

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No HAA 5 of 2014

BETWEEN:

ALIKI HARRY

- V -

STATE

Appellant in Person
Mr L. Fotofili for the State

Dates of Hearing : 9 Dec, 2013, 21 January, 4th February 2014
Date of Judgment : 10 February 2014

JUDGMENT

[1] On the 31st day of May, 2013 in the Magistrates Court at Suva, the appellant entered a plea of guilty to one charge of theft and was sentenced on the 3rd June 2013 to a term of 8 months' imprisonment. At the same time the Magistrate activated a 10 month suspended sentence

which he ordered to be served consecutively resulting in a total term of 18 months' imprisonment with a minimum term of ten months imprisonment.

- [2] The appellant appeals his sentence on the grounds that the Magistrate had no authority to activate the suspended sentence and that by making it consecutive to the sentence for theft, it was manifestly excessive and wrong in principle.
- [3] The brief facts of the case were that on the 28th May 2013 at 1855 hours the appellant had entered M.H Supervalu in Suva and had taken a bottle of Regal Whisky to the value of \$26.00 and left the store without paying. He was subsequently located and arrested. He admitted the offence under caution.
- [4] The accused has many previous convictions for various offences. Three of these are current including one previous for theft in 2011 where he was sentenced to 10 months' imprisonment suspended for three years.
- [5] In casting his sentence the Magistrate unfortunately fell into several errors of sentencing. He correctly stated that the maximum penalty for the offence is 10 years imprisonment and took a starting point of 9 months' imprisonment. He increased this by 5 months for "the aggravating factors", factors which he failed to specify. He deducted 3 months for the plea of guilty. The 9 months plus the added 5 months less the 3 months should have arrived at a total of 11 months imprisonment but the Magistrate declared the total sentence for the theft to be 8 months imprisonment.
- [6] The Magistrate then quite improperly declared the accused to be a habitual offender. He then also improperly activated the suspended

sentence which he made consecutive to the sentence for theft, passing a total term of imprisonment of 18 months.

- [7] A Magistrate does not have the power to declare an accused to be a habitual offender. By the terms of *section 11 of the Sentencing and Penalties Decree 2009* that power is reserved for a Judge, The Court of Appeal and the Supreme Court. Nor does section 10 of that Decree specify theft to be an offence which qualifies as a basis for the declaration. The classification can only be extended to those with previous for sexual offences, violence, robbery, drugs or arson. In any event most of the previous convictions for this accused had expired and the three current previous, even if they were qualifying offences would not have been enough for a Judge (and not a Magistrate) to make the declaration. The criminal record clearly shows that in the last ten years the appellant has been making an effort to reform himself in comparison with his earlier record.
- [8] A suspended sentence cannot be activated unless an accused has been charged with breach of order suspending sentence. Section 28(4) of the Sentencing and Penalties Decree allows a court to order an accused to serve the sentence held in suspense only on hearing of the charge. For the Magistrate to order it to be served in this case is *ultra vires*.
- [9] The arithmetic of the sentence being wrong and the Magistrate having made several orders beyond his powers, this court would sentence the appellant afresh. In adopting the Magistrates starting point of 9 months, which is quite proper for a repeated offence of theft, a deduction is made of 3 months bringing the sentence down to 6 months. There are no stated aggravating features which would enhance this sentence and his previous criminal record cannot be used to do so.

[10] The sentence for this offence is one of 6 months and the appellant having served that since June 2013, he is to be released immediately.

P.K.Madigan
Judge

At Suva
10th February 2014