

TUIPOLOTU HALAFIAFI VEREIVALU v STATE (HAA0069 of 2004S)

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

16 September, 1 October 2004

10 **Criminal law — sentencing — disclosure by persons engaged in examinations — larceny by servant — whether sentence harsh and excessive — courts to balance deterrence, just punishment and sufficient flexibility — whether there was loss of integrity in Fiji education system — Examinations Act 262A ss 5(a), 8.**

15 On 24 November 2003, the Chief Education Officer at the Ministry of Education reported that the Fiji School Leaving Certificate examination papers had “leaked” before the students’ examinations.

On 18 March 2004, the Appellant admitted that he stole the papers from the ministry while employed as a clerical assistant and sold them to another for \$6 each. He also admitted one previous conviction for drunk and disorderly conduct.

20 The learned magistrate ruled that the accused deserved a 6-year prison sentence. The court gave him a discount of 2 years for pleading guilty and considered other mitigating factors. Accordingly, the magistrate convicted and sentenced the Appellant with the following: count 1 — larceny by servant, 4 years’ imprisonment for stealing the examination papers; count 2 — disclosure by persons engaged in examinations, 18 months’ imprisonment for disclosing the contents of the examination papers while engaged as clerical assistant; and count 3 — disclosure by persons engaged in
25 examinations, 18 months’ imprisonment for disclosing the contents of the examination papers while engaged as clerical assistant.

The Appellant appealed in the form of a letter and averred that the sentences imposed were unduly harsh and excessive. The Appellant later filed a further petition of appeal with the following grounds: (a) that the sentence was unduly harsh and excessive; (b) the learned magistrate did not correctly apply the principle relative to the need to balance
30 condemnation of society and the protection of the examination system in Fiji with a just punishment for the Appellant; (c) the learned magistrate failed to refer to authority or precedent to justify the tariff for sentence. Counsel for the Appellant referred to the case *R v Puru* emphasising on the need for the courts to balance deterrence, just punishment and sufficient flexibility for the assurance that the punishment fits the particular crime.
35 Counsel for the Appellant said that there were no aggravating factors in the Appellant’s case because he did not sell and copy the papers for large sums of money and that he was of good character with only one minor and dissimilar offence. Further, the counsel submitted that either a short custodial or a suspended term would have satisfied sentencing principles.

40 On the other hand, the state counsel opposed the appeal and argued that offences of larceny by servant have sentences of between 15 months and two-and-a-half years’ imprisonment, with 4-year terms reserved for the more serious types of offending. The State counsel further said that because the Appellant compromised the nation’s examination system, justified a longer custodial term.

45 **Held** — The theft of examination papers does not fall within the usual category of theft by servant because although the value of the money received was small, there was an immense loss to the ministry, students and the Fiji public in that: (a) there was loss of the integrity in the Fiji education system; (b) there existed an unfair advantage for those students who were able to buy and see the papers in advance; (c) there was doubt as to the accuracy of the examination results for the entire country; (d) the leakage of examination
50 papers resulted to cheating. Thus, these factors justified a starting point at the highest end of the tariff which is 4 years’ imprisonment.

Appeal allowed.

Cases referred to

- 5 *Anil Kumar v R* (Cr App 69/1985); *Gerald Neelamkant Panniker v State* [2000] FJHC 156; *Harbans Singh v State* [1991] FJCA 2; *Mara Kapaiwai v R* (Crim App 22/1985); *R v Puru* (1985) LRC Crim 817; *State v Mahendra Prasad* [2003] FJHC 320; *Vishwajeet Prasad v State* (Crim App 23/1993), cited.
- R v Barrick* (1985) 81 Cr App Rep 78; 7 Cr App R(S) 142; *Shane Raymond Heatley v State* [1995] FJHC 5, considered.

10 *S. Valenitabua* for the Appellant

N. Lajendra for the State

Shameem J. The Appellant was sentenced to a total of 4 years' imprisonment for the following offences:

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FIRST COUNT

Statement of Offence

LARCENY BY SERVANT: Contrary to s 274(a)(i) of the Penal Code Act 17.

Particulars of Offence

20 TUIPOLOTU HALAFIAFI VEREIVALU, during the month of November 2003 at Suva in the Central Division, being employed as a casual Clerical Assistant with the Ministry of Education (Exams), stole a 2003 Fiji School Leaving Certificate Examination English Paper valued at \$8.00 and a Maths Paper valued at \$8.00 to the total value of \$16.00 the property of the Ministry of Education.

SECOND COUNT

Statement of Offence

25 *DISCLOSURE BY PERSONS ENGAGED IN EXAMINATIONS*: Contrary to ss 5(a) and 8 of the Examinations Act 262A.

Particulars of Offence

30 TUIPOLOTU HALAFIAFI VEREIVALU, during the month of November 2003 at Suva in the Central Division, whilst being engaged in collating Fiji School Leaving Certificate Mathematics paper, knowingly disclosed the contents of the said paper to INOSI VUNITABUA.

THIRD COUNT

Statement of Offence

35 *DISCLOSURE BY PERSONS ENGAGED IN EXAMINATIONS*: Contrary to ss 5(a) and 8 of the Examinations Act 262A.

Particulars of offence

40 TUIPOLOTU HALAFIAFI VEREIVALU and another, during the month of November 2003 at Suva in the Central Division, while being engaged in collating Fiji School Leaving Certificate English paper, knowingly disclosed the contents of the said paper to INOSI VUNITABUA.

45 On 18 March 2004, the Appellant pleaded guilty on all counts. The facts were that on 24 November 2003, the Chief Education Officer at the Ministry of Education reported that the Fiji School Leaving Certificate examination papers had been "leaked" before the students were required to sit for the examinations.

50 The Officer said that she received a number of complaints on 24 November 2003, that similar questions from the Maths paper were found in a revision paper at the Suva Grammar School 2 days earlier, that a student from Nakasi High School had similar questions written in an exercise book before the examinations, and principals of various schools said that students had discussed the same questions with their Mathematics teachers before the exam. The Appellant was questioned by the police as a result of their investigations. Under caution, he admitted

stealing the papers from the ministry, while employed there as a casual clerical assistant, and selling them to a person for \$6 each.

These facts were admitted by the Appellant. He also admitted one previous conviction for drunk and disorderly conduct. In mitigation, counsel said that the Appellant was a single 26-year-old man who lived with his brother's family in Nabua. He lost his job with the ministry as a result of the offences, but wished to attend the Fiji Institute of Technology. The Appellant co-operated with the police during investigations and was candid about the commission of the offences. He represented Fiji in the South Pacific Games and expressed remorse.

The learned magistrate said that the maximum sentence on counts 2 and 3, was \$2000 fine or 2 years' imprisonment, and that the maximum sentence on count 1 was 14 years' imprisonment. The Magistrates' Court had a jurisdictional limit of 10 years' imprisonment. He then said:

- 4) It is sad to say that Fiji's Examination System is continually undermined by reckless people like the accused.
- 5) For personal greed, they are prepared to sacrifice the hard work put in by so many students throughout the country.
- 6) In my view, the time has come for offenders to face the full brunt of the law and that is, a prison sentence, even for first offenders, is necessary to restore the credibility of the education system in Fiji.
- 7) I have noted the accused's plea in mitigation.
- 8) The only mitigating circumstance in this case, is his guilty plea.
- 9) As a casual labourer of the Education Ministry at the material time, he saw fit, through his greed, to compromise the examination system for Form 6 students.
- 10) He is therefore asking for a prison sentence.
- 11) In my view, the accused deserves a 6 year prison sentence.
- 12) However, for pleading guilty and the other mitigating factors, I will give him a discount of 2 years. Balance is 4 years prison.
- 13) Count No 1 — imprisoned for 4 years.
Count No 2 — imprisoned for 18 months.
Count No 3 — imprisoned for 18 months.
- 14) All the above sentences are concurrent to each other ie total sentence is 4 years imprisonment.

The original petition of appeal was in the form of a letter and said that the sentences were unduly harsh and excessive. The Appellant later filed a further petition of appeal with the following grounds:

- (a) the sentence was unduly harsh and excessive given the background of the Appellant and the circumstances of the offence.
- (b) the learned Magistrate did not correctly apply the principle relative to the need to balance condemnation of society and the protection of the examination system in Fiji with a just punishment for the Appellant.
- (c) the learned Magistrate failed to refer to authority or precedent to justify the tariff for sentence.

In his submissions, counsel for the Appellant referred to *R v Puru* (1985) LRC Crim 817, on the need for courts to balance deterrence, just punishment and sufficient flexibility to ensure that the punishment fits the particular crime. He said that there were no aggravating factors in the Appellant's case, that he had not sold the papers for large sums of money nor had he copied large numbers of them, and that the Appellant was of good character with only one minor and dissimilar offence. He submitted that either a short custodial or a suspended term would have satisfied sentencing principles.

State counsel opposed the appeal, saying that offences of larceny by servant led to sentences of between 15 months–two-and-a-half-years’ imprisonment, with 4-year terms reserved for the more serious types of offending. He said that because the Appellant had compromised the nation’s examination system, a longer custodial term was justified. He referred me to several cases of larceny by servant in support of his submissions. In particular he relied on the English case of *R v Barrick* (1985) 81 Cr App Rep 78; 7 Cr App R(s) 142, which set out guidelines for the sentencing principles applicable in cases of breach of trust. In that case of Court of Criminal Appeal said at 146:

10 In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money is very small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide.

15 These principles were referred to, and relied upon in *Vishwajeet Prasad v State* (unreported, Crim App 23/1993), a case of the stealing of \$78,000, from the offender’s employers. The Court of Appeal considered the 4-year term to be excessive and substituted a two-and-a-half-year-term.

20 In *Shane Raymond Heatley v State* [1995] FJHC 5 (*Heatley*), Pain J reviewed sentences for fraudulent offending. In *Anil Kumar v R* (unreported, Cr App 69/1985) a 5-year term was upheld for the stealing of \$14,000 from the village co-operative by the treasurer. A 9-month term was eventually imposed, on appeal in *Mara Kapaiwai v R* (unreported, Crim App 22/1985) for the fraudulent conversion of \$26.10. A 15-month term was upheld on appeal in *Harbans Singh v State* [1991] FJCA 2, for the larceny of \$18,868.72 by the accountant of the Sports Council.

Pain J in *Heatley* said at 6:

30 These cases show that *on a plea of guilty* of obtaining money by fraud a sentence of 4 years imprisonment is likely for the most serious type of case (see dicta in *Vishwajit Prasad v State*). However aggravating circumstances may warrant a greater sentence (*Anil Kumar v R*). If the amount involved is small a short period of imprisonment is appropriate (see *Mara Kapaiwai v R* — albeit on a plea of guilty). Otherwise sentences imposed in these reported cases have ranged from 15 months to 2 ½ years imprisonment.

35 In the more recent case of *State v Mahendra Prasad* [2003] FJHC 320, Gates J considered the larceny of \$59,000 by an employee of Datec Fiji Ltd. The employee had fully compensated his employers, who had in turn, asked (unsuccessfully) for the charges to be withdrawn. A suspended term was imposed, his Lordship finding exceptional circumstances to apply.

40 In *Gerald Neelamkant Panniker v State* [2000] FJHC 156, Pathik J adopted the *Barrick* guidelines in a case of larceny by servant of \$49,348.82, and reduced a three-and-a-half-year-term to 3 years. He referred, in particular to the following factors which are relevant for sentencing in breach of trust cases:

- 45 (i) the quality and degree of trust reposed in the offender including his rank;
(ii) the period over which the fraud has been perpetrated;
(iii) the use to which the money or property dishonestly taken was put;
(iv) the effect upon the victim;
(v) the impact of the offences on the public and public confidence;
50 (vi) the effect on fellow-employees or partners;
(vii) the effect on the offender himself;

(viii) his own history;

(ix) other mitigating factors such as delay, illness, and co-operation with investigations.

A case of the theft of examination papers does not fall into the usual category
5 of theft by servant, because although the value of the money received was small,
the loss to the ministry, to students and the Fiji public was immense. The theft of
examination papers leads to the loss of the integrity of Fiji education system. It
leads to the creation of unfair advantages for those students who are able to buy
and see the papers in advance. It leads to doubt as to the accuracy of examination
10 results for the entire country for that year. And finally, the leakage of examination
papers leads some students to cheat at a time of great stress and tension for them.
These factors justify a starting point at the highest end of the tariff. The highest
end of the tariff is not 6 years as the learned magistrate decided, but is 4 years'
imprisonment. The aggravating factors are the gross breach of trust, and the
15 widespread nature of the "leak". Although counsel submitted that the Appellant
stole only two papers, it is clear that his actions then led to other leakages for
which the Appellant must be held responsible. The fact of the matter is that no
one would have been able to see or copy the papers, had the Appellant not stolen
them. I increase the sentence by 1 year to reflect the aggravating factors.

20 In mitigation is his guilty plea, the fact that he did not gain monetarily by the
theft (except to the tune of \$6) and his good character. I disregard his previous
conviction. For these factors I reduce his sentence by 3 years, to 2 years'
imprisonment.

Because of the serious nature of the offending, I consider it inappropriate to
25 suspend his sentence. The sentence of 4 years' imprisonment on count 1 is
quashed, and is substituted with a 2-year term.

In respect of counts 2 and 3, the maximum term of imprisonment is 2 years'
imprisonment. The seriousness of disclosing examination papers to other
persons, is already an aggravating factor on count 1, so a concurrent sentence is
30 appropriate. I consider an 18-month term on each count to be appropriate. The
sentences on counts 2 and 3 remain.

Conclusion

For the reasons I gave in this judgment, this appeal succeeds. The sentence on
35 count 1 is quashed and substituted with a 2-year term. It is to be served
concurrently with the 18-month term imposed on counts 2 and 3.

Appeal allowed.

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