

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

**CRIMINAL APPEAL CASE NO. HAA 15 OF 2019**

**(Magistrates' Court Case No. 388 of 2012)**

**BETWEEN:**           SHAVIN VINIL MAHARAJ

**APPELLANT**

**AND:**                 THE STATE

**RESPONDENT**

**Counsel:**       Ms K Boseiwaqa for the Appellant  
                  Ms A Vavadakua for the Respondent

**Date of Hearing:**   30 October 2019

**Date of Judgment:** 31 October 2019

**JUDGMENT**

[1]     Following a trial in the Magistrates' Court at Labasa, the appellant was convicted of one count of theft and sentenced to 2 years' imprisonment. The sentence was partially suspended, that is, 15 months to serve in prison and 9 months suspended for 2 years. This is an appeal against that sentence.

[2]     The facts of the case were that the appellant was part of a dishonest scheme with his work colleagues to steal from his employer, Westpac Bank. At the relevant time, he was

employed as a teller at Labasa branch. Altogether five employees were involved in the scheme including the branch manager. All five were charged and convicted.

- [3] The scheme was to take the funds from the bank disguised as loans by raising withdrawal slips and offsetting the accounts with vouchers. The scheme which was contrary to the bank's procedures was sanctioned by the branch manager who was the principal offender. The scheme was discovered and the appellant was exposed after an internal inquiry by the bank. When confronted he reimbursed a sum of about \$20,000.00 which he took from the bank. The total sum defrauded by all five accused was about \$180,000.00. All five employees were terminated by the bank.
- [4] The sole ground of appeal is that the learned magistrate made an error by giving the same discount for the mitigating factors to all accused despite the difference in circumstances between the appellant and his co-accused. However, the appellant did not identify the circumstances that made his case different from others. The focus of the submissions was that the learned magistrate did not quantify the discount that she gave for each mitigating factor. The appellant and his three other co-accused received the same discount of 12 months for their mitigating factors. The learned magistrate justified her decision to give the same discount saying the four accused had common mitigating factors. The principal offender received a discount of 6 months only.
- [5] Apart from the payment of restitution, there were hardly any mitigating factors. The appellant's good character carried very little mitigating value due to the fact that he was employed by the bank due to his good character and he breached the trust of his employer by stealing. At the time of sentencing, the appellant was 34 years old and married with two young children. He was driving a taxi for a living. However, his family or personal circumstances were of little mitigating value. Given the presence of little mitigating factors, the discount of 12 months was generous.

[6] This was a case where the appellant together with his colleagues dishonestly misappropriated funds from his employer. The scheme to defraud the bank was systematic and coordinated.

[7] The maximum penalty prescribed for theft is 10 years imprisonment. The tariff is from 4 months to 3 years imprisonment (*Waqa v State* [2015] FJHC 729; HAA017.2015 (5 October 2015)). In cases of theft involving a breach of trust, suspension is only considered if there are special circumstances present. As the Court of Appeal said in *Deo v The State* [2005] FJCA 62; AAU0025.2005S (11 November 2005) at [27]-[29]:

[27] 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.

[28] That applies with particular emphasis in cases involving betrayal of a position of trust where matters of personal mitigation will usually be subordinate to the seriousness of the offence. In most such cases, the offenders share many common aspects of mitigation; most are first offenders, most will, as a result of their fraud, have lost a good job and have little chance of ever being given such responsibility again and almost all will never commit a similar crime in future. Similarly, most are relatively well educated and so will find it easier than many released from prison to find at least reasonably remunerated employment in future.

[29] Therefore we would suggest that, in such cases, personal mitigation should carry less weight than it might in other crimes. The same will generally apply to efforts at rehabilitation. The result is that it must only be in the most exceptional

cases of breach of trust that the court should consider personal mitigating factors are sufficient to outweigh the seriousness of the crime to the extent of allowing a suspended sentence.

[8] The appellant is fortunate that his sentence was partially suspended. The restitution paid by him was not an indication of genuine remorse to constitute special circumstance to suspend the sentence. The appellant contested the charge. He was found guilty. There were no special circumstances to suspend the sentence.

[9] There is no error in the exercise of sentencing discretion that has prejudiced the appellant.

[10] The appeal is dismissed.



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**Hon. Mr Justice Daniel Goundar**



**Solicitors:**

Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the Respondent