IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 29 OF 2018

BETWEEN:	**NAZIA NISHA**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel:	Mr. J. Reddy with Mr. J. Vulakouvaki for the Appellant Ms. S. Serukai for the State
Date of Hearing:	28th June 2018
Date of Judgment:	29th August 2018

JUDGMENT

1. The Appellant had been charged in the Magistrate's Court with one count of Conversion, contrary to Section 319 (1) (c) (i) of the Crimes Act. The particulars of the offence are that:

> *"Nazia Nisha between 1st day of January 2011 and 31st day of December 2011, at Nausori High School in the Central Division has been entrusted in cash of $9,054.95 by the Management of Nausori High School that she may retain in safe custody fraudulently converts to her own use and benefit."*

2. The Appellant pleaded not guilty for the offence. Hence, the matter proceeded to hearing. The prosecution had presented the evidence of three witnesses and the Appellant had given evidence for the defence. The learned Magistrate in his judgment dated 13th of February

2018, found the Appellant guilty for the offence of conversion as charged and convicted for the same accordingly. On the 1st of March 2018, the Appellant was sentenced for a period of 31 months imprisonment with a non-parole period of 20 months.

3. Aggrieved with the said sentence, the Appellant filed this appeal on the following grounds, which I reproduce verbatim as follows:

> *"That the sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case in view of the following grounds;*
>
> *i) That the Appellant was a 1st offender,*
> *ii) That the Appellant had a good character generally,*
> *iii) That the Appellant was remorseful for her actions,*
> *iv) That the Appellant was prepared to make restitution of the money,*
> *v) That the learned trial Magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances.*

The Law

4. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, where it was held that:

> *"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 principle, 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 of the relevant considerations, then the appellate court may impose a different sentence."*

5. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

> *"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."*

First and Second Grounds of Appeal

6. Section 4 (2) (i) of the Sentencing and Penalties Act states that the offenders previous character must be taken into consideration in sentencing.

7. Section 5 of the Sentencing and Penalties Act has stipulated the factors in which the court could consider when determining the character of an offender, where it states that:

> *"In determining the character of an offender a court may consider (amongst other matters) -*
>
> *i) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender,*
>
> *ii) the general reputation of the offender, and*

iii) any significant contribution made by the offender to the community, or any part of it,

8. I now take my attention to discuss the mitigatory value of the previous good character of an offender in respect of an offence involved with breach of trust.

9. Justice Shameem in **The State v Simeti Cakau (HAA 125 of 2004S)** has discussed the mitigatory value of the good character of offenders in respect of offences involved with breach of trust, where her Ladyship Justice Shameem expounded that:

> *"Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust, that renders serious fraud offences the worst type of offending in property related cases."*

10. The offender in **Simeti Cakau (supra)** was a clerical officer in the Republic of Fiji Military Force. Justice Shameem held that in order to hold such a position, a good previous character is one of the essential prerequisites. Likewise, an unblemished character is a *sine quo non* to obtain an employment at a school as such an employment requires a great amount of trust and honesty. Hence, the previous good character of the Appellant in this particular case has a minimal mitigatory value.

11. Accordingly, I do not find any merit in first and second grounds of appeal.

Third Grounds of Appeal

12. The third ground of appeal is founded on the contention that the learned Magistrate has not taken into consideration the remorsefulness of the Appellant in the sentence.

13. Section 4 (2) (g) of the Sentencing and Penalties Act states that:

> *"In sentencing offenders a court must have regard to —*
> *g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*

14. Accordingly, the court is allowed to consider the conduct of the offender during the trial in order to determine whether such conduct indicates any remorse of committing the offence. Apart from merely stating in the mitigation submission that the Appellant is remorseful of committing this crime, I do not find any conduct of the Appellant during the course of the trial, indicating that she was remorseful of committing this crime. Therefore, I do not find any merit in this ground of appeal.

Fourth Ground of Appeal

15. The fourth ground of appeal is based upon on the contention that the learned Magistrate has failed to take into consideration the fact that the Appellant was prepared to make restitution of the money.

16. Having carefully considered the record of the proceedings in the Magistrate's Court, I do not find at any instance that the Appellant or her counsel has indicated or made an application that she was ready to make the restitution of money. The Appellant had only indicated her intention of restitution after she was found guilty and convicted for this offence. Restitution is not a method of solicitation for a lenient sentence. It must be a genuine and truly reflection of remorse or repent in committing the crime.

17. The learned Magistrate in paragraphs 12, 13 and 14 of the sentence has correctly taken into consideration the suggestion of restitution and its mitigatory value. Therefore, I do not find any merit in this ground as well.

Fifth Ground of Appeal

18. The Appellant argues that the learned Magistrate erred in law in imposing an immediate custodial sentence, when a suspended sentence would have been more appropriate sentence under all circumstances prevailed in the case.

19. Section 26 (1) of the Sentencing and Penalties Act states that:

> *"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."*

20. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

21. Section 26 (2) of the Sentencing and Penalties Act has stipulated the jurisdictional limitation of the court in suspending sentences, where it states that:

> *"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.*

22. Accordingly, a Magistrate is only allowed to suspend a sentence which does not exceed two years. The final sentence imposed by the learned Magistrate in this matter is 31

months, which exceeds two years. Therefore, the learned Magistrate has no jurisdiction to suspend this sentence pursuant to Section 26 (2) of the Penalties and Sentencing Act.

23. Having concluded that the learned Magistrate has no jurisdiction to suspend the sentence of 31 months of imprisonment, I now proceed to consider the sentencing approach adopted by the courts in Fiji in respect of the offences involved with breach of trust.

24. ,Justice Shameem in **State v. Raymond Roberts (HAA 0053 of 2003 S)** found that:

> *"The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust , the money stolen is high in value and the accused shows no remorse or attempt at reparation. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim."*

25. In **State v Simeti Cakau (supra),** Justice Shameem has further elaborated the applicable sentencing approach for offences involved with breach of trust, where her ladyship found that:

> *"That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender's way out of prison, but as a measure of true remorse."*

26. Accordingly, a suspended sentence may not be wrong in principle, if the accused is a first offender, pleads guilty and had made full reparation, demonstrating genuine remorse. The sentencing court must satisfy that the reparation made by the offender is not an attempt to

escape from a custodial sentence. Hence, the actual consideration is not the reparation, but the true and sincere remorse in it.

27. In view of the above reasons, I do not find any merits in the fifth ground of appeal.

28. In conclusion, I make following orders that:

    i) The appeal against the Sentence is refused and dismissed.

29. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

At Suva
29th August 2018

Solicitors
Jitendra Reddy Lawyers for the Appellant
Office of the Director of Public Prosecutions for the State.