

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 16 OF 2018

BETWEEN : **ABDUL SAIYAD KHAN**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. N. Khan for the Appellant.
: Mr. J. Niudamu for the Respondent.

Date of Hearing : 16 April, 2018

Date of Judgment : 18 April, 2018

JUDGMENT

Background Information

1. The appellant was charged in the Magistrate's Court at Nadi for the following offences:

FIRST COUNT

Statement of Offence

THEFT: Contrary to section 291 of Crimes Act 2009.

Particulars of Offence

Abdul Saiyad Khan on 31st day of October 2017 at Nadi in the Western Division, dishonestly appropriated \$100, the property of

Prouds Duty Free with intent to permanently depriving the said Prouds Duty Free.

SECOND COUNT

Statement of Offence

Fraudulent Falsification of Account: Contrary to section 322 (1) (a) (i) of Crimes Act 2009.

Particulars of Offence

Abdul Saiyad Khan on 31st day of October 2017 at Nadi in the Western Division, wilfully falsified Prouds Duty Free cashier till balancing form no. 27867 to read \$1048.85 from \$948.85 with intent to defraud Prouds Duty Free.

2. On 12th February, 2018 the appellant in the presence of his counsel pleaded guilty to the charges and thereafter admitted the summary of facts after it was read to him.
3. 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:

“On 01st day of November 2017 at about 0800 hrs Ronil Kumar, (A-1) 36 years, Chief Cashier, of Prouds Duty Free Nadi Airport received cashier’s till of Abdul Saiyad Khan (Suspect) 22 years, Cashier of Legalega Nadi who was cashier for afternoon shift on 31/10/17 for balancing with the cashier’s balancing form which (Suspect) prepared. (A-1) whilst doing the physical check on the cash in till discovered that \$100.00 was short.

(A-1) then check the reconciliation of last night sales in the system and also the float of \$500, all should come to total sales as \$1048.85. In verifying (A-1) then took out \$548.85 which was the sales from last

night. The leftover should have been \$500 for the float but there was only \$400 in (Suspect)'s till. (A-1) then made his report and handed over to Vineel Prakash, (A-2) 24 yrs IT support staff for reconciliation of (Suspect's) sales record dated 31/10/17.

(A-2) then checked the physical content of money in (Suspect's) till and (Suspect's) till balancing form no. 27867 entry and found the money was \$948.85 and \$100 were short. (A-2) then checked the system generated reconciliation form for the (Suspect's) sale record dated 31/10/17 and the system stated that there was cash sale of \$1048.85 and the till should be same. (A-2) then checked the cashier till balancing form no.27867 and found out that (Suspect) has falsified the cashier till balancing form dated 31/10/17 to read as \$1048.85 from \$948.85 to hide his theft.

(A-2) then inform Ashwin Sumer (A-3), 27 yrs, Assistance Manager of Sanasana Road, Nasoso about (Suspect) and (Suspect's) till balancing form and (A-2) and (A-3) informed their Manager Ashwin Prakash Chand (A-4), 37 yrs of Nadi Back Road and they all viewed the CCTV footage and discovered (Suspect) stealing the \$100 from the till.

The matter was reported and (Suspect) was arrested and interviewed under caution and he admitted that he stole the money and falsified the cashiers till balancing form to hide his theft. (Suspect) also stated that the money is kept at his house, 1 x \$100 serial number FFA4164091 was recovered from (Suspect). Later (B-1) was formally charged for 2 counts and produce in custody for Nadi Magistrate Court on 03/11/17"

5. After considering mitigation on 16th March, 2018 the appellant was sentenced to 15 months imprisonment for both counts to be served concurrently, however, the appellant was ordered to serve 6 months and the balance of imprisonment was suspended for 3 years.
6. The appellant being dissatisfied with the sentence filed a timely appeal against sentence (as amended) as follows:
 1. The learned Magistrate erred in law and in fact in misapplying the principles of sentencing of the Sentencing and Penalties Act in sentencing the Appellant to 6 months imprisonment and 8 months suspended for 3 years.

2. *The learned Magistrate erred in law and in fact in misapplying the case authorities quoted in his judgment to the facts of the Appellant case.*
 3. *The learned Magistrate erred in fact in not applying his mind to the fact that full restitution was made and holding that only "some recovery" was done.*
 4. *The learned Trial Magistrate erred in fact that there was a certain "degree of planning" in the absence of any evidence before him to come to such a finding.*
 5. *The learned Trial Magistrate erred in not considering and/or falling to consider the mitigating factors of the Appellant.*
7. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

LAW

8. 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.
9. 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..”*

10. From the grounds of appeal it is obvious that the appellant's contention is that the sentence is wrong in principle which has resulted in a harsh and excessive sentence. The appellant seeks a wholly suspended sentence.

PRINCIPLES OF THE SENTENCING AND PENALTIES ACT NOT APPLIED

11. The learned counsel for the appellant submits that the learned Magistrate had misapplied the principles of the Sentencing and Penalties Act in sentencing the appellant.
12. Counsel submits that there was no evidence of any planning by the appellant who was just following what the others were doing hence he could not have planned anything. Counsel further submits that the learned Magistrate had incorrectly mentioned in his sentence that there was “some recovery” when the facts show full recovery.
13. At paragraph 15 of the sentence the Learned Magistrate states the following:
- “I have considered section 4 (1), 4 (2) and 15 (3) of the Sentencing and Penalties Act 2009 for the purpose of your sentence”.*
14. 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.”*

15. Section 4(2) states the different factors which a court must take into account when sentencing an offender. Section 15(3) inter-alia states that sentences of imprisonment should be regarded as the sanction of last resort.
16. The learned Magistrate had directed his mind to all the relevant provisions of the law as required by the Sentencing and Penalties Act, however, he did not give any weight to the principles of rehabilitation which was available to him from the facts before the court. This requires the intervention of this court.
17. Taking into consideration the facts of the case in particular that the amount of money stolen was \$100.00 which was immediately recovered due to the cooperation of the appellant, plea of guilty at the first available opportunity, genuine remorse and being a young offender of 22 years does compel this court to also consider the principles of rehabilitation in favour of the appellant (section 4 (1) (d) of the Sentencing and Penalties Act) by varying the term of

imprisonment in accordance with section 256 (2) of Criminal Procedure Act.

18. This ground of appeal is partly allowed.

MISAPPLICATION OF CASE AUTHORITIES

19. Counsel for the appellant submits that the learned Magistrate had misapplied the case authorities mentioned in his judgment to the facts of the appellant's case. At paragraph 2.1 of the written submissions counsel admits that the learned Magistrate had correctly relied on all the applicable laws and case authorities.
20. However, counsel submits the learned Magistrate failed to apply the case authorities to the current circumstances by not taking into account the following considerations:
- i) The value of money stolen;
 - ii) The method of stealing;
 - iii) Number of offence (first offence attracts much lesser penalty);
 - iv) Thefts in breach of trust;
 - v) Planned thefts.
21. Although the amount of money stolen was minimal which was recovered in full this court cannot ignore the fact that the appellant was employed as a cashier which was a position of trust and responsibility. It is the betrayal of that trust that classifies fraud related offences as worst type of offences.
22. The maximum punishment for the offence of theft under section 291 of the Crimes Act is 10 years imprisonment. The tariff for the offence of theft arising out of breach of trust is between 18 months to 3 years

imprisonment (see *State vs. Pauliasi Vatunalaba*, criminal case no. HAC 134 of 2008 (31 March, 2010).

23. The maximum punishment for the offence of Fraudulent Falsification of Account under section 322 of the Crimes Act is 7 years imprisonment. The tariff for such fraud cases range from 18 months to 4 years imprisonment. In *Hu Jun Jun v The State*, Criminal Appeal no. HAA 0024 of 2005 Shameem J. had observed as follows:

“... the tariff for fraud related cases ranged from eighteen months to four years imprisonment, with 4 years imprisonment reserved for the worst type of offending.”

24. This court accepts the observations 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 his Lordship had stated:

“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...”

25. In cases involving breach of trust a custodial sentence is inevitable as a deterrence factor. Here the total sentence of 15 months imprisonment is below tariff with partial suspension does show the leniency of the sentencing court.

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

RESTITUTION

27. Counsel for the appellant submits that the learned Magistrate erred when he did not direct his mind to the fact that full restitution was made by stating in his sentence that "some recovery" had been done.
28. At paragraph 29 of the sentence the learned Magistrate states:

"In view of the nature of the offence of breach of trust and some recovery, I will partly suspend your sentence and it serves both as a lesson to you not to steal from your employer and serve as deterrence to other employees not to abuse the trust reposed on them by their employer."
29. There is no doubt that the amount of money stolen was recovered in full. The learned Magistrate had taken this aspect at paragraph 6 of the sentence as part of mitigation as "\$100 refunded to police at investigations".
30. The omission by the learned Magistrate at paragraph 29 of the sentence does not cause any substantial miscarriage of justice to the appellant. At paragraph 29 of the sentence the learned Magistrate had after coming to the final sentence was considering section 26(2) (b) of the Sentencing and Penalties Act whether to suspend the sentence or not. The learned Magistrate exercised his discretion to partly suspend the imprisonment term which was correctly done.
31. There is no error by the learned Magistrate and this ground of appeal is also dismissed due to lack of merits.

ABSENCE OF EVIDENCE IN RESPECT OF PLANNING

32. The counsel for the appellant submits that the learned Magistrate erred in fact when he stated there was a certain degree of planning in the absence of any evidence to come to such a finding.

33. At paragraph 18 of the sentence the learned Magistrate states:

“The aggravating factor here is degree of planning and breach of trust...”

34. At paragraph 3 of the summary of facts there is evidence of planning considering the manner and circumstances in which both the offences were committed. The theft of the money in question and falsification of the cashier till balance form to hide the offence of theft in my view does require some degree of planning.

35. The learned Magistrate had correctly taken into account that there was some degree of planning by the appellant in committing the two offences. The following questions and answers in the record of interview of the appellant confirm the above as well:

“Q55: Then what happened?”

A: I wrote total amount of \$1048.85 for Fijian dollars on the cashier till balancing form and Sanjay our supervisor check the system reconciliation and balance the documents which I wrote manually but did not physically count the cash.

Q56: Take a look at this cashier till balancing form no. 27867 dated 31/10/17. (Cashier till balancing form no. 27867 dated 31/10/17 shown to the suspect). Is this amount \$1048.85 right amount you entered on cashier till balancing form?

A: no

Q57: *What should be the right amount you should put in this form?*

A: *notes should be [written] as \$855.00 instead of \$955.00 and total should be \$948.85 instead of \$1048.85.*

Q58: *Why you wrote the wrong information on the cashier till balancing form?*

A: *to cover my track of \$100.00 theft."*

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

FAILURE TO CONSIDER MITIGATING FACTORS

37. The counsel for the appellant submits that the learned Magistrate had erred in not considering and/or failing to consider the mitigating factors of the appellant.

38. At paragraph 6 of the sentence the learned Magistrate takes into account all the mitigating factors as mentioned by the appellant and at paragraph 25 states:

"Considering your mitigation and personal circumstances, I further reduce 5 months."

39. This court also notes that previous good character is not a compelling mitigating factor in breach of trust cases (*State v Simeti Cakau, Criminal Appeal No. HAA 125 of 2004S (10/11/2004)*) but in the present case the learned Magistrate had considered the appellant's previous good character as a mitigating factor which was favourable to the appellant.

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

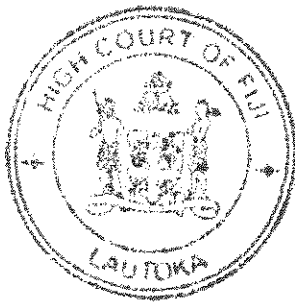
CONCLUSION

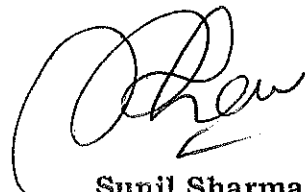
41. Having partly allowed the appeal against sentence this court is of the view that there is a need to vary the existing term of imprisonment of 6 months to assist the appellant in rehabilitation. It is noted that the appellant has already served a little over one month imprisonment.

ORDERS

1. The appeal against sentence is partly allowed.
2. The sentence of the Magistrate's Court is affirmed in respect of both counts to be 15 months imprisonment to be served concurrently, however, the term of imprisonment is reduced, the appellant is to serve 2 months imprisonment with the balance term of 13 months to be suspended for three years with effect from 16th March, 2018.*
3. 30 days to appeal to the Court of Appeal.

*The effect of suspension is once again explained to the appellant.




Sunil Sharma
Judge

At Lautoka
18 April, 2018

Solicitors

Messrs Natasha Khan Associates, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.