

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA002/2018
(Magistrates' Court Case No. 742/ 2017)

BETWEEN : NEMANI TALAU
APPELLANT

AND : THE STATE
RESPONDENT

Counsel : Appellant in Person
Ms S Serukai for the Respondent

Date of Hearing : 16 February 2018
Date of Judgment : 19 February 2018

JUDGMENT

- [1] This is an appeal against sentence only.
- [2] The appellant was charged with one count of theft contrary to section 291(1) of the Crimes Act 2009. The charge alleged that the appellant on 26 November 2017 stole a number 14 chicken valued at \$13.00 from Pack and Save Supermarket in Nausori.
- [3] The appellant pleaded guilty to the charge after waiving his right to counsel in the Magistrates' Court at Nausori. On 27 November 2017, he was sentenced to 12 months' imprisonment.
- [4] Aggrieved with his sentence, the appellant gave his Notice of Appeal to the Department of Corrections on 28 December 2017. By the time Court Registry received the Notice of Appeal from the Department of Corrections, the appeal was late by one week.
- [5] Since the appellant is unrepresented and the length of the delay is short, I grant him an enlargement of time to appeal.

- [6] The appellant's main complaint is that his sentence is excessive in all circumstances of the case.
- [7] The maximum penalty prescribed for theft is 10 years imprisonment. At the time of the offending, the appellant was 37 years old and working as a cleaner, earning \$120.00 per week.
- [8] He entered an early guilty plea and expressed remorse.
- [9] In sentencing the appellant, the learned Magistrate referred to the old tariff under the Penal Code and said the tariff for simple larceny on first conviction was 2-9 months imprisonment and on second conviction a sentence in excess of 9 months.
- [10] Since the appellant had previous convictions for theft, the learned Magistrate took a starting point of 17 months and then reduced the sentence by 3 months for the early guilty plea and 2 months for the mitigating factors.
- [11] The learned Magistrate considered suspension but decided against it due to the fact that the appellant was not a first time offender.
- [12] Appellate courts review sentence on appeal for errors in the exercise of the sentencing discretion. Sentencing discretion is vitiated if the sentencing court applies a wrong principle, ignores relevant considerations and takes into account irrelevant considerations.
- [13] The learned Magistrate sentenced the appellant based on the seriousness of the offence as specified by maximum sentence and the tariff that was established under the repealed Penal Code. There is nothing in the sentencing remarks that indicate that the learned Magistrate directed his mind to the seriousness of the actual acts of the appellant. As the Court of Appeal said in *O'Keefe v State* [2007] FJCA 34; AAU0029.2007 (25 June 2007) at [15]:

When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person who is to be sentenced.

- [14] Theft is a serious offence. But the seriousness of the actual acts of the offender will depend on the value of the property stolen, the nature of the relationship between the offender and the victim and the method of stealing (*State v Saukilagi* [2005] FJHC 13; HAC0021X.2004S (27 January 2005). Factors such as an early guilty, expression of remorse, recovery of stolen property and previous good character may operate as mitigating factors.
- [15] In cases of petty theft of groceries from supermarkets, suspended sentences have been imposed where the offenders were first time offenders, early guilty pleas were entered and the stolen goods were recovered (*State v Yakamoce* [2013] FJMC 59; Criminal Case 36.2013 (4 February 2013), and custodial sentences up to 3 months imprisonment have been imposed where the offenders were repeat offenders (*State v Devi* [2013] FJMC 187; Criminal Case 177.2013 (13 May 2013)).
- [16] In the present case, the appellant walked out of a supermarket with a frozen chicken without paying. He was caught at the scene and the frozen chicken was recovered. The value of the stolen property was relatively small and there was no loss to the supermarket when the property was recovered. The learned magistrate only considered the seriousness of the offence. He did not consider the seriousness of the actual conduct of the appellant. Such an error vitiated the sentencing discretion. The appellant's sentence is manifestly excessive.

Orders of the Court:

1. Appeal against sentence allowed.
2. The sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 3 months' imprisonment effective from 27 November 2017. Suspension is inappropriate because the appellant is a repeat offender.



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Hon. Mr. Justice Daniel Goundar

Solicitors

Appellant in Person

Director of Public Prosecutions for the Respondent