IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 08 OF 2016

BETWEEN : HAMENDRA RAJ

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr. Iqbal Khan for the Appellant
Ms. S. Kiran for the Respondent

Date of Judgment : 13th of July 2016

# JUDGMENT

## Introduction

1. The Appellant was charged with another in the Magistrates' court at Lautoka for one count of Theft contrary to Section 291 (1) of the Crimes Decree. The Appellant pleaded guilty for this offence on the 08th of February 2016. The learned Magistrate then convicted the Appellant and sentenced him for a period of eight (8) months of imprisonment on the 11th of May 2016. Aggrieved with the said sentence, the Appellant filed this Petition of Appeal on the following grounds;

   i) *That the Appellant appeals against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case,*

   ii) *The learned Trial judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant*

*consideration in particular that the police had fully recovered the 5x50 kg bags of sugar the subject matter of the charge,*

*iii) The learned trial judge erred in law and in fact in passing sentence of imprisonment for 8 months was disproportionately severe punishment contrary to Section 25 of the Constitution of Fiji, ( Section 11 (1) of the 2013 Constitution of Fiji),*

*iv) The learned trial magistrate misdirected himself to the application 4 (2) (j) of the Sentencing and Penalties Decree 2009 in failing to suspend the sentence of the accused,*

*v) The learned trial magistrate erred in law and in fact by failing to give sufficient weight to the accused character and the mitigating factors in imposing custodial sentence and that the accused was a first offender.*

*vi) The Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the court records in this matter,*

2. Upon being served with this petition of appeal, the Respondent appeared in court on the 30th of May 2016. The Appellant and the Respondent were then directed to file their respective written submissions, which they filed as per the direction. The leaned counsel for the Appellant and the Respondent informed the court that they do not wish to make any oral submissions. Both counsel opted to reply on their respective written submissions.

3. Having carefully perused the record of the proceedings in the Magistrates' Court and the respective written submissions of the parties, I now proceed to pronounce my judgment as follows.

4. In view of the grounds of appeal as stated in the Petition of Appeal and the submissions made by the learned counsel for the Appellant, it could be summarised for the convenience of consideration as follow;

i) Failed to consider Sections 4 (2) (d), (i) and 5 the of Sentencing and Penalties Decree,

ii) Sentence is harsh and excessive/ failed to give a non-custodial sentence,

iii) Failed to consider relevant factors and has considered irrelevant factors in the sentence,

iv) Failed to consider the recovery of stolen items in favour of the Appellant,

v) Failed to consider the good character of the Appellant,

**Grounds I and V,**

5. The learned counsel for the Appellant in his submissions urged that the leaned Magistrate has failed to properly consider Sections 4 (2) (d) and (i) and 5 of the Sentencing and Penalties Decree.

6. According to Section 4 (2) (d) of the Sentencing and Penalties Decree, the court is required to consider the level of culpability and the responsibility of the offender in the sentencing. The learned Magistrate in paragraph three and seven of the sentence has discussed the culpability and responsibility of the Appellant in this offending. Having found that the Appellant stole from the supermarket, that provided him an employment, the learned Magistrate accurately found that this

is a case of steeling that involves with breach of trust. Accordingly, I am of the view that the learned Magistrate has adequately considered the level of culpability and the responsibility of the Appellant in this offending.

7. Section 4 (2) (i) of the Sentencing and Penalties Decree requires the court to consider the previous character of the offender in sentencing. Moreover, Section 5 of the Sentencing and Penalties Decree has stipulated the grounds that can be taken into consideration in determining the character of the offender, where it states that;

*"In determining the character of an offender a court may consider (amongst other matters) —*

*a) The number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender;*

*b) The general reputation of the offender; and*

*c) Any significant contributions made by the offender to the community, or any part of it.*

8. The learned counsel for the Appellant submitted that the leaned magistrate has failed to consider the previous good character of the Appellant in the sentence. I do not concur with the submissions of the learned counsel of the Appellant on this issue. The learned Magistrate has considered the previous criminal record of the Appellant and found that the Appellant has one previous conviction. However, the learned Magistrate has not adversely considered the said previous conviction against the Appellant as it is over ten years. The learned Magistrate

has then considered the submissions of the Appellant that he has become a changed person after his last conviction in his favour as a mitigating factors. Accordingly, I do not find any merit in the contention that the learned Magistrate has failed to consider the previous character of the Appellant in the sentence.

**Grounds II, III, and IV,**

9. I now draw my attention to consider the second, third and fourth grounds as mentioned in paragraph 4 above.

10. The learned Magistrate has accurately found this is a case involves with breach of trust. Having considered the guidelines of tariff as enunciated in **Ratusili v State ([2012] FJHC 1249; HAA011.2012 (1 August 2012),** the learned Magistrate has selected 12 months as the starting point.

11. Justice Madigan in **Ratusil v State ( Supra)** has expounded the applicable tariff limit for the offence of theft, where his lordship found that;

*i) For a first 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 of up to three years.*

*iv) Regard should be had to the nature of the relationship between offender and victim.*

*v) Planned thefts will attract greater sentences than opportunistic thefts.*

12. In view of the guidelines of **Ratusil (supra)** , I find that the learned Magistrate has correctly identified the starting point as 12 months as it is within the tariff limits prescribed for thefts involve with breach of trust.

13. Having done so, the learned Magistrate has then considered that the Appellant has breached the trust reposed in him by his employer as an aggravating factor. The Fiji Court of Appeal in **Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008)** has expounded the applicable approach in determining the starting point and aggravating factors in sentencing, where it was held that;

*"The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point"*

14. According to the guidelines as enunciated in **Naikelekelevesi (Supra) and Ratusil (supra),** it appears that the breach of trust by the Appellant is already subsumed in the determination of starting point of twelve months. Consequently, the reconsideration of the same issue as an aggravating fact to increase the offence constitutes to double counting.

15. I now draw my attention to the contention of the Appellant that the learned Magistrate failed to consider the recovery of stolen items in his favour. Justice

Medigan in **Soko v State ( 2011) FJHC 777; HAA 031.2011 ( 29 November 2011)** held that;

*"Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature".*

16. The summary of facts reveals that the stolen items were recovered. It does not indicate whether the Applicant has returned the stolen items. Nevertheless, it is my opinion that the learned Magistrate should have considered the recovery of the stolen items in favour of the Applicant in his sentence.

17. Having concluded that the learned magistrate made an error in considering aggravating circumstances and also failed to consider the recovery of stolen items in favour of the Applicant, I now turn onto consider whether these errors warrant an intervention of this court.

18. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that;

*"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the*

*test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".*

19. Justice Madigan in **Boyte v State [2012] FJHC 1317; HAA22.2012 (7 September 2012)** has imposed a sentence of twelve months of imprisonment for an offence of theft, which was founded on breach of trust.

20. In **Gonerogo v State - [2013] FJHC 163; HAA22.2012 (5 April 2013)** the High Court has sentenced an accused for a period of two years of imprisonment for an offence of theft, which was also founded on breach of trust.

21. Having considered the above discussed sentencing approach and also the acceptable tariff limit of the offence of theft, I do not find the sentence of 8 months imprisonment is harsh and excessive.

22. Justice Shameem in **State v. Raymond Roberts HAA 0053 of 2003 S** has discussed the applicable sentencing approach for the offences involve with breach of trust, where his ladyship found that

*"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"*

23. According to the record of the proceedings in the Magistrates' court, I do not find that the Appellant had made any restitution. The summary of facts only states that the stolen items were recovered. The Appellant in his submissions in mitigation has not advanced any ground of restitution. Having considered the circumstances of this case, the learned Magistrate found that this case does not warrant a non-custodial sentence. Hence, I find that the learned Magistrate has correctly exercised his discretion pursuant to Section 26 of the Sentencing and Penalties Decree. Hence, I do not find any reason to interfere with the learned Magistrate's finding and conclusion in his sentence.

24. In conclusion, I refuse and dismiss this Appeal and uphold the sentence imposed by the learned Magistrate on 11th of May 2016.

25. 30 days to appeal to the Fiji Court of Appeal.

**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**13th of July 2016**

HIGH COURT OF FIJI
LAUTOKA

**Solicitors : Iqbal Khan & Associates for the Applicant**

**Office of Director of Public Prosecution for the Respondent**