IN THE HIGH COURT OF FIJI
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 058 OF 2010

BETWEEN:

JOSUA NATAKURU NALATU

A N D:

THE STATE

Counsel: Applicant in Person
Ms. S. Tagivakatini for the State

Date of Hearing: 19th November 2010
Date of Ruling: 09th December 2010

J U D G M E N T

1. The appellant was charged for theft, punishable under Section 291 of the Crimes Decree No. 44 of 2009, in the Magistrate's Court.

2. The appellant pleaded guilty to the charge and admitted the summary of facts.

3. The appellant was convicted and sentenced to 12 months imprisonment on the 13th May 2010.

4. Being aggrieved with the sentence the appellant preferred an appeal and submitted following grounds of appeal. I wish to place it on record that he had submitted several letters and written submission on this regard. Most are repeated therefore following grounds of appeal are identified for consideration.

   (a) That the sentence is manifestly harsh and excessive when considering the totality of the offending and wrong in principle.

   (b) That the Learned Magistrate erred in law and in fact in not considering that I was under self induced intoxication when I committed the offence, therefore my conduct accidental, when sentencing.

(c) That the Learned Magistrate erred in law and in fact in failing to take into critical mitigating factors on sentencing.

5. The appeal was filed out of time. The State Counsel raised objection in her written submission but in open Court, she submitted that she has no objection of hearing the substantial appeal.

6. Considering all material, the Court granted enlarging the time of appeal.

7. The appellant filed a lengthy 14 pages written submission in addition to his other short submissions. State Counsel filed a written submission objecting the enlargement of time of appeal in that, there is portion she had dealt with the main issue. She confined herself with the same written submission without filing another submission after the appellant's submission.

8. Now I consider the conviction. The appellant had not challenged the conviction when I perused the record. I find that the appellant had pleaded to the information on his own free will, accepting it as unequivocal, I see no reason to interfere with the conviction.

9. Now I consider the 1st ground of appeal.

(a) That the sentence is manifestly harsh and excessive when considering the totality of the offending and wrong in principle.

10. Considering the nature of the offence Section 291 of the Crimes Decree provides a maximum 10 years imprisonment. The tariff is discussed in many cases. In **Kaloumaira vs State** *2008 FJHC 63* it was stated the tariff is 6 months to 12 months. In **Tikoitoga vs State** *(2008) FJHC 44* it was found to be 18 months to 3 years. In **Shiu Prasad vs State** *Crim. App. 28, 29, 35 of 1993* the Court imposed 12 months to a first offender. In **Manoa Laqere v State** *Cri. App. 31-34, 61 of 1997* the Court upheld that 4 ½ years imprisonment to a previous offender. Considering this case we can conclude the tariff is between 6 months to 4 ½ years imprisonment. The Learned Magistrate commencing her sentence at 12 months is very much within the tariff. I do not see any illegality in the starting point of the sentence.

11. The Learned Magistrate had considered the aggravating factors and added 6 months and reduced 6 months for the early plea and mitigating factors.

12. Now I consider the offence *per se*. The appellant went to the virtual complainant's house, who is a taxi driver, to hire his taxi to go home. There, he and his wife offered the appellant dinner and packed the same for him to take it to his home. When he left the house he took the mobile phone of the complainant and it was recovered from him by the Police on the following day.

13. The complainant and his wife were kind enough to pack dinner for the appellant even though he was not very known to them, under that circumstances his act can be considered as betrayal of trust. Considering the nature of the offence and the way it was committed, I do not see the Learned Magistrate is harsh in her sentencing in fact she has considered very leniently. Considering all the above facts I find that the 1st ground of appeal has no merit. Therefore it fails.

14. Now I consider the 2nd ground of appeal.

> (b) That the Learned Magistrate erred in law and in fact in not considering that I was under self induced intoxication when I committed the offence, therefore my conduct accidental, when sentencing.

15. The appellant submits that the offence was committed under the influence of liquor therefore it should be considered as accidental.

16. This ground of appeal goes to the root of the conviction. In other words the appellant says that he had no intention to commit the offence. If there is intention there is no offence because the offence consists of two major ingredients. Those are *actus reus* (the act) and *mens rea* (the intention). If one of these ingredient fails, there is no offence.

17. In this case the appellant had admitted committing the offence by pleading guilty to the charge. Further he admitted in the High Court and submitted that he is not canvassing the conviction but only the sentence.

18. Now I consider Section 29 and 30 of the Crimes Decree.

> **29.** "For the purposes of this Chapter, intoxication is self induced unless it came about –
>
> (a) Involuntarily; or
> (b) As a result of fraud, sudden or extraordinary emergency,
> accident, reasonable mistake, duress or force".
>
> **30.** "(1). Evidence of self induced intoxication cannot be considered in determining whether a fault element of basic intent existed.
>
> (2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.
>
> (3) This section does not prevent evidence of self induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(5) A person may be regarded as having considered whether or not facts existed if –

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion".

19. This comes under part 6 of the Crimes Decree. If any person claims that he falls within the circumstances of this part, he has to prove the defence. In this case the appellant had submitted to the Magistrate that he was drunk but he has not claimed that he was of the level of intoxication that he didn't know what he was doing. If the appellant had proved that fact in the Magistrate's Court he could have got an absolute acquittal.

20. If the Court consider the self intoxication as an absolute defence it is going to cause serious insecure to the society. Thereafter all the offenders will consume alcohol before they commit any offence and claim defence under this section. I agree that Intoxication can be taken as a defence but subject to several qualifications. In this case the appellant had not qualified to get the defence of self intoxication.

21. In the case of **State v Vamarasi Motofaga [2009]** *HAC 127 of 2009* at page 2 of paragraph 8 Goundar J stated:-

"Clearly this was a very serious assault administered after the accused had lost control of his temper. The accused was drunk but drunkenness is not a mitigating factor. There was some minor provocation from the victim, who tried to damage the property of the accused after getting drunk".

22. Considering all above facts I am of the view that the 2nd ground of the appeal cannot be sustained therefore it is dismissed.

23. Now I consider the 3rd ground of appeal.

(c) That the Learned Magistrate erred in law and in fact in failing to take into critical mitigating factors on sentencing.

24. The Learned Magistrate had considered following factors as mitigating fea

- he was 32 years of age
- married with two children
- regretted and was remorseful for what happened
- last offence committed was 5 years ago
- had been drunk and was tempted to take the phone
- a plea of guilty was given a discount
- previous convictions more than 10 years old were disregarded
- previously employed by the Social Welfare but lost the job
- unemployed at the moment
- pleaded guilty in the first available instance and therefore given a 1/3 remission.

25. In my view the Learned Magistrate had extensively considered the mitigating circumstances, the early plea and given the appellant 1/3 deduction of the sentence.

26. There is no hard and fast rule, that the early plea should be given 1/3 discount. As I discussed in many other cases previously the deduction is completely in the hands of the trial judges. They may consider the facts of the case and all other circumstances and decide the period of deductions.

27. Considering all above factors the 3rd ground of appeal also fails in its own merits.

28. Since all grounds of appeal failed I dismiss the appeal.

29. Appeal dismissed.

30. 30 days to appeal.

S Thurairaja
Judge

At Suva

Solicitors
Applicant in Person
Office of the Director of Public Prosecution for State