

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 04 OF 2017**

**BETWEEN** : **MILIANA TUBUNA**

**APPELLANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Mr. M. Fesaitu [LAC] for the Appellant  
: Ms. R. Uce for the Respondent

**Date of Hearing** : 17 March, 2017  
**Date of Judgment** : 28 March, 2017

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**JUDGMENT**

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**BACKGROUND INFORMATION**

- [1] The Appellant was charged in the Magistrate's Court with one count of Theft contrary to section 291 (1) of the Crimes Decree.
- [2] It was alleged that the Appellant between the 9<sup>th</sup> day of July, 2014 to the 10<sup>th</sup> day of July, 2014 dishonestly appropriated a Singer Brand Sewing Machine valued at \$429.00 the property of MARIA LEILANI NACOLAWAI.

- [3] On 19 February, 2015 the Appellant pleaded guilty to the charge after it was read to her. Thereafter the Appellant did not appear in court on five occasions and a bench warrant was issued.
- [4] On 2 February, 2016 the Appellant admitted the summary of facts read to her. Upon been satisfied that the Appellant had entered an unequivocal plea the learned Magistrate convicted the Appellant.
- [5] After hearing mitigation and after allowing the Appellant time to pay the victim which did not eventuate, the learned Magistrate on 19 December, 2016 sentenced the Appellant to 19 months and 19 days imprisonment.
- [6] I note that the delay in sentencing has been due to the fact that the Appellant was on bench warrant for not appearing in court.
- [7] The Appellant had filed a timely notice of appeal in person. After the Legal Aid Commission approved assistance an amended Petition of Appeal and amended grounds of appeal against sentence were filed as follows:
- “1. *The sentence imposed on the Appellant is harsh in the circumstances when in fact the appropriate sentence should have been a suspended sentence.*
  2. *The learned Magistrate took into account irrelevant factors when sentencing the Appellant.*”
- [8] The court is grateful to both counsel for filing helpful written submissions.

## **SUMMARY OF FACTS**

- [9] The following summary of facts was read to the Appellant who understood and admitted the same:-

*“Between 09<sup>th</sup> day of July 2014 to 10<sup>th</sup> day of July, 2014 at Nadi Police barrack one Miliana Tubuna (B-1) aged 33 years domestic duties of Malomalo for stealing a Singer Brand sewing machine valued at \$429.00 the property of one Maria Leilani Nacolawai (A-1) aged 32 years domestic duties of Nadi Police Barrack.*

*(B-1) was staying with (A-1) who is the cousin sister as she was on medication as (B-1) was pregnant. (B-1) on the 10<sup>th</sup> day of July, 2014 at about 0530hrs woke up and took the sewing machine out of the house and place the said machine near the temporary market and returned back to the police barrack.*

*Later at about 0800hrs (B-1) left the barrack informing (A-1) that she is going to hospital. (B-1) went to the market and picked the sewing machine and went to Lautoka in the bus. Upon reaching Lautoka (B-1) went straight to Ledger Pawn Shop and sold the machine for \$80.00. After receiving the money (B-1) got again in the bus and came to the Nadi Hospital and had her iron injection and went to Malomalo.*

*(B-1) was arrested and was cautioned interviewed who admitted committing the offence and she stated that she had used the cash on her personal use. B1 was later charged for one count of theft and bailed to attend Nadi Magistrate court on 05/09/14.*

*Machine not recovered.”*

## **GROUND OF APPEAL**

### **GROUND ONE**

*The sentence imposed on the Appellant is harsh in the circumstances when in fact the appropriate sentence should have been a suspended sentence.*

- [10] The learned counsel for the Appellant submits that the learned Magistrate had made references to several case authorities in his sentence. The case authorities were for simple theft with a tariff in the range of two to nine months imprisonment and also theft arising out of breach of trust with a tariff from 18 months to 3 years imprisonment.
- [11] Counsel states that despite making reference to case authorities having two distinct range of sentencing tariff the learned Magistrate picked a starting point of 1 year which does not fall within any of the tariffs whether it is simple theft or theft arising from breach of trust.
- [12] Counsel further states that the learned Magistrate did not give enough deduction for the Appellants mitigating factors, according to counsel four months reduction for a first offender with previous good character is not enough.
- [13] Finally counsel submits that the learned Magistrate should have exercised his discretion to suspend the term of imprisonment considering the fact that the Appellant was a first offender and bearing in mind her other mitigating factors.
- [14] The learned counsel for the Respondent submits that taking into account the closeness of the relationship between the Appellant and the victim and that the victim had accommodated the Appellant at her house a relationship of trust existed between the two.
- [15] Counsel further submits that in accordance with *State vs. Pauliasi Vadunalaba, criminal case no. HAC 134 of 2008* the tariff for theft arising from breach of trust range from 18 months to 3 years imprisonment. In respect of the starting point of 1 year selected by the learned Magistrate counsel agrees it is below tariff.
- [16] The Respondent accepts that the learned Magistrate did not allow sufficient deduction for the Appellant's mitigating factors and that a

suspended sentence was appropriate sentence taking into account the fact that the Appellant pleaded guilty to the offence and was a first offender.

[17] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.”*

[18] The summary of facts admitted by the Appellant points to a breach of trust by the Appellant towards her cousin sister the victim. The victim had accommodated the Appellant who was pregnant and on medication at her house. The chain of events that followed thereafter shows a planned theft in which the sewing machine of the victim was removed from the house of the victim early in the morning and kept in the temporary market and then taken to Lautoka and sold.

[19] The above brief account of the facts when viewed objectively points to the seriousness of the offence committed by the Appellant. The learned Magistrate was correct when he considered the offending as a breach of trust.

[20] In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in

*Laisiasa Koroivuki v The State, Criminal Appeal No. AAU0018 of 2010 at paragraphs 26 and 27 the following is stated:-*

*“[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public’s confidence in the criminal justice system is maintained.*

*[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.*

- [21] The learned Magistrate selected 1 year as a starting point without giving any reason why he chose to do so. The applicable tariff for theft by breach of trust is from 18 months to 3 years imprisonment.
- [22] I accept that the starting point of 1 year was incorrect and the learned Magistrate erred in selecting such a low (below the tariff) starting point in view of the seriousness of the offence.
- [23] I do not agree that the learned Magistrate erred in the exercise of his discretion when he gave a 4 months deduction to the mitigatory factors. In fact the learned Magistrate took into account some factors which should not be taken as mitigatory factors. I am satisfied that the 4 months deduction allowed for mitigation is correct.
- [24] The Appellant argues being a first offender with previous good character the learned Magistrate should have suspended the imprisonment term.

[25] At paragraphs 21 and 22 of the sentence the learned Magistrate when declining to suspend the Appellant's term of imprisonment stated:-

*"21. Since your sentence is less than 2 years imprisonment, under section 26 of the Sentencing and Penalties Decree 2009 I have to decide whether this case merits that suspension of the sentences.*

*22. The fact that you had evaded court for 8 months and due to the circumstances of the case it warrants a custodial sentence."*

[26] Section 26 (2) (b) of the Sentencing and Penalties Act states:-

*"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed...*

*(b) does not exceed 2 years in the case of the [Magistrates Court]."*

[27] In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

*"[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.*

*[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:*

*"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

- [28] The learned Magistrate in the exercise of his discretion under section 26 (2) of the Sentencing and Penalties Act declined to suspend the term of imprisonment he had arrived at as final sentence. The reason given by the learned Magistrate not to suspend the sentence was that the Appellant had evaded court for 8 months and due to the circumstances of the offending a custodial sentence was warranted.
- [29] The learned Magistrate erred when he failed to take into account the following relevant special circumstances or special reasons for the suspension of the imprisonment term which in my view needed to be weighed in choosing immediate imprisonment or suspended sentence.
- [30] The Appellant is a first offender who committed an isolated offence, she is 34 years of age, pleaded guilty, was remorseful, cooperated with Police, the value of the property stolen was small and has a young family to look after. I consider these special reasons as rendering immediate imprisonment inappropriate.
- [31] This ground of appeal is allowed.



## **GROUND TWO**

*The learned Magistrate took into account irrelevant factors when sentencing the Appellant.*

- [32] At paragraph 17 of the sentence the learned Magistrate when considering the aggravating factors stated as follows:-

*“The aggravating factor here is the breach of trust you displayed to your cousin sister who accommodated you at the Police Quarter whilst you were under examination at the Nadi Hospital, failed to pay restitution as per your undertaking in court on 14/04/16 in respect to your FNPF Cheque of \$855.00 which was approved on 18/3/16 and you were on bench warrant from the day of sentencing namely 22/04/16 arrested for absconding bail in December, 2016 and matter being called 4 times, I add 2 years your interim sentence is 3 years.”*

- [33] Section 4 (2) (j) of the Sentencing and Penalties Act states:-

*“(2) In sentencing offenders a court must have regard to –*

*...*

*(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence...”*

- [34] The above provision of the law makes it mandatory for the sentencing court to consider the presence of aggravating or mitigating factors which are relevant to the commission of the offence.

- [35] The learned Magistrate erred when he took into consideration irrelevant aggravating factors other than breach of trust such as the issue of unsuccessful restitution and the issuance of bench warrant against

Appellant which did not arise as a result of the commission of the offence.

[36] Having considered the above grounds of appeal and in the interest of justice it is only proper that this court in accordance with section 256 (3) of the Criminal Procedure Act quash the sentence of the Magistrate's Court and sentence the Appellant afresh.

[37] I note that the Appellant has served about 3 months of her sentence.

[38] The maximum punishment for an offence under section 291 (1) of the Crimes Act is 10 years imprisonment. After considering the facts of the case and taking into consideration the objective seriousness of the offence committed, I am satisfied that a starting point of 18 months imprisonment is justified.

[39] The following aggravating factors apply:

- (a) breach of trust; and
- (b) degree of pre-planning.

For the aggravating factors I add another 15 months. This brings the interim sentence to 33 months imprisonment.

[40] The following mitigating factors are available:-

- (a) first offender;
- (b) 34 years, married with 3 young children;
- (c) seeks forgiveness, and
- (d) is remorseful.


For the above mitigating factors I maintain the deduction of 4 months. The total now is 29 months. For the guilty plea although not at the first available opportunity and the remand period of 5 days I deduct 11 months bringing the sentence to 18 months.

[42] As indicated at paragraph 30 the term of imprisonment will be suspended, however, the suspension will only apply to the balance of the imprisonment term.

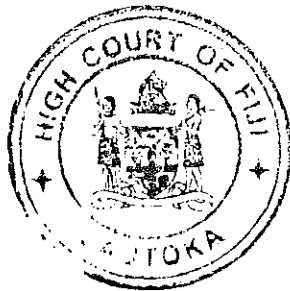
[43] The new sentence will assist the Appellant in rehabilitation, the effect of the suspended sentence is explained to the Appellant.

### **ORDERS**

1. The Appeal is allowed.
2. The Appellant is sentenced to 18 months imprisonment since the Appellant has served three months of her sentence the balance of her sentence is suspended for 3 years from today.
3. The Appellant is to be immediately released from the Corrections Centre.
4. 30 days to appeal to Court of Appeal

  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
28 March, 2017



### **Solicitors**

**Office of the Legal Aid Commission for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**