IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA39 of 2016
[Magistrates' Court Case No.262 of 2016)

BETWEEN : **ASHWIN PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : Hon. Mr Justice Daniel Goundar

Counsel : Mr A Chand for the Appellant
Ms S Lodhia for the Respondent

Date of Hearing : 24 February 2017

Date of Judgment : 14 March 2017

JUDGMENT

[1] The appellant was charged with the offences of falsification of document (count 1) and obtaining financial advantage by deception (count 2). He pleaded guilty to the charges in the Magistrates' Court and was sentenced to 18 months' imprisonment for falsification of document and 2 years' imprisonment for obtaining financial advantage by deception, to be served concurrently with a non parole period of 1 year. Initially, he appealed against both conviction and sentence, but at the appeal hearing, he freely and voluntarily abandoned his appeal against conviction and pursed his appeal against sentence only.

[2] The grounds of appeal against sentence are:

(i) That the learned Magistrate erred in principle when he granted a discount on an early guilty plea on the initial reduction of the sentence rather than considering it as the final component of the sentence.

(ii) That the learned Magistrate erred in principle when he failed to consider in the mitigating factors that the Petitioner had returned $950.00 which is duly reflected in the Summary of Facts.

(iii) That the learned Magistrate erred in law when he stated that the final sentence exceeded 2 years.

Facts

[3] The appellant committed the offences when he was an employee of Carpenters Hardware (Fiji) Limited. He was a sales representative based at the Walu Bay branch. Between 4 December and 10 December 2014, he embezzled $1565.64 cash sales he received from customers. To conceal his dishonesty, the appellant raised five false invoices and debited the amount of $1565.64 to a customer who had an account with Carpenters Hardware (Fiji) Limited. The fraud was detected when the company carried out an internal audit of the customers' accounts. When the manager confronted the appellant, he admitted the fraud and immediately repatriated $950.00 cash to his employer.

The two-tiered sentencing process

[4] The learned magistrate used the two-tiered process as opposed to the 'instinctive synthesis' process to provide reasons for the sentence he imposed on the appellant. He identified the tariff for the offences and then used a starting point to adjust the sentence upwards and downwards to reflect the aggravating and mitigating factors. For tariff, the learned magistrate specifically referred to cases *State v Bole* [2005] FJHC 470; HAC0038S.2005S (4 October 2005) and *Hu Jun Yun v The State* [2005] FJHC 93; HAA0024J.2005S (26 April 2005). He also referred to the case of *State v Miller* unreported Cr App No 29 of 2013; 31 January 2014, in which Madigan J said the tariff for these offences is between 2 to 5 years imprisonment and that the high end of the tariff should be reserved for well planned and sophisticated deception.

[5] Since both offences were part of one transaction, the appellant's criminality was assessed on the more serious offence of obtaining financial advantage by deception. The maximum sentence prescribed for obtaining financial advantage by deception is 10

years' imprisonment. The maximum sentence for fraudulent falsification of document is 7 years' imprisonment. For the offence of obtaining financial advantage by deception, the learned magistrate used a starting point of 3 years and enhanced the term by 1 ½ years to reflect the aggravating factors - breach of trust and planning involved in deception. The sentence was then reduced to reflect the following mitigating factors:

- Early guilty plea - 1 year
- Previous good character - 1 year
- Partial restitution - 6 months.

[6] The final term arrived at was 2 years' imprisonment, to be served concurrently with 18 months' imprisonment imposed for fraudulent falsification of document.

Discount for early guilty plea

[7] Section 4(2) (f) of the Sentencing and Penalties Decree 2009 states that the sentencing court must have regard to 'whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'. The charges against the appellant were filed on 10 February 2016. He appeared in the Magistrates' Court on the same date. No plea was taken on that day. The case was adjourned to 3 March 2016 for plea. On 3 March 2016 the case was further adjourned to 30 May 2016 without the appellant's plea being taken. On 30 May 2016, the appellant appeared before a new magistrate. He waived his right to counsel and pleaded guilty to the charges. He told the learned magistrate that he was freely pleading guilty. He admitted the facts tendered by the prosecution. He was a first time offender. In mitigation, he told the learned magistrate that he was 29 years old and married with one child. He was earning $400.00 per week as a taxi driver. He told the learned magistrate that he had already paid $950.00 to his employer and he was seeking further time to pay the balance. The case was adjourned to 20 June 2016 to check on the payment of full restitution.

[8] On 20 June 2016, the appellant failed to appear in court and a warrant was issued for his arrest. On 2 September 2016, that warrant was cancelled without reasons. On 28 September 2016, the appellant appeared in court and told the learned magistrate that he

could not pay full restitution because of family commitments. The appellant was sentenced on the same day.

[9] The appellant's complaint relates to the quantum of discount given for the guilty plea based on the decision of the Court of Appeal in *Rainima v State* [2015] FJCA 17; AAU0022.2012 (27 February 2015). In *Rainima*, the Court of Appeal said at [46]:

> Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance. (per Madigan JA)

[10] Counsel for the appellant submits that the one-third discount for the guilty plea should have been calculated after adjustments had been made for aggravating and mitigating factors. A similar submission was made in the Supreme Court in the case of *Qurai v State* [2015] FJSC 15; CAV24.2014 (20 August 2015) citing *Rainima* as authority. The Supreme Court rejected the submission and said at [51]:

> In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges. (per Marsoof JA)

[11] Similarly, in *Bonaseva v State* [2015] FJSC 12; CAV0022.2014 (20 August 2015) the Supreme Court said at [20]:

> Sentencing is not an exact science: **Maciu Koroicakau v The State** [2005] FJSC 5; CAV0006.2005S (4 May 2006). It is an exercise of discretion and it must remain a practiced art. The judge might have granted a discount appropriate to the mitigating factors **after** allowing such discount as appropriate for the guilty plea. (per Gates CJ)

[12] It is clear that the failure to quantify each mitigating factor separately does not nullify the sentence (*Qurai* at [53]). Provided the sentencing court considers the guilty plea, there is no legal requirement for the discount for guilty plea to be assessed on numerical terms. As the Supreme Court said in *Koroicakau v State* unreported Cr App No CAV0006 of 2005S; 4 May 2006, at [13]:

> When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.

[13] Even if this Court was to consider the merits of the argument that one-third discount for the guilty plea should have been calculated after adjustments had been made for aggravating and mitigating factors, the result would have been the same. The appellant's argument effectively means that the discount that should have been accorded to his early guilty plea was one-third of 3 years (starting point 3 + 1 ½ aggravating factors – 1 good character – ½ partial restitution = 3). One-third of 3 is 1 – the appellant was given a separate 1/3 discount for his early guilty plea. Ground one fails.

Restitution

[14] It is clear that the learned magistrate had accepted in his sentencing remarks that the appellant had paid partial restitution in the sum of $950.00 cash to his employer. The partial restitution was considered as a mitigating factor, for which the appellant was granted a discount of 6 months in the sentence. Ground two lacks merit.

Failure to consider suspension

[15] There is an apparent contradiction in the sentencing remarks regarding the issue of suspension. In paragraph 10 of the sentencing remarks, the learned magistrate said

'your sentence cannot be suspended as it exceeds 2 years in terms of Sec 26(1) of the Sentencing and Penalties Decree 2009'. Immediately after making this remark, the learned magistrate said 'moreover this is not a fit case to grant a suspension when the seriousness is concerned'. The contradiction is that if there was no power to suspend, then the issue of suspension based on the seriousness of the offence did not arise.

[16] It is not in dispute that the appellant's total sentence was 2 years' imprisonment. The sentence did not exceed 2 years, and therefore, the learned magistrate had the power to suspend it under section 26(2) (b) of the Sentencing and Penalties Decree 2009. When there is power to suspend, the magistrate is obliged to consider the option of suspension. However, in breach of trust cases involving dishonest employees, suspension is only appropriate if there are special circumstances present. As the Court of Appeal said in *Deo v State* unreported Cr App No AAU0025.2005S; 11 November 2005 at [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.

[17] Counsel for the appellant submits that the special circumstances that justified suspension of sentence were that the appellant was a young and a first time offender and that he showed genuine remorse by paying partial restitution and entering early guilty pleas. In *State v Cakau* unreported Cr. App. No. HAA 125 of 2004S; 10 November 2004, the offender who was a military officer stole $23,817.56 from the Fiji Military Forces after falsifying the accounts. He pleaded guilty to the charges and was handed a suspended sentence in the Magistrates' Court. On appeal by the State, the High Court quashed the suspended sentence and imposed a custodial sentence of 18 months' imprisonment. In that case, Shameem J said at p.5:

> There is ample authority supporting the imposition of custodial sentences for serious fraud and breach of trust offences. Indeed custodial sentences are usually imposed despite the offender's good character. Good character is

inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust, that renders serious fraud offences the worst type of offending in property-related cases. It is for this reason, that a custodial sentence is inevitable except in those exceptional cases where full restitution has been effected, not to buy the offender's way out of prison, but as a measure of true remorse.

[18] Similarly, it was said in *Barrick* 81 Cr. App. R(S):

> The type of case with which we are concerned is where a person in a position of trust has used his trusted position to defraud his partners or employers. He will usually, as in this case, be a person of hitherto impeccable good character. It is practically certain, again as in this case that he will never offend again and in his life be able to secure similar employment with all that means in the shape of disgrace for himself and hardship for himself and also his family.

[19] And later at pp 81-82:

> In general a term of immediate imprisonment is inevitable, **save in very exceptional circumstances or where the amount of money obtained is small.** Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficient substantial term of imprisonment to mark publicly gravity of the offence. (Emphasis added)

[20] In considering the issue of suspension, the question for the learned magistrate was whether the appellant had expressed genuine remorse by entering early guilty and by making attempts to pay full restitution.

[21] In the present case, the amount obtained was $1565.64. The sum involved was small when compared to similar cases. The appellant reimbursed $950.00 immediately after his employer confronted him with the allegation and before the case was referred for prosecution. Under caution, he admitted the allegation. He maintained that stance after he was charged. He admitted the charges at the first opportunity when his plea was taken in the Magistrates' Court. He made attempts to repatriate the balance sum of $615.64 but was unsuccessful because he had lost his job and was supporting his family. If the learned magistrate had directed his mind to these circumstances, he would have concluded that the appellant was genuinely contrite. For these reasons, there is an error in the exercise of the sentencing discretion in not suspending the appellant's sentence based on special circumstances.

Result

[22] The appellant has already served nearly 6 months in prison. In these circumstances, I set aside the sentence imposed in the Magistrates' Court and substitute a concurrent term of 18 months' imprisonment on each count, suspended for 2 years effective from the date of this judgment. I will now explain the suspended sentence to the appellant. The appeal is allowed to this extent.

....
Hon. Mr Justice Daniel Goundar

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State