Learned Magistrate failed to take into consideration that the appellant’s escaping from lawful custody was based on inhuman treatment that itself amounted to exceptional circumstances that deserved concurrent sentence in the interest of justice.
10. The Appellant had the opportunity to inform the Prison Authority the inhuman treatment he was subjected while in the custody of the prison officials. The Appellant however took matters into his own hands by ultimately breaking the law and escaped from prison custody. This cannot be considered as an exceptional circumstances as advanced by the Appellant. I fully agree with Learned Magistrate’s reasoning at paragraph 12 of his sentence.

Appeal Ground 02

11. The Appellant states that the Learned Magistrate erred in respect of the commencement date of the sentence imposed.
12. The Appellant suggests that because the Sentencing and Penalties Decree 2009 provides at Section 23(1) that “a sentence of imprisonment commences on the day it is imposed”; the Learned Magistrate erred in ordering his sentence to run consecutive to the sentence he is currently serving. He further contends that this provision is not subject to any other provision.
13. Section 23(1) of the Sentencing and Penalties Decree 2009 must be read in light of all other provisions of Sentencing and Penalties Decree, especially Section 22. Section 22(4) of the Sentencing and Penalties Decree 2009 provides sentencing directions to be followed in a prison escape case. The Learned Magistrate very correctly followed the section before passing his final sentence.

Appeal Ground 03

14. That the Learned Magistrate failed to allow the discount for mitigating factor separately.
15. In **Daunabuna v State** [2009] FJCA 23; AAU120.2007 (4 December 2009), the Court of Appeal at para [16] stated:

“A plea of guilty is always a matter which must be taken into account when imposing sentence”.
16. As per paragraph 12 of the sentence the Learned Magistrate accepted this mitigation and awarded sufficient discount before imposing the sentence.

Appeal ground 04

17. That the sentence imposed is harsh and excessive in all the circumstances of the case.
18. The Learned Magistrate in sentencing the Appellant identified the correct maximum term of imprisonment as 2 years and further went on to provide the tariff which is 6 to 12 months.
19. The Learned Magistrate selected a starting point within the tariff, noted there was no aggravating factors to increase the sentence as it was subsumed in the offence itself, and then went on further to deduct 2 months for mitigating factors as earlier

mentioned. The Learned Magistrate then found that there were no exceptional circumstances which exist and as a result ordered that the Appellant serve a consecutive sentence.

20. Upon perusal of the Sentence the learned Magistrate has considered the factors relating to the application of consecutive sentence and the totality principle before making orders for consecutive sentence. However Section 22 of the Sentencing and Penalties Decree 2009 does give discretion to the learned Magistrate to exercise the same in a judicial manner.
21. I agree with learned Magistrate's sentence passed in this case as he used his discretion under Section 22 of Sentencing and Penalties Decree 2009 in a judicial manner.
22. As there are no merits in respect of all the grounds urged by the Appellant, I dismiss his Appeal against the sentence.
23. Appellant has 30 days to appeal.

 A circular purple seal of the High Court of Fiji. The outer ring contains the text "HIGH COURT OF FIJI" at the top and "SUVA" at the bottom, separated by two stars. The center features the national coat of arms of Fiji.
P Kumararatnam
JUDGE

At Suva
10/09/2014