

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

**Criminal Appeal No.: HAA 82 of 2016**

**EPELI NAISILISILI**

vs.

**STATE**

**Counsel** : Appellant in person  
Mr. T. Qalinauci for the State

**Dates of Hearing** : 3 February, 2017

**Date of Judgment** : 8 February, 2017

---

**JUDGMENT**

---

- 1] On the 25<sup>th</sup> October 2016 the appellant was convicted on his own plea for one charge of theft contrary to section 291(1) of the Crimes Decree 2009. He was sentenced on 25<sup>th</sup> November to a term of 18 months with a minimum to be served of 12 months.
- 2] The appellant originally appealed both the conviction and sentence but in written submissions filed at the hearing of the appeal abandoned the appeal against conviction. Consequently the appeal against conviction is dismissed.

3] The appeal against sentence is extant and is founded on the following grounds:

1. The Magistrate erred in picking a starting point of 2 years.
2. He erred in following a judgment of Madigan J. as to tariff.
3. He erred in not applying ss 4(2), 15(3) and 16(1) of the Sentencing and Penalties Decree 2009.
4. The sentence is manifestly harsh and excessive.
5. The Magistrate failed to apply proper discount for relevant mitigating factors.
6. He mistook the facts.

4] The facts admitted by the appellant in Court were as stated by the Magistrate to be:

*“On the 20<sup>th</sup> August 2016 at about 9am the Complainant who came from Tahiti for a visit, was going to buy some cassava for his friends. You came from behind and grabbed his wallet from the jacket pocket and ran away. A security officer who was nearby saw the incident and gave chase with another Police Officer and you were arrested. The stolen cash was recovered.”*

5] In extremely well crafted written submissions, the Appellant pleads that the sentence is excessive given the reasonably small sums stolen and that they were recovered. He submits that the Magistrate failed to consider that no force was used and the victim suffered no injuries. He produced in Court a contract of employment to prove that he has a job waiting for him. He intelligently discusses in his written submissions the differing philosophies of sentencing practice using relevant case law in illustration of his arguments. He takes issue with the Magistrate’s application of this Court’s judgment in **Ratusili** HAA011 of 2012 by saying that the within offence was but a “simple opportunistic theft without any serious aggravated (sic) features.” He cites other theft cases with lesser sentences passed.

- 6] The cash stolen was NZD\$140 and FJD\$125.
- 7] The State too has filed written submissions in which Mr. Qalinauci seeks to defend the Magistrates sentence on the basis that this was not the appellant's first offence.

### **Discussion**

- 8] The maximum penalty for theft is 10 years imprisonment and the case of **Ratusili** (supra) is still the subsisting authority for the sentencing of offences of theft.
- 9] The Magistrate was quite correct in relying on it to take his starting point of 2 years imprisonment.
- 10] The erudite written submissions of the appellant are unfortunately defeated by two very important factors:-
  - First his previous criminal record; and
  - Secondly the fact that the victim was a tourist.
- 11] The appellant has three previous convictions which are "alive". One a minor conviction for criminal trespass, one a conviction for attempted aggravated burglary, and unfortunately for the appellant a previous conviction for larceny in 2010 for which he received a 12 month sentence suspended for three years.
- 12] That one conviction brings him within the 9 month to three years tariff.
- 13] It is true that the sums stolen were small and it is true that they were recovered almost immediately. It was a spontaneous theft without sophisticated planning.

14] What this Court finds as particularly aggravating is the fact that the victim was a tourist who had only arrived in Fiji from Tahiti the day before.

15] This Court said in **Tevita Vatukarasa** HAC 28 of 2008Ltk (14 April 2010):

*“The offence was committed against a tourist to Fiji and this Court has a zero tolerance policy of crimes committed against tourists. The tourist industry is the major contributor to the economy of Fiji, particularly in this part of the country, and any interference with the confidence of tourists coming here will receive harsh punishment.”*

16] Similar sentiments were expressed in **Pauliasi Yara** HAC44 of 2012S.

17] Had the victim not been a tourist then the arguments of the Appellant would have force in that it was a simple spontaneous theft of reasonably small sums but one of the factors referred to in **Ratusili** (*supra*) is:

*“regard should be had to the nature of the relationship between offender and victim”..*

18] Even though the Magistrate did not refer to the aggravation of the victim being a tourist, it was obviously a factor that led him to acting in his discretion to take the high starting point of 2 years.

19] The appellant’s prior conviction for larceny brings him within the enhanced sentencing provisions authorized by **Ratusili** and the victim being a tourist adds to the seriousness of the offence.

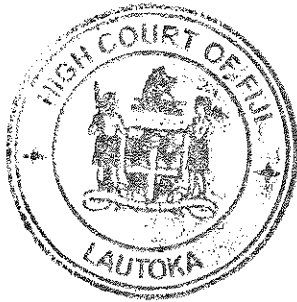
20] The Court of Appeal held in **Sachindra Nand Sharma** AAU 48.2011 (3 December 2015) that when dealing with appeals against sentence if there

has been an error in the exercise of the sentencing discretion, the Court will dismiss the appeal in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. (para 45).

- 21] This decision does not of course apply to the High Court. This Court has very wide powers on appeal pursuant to s.256 (2) of the Criminal Procedure Decree. The Court of Appeal does not have such legislative provisions of procedure.

**Conclusion**

- 22] This court is exercising its powers under s.256 (2)(a) and s.256 (2)(f) in dismissing the appeal and confirming the sentence of 18 months imprisonment with a minimum to be served of 12 months.



A handwritten signature in black ink, appearing to read "P. Madigan".

**P. Madigan  
JUDGE**

**At Lautoka  
8<sup>th</sup> February 2017**