IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 121 OF 2017

BETWEEN	:	**NAZIA NISHA ALI**
		APPELLANT
A N D	:	**THE STATE**
		RESPONDENT

Counsel	:	Ms. J. Singh [LAC] for the Appellant.
	:	Ms. L. Latu for the Respondent.
Date of Hearing	:	27 February, 2018
Date of Judgment	:	28 February, 2018

JUDGMENT

Background Information

1. The Appellant was charged in the Magistrate's Court at Ba with three (3) counts of Theft contrary to section 291(1) of the Crimes Act as follows:

FIRST COUNT

Statement of Offence

THEFT: Contrary to section 291 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Nazia Nisha Ali between the 2nd day of November, 2011 and 30th day of November, 2011 at Nukuloa, Ba, in the Western Division

dishonestly appropriated $2002.00 in monies, the property of Nukuloa College.

SECOND COUNT

Statement of Offence

THEFT: Contrary to section 291 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Nazia Nisha Ali between the 25th day of June, 2012 and 29th day of October, 2012 at Nukuloa Ba in the Western Division dishonestly appropriated $6,731.50 in monies, the property of Nukuloa College.

THIRD COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Nazia Nisha Ali on the 2nd day of June, 2012, at Ba, in the Western Division dishonestly appropriated $2,670.00 in monies, the property of Nukuloa College.

2. On 17th September, 2015 the Appellant pleaded guilty to the charges after it was read, explained and understood by her in the Magistrate's Court.

3. The Appellant also admitted the summary of facts after it was read to her. The learned Magistrate after being satisfied that the guilty plea was unequivocal convicted the Appellant as charged.

SUMMARY OF FACTS

4. The following summary of facts was admitted by the Appellant:

"

1. *The complainant is Bimlesh Kumar Nath (PW 1), 39 yrs, School Manager of Nukuloa College, Ba.*

2. *The Accused is Nazia Nisha Ali, 29 yrs Clerk of Luvu, Lautoka.*

3. *The accused was working at Nukuloa College as the bursar of the college and her duties was to receive school fees from the students, making payments and do banking.*

4. *On 29/10/12 the complainant was auditing the Nukuloa College accounts and found some discrepancies in the schools account. The complainant went through the school fees receipt books and found out that money was received from students as school fees but the money was not deposited into the school account.*

5. *The complainant then asked the accused about the money and since then she did not turn up for work and then was terminated from the school and she also wrote a promising note that she will [pay] the money back to the school but failed to do so.*

6. *Between the 2nd day of November, 2011 and 30th day of November, 2011 at Nukuloa, Ba the accused received school fees from students and used an old receipt book and gave the students the receipts numbers 4528 to 4528 all to the total sum of $2002.00 in monies, the property of Nukuloa College but did not deposit the money into the school account but used the money for her personal gain.*

7. *Between the 25th day of June, 2012 and 29th day of October, 2012, the accused received school fees from students and used an old receipt book and gave the students the receipt numbers 16201 to 16203 and 16246*

to 16409 all to the total sum of $6731.50 in monies, the property of Nukuloa College but did not deposit the money into the school account but used the money for her personal gain.

8. *On 29.5.2012 accused prepared Westpac Bank cash cheque #003844 dated 29/05/12 for the sum of $3391.10 from the schools cheque account to be paid to South Pacific Business Systems for supplying stationary, cartridge and fax machine.*

9. *The accused on 29/05/12 prepared a Nukuloa College payment voucher and on 02/06/12 the accused went to Westpac Bank and cashed the same cheque for the amount of $3391.00 and only paid $721.10 to South Pacific Business Systems and kept the $2, 266.90 for her personal gain.*

10. *The matter was reported to Ba Police Station and DC 3237 Aveen was appointed to be the investigating officer.*

11. *Upon information accused was arrested and interviewed under caution who voluntarily admitted stealing the above mentioned money from the school.*

12. *The accused was charged for three counts of Theft contrary to section 291 of the Crimes Decree No. 44 of 2009 and bailed for Ba Magistrates' court on 25.06.2014."*

5. After considering mitigation, on 13th September, 2017 the Appellant was sentenced to 2 years imprisonment for all the counts to be served concurrently with a non-parole period of 18 months to be served before the Appellant was eligible for parole.

6. The Appellant being dissatisfied with the sentence filed a timely appeal against sentence as follows:

(a) *That the Learned Trial Magistrate erred in law and in principle by taking the higher end of the tariff therefore acted upon the wrong principle.*

(b) *The Learned Magistrate did not state the aggravating factors wherein he had imposed 40 months after selecting 30 months as the starting point in his sentencing.*

(c) *That the Learned Trial Magistrate took into consideration extraneous factors or irrelevant matters whilst sentencing.*

(d) *That the Sentence imposed on the Appellant is harsh in the circumstances when in fact the appropriate sentence should have been a suspended sentence.*

(e) *That the Learned Magistrate erred in law and in principle when he failed to afford sufficient credit for the appellant's early guilty plea when in fact it should have deducted one third of the Accused's sentence.*

(f) *That the Learned Magistrate considering the Accused was a mother and she had a four year old child to look after and therefore there was compelling circumstances to suspend her sentence pursuant to section 26 of the Sentencing and Penalties Act 2009.*

7. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

8. During the hearing counsel for the Appellant abandoned grounds of appeal (b) and (f).

LAW

9. In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the Appellate Court that the Sentencing Court fell in error whilst exercising its sentence discretion.

10. 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."*

GROUNDS OF APPEAL

GROUND ONE

The learned Trial Magistrate erred in law and in principle by taking the higher end of the tariff therefore acted upon the wrong principle.

11. The counsel for the Appellant submits that the tariff for theft arising from a breach of trust was a term of imprisonment from 18 months to 3 years, by taking 30 months as a starting point (which was on the higher end of the tariff) the learned Magistrate had erred in principle.

12. There is no doubt that the Appellant was working as a Bursar at a Secondary School. On three occasions the Appellant stole cash from her employer totalling the sum of $11,403.50.

13. For the selection of a starting point this court is guided by the Court of Appeal in *Laisiasa Koroivuki vs. The State, Criminal Appeal No. AAU 0018 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.*

14. The learned Magistrate had correctly identified the tariff for the offence of theft (arising out of breach of trust) to be between 18 months to 3 years imprisonment *(see State vs. Pauliasi Vatunalaba, Criminal Case no. HAC 134 of 2008 (31 March, 2010).* The learned

Magistrate selected 30 months as a starting point after an objective assessment of the seriousness of the offending.

15. In *Suresh Lal v State, Criminal Appeal Case No. HAA 020 of 2013* at paragraph 17 it was stated:

> *"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'.... Identification of the correct tariff and the selection of a proper 'starting point' play a pivotal role in the sentencing process."*

16. The *Koroivuki principle* suggests that as a matter of good practice the starting point should be picked from the lower or middle range of the tariff. However, in my view this may not always be possible since each case is dependent upon its own facts.

17. In this case the starting point of 30 months imprisonment selected by the learned Magistrate was within the tariff of the offence of theft.

18. The learned Magistrate did not err in the exercise of his sentencing discretion when he selected a starting point which was in the higher range of the tariff. Furthermore, the final sentence correctly reflects the criminality involved which is just and reasonable in the circumstances of the offending.

19. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

The learned Magistrate took into consideration extraneous factors or irrelevant matters whilst sentencing.

20. Counsel for the Appellant submits that the learned Magistrate erred when he considered breach of trust component as an aggravating factor as well as in selecting the starting point thus punishing the Appellant twice.

21. There is no doubt that the offences were committed as a result of a breach of trust which was an aggravating factor. In selecting the starting point the learned Magistrate at paragraphs 9 and 10 of the sentence states:

> *Paragraph 9*
>
> *"...Further in the case of Mohammed Zohit Khan v State, Lautoka High Court, Criminal Appeal No. HAA 24 of 2016, Justice Aluthge mentioned at paragraph 9 "...According to these guideline judgments, final sentence would depend on the value of goods stolen, circumstances including modus operandi of the stealing and the relationship between the accused and the victim. In cases of larceny of large amounts of money sentences of 18 months to 3 years imprisonment have been upheld.*
>
> *Paragraph 10*
>
> *Bearing in mind the above mentioned guidelines and the circumstance of offending in this case, for the first count I take a starting point of 30 months."*

22. Taking into consideration the above, it is obvious that when the learned Magistrate selected the starting point he had taken into account the breach of trust factor as a consideration in selecting the

high starting point. Thereafter in enhancing the sentence, the breach of trust component was again taken as part of the aggravation. At paragraph 6 of the sentence the following aggravating factors are stated:

> *"* Breach of trust,*
> ** The benefit derived from the offending,*
> ** Your actions were calculated and carried out over a period of 6 – 7 months."*

23. For the aggravating factors the learned Magistrate increased the sentence by 10 months. The learned Magistrate fell in error when he considered breach of trust component in selecting the starting point as well as in enhancing the sentence as part of the aggravating factor.

24. However, it is important to note that the breach of trust component is not the only consideration taken into account as part of the aggravating factors there are other components as well. The Appellant has issue with one component only. The other components mentioned as part of the aggravating features are also sufficient to attract an increase of 10 months which is justified even without the breach of trust component.

25. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 had stated that an Appellate Court does not use the same methodology of sentencing as the Sentencing Court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by determining the facts the sentence was unreasonable or unjust in the following words:

> *"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."

26. In my view the error by the learned Magistrate does not cause any substantial miscarriage of justice since the final sentence is within tariff and is an appropriate punishment considering the circumstances of the offending.

27. This ground of appeal is also dismissed due to lack of merits.

GROUND THREE

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

28. Counsel for the Appellant submits that the Appellant was a first offender who had pleaded guilty, was remorseful, had cooperated with the police and her family circumstances were compelling reasons for the learned Magistrate to suspend the term of imprisonment.

29. The final sentence of 2 years imprisonment fell within section 26 (2) (b) of the Sentencing and Penalties Act which gave the Magistrate's Court powers to consider a suspended sentence. The learned Magistrate had directed his mind towards a suspended sentence at paragraph 19 of the sentence as follows:

> *"... even if the court had powers to suspend your sentence I find no exceptional or compelling circumstance to suspend the sentence."*

30. The Court of Appeal in *Jocelyn Deo vs. The State, Criminal Appeal No. AAU 0025 of 2005 (11 November, 2005)* at paragraph 27 confirmed the above in the following words:

> *"Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting such a sentence and, in all cases, the sentencing court should not be too quick to find such circumstances."*

31. Considering the seriousness of the offences committed and in view of the maximum punishment of 10 years imprisonment provided for under section 291 of the Crimes Act a term of imprisonment in the circumstances of this case was inevitable.

32. This court endorses the comments made by Aluthge J. in *Mohammed Zohit Khan vs. the State, Criminal Appeal case no. HAA 24 of 2016 (24th October, 2016)* at paragraph 22:

> *"Case authorities in Fiji do not recommend imposing a suspended sentence where there is a breach of trust situation; a degree of preplanning, no restitution had been done and no genuine remorse is manifested even though the convict is a first offender..."*

33. In this case the Appellant was in a position of trust which she breached, the amount of money stolen was substantial. The facts show a systematic and well planned theft committed over a period of time. The Appellant also made a false promise (in writing) that she will repay the money stolen which she never fulfilled. There are no special circumstances in this case which would have warranted a suspended sentence. Although the Appellant has a young family it is unfortunate that she did not think of her family at the time she was committing the offences.

34. The learned Magistrate was correct in refusing to suspend the term of imprisonment the punishment was justified taking into account the offences committed by the Appellant.

35. This ground of appeal is also dismissed due to lack of merits.

GROUND FOUR

The learned Magistrate erred in law and in principle when he failed to afford sufficient credit for the Appellant's guilty plea when in fact it should have deducted one third of the Appellant's sentence.

36. Counsel for the Appellant submits that the learned Magistrate did not allow a discount of one third to the Appellant for her guilty plea which

would have resulted in a reduction of 11 months and not 10 months.

37. At paragraph 12 of the sentence the learned Magistrate stated:

> *"...For the guilty plea I further deduct your sentence by 10 months."*

38. In *Poate Rainima vs. State, Criminal Appeal No. AAU 0022 of 2012* (27 February, 2015) the Court of Appeal at paragraph 46 stated that for an early guilty plea one third discount is to be allowed during sentencing:-

> *"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance".*

39. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:

> *"(a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
>
> *(b) to protect the community from offenders;*
>
> *(c) to deter offenders or other persons from committing offences of the same or similar nature;*
>
> *(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*

(e) *to signify that the court and the community denounce the commission of such offences; or*

(f) *any combination of these purposes."*

40. Section 4(2)(f) and (g) of the Sentencing and Penalties Act states that the Sentencing Court must have regard to whether the offender pleaded guilty to the offence, the stage of the proceedings when the offender pleaded guilty and whether the offender's conduct was an indication of remorse or lack of remorse.

41. The learned Magistrate had correctly allowed a reduction for guilty plea (although not one third) the sentence was a correct reflection of the criminality involved. It was open to the learned Magistrate what weight he gave to the guilty plea *(see Viliame Daunabuna vs. The State, Criminal Appeal no. AAU 120 of 2007).*

42. The above proposition was further strengthened by the Court of Appeal in *Alfaz Khan vs. The State, Criminal Appeal no. AAU 105 of 2011 (2 June, 2014)* where it was observed at paragraph 9 that the Sentencing and Penalties Act had left it to the decision of the Sentencing Court to give an appropriate weight to a guilty plea when sentencing an offender.

43. The learned Magistrate in this case had complied with the purposes of sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2) (b) and (f) of the Sentencing and Penalties Act.

44. In view of the above, there is no error made by the learned Magistrate in the exercise of his sentencing discretion or any substantial miscarriage of justice caused to the Appellant when the learned Magistrate did not allow a full discount of one third for the guilty plea. The final sentence was within the acceptable tariff.

45. It should also be borne in mind that the Appellant had been appearing in court with counsel without any attempt to take plea from 25th June, 2014. A plea was taken on 17th September, 2015 (after a lapse of over one year) yet a very generous reduction was allowed.

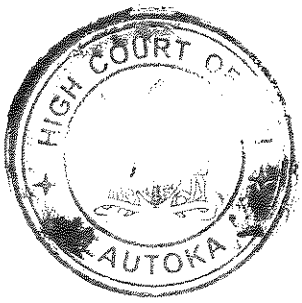
46. This ground of appeal is also dismissed due to lack of merits.

ORDERS

1. The appeal against sentence is dismissed.

2. The sentence of the Magistrate's Court is affirmed.

3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
28 February, 2018

Solicitors

Office of the Legal Aid Commission, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.