

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 71 of 2018

RENUKA DEVI

Appellant

VS

STATE

Respondent

Mr. M. Anthony for the Appellant
Mr. J. Niudamu for the State.

Date of Hearing: 1st November 2018

Date of Judgment: 1st November 2018

JUDGMENT

- 1.) On the 12th September 2018, the Appellant was convicted on her own plea of 14 counts of theft contrary to section 291(1) of the Crimes Act 2009.
- 2.) She was sentenced to 14 terms of 12 months' imprisonment, each term to be served concurrently with each other and with no minimum term imposed.
- 3.) The Appellant has made a timely application to appeal that Sentence on the grounds that:
 - The Starting point of the sentence (at 18 months) was excessive.
 - Insufficient weight was given to her character and mitigating factors
 - The learned Magistrate failed to take the principle of rehabilitation into account

- That the sentence was harsh and excessive in all the circumstances of the case.
- 4.) Both Counsel for the Appellant and the State have made helpful submissions in the hearing of this appeal and the Court has considered all that they have said and submitted.

Facts

- 5.) At all material times the Appellant, aged 52, was a secretary working for the Department of Health in Lautoka. In 2013, she was living in Ba and nursing her ailing mother who was severely incapacitated by a chronic heart disease. The mother was receiving Social Welfare Assistance and the appellant was appointed to be her sole caregiver and as such had complete authority to operate the account into which the Social Welfare monies were deposited.
- 6.) The mother died on the 15th December 2014.
- 7.) After the death, the Appellant continued to withdraw small amounts from the account until 4th February 2016. She did this on 14 occasions (each being a withdrawal of \$50); hence, the 14 separate charges.
- 8.) The matter came to the notice of the Department when the Bank card and authority expired.
- 9.) The appellant was arrested and interviewed under caution by the Police. She admitted taking the monies post mortem, but said that she was applying to funds to funeral rites.

Mitigation and Aggravation

- 10.) Mitigation advanced to the Court below including these factors:
- A first offence
 - Totally remorseful
 - Early plea of guilty
- 11.) The sentencing judge made mention of the aggravating features of
- Benefit derived from the offending
 - Breach of trust in concealing the demise of the mother.

- 12.) After rehearsing the applicable authorities the Magistrate proceeded to sentence as follows:

Sentence

- 13.) The learned Magistrate took a starting point of 18 months imprisonment for the first offence (each offence being identically worded). He then increased the sentence to 22 months in view of the aggravating features that he had earlier identified. For mitigation and her clear record he deducted 4 months and for the guilty plea he deducted another 6 months arriving at a total sentence of 12 months, which he imposed on all 14 charges and ordering them to be served concurrently.

Discussion

- 14.) It is now well established by authority that a sentence of theft for a first offender should be in the region of suspended to 9 months. (Ratusili [2012] HAA1/12)
- 15.) A sentence passed above this range can be passed in cases of thefts of large amounts, and /or where there has been a systematic and premeditated scheme to deprive.
- 16.) The learned Magistrate picked his high starting point for the reasons stated in his sentence "(stealing been systematic and carried out over a period of more than a year)".
- 17.) This Court cannot accept that "benefit derived from the offending" is a legitimate aggravating factor. It is part and parcel of the offence of theft. Every thief steals to gain a benefit for himself or for others.
- 18.) To add 4 months to the sentence for this invalid feature and for the breach of trust is in effect penalizing the appellant twice but adding more time to an already high starting point.
- 19.) In addition, the Court agrees that not enough credit was given to the Appellant for her clear record and her early plea of guilty.
- 20.) This Court will therefore proceed to recast the sentence pursuant to section 256(2) (a) of the Criminal Procedure Act 2009.

The Revised Sentence.

- 21.) The Court adopts a starting point of 12 months' imprisonment. This starting point is outside the accepted range of 0 to 9 months because it is sentencing a systematic fraud of the Fiji Government over a period of one year.
- 22.) The Department of Social welfare had trusted the Appellant to administer the emergency funds on their behalf and the Appellant abused that trust after the death of her mother. For that very valid aggravating feature I add a term of 4 months' imprisonment to the starting point bringing it to an interim total of 16 months.
- 23.) Credit must be given of course to the Appellant for her clear record and for her long service to the Lautoka hospital. For those very real mitigating features I deduct 6 months from the sentence leading to an interim sentence of 10 months.
- 24.) Her early plea of guilty to all 14 charges must too be recognized and to reflect that her sentence is further discounted to 7 months' imprisonment.
- 25.) The Appellant was acting in a state of grief after her mother's death and her claim that she was using Social Welfare money to pay for faith based funeral rites may well be true, but such an excuse cannot hold true for a full year of withdrawals. The Court does not believe she had any criminal intent save as to take advantage of what she saw as a government windfall.
- 26.) This sentence of 7 months imprisonment is passed on each of the 14 counts and there are to be served concurrently with each other.
- 27.) She will serve a total term of 2 months' imprisonment dated from 12 September 2018 and the balance of 5 months will be suspended for a period of two years.

- 28.) Given that the Appellant has already served 6 weeks of the two month incarceration component, presumably with good behaviour, this Court now orders that she be released immediately to commence serving the 5 months' suspended component.
- 29.) I request her Counsel to explain the meaning and penal implications of a suspended sentence.



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P.K. Madigan
Judge.

01/11/2018