IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 014 OF 2017

BETWEEN : VARANISESE DALI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel: Mr. Rigsby for Appellant

Ms. J.B. Niudamu for the Respondent

Date of Hearing: 24th May, 2017

Date of Judgment: 7th June, 2017

JUDGMENT

INTRODUCTION

1. The Appellant was convicted as charged on his own plea of guilty on 12 counts of Conversion contrary to Section 319 (1) (c) (ii) of the Crimes Act, 2009.

2. The Appellant pleaded guilty to the above charges on the 15th May 2015 when her plea was taken at the Lautoka Magistrates Court.

3. The Appellant was convicted accordingly with the above offences and on 24th January, 2107 she was sentenced to 20 months' imprisonment. Court ordered that the Appellant served 15 months' imprisonment and the remainder of 5 months imprisonment to be suspended for 2 years.

4. Being dissatisfied with the decision of the Magistrates Court, the Appellant through his Counsel filed her grounds of appeal against sentence which was within time.

Grounds of Appeal

5. In summary, the Appellant's grounds of appeal filed are as follows:

(i) That the learned sentencing Magistrate erred in law and principle when he considered the breach of trust as an aggravating factor when it is already an ingredient of the offence of conversion.

(ii) That the learned sentencing Magistrate erred in law and principle when he took into account lack of recovery of the monies as an aggravating factor when this has no relevance to the actual offending itself.

(iii) That the learned sentencing Magistrate erred in law and principle when he failed to give proper credit for the appellant's unblemished record, early guilty plea at the first given opportunity and her expression of remorse.

(iv) That the learned sentencing Magistrate erred in law and in principle when he failed to take into account the compelling mitigation when considering whether to impose a wholly suspended sentence.

(v) That the sentence of 20 months' imprisonment is harsh and excessive.

6. To support these grounds, the Appellant filed written submissions. The Respondent filed written submissions in reply. At the hearing, both parties sought a judgment based on written submissions filed.

The Law

7. The principal ground of appeal relates to the issue of sentencing in the Magistracy. This Court will approach an appeal against sentence using 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].

8. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Fiji Appeal Court observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

9. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"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.*

10. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed the approach to be taken by an appellate court when reviewing a sentencing discretion of a lower court. The Court observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust"*

Factual Matrix

11. The facts are that, the Appellant was employed by the Water Authority of Fiji as an accounts clerk with the Enforcement Team at Lautoka between 2010 and 2012. She was entrusted to collect payment on behalf of Water Authority of Fiji when she fraudulently converted the payment to her own use to the total of $2,795.00.

Analysis

12. Grounds raised by the Appellant are based on the premise that the sentence is harsh and excessive and wrong in principle. Therefore, all the grounds can be dealt with together.

> **Ground 1** – *That the learned sentencing Magistrate erred in law and principle when he considered the breach of trust as an aggravating factor when it is already an ingredient of the offence of conversion.*

Ground 2 – *That the learned sentencing Magistrate erred in law and principle when he took into account lack of recovery of the monies as an aggravating factor when this has no relevance to the actual offending itself.*

13. At paragraph 9 of the Sentencing Ruling, the learned sentencing Magistrate stated:

> *"in this case the aggravating factors are the breach of trust and the non recovery of the monies stolen by you"*

14. The Appellant was charged with 12 counts of Conversion under Section 319 (1) (c) (ii) of the Crimes Act. The relevant part of the Section reads:

(1) A person commits a summary offence if he or she —

> *C -(ii) having either solely or jointly with any other person received any property for or on account of any other person fraudulently converts to his or her own use or benefit, or the use or benefit of any other person, the property or any part of it, or any proceeds from it.*
>
> *Penalty — Imprisonment for 7 years.*

15. The offence of Conversion is based on breach of entrustment. Therefore, the breach of trust by the Appellant is already subsumed in the offence.

16. The Counsel for Respondent has cited ***State v Ratusuka*** *[2013] FJHC 93; HAA001.2013 (7 March 2013)* to support his argument that the learned Magistrate was correct in considering breach of trust as an aggravating factor.

17. In ***Ratusuka*** (supra), respondents were jointly charged with **theft** of 5,000 oysters valued at $15,000 from the farm of their employer. The respondents were employed as divers. Goundar J stated at paragraph [7] that:

> *"The loss to a third party who had bought the oysters but had to return them upon revelation that the oysters were stolen and breach of trust were properly taken into account as aggravating factors."*

18. The Appellant in this case was charged with Conversion. ***Ratusuka*** (supra) which is a Theft case has no relevance to the present appeal.

19. The learned sentencing Magistrate fell into error when he took into account an ingredient of an offence as an aggravating factor. This ground succeeds.

20. The lack of recovery of the stolen money cannot be considered as an aggravating factor. This position was affirmed by Madigan J. in ***Soko v State,*** *[2011] FJHC 777; HAA 031.2011 (29 November 2011)* where His Lordship observed:

> *'Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature.'*

21. This point was also highlighted by Nawana J in ***Vasuca v State*** *[2012] FJHC 1244; HAA 03.2012 (31 July 2012):*

> *'.....Consequently the fact that all or some items of property were not recovered cannot be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa.'*

22. The learned sentencing Magistrate erred in principle in having regard to the lack of recoveries as an aggravating factor. Therefore, this ground succeeds.

Ground 3 – *That the learned sentencing Magistrate erred in law and principle when he failed to give proper credit for the Appellant's unblemished record, early guilty plea at the first given opportunity and her expression of remorse.*

23. The learned sentencing Magistrate had considered the Appellant's unblemished record, early guilty plea and her expression of remorse. At paragraph 6 of his Sentencing Ruling it is stated:

"The mitigation factor is that you have pleaded guilty on the first available opportunity and have save court's time and resources..."

Further at paragraph 11 it is stated:

"..... I will deduct 6 months for the mitigation, 2 months for plea in mitigation and 1 month for unblemished record and left with 20 months' imprisonment for all the counts to be served concurrently".

24. It is clear from the above quotations that the learned sentencing Magistrate had considered the Appellant's unblemished record, early guilty plea and her expression of remorse.

25. Furthermore, the unblemished character is of little value as a mitigating factor in breach of trust cases. In ***Chand v State*** *[2017] FJHC 144; HAA 037.2016 (20 February 2017)* the Court at paragraph 16 stated:

" Previous good character is not a compelling mitigation factor in breach of trust cases (State v Cakau unreported Cr. App. No. HAA 125 of 2004S; 10 November 2004), but in the present case, the learned Magistrate was generous to consider the Appellant's previous good character as a mitigating factor."

26. In this case, the Appellant was fortunate that the learned Magistrate had considered her unblemished record.

27. The learned sentencing Magistrate however failed to give effect to an accepted sentencing practice and to give the full discount the Appellant was entitled to for her early guilty plea and discount it separately. Appellant's early guilty plea should have been discounted for separately from other mitigating factors after adjusting for mitigating and aggravating circumstances. An allowance of 1/3rd should have been given. When there is an accepted sentencing practice, Courts must give effect to that practice unless there are compelling exceptional circumstances for deviation. And reasons should be recorded for such deviation.

28. On the other hand, from case management perspective, pleas at first opportunity are very valuable to the administration of justice. Court time is saved, witnesses are spared and the case is disposed of immediately.

29. In this case, the learned sentencing Magistrate had considered the guilty plea and reduced the sentence by 2 months. He had however considered this mitigating factor together with other mitigation factors. The learned sentencing Magistrate should have considered the early guilty plea separately. The reduction of the sentence only by two months for the early guilty plea was inadequate and such reduction was not in accord with the precedents as laid down in ***Maharaj v State*** [2011] FJHC 373 and ***Waqalevu v State*** [2010] FJHC 468. Therefore this ground should be upheld.

Ground 4 - *That the learned sentencing Magistrate erred in law and in principle when he failed to take into account the compelling mitigation when considering whether to impose a wholly suspended sentence.*

30. The learned sentencing Magistrate in fact considered compelling mitigating factors when he imposed a partly suspended sentence. Generally, as a matter of sentencing practice, suspended sentences are not warranted when there is breach of trust. The learned sentencing Magistrate was correct when he considered the offending as a breach of trust.

31. In ***Hakik v State*** *[2016] FJHC 682; (1 August 2016)* this Court held:

> *"Offences involving breach of trust attract custodial sentence unless an exceptional circumstances requires otherwise. Such acts are socially abhorrent. Trust and confidence is one of the essential prerequisites for the proper and progressive functioning of the social web, which includes personal human relationships, business and administrative relationships of people, etc. Hence, I find that the purpose of sentencing of offenders commit crimes of this nature must be founded on the principles of deterrence and the protection of community. I am mindful of the principle of rehabilitation. However as I mentioned above, the need to deter the offenders or other persons from committing offences of this nature outweighs the purpose of rehabilitation."*

32. In ***The State v Simeti Cakau*** (HAA 125 of 2004S) Court discussed the notion of good character of offenders involved in breach of trust cases. Shameem J expounded that;

> *"Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust that renders serious fraud offences the worst type of offending in property related cases."*

33. In ***State v Simeti Cakau*** *(supra),* Shameem J has further elaborated the applicable sentencing approach for offences involved with breach of trust, where her Ladyship found that;

> *"That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender's way out of prison, but as a measure of true remorse."*

34. In ***State v Roberts*** [2004] FJHC 51; HAA0053J.2003S (30 January 2004) Shameem J observed:

> *The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim.*

35. Authorities cited above justify the decision of the learned sentencing Magistrate to impose an immediate custodial sentence with a partly suspended sentence. If

the Court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so. The learned sentencing Magistrate has considered the mitigating factors in favour of the Appellant before he ruled that the case before him was not an appropriate case to wholly suspend the sentence. It is a discretionary power of the sentencing Court to impose a suspended sentence. The learned sentencing Magistrate had exercised his discretion judiciously. This ground fails.

Ground 5 – *That the sentence of 20 months' imprisonment is harsh and excessive*

36. The maximum sentence for Conversion is 7 years' imprisonment. The learned sentencing Magistrate has accurately considered the acceptable tariff limit as between 18 months and 3 years' imprisonment for breach of trust offences. ***(See: State v Pauliasi Vadunalaba,*** Criminal Case No. HAC 134 of 2008).

37. In respect of the starting point, the learned sentencing Magistrate picked 24 months from the middle range of the tariff. He picked this starting point after considering the circumstances of this case. He then has added further five months to reflect aggravating factors. Six months had been reduced for mitigating factors and two months for the guilty plea, 1 month for the unblemished record reaching the final sentence of twenty (20) months' imprisonment. The learned sentencing Magistrate has not imposed any parole period. The final sentence of twenty (20) months' imprisonment is in fact within the acceptable tariff limit of 18 months to 3 years as expounded in above mentioned judicial precedents.

38. In light of the above mentioned case authority in ***Sharma,*** *even if there has been an error in the exercise of the sentencing discretion, an appellate court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.* However, since the learned sentencing Magistrate had fallen into error in respect of three appeal grounds raised by the Appellant, I find this case to be a fit case to exercise appellate jurisdiction to disturb the sentencing discretion of the sentencing Magistrate.

39. The material placed before this Court warrants me to exercise powers in terms of Section 256 (3) of the Criminal Procedure Act to quash the sentence passed by the

learned sentencing Magistrate and pass another sentence which reflects the gravity of the offence and circumstances of the case.

40. The Appellant is a first offender. She pleaded guilty to the charges at the first available opportunity. She is an unmarried girl of 26 years of age. Amount of money converted is only $ 2750 in respect of all 12 counts.

41. For each count, I will select a starting point of 24 months' imprisonment from the middle range of the tariff. There are no aggravating circumstances. I deduct 3 months for mitigating circumstances bringing the interim sentence to one of 21 months' imprisonment. I give a further discount of 7 months to reflect the early guilty plea. I impose a sentence of 14 months' imprisonment for each count with effect from 24th January 2014 to be served concurrent to each other.

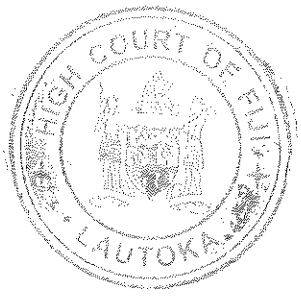
42. Having considered the Appellant's youth, early guilty plea, and the value of the money converted, I suspend 4 months of the sentence for a period of two years with effect from 24th January 2017.

43. Appellant's final sentence is as follows:

I order that Appellant served 10 months in prison with effect from 24th January 2017 and the remainder of 4 months to be suspended for a period of 2 years with effect from 24th January, 2017.

44. Appeal succeeds to that extent. Effects and consequences of breach of terms of suspended sentence explained to the Appellant.

45. 30 days to Appeal to the Court of Appeal



Aruna Aluthge

Judge

At Lautoka

07th June, 2017

Solicitors: Rigsby Law for Appellant

Office of the Director of Public Prosecution for Respondent