IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 76 OF 2017

BETWEEN	:	**1. APAITIA TUIVALE** **2. LEPANI RATALETOKA**
		APPELLANTS
A N D	:	**THE STATE**
		RESPONDENT

Counsel	:	Ms. J. Singh [LAC] for the Appellants.
	:	Ms. L. Latu for the Respondent.
Date of Hearing	:	16 January, 2018
Date of Judgment	:	19 January, 2018

JUDGMENT

Background Information

1. Both the Appellants were charged with the offence of Theft contrary to section 291 (1) of the Crimes Act. It was alleged that both the Appellants between the 28th day of April to the 2nd day of May, 2017 at Vatukoula had stolen some motor cables measuring 95mm x 5 metre valued at $1,000.00, 35 mm x 12 metres valued at $1,800.00, 35mm x 12 metre valued at $1,800.00, 35 mm x 16 metres valued at $2,400.00 and a red wheel barrow valued at $180.00 all to the total value of $7,180.00 the property of Rattan's Civil Contractors.

2. In another count, the first named Appellant was charged for the offence of breaching conditions of bail contrary to section 26 (1) (a) of the Bail Act and the Bail Amendment Act. It was alleged that the first named Appellant had between the 28th day of April to the 2nd day of May, 2017 at Vatukoula breached the bail conditions imposed by the Tavua Magistrate's Court vide case no. 305/15 not to re-offend whilst on bail.

3. Both the Appellants had pleaded guilty when they appeared in court.

SUMMARY OF FACTS

4. The following summary of facts was admitted by both the Appellants:

"The accused namely Apaitia Tuivale, 25 yrs, U/E of Korowere, Vatukoula stole some motor cables of 95mm x 5 mtr valued at $1000.00, 35mm x 12 mtr valued at $1800.00, 35mm x 12 mtr valued at $1800.00, 35mm x 16mtr valued at $2400.00 and a red wheel barrow valued at $180.00 to the total value of $7180.00 the property of Rattans Civil Contractors between the 28/04/17 to 02/05/17 at Dam 1 site, Main Gate, Vatukoula.

On the above mentioned date, time and place the accused entered into the said place and cut the said motor cables and loaded in the said wheel barrow and peeled the said cable which was packed into two 50kg white bag. The accused then sold it at Lautoka at the South Pacific Metal Company in Lautoka who received $160.00. He used the money he earned from selling the said cable.

The accused admitted stealing and selling the said cables. The red wheelbarrow was recovered from where he peeled the cables before packing into the two white bags. The said bags with the cables were recovered as well.

The matter was reported to police and upon information received the accused was arrested, interviewed under cautioned and charged for Theft and one count of Breaching Bail Condition vide CF No. 305/15. The accused is in custody to appear at Tavua Magistrate Court today 5/5/17.

That is the case for Prosecutions.

"The accused namely Lepani Rataletoka, 25 yrs, U/E of Lololevu, Vatukoula stole some motor cables of 95mm x 5 mtr valued at $1000.00, 35mm x 12 mtr valued at $1800.00, 35mm x 12 mtr valued at $1800.00, 35mm x 16mtr valued at $2400.00 and a red wheel barrow valued at $180.00 to the total value of $7180.00 the property of Rattans Civil Contractors between the 28/04/17 to 02/05/17 at Dam 1 site, Main Gate, Vatukoula.

On the above mentioned date, time and place the accused entered into the said place and cut the said motor cables and loaded in the said wheel barrow and peeled the said cable which was packed into two 50kg white bag. The accused then sold it at Lautoka at the South Pacific Metal Company in Lautoka who received $160.00. He used the money he earned from selling the said cable.

The accused admitted stealing and selling the said cables. The red wheelbarrow was recovered from where he peeled the cables before packing into the two white bags. The said bags with the cables were recovered as well.

The matter was reported to police and upon information received the accused was arrested, interviewed under cautioned and charged for Theft contrary to section 291 of the Crimes Act No. 44 of 2009. The accused is in custody to appear at Tavua Magistrates Court.

That is the case for Prosecutions."

5. Both the Appellants admitted the summary of facts after it was read to them. Upon being satisfied that the Appellants had entered an unequivocal plea the learned Magistrate convicted both the Appellants as charged.

6. After hearing mitigation the Appellants were sentenced on 6th June, 2017 as follows:

   (a) Appellant One - Apaitia Tuivale for the offence of theft was sentenced to 3 years imprisonment and for the offence of breaching bail conditions he was sentenced to 4 months imprisonment. Both the sentences were to be served concurrently.

   (b) Appellant Two – Lepani Rataletoka for the offence of theft was sentenced to 3 years imprisonment.

   Both the Appellants are not eligible for parole until they have served a term of imprisonment of 24 months.

7. The Appellants being dissatisfied with the sentence filed a timely appeal against sentence which was later amended by the Legal Aid counsel who now appears for both the Appellants. The amended grounds of appeal are as follows:

   "1. That the learned Magistrate erred in law and in fact when he failed to consider the fact that the items were recovered.

   2. That the learned Magistrate erred in principle when he selected a starting point of 36 months imprisonment which was on the

higher scale of the tariff. The chosen starting point did not properly reflect the seriousness of the offending.

3. *That the learned Magistrate failed to consider the appropriate one third reduction from his early guilty plea and reduction from remand period allowing the Appellants sentence to be excessive within the circumstances.*

4. *That the learned Magistrate misdirected and erred in law and in principle when he failed to suspend the sentence considering the type of offending and section 26 of the Sentencing and Penalties Act.*

5. *That the learned Magistrate took extraneous factors when considering sentence.*

8. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

9. During the hearing, counsel for the Appellants withdrew the 5th ground of appeal and also informed the court that this appeal will only be against the sentence of theft.

10. The main thrust of the Appellants submission is that the sentence was excessive. The Appellants had pleaded guilty at the first available opportunity, were first offenders and there was full recovery of the stolen items. The Appellants also submit that a suspended sentence was an appropriate sentence in the circumstances of the offending.

LAW

11. In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must

demonstrate to the Appellate Court that the sentencing court fell in error whilst exercising its sentence discretion.

12. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

FAILURE TO CONSIDER RECOVERY OF ITEMS AS A MITIGATING FACTOR

13. The Appellants submit that the learned Magistrate took into account the recovery of the wheel barrow only as part of mitigation whereas when the summary of facts (which was admitted by both the Appellants) is taken into account it reveals that the stolen motor vehicle cables were recovered as well.

14. The summary of facts mentions the following in respect of the recovery of stolen items:

"The accused admitted stealing and selling the said cables. The red wheelbarrow was recovered from where he peeled the cables before packing into the two white bags. The said bags with the cables were recovered as well."

15. From the court records, it is also obvious that the learned Magistrate was incorrectly informed by the Prosecutor about the recovery of stolen items. At page 14 of the court records the following is noteworthy of what had transpired in court about the recovery of stolen items:

"Court: *Recovery*
Mr. Prakash: *Recovery is only the wheelbarrow*
Court: *And two counts against the accused. Items are recovered*
Mr. Prakash: *The recovery is the wheelbarrow*
Court: *Wheelbarrow*
Mr. Prakash: *Yes"*

16. Whatever the Prosecutor told the court was different from the summary of facts. It is a matter of good practice that Prosecutors are fully versed with the facts of their case so that such situations are avoided. There is, however, nothing to suggest that the omission in this case was intentional.

17. As a result of the above, the learned Magistrate only took into account the recovered wheel barrow as part of mitigation and not the motor cables. The learned Magistrate erred when he failed to take into account all the stolen items that were recovered as a mitigating factor *(see Abdul Jahid vs The State, Criminal Appeal No. HAA 05 of 2011 (12 May, 2011).*

HIGH STARTING POINT

18. The Appellants argue that the learned Magistrate erred when he selected a high starting point of 36 months imprisonment which has resulted in excessive punishment for the Appellants. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not this court is guided by the Court of Appeal in *Laisiasa Koroivuki –vs. - The State, Criminal Appeal No. AASU0018 of 2010* at paragraphs 26 and 27 the following is stated:

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

19. The maximum sentence for the offence of theft is 10 years imprisonment. In *Mikaele Ratusili vs. The State, Criminal Appeal No. HAA 011 OF 2012* Madigan J. after reviewing various and varying decisions on the tariff for larceny which offence has now been replaced by the offence of theft established the tariff for theft as follows at paragraph 13:

"(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 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."

20. At paragraph 10 of the sentence the learned Magistrate when selecting a starting point had relied on the case of *Naisilisili vs. The State [2017] FJHC 77; HAA 82 of 2016 (8 February, 2017)* as follows:

"...Justice Madigan further held that a subsequent offence of Theft would attract the sentence from 09 months to 03 years imprisonment".

21. The learned Magistrate selected a starting point of 36 months. The applicable tariff in this case is between 18 months and 3 years imprisonment. This was due to the substantial amount of property stolen ($7,180.00) and the degree of planning and premeditation involved.

22. Shameem J. in *State vs. Jona Saukilagi, criminal case no. HAC 21 of 2004S* had stated that the sentence for larceny of large amounts of money was between 18 months and 3 years imprisonment as follows:

"...In cases of the larceny of large amounts of money sentences of 1½ years imprisonment (Isoa Codrokadroka v. State Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (Sevanaia Via Koroi v. The State Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between the victim and the defendant. The method of stealing is also relevant."

23. At paragraph 12 of the sentence the learned Magistrate stated the following when selecting the starting point:

"This is well planned theft and high value of the stolen property that was committed by both the accused. I will take a starting point of 36 months imprisonment and will add your sentence by 10 months for the aggravating factor to the total of 46 months imprisonment..."

24. The learned Magistrate erred when he took into account the aggravating factors in selecting a starting point and then enhanced the sentence by adding the same factors of aggravation thus punishing the Appellants twice.

EARLY GUILTY PLEA AND REMAND PERIOD

25. The Appellants had pleaded guilty at the earliest opportunity when they appeared in court. This aspect was taken into account by the learned Magistrate, however, sufficient discount was not given for early guilty plea. I note that a 5 months reduction was allowed for the early guilty plea.

26. The Court of Appeal in *Poate Rainima vs. State, Criminal Appeal No. AAU 0022 of 2012 (27 February, 2015)* held that an early guilty plea should receive a discount of one third at paragraph 46 in the following words:-

"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."

27. The learned Magistrate did not allow sufficient discount to both the Appellants for their early guilty plea.

REMAND PERIOD

28. Both the Appellants were remanded in custody by the court. The sentence does not indicate any reduction being allowed to any of the Appellants. According to the court record the first Appellant was in remand from 5th May, 2017 to 6th June, 2017. The second Appellant was in remand from 16th May, 2017 to 6th June, 2017.

29. Section 24 of the Sentencing and Penalties Act states that any period of time during which an offender was held in custody be regarded as a period of imprisonment already served.

30. The learned Magistrate erred when did not reduce the sentence of the Appellants for the period they had been in remand.

SUSPENDED SENTENCE

31. The Appellants counsel submits that considering the age of the Appellants at the time of the offending, recovery of all the stolen items and their early guilty plea the learned Magistrate should have

exercised his discretion to suspend the sentence of both the Appellants.

32. Counsel further argues that under section 15(3) of the Sentencing and Penalties Act sentences of imprisonment should be regarded as the sanction of last resort.

33. Section 26 (2) (b) of the Sentencing and Penalties Act states:
"A court may only make an order suspending a sentence of imprisonment of the period of imprisonment imposed...
(b) does not exceed 2 years in the case of the Magistrate's Court."

34. The final sentence the learned Magistrate had arrived at was 36 months imprisonment under section 26(2) (b) of the Sentencing and Penalties Act the learned Magistrate had no discretion to suspend the sentence.

35. Having allowed some of the grounds of appeal it is in the interest of justice that both the Appellants be sentenced afresh in accordance with the powers vested in this court under section 256 (3) of the Criminal Procedure Act.

36. The sentence of the Magistrate's court is quashed for the offence of theft.

37. After considering the seriousness of the offending objectively, I select a starting point of 18 months imprisonment being on the lower range of the tariff.

38. The aggravating factors are:
(a) the degree of planning and premeditation involved in committing the offence;
(b) theft from a commercial premises;

(c) the value of the items stolen was substantial.

39. For the aggravating factors I add 18 months arriving at an interim sentence of 36 months imprisonment.

40. The mitigating factors are:
Appellant One/ Appellant Two
- 25 years of age;
- single/ married;
- student of Fiji National University/ Unemployed;
- first offender;
- full recovery of the stolen items;
- cooperated with police during investigation

41. For the above mitigating factors, I allow a reduction of 6 months this brings the sentence to 30 months. For guilty plea, I deduct a further 11 months the sentence is now 19 months imprisonment since the Appellants have been in remand a further reduction of one month is allowed as a term of imprisonment already served.

42. The final sentence for both the Appellants for the offence of theft is 18 months imprisonment. This sentence falls within the ambit of section 26 of the Sentencing and Penalties Act since it does not exceed 3 years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the term of imprisonment either wholly or partly if the court considers it to be appropriate to do so in the circumstances of the case.

43. The discretion to suspend the term of imprisonment must be exercised judiciously after identifying special reasons for doing so.

44. In order to suspend the sentence of the Appellants this court has to consider whether the punishment is justified taking into account the

offence committed by the Appellants. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

45. This court accepts that there are some factors in favour of both the Appellants such as they are first offenders, both 25 years of age at the time of the offending and persons of generally good character. On the other hand, both the Appellants have committed a serious offence of theft on a commercial enterprise as a result of planning and premeditation and their culpability is obvious.

46. After carefully weighing the factors in favour of both the Appellants and the serious nature of the offence committed, I am compelled to state that there is a need for special and general deterrence. I am satisfied that the term of imprisonment of 18 months is an appropriate punishment to be served and I therefore refuse to suspend the term of imprisonment.

47. To assist in rehabilitation, I impose a non-parole period of 12 months to be served before the Appellants are eligible for parole.

ORDERS

1. The appeal against sentence is allowed.

2. The sentence of the Magistrate's Court is set aside.

3. The Appellants are sentenced to 18 months imprisonment with a non-parole period of 12 months to be served before they are eligible for parole with effect from 6th June, 2017.

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
19 January, 2018

Solicitors
Office of the Legal Aid Commission, Lautoka for the Appellants.
Office of the Director of Public Prosecutions for the Respondent.