IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 020 OF 2013

BETWEEN	:	**SURESH LAL**	**APPELLANT**
AND	:	**THE STATE**	**RESPONDENT**
Counsel	:	Appellant in Person Mr. Prakash for the Respondent	
Judgment	:	12th November 2013	

JUDGMENT

1. This is an appeal by the appellant against his sentence of 24 months imprisonment ordered by a learned Magistrate of the Magistrate's Court at Suva. The learned Magistrate had sentenced the accused to 24 months imprisonment for a count of 'Theft' contrary to section 291 (1) of the Crimes Decree and decided to suspend 15 months imprisonment for 30 months and the balance 9 months to be in custody. The appellant was convicted on his own plea of guilty.

2. According to the particulars of offence, the appellant had dishonestly appropriated four bags of 'Sukhi' (Fijian Tabacco) weighing 60 kg on the 9th of April 2013, valued at $4000. The appellant had pleaded guilty to the charge on his 2nd appearance before the learned Magistrate.

3. The appellant raises three grounds of appeal in his Petition of Appeal.

(i) The learned Magistrate erred in law and in fact when failed to consider his early guilty plea at the first given opportunity;
(ii) The learned Magistrate erred in law and in fact as she failed to consider his good character and his approach to restitute the loss incurred by the complainant and;
(iii) The learned Magistrate erred in law and in fact by taking starting point on the higher end of the tariff which led the sentence to be harsh and excessive.

4. The learned Magistrate had selected the starting point of 30 months imprisonment after having considered **Kaloumaira v. State** (2008) FJHC 63 (the tariff for simple larceny to be 6 – 12 months imprisonment) and **Vaniqi v. State** [2008] FJHC 348 (the tariff for simple larceny with a previous conviction to be over 9 months imprisonment).

5. This court prefers to start the analysis with the 3rd ground of appeal to see whether the learned Magistrate erred in law by selecting a 'starting point' at the 'higher end' of the tariff resulting an excessive and harsh sentence. In doing so, it is better to have a clear view on the existing 'tariff' for the offence of 'Theft'.

6. The offence of 'larceny' contained in section 262 of the Penal Code was replaced by the offence of 'Theft', with section 291 of the Crimes Decree 2009. The offence of 'larceny' was recognized as a felony punishable with a maximum period of 5 years imprisonment (Section 262 (1) of the Penal Code. It was 10 years maximum imprisonment for the offenders on a second conviction (Section 262 (2) of the Penal Code). Justice Shameem in the case of **Navitalai Seru v. State** [2002] FJHC 183; HAA0084J. 2002S (22 November 2002) made the following remarks on the tariff of 'Larceny'.

> *"On count 2, the maximum sentence for simple larceny is (on a second conviction) 10 years imprisonment. The tariff, on a first conviction under sections 259 and 262 of the Penal Code, is two months to nine months imprisonment (**Paula Bale v. The State** Crim. App. No. 27 of 1998. **Pauliasi Nadali v. The State** Crim.*

*App. No. 29 of 1998, **Iowane Wainiqolo v. The State** Crim. App. No. 44, 45 of 1998, **Ronald Vikash Singh** Crim. App. No. HAA035 of 2002). It is logical, that on a second conviction the tariff is doubled to four months to 18 months imprisonment, because the statutory maximum increases from five to ten years, I accept this as the tariff in cases of second convictions for larceny."*

7. This position was confirmed by Justice Shameem in the cases of **Singh v. The State** [2002] FJHC 118; HAA0035J.2002S (23rd May 2002) and in **State v. Saukilagi** [2005] FJHC 13; HAC 0021X.2004S (27th January 2005) as well. Justice Shameem did mention in Saukilagi (supra) that the High Court had upheld sentences of 18 months to 3 years imprisonment in cases of 'Larceny' where large amount of money is involved and said that the final sentence depends much on the value of the money stolen, nature of the connection between the victim and the defendant and the method of stealing.

8. Justice Mataitoga took two different stands regarding the tariff for the offence of larceny. In the case of **Kaloumaira v. State** (2008 supra) he acted on a tariff of 6 months to 12 months imprisonment whilst setting a tariff of 2 – 3 years imprisonment in the case of **Chand v. State** [2007] FJHC 65; HAA 20.3007 (11th October 2007).

9. With the introduction of the Crimes Decree 2009, the offence of 'Theft' stipulated in section 292 (1) prescribed a maximum penalty of 10 years imprisonment for the offence. Yet, the tariff established for the Penal Code offence of larceny, 02 – 9 months imprisonment continued to be in existence in most of the decisions. (**State v. Tavualevu** [2013] FJHC 246; HAC 43.2013 (16th May 2013) by Justice Thurairaja, **State v. Ratumaijoma** [2012] FJHC 1007, (4th April 2012) by Justice Madigan and **State v. Lal** [2012] FJHC 1333; HAC 215.2011 (14th September 2012) by Justice Kumararatnum) However tariff of 2 – 3 years imprisonment was applied in **Chand v. State** [2010] FJHC 291, HAA 018.2010 (10th August 2010) by Justice Thurairaja by citing **Chand v. State** (2007. Supra).

10. Justice Temo in the case of **State v. Koroinavosa** [2013] FJHC 243; HAC 059(B).2010S (17th May 2013) identified the tariff to be from a suspended sentence to 3 years imprisonment. In the above context this court can identify

the application of following tariffs 'for the offences of 'larceny' and 'theft' by the parallel courts under the old and new regimes.

- Penal Code Tariffs (Larceny)

(a) 2 to 9 months imprisonment
(b) 2 to 3 years imprisonment
(c) 6 to 12 months imprisonment

- Crimes Decree Tariff (Theft)

(a) 2 to 9 months imprisonment
(b) 2 to 3 years imprisonment
(c) Suspended sentence to 3 years imprisonment

11. The varying decisions of the High Court in respect of the 'tariff' for the offence of 'Theft' were considered by Justice Madigan in the case of **Ratusili v. State** [2012] FJHC 1249; HAA011.2012 (1st of August 2012) and formulated certain guidelines in an effort to reconcile the existing ambiguities.

> *"From the cases then the following sentencing principles are established:*
>
> *(i) for a first 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 of up to three years.*
> *(iv) regard should be had to the nature of the relationship between offender and victim.*
> *(v) planned thefts will attract greater sentences than opportunistic thefts."*

12. With the decision of Ratusili (supra) the tariff pertaining to 'theft' is much more settled now. Nevertheless, the learned Magistrate had opted to follow the tariff of 6 -12 months imprisonment in this instance by citing **Kaloumaira** (2008 supra). The very next paragraph of her sentence says as follows:

> *"After carefully perusing and considering the above case authorities and relevant provisions of the Sentencing and Penalties Decree of 2009, I select 30 months imprisonment term as a starting point." (paragraph 8)*

13. In a context where the learned Magistrate identified the tariff to apply as 6 – 12 months imprisonment, the starting point of 30 months imprisonment is demonstrably high in the scale. Their Lordships of the Court of Appeal in **Koroivuki v State** [2013] FJCA 15; AAU0018.2010 (5th March 2013), made the following remarks in paragraph 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."*

14. The same principle seems to have been adopted in the case of **State v. Bainibiau** {2013] FJHC 237; HAC 165.2012 (10th May 2013) by Justice Thurairaja.

> *"Although sentencing is not a mathematical exercise, in the present case, the learned Magistrate erred in his approach. The starting point was picked outside the range for this kind of offence. A term outside the tariff should only be picked when exceptional circumstances are present. In this case the learned Magistrate did not record any reason why a starting point outside the range was picked. This was an error."*

15. A similar approach can be seen in the NZ appellate courts in respect of the 'starting point' is concerned by deciding that a 'starting point' should be within the range of sentencing tariff.

> *"Thirdly, it is submitted for the appellant that the starting point of four years' imprisonment taken by the sentencing Judge was unnecessarily high. Given that the maximum sentence for the offence is 14 years' imprisonment…we can see no force in this submission. In any event, what we are ultimately concerned with on this appeal is the sentence imposed. As Hereora indicated, cases involving impulsive acts of violence using a weapon can attract a sentence within the bracket of three to five years. Having regard to the aggravating features of the present offending, it cannot be said that the sentencing Judge took a starting point which was outside the range reasonably available to him."*
> (**The Queen v. Aminda Claire Boyd** [2000] NZCA 32 (1 March 2000)

16. The sole purpose of introducing the concept of 'tariff' was to maintain the uniformity in sentencing. Uniformity in sentencing will enhance the establishment of 'Rule of law" by treating everybody equal who comes before the criminal justice system of a country. That does not mean the 'tariffs' have to be applied in any rigid or uncompromised terms. Whenever a sentencing court deviates from the accepted 'tariff', either below or higher, it should provide its good reasons for doing so as such a move affects the whole establishment. At the end of the day what matters is the public confidence towards their justice system and should not allow that to be eroded at any cost.

17. 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'. That will preclude the sentencer from using the 'aggravating factors' once again to enhance the sentence and punish the offender twice for the same facts. Therefore it is important to select a 'starting point' irrespective of aggravating and mitigating factors. Identification of the correct 'tariff' and the selection of a proper 'starting point' play a pivotal role in the sentencing process.

18. This court is pretty much aware about the busy schedule in the Magistrate's Courts with a large number of cases been handled on daily basis. Whilst appreciating the efforts of the Magistrates to handle such a workload, it has to be borne in mind that not only the direct participants to a criminal litigation such as the Director of Public Prosecutions (DPP) or Divisional Prosecuting Officer (DPO) or accused, but the public also have a right to know the reasons to any particular decision of a court. When it comes to sentencing, especially the accused must know why a sentence been imposed upon him and on what footing it was done. Thus, providing the reasons for the sentencer's decision is fundamental.

19. Unfortunately, the learned Magistrate in this instance had overlooked the existing law when choosing the 'tariff' for the offence of 'theft' and erred in law in selecting the 'starting point'. The learned Magistrate had not given any reason as to what compelled her to select a far above mark of '30 months' as the starting point. In any event the starting point selected by the learned Magistrate is too excessive and unjustifiable. The learned State counsel quite correctly conceded that the learned Magistrate erred in law when selecting the starting point outside the range of tariff without giving reasons. Thus, this ground of appeal succeeds.

20. Now this court turns to analyze the 1st ground of appeal, that the learned Magistrate failed to give a one third discount to the early plea of guilty of the accused. There is no specific statutory provision in the procedural law to empower the sentencing court to consider a reduction in sentence for an early plea of guilty. That is a practice evolved in the common law systems to appreciate the genuine remorse of the offenders who assist the court to save the time and public resources by refraining from a full trial. The Sentencing Guidelines Council's revised guidelines in 2007 regarding the 'Reduction in Sentence for a Guilty Plea' says the 'reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation." (paragraph 2.2.). It is now widely accepted that an accused person who pleads guilty to the allegations leveled against him at the 1st available opportunity will be entitled up to a reduction of a third of his or her final sentence.

21. Nevertheless, it has to be stressed that there is no such mathematical precision that the offenders who plead guilty to the allegations will receive a definite

one third reduction. This amount of reduction will heavily depend on the stage at which the offender expresses his willingness to admit guilt. That is why, in most of the cases, the full recommended reduction is given to the offenders who plead guilty at the first available opportunity. The later the admission of guilt is, the lesser the reduction will be. At the same time the sentencing court need to be mindful on the fact that whether the plea of guilt was ignited out of the recognition of inevitable fate, had the offender proceeded for a full trial or it reflects the true colours of remorse and contrition, when deciding the amount of leniency to be extended for the plea of guilt. Still, it is the duty of the sentencing court, which has the discretion to decide upon the amount of reduction in sentence to specify in express terms that on what basis it determined to grant the reduction.

22. There is an array of decisions to show the weight that the courts in this jurisdiction attached to early pleas of guilty. In the case of **Mahendra Singh v. The State**; Criminal Appeal No. AAU0036.2008 (1st April 2009) their Lordships of the Court of Appeal held that (per Scutt, Powell and Lloyd, JJA)

> *"A reduction of sentence by one third is the standard for a plea of guilty:* ***Vilimone v. State*** *[2008] FJHC 12; HAA 131-133.2007 (8 February 2008);* ***Veretariki Vetaukula*** *v.* ***The State*** *(FJCA Crim App Case No. HAA057/07);* ***Hem Dutt v. The State*** *(FJCA Crim App Case No. AAU0066 of 2005);* ***Tuibua v. State*** *(2005) FJHC 188 HAA 0677 (15 July 2005). The appellant pleaded guilty. He could have done so earlier; however, this does not detract from the principle that his plea ought to have been taken into account in the sentence. Additionally, the appellant was 57 years of age at the time, and a widower with sole responsibility for children."*

23. Justice Winter in the case of **Waqasaqa v. The State** [2005] FJHC 115; HAA0061.2004 (20th May 2005) made following remarks.

> *"In my view the best mitigation is an early guilty plea. Courts have often recognized that sparing victims the agony of re-living the terror of the event through an adversarial process in trial deserves full recognition. In addition the assistance to the due process of justice by sparing the expense of trial deserves a significant discount.*

Against that total term an appropriate discount needs to be given for the early guilty plea and co-operation with the police. A one third discount would appear to be appropriate reducing the sentence then to 6 years imprisonment."

24. In **Vilimone v The State** [2008] FJHC 12; HAA 131-132.2007 (8th February 2008) Justice Mataitoga held that:

> *"The aspect of the sentence determination in the Magistrates Court, that concerned me relates to the fact that the appellant's guilty plea was not accounted for separately, but included as part of the mitigating factors. Because the appellant pleaded guilty at the first available opportunity, his sentence should be reduced by a third:* ***Veretariki Vetaukula v. The State****, High Court Crim App Case No: HAA057/07 following* ***Hem Dutt v. The State****, FCA Crim App Case No: AAU0066 of 2005."*

25. Justice Goundar discussed the issue of granting insufficient discount for the early guilty plea to the applicant in the case of **Waqalevu v. State** [2010] FJHC 468; HAA044.2010 (25th October 2010):

> *"There is no hard and fast rule about how much discount should be given to an offender who pleads guilty. The length of reduction will depend on a number of factors such as admission made to police, timing of guilty plea and remorse expressed in mitigation. If the court is satisfied that the offender's guilty plea is evidence of contrition, then substantial reduction ought to be given in sentence.*
>
> *The appellant was given 1/10 reduction in sentence for his guilty plea. In my judgment, the appellant was not given sufficient discount for confession to police and entering early guilty plea.*
>
> *On the facts of this case, a reduction of more than 6 months should have been given for early guilty plea as evidence of contrition."*

26. Justice Madigan in two recent judgments made it clear the rationale underlining a plea of guilty. **Nausa v State** [2011] FJHC 23; HAA022.2010 (28th January 2011):

> *"From his total of 18 months, to allow only 3 months for the very powerful mitigation available to this accused was derisory. The accused pleaded guilty as soon as he possibly could and he willingly co-operated with the police; his record is not attractive but he should not be punished for it. In any event the record shows an attempt to reform.*
>
> *Early pleas of guilty should be rewarded and until the Fiji Court of Appeal issues specific guidelines it should be a rule of thumb that at least 25% if not 33% discount should be given depending on the timing and sincerity of the plea." (paragraphs 13 and 14)*

In **Leone v. State** [2011] FJHC 374; HAA011.2011(L) (8th July 2011):

> *"It is now recognized in this jurisdiction that pleas if guilty entered at the first opportunity can attract discounts in sentence of up to 33% with lesser percentages attaching to later pleas…*
>
> *Pleas of guilty even at a late stage must be given recognition by the Courts by way of encouragement to alleviate the burden and expense of proceeding to trial. If no recognition by way of discount is given to a contrite and remorseful accused, then there would be no pleas of guilty, thereby bringing pressure on already overloaded fixtures lists." (paragraphs 14 – 16)*

27. In the case of **Uluinabukelevu v. State** [2011] FJHC 663; HAM 105.2011 (11th October 2011) Justice Nawana upheld the appeal for not awarding adequate discount for the early plea of guilt and made the following remarks.

> *"There would be no gain saying in the usefulness of having one uniform formula as to the amount of possible reduction of a sentence in the event of an early guilty plea. Such a formula will serve to establish certainty and uniformity on this important area of law in the*

system of administration of criminal justice. While the elements of certainty and uniformity are sine qua non for any system of justice to flourish, uniformed recognition in principle of the amount of reduction of a sentence consequent upon a guilty plea, on the other hand, could contribute to encourage and promote accused-persons to avoid protracted trials. They would, accordingly, endeavor to achieve the benefit of a reduced sentence on a guilty plea."

28. The proper procedure to deduct the discount for plea of guilty was discussed by Justice Madigan in the case of **Gonerogo v. State** [2013] FJHC 163; HAA 22.2012 (5th April 2013):

> *"When casting a sentence, the Court should first deal with aggravating features, then mitigating features arriving at an interim final figure. Only then should the Court as a final act reduce the sentence in recognition of the plea of guilty. To do otherwise distorts the sentence."*

This procedure is been recommended by the United Kingdom's Sentencing Guidelines Council in paragraph 3.1 of their 2007/revised Guidelines on 'Reduction in Sentence for a Guilty Plea' as well.

29. Coming back to the matter in hand, it is demonstrably clear that the learned Magistrate had not paid any attention to the applicant's early plea of guilty when sentenced him. Nowhere in the sentence, the learned Magistrate had mentioned, that she is ready to offer any recognition to appellant's plea of guilty entered at the very outset of the Magistrate Courts proceedings. Hence, it is unfortunate to note that the learned Magistrate erred in law by not awarding the appellant a reduction for his early plea of guilt. In this instance the appellant deserves to get a reduction of a third from his final sentence. The learned State Counsel quite correctly conceded that the appellant would have given a reduction of one third of his sentence as he has a rightful expectation and entitlement to such a discount. Hence, the 1st ground of appeal also succeeds.

30. Finally, this court will now pursue the 2nd ground of appeal the failure of the learned Magistrate to consider the previous good character of the appellant and his approach to restitute the loss incurred by the complainant.

31. I note that paragraph 11 of the written Sentence delivered by the learned Magistrate states following factors, among several other grounds, as mitigating factors that she thought fit to grant a deduction of 18 months from the final sentence.

(a) 54 years old,
(b) First offender,
(c) Proposed to pay $150 per week to the complainant,
(d) Seeking forgiveness,
(e) Promises never to re-offend,

32. Therefore, it is plainly visible on the face of the record that the assertion of the appellant is misconceived. The learned State Counsel correctly pointed out there is no merit in this ground of appeal. The learned Magistrate had given due consideration to appellant's good character, his remorse and the approach to restitute the loss incurred by the complainant. Thus, this ground of appeal fails.

33. In conclusion, the 1st and 3rd grounds of appeal raised by the appellant succeeds. This court agrees a sentence of 24 months imprisonment to an offence of 'theft' in this nature is excessive and manifestly wrong in principle. This background warrants this court to exercise its powers in terms of section 256 (3) of the Criminal Procedure Decree, to impose a sentence on the appellant which reflects the gravity of the offence within the accepted range of tariff. Therefore, court orders to quash the 24 months imprisonment imposed by the learned Magistrate and replace it with a 9 months period of imprisonment.

34. As a final note, it must be stated with appreciation that the extensive written submission submitted by the learned State Counsel pertaining to the legal issues discussed in this judgment was really helpful and extremely pertinent.

35. Subject to the above variation, the appeal is dismissed.

Janaka Bandara
Judge

At Suva
Appellant in Person
Office of the Director of Public Prosecution for the Respondent