IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 57 OF 2016

BETWEEN : ANATENA RARAWA

Appellant

AND : STATE

Respondent

Counsel : Ms. V. Narara for the Appellant

Ms. L. Latu for the Respondent

Date of Hearing : 18th January, 2017

Date of Judgment : 1st February, 2017

JUDGMENT

Background

1. The Appellant was charged before the Magistrates Court at Lautoka with 7 counts of Forgery contrary to Section 156(1) (a) ((b), 7 counts of using Forged Document contrary to Section 157 (3) (a) (b) and 7 counts of Obtaining Financial Advantage by Deception contrary to Section 318 respectively of the Crimes Decree 44 of 2009.

2. On the 26th October, 2015, the Appellant entered a plea of guilty on her own free will. She agreed the summary of facts and was sentenced on the 9th May, 2016 for all counts to 3 years' imprisonment with 2 years' non-parole period to be served concurrently.

3. Being aggrieved by the sentence, Appellant filed this appeal one week out of time. Having been granted leave to appeal out of time, the Appellant filed written submissions. Both parties seek a judgment on respective written submissions filed.

4. The grounds the Appellant now relies on are as follows:

   (i) *The learned Magistrate erred in law and in principle in failing to make a discount for an early guilty plea.*

   (ii) *The learned Magistrate failed to give considerable consideration to the fact that the Appellant was a first offender making the sentence harsh and excessive and,*

   (iii) *The learned Magistrate erred in fact and in law when he failed to give the Appellant sufficient time to seek further legal advice and submit her mitigation grounds.*

5. The summary of facts admitted by the Appellant are as follows:-

   Between 30th day of September, 2013 and 19th day of September, 2014, at Westpac Bank Lautoka, ***Anatena Rarawa****, 24 years, Domestic Duties of Matawalu Village, Lautoka forged the signature of* ***Rosina Vereivalu****, 31 year-old student*

of Howell Road, Suva on seven [7] different occasions on Westpac withdrawal slips and withdrew $17,000.00 from the account of Rosina.

On 19th September 2014 Rosina went to Westpac Bank to withdraw cash when she was told by Bank teller that, in the morning, $2000.00 had already been withdrawn from her account. Rosina told that she did not withdraw any money in the morning and upon enquiry she was given the bank statement.

Matter was reported to Police and investigation was conducted and all the relevant documents and footage was obtained from the bank. The footage shown was of Anatena, cousin of Rosina.

Anatena was brought in under arrest and interviewed under caution where she admitted the allegation. Anatena stated that she knew that Rosina had this account at Westpac bank as she filled all the documents to create this account. Anatena also stated that she knew Rosina's signature as she signed few documents on her behalf when told by Rosina to do so while both were working at Turtle Islands. Anatena stated that she had used all the cash she had withdrawn.

Law

6. It is well settled that sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

The Fiji Court of Appeal in ***Bae v State*** *[1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:*

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).*

7. In ***Sharma v State*** **[2015] FJCA 178; AAU48.2011 (3 December 2015)** the Fiji Court of Appeal discussed the proper approach to be taken by an appellate court when called upon to review the sentencing discretion of a court below:

> *"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.

Analysis

Ground (i) ***failure to make a discount for an early guilty plea***

8. The learned Magistrate in paragraph 5 of his Ruling did in fact consider the Appellant's early guilty plea. However, he did not separately discount for the early guilty plea but had subsumed this factor as part of mitigation in arriving at the final term of imprisonment imposed on the Appellant.

9. The Sentencing and Penalties Decree does not specifically say that quota for an early guilty plea should be separately discounted. Section 4(2) (f) reads as follows:

> *4(2) In sentencing offenders a court must have regard to —(f) 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;*

10. There is, however, a body of case law developed in Fiji that when there is an early guilty plea, this should be discounted separately independent of other mitigating factors.

11. In ***Naikelekelevesi v State*** [2008] FJCA 11; AAU0061.2007 (27 June 2008) Fiji Court of Appeal observed at Paragraph 22:

"In Fiji sentencing now involves a more structured approach incorporating a two tier process. 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, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. ***Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case".*** *(emphasis added)*

12. In ***Rainima v State*** [2015] FJCA 17; AAU0022.2012 (27 February 2015) Madigan JA endorsed the view taken in ***Naikelekelevesi v State*** and said in paragraphs 45 and 46:

"Although the judge passing sentence below took all matters complained of into consideration when assessing an appropriate "global" sentence, it is better sentencing practice to specify terms of discount when allowing for such matters as pleas of guilty, time on remand and clear record for example. The convict and the reader can then see easily the various components of a sentence and sentence appeals could be prevented....

..... 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.

13. Taking a different view, the Court of Appeal in ***Khan v The State*** [2014] FJCA 92;

AAU 105/2011 (2 June 2014) it was observed:

> *"the Sentencing and Penalties Decree has left it to the decision of the sentencing court to give an appropriate weight to a guilty plea when sentencing an offender"*

14. While making the above observation, the court further opined that:

> *"**Naikelekelevesi's** case was considered before the Sentencing and Penalties Decree came into effect in 2010. The Sentencing and Penalties Decree has not endorsed the **Naikelekelevesi** principle"*

15. Despite the observation added by Madigan JA to the Judgment in ***Rainima v State,*** (supra at paragraph 12) the Court of Appeal in that case affirmed the sentence in court below on the basis that the learned sentencing Magistrate had taken the early guilty plea into account in determining the sentence although he had 'subsumed' this factor among the other factors that were considered as mitigating factors.

16. Sentencing of offenders is an integral and important part of the Administration of Criminal Justice process. When statutes have set out different levels of punishment to different offences, it leaves a broad discretion on a court to determine the exact type and the level of punishment that will be imposed in a given situation.

17. Sentencing and Penalties Decree 2009 sets out broad guidelines on sentencing as well as specific requirements that need to be adhered to, in imposing sentences of imprisonment while recognizing in Section 4(2) of the Decree several factors a

court must have regard to in sentencing offenders. They include: whether the offender pleaded guilty or not, the stage at which such plea was entered if he had pleaded guilty and whether the offender's conduct is an indication of remorse or lack of remorse. This section also recognizes the impact of an offence on any victim as a factor a court must give due regard to, in deciding on the sentence, in a given situation.

18. The sentencing Magistrate at paragraph 5 of the Ruling had observed the following:

> *(a) "The mitigation factor is your early guilty plea and you have saved Court's time and resource. This is an indication of remorse on your part".*

19. The sentencing Magistrate had taken the 'guilty plea' into account in determining the sentence, despite he had 'subsumed' this factor among the other factors that were considered as mitigating factors and had given a discount of two years. Therefore, this court is not inclined to interfere with the sentencing discretion of the sentencing Magistrate. This ground fails.

Ground II –***Failure to consider that the Appellant is a first offender***

20. The sentencing Magistrate at paragraph 4 of the Sentencing Ruling in fact considered that the Appellant was a first offender and gave an appropriate discount. Therefore, I do not see any merit in this ground.

21. The Counsel for the Appellant has cited the following paragraph from the judgment of ***State v Roberts*** *[2004] FJHC 51; HAA0053J.2003S (30 January 2004)*

and argues that a lenient sentence was warranted to the Appellant.

> *"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".*

22. There can be no doubt that in Appellant's case there is a bad breach of trust, the money stolen is high in value and she did no attempt at reparation. She forged complainant's signature different occasions on Westpac withdrawal slips and withdrew $17000.00. She had filled up all the documents on behalf of the complainant to create the account and had known the complainant's signature as she had signed on previous occasions on complainant's behalf when both were working at Turtle Islands. She used that knowledge to forge the bank slips.

<u>Ground III</u> – *Failure to give the Appellant sufficient time to get legal advice and submit mitigation*

23. The Appellant had been produced before the learned Magistrate on the 08th October, 2014. It appears from the case record that on the 2nd March 2015 the learned Magistrate had explained the Right to Counsel to the Appellant. The

Appellant had indicated that she would seek legal assistance from the Legal Aid Commission. She, however, failed to appear on two occasions thereafter and a bench warrant was issued. When she was arrested and brought before court, bench warrant was cancelled. She pleaded guilty to all the counts on her own free will. The case was then put off for 12th October, 2015 to file the summary of facts on which date, the Appellant again failed to appear.

24. There is no evidence that the learned Magistrate had inquired from the Appellant whether she had sought legal assistance from the Legal Aid Commission when he read the summary of facts to the Appellant.

25. The right to counsel and legal aid are not absolute and not something to be imposed but something to be exercised when they have been explained. Since the Applicant had been explained of her rights, there was no need for the learned Magistrate to explain that right over and over again and await any counsel for mitigation. The learned Magistrate had given adequate time to file mitigation.

26. The Appellant had effectively mitigated herself and stated that she was a first offender; 35 years of age, married with 3 children; reconciled with the complainant in the traditional manner and sought forgiveness from court for which she received a substantial discount. She has not revealed to this court what other grounds of mitigation she could have advanced had she been represented by a counsel. Therefore, there is no merit in this ground.

27. All the offences with which the Appellant was charged carry a maximum sentence of 10 years' imprisonment. In relation to Forgery offence, Madigan J in

State v Prasad **[2011]** FJHC 218; CRC024.2010 (19 April 2011), observed at paragraphs 30 and 31 as follows:

> *" ...The tariff for forgery has always been seen as between eighteen months to three years imprisonment depending on the circumstances of the case. It is the Court's view that this tariff having been in place for many years seriously needs to be revisited. In these lean economic times forgery, especially by those in positions of trust, is becoming far too prevalent and the forgery is usually the conduit to obtaining money or property by means of the uttering of the forged document.*
>
> *There is no reason now why the range for forgery should not be between 3 years and 6 years, with factors to be considered to be –*
>
> *a high gain – actual or intended.*
>
> *b Whether the accused a professional or non professional.*
>
> *c Sophisticated offending with high degree of planning.*
>
> *d Target individuals rather than institutions.*
>
> *e Vulnerable victim*

28. The forgeries that the Appellant had committed can be seen to satisfying many of these factors. They were a serious breach of trust. There was a degree of pre planning and repeated offending on a vulnerable victim. She had gained from the offence and no repayment made. All of these are serious aggravating features.

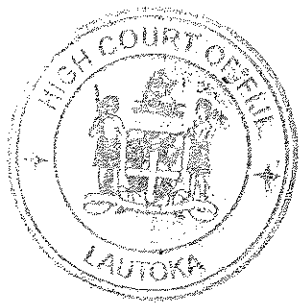
29. As emphasised in ***Sharma*** (supra) the approach taken by this Court as an appellate forum is to assess whether in all the circumstances of the case the

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. The sentence actually imposed by the sentencing Magistrate falls within the permissible range and is at the bottom edge of tariff and quite lenient. Therefore, it cannot be said that the impugned sentence is harsh and excessive.

Order

30. Sentence imposed by the learned Magistrate is neither excessive nor unreasonable. Therefore, I affirm the sentence imposed by the learned Magistrate. The appeal against sentence is dismissed.

31. 30 days to appeal to the Court of Appeal.



Aruna Aluthge

Judge

At Lautoka

1st February,2017

Solicitors: **Legal Aid Commission for the Appellant**

Office of the Director of Public Prosecution for the Respondent