

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS NO: HAM 011 OF 2014

BETWEEN : SAMUELA TURAGABECI

APPELLANT

AND : STATE

RESPONDENT

COUNSEL : Ms L R Raisuva Applicant
Mr V Parera for the Respondent

Date of Hearing : 03/07//2014

Date of Judgment : 11/07/2014

JUDGMENT

[01] The Appellant, Samuela Turagabeci appearing through Legal Aid Commission, is seeking Leave to Appeal Out of Time against his sentence in Criminal case No: CF/1037/2013. The sentence was imposed on 07th June, 2013 by learned Magistrate Suva.

[02] The Appellant was charged for one count of Theft contrary to Section 291(1) of the Crimes Decree No: 44 of 2009. He had pleaded guilty to the charge and admitted the summary of facts. He was sentenced to 21 months imprisonment.

[03] Now the Appellant has filed his amended Petition of Appeal on the following grounds:

1. The Learned Magistrate erred in law and in principle when he selected a starting point at the higher end of the tariff without an objective seriousness of the offence which resulted in a harsh and excessive sentence.
2. The Learned Magistrate erred in law and in principle when he did not take into account the mitigating factors of the Appellant specifically that he is the sole breadwinner of his family.
3. The Learned Magistrate erred in law and in principle when he took into account as an aggravating factor that there was no recovery of the items which had resulted in a loss to the company when this is already an ingredient of the offence of theft.
4. The Learned Magistrate erred in law and in principle when he failed to give proper credit for the Appellant's early guilty plea at the first given opportunity and his expression of remorse.
5. The sentence of 21 months imprisonment is harsh and excessive.

[04] The law with regard to Leave to Appeal out of time is stipulated in Section 248 of the Criminal Procedure Decree, 2009. According to the section:

248(1)-Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the decision appealed against-

(a) It shall be presented to the Magistrates Court from the decision of which the appeal is lodged;

(b) A copy of the petition shall be filed at the registry of the High Court; and

(c) A copy shall be served on the Director of Public Prosecution or on the Commissioner of the Fiji Independent Commission against Corruption.

(2) The Magistrate Court or High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include-

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within reasonable time of applying to the court for these documents.

[05] The Appellant had submitted his application dated 16/10/2013 to the Court of Appeal Registry on 30/10/2013. This was then received by High Court Criminal Registry on 28/11/2013. If 16/10/2013 is taken as the date of filing, the papers were filed after four months and just over one week from the date of the sentence.

[06] The principles of extension of time to appeal are well settled. As per Supreme Court in **Kumar v State; Sinu v State** [2012] FJSC 17; 2CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

- (i) The reason for the failure to file within time.
- (ii) The length of delay.
- (iii) Whether there is a ground of merit justifying the appellate courts consideration.

- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will respondent be unfairly prejudiced.

[07] In **Beuka v State** [2002] FJHC 110; HAA00113D.2002S (14 May 2002) Shameem J stated,

“In considering an application for leave to appeal out of time, a court generally considers the length of the delay, the reason for the delay, whether the appeal has prospects of success and whether an injustice will arise if leave is refused”.

[08] Now I proceed to consider the proposed appeal grounds submitted by the Appellant to consider whether it has any merits.

- 1) Learned Magistrate erred in law and in principle when selecting a starting point at the higher end of the tariff without regard to an objective seriousness of the offending which resulted in a harsh and excessive sentence.

[09] The Learned Magistrate identified the Tariff of Theft to be 2 months to 3 years imprisonment. But he picked the 26 months imprisonment which is higher end of the tariff. Therefore this ground has some merits.

[10] The Court of Appeal in **Koroivuki v State** Criminal Appeal No: AAU0018 of 2010 (5 March 2013) said at 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”.

[11] The Learned Magistrate failed to apply the principle of good practice as stipulated in **Koroivuki v State**.

- 2) The Learned Magistrate erred in law and in principle when he did not take in to account the mitigating factors of the Appellant specifically where he is the sole bread winner of the family.
- [12] This has no merit as the Learned Magistrate considered this before passing the sentence.
- 3) The Learned Magistrate erred in law and in principle when he took in to account as an aggravated factors that there was no recovery of the items which had resulted in a loss to the company when this is already an ingredient of the offence of theft. This ground also has some merits.
- [13] The offence of theft already includes the element of “appropriation” and “intention to permanently deprive” thus for the Learned Magistrate to include the loss and non-recovery of the items as an aggravating factor is penalising the Appellant twice.
- [14] In the case of **Niudamu v State** [2011] FJHC 661; HAA028.2011 (20 October 2011) Madigan J stated:
- “That the lack of recovery of property and no attempt to compensate are contingencies that can only arise after the offence and therefore are irrelevant to the actual offending. The only weight they might carry is on mitigation”.
- 4) The Learned Magistrate erred in law and in principle when he failed to give a proper discount for the Appellant’s early guilty plea given at the first available opportunity and his expression of remorse.
- [15] The Appellant’s early guilty plea saved the court time and recourses of all parties. Further he had fully co-operated with the police and admitted the charge.
- [16] In **Mahendra Singh v State**; Criminal Appeal No: AAU0036.20008 (1st April 2009) the court of Appeal held:
- “A reduction of sentence by one third is the standard of a plea of guilty”

- [17] This ground of Appeal also succeeds as the Learned Magistrate failed to award proper discount to the Appellant for his early guilty plea.
- [18] Considering the Appeal grounds of the Appellant it shows prospects of success. Therefore I grant leave out of time to proceed with Appellant's appeal under section 248 of Criminal Procedure Decree 2009.
- [20] Now I consider whether the sentence of 21 months imprisonment is harsh and excessive.
- [21] The maximum sentence for Theft under Section 291(1) of Crimes Decree 2009 is 10 years.
- [22] The sentencing principles for Theft was outlined in the case of **Ratusili v State** [2002] FJHC 1249; HAA011.32012 (1 August 2012) by Madigan J. At paragraph 13 his Lordship stated:
- (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 sum of money and theft in breach of trust, whether first offence or not can attract sentence of three years.
 - (iv) regard should be to the nature of the relationship between offender and victim.
 - (vi) Planned thefts will attract greater sentence than opportunistic theft.
- [23] In the instant case the Appellant is not a first offender. He was convicted for a similar offence in the year 2010. According to the above judgment the Appellant's case falls into the second category. Due to picking the starting point from higher range of the tariff and not discounting for his guilty plea, the Learned Magistrate imposed an excessive sentence in this case.
- [24] The Appellant was sentence to 21 months on 07/06/2013. He has already served over 13 months. This is well over the tariff set up by the above guideline judgment. Considering Section 256(3) of the Criminal Procedure Decree, I quash the sentence passed by Learned Magistrate on 07/06/2013.

- [25] I take 12 months as the starting point and add 06 months for the aggravating factors and deduct 08 months for his mitigating factors. Final sentence is 10 months imprisonment.
- [26] As the Appellant had already served the sentence he is released from custody forthwith.
- [27] You have 30 days to appeal.



P. Kumararatnam
JUDGE

At Suva
11/07/2014