IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0025 of 2005S
(High Court Criminal Action No. HAA 008 of 2005S)

BETWEEN:

JOSELYN DEO

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Wood, JA
Ford, JA

Hearing: Thursday, 10 November 2005, Suva

Counsel: Mr M. Raza] for the Appellant
]
Ms A. Prasad] for the Respondent
Ms J. Tuiteci]

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

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[1] The appellant was an accounts officer with Unit Trust of Fiji. She started work in February 2000 and, in July 2001, carried out the first of a series of five fraudulent transactions from the first four of which she dishonestly obtained $15, 128.00. The fifth attempt, in December 2001, to obtain a further $4,652.64 was discovered and she was charged.

[2] It is not clear from the papers before the Court when she first appeared in the Magistrates Court. There is reference to the fact that she was first interviewed by the

police in December 2001 and was charged in August 2002. However, the court record starts with an entry for 3 February 2004 on which date it appears her counsel asked for the plea to be deferred because he had not been aware of additional charges which must have been preferred that day.

[3] The pleas were deferred to 29 March 2004. On that date, there is a note that new counsel took over the defence and that the prosecution told the court, "We had withdrawn the old charges, we've filed new ones."

[4] Those were the final fifteen charges comprising five of fraudulent falsification of accounts, four of forgery, three of obtaining money on a forged document with an additional charge of an attempt to do so, and one each of embezzlement by servant and larceny.

[5] On 19 July 2004, counsel indicated that there would be a change of plea and those pleas were entered on 25 August 2004. The case was set down for hearing of the facts and sentence on 8 September 2004 but, following a number of adjournments, the facts were given on 6 October 2004. On 23 September 2004, the hearing immediately preceding that on 6 October 2004, the magistrate records, "Cheque for $15,280.00 Mr Raza's Trust Account"

[6] The appellant was eventually sentenced, on 29 November 2005, to two years imprisonment on each count to be served concurrently and all suspended for three years.

[7] The prosecution appealed to the High Court on the ground that the sentence was wrong in principle and was manifestly lenient given the entire circumstances of the case. The appeal was heard on Friday, 18 March 2005, and judgment delivered on Wednesday, 23 March 2005 – a commendable improvement on its rather leisurely progress through the Magistrates' Court.

[8] The learned judge considered a number of previous cases in this jurisdiction and concluded:

> *"It is now settled that the tariff for fraud and breach of financial trust cases ranges from 18 months to 3 years imprisonment. Where the accused has expressed remorse and has manifested such remorse in an early attempt to compensate the victim for the losses caused by the theft, a suspended sentence can be imposed."*

[9] Following reference to three previous cases; ***State v. Mahendra Prasad***, Crim. App. HAC 9/2005, ***State v. Roberts***, Crim. App. HAA 53/2003 and ***State v. Sanjay Sharma,*** Crim. case 3/2005 where suspended sentences had been imposed the judge continued:

> *"Clearly in those circumstances suspended sentences were not wrong in principle, because the offender had not effected restitution merely to buy himself out of a suspended sentence [sic]. 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.*
>
> *In this case, I am not convinced that there was any such remorse, expressed at the earliest opportunity. The respondent never admitted her guilt to the police. She benefited from the fraud and did not effect restitution until more than 3 years after the event. In court she maintained her not guilty plea for those 3 years. The payment into court of the money stolen, suggests not remorse, but an attempt to avoid a custodial sentence. In the circumstances of this case, the starting point on each count should have been 2 years imprisonment, to reflect the gross breach of trust. The sentence should have been increased to 3 years imprisonment for the premeditation, the length of time over which the fraud was perpetrated and the amount of money stolen. It should have been scaled down for her youth, good character, (late) restitution, the loss of her job and the 5 months of her suspended term already served, to 18 months imprisonment. There are no exceptional circumstances justifying a suspension."*

[10] This is an appeal from the decision of the High Court sitting in its appellate jurisdiction and is brought under section 22 (1A) (b) of the Court of Appeal Act:

> *"(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground –*
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> ...
>
> *(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence."*

[11] That provision is the only exception to the restriction that appeals under section 22 will be heard on questions of law only. It is clearly included because of the need to consider matters of fact in deciding whether there were exceptional circumstances to justify suspending the sentence.

[12] The grounds are that the learned judge erred, (1) in substituting an immediate custodial sentence, (2) in failing to consider the exercise by the magistrate of his discretion to suspend the sentence and (3) in disregarding the mitigating circumstances.

[13] The first two relate to the same issue. Mr Raza suggests that the learned judge based the decision to quash the order of suspension entirely on a finding that there had not been genuine remorse. He asks the Court to find that the judge was wrong to suggest that the maintenance of the not guilty plea for three years and the last minute restitution demonstrated that the professed remorse was not genuine and simply to avoid a custodial sentence.

[14] Whilst we do not consider it is conclusive, we do note that the judge, like ourselves, had no knowledge of the charges that were preferred before those filed on 29 March 2004. The appellant was represented and there could be good reasons why she may have been advised not to plead to the previous, discarded, charges. What is clear on the record is that following the new charges, her counsel advised the court that she would be changing her plea at the first effective hearing thereafter. Once that had been done there was no equivocation and so the plea was entered relatively early in the trial on the final charges.

[15] The judge was correct that the question of remorse is important. We would suggest that a plea of guilty, whilst always indicative of remorse, should not be given too much emphasis in cases of financial breach of trust. A far stronger indicator, as the learned judge clearly thought, is an early admission to the investigating authorities followed by complete disclosure of the fraudulent method used. In this case, such an admission was not offered.

[16] However, there are two matters that cause us concern.

[17] First is the learned judge's finding on remorse. When passing sentence the magistrate had properly first decided that a sentence of imprisonment was correct in a case of this nature. Having reached that decision he needed to consider whether there were exceptional circumstances which could justify an order suspending that sentence. He referred to the plea of guilty, the fact the appellant was a first offender and that full restitution had been made. Those were matters possibly pointing to genuine remorse and his decision to suspend shows he found they did so point. That was a finding of fact and, as such, is one an appellate court will be hesitant to change. This applies generally normally where the advantage to the lower court arises from the fact it has seen and heard witnesses.

[18] However, a similar approach is taken to the exercise of judge's discretion where it involves or depends on a finding of fact as was the case here. In ***Hadmor Productions Ltd and ors v Hamilton and anor*** [1982] 2WLR 322 at 325 Lord Diplock reiterated the long standing position:

> *"... the function of an appellate court ... is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. ... It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him ... there may also be occasional cases where even though no erroneous assumption of law can be identified the judge's decision to grant or*

> ***refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."***

[19] The House of Lords was there considering the exercise of the judge's discretion to grant or refuse an injunction but the principle is the same in criminal appeals; ***House v. The King*** [1936] 55 CLR 499 .

[20] The appellate court will interfere only if there is no evidence upon which the sentencing magistrate could properly have based his decision or it was based on a wrong principle or mistake of law or is plainly unreasonable.

[21] That is not what the learned judge did. The judgment shows that the learned judge reached a different conclusion about the genuiness of the appellant's remorse following a careful reassessment of the same evidence as had been before the magistrate. That was not the proper approach. The question should have been whether the magistrate had evidence upon which he could have reached the decision he did and not simply to substitute the appellate judge's own opinion.

[22] The second matter relates to the third ground of appeal. In any case where the court has imposed a sentence of imprisonment which might be suspended, the court will have to consider the various mitigating factors. They have been referred to in the judgment and we have no hesitation is accepting that the experienced judge in this case, having noted them, will have given them full and proper consideration.

[23] It is important for the sentencing court to know of any attempt the offender may have made to rehabilitate himself. This is particularly important where the case has been hanging over the accused for a very long time unless the delay lay in the hands of the accused. In the present case that was from the first discovery and interview by the police in December 2001 to sentence in November 2004 but it is

clear that, once the previous period of uncertainty had been concluded by the order of a suspended sentence, the appellant obtained employment.

[24] That was a critical factor in deciding whether she intended to try and rehabilitate herself yet it appears it was not mentioned to the learned judge. Counsel for the appellant accepts he could have overlooked it and we consider that must be the case. Whilst the learned judge specifically refers to the loss of the appellant's previous employment because of the offence, no mention is made of any new employment as would undoubtedly have been the case if that information had been available. The court has been informed that she has since changed her employment to another position of some responsibility which she has now held for six months without reoffending.

[25] Those facts are sufficient to persuade us that we should allow the appeal and restore the order of the magistrate.

[26] During the course of the appeal, we have been referred to a number of cases of similar breaches of trust in the Fiji courts. In a surprising number, suspended sentences have been imposed. They have caused us some disquiet.

[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.

[30] On the other hand, undue delay in the investigation and trial of such offences will tend to strengthen the mitigating effect of such matters. The courts in Fiji seem almost to possess a culture of delay. Magistrates and judges should not lose sight of the detrimental effect on the person charged of a seriously delayed determination of his case. In the case of a first offender, that is likely to be particularly destructive.

[31] In this case, the attempts of this appellant to obtain proper employment as soon as the sentence was passed, despite the debilitating effect of the time she had to wait before she knew she was free to plan her future, strengthens the value of her efforts in mitigating her offence. However, our decision is based both on counsel's failure to advise the judge of that fact and on the judge's approach to the magistrate's decision on remorse. Those factors make this an unusual case.

[32] However, we emphasise that, without very unusual mitigating circumstances and even with the additional impact of unnecessary and inordinate delay of the type which has characterised the present case, suspended sentences in such cases must be regarded as exceptional and should rarely be ordered.

[33] The appeal against sentence is allowed. The sentence ordered by the High Court is quashed and the order of the magistrate restored.

Ward, President

Wood, JA

Ford, JA

Solicitors:

Messrs. M. Raza and Assoicates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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