IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 48 OF 2019

BETWEEN : **SHANAL AVIKESH KUMAR**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Ms. A. Bilivalu for the Appellant.
Ms. R. Uce for the Respondent.

Date of Hearing : 28 May, 2020
Date of Judgment : 29 May, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Rakiraki for one count of burglary contrary to section 312 (1) of the Crimes Act and one count of theft contrary to section 291 (1) of the Crimes Act.

2. The brief facts were as follows:

Between 27th October, 2018 and 29th October, 2018 at Vaileka, Rakiraki the appellant broke into the shop of Supreme Fuel Limited and stole cash of $1,600.00. When the complainant discovered the shortage of

cash he got suspicious and reported the matter to the police. An investigation was carried out the appellant was arrested on 17 December, 2018 he was caution interviewed whereby he admitted committing both the offences.

3. The appellant had elected Magistrate's Court trial. On 3rd April, 2019 the appellant pleaded guilty to both the counts in the presence of his counsel. Thereafter the appellant admitted the summary of facts read by the prosecution. The learned Magistrate found the appellant guilty as charged but reserved conviction until sentence.

4. On 9th August, 2019 the appellant was convicted, after having heard mitigation the appellant was given an aggregate sentence of 2 years and 8 months imprisonment with a non-parole period of 2 years and 2 months.

5. The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely appeal against sentence which was amended by the amended Petition of Appeal filed on 10th December, 2019 by the Legal Aid Counsel who now appears for the appellant. The amended grounds of appeal are as follows:

APPEAL AGAINST SENTENCE

1. The learned Magistrate erred in law and in principle when he failed to take into account the full remand period as sentence already served.

2. The learned Magistrate erred in law and in principle in failing to consider the correct tariff for burglary and thereby using a higher starting point.

3. The learned Magistrate erred in law and in principle when failing to correctly apply the totality principle.

4. The sentence of the learned Magistrate was harsh and excessive in all the circumstances of the case.

6. Both counsel filed helpful written submissions and also made oral submissions during the hearing for which the court is grateful.

LAW

7. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the Appellate Court that the sentencing court fell in error whilst exercising its sentence discretion.

8. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"*It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-*

(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

9. The appellant's main argument in this appeal is that the sentence is harsh and excessive for the following reasons:

   a) Remand period not taken into account;
   b) Incorrect tariff taken for the offence of burglary resulting in a high starting point;
   c) Incorrect application of the totality principle.

DETERMINATION

REMAND PERIOD

10. Counsel for the appellant argued that the learned Magistrate did not give any reduction for the period the appellant was in remand which was contrary to section 24 of the Sentencing and Penalties Act.

11. At paragraph 10 of the sentence the learned Magistrate stated the following about remand period:

"You have been in remand since the inception of your case which was from 20th March, 2019. I will not consider any time you have been in remand as time served as you deserve to be remanded in custody as you had other similar cases pending, see example EJR 03-17 which involves aggravated burglary which was committed in 2016 and which you have pleaded guilty to and has been sentenced."

12. At paragraph 34 of the sentence the learned Magistrate makes the following comments about the EJR matter mentioned above.

> *"I am aware that you are currently serving your sentence in Rakiraki EJR 03 – 2017 for aggravated burglary and theft. You were sentenced on the 23rd of May, 2019 to an aggregate sentence of 3 years 5 months and 14 day imprisonment with no parole period fixed. I am aware of that case as I sentenced you …"*

13. Section 24 of the Sentencing and Penalties Act states:

> *"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 … shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

14. The appellant's counsel submits that the appellant was in remand from 20th March, 2019 until he was sentenced on 23rd May, 2019 in file EJR 03 – 17. The remand period comes to 2 months and 3 days which was not allowed as a reduction which is unfair and unjustified.

15. Section 24 of the Sentencing and Penalties Act states that a sentencing court must regard the remand period as a period of imprisonment already served by the offender on one hand and on the other the provision then bestows a discretion on the sentencing court by stating *"unless a court otherwise orders"*.

16. In my view when one reads section 24 of the Sentencing and Penalties Act there is no ambiguity in its construction. The plain and ordinary meaning of this section makes it mandatory that any remand period be regarded as a period of imprisonment already served which essentially

means that an appropriate reduction be considered in arriving at the final sentence. Section 24 therefore is a right given by law which accrues to the offender that must be taken into account by the sentencing court.

17. However, the discretion given in this section is to be exercised in the context of the mandatory requirement because the discretion cannot override the statutory intent of section 24. In this regard the discretion given to the sentencing court is in respect to the length of the remand period to be taken into account. For example there is no necessity for a sentencing court to make a precise mathematical calculation on the length of the remand period as long as it takes into account a substantial period of remand which is then deducted from the interim sentence before finality.

18. In *Vilitati Vasuca v State [2015] FJCA 65, AAU 011 of 2011 (28 May, 2015)* the Court of Appeal made a pertinent observation in respect of section 24 of the Sentencing and Penalties Act from paragraphs 14 to 17 as follows:

> *[14]...Section 24 of the Sentencing and Penalties Decree 2009 requires sentencing courts to regard any pre-trial detention as a period of imprisonment already served by the offender. In this jurisdiction, the practice has been discounting or subtracting the remand period instead of backdating the sentence. There is no exact formula on how the discounting should be made. Some judges incorporate the discounting in the combined quantification for all the mitigating factors while some judges turn to give separate discounting for pre-trial detention. The length of the remand period may vary from case to case, and in each case the discretion lies with the sentencing court to comply with section 24 of the Sentencing and Penalties Decree 2009. In Basa v State (unreported Criminal Appeal No.*

AAU0024 of 2005; 24 March 20006), the offender had spent one year, one month and fourteen days in custody before the trial but the judge only allowed for one year on remand. On appeal this Court said at para. [12]:

"The appellant also points out that he had spent one year, one month and 14 days in custody before the trial but the Judge only allowed for one year on remand. When calculating the appropriate sentence for any offence, the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount."

[15] Although ***Basa's*** *case was considered before the Sentencing and Penalties Decree 2009 came into effect, the view that was expressed by this Court regarding consideration of the remand period in sentence has not been altered by section 24 of the Decree. Section 24 reads:*

'Time in custody before trial to be deducted'

"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."

[16] The heading to section 24 states 'time in custody before trial to be deducted'. But the section itself does not use the word deduction. The operative word in section 24 is 'regarded'. To regard means to consider or to take into account (Shorter Oxford English Dictionary, 2nd ed. Vol. 1 p. 1690). The use of the word 'shall' in section 24 literally means that sentencing courts have no option but to consider any remand period, even if it is a few days, as a period of imprisonment already served. If this interpretation is correct, then the offenders will be ending with sentences in terms of years, months and days. But the word 'shall' in section 24, is followed by a comma and a phrase 'unless a court otherwise orders',

which can mean that it is discretionary as opposed to mandatory for sentencing courts to consider remand period as a period of imprisonment already served. If the purpose of section 24 is to create a mandatory obligation on sentencing courts to consider any remand period as a period of imprisonment already served, then what is the purpose of giving a residual discretion that defeats the original purpose? The two propositions are clearly in conflict.

[17] So how should sentencing courts consider remand period in sentence. In my opinion, the answer lies with how the remand period was considered under the common law as outlined in ***Basa's*** *case, that is, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation. What is a substantial period, of course, will depend on the facts of each case and the sentence that has been imposed on the offender.*

19. Here the learned Magistrate had totally disregarded the remand period of the appellant for a sentence which was on the higher scale of the tariff. Furthermore, there was no justified reason given why the remand period was not taken into account. This ground of appeal is allowed.

INCORRECT TARIFF

20. The appellant's counsel also submits that the learned Magistrate had relied on an incorrect tariff for the offence of burglary to be between 20 months to 6 years imprisonment as per *State vs Prasad, HAC 254 of 2016 (12 October, 2017)* as a result the starting point of 2 years and 4 months imprisonment was on the higher scale.

TARIFF

21. The maximum penalty for the offence of burglary is 13 years imprisonment. The accepted tariff for this offence is a sentence between 1 year and 3 years imprisonment *(see Viliame Waqavanua vs. State, Criminal Appeal No. HAA 013 of 2011, 6th May, 20110), Penaia Ratu vs. State, Criminal Case No. HAA 95 of 2017).*

22. There is no doubt that the learned Magistrate took an incorrect tariff. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in *Laisiasa Koroivuki v The State, criminal Appeal No: AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[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.

23. The learned Magistrate used a starting point of 2 years and 4 months imprisonment for the aggregate sentence this in my view was in the higher range of the established tariff. Thereafter, the aggravating factors were added and mitigating factors were used to reduce the sentence. In the end the appellant was sentenced to 2 years and 8 months imprisonment with a non-parole period of 2 years and 2 months.

24. The final sentence is within the tariff but on a higher scale. A perusal of the sentence shows that the appellant was not a first offender having two previous convictions of similar offences who had targeted a commercial enterprise in the heart of Vaileka Town.

25. In *Suresh Lal v State, Criminal Appeal Case No. HAA 020 of 2013* at paragraph 17 it was stated:-

"It is trite law that the 'starting point' of a sentence to be within the range of tariff of a particular offence. If the sentencing court deviates from this principle, it should only be in exceptional circumstances. Reasons for such a deviation must be provided as it would be clear to the public, prosecution and the accused as to why the court took a different approach in a given scenario. It is an objective approach towards the offence and the offending background when selecting a 'starting point'.... Identification of the correct tariff and the selection of a proper 'starting point' play a pivotal role in the sentencing process."

26. Although this court agrees that the final sentence is on a higher scale of the tariff considering the circumstances of the offending and the culpability of the appellant the incorrect use of the tariff and a high starting point and the addition of the aggravating factors does not in my view cause any substantial miscarriage of justice to the appellant. The

purpose of the sentence was deterrence which the learned Magistrate had in mind throughout his sentence.

27. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 of the judgment had stated that an appellate court does not use the same methodology of sentencing as the sentencing court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by determining the facts the sentence was unreasonable or unjust as follows:

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing Judge. The approach taken by this court is to assess whether in all the circumstances of the case the sentence is one that could reasonably being imposed by a sentencing Judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this court will still dismiss the appeal if in the exercise of its own discretion the court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing Judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

28. This ground of appeal is dismissed due to lack of merits.

TOTALITY PRINCIPLE

29. The totality principle of sentencing is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences or when making sentences consecutive.

30. The appellant's counsel argues that the appellant who was 23 years of age at the time of the offending will have to serve a total sentence of 6 years 7 months and 14 days imprisonment for the three offences of similar offending that had been made consecutive to each other.

31. At paragraphs 34 and 35 of the sentence the learned Magistrate stated the following:

Paragraph 34

I am aware that you are currently serving your sentence in Rakiraki EJR03-2017... You were sentenced on 23rd May, 2019 to an aggregate sentence of 3 years 5 months and 14 days imprisonment with no parole fixed.

Paragraph 35

You committed another offence of theft in Rakiraki CF 37/18. You have pleaded guilty and was sentenced in that case on the 20th June, 2019 to a 6 month imprisonment term consecutive to your sentence in Rakiraki EJR 03-2017.

32. According to the sentence the above two offences were pending when this offence was committed. In his reasons for making the sentence consecutive to the other sentences the learned Magistrate stated *"willful disregard of the law and going out of your way to commit a series of offences must be met with appropriate sentences and deterrence."*

33. The consecutive sentence is made up as follows:

a) File No: EJR 03 of 2017 - 3 years 5 months and 14 days imprisonment;

b) File No: CF 37 of 2018 - 6 months imprisonment made consecutive to (a) above;

c) File No: Criminal Case (current appeal) No: 118 of 2019 - 2 years and 8 months imprisonment made consecutive to (a) and (b) above with a non-parole period of 2 years and 2 months.

34. Taking into account the consecutive sentences imposed, the appellant has to serve 6 years 7 months and 14 days imprisonment with a non-parole period of 2 years and 2 months. This court accepts the sentence in its current form is excessive.

35. In *Mill v The Queen [1988] HCA 70* the High Court of Australia in its judgment cited D.A. Thomas, Principles of Sentencing (2nded. 1979) pp. 56-57 as follows:

"the effect of the totality priniciple is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms; 'when a number of offences are being dealt with and specific punishment in respect of them are being totted up to make a total, it is always

necessary for the court to take a last look at the total just to see whether it looks wrong'; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic producers. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

36. In Fiji the above principles have been approved and applied by the court in many cases a few to mention are *Tuibua v The State, [2008] FJCA 77, Taito Raiwaqa v The State, [2009] FJCA 7)* and *Asaeli Vukitoga v The State, Criminal Appeal No: AAU 0049 of 2008.*

37. In the interest of justice and in accordance with section 256 (3) of the Criminal Procedure Act it is only fair and justified to quash the sentence ordered by the Magistrate's Court and vary it to 2 years and 6 months imprisonment after taking into account the remand period of 2 months.

38. By looking at the sentence already imposed in EJR No. 03 of 2017 and CF 37 of 2018 the total sentence to be served is 3 years 11 months and 14 days imprisonment. Taking into account the current tariff for burglary a further consecutive sentence will have a crushing effect on this young offender who had accepted his guilt at the earliest opportunity, however, this court is unable to do much since the appellant according to his counsel has not appealed the EJR matter to the Court of Appeal.

39. To strike a balance between deterrence and rehabilitation this court cannot make the sentence in this appeal wholly concurrent or wholly consecutive. There is no doubt the appellant has committed a serious

offence and a substantial amount of money was stolen without any recovery.

40. For the above reasons, the aggregate sentence of 2 years and 6 months imprisonment is justified. To give effect to the offence committed in this file and after taking into consideration the length of sentence the appellant will have to serve and also taking into account the appellant's age and guilty plea it is my considered view that out of the term of imprisonment mentioned above 9 months from this aggregate sentence is made consecutive to any sentence the appellant is serving.

41. To assist in the rehabilitation of the appellant a non-parole of 1 year and 8 months is imposed for all the sentences the appellant is serving with effect from 9th August, 2019. The reason for this consecutive sentencing is to give effect to the sentence in this case as a deterrent factor considering the seriousness of the offending and the culpability of the appellant. In my view the consecutive sentencing mentioned above does not have a crushing effect on the appellant.

ORDERS

1. The appeal against sentence is allowed.
2. The sentence of the Magistrate's Court is quashed and set aside.
3. The appellant is sentenced to 2 years and 6 months imprisonment, out of which 9 months is made consecutive to any imprisonment term the appellant is serving with effect from 9th August, 2019. A non-parole period of 1 year and 8 months is imposed before the appellant is eligible for parole.

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

<u>At Lautoka</u>

29 May, 2020

<u>Solicitors</u>

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.