IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA18 OF 2017

(Magistrates' Court Case No. 51 of 2016)

BETWEEN: **TITOKO BULI**

APPELLANT

AND: **THE STATE**

RESPONDENT

Counsel: **Appellant in Person**
Mr R Kumar for the Respondent

Date of Hearing: **8 January 2018**

Date of Judgment: **15 January 2018**

JUDGMENT

[1] This is an untimely appeal against sentence by an unrepresented appellant.

[2] On 6 June 2016, the appellant was charged with one count of bribery of a public official. The charge alleged that the appellant offered $50.00 to a police officer for the release of a suspect detained at Taveuni Police Station. The suspect was a mechanic. The appellant had engaged the suspect to fix his vehicle before the next renewal of registration. When the appellant learnt that his mechanic was in police custody for drunk driving, he offered a police officer $50.00 for his release from the cell so that he could get his vehicle released for registration before expiry. When the appellant made the offer, he was arrested and charged with bribery. He was produced in the Magistrates' Court on the same day, but his plea was not taken until 12 July 2016.

[3] On 12 July 2016, the appellant freely and voluntarily pleaded guilty to the charge. In mitigation, he said he was 35 years old and a farmer. He offered the bribe because he had paid his mechanic $300.00 for repair of his vehicle and that his concern was to get his vehicle's registration renewed before it expired. He said he was deeply remorseful for his conduct.

[4] On 13 July 2016, the appellant was sentenced to 3 years 4 months imprisonment with a non-parole period of 2 years 6 months.

[5] On 16 September 2016, the appellant gave his Notice of Appeal in person. By the time that Notice was received by the High Court Registry on 10 November 2016, the appeal was late by about three months. Subsequently, legal aid was approved, and on 16 December 2016, counsel for the appellant applied for leave to withdraw the appeal before Justice Temo. At no stage, the appellant gave any written notice to discontinue the appeal pursuant to section 255 of the Criminal Procedure Act 2009. The appeal in the Criminal Appeal No. 12 of 2016 was marked withdrawn after leave was granted.

[6] Almost 9 months later, on 11 September 2017, the appellant filed a new application for an enlargement of time to appeal against sentence that was earlier marked withdrawn. The appellant informed the Court that he had earlier withdrawn his appeal because he was under misapprehension that his sentence could be enhanced if he proceeded to the hearing. This explanation is plausible. When counsel applied for leave to withdraw the appeal, the Court did not inquire from the appellant to establish that the decision to withdraw is informed and without mistake. As was said by the Supreme Court in *Masirewa v State* [2010] FJSC 5; CAV0014.2008S (17 August 2010) at [11]:

> Where written or oral applications are made by an unrepresented petitioner seeking leave to withdraw an appeal, appellate courts should proceed with caution. It would be prudent for instance to ask the petitioner, on the day the matter is listed for hearing, why the petition was to be withdrawn, whether any pressure had been brought to bear on the petitioner to do so, and whether the decision to abandon had been considered beforehand. This inquiry should be made of the petitioner personally and recorded even in cases where the petitioner is represented. The purpose of the inquiry is to establish that the decision to withdraw has been made deliberately, intentionally and without mistake. Ideally, the decision should be informed

> also. That aspect is not always an easy matter to achieve in a jurisdiction such as Fiji with limited access to appellate advice, and occasionally if rarely, will give rise to difficulty. (underlining mine)

[7] If an inquiry was made, the Court would have been informed of the true reason for the decision to withdraw and whether the decision was deliberate and intentional. Leave would not have been granted if the Court would come to the conclusion that the appellant was mistaken in his belief that his sentence could be enhanced on appeal.

[8] This was not case for an enhancement of sentence on appeal. Counsel for the State fairly concedes that the appeal against sentence has merits to justify an enlargement of time. Fortunately, the appeal was not dismissed when leave to withdraw was allowed. In these circumstances, I accept that the appellant was under misapprehension that his sentence could be enhanced if he proceeded to hearing. I am satisfied that the oral withdrawal of appeal by counsel was made in an error and was a nullity (see, *Rex v Van Dyn* (1932) 23 Cr. App. R 150).

[9] The next question is whether there is an error in the exercise of the sentencing discretion. The learned Magistrate used the two-tiered approach to give reasons for the sentence that he imposed on the appellant. He identified the appellant's level of culpability based on the UK Sentencing Guidelines. This was an error of principle. The UK Sentencing Guidelines is based on a completely different sentencing regime. It has no legal force in Fiji. Sentencing guidelines from foreign jurisdictions may be relevant only if there are no comparable domestic cases and that the maximum sentence prescribed for the alleged offence is same.

[10] A comparable domestic case is *Fiji Independent Commission Against Corruption v Niraj Singh* unreported Cr Case No HAC004 of 2010; 19 March 2010. In that case, the offender, who was a court officer, was sentenced to 8 months imprisonment by Justice Priyantha Fernando after he pleaded guilty to soliciting and accepting $100.00 from a member of the public in order to expedite her Small Claims Tribunal appeal.

[11] More recently, this Court reduced the sentence of a 20-year old offender from 18 months to 6 months imprisonment for offering $200.00 to a police officer in order to

get his vehicle released from police custody and pleading guilty to the charge at an early opportunity (*Kumar v State* [2017] FJHC 953; HAA 120.2017 (22 December 2017)).

[12] In the present case, not only the appellant's level of culpability was wrongly assessed using the UK Sentencing Guidelines, the learned Magistrate erroneously found that the appellant's level of culpability was high to justify a starting point of 6 years imprisonment. The UK Sentencing Guidelines state that the high culpability offenders are those who are in positions of significant power or trust and who are motivated by expectation of substantial financial or political gain to engage in bribery offences. The appellant was an indigent farmer from Taveuni who offered only $50.00 as bribe. This was not a sophisticated case of bribery involving large sums of money by those holding significant power to justify a starting of 6 years imprisonment. In my judgment, 3 years 4 months imprisonment is manifestly excessive in all circumstances of the case. However, since the appellant has served nearly 1½ years' imprisonment, a just result can be achieved by substituting a sentence with the term already served.

Orders of the Court:

[13] Enlargement of time granted.

Appeal against sentence allowed.

Sentence imposed by the Magistrates' Court is set aside and substituted with a sentence of 1 ½ years effective from 13 July 2016.

HIGH COURT OF FIJI
LABASA

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Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions for the Respondent