IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 90 OF 2016

BETWEEN	:	**EVA TAGILALA** also known as **IVAMERE BIAUKULA** and **MEREONI VOSITA**
		APPELLANTS
A N D	:	**THE STATE**
		RESPONDENT

Counsel	:	Ms. V. Narara and Ms. N. Sharma [LAC] for the Appellants.
	:	Ms. S. Kiran for the Respondent.
Date of Hearing	:	21 April, 2017
Date of Judgment	:	25 April, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellants were charged in the Magistrate's Court with one count of Theft contrary to section 291 (1) of the Crimes Act.

[2] It was alleged that both Appellants on the 27th day of November, 2016 at Lautoka in the Western Division dishonestly appropriated assorted

groceries valued at $77.18 the property of R. B. Patel Supermarket with the intention to permanently deprive the said R. B. Patel Supermarket.

[3] On 29 November, 2016 both Appellants pleaded guilty to the charge after it was read and explained to them.

SUMMARY OF FACTS

[4] Thereafter the following summary of facts were admitted by both the Appellants after it was read and explained:-

"On the 27th day of November, 2016 at 2.00pm at R. B. Patel Supermarket, Tavewa Avenue, Lautoka one Eva Tagilala (B-1), 44 years, Domestic Duties of Bandila Crescent, Field 40 New Subdivision, Lautoka with one Mereoni Vosita (B-2), 46 years, Domestic Duties of Kalacraft, Kashmir, Lautoka stole 3 x 1kg packet Milo valued at $16.39 each total value of $49.17, 1 x 1kg Kinus Peanut Butter valued $16.95, 1 bottle Brut spray valued $7.99 and I bottle Johnson Baby Cologne valued $3.10, all to the total value of $77.18 the property of R. B. Patel Supermarket.

On the above date, time and place, the security officer namely Rokotakala Roratu (A-2), 31 years of Lovu Seaside was waiting for customers to vacate the shop preparing for closure, when (A-2) saw (B-1) and (B-2) entered the shop. (A-2) then kept a watch at (B-1) as she walked towards the shelves where the packet of milo is stacked. (A-1) saw (B-1) picked something from the shelves and rushed out the shop. (A-2) then followed (B-1) out when (B-1) put the items in a parked car. Inside the car (A-2) saw 2 carry bags on the passenger's seat packed with the above items. However (A-2) was also watching (B-2) acting suspiciously. (A-2) informed his Boss, Daniel Raj (A-1), 37 years, Supervisor Varieties of Guruwaiya Street, Waiyavi, Lautoka who then reported the matter to police.

Upon receipt of report, W/Cpl 3957 Liku was appointed the investigating officer.

(B-1) and (B-2) was cautioned interviewed whereby they admitted stealing the above items. (B-1) and (B-2) were later charged for the offence of Theft. Both in custody for court on 29/11/16.

Recovery 3 x 1kg packets milo - $49.17."

[5] Upon been satisfied that the Appellants had entered an unequivocal plea the learned Magistrate convicted the Appellants.

[6] On 30 November, 2016 after hearing mitigation the Appellants were each sentenced to 20 months imprisonment.

[7] The Appellants filed a timely appeal in person which was later amended after the Legal Aid Commission approved their legal representation.

[8] On 30 March, 2017 counsel for both the Appellants abandoned their appeal against conviction and indicated their intention to proceed with appeal against sentence only.

[9] Counsel have filed helpful written submissions and also made oral submissions in support for which the court is grateful.

[10] The Appellants have filed separate grounds of appeal against sentence which can be summarized as follows:-

APPEAL AGAINST SENTENCE

"1. That the sentence passed by the Learned Magistrate was erroneous when he picked the starting point of 30 months which was in the higher range of the tariff.

2. That the Learned Magistrate erred when he failed to consider the fact that the items were partially recovered.

3. That the Learned Magistrate erred when he failed to consider the minimal value amount of the stolen items.

4. That the Learned Magistrate erred when he failed to consider that the Appellants were in a position to restitute the complainant."

GROUNDS OF APPEAL

GROUND ONE

That the sentence passed by the Learned Magistrate was erroneous when he picked the starting point of 30 months which was in the higher range of the tariff.

[11] The thrust of the argument put forward by both the Appellants is that the learned Magistrate selected a starting point of 30 months which was in the higher range of the tariff.

[12] For the selection of a starting point I am guided by the Court of Appeal in *Laisiasa Koroivuki vs. The State, Criminal Appeal No. AAU 0018 of 2010* at paragraphs 26 and 27 the following is stated:-

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

[13] At paragraph 9 of the sentence the learned Magistrate stated:-
"You are charged for subsequent offences. In view of the above sentencing guidelines I pick a starting point of 30 months for each of you..."

[14] Since the Appellants were convicted for subsequent offending the tariff as per *Ratusili vs. State, Criminal Appeal HAA 011 of 2012, (1 August 2012)* guidelines should be a sentence between 9 months and 3 years imprisonment.

[15] Whilst the starting point selected by the learned Magistrate is within the tariff, however, the test is that the starting point selected must have regard to the seriousness of the offence committed.

[16] In this case the Appellants stole assorted groceries valued at $77.18 from a supermarket. The value of goods or items stolen was small and there was no breach of trust involved.

[17] The learned Magistrate erred in principle when he selected a starting point of 30 months imprisonment which was on the higher scale of the tariff. The chosen starting point did not properly reflect the seriousness of the offending.

[18] This ground of appeal is allowed.

GROUNDS TWO AND THREE

[19] The above grounds of appeal can be dealt with together as follows:

That the Learned Magistrate erred when he failed to consider the fact that the items were partially recovered.

That the Learned Magistrate erred when he failed to consider the minimal value amount of the stolen items.

[20] There is no doubt that items worth $49.17 were recovered unfortunately nowhere in the sentence does the learned Magistrate make any reference to the recovery of the items as a mitigating factor.

[21] The learned Magistrate erred when he did not take into account a relevant consideration thereby failing to comply with section 4 (2) (j) of the Sentencing and Penalties Act which allows a sentencing court to take into consideration mitigating factors before sentencing.

[22] Since there was a substantial recovery of the stolen items to the value of $49.17 the learned Magistrate ought to have taken this aspect as a mitigating factor.

[23] Ground two of the appeal is also allowed. Ground three above has already been dealt with in ground one.

GROUND FOUR

That the Learned Magistrate erred when he failed to consider that the Appellants were in the position to restitute the complainant and had expressed a willingness to restitute in her mitigation.

[24] As part of their mitigation both the Appellants had stated their willingness to pay back the full amount. However, they did not put their intention into practice by making payments or suggesting to court when and how they would be making their payments.

[25] Section 4 (2) (h) of the Sentencing and Penalties Act states:

"(2) In sentencing offenders a court must have regard to -

> *(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree."*

[26] It appears from the mitigation of the Appellants that they were only making their willingness known to the court in respect of restitution without any genuine desire to pay. I reiterate the comments I made in *Hussein vs State [2012] FJHC 220, HAA 87 of 2016 [20 March, 2017]* at paragraph 20 in the following words:

"The wordings of section 4 (2) (h) of the Sentencing and Penalties Act demands action from an offender if restitution is to be meaningful, mere words are not sufficient."

[27] In this case the Appellants did not make any attempt towards restitution mere words are not sufficient no doubt the learned Magistrate did not consider the offer of restitution as genuine.

[28] This ground of appeal fails.

[29] I note the following at paragraph 4 of the sentence:
"These types of offences are prevalent in the society. You have committed the offence in a planned manner. I consider those as aggravating factors."

[30] This court does not agree that prevalence of an offence is an aggravating factor. In *Tuilaselase vs. State [2015] FJHC 920, HAA 33 of 2015 [25 November 2015]* Aluthge J. at paragraph 29 held that the fact that an offence was prevalent in society could not be considered as aggravating factor.

[31] The learned Magistrate fell into an error when he took the prevalence of the offence in the society as an aggravating factor.

[32] Having considered the facts of the case and the grounds of appeal I am of the view that the sentencing discretion exercised by the learned Magistrate resulted in a sentence that was harsh and therefore it is unreasonable and unjust to allow the sentence to continue (see *Sharma vs State [2015] FJCA 178, AAU 48 of 2011, (3 December, 2015).*

[33] In the interest of justice and in accordance with section 256 (3) of the Criminal Procedure Act I quash the sentence of the Magistrate's Court and sentence both the Appellants afresh.

[34] The maximum sentence for Theft is ten years imprisonment.

[35] After considering the seriousness of the offending I select a starting point of 18 months imprisonment.

[36] The aggravating factor is:
(a) the offence was committed in a planned manner.

[37] For the aggravating factor I add three months arriving at an interim sentence of 21 months imprisonment.

[38] The mitigating factors are:

Appellant one

- 42 years of age;
- 2 children 7 and 13 years of age;
- Divorced;
- Supports her family;
- Seeks forgiveness;
- Substantial recovery of items.

Appellant two

- 44 years of age;
- 4 children 20, 16, 10 and 4 years of age;
- Divorced;
- Seeks forgiveness;
- Sole breadwinner;
- Substantial recovery of items.

[39] For the mitigating factors I deduct 4 months bringing the interim sentence to 17 months, for the early guilty plea I give a further deduction of 6 months. The final sentence for each of the Appellant is 11 months imprisonment. I understand that the Appellants have served nearly 5 months of their sentence.

[40] I decline to suspend the final sentence of both the Appellants due to the circumstances of the offending and their previous record.

[41] The new sentence of 11 months imprisonment for each Appellant will assist them in rehabilitation.

ORDERS

1. The appeal against sentence is allowed.

2. The Appellants are each sentenced to 11 months imprisonment from today.

3. 30 days to appeal to Court of Appeal.

Sunil Sharma

Judge

At Lautoka
25 April, 2017

Solicitors

Office of the Legal Aid Commission for both the Appellants.

Office of the Director of Public Prosecutions for the Respondent.