

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

APPEAL CASE NO.: HAA 022 OF 2013

BETWEEN : THE STATE

Appellant

AND : ILIKANA WAQA

Respondent

COUNSEL : Ms P Madanavosa for the Appellant

Mr J Savou for the Respondent

Date of Hearing : 15/07/2014

Date of Judgment : 08/08/2014

JUDGMENT

[01] Ilikana Waqa (hereinafter “the Respondent”) was charged for one count of Larceny by Servant contrary to Section 274(b)(i) of the Penal Code Cap 17. The Charge was filed at the Nasinu Magistrates Court on 22nd day of November 2011.

[02] The Particulars of Offence are:

Ilikana Waqa, between 1st of November 2009 to 30th November 2009, at Nasinu in the Central Division being employed as a servant by the Fiji Police Force stole 8 sets of 7 pieces of the Sports Uniform valued at \$ 1427.00 in cash, the property of the Fiji Police Force.

[03] After several mentioning before Nasinu Magistrates Court, the Respondent on the 1st of August 2012 pleaded guilty to the charge.

[04] The Respondent admitted the summary of facts. On 9th of October 2012 the Learned Magistrate in her sentencing discharged the Respondent without any conviction but imposed a condition that the Respondent to pay restitution of \$1,427.00 to the Complainant within three months Pursuant to Section 45(1) of the Sentencing and Penalties Decree No: 42 of 2009.

[05] Being dissatisfied with the said sentence, the Appellant lodged a Petition of Appeal on the 28th day of November 2012 on the following grounds:

1. The learned Magistrate erred in law by imposing a sentence which was wrong in principle having regard to a charge of Larceny by Servant and sentences imposed in other similar cases that show that a discharge without conviction under Section 45 of the Sentencing and Penalties Decree No: 42 of 2009 was not appropriate.
2. The Learned Magistrate erred in law in imposing a sentence which was manifestly lenient for this particular offending.

[06] The powers of the High Court after hearing an appeal is clearly set out in Section 256 (2) of the Criminal Procedure Decree No: 43 of 2009 which states:

(2) The High Court may-

- (a) confirm, reverse or vary the decision of the Magistrates Court; or
- (b) remit the matter with the opinion of the High Court to the Magistrates Court; or
- (c) order a new trial; or
- (d) order trial by a court of competent jurisdiction; or
- (e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

- (f) the High Court may, notwithstanding that it is opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Appeal Ground 1

[07] The learned Magistrate erred in law by imposing a sentence which was wrong in principle having regard to a charge of Larceny by Servant and sentences imposed in other similar cases that show that a discharge without conviction under Section 45 of the Sentencing and Penalties Decree No: 42 of 2009 was not appropriate.

[08] Section 16 (1) of the Sentencing and Penalties Decree No: 42 of 2009 states that:

“in exercise its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case including-

- (a) The nature of the offence
- (b) The character and past history of the offender
- (c) The impact of a conviction on the offender’s economic or social well-being on his or her employment prospects.

[09] The Appellant submits that the Respondent held a rank of Inspector with the Fiji Police Force at the time of offence, he breached his duty towards his employer being the Fiji Police Force by selling the surplus Fiji Police Force Sports Uniform to the staffs at Ready Action Unit which was not authorized, after he sold the uniform that he got the money and he further does another act of using the money to buy food for single men at Ready Action Unit without notifying his superiors.

[10] The Respondent submits that he was on attachment at the Inventory Management Cell of Fiji Police Force. He did not intend to steal or used it for his personal use the money obtained from the sale of the sports uniform but used it for the single male police officers residing at the Police Barracks who

were on standby duty for 48 hours without any food. The filing of this case was a misunderstanding between him and his supervisor.

[11] In the case of **FICAC v Tevita Peni Mau & Mahendra Motibai Patel** [2002] HAC 89/10S the court held that if the Court exercises discretion not to record a conviction the Court must consider all factors in Section 16 of Sentencing and Penalties Decree No. 42 of 2009 in the exercise of its discretion.

[12] In the case of **State v Batiratu** [2012] 864: HAR001.2012 (13 February 2012) Gates J held:

“If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether;

- (a) the offender is morally blameless
- (b) whether only a technical breach in law has occurred
- (c) whether the offence is of a trivial nature
- (d) whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest
- (e) whether circumstances exist in which it is inappropriate to record a conviction or merely to impose nominal punishment
- (f) are there any other extenuating or exceptional circumstances, a rare situation justifying a court showing mercy to an offender

[13] The Respondent did not covert the money for his personal use but he used it for members of Ready Action Unit who were on standby duty for 48 hours without any food. I consider this is an exceptional circumstance, a rare situation justifying the Court to show mercy to the Respondent.

Appeal Ground 2

- [14] The Learned Magistrate erred in law in imposing a sentence which was manifestly lenient for this particular offending.
- [15] The tariff for the offence of Larceny by Servant was considered in the case of **State v Chandra** [2008] FJHC 104 where the Court held that the tariff for fraud offences is 18 months to 3 years imprisonment. Suspended sentence is reserved for cases where the offender has demonstrated genuine remorse by admitting the offence to the police or by pleading guilty at the first reasonable opportunity and where the offender has paid an early restitution.
- [16] The Appellant has not denied that the Respondent provided food for starving members of the Fiji Police Ready Action Unit with the money obtained from selling of surplus Fiji Police Sport Uniform. He had not appropriated a single cent for his own use. But he pleaded guilty to the charge and restored the money back to Fiji Police Force.
- [17] I conclude that the Respondent had been adequately punished by ordering to pay \$1,427.00 to the Fiji Police Force by the Learned Magistrate as he used the entire money to buy food for starving police officers whom were assigned very important duty on that day. I consider this an exceptional circumstance and also a rare situation. Further he was interdicted from service until conclusion of the Magistrates' Court case.
- [18] After careful consideration of all the factors, I agree with Learned Magistrate acting under Section 45(4) of the Sentencing and Penalties Decree No: 42 of 2009. Therefore I dismiss the Appeal filed by the Appellant in this case.
- [19] Appellant has 30 days to appeal.




P. Kumararatnam
JUDGE

At Suva
08/08/2014