

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.: HAA 018 OF 2017**

**BETWEEN:**                      **IMANUELI TUNI**

**Appellant**

**A N D:**                              **STATE**

**Respondent**

**Counsel:**                      Appellant In Person  
Mr M. Vosawale for Respondent

**Judgment:**                      24<sup>th</sup> July 2017

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## **JUDGMENT**

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**Introduction**

1. The Appellant was charged in the Magistrate's court in Suva for one count of Theft contrary to Section 291 (1) of the Crimes Act. The Appellant pleaded not guilty for the offence and the matter proceeded to hearing. At the conclusion of the hearing, the learned Magistrate found the Appellant is guilty for the offence and convicted accordingly. The learned Magistrate then sentenced the Appellant for the period of twenty six (26) months imprisonment with non-parole period of eighteen (18) months. Aggrieved with the said conviction and the sentence, the Appellant filed this Petition of Appeal.
2. The Appellant filed this petition of appeal by himself, which does not carry same clarity as of the drafting of a qualified legal practitioner. Having carefully considered the Petition of Appeal, I find the main contention of the Appellant in this appeal against the conviction is founded on the issue of identification. The Appellant contents that the learned Magistrate erroneously accepted the evidence of identification in order to reach to his conclusion. The

Appellant argues that the learned Magistrate failed to take into consideration the following issues, that:

- i) The inconsistency nature of the evidence given by the complainant in the court with the statement made to the police,
- ii) Photo identification,
- iii) Identification of the accused by the complainant at the scene of the crime.

### **Background**

3. The prosecution alleged that the Appellant together with others stole \$15,000 of cash from the complainant. The complainant came to the back side of the MHCC building in order to park her vehicle as she wanted to go to the bank. While she was parking her vehicle, the appellant and his accomplices came and started to talk to her. The Appellant was talking to her as they wanted to distract her attention from the hand bag that was on the front passenger seat. According to the evidence given by the complainant, one of the Appellant's accomplices grabbed the purse with the money while the accused was talking to the complainant. The complainant said that she had been talking to the accused for about five minutes and clearly saw him. The complainant was shown photos of the known criminals in Suva by a police officer when she went to the police station to report this incident. She identified the Appellant in one of those photos. Few days later, she was called for an identification parade, where she again identified the Appellant.
4. The Appellant denied the allegation and adduced evidence that he was not at that place at the material time as he was at a house of his friend and selling mobile phones.

### **Inconsistence Nature of the Evidence given by the Complainant with the Statement made to the Police.**

5. The Appellant argues in his submissions that the learned Magistrate failed to take in to consideration the inconsistency nature of the description of the accused given by the complainant in her statement made to the Police and the evidence given in the court. The

Appellant further contents that the learned Magistrate has failed to take into consideration about the inconsistency nature of the time given by the complainant in her statement made to the police. The evidence is what a witness says on oaths in the court. The contents of the previously made statement are not evidence unless it is tendered as exhibits in the hearing.

6. According to the record of the proceedings in the Magistrates Court, I do not find the defence has taken this issue of inconsistency when the complainant was given evidence. Neither the defence tendered the statement of the complainant as exhibits. Under such circumstances, the learned Magistrate is not required to consider such inconsistencies when he evaluate the evidence given by the Complainant.

#### **Identification made by the Complainant at the Scene of the Crime and Photo Identification**

7. The Appellant argues that the learned Magistrate has failed to consider that the complainant cannot make a positive identification within five minutes. She was trying to park her vehicle while talking to the appellant at that time. He further submits that there was no special reason for the Complainant to remember the accused.
8. The learned Magistrate in paragraph 28 to 34 of his judgment has extensively considered the evidence of identification based on the guidelines set out in **R v Turnbull ( 1977) Q.B.224**. I find the learned Magistrate has applied those guidelines with the evidence adduced in the hearing in a proper and correct manner.

#### **Appeal against the Sentence**

9. The contention of the Appellant against the conviction is mainly founded on the ground that the sentence is harsh and excessive.
10. The Appellant has been sentenced for a period of twenty six (26) months imprisonment with a non-parole period of eighteen months (18).

11. Goundar JA in Saqanaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015) has discussed the applicable principles of reviewing of a sentence by an appellate court, where His Lordship held that:

*“It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:*

- i) Whether the sentencing judge acted upon a wrong principle;*
- ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
- iii) Whether the sentencing judge mistook the facts;*
- iv) Whether the sentencing judge failed to take into account some relevant consideration.*

*Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)”*


12. Justice Madigan in Ratusili v State [2012] FJHC 1249; HAA011.2012 (1 August 2012) has expounded the applicable tariff limit for the offence of Theft, where His Lordship said 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.*

13. The learned Magistrate has considered Ratusili (supra), Naisilisili v State [2017] FJHC 77; HAA82.2016 (8 February 2017) in order to identify the applicable tariff limit for the offence of Theft.
14. Having considered the aggravating and mitigating grounds, the learned Magistrate has reached to the final sentence of twenty six (26) months which is within the acceptable tariff limit for the offence of theft that involves with substantively large sum of money.
15. In view of these reasons discussed above, I find that the leaned Magistrate has applied the correct sentencing principles in reaching his final sentence of twenty six (26) months of imprisonment.
16. Having considered the above discussed reasons, I do not find any merits in the grounds of appeal. I accordingly refuse and dismiss this Appeal.
17. Thirty (30) days to appeal to the Fiji Court of Appeal.



  
R.D.R.T. Rajasinghe  
Judge

At Suva  
24<sup>th</sup> July 2017

Solicitors  
Appellant In Person  
Office of the Director of Public Prosecutions for the Respondent.