IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 28 of 2019

BETWEEN : **SEKOVE VUNIYAYAWA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. A. Bilivalu [LAC] for the Appellant.
: Ms. R. Uce for the Respondent.

Date of Hearing : 23 August, 2018
Date of Ruling : 30 August, 2018

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi for two counts of obtaining property by deception contrary to section 317 of the Crimes Act. For the first count it was alleged that on the 18th day of October, 2016 at Nadi, the appellant by deception dishonestly obtained

building materials valued at $16, 285.50 the property of Lale's Hardware Solution Limited with intention of permanently depriving the owner.

2. For the second count it was alleged that on the 27th day of February, 2017 at Nadi the appellant by deception dishonestly obtained building materials valued at $10,403.50 the property of Lale's Hardware Solution Limited with intention of permanently depriving the owner.

3. On 4th October, 2018 the appellant pleaded not guilty to count one but pleaded guilty to count two. On 18th November, 2018 the appellant after understanding the summary of facts read by the prosecution admitted the same in respect of count two in the presence of his counsel.

4. The learned Magistrate after being satisfied that guilty plea in respect of count two was unequivocal, convicted the appellant.

SUMMARY OF FACTS

5. The brief summary of facts was as follows:

On 27th February, 2017 the appellant bought building materials from Lale's Hardware Solution Limited to the total value of $10,403.50. He then issued his company cheque for the same amount to pay for the building materials. The cheque was later dishonoured by the Bank due to lack of funds in the account.

6. Upon investigation by the police it was revealed that on 20th October, 2016 when the cheque was deposited there was insufficient cash in the Bank Account. On 1st of November, 2016 the Bank Account was closed but the appellant had issued this cheque. On 27th February, 2018 during

his caution interview the appellant admitted buying the materials from the complainant.

7. After hearing mitigation on 1st April, 2019 the appellant was sentenced to 28 months imprisonment for count two out of which 11 months and 22 days (after deducting 8 days remand period) was to be served in custody and the balance of 16 months was suspended for 2 years. A non-parole period of 11 months and 22 days was also imposed pursuant to section 18 of the Sentencing and Penalties Act.

8. The appellant being dissatisfied with the sentence lodged a timely appeal against sentence by virtue of an amended ground of appeal as follows:

GROUND ONE

"That the learned Magistrate erred in law in giving a non-parole period which is in breach of section 4 and 18 of the Sentencing and Penalties Act".

9. The counsel for the appellant submits that the learned Magistrate should not have imposed a non-parole period since the term of imprisonment was less than 12 months and also the non-parole period is the same as the term of imprisonment which is contrary to section 18 (4) and section 4 (1) (d) of the Sentencing and Penalties Act.

10. The State Counsel in her fairness concedes the ground of appeal.

LAW

11. Section 18 of the Sentencing and Penalties Act states:

18. — (1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must

fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented under a law making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6).

12. Section 18 of the Sentencing and Penalties Act is silent regarding the imposition of a non-parole period for a sentence under 12 months imprisonment. In my judgment any sentence of imprisonment under 12 months does not fall under the non-parole period regime of section 18 the rationale is to allow for rehabilitation of the offender as per section 4 (1) (d) of the Sentencing and Penalties Act. As a matter of sentencing principle an offender should not be deprived of or denied the opportunity to rehabilitate or be rehabilitated.

13. The learned Magistrate had also fallen in error when she imposed a non-parole period of 11 months and 22 days when the term of imprisonment was 11 months and 22 days. The non-parole period was the same as the term of imprisonment which was contrary to section 18 (4) of the Sentencing and Penalties Act which states that any non-parole period fixed must be at least 6 months less than the term of the sentence. It should also be noted that a non-parole is only applicable to a term of imprisonment which an offender is required to serve before being eligible for an early release.

14. The primary duty or the foremost responsibility of a sentencing court is to ensure that the sentencing guidelines contained in section 4 of the Sentencing and Penalties Act is adhered to at all times to avoid any injustice to the offender.

15. The Court of Appeal in *Miniuse Rarasea –vs – The State, Criminal Appeal No. AAU 0118 of 2014 (04 October, 2018)* in respect of the imposition of a non-parole period and its effect on rehabilitation made the following pertinent comments at paragraphs 8 and 9:

[8]... in relation to the issue in this appeal, one of the best discussions is contained in Paula Tora –vs – The State; Criminal Appeal No. AAU 0063 of 2011, where one could find the following pronouncement;

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in Section 18 of the Sentencing and Penalties Decree (Act) as to what matters should be considered when fixing the non-parole period, it is my view that the purpose of sentencing set out in Section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the

non-parole period should not be so close to the head sentence as to delay or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent" per Calanchini P. (emphasis added)

[9] The issues that came up for determination in Paula Tora had been striking similar to the issue in the instant appeal. It is indeed a truism that the narrow gap between the head sentence and the non-parole sentence does impede the effective implementation of the administrative mechanisms such as grant of remission and so on, which are meant to be utilized primarily to "facilitate and promote the rehabilitation of offenders" as contemplated in Section 4(1)(d) of the Sentencing and Penalties Act which states that; "the only purposes for which sentencing may be imposed by a Court are...(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated."

16. The non-parole period imposed by the learned Magistrate is wrong in law the appeal is allowed to the extent that the non-parole period is set aside and the sentence of the Magistrate's Court varied to read as:

"For count two the accused is sentenced to 28 months imprisonment out of which the accused is to serve a term of imprisonment of 11 months and 22 days. The balance term of imprisonment is suspended for 2 years from the time the accused is released from the Corrections Center."

ORDERS

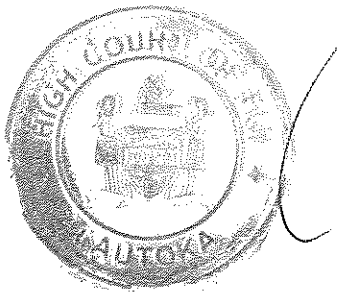
1. The appeal against sentence is partially allowed;

2. The non-parole period of 11 months 22 days is set aside;

3. The sentence of the Magistrate's Court is varied to read as:

"For count two the accused is sentenced to 28 months imprisonment out of which the accused is to serve a term of imprisonment of 11 months and 22 days. The balance term of imprisonment is suspended for 2 years from the time the accused is released from the Corrections Center."

4. 30 days to appeal to Court of Appeal.



Sunil Sharma
Judge

At Lautoka
30 August, 2018

Solicitors

Office of the Legal Aid Commission, Nadi for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.