IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 038 of 2022
CRIMINAL MISC. NO. HAM 171 of 2022

BETWEEN : **BULOU AMALAINI TAGITAGIVALU NANOVO**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. N. Khan for the Appellant.
: Ms. S. Naibe for the Respondent.

Date of Hearing : 07 November, 2022
Date of Judgment : 14 November, 2022

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Ba for one count of theft contrary to section 291 (1) of the Crimes Act. It was alleged as follows:

Particulars of Offence

BULOU AMALAINI TAGITAGIVALU NANOVO on the 16th day of September, 2020 at Koronubu, Ba in the Western Division dishonestly appropriated 1 x bull valued at $1,500.00 and 1 x cow valued at $800.00 all to the sum of

$2,300.00 the property of Satendra Nand, with the intention to permanently deprive the said Satendra Nand of his property.

2. The summary of facts admitted by the appellant was as follows:

On Wednesday 16th September, 2020 between 1100 hrs and 1700 hrs at Koronubu , Ba the accused dishonesty appropriated 1 x white bull valued at $1,500.00 and 1 x brownish black cow valued at $800.00 all to the total sum of $2,300.00 the property of Satendra Nand (PW-1), 56 years, Businessman of Lot 13 Willow Street, Nakasi.

On the above mentioned date, time and place the accused who is the overall caretaker of the property of (A-1) came to Koronubu, Ba with others and informed one Makereta Voi Nakesevi (PW-2), 53 years, caretaker of Koronubu, Ba who resides at the property that she is coming to slaughter two cattle to be taken to Lautoka to be used in the funeral of her grandmother. (PW-2) who is related to the accused acted on the instructions of the accused. The accused with other Itaukei men brought the cow out of the fence and took it close to where the bull was tied to slaughter it there. The accused with the other Itaukei men slaughtered only the bull and loaded it onto a white twin cab and went back to Lautoka. The accused told (PW-2) to look after the cow which was left behind.

Later in the afternoon at about 1700 hrs (PW-2) informed the accused that the cow which they were supposed to slaughter earlier that day was weak. The accused requested one Josaia Waqabaca (PW-3), 33 years, cane cutter of Benai, Ba to go to the farm and slaughter the reddish brown cow. PW-3 who is also a relative of the accused went to the farm and slaughtered the cow.

PW-1 who is residing in Suva received information that his cattle were slaughtered and that one is currently being slaughtered by (PW-3) and his gang members. PW-1 reported the matter to police who managed to seize the slaughtered cow and brought (PW-3) and the rest of the gang members to the police station for questioning. PW-3 informed police that he received instruction

from the accused to slaughter that cow. He only knows that the accused is the owner of the property and that is why he obeyed her instructions.

<u>*Appendix "A"*</u>

PW-1 came and checked his farm and confirmed that 1 x white bull and 1 x brownish black cow was missing from the farm. PW-1 was informed by PW-2 that one bull was slaughtered and taken to Lautoka and another cow was seized by police which was already slaughtered. (PW-1) was shown the slaughtered cow which was recovered by police and positively identified as his.

The accused never informed (PW-1) that she is going to slaughter the bull and the cow for her grandmother's funeral in Lautoka. PW-1 was not informed before and after the cattle was slaughtered by the accused. PW-1 only came to know that his cattle were slaughtered by accused when he received information from the neighbours. PW-1 did not give his consent or was informed by the accused that she was going to slaughter his cattle.

Since 2018 (PW-1) and the accused made dealings as accused was interested to buy the property from (PW-1) however, the accused never signed the sale and purchase agreement which was drafted by (PW-1)'s lawyer and had not made the $10,000 deposit which was part of the agreement. PW-1 had agreed for the accused to look after the farm only.

The accused was brought under arrest and interviewed under caution. She admitted slaughtering the bull and taking it to Lautoka to be consumed in her grandmother's funeral and also admitted that she gave instructions to (PW-3) to slaughter the cow. The accused was charged for 1 count of theft contrary to section 291 (1) of Crimes Act no. 44 of 2009.

3. The matter was first called on 21st September, 2020 in the Magistrate's Court and after numerous adjournments on 17th January, 2022 the appellant in the presence of her counsel pleaded not guilty to the charge. The matter was fixed for trial on 20th September. On the date of the hearing the appellant in the

presence of her counsel changed her plea to guilty. Thereafter the appellant admitted the summary of facts read.

4. The learned Magistrate upon being satisfied that the appellant had voluntarily entered an unequivocal plea and the summary of facts read satisfied all the elements of the offence charged, found the appellant guilty and convicted her accordingly.

5. After hearing mitigation on 11th October, 2022 the appellant was sentenced to 7 months imprisonment.

6. The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely petition of appeal in this court. The appellant also filed a notice of motion with her affidavit in support sworn on 19th October, 2022 and the affidavit of Satendra Nand sworn on 17th October, 2022 seeking the following orders:

   1. *That the applicant to be released on bail while awaiting the determination of this appeal.*
   2. *That the service of this application be abridged.*

7. The appellant's counsel filed skeletal written submissions and the state counsel filed complete submissions. Furthermore, both counsel made oral submissions during the hearing for which this court is grateful.

8. Considering the short imprisonment term imposed on the appellant this appeal has been given a priority hearing.

APPEAL AGAINST SENTENCE

9. The appellant relies on the following grounds of appeal:

1. *That the Learned Magistrate erred in law and in fact in not giving adequate weight to the complainant informing the honourable court that he and the appellant had reconciled and he was willing to accept full restitution for his cattle in due course.*

2. *That the Learned Magistrate erred in law and in fact a misapplying the principles of Sentencing and Penalties Act in sentencing the Appellant to 7 months imprisonment.*

3. *That the Learned Magistrate erred in law and in fact in misapplying the case authorities quoted in her judgment to the facts of the Appellant's case.*

4. *That the Learned Magistrate erred in law and in fact in adding 7 months imprisonment for aggravating factors to the sentence, in finding that the Appellant deprived the owner/complainant of the bull and cattle for his active usage without any evidence before her to support such a claim and in light of evidence to the contrary that the appellant was in charge of the farm and responsible for the income and out goings of the same.*

5. *That the Learned Magistrate erred in law and in fact in failing to properly apply Section 26 (2) (b) of the Sentencing and Penalties Act 2009 and in particular disregarding the Appellant's mitigation for restitution when the Complainant at the material time was willing to accept the same.*

6. *That the Learned Trial Magistrate erred in not considering and/or failing to adequately consider the mitigation factors of the appellant.*

LAW

10. 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."*

SUBSTANTIVE APPEAL

GROUND ONE

The Learned Magistrate erred in law and in fact in not giving adequate weight to the Complainant informing the Honourable Court that he and the Appellant had reconciled and he was willing to accept full restitution for his cattle in due course.

11. The appellant's counsel argued that the complainant had appeared in court and expressed that he had reconciled with the appellant and was willing to receive full restitution for his loss. The court ought to have accepted the same and imposed a non-custodial sentence.

12. It is accepted that the complainant appeared and informed the court about reconciliation and the proposed restitution offered by the appellant. However, the offence committed was not reconcilable as per section 154 of the Criminal Procedure Act hence the learned Magistrate correctly did not consider

reconciliation. In respect of restitution the allegation dates to 16th September, 2020 and the appellant was only able to provide complete restitution on 17th October, 2022. In other words there was no restitution made by the appellant in the Magistrate's Court at the time of mitigation and sentencing.

13. It took the appellant a little over two years to effect restitution and more so, after she was sentenced to an imprisonment term. The reason of the covid-19 pandemic and reduced wages cannot be relied upon to justify this late payment. Taking into consideration the substantial delay by the appellant it is obvious to me that she was not genuinely interested in making any restitution. At the very least she could have made installment payments but she did not.

14. In this case the evidence of restitution was attached to the miscellaneous application seeking bail pending appeal and no leave was obtained by the appellant to adduce fresh evidence. I have, however, taken note of the receipt of payment attached to the affidavit of Satendra Nand in the sum of $2,300.00. It should be noted that restitution cannot be used as an out of jail card the court has to weigh the timing of the restitution and whether it was made out of genuine regret for a wrong done to the complainant.

15. In *Manoj Khera vs. The State [2016] FJSC 2; CAV0003 of 2016 (1 April 2016)* the Supreme Court in respect of the effect of restitution on sentence at paragraph 7 stated:

"...Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences..."

16. Furthermore, in *State vs. Jocelyn Deo, Criminal Appeal no. HAA 0008 of 2005,* Shameem J. also made a valuable comment about restitution:

"...The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology.

17. Section 4 (2) (h) of the Sentencing and Penalties Act states:

"*(2) In sentencing offenders a court must have regard to -*

> *(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree."*

18. In *Hussein vs. State [2012] FJHC 220, HAA 87 of 2016 [20 March, 2017]* at paragraph 20 I made the following observations:

"The wordings of section 4 (2) (h) of the Sentencing and Penalties Act demands action from an offender if restitution is to be meaningful, mere words are not sufficient."

19. In this case the appellant did not make any attempt towards restitution when she had ample opportunity to do so. The lapse of time from the date of the allegation and the actual payment after the sentence is substantial. In her mitigation the appellant only expressed her willingness to pay restitution.

20. Unfortunately nothing in respect of restitution was carried out or performed. Mere words are not sufficient there should have been a genuine effort made by the appellant. The learned Magistrate was correct in not giving any weight to the offer of restitution made. At paragraph 21 of the sentence the learned Magistrate had taken note of the restitution offered and made the following observations:

The court cannot also accept your mitigation to restitute, this offence occurred in September, 2020 and you were caution interviewed soon after on 18/9/20 and first produced in Court on 21/9/20 – as such the time for a genuine restitution is long past. Your requests to restitute now is not genuine and is an attempt to

evade a custodial sentence as such I disregard your mitigation for restitution at this stage.

GROUNDS TWO AND THREE

The Learned Magistrate erred in law and in fact in misapplying the principles of Sentencing and Penalties Act in sentencing the appellant to 7 months imprisonment and also misapplied the case authorities quoted in her judgment to the facts of the Appellant's case.

21. The appellant's counsel submitted that the principles of the Sentencing and Penalties Act was not applied in sentencing the appellant to 7 months imprisonment and that the facts in *State vs. Ratusuka [2013] FJHC 93; HAA 001 of 2013* is very different to the current case. It is not clear to me what principles of the Sentencing and Penalties Act has not been applied by the learned Magistrate when it is obvious to me that the learned Magistrate had taken *Ratusuka's* case as a guide and adopted the principle that came out from that case.

22. At paragraph 17 of the sentence the learned Magistrate followed the two tier sentencing practice as follows:

Taking into consideration the objective seriousness of the offence of Theft of Livestock because of its maximum sentence and its prevalence in farming communities, the court takes a starting point of 5 months imprisonment and I add 7 months imprisonment for the aggravating factors so the interim sentence is at 12 months imprisonment. I deduct 2 months for your mitigation so the interim sentence is 10 months imprisonment. I further deduct 3 months for your early guilty plea therefore your sentence stands at 7 months imprisonment.

23. In Fiji a sentencing court is guided by the Sentencing and Penalties Act and the two tier sentencing approach. The first step is the selection of the starting point. As it was pronounced in *Laisiasa Koroivuki vs. State, criminal appeal*

AAU 0018 of 2010 the starting point should be determined considering the objective seriousness of the offence committed.

24. The second step requires the sentencer to make an adjustment to the starting point considering the aggravating and the mitigating factors. If there is a guilty plea, an appropriate reduction is given after that adjustment.

25. The sentence arrived at after this second step is the actual sentence or the term of imprisonment, which is commonly called the head sentence. However, if the offender had spent time in remand in relation to the offence, then that time spent in custody will be regarded as time already served and accordingly, that time will be deducted to reflect the remaining time that need to be served by the offender.

26. A perusal of the sentence shows that the learned Magistrate had adhered to the two tier sentencing approach and therefore no fault can be attributed to the methodology or the sentencing principles applied. The learned Magistrate had also correctly relied on the case of *Ratusuka's* case (supra). The summary of facts shows a gross breach of trust by the appellant. The fact that the appellant was a potential buyer of the livestock and the farm does not exculpate her from the offending. The appellant had not signed the sale and purchase agreement or paid any consideration by way of a deposit to the owner of the property hence she knew or ought to have known that she was not entitled to do what she did.

27. I also reiterate the observations made by Goundar J. in *Ratusuka's* case which was adopted by the learned Magistrate at paragraph 11 of her sentence as follows:

Farm theft is considered a serious offence because of the value that the commodities bring to the farmer and the community. For this reason, theft of cattle, goats, livestock and root crops from farming community is usually punished by custodial sentences to deter the offenders and others from engaging

in this type of conduct in the future (Sateo Tuta v State [2002] HAA 5/02B, Abdul Afiz v State [1990] HAA 0011 & 12/89S, Jone Naca v State HAA016/-02S, Penisoni Waqa v State [2004] HAA 101/04L).

28. The learned Magistrate had correctly taken into account deterrence factor after considering the circumstances and the manner of the offending. At paragraph 20 of the sentence the learned Magistrate made the following observations:

The court denounces the accused offending on the complainant. I find your mitigation and explanation that you proceeded to slaughter the livestock on account of their sick state without first informing the complainant unacceptable. Your answers in your caution interview also reflect that your reasons for this offending is unsubstantiated for reasons that you only called the Agriculture Officer after you had slaughtered the livestock and there was no test sample also taken for testing of the illness suffered by the livestock, rather you only queried with the Agriculture Officer on the go-ahead to consume the livestock. You also at no time informed the complainant about any possibility of slaughtering the livestock following the seriousness of any sickness suffered, you however only informed the complainant that the bull is sick. These are your answers at Q&A 57-62.

GROUNDS FOUR AND SIX

That the Learned Magistrate erred in law and in fact in adding 7 months imprisonment for aggravating factors to the sentence, in finding that the appellant deprived the owner/complainant of the bull and cattle for his active usage without any evidence before her to support such a claim and in light of evidence to the contrary that the Appellant was in charge of the farm and responsible for the income and out goings of the same.

That the Learned Trial Magistrate erred in not considering and/or failing

to adequately consider the mitigation factors of the appellant.

29. The appellant's counsel submitted that 7 months for the aggravating factors was excessive considering the fact that there was no evidence to support the aggravating factors. In respect of the mitigating factors counsel argued that the learned Magistrate did not adequately consider the mitigating factors of the appellant as well.

30. The aggravating factors noted by the learned Magistrate did not appear in a vacuum it was construed from the summary of facts admitted by the appellant. The aggravating factors identified by the learned Magistrate are pertinent and applicable to the offence committed and the offender. The increase of 7 months imprisonment was within the discretion of the learned Magistrate which was exercised judicially and I do not see any error in this regard.

31. Counsel for the appellant also submitted that the learned Magistrate did not thoroughly consider all the mitigating factors as put before the court in mitigation.

32. At paragraph 13 of the sentence the learned Magistrate stated the following:

"The mitigating factors are:

- *Accused is a first offender.*
- *Confessed to the police.*
- *Nil recovery (both livestock was slaughtered but only was recovered in slaughtered state).*

33. The submission of counsel is misconceived considering the fact that the learned Magistrate had taken into account all the relevant mitigating factors under broad headings. Although nil recovery in my view was not a mitigating factor in view of the intangible state of the second slaughtered cattle nevertheless the appellant was allowed a reduction which is favourable to her.

34. The learned Magistrate did consider the mitigation offered and on that basis had allowed two months deduction which is reasonable. It is not expected that a sentencer will state all the mitigating factors in the sentence. However, it is acceptable that broad category of factors be used during sentence. At paragraph 13 of the sentence the learned Magistrate took into consideration pertinent mitigation in accordance with her discretion.

35. It is not for an Appellate Court to revisit mitigation which was all before the Magistrate's Court at the time of sentencing unless manifest injustice will be caused to the appellant (see *Josaia Leone & Sakiusa Naulumatua vs. State [2011] HAA 11 of 2011 (8 July, 2011)*.

36. The learned Magistrate had complied with the purposes of the sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2) (j).

37. It is not incumbent upon a court to list and consider every point made by counsel. The court will of course consider and adopt all points that are relevant.

38. Furthermore, there is no requirement of the law that where there are several mitigating factors each one of them should be dealt with separately. The Supreme Court in *Solomone Qurai vs. The State, Criminal Petition No. CAV 24 of 2014 (20th August, 2015)* stated this very clearly at paragraph 53 in the following words:-

"Although section 4 (2) (j) of the Sentencing and Penalties [Act] requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately..."

GROUND FIVE

That the Learned Magistrate erred in law and in fact in failing to properly apply Section 26 (2) (b) of the Sentencing and Penalties Act 2009 and in particular disregarding the Appellant's mitigation for restitution when the Complainant at the material time was willing to accept the same.

39. The appellant's counsel argued that the learned Magistrate did not properly apply section 26 (2) (b) of the Sentencing and Penalties Act in particular not taking into account restitution.

40. At paragraphs 18, 19 and 24 of the sentence the learned Magistrate had directed her mind to whether a non-custodial term was warranted or not.

Paragraph 18

I'm mindful of section 26(2), (b) of the Sentencing and Penalties Act 2009 that I have discretion to suspend the final sentence when it is below 2 years imprisonment.

Paragraph 19

The court looks at the sentencing remarks of Goundar J in Balagan v State [2012] HAA 31/11S, 24 April 2012 at [20] in considering to suspend a sentence:

"Whether an offenders sentence should be suspended will depend on a number of factors. These factors no doubt overlap with some of the factors that mitigate the offence … the final test for an appropriate sentence is – whether punishment fits the crime committed by the offender?"

Paragraph 24

In State v Tilalevu [2010] FJHC 258; HAC 081.2010 (20 July 2010) Justice Nawana stated:

"… the imposition of suspended terms on first offenders would infect the society with a situation – which I propose to invent as 'First Offender Syndrome' – where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offender as a rule."

41. The learned Magistrate had correctly directed her mind towards a suspended sentence, however, upon considering the offence, the circumstances in which it was committed and the culpability of the appellant she came to the conclusion that an immediate custodial sentence was warranted. The discretion not to suspend the sentence has been correctly exercised.

NON-CONVICTION ORDER

42. Although not raised as a specific ground of appeal the appellant's counsel argued that this was a case where a conviction ought not to have been entered. At paragraph 22 of the sentence the learned Magistrate had directed her mind to this aspect of the mitigation as follows:

The accused seeks a conviction not to be recorded and, in his mitigation, submission refers the court to section 15 (1) (e) of the Sentencing and Penalties Act. The offence of which the accused is sentenced is not one that warrants a sentencing option covered under Section 15 (1) (e), as stated in Ratusuka [supra] such an offence warrants an immediate custodial sentence. Also, in the case of

State v Batiratu [2012] FJHC HAR 001.2012 the High Court has well answered the factors that any court is to consider before deciding the allowing of an application for a conviction not to be recorded. In light of Batiratu [supra] and Ratusuka [supra] I find that there is no merits in the accused's application for a conviction not to be recorded, the offending is not trivial in nature nor is the accused morally blameless and this offending and its circumstances is far from being rare to warrant the allowance of such an application. This court therefore declines to allow the application for a conviction not to be recorded against the accused.

43. It is noted that the learned Magistrate had directed her mind to the case of *State v David Batiratu (supra)* in this regard. At paragraph 29 of *Batiratu's case* (supra), his Lordship Gates C.J (as he was) mentioned the following questions that must be answered if a discharge without conviction is urged upon the sentencing court whether:

"(a) The offender is morally blameless.

(b) Whether only a technical breach in the law has occurred.

(c) Whether the offence is of a trivial or minor nature.

(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.

(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.

(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."

44. Furthermore, the Sentencing and Penalties Act provides for situations and circumstances where a court can consider a discharge without entering a conviction. Part IX begins with the heading "Dismissals, Discharges and

Adjournments", section 43 of the Sentencing and Penalties Act states the purpose for which the above orders can be made:

"43. (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."*

45. Section 45 specifically governs discharges or releases without conviction as follows:

> *(1) A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.*
>
> *(2) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2), and any further conditions imposed by the court.*
>
> *(3) An undertaking under sub-section (2) shall have conditions that —*

(a) that the offender shall appear before the court if called onto do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;

(b) that the offender is of good behaviour during the period of the adjournment; and

(c) that the offender observes any special conditions imposed by the court.

(4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.

(5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court —

(a) by order of the court;

(b) by notice issued by a court officer on the authority of the court.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding."

46. The Fijian Courts have over the years developed the jurisprudence relating to discharge without conviction. In *State v Patrick Nayacalagilagi and others (2009) FJHC 73; HAC165 of 2007 (17th March 2009)* Goundar J. looked at the principles governing discharge without a conviction under the repealed section 44 of the Criminal Procedure Code.

47. His lordship succinctly outlined the situations where the courts have exercised its discretion in regards to granting a discharge without conviction. His lordship at paragraph 3 mentioned the following:

"Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law (State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97, Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."

48. In the appeal of *The State v Mosese Jeke Cr. App HAA 010.2010 (2nd July 2010)* Goundar J. substituted a term of 6 months imprisonment suspended for 12 months. The Magistrate's Court had ordered an absolute discharge. The injuries to the complainant were minor scratches and tenderness as a result of two blows from the blunt side of a cane knife. There were other mitigating factors, however, the imposition of a term of imprisonment was necessary to demonstrate the seriousness with which the court viewed the offence of act with intent to cause grievous bodily harm together with the circumstances of aggravation, particularly the use of cane knife.

49. Goundar J. correctly took into account the seriousness of the offending and at paragraph 11 mentioned about the use of cane knife as:

"…The court would not condone the use of a cane knife in a family conflict. The circumstances of the case warranted imposition of a sentence on the respondent despite his previous good character."

50. The underlying principle emanating from *Batiratu's* case is that public interest plays a dominant role when a sentencer considers whether a discharge without conviction was warranted in a given situation which was mentioned at paragraph 27 in *Batiratu's* case (supra) as follows:

"It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues…"

51. The cases mentioned above takes into account general and specific deterrence which public interest demands in imposing a penalty and not a discharge without conviction. In such cases a fine or term of imprisonment will override mitigating factors such as previous good character or other personal mitigating factors.

52. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J. (as he was at the time) in the matter of an appeal from the Magistrate's Court against an order of absolute discharge for the offence of common assault said:

"…The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this accused was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. 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)".

53. It is noted from the mitigation filed in the Magistrate's Court that the appellant was asking for a non-conviction order in accordance with section 16 of the Sentencing and Penalties Act.

54. Section 16(1) of the Sentencing and Penalties Act states that a sentencing court shall have regard to all the circumstances of the case when exercising the discretion whether or not to record a conviction, but nevertheless, the circumstances so considered should include the three factors listed in that section which is as follows:

(1) In exercising its discretion whether or not to record a conviction, a court shall 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; and

(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

55. In her mitigation the appellant was seeking specific orders under section 15 (1) (f) or (j) of the Sentencing and Penalties Act. Section 15 of the Sentencing and Penalties Act states:

(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this [Act]:

(a) record a conviction and order that the offender serve a term of imprisonment;

(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;

(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;

(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 *or for a probation order under the* Probation of Offenders Act *[Cap. 22];*

(f) with or without recording a conviction, order the offender to pay a fine;

(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(h) record a conviction and order the discharge of the offender;

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(j) without recording a conviction, order the dismissal of the charge; or

(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

(2) All courts may impose the sentences stated in sub-section (1) notwithstanding that a law may state that a penalty is to be imposed upon the conviction of an offender.

(3) As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part.

(4) Notwithstanding the provisions of the Community Work Act 1994 *and the Probation of Offenders Act[Cap. 22] a court may impose a sentence under sub-section (1)(e) upon finding an offender to be guilty of an offence but without recording a conviction.*

(5) When sentencing or dealing with offenders who, by reason of their mental state have been found to be unfit to plead or have established a defence under law related to their mental impairment, the provisions of this Decree may only be applied subject to any aw which makes specific provision for dealing with such offenders.

56. In accordance with subsections (1) (e), (f), (i) and (j) above the sentencing court is given the discretion not to record a conviction. It is also to be noted that (i) and (j) gives a further discretion which is to order the conditional release of the offender upon adjournment of the hearing and order the dismissal of the charge. The purpose of the above orders is mentioned in section 43 of the Sentencing and Penalties Act.

57. Moreover, section 174 of the Criminal Procedure Act 2009 states that:

(1) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this [Act]...

58. In my considered judgment the case of *Batiratu* (supra) was in respect of discharge without conviction and not with respect to non-conviction order as mentioned in section 16 of the Sentencing and Penalties Act. This case was judicially reviewed by the High Court on the motion of the then Chief Justice Gates after the Magistrate's Court made an order under section 15(1) (i) of the Sentencing and Penalties Act.

59. In this case, the appellant by her mitigation was specifically asking for an order of non-conviction under section 16 of the Sentencing and Penalties Act which is different to a discharge without conviction order. An application for a discharge without conviction falls under section 45 of the Sentencing and Penalties Act. This was not what the appellant was asking for because section 174(2) of the Criminal Procedure Act makes it mandatory for a Magistrate to convict an accused upon a guilty plea or finding of guilt.

60. The Magistrate's Court upon finding an accused guilty must convict before proceeding to sentence under the Sentencing and Penalties Act. The effect of sections 15(1)(e), (f), (i) or (j) of the Sentencing and Penalties Act is to give a discretion to the sentencer not to record a conviction or dismiss a charge as a sentencing option based on the mitigating factors and the nature of the offence committed.

61. An order not to record a conviction as per section 15(1) (e), (f), (i) or (j) read with section 16(1) of the Sentencing and Penalties Act forms part of the sentence. Accordingly, if a sentencer uses the discretion not to record a conviction in terms of the above sub sections then the conviction entered under section 174(2) of the Criminal Procedure Act is to be regarded as a conviction not recorded.

62. In this case the appellant had specifically made an application under section 16 of the Sentencing and Penalties Act and had made submissions in respect of the factors required under this section. At paragraph 22 of the sentence the learned Magistrate did not direct her mind to section 16.

63. In the interest of justice this court on its own volition takes into consideration all the circumstances of the case including the nature of the offence committed, the character and past history of the appellant and the impact of the conviction on the appellant's economic or social well-being, and her employment

prospects when addressing whether a non-conviction order was justified in this case. I have gone ahead to address each factor as follows:

a) Nature of the offence

From the summary of facts admitted the offence committed was serious due to gross breach of trust. The appellant was the overall caretaker of the property including all its assets and livestock. The owner had trusted her that is why he had permitted her to occupy his property without paying any consideration and even before signing the sale and purchase agreement. The appellant and the complainant were in discussions since 2018 about the property but nothing fruitful had taken place in respect of ownership transfer to the appellant. The appellant had no right to slaughter the animals without the permission of the owner. The offending was farm related and livestock play an important role in a farmer's life.

b). Character and past history of the offender

There is no dispute that the appellant was a first offender.

c). Impact on economic and social well being and employment prospects

It is a well-known fact that a conviction will have an impact on a person's future opportunities and employment, however, in this case there was nothing before the court in mitigation to show how the appellant would be affected in her employment and future opportunities as a result of the conviction. The appellant in her mitigation did not provide any details and/or evidence to support this contention. The mitigation only states as follows:

> *"The court in entering a conviction will affect the accused [person] by entering a conviction, this would have an impact on her future opportunities, employment and support for his family."*

64. It is without doubt an accepted notion of life that an offender has to face the consequences of his/her actions based on the decisions he/she takes in life. The appellant was a mature person with worldly experience to understand what she was doing or differentiate between right and wrong and the need to refrain from engaging in a conduct that would affect her future. In this regard, I would like to restate the comments made by Perera J. in *Benericco Marika Naiveli v State [2020] FJHC 420; HAA11.2020 (12 June 2020)* at paragraph 38:

"Invariably, a conviction would have an impact on every offender. An order that the conviction should not be recorded would be justified if the welfare or the best interest of the accused in terms of the impact of a conviction on that accused's economic or social well-being, and on his or her employment prospects, would still standout when weighed against all the other circumstances of the case especially the nature of the offence, circumstances of the offending, the culpability of the accused, the character and the past history of the accused and also the public interest."

65. Considering all the circumstances of the case and the factors mentioned in section 16 of the Sentencing and Penalties Act I am unable to exercise my discretion in favour of the appellant. There is no exceptional reason to grant a non-conviction order.

HIGH STARTING POINT

66. The appellant's counsel also argued that the learned Magistrate had taken a high starting point of 5 months imprisonment which has resulted in an excessive sentence.

67. I do not agree that the starting point selected by the learned Magistrate was at the higher side of the scale after taking into account the objective seriousness of the offence committed.

68. The maximum sentence for theft is ten years imprisonment. In *State vs. Pauliasi Vadunalaba, criminal case no. HAC 134 of 2008* it was held that the tariff for theft arising from breach of trust offences was from 18 months to 3 years imprisonment. In this case the starting point of 5 months selected by the learned Magistrate is below the accepted tariff.

69. This was a case of gross breach of trust there is no error made by the learned Magistrate in selecting 5 months as the starting point.

70. The final sentence of 7 months imprisonment is in my view a lenient sentence considering the circumstances of the offending and the culpability of the appellant. The appellant is also lucky to get one third discount for guilty plea which in my view was not out of a genuine show of remorse and/or at the earliest opportunity as well.

GUILTY PLEA

71. The accused pleaded guilty about 2 years after the matter was first called in the Magistrate's Court. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

[14]. In ***Rainima -v- The State*** *[2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:*

> *"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance."*

*In **Mataunitoga –v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:*

"In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment."

*[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.*

72. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence *(see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*.

73. This court does not believe that the accused had shown genuine remorse when she pleaded guilty on 20 September, 2022. The date of allegation is 16th September, 2020 and the accused did not plead guilty until 20th September, 2022.

74. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. In this regard, the

sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt the timing of the guilty plea is late and that the prosecution had a strong case against the accused yet the learned Magistrate gave one third reduction is very much in favour of the appellant which I can revisit but do not wish to do so due to the appellant's good character.

75. Counsel also submitted that considering the high likelihood of success in respect of the grounds of appeal argued this court should allow bail to the appellant pending appeal.

76. Before I leave, I adopt the observations expressed by his lordship Prematilaka JA sitting as a single judge of the Court of Appeal in *Alfred Ajay Palani vs. State, AAU 111 of 2020 (16 December, 2021)* in respect of the importance of the final sentence rather than the reasoning process leading to the final sentence at paragraph 37 which is applicable to the current appeal in the following words:

However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015). However, not every sentence within the range would be necessarily an appropriate sentence that fits the crime.

77. Finally, upon perusal of the final sentence I would like to state that the appellant in this case is very lucky to have received a lenient below the tariff sentence. All the grounds of appeal against sentence are dismissed due to lack of merits.

ORDERS

1. The application for bail pending appeal is refused;
2. The appeal against sentence is dismissed;
3. The sentence of the Magistrate's Court is affirmed.
4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
14 November, 2022

Solicitors

Messrs Natasha Khan & Associates for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.