

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 23 OF 2023

LAUTOKA MAGISTRATES COURT CASE NO. 164 OF 2023

BETWEEN

REVONI YALAYALA

Appellant

AND

STATE

Respondent

Counsel:

Appellant in Person

Mr Muhammed Rafiq for Respondent

Date of Hearing:

24 July 2023

Date of Judgment :

14 August 2023

JUDGMENT

1. The Appellant was charged at the Lautoka Magistrates Court with one count of Escaping from Lawful Custody contrary to section 196 of the Crimes Act 2009.

2. The Appellant voluntarily pleaded guilty to the charge and was convicted by the learned Resident Magistrate (RM). He was sentenced on 14 April 2023 to an imprisonment term of six and half months to be served in custody.
3. Being aggrieved by the sentence, the Appellant filed this timely appeal in person against sentence only.

The Ground of Appeal

4. The Appellant's sole ground of appeal against the sentence is that the Learned RM had failed to suspend his sentence pursuant to section 26 (1) of the Sentencing and Penalties Act.

The Law on Suspended Sentences

5. S.26 of the Sentencing and Penalties Act provides as follows:
 - (1). On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence if it is satisfied that it is appropriate to do so in the circumstances.
 - (2). A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -
 1. does not exceed 3 years in the case of the High Court; or
 2. does not exceed 2 years in the case of the Magistrates' Court.

6. The sentence of imprisonment imposed by the Learned RM was six and a half months. Therefore, the Learned RM had the discretion to suspend the sentence wholly or partially if he was satisfied that it was appropriate to do so in the circumstances of the case.
7. The contention of the Appellant is that the circumstances of his case warranted a suspended sentence in that he was a first offender, he pleaded guilty at the first available opportunity, and that he was the sole breadwinner of four children (kids).
8. Undoubtedly, the discretion given to the sentencer under s 26 should be exercised judiciously. The Learned RM was mindful of the fact that a suspension of sentence is not automatic. From paragraphs 15 to 17 of the Sentence Ruling, the Learned RM carefully considered if there were any "special circumstances" present that may warrant a suspended sentence.
9. The Learned RM has taken into consideration all but one of the grounds advanced by the Appellant, namely that the Appellant was the sole breadwinner of the family of four kids.
10. The Learned RM had acknowledged that the Appellant was a first offender. However, he considered the observations made by Nawana J in State v. Nadolo [2012] FJHC 144; HAC143/10 (23 November 2012), having quoted from his Lordship's own Ruling in State v Tilalevu [2010] FJHC 258 HAC 81 of 2010; (20.07.2010), that being a first offender does not absolve one from getting a custodial sentence, and rather it is important to assess all the circumstances including societal interests in deciding whether to suspend the sentence or not. Quoted from the said judgment were the following paragraphs:

[18] 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 offenders as a rule.'

[13] It is of paramount importance for any sentence to reflect court's bounded duty of protecting the community and its unhesitant approach of denouncing the commission of offences within the prescribed parameters of the law. This can be manifested only by deterring the offenders and others who attempt to commit a crime"

11. The Learned RM considered the risk of creating a phenomenon which he described as the "First Offender Syndrome" which Nawana J first expounded in Tilalevu.
12. However, it appears that Nawana J was contemplating 'serious offences' when he made the above observation. That suggests that where the offending involves a serious offence, the sentencer should be hesitant to consider suspending a sentence. If a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation [See also *Muskaan Balagan v State* [2012] ACC 31/115 (24 April 2012) p[20].
13. The Crimes Act does not define what a serious offence is. Undoubtedly, all indictable offences fall into that category. In that sense, one would argue that a person convicted of Escaping from Lawful Custody, which is a summary offence carrying a maximum sentence of two years, is qualified to receive a suspended sentence.
14. However, the Learned RM took cognizance of the facts of the case and observed in paragraph [16] that '*You have been sentenced on a serious offence which attracts an immediate custodial term as it is a direct challenge to the authority of the law itself*'. The Appellant had admitted that he ran away using the Magistrate's door when he was asked to be seated on the bench reserved for the accused after his bail application was refused. In paragraph [10], the Learned RM observed- '*You have committed this offence inside the courthouse when the*

court sitting was in progress'. Considering the circumstances of this case, the Learned RM was justified in concluding that the offence was serious.

15. In *State v Roberts* [2004] FJHC 51; HAA0053J.2003S (30 January 2004), Shameem J articulated the circumstances under which a suspended sentence is warranted. Her Ladyship observed:

The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation.

However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender and the attitude of the victim" (emphasis added).

16. Neither under the common law nor under the Sentencing and Penalties Act, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended or not will depend on several factors. The case law in Fiji suggests that when a first offender pleads guilty at the first available opportunity, thus indicating genuine remorse, to a charge that does involve neither a serious offence nor breach of trust situation, he or she is a suitable candidate to receive a suspended sentence. At the end of the day, the judicial discretion would be governed by Section 4(1) of the Sentencing and Penalties Act, which prescribes the purposes for which a sentence is imposed by a court.
17. In the present case, the Appellant is a first offender. He pleaded guilty at the first available opportunity. The offence he was convicted of is not considered serious in terms of the Crimes Act. The remaining consideration would be whether the Appellant was genuinely remorseful.
18. Section 4(2)(g) of the Sentencing and Penalties Act provides that, in sentencing offenders, a court must regard the conduct of the offender during the trial as an indication of remorse or the lack of remorse. Early guilty pleas,

confessions, cooperation with police to conduct the investigation and restitution to the victim may be considered evidence of such remorse. The remorse must be demonstrated to be genuine both to the complainant and to the court. Prasad [2003] FJHC 320; HAC0009T.2002S (30 October 2003).

19. The Appellant pleaded guilty at the first available opportunity. Does this conduct of the Appellant demonstrate a genuine expression of remorse in the circumstances of this case? He escaped from lawful custody on 20 February 2023 and did not surrender himself thereafter. He admitted being arrested on a bench warrant on 1 March 2023 after a continuous search by police at Lovu. He must have pleaded guilty as he had no other option, having committed an offence in the well of the court which seemed almost unassailable. In those circumstances, the Learned RM was not entitled to believe that the Appellant's guilty plea was genuinely remorseful.
20. Since the Learned RM had provided reasons for his decision not to suspend the sentence, it can be argued that the decision was lawful as much as it was rational. However, neither in the process of giving allowances for mitigation nor in vetting the suitability of whether to suspend the sentence did the Learned RM consider the Appellant's personal and family circumstances. While accepting that the personal circumstances of the offender have very little mitigatory value (Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)), as he should have been conscious of the consequences of the offence before it was committed, the Bill of Rights Chapter of the Constitution places a heavy responsibility on the courts in its decision-making process if the rights of a child are going to be affected by judicial action.
21. In his mitigation submission in the court below and the submission to this Court, the Appellant pleaded for a suspended sentence in view inter alia that he is the sole breadwinner of the family of four kids.
22. Our Constitution provides that the best interests of a child are the primary consideration in every matter concerning the child [Section 41(2)]. Every child

has the right to family care, protection and guidance, which includes the equal responsibility of the child's parents to provide for the child [41(1)(c)]. The Bill of Rights Chapter of the Constitution binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office [Section 6 (1)]. The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in the Bill of Rights Chapter [Section 6(2)] which include the rights of a child. Although the Sentencing and Penalties Act does not require the courts in the sentencing process to have regard to the personal and family circumstances of the offender, in view of the said provisions of the Constitution, the court cannot turn a blind eye to the rights of the children of the offender that may be affected by its decision.

23. The Appellant has already served exactly four months in the correction facility. In the circumstances of this case, that would sufficiently fulfil the purposes of deterrence, punishment and denunciation. To achieve the purpose of rehabilitation and in the best interests of the children, I am inclined to suspend the remaining portion of two and half (2 ½) months of the sentence as provided for under Section 26(1) of the Sentencing and Penalties Act.
24. I accordingly order that the remainder of two and half (2 ½) months of the sentence be suspended for a period of three years. If the Appellant commits any crime punishable by imprisonment during the above mentioned operational period of three years and found guilty by the court, he is liable to be charged and prosecuted for an offence pursuant to Section 28 of the Sentencing and Penalties Act.
25. The Appeal succeeds to that extent. The Appellant is released forthwith.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge
Judge

At Lautoka

14 August 2023

Solicitors:

- Appellant in Person

Office of the Director of Public Prosecution for Respondent