IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 84 OF 2017

BETWEEN : STATE

APPELLANT

AND : SAIYAD TASLIM HUSSEIN

RESPONDENT

Counsel : Mr A. Datt for Appellant

Mr R. Kumar for the Respondent

Date of Hearing : 01st May, 2018

Date of Judgment : 05th June, 2018

JUDGMENT

Background

1. This is a timely appeal filed by the State against the Sentence and the Discharge Order made on the 14th July, 2017, by the learned Magistrate at Ba.

2. The Respondent was charged in Ba Criminal Case No. 359 of 2014 with one count of 'Bribery of Public Official' contrary to Section 134 (1) (a) (ii)) of the Crimes Act No. 44 of 2009.

3. The particulars of the offence read as follows:

> *"Saiyad Taslim Hussain on the 19th day of July 2014 at Ba Police Station, in Western Division, without lawful authority, caused a benefit of $ 15.00 to PC 47007 Mosese Maraivalu, a public officer with intent to influence the said Mosese Maraivalu in the exercise of his duties as a public official".*

4. The Respondent voluntarily pleaded 'guilty' to the charge albeit not at the first available opportunity. Having considered the mitigation filed by the Counsel for Respondent, the learned Magistrate recorded a conviction whereupon the Respondent was sentenced on 14th July 2017 to 9 months' imprisonment and a fine of $500 was imposed. Having imposed the said 'sentence', the learned Magistrate suspended the whole custodial sentence for a period of 24 months and then discharged the Respondent purportedly pursuant to Section 44 (1) of the Sentencing & Penalties Act 2009 (SPA).

5. The State filed a Petition of Appeal against the said Rulings raising two grounds of appeal;

> (a) that there were no 'exceptional circumstances' justifying the final sentence to be wholly suspended; and
> (b) that there were no compelling reasons to completely discharge the Respondent.

6. Following summary of facts was admitted by the Respondent at the magistracy:

> *"On 19/07/14, PC 4707 Mosese Maraivalu (A-1) aged 42 years Police Officer of Ba Police Station reported that (B-1) Saiyad Taslim Hussain aged 28 years, School Teacher of Rakiraki Public School bribed him of $15.00.*
>
> *On the 19th day of July 2014 at about 6.40 pm (A-1) was doing operation duty with (A-2) PC 4186 Petero and SC Seru of Ba Police Station at Ba Town near the Court House, noticed a white car registration No. HD 424 coming from the riverside towards the Ba Town. (A-2) stopped the vehicle and told the driver to off the engine and asked him for his driving licence and also if he was drunk. The driver was informed by (A-2) that he will be taken to Police Station for breathalyzer test. (A-1) sat at the back seat of car with (B-2) and (A-2) drove the car to the Police Station yard with the other passengers. Upon getting off from the car (B-1) who was the passenger put the money in (A-1)'s right pocket trousers. (A-1) took if off and saw 1 x 5.00 (dollar note) and 1 x 10.00 (dollar note) to the*

total of 15.00 (dollars). (A-1) asked (B-1) what's the money for and (B-1) said to release them and not to take them inside the Police Station".

Analysis

Ground (1) - Complete Suspension of Custodial Sentence

7. The Appellant is not contesting the length of the sentence that is 9 months' imprisonment. They concede that, in previous cases, sentences of similar length had been passed and/or upheld. They have cited number of cases, for instance in ***FICAC v Niraj Singh*** (Criminal Case No. 004 of 2010), an imprisonment term of 8 months plus a fine of $200.00 had been imposed by the High Court. In ***The State v Joeli Vunisa*** (Suva Criminal Case No. 204 of 2013), the Magistrates Court had sentenced the accused to 12 months' imprisonment. In ***Satendra Nathan v The State*** (Criminal Appeal No. HAA 03 of 2013) a sentence of 8 months' imprisonment had been upheld in appeal.

8. The Appellant submits that the learned Magistrate erred in law and in principle when he wholly suspended the custodial sentence of the Respondent.

9. When the imprisonment term does not exceed two years', the sentencing Magistrate, has a discretion to suspend the sentence wholly or partly if he is satisfied that it is appropriate to do so in the circumstances (SPA Sec: 26 (1), (2) (b)).

10. However, that discretion must be exercised judiciously while giving valid reasons for suspension of the sentence. At paragraph [9] of the Sentencing Ruling, the learned Magistrate arrived at a final sentence of 9 months' imprisonment, which he decided to wholly suspend for 24 months. There were no justifications provided by the learned Magistrate for suspending the sentence.

11. In ***The State v Alipate Sorovanalagi*** (Criminal Review Case No. 006 of 2012), Goundar J laid down the general guideline when it comes to suspending a sentence. His Lordship at paragraph [22] specifically stated that the discretion to suspend sentences in the Magistrates' Courts must be ".... Exercised judiciously, after identifying special reason to suspend the sentence". His Lordship then referred to the case of ***DPP v Jolame Pita*** (1974) 20 FLR 5, where the then Acting Chief Justice Grant (as he then was) held that *"... in order to justify the imposition of*

a suspended sentence, there must be factors rendering immediate imprisonment inappropriate".

12. The learned Magistrate had not justified the use of his discretion in wholly suspending the Respondent's sentence. Per paragraph [4] of the Sentencing Ruling, it appears that the learned Magistrate was aware that the Respondent had three previous convictions albeit those previous convictions were not fraud or bribery related. Therefore, the Respondent was not entitled to leniency normally shown to first offenders.

13. Furthermore, as a matter of public policy, in bribery and corruption cases, the fact that a person had a good character will normally count for little. Madigan J in ***Fiji Independent Commission Against Corruption [FICAC] v Mohammed*** [2015] FJHC 479; HAC349.2013 (24 June 2015) observed that ... *"it would be in truly exceptional circumstances that sentences (for bribery offences) could be suspended..."* His Lordship has set a very high threshold for suspension of sentences in bribery related cases.

14. In ***Blake*** (Criminal Review 005 of 2013) Madigan J observed at paragraph. 10.

> *"In an age where commercial intercourse is paramount and where the nation's economy depends on honesty and propriety of commercial transactions, bribery is a canker that undermines economic growth and discourages investment. Bribery of public officials is of course more serious. It attacks the integrity of Government; it injures the moral fibre of Government Officials and if it succeeds it serves to disadvantage the underprivileged and the poor. Sentences must be passed by the Courts that would do everything to discourage the practice by sending a message that it will be punished severely. As Winter J. said in Suliasi Sorovakatini HAC 18 of 2005:*
>
> > *"We all know that public corruption betrays the public trust and erodes public confidence in our Government institutions. These are serious crimes and it is important that potential offenders and the public at large understand that these crimes will be met with stiff penalties".*

15. His Lordship further observed:

> *"For a crime as serious and as damaging as Bribery of a Public Official sentences in the range of 9 months to 3 years must be regarded as the accepted range and it would*

be in the most exceptional circumstances that suspended sentences would be countenanced. Suspended sentences in a bribery context merely send a message that it is acceptable to offer bribes in some circumstances and the message must be given that it is never acceptable".

16. In ***Blake*** (supra), upon review, Madigan J, having re-sentenced the accused to 12 months imprisonment, found that it was a fitting case for the imprisonment term to be wholly suspended. Despite the court's view expressed in paragraphs 10 and 12 of the Judgment that it would only in truly exceptional circumstances that sentences for very serious crimes of this nature could be suspended, the court took the view that exceptional circumstances did exist warranting a suspension of sentence. The Court observed;

> *"The Magistrate quite rightly recognized his strong mitigating factors, the fact that he was co-operative with the authorities and entered pleas of guilty at the earliest opportunity. He has provided glowing references as to his character and he undertakes two jobs in Nevada to provide for his young family and to care for his widowed mother and aged grandmother. Most important of all he has stayed back in Fiji in response to this review procedure. The Court has had no power to detain him or to order him to remain but he has of his own volition remained to see this matter to the end which is very much to his credit".*

17. Similarly, in the case under appeal, although the learned Magistrate failed to give reasons for the suspension of the sentence, strong exceptional and extenuating circumstances did exist to justify a suspension. The Respondent was not motivated by personal gain. He was involved through coercion to help a friend. The advantage offered is nominal ($15). The offence is opportunistic, with a "one-off" offence with no planning. There is no sophistication of the offence. There was no evidence of abuse of position of significant power or trust. The respondent was not motivated by the expectation of substantial financial, commercial or political gain.

18. Furthermore, in Respondent's case, strong mitigating circumstances did exist. The Respondent was young (27 years old) and had no previous convictions of similar nature. He was married and had a son of one year old. He had a strong rehabilitation potential. He was a final year law student at USP and had teaching qualifications with Bachelors of Science with Graduate Certificate in Education, majoring in mathematics and physics. He had taught from 2009 to 2014. He was remorseful and admitted the allegations in his caution interview and pleaded guilty to the charge albeit not at the first available opportunity. He co-operated

with the police. He was called upon to be sentenced three years after the offence and during which time a serious charge was hanging over his head.

19. In light of the case cited above (Blake), it is the considered view of this Court that the learned Magistrate could have recorded reasons and exercised his discretion judiciously in wholly suspending the sentence of the Respondent. Therefore, I am not inclined to interfere with the decision of the learned Magistrate that suspended the sentence. Appeal ground one fails.

Ground: (ii) – Propriety of Discharge Order

20. The Appellant submits that the learned Magistrate erred in law and in principle when he discharged the Respondent under Section 44 (1) of the SPA.

21. The learned Magistrate, at paragraph [9] of the Sentencing Ruling, invoked Section 44 (1) of the SPA and discharged the Respondent after conviction.

22. Section 44 empowers a magistrate to exercise this option to discharge an accused after conviction. However that discretion is not unfettered and must be exercised judiciously having considered the purposive guidelines stipulated in Section 43 of the SPA. A discharge ought to be granted only in those matters which satisfy the purpose(s) under Section 43 (1). It has been held that absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (***R v O'Toole*** (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (***R v Kavanagh*** (unreported) May 16th 1972 CA).

23. Section 43 of the SPA provides for discharges in general terms. It does so under the chapter heading "Dismissals, Discharges and Adjournments". It encapsulates much of the common law and case law of the last 30 years or so. (***Batiratu*** HAR 001/2012 (13 February, 2012)).

24. Section 43 of the SPA states:

> *(1) An order may be made under this Part :*
>
> > *(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;*

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;

(d) to allow for circumstances in which it is inappropriate to record a conviction;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender."

25. A discharge after conviction in Respondent's case does not serve any of the listed purposes from (a) to (e) above. Firstly, the Respondent already had previous convictions prior to sentencing albeit they are not related to bribery. Since he was not a first offender, rehabilitation would not be the core objective for sentencing. In addition, the strict sentencing approach for bribery related offences reflected in case law suggests that deterrence and denunciation are the main purposes.

26. Secondly, the offence committed by the Respondent is a serious one and carries a maximum penalty of 10 years' imprisonment. In relation to the tariff for the offence, in the case of ***FICAC v Feroz Jan Mohammed & Ors*** (Criminal Case No. HAC 349 of 2013) Madigan J, after analyzing previous case authorities including his own decision in ***The State v Sonny David Bernad Blake*** (Criminal Review Case No. 005 of 2013), and referring to the U.K. Sentencing Council's considerations and recommendations on bribery sentencing, defined 2 categories with respective tariffs for sentencing in bribery offences. Category 1 was for cases of high culpability with a tariff from 5 to 8 years imprisonment whereas Category 2 was for lesser offending with a tariff from 18 months to 4 years. His Lordship had also remarked at paragraph [26] that *"it would be in truly exceptional circumstances that sentences could be suspended and probably never for a Category 1 offence".*

27. The conduct of the Respondent in trying to bribe a police officer to secure the release his friend, who was pulled over for drunk driving, was not a minor, technical nor a trivial breach of law. It was a conscious act by a person who was well educated and capable of appreciating the consequences of his actions.

28. Thirdly, the learned Magistrate had sentenced the respondent to 9 months' imprisonment, which was way below the bottom end of the tariff for Category C

offending that is 18 months imprisonment. In view of this comparatively lenient or nominal punishment imposed by the learned Magistrate, a discharge order was unwarranted.

29. Fourthly, the learned Magistrate proceeded to convict the Respondent in the circumstances of the case. Section 44 (1) of the SPA can only be used after a person is convicted. In exercising its discretion whether or not to record a conviction, a court under Section 16(1) of the SPA, must have regard to all the circumstances of the case, including:

(a) the nature of the offence
(b) the character and past history of the offender;
(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

30. In light of this section, it appears that the learned Magistrate was satisfied that the circumstances of Respondent's case warranted a conviction. There were no exceptional reasons not to formally record a conviction, especially in view of three previous convictions on record. Even in ***Blake*** (supra), the court on revision set aside the Magistrate's no conviction order and recorded a conviction against the accused.

31. Fifthly, there were no other extenuating or exceptional circumstances in the Respondent's case that validated a discharge after conviction. Similar personal circumstances, such as that of the Respondent, were shared by other accused in other similar cases.

32. The learned Magistrate, in line with the requirements laid down in ***Koroivuki v The State*** [2013] FJCA 15 to provide reasons for going outside the established tariff, stated at paragraph [10] of the Sentencing Ruling that the Court was supporting the Respondent's endeavors of becoming a lawyer.

33. In light of this this reason, one can argue that the learned Magistrate's decision to discharge the Respondent should be considered as an "extenuating or exceptional circumstance that justifies a court showing mercy to an offender" under Section 43 (1) (e) of the SPA.

34. In ***Batiratu*** (supra) Gates CJ observed that if offenders are allowed to secure lenient sentences in serious cases based on their educational qualifications and job potentials then it would be unfair to those offenders who were not so educated. Hence, passively creating a separate 'class' of offenders based on educational qualifications, who are given lenient sentences, would fly in the face of the legal principle of 'Equality before the law'. His Lordship at paragraph [33] referred to the English Court of Appeal judgment in ***R v Caird, Lagden and Others*** [1970] Crim. LR 656 where a similar view was taken that there was nothing exceptional about offenders being students.

35. For these reasons, I find that the learned Magistrate erred in law and in principle when he discharged the Respondent after recording a conviction under Section 44 (1) of the SPA. Hence that ground (ii) succeeds.

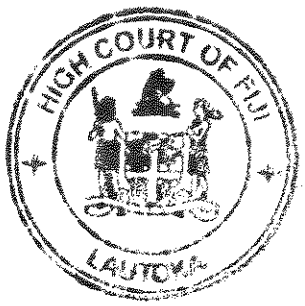
Summary

36. Therefore, following orders are made:

(a) The Order given by the learned Magistrate at Ba not to record a conviction is set aside.

(b) In its place, a conviction is recorded. The appeal succeeds to that effect.

(c) In the most exceptional circumstances, the Court affirms the sentence of 9 months' imprisonment suspended for a period of two years and the fine of $ 500 imposed by the learned Magistrate at Ba on 14th July, 2017.



Aruna Aluthge
Judge

At Lautoka
05th June 2018

Counsel: **Director of Public Prosecution for Appellant**
Messrs Iqbal Khan & Associates for Respondent.