

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Appeal No: 005 of 2009

BETWEEN:

ILIKAYA SOKO

Appellant

AND:

STATE

Respondent

Counsel: Mr. A. Sen for Appellant
Mr. M. Korovou for the State

Date of Hearing: 11 June 2009

Date of Judgment: 12 June 2009

JUDGMENT

[1] The appellant was jointly charged with his co-accused with one count of burglary.

The particulars of offence alleged:

ILIKAYA SOKO and **HARRY MURPHY** between 14/08/08 and 23/08/08 at Daria, Wainunu Bua in the Northern Division by night broke and entered into the dwelling house of **Rajendra Prasad** and stole on Akita brand Video deck valued at \$100.00, one Drilling

Machine valued \$300.00, one Circular Saw valued \$100.00, one Steel Safe valued \$1,000.00, 16 Whales Tooth valued \$10,000 and cash \$2,000 all to the total value of \$13,500.00, the property of Rajendra Prasad.

- [2] On 4 March 2009, the appellant and his co-accused pleaded guilty to the charge after waiving their right to counsel.
- [3] The appellant was sentenced to 28 months imprisonment while his co-accused was sentenced to 16 months imprisonment suspended for 2 years. Further, the co-accused was ordered to pay restitution.
- [4] The appellant appeals against sentence. The appellant takes objection to the learned Magistrate's finding that he was the "*mastermind*" of the crime. The learned Magistrate used this finding to justify a higher starting point for the appellant than his co-accused.
- [5] Counsel for the appellant submits that the learned Magistrate took into consideration irrelevant matters to make an adverse finding against the appellant without giving him an opportunity to be heard on those matters. Counsel further submits that the facts tendered by the prosecution did not support such finding.
- [6] The facts tendered by the prosecution stated that the appellant under caution told the police that his co-accused was the principal offender and that he only assisted him. The facts also stated that the co-accused under caution implicated the appellant to be the principal offender while he only assisted.

- [7] Since the facts tendered by the prosecution did not resolve the issue of the principal offender, the learned Magistrate of his own motion referred to the witnesses' statement and the caution interview of the co-accused that did not form part of the facts admitted by the appellant. Relying on the witnesses' statements and the statements of the co-accused implicating the appellant, the learned Magistrate concluded that the appellant was the mastermind of the crime.
- [8] It is an essential component of due process that a person against whom an adverse finding is made should be given an opportunity to respond to those matters which form the basis for such finding. In this case, the learned Magistrate directed his mind to adverse statements contained in the disclosures without inviting the appellant to respond. The approach was wrong. In this regard, I accept the submission of the appellant that the learned Magistrate erred in making the finding that the appellant was the mastermind. The learned Magistrate should have confined himself to the facts admitted by the appellant. There was no need to go beyond the admitted facts to resolve an issue that was irrelevant.
- [9] The charge alleged a joint enterprise between the appellant and the co-accused. The essence of this principle is that the offenders act in concert for an unlawful design. It does not matter what role each offender play or who the author of the design is, as far as the sentence is concerned.
- [10] For these reasons, I find the learned Magistrate erred in drawing a distinction between the culpability of the appellant and his co-accused to justify a higher starting point for the appellant.

- [11] Justice should be evenly handed. The same term of starting point should have been picked up for the appellant and his co-accused because no distinction in their culpability should have been made.
- [12] The starting point for the co-accused was 18 months imprisonment. The same term should have been picked up for the appellant. After discounting for the mitigating and aggravating factors, the appellant would have been sentenced to 16 months imprisonment, a term which was imposed on the co-accused as well.
- [13] The co-accused was young and a first time offender. In those circumstances, a suspended sentence was justified in the case of the co-accused (see, ***Turuturuvesi v State*** HAA 86/02S).
- [14] The appellant is not a first time offender. He has similar previous convictions. A deterrent sentence is justified. In this regard, not suspending his term of imprisonment will not offend the parity principle in sentence.
- [15] The appeal is allowed. The sentence of 28 months is substituted with a term of 16 months imprisonment effective from 2 April 2009.

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[Daniel Goundar]

JUDGE

At Labasa
12th June 2009