IN THE HIGH COURT OF FIJI
AT LAUTOKA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL CASE NO. HAA 90 OF 2017

BETWEEN : PRENEY AJNESH DEO

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Ms. L. M. Ratidara for Appellant
Mr. T. Qalinauci for State

Date of Hearing : 07th November, 2017
Date of Sentence : 30th November, 2017

JUDGMENT

Background

1. This is an appeal filed by the Appellant against his sentence. The Appellant was charged in the Magistrates Court at Sigatoka with one count of Theft contrary to Section 291(1) of the Crimes Act, 2009. The information reads as follows:

Statement of Offence

THEFT: Contrary to Section 291 (1) of Crimes Decree No. 44 of 2009.

Particulars of Offence

PRENEY ANJESH DEO on 03rd day of September, 2016 at Sigatoka in the Western Division, dishonestly appropriated 9 x 1 kg packet prawns worth $400.00, the property of Outrigger Beach Resort with intent to permanently deprive the said Outrigger Beach Resort of the properties thereof.

2. On 24th of July, 2017 Appellant voluntarily pleaded guilty to the above charge in the presence of his Counsel from the Legal Aid Commission. On 28th of July,

2009, the court convicted Appellant and sentenced him to an immediate custodial sentence of 9 months' imprisonment.

3. Being aggrieved by the said sentence, Appellant filed this appeal within the stipulated time frame on following grounds of appeal.

   i. That the learned Magistrate erred in law and in fact when he failed to suspend the sentence after a full restitution to the Court.

   ii. The learned Magistrate erred in law and in fact when he wrongly calculated the one third discount for his early guilty plea and ultimately coming to a wrong sentence term.

   iii. That the learned Magistrate erred in law and in fact in failing to suspend his sentence on account of his status as a first offender.

4. Both Counsel filed helpful written submissions and, in addition to that, they made oral submissions.

The Law

5. In ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015), the Court of Appeal laid down the approach to be taken by an appellate court when a sentencing discretion by a court below is challenged. The Court observed:

> *"In **Kim Nam Bae v The State** (AAU 15 of 1998; 26 February 1999) this Court 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 principles, 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)."*
>
> *"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"

The Facts

6. The Appellant agreed following facts in the Magistrates Court:

On the 3rd day of September, 2016 around 1900 hours at Outrigger Beach Resort, Appellant, aged 38, stole 9 x 1 kg packed prawns worth $ 400.00, property of Outrigger Beach Resort. Appellant was working as Kitchen hand at Outrigger Beach Resort with the Executive Chef. when the chef checked her stock, she noticed that, 4 x 1kg packed prawns was hidden in one white bucket inside the freezer. When chef saw this she informed her Head Chef who was on day off. Head Chef requested Manager of Outrigger Resort to assist the Executive Chef. Then Manager requested Executive Chef to carry out her normal duty and to keep an eye on the bucket in case of any movement. Few minutes later Executive Chef noticed Appellant taking the bucket with prawns to canteen with one carton of packed prawns as well. Appellant then placed all the packed prawns in a rubbish bin and took it to nearby engineering and laundry area near the fence and packed all the prawns in a green linen bag and threw it over the fence towards Sunset St. When the Executive Chef noticed what Appellant was doing, she informed the Manager. Manager then went to Sunset St. where the prawns were and waited to see who comes to pick this bag. After around 1900 hours Appellant reported off duty, came to where the bag of prawns was and was trying to go away when the Manager approached Appellant and took the bag of prawns, while Appellant managed to run away. Later the matter was reported at Sigatoka Police Station. Appellant was later arrested and caution interviewed in which he admitted taking the prawns.

Analysis

Ground i and iii

7. Grounds (i) and (iii) can be considered together as both grounds relate to suspension of a sentence.

8. Section 26 of the Sentencing & Penalties Act provides for suspended sentence as follows:

> *26. – (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*
>
> *(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -*
>
> *(a) does not exceed 3 years in the case of the High Court; or*
>
> *(b) does not exceed 2 years in the case of the Magistrate's Court.*

9. The term of imprisonment imposed by the learned Magistrate in this case is for a period of 9 months. Therefore, in light of the above mentioned Section 26 (2) (b), the learned Magistrate had a discretion to suspend the sentence if he was satisfied that it was appropriate for him to do so. The learned Magistrate in exercising his discretion opted not to suspend the sentence.

10. The sentence can only be overturned if it were shown that learned Magistrate had failed to exercise his discretion judiciously.

11. In exercising his discretion, sentencing judge is expected to consider the sentencing guidelines set out in Section 4 of the Sentencing and Penalties Act 2009 as well as case authorities pertaining to suspended sentence.

12. In ***DPP v Jolame Pita*** (1974) 20 FLR 5, the Supreme Court held:

> *"Once a court has reached the decision that a sentence of imprisonment is warranted there must* ***be special circumstances to justify a suspension****, such as an offender of comparatively good character who is considered suitable for, or*

in need of probation, and who commits relatively isolated offence of a moderately serious nature but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender or the circumstances of the offence as for example, the misappropriation of a modest sum not involving a breach of trust or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate." (emphasis added)

13. The Maximum sentence for Theft is ten year's imprisonment. The accepted tariff for theft arising from breach of trust is 18 months to 3 years' imprisonment. (***State v Pauliasi Vadunalaba***, Criminal Case No. HAC 134 of 2008).

14. In ***Ratusili v State*** [Criminal Appeal No. HAA 11 of 2012, 1 August 2012] following sentencing principles were established:

(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.(emphasis added)

15. The Appellant stole 9 packets of 1kg prawns worth $ 400.00 from his employer – Outrigger Beach Resort. He breached the trust of his employer. The theft was well planned. He was a first offender. The stolen goods were fully recovered.

16. The learned Magistrate took into account the full recovery of the stolen items as part of mitigation:

"...further deduct 6 months for other mitigating factors inclusive of the stolen prawns recovered and returned to complainant."

17. However the recovery is not an indication of remorse in this case. The Appellant had not returned the stolen items voluntarily. If he had returned the stolen items voluntarily, then the learned Magistrate could have considered Appellant's case to be a genuine case of remorse in light of his early guilty plea. However, the stolen goods were seized by the General Manager of Outrigger Beach Resort when the Appellant ran away leaving the stolen items behind. Furthermore, the offending was well-planned by the Appellant.

18. Justice Shameem in ***State v Semiti Cakau*** (HAA 125/2004S) observed;

> *"there are ample authorities supporting the proposition for custodial sentences on fraud and breach of trust offences. Custodial sentences are usually imposed in spite of the offender's good character. People of previously good character are often given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust makes a custodial sentence inevitable except in the most exceptional cases where full restitution had been made. Non-custodial sentences in those circumstances are not to be seen as offenders buying their way out of prison but as true remorse".*

19. In ***Khera v State*** [2016] FJSC 2; CAV0003.2016 (1 April 2016) [2016] FJSC 2; CAV0003.2016 (1 April 2016), the question of restitution was raised. Chief Justice Gates observed that restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences.

> *"However the making of restitution is regarded as an expression of sorrow for what has admittedly been done, and as a demonstration of regret and remorse".*

20. In ***State v Mahendra Prasad*** [2003] FJHC 320; HAC0009T.2002S (30 October 2003) it was stated;

> *"Where there is an earnest and sincere wish to effect reparation to the victim and there is prompt an expression of remorse, a suspended sentence is not wrong in principle.*

21. Furthermore, Goundar JA stated that "in fraud cases, payment of restitution before any charge is laid may indicate that the offender is genuinely remorseful to justify a suspended sentence, while a late payment of restitution after a charge is laid may indicate that the offender is trying to buy his way out of prison".

22. The learned Magistrate has taken into account the recovery of items as a mitigating factor. He has given reasons why a suspended sentence was not warranted in the circumstances of the case. Therefore, ground 1 must fail.

23. The learned Magistrate took into account that the Appellant was a first offender and gave a discount but it does not mean that the Appellant will automatically get a suspended sentence. Especially in a breach of trust situations, courts are not inclined to suspend the sentence.

24. In ***State v Tilalevu*** (2010) FJHC 258; HAC081.2010 (20 July 2010), Nawana J stated:

> *I might add that the imposition of suspended terms on first offenders would infect the society with a situation – which I propose to invent as 'First Offender Syndrome' – where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule.*

25. Ground iii has no merit and should therefore be dismissed.

Ground ii

26. The Appellant contends that the learned Magistrate erred in law and in fact when he wrongly calculated the one third discount for his early guilty plea and ultimately coming to a wrong sentence term.

27. The learned Magistrate considered the early guilty plea and discounted the sentence by 3 months. However, he did not give a 1/3 discount. In ***Qurai v State*** [2015] FJSC 15; CAV24. 2014 [20 August 2015]. The Supreme Court held:

> *"[54] There is no pronouncement of this Court in the question of the discount to be given for a guilty plea made a very early stage, although this aspect of the matter was discussed by Madigan JA in his concurring opinion in Rainima v The State [2015] FJCA 17; AAU0022.2012 (27 February 2015) at paragraph [46] where his Lordship was constrained to observe as follows:-*

"[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 authoritative 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. "(Emphasis added)

[55] Having said that, his Lordship agreed with the other Justices of Appeal of the Court of Appeal (Calanchini P and Jayasuriya JA) that, given the very lenient sentence already passed on the appellant in that case, the appeal against sentence should be dismissed.

[56] This Court takes cognizance, as it is bound to in terms of section 4(2) (b) of the Sentencing Decree, the existence in Fiji of a sentencing practice of allowing a discount of one third of the sentence for an early guilty plea. "

28. In light of the above case authorities, it should be accepted that there is well established practice (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. However, this is not a fixed formula applicable to all cases. The amount of deduction given will depend on the circumstances of each case and to be decided on a case by case basis. Specially when the final sentence falls within tariff and the prison term is for a short period, this practice may be dispensed with. One of the relevant considerations is at what stage of the proceeding was the guilty plea made.

29. There is no merit in any of the grounds raised by the Appellant. The appeal against sentence is dismissed. The sentence passed by the learned Magistrate at Sigatoka is affirmed.

Aruna Aluthge
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
30th November, 2017

Solicitors: **Office of the Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent