

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 55 OF 2014

BETWEEN: JOSAIA MARAIVALU

Applicant

AND: STATE

Respondent

Counsels: Ms S. Ratu for the Applicant
Ms. S. Kiran for the Respondent

Date of Ruling: 04th July, 2014

RULING

1. The applicant was charged before the Sigatoka Magistrate Court for the offence of theft contrary Section 291 (1) of the Crimes Decree No. 44 of 2009.
2. The facts of the case are that on 30th June 2011, appellant stole a cow valued \$500.00 property of Tevita Degei, farmer of Waibogi settlement, Sigatoka. The cow was missing and the complainant went in search. He saw a wedding function and upon enquires he received the information that the accused brought the cow for the purpose to be consumed at the wedding. The accused admitted that he sold the cow for \$500.00. The matter was reported to the Police and appellant admitted the offence in his caution interview.
3. He pleaded guilty to the charge on 2.10.2013 on the first date a plea was taken.
4. The applicant was sentenced for 23 months and 17 days imprisonment with non-parole period of 18 months on 6.11.2013.
5. This appeal against the sentence out of time was filed on 7.2.2014 and therefore 2 months out of time.

6. The grounds for the delay are:

- (i) That copy of the sentence was not given to him,
- (ii) He is unaware of the procedure of the appeal,
- (iii) It was difficult to obtain legal aid assistance within time.

7. The Section 248 of the Criminal Procedure Decree provides:

(1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-

(a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;

(b) a copy of the petition shall be filed at the registry of the High Court; and

(c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.

(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include-

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.

8. The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

"Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate courts consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced?"

9. More recently, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

" These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court. "

10. The grounds of appeal against the sentence are:

- (i) That the sentence is harsh and excessive,
- (ii) That insufficient weight was discounted for the guilty plea,
- (iii) That insufficient weight was discounted for mitigating factors.

11. Both parties have filed written submissions. The state in their submissions had conceded that sentence of 23 months for a first offender who had pleaded guilty is harsh and excessive. Further they have conceded the fact the accused lied to Court does not aggravate the offending.

12. The applicant was not represented at the trial. There is a delay of 2 months, nonetheless there is a ground of appeal that will succeed as conceded by the State.

13. The learned Magistrate had correctly identified maximum penalty for the offence of Theft according to Section 291 (1) as 10 years imprisonment.

14. The Magistrate had accepted a tariff of 2-9 months following the judgment of Waisale Vakarauvanua v State [2004] FJHC 116, HAA 0051J.2004S.

15. Tariff for the offence of theft was discussed in several cases. In Saukilagi v State the Court accepted between 2 to 9 months as tariff for simple theft.

'The tariff for simple larceny on first conviction is 2-9 months (Ronald Vikash Singh v. State HAA 035 of 2002) and on second conviction a sentence in excess of 9 months. In cases of the larceny of large amounts of money sentences of 1 ½ years imprisonment (Isoa Codrokadroka v. State Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (Sevanaia Via Koroi v. State Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between victim and the defendant. The method of stealing is also relevant.'

16. In Ratusili v State [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Hon. Mr. Justice Paul Madigan summarized the tariff judgments.

'From the cases then the following sentencing principles are established:

- (i) For an offence of simple theft the sentencing range should be between 2 and 9 months*
- (ii) Any subsequent offence should attract a penalty of at least 9 months*
- (iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences up to three years*
- (iv) Regard should be had to nature of the relationship between offender and the victim*
- (v) Planned thefts will attract greater sentences than opportunistic thefts.*

17. Then the learned Magistrate had considered the following guideline judgments.

"In Chand v State [1998] FJHC 60, the High Court upheld a 12 months sentence of the Labasa Magistrates Court for a similar offence.

In Raibono v State[2002] FJHC 62, the High Court said that a sentence of two years for the theft of two cows valued at \$300 was not excessive.

(However the accused in that case was 2nd time offender and he had a suspended term for a similar offence)

In Naivi v The State [2004] the High Court did not disturb a sentence of 2 years imprisonment for an accused who had two previous convictions for the same offence."

(In this case accused had two previous convictions)

18. The learned Magistrate had further observed that:

"From the cases, the tariff ranges from suspended sentence to 9 months imprisonment for the first offenders. However, in farming community theft of animals like cattle and horse, imprisonment sentence may be imposed between 12 months to 2years."

19. The learned Magistrate had selected two years as the starting point.

20. In Totvosau v State [2013] FJHC 561; HAA 16.2013 (25 October 2013) Hon. Mr. Justice Paul Madigan had observed:

"Theft of livestock admittedly is very serious in a rural community and for a first offence which this is deemed to be an appropriate starting point would be 15 months imprisonment."

21. The learned Magistrate had then stated:

*"The aggravating factor here is you lied to court on 02/10/13 [the date it was fixed for hearing and prosecution not ready to proceed because witnesses were not present] that complainant had earlier taken your cow without asking you and you wanted to pay him back. When complainant attended court on 23/10/2013 on the orders of the court, he denied your statement. Not able to confront the accused with truth, **you were forced to admit in court** that you had lied to police and court of your version that your brother [complainant] had earlier taken your cow. In that context, the reconciliation made by you in August was not genuine due to the fact that incident was more than 1 year ago in June, 2011 and it was purposely for your own benefit to evade the full consequences of your misconduct. Giving a false or misleading statement in court a serious issue which shows your disrespect to the judicial proceedings. Taking into consideration all this factors, and the loss sustained by the complainant of his cattle, I will increase your sentence interim sentence to 12 months. Therefore, your total interim sentence is 3 years or 36 months imprisonment."*

22. Then the learned Magistrate had considered mitigating factors and stated:

"You did not give an early guilty plea bout on a hearing date on 02/10/2013. You will not get full discount of 1/3 of the 3 years. However, considering our other mitigating factors namely your act of offending, I will deduct 12 months from your interim sentence."

23. Learned Magistrate had noted following mitigating factors:

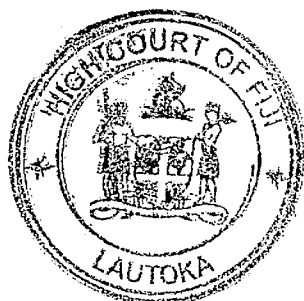
- (i) You are a first offender,
- (ii) 45 years of Yadua,
- (iii) Single,
- (iv) Professional painter,
- (v) Seek court forgiveness,
- (vi) You said that you did not realize that you will end up in court hence you will not reoffend again,
- (vii) I had apologized to complainant two months ago,
- (viii) Steward Yadua Methodist Church confirm reconciliation.

24. In *Basa v State* [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

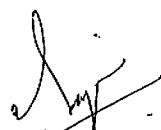
"The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be

may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably."

25. At was held in **Naikelekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that *"Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case."*
26. The learned Magistrate had erred when he failed select correct stating point, he had failed to give a separate discount for guilty plea.
27. This background warrants this court to exercise its powers in terms of section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.
28. Accordingly I take a starting point of 15 month and add 6 months for the aggravating factors. That is true lack of remorse. I deduct 6 months for the mitigating factors of personal circumstances. Further 5 months to be deducted for the Guilty plea. Final sentence is 10 months.
29. Applicant had served 6 months and 28 days and he was in remand for 14 days. Therefore period of 7 months and 12 days to be deducted from the final sentence.
30. Applicant is a first offender. Therefore I order the balance of the sentence to be suspended for a period of 2 years.
31. Suspended sentence is explained to the applicant.
32. Application is allowed. Application is treated as a sentence against appeal with no objection from the State. Sentence is varied. Applicant to be released from the custody today.



At Lautoka
4th July 2014


Sudharshana De Silva
JUDGE

Solicitors: Legal Aid Commission for the Applicant
Office of the Director of Public Prosecutions for Respondent