IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 34 OF 2018

IN THE MATTER of an Appeal against the Sentence of the Magistrate's Court of Suva in Criminal Case No. 948 of 2015.

BETWEEN : **RATU PENI VOKA SEMIRA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. K. Prasad for the Appellant
Mr. R. Kumar for the Respondent

Date of Hearing : 11 December 2018

Judgment : 20 March 2019

JUDGMENT

[1] This is an Appeal made by the Appellant against the Sentence imposed against him by the Magistrate's Court of Suva, on 2 March 2018.

[2] From the Magistrate's Court record I find that the original Charge was filed in Court on 15 May 2015. Subsequently, the prosecution sought the leave of Court to file

Amended Charges on two occasions: 25 November 2015 and 11 February 2016. As per the Amended Charge filed in the Magistrate's Court of Suva, on 11 February 2016, the Appellant was charged with the following two offences:

Count 1

Statement of Offence

SERIOUS COMPUTER OFFENCE: Contrary to Section 340 (1) (a) (ii), (b), (c), 340 (2), 340 (3) and 340 (6) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RATU PENI VOKA SEMIRA, between 18th day of November 2013 and the 18th day of October 2014, at Suva, in the Central Division, caused the unauthorized modification of data from the computer belonging to **WESTPAC BANKING CORPORATION** and knowingly modified the data with the intent to commit theft.

Count 2

Statement of Offence

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

Particulars of Offence (b)

RATU PENI VOKA SEMIRA, between 18th day of November 2013 and the 18th day of October 2014, at Suva, in the Central Division, dishonestly appropriated cash amounting $87,204.30 the property of **WESTPAC BANKING CORPORATION** with the intention of permanently depriving the said **WESTPAC BANKING CORPORATION** of the said property.

[3] On 24 May 2016, the Appellant was ready to take his plea on the Amended Charge and he pleaded guilty to the two charges.

[4] Thereafter, several adjournments had been granted for parties to agree on the Summary of Facts. Finally, on 26 October 2017, the Appellant had admitted to the Summary of Facts. He was convicted as charged and remanded into custody.

[5] On 2 March 2018, the Appellant was sentenced to 40 months imprisonment for Count 1 and 18 months imprisonment for Count 2. The Learned Magistrate had ordered that both sentences of imprisonment run concurrently. After deducting the time spent in remand (which the Learned Magistrate computed as 4 months and 4 days), the Appellant was imposed a final Sentence of 35 months and 26 days imprisonment. The Learned Magistrate ordered that the Appellant will be eligible for parole after serving 29 months and 26 days imprisonment (2 years, 5 months and 26 days imprisonment).

[6] Aggrieved by this Order the Appellant filed this Appeal against his Sentence, on 26 June 2018. The appeal was originally filed in person by the Appellant and was filed out of time. However, the Learned State Counsel submitted that the State would not be objecting to the enlargement of time to hear this appeal.

Grounds of Appeal

[7] In the Notice of Appeal filed by the Appellant he has taken up nine Grounds of Appeal. The said Grounds of Appeal are reproduced below for ease of reference:

1. That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case;

2. That the Learned Magistrate erred in law and in fact when she failed to direct herself to refer to any similar case authority to possibility on fairness and as such by her failure there was a substantial miscarriage of justice and in particular the count number one (No. 1) sentencing terms;

3. That the Learned Magistrate erred in law and in fact when she exercised her powers in a lower court to set up a tariff of the serious computer offence as a principal guideline to follow in the future;

4. That the Learned Magistrate erred in law and in fact when she unfairly sentenced the Appellant to count number one (No. 1) and used the new tariff as a principal guideline to allow the second count to be concurrent within the prescribed tariff as based on what she thinks and not according

to authorities and a higher court guideline. (Please view case authority R. v. Punj (2002) QCA 333) that stated and I quote: "The definition of **proof beyond reasonable doubt** has been held to be misdirection, feeling **sure** or **really sure**;

5. That the Learned Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into account, relevant matters (into) considerations;

6. That the Learned Magistrate erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 when sentencing the Appellant;

7. That the Learned Magistrate erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasons even though he pleaded guilty;

8. That the Appellant respectively submits, he had taken the early plea in 2015, and the Magistrate's Court took 3 years to finally sentence the Appellant. Therefore, such delay causes a substantial miscarriage of justice pursuant to the Appellant's rights under the Constitution;

9. That the Appellant reserves the right to argue and or file further grounds of appeal against sentence, upon receipt of the Court's mentioned date.

[8] During the hearing of this matter, the Learned Counsel for the Appellant, submitted that he wishes to consolidate the above 9 Grounds of Appeal in the following manner:

1. Consolidated Ground of Appeal No 1 [Consolidation of Grounds 1, 2 and 8] to state as follows:

   The Learned Sentencing Magistrate erred in law and in principle by:

   (i) Not considering the length of delay between the plea and the sentencing being 1 year, 9 months' and 5 days' for Counts 1 and 2;

(ii) Not considering on section 340(3) of the Crimes Act 2009 as the intention of the statue when sentencing for Count 1; and

(iii) Selecting a tariff and sentence which was manifestly harsh and excessive and wrong in principle in all the circumstances of the case for Count 1.

2. Consolidated Ground of Appeal No 2 [Consolidation of Grounds 3, 4 and 5] to state as follows:

The Learned Sentencing Magistrate erred in law when considering the tariff for Count 1 as different from the tariff of Count 2 by not taking into consideration Section 340(3) of the Crimes Act 2009.

3. Consolidated Ground of Appeal No 3 [Consolidation of Grounds 6 and 7, considering that Ground 9 is not a Ground of Appeal]:

The Learned Sentencing Magistrate erred in principle in not giving reasons to select a tariff of 2 years to 5 years imprisonment.

The Law and Analysis

[9] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[10] Section 247 of the Criminal Procedure Act stipulates that "*No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"*(2) The High Court may —*

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

Appeal against Sentence

[12] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"…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 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)."*

[13] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

> *"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. AAU 0015 of 1998. 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."*

[14] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[15] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

> *"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*
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> *" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*
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> *[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*
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> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

……..

[45] 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 Grounds of Appeal against Sentence

[16] As stated earlier during the hearing of this matter, the Learned Counsel for the Appellant, submitted that he wishes to consolidate the 9 Grounds of Appeal (originally filed in person by the Appellant), into 3 Consolidated Grounds of Appeal.

Consolidated Ground of Appeal No 1

[17] The said consolidated Ground of Appeal has been framed as follows:

The Learned Sentencing Magistrate erred in law and in principle by:

(i) Not considering the length of delay between the plea and the sentencing being 1 year, 9 months' and 5 days' for Counts 1 and 2;

(ii) Not considering on section 340(3) of the Crimes Act 2009 as the intention of the statue when sentencing for Count 1; and

(iii) Selecting a tariff and sentence which was manifestly harsh and excessive and wrong in principle in all the circumstances of the case for Count 1.

[18] The Appellant had taken his plea on 24 May 2016. Sentence had been imposed on him on 2 March 2018. Therefore, it is correct to say that the length of delay between the plea and the sentencing was 1 year and 9 months and a few days. Thus, I wish to state at the very outset that it was factually incorrect for the Appellant to allege (as he has done at Ground 8 of the original Grounds of Appeal) that the Magistrate's Court took 3 years to finally sentence the Appellant consequent to him taking his plea.

[19] Furthermore, when scrutinizing the Record of the Magistrate's Court it is apparent that the primary reason for this delay was that several adjournments had been granted by the Learned Magistrate for parties to agree on the Summary of Facts.

[20] The first count against the Appellant was the charge of Serious Computer Offence, contrary to Section 340 (1) (a) (ii), (b), (c), 340 (2), 340 (3) and 340 (6) of the Crimes Act No. 44 of 2009 (Crimes Act). For ease of reference Section 340 of the Crimes Act is reproduced below:

(1) ***A person commits an offence if he or she —***

(a) causes —

(i) any unauthorized access to data held in a computer; or

(ii) any unauthorized modification of data held in a computer*; or*

(iii) any unauthorized impairment of electronic communication to or from a computer; and

(b) knows the access, modification or impairment is unauthorized*; and*

(c) intends to commit, or facilitate the commission of, a serious offence against a law (whether by that person or another person) by the access, modification or impairment.

(2) In a prosecution for an offence against sub-section (1), it is not necessary to prove that the defendant knew that the offence was —

(a) an offence against a law; or

(b) a serious offence.

(3) A person who commits an offence against this section is punishable by a penalty not exceeding the penalty applicable to the serious offence.

(4) A person may be found guilty of an offence against this section even if committing the serious offence is impossible.

(5) It is not an offence to attempt to commit an offence against this section.

(6) In this section—

"serious offence" means an offence that is punishable by imprisonment for life or a period of 5 or more years.

[Emphasis is mine].

[21] When examining the above provisions it is clear that Section 340 (1) (a) stipulates the manner in which the Serious Computer Offence can be committed or the physical elements of the offence. Section 340 (1) (b) and (c) constitute the fault elements of the offence: namely both knowledge and intention.

[22] As to the prescribed penalty for the offence, Section 340 (3) provides that "*A person who commits an offence against this Section is punishable by a penalty not exceeding the penalty applicable to the serious offence."* The serious offence has been defined to mean an offence that is punishable by imprisonment for life or a period of 5 or more years.

[23] In the instant case, the serious offence would be the offence of Theft, for which the Appellant has been charged in Count 2. The prescribed penalty for the offence of Theft is 10 years imprisonment.

[24] The Learned Magistrate has erred in law by stating that the punishment for a Serious Computer Offence, as per Section 340(6) of the Crimes Act, was imprisonment for life or a period of 5 or more years. In terms of Section 340(3) of the Crimes Act, a person who commits an offence against Section 340 of the Crimes Act is punishable by a penalty not exceeding the penalty applicable to the serious offence. It is the serious offence that has been defined to mean an offence that is punishable by imprisonment for life or a period of 5 or more years. As I have stated above, in the instant case, the serious offence is the offence of Theft.

[25] The Learned Magistrate has further erred in law by stating that there is no tariff for the offence which is categorized as a Serious Computer Offence. She has then gone on to create a tariff of 2 years to 5 years imprisonment for the said offence. There was no necessity for the Learned Magistrate to establish a tariff for the Serious Computer Offence. The tariff would be the tariff applicable for the serious offence, which in this instance is the offence of Theft.

[26] For the aforesaid reasons, I am of the opinion that the sentence of 40 months imprisonment imposed by the Learned Magistrate for the Serious Computer Offence (Count 1) was wrong in law.

[27] Therefore, in terms of Section 256 (3) of the Criminal Procedure Act, I hereby quash the sentence imposed by the Learned Magistrate for Count 1. In my opinion a different sentence should have been imposed on the Appellant for the said count. Accordingly, in terms of Section 256 (3) of the Criminal Procedure Act, I wish to substitute a sentence that is warranted in law for Count 1.

[28] In terms of Section 291 of the Crimes Act "A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property." As stated earlier, the prescribed penalty for this offence is a term of imprisonment for 10 years.

[29] In ***Ratusili v. State*** [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

"(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."

[30] In ***State v Prasad*** Sentence [2017] FJHC 761; HAC 254.2016 (12 October 2017); His Lordship Justice Vincent Perera making reference to his Judgment in ***Waqa v State*** [2015] FJHC 729; HAA 017.2015 (5 October 2015); held that the tariff for the offence of Theft should be between 4 months to 3 years imprisonment.

[31] Therefore, in my opinion, the appropriate tariff for the Serious Computer Offence in the instant case should be between 2 months to 3 years imprisonment.

[32] In determining the starting point within a tariff, the Court of Appeal, in ***Laisiasa Koroivuki v State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"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 time. 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."

[33] Considering the objective seriousness of this offence, I would select a starting point of 18 months imprisonment for Count 1.

[34] The Appellant was an employee of the Westpac Bank and was in a position of trust. He had breached that trust. It is clear from the evidence that the Appellant had planned to commit this offence over a period of time. For the aforesaid aggravating factors, I increase his sentence by a further 36 months. Now his sentence would be 54 months imprisonment.

[35] I note from the Record of the Magistrate's Court that the Appellant is a first offender and that he was remorseful for his actions. For the said mitigating factors, I reduce 12 months from his sentence. Now, his sentence would be 42 months imprisonment.

[36] I find that the Appellant had entered his plea of guilt at a very early stage of these proceedings. For his early guilty plea, I grant the Appellant a further discount of 10 months. Now, his sentence would be 32 months imprisonment for Count 1.

Consolidated Grounds of Appeal No 2 and 3

[37] Since these two Grounds of Appeal have already been dealt with when determining the 1st Consolidated Ground of Appeal, it is now inexpedient to deal with them separately.

[38] The Appellant has not challenged the sentence imposed by the Learned Magistrate for Count 2. Therefore, the sentence of 18 months imprisonment for Count 2 (Count of Theft) remains unaltered.

[39] In the circumstances, the sentences imposed on the Appellant would be as follows:

Count 1 - Serious Computer Offence – 32 months' imprisonment.

Count 2 - Theft – 18 months' imprisonment.

[40] The Learned Magistrate had ordered that both terms of imprisonment to run concurrently. I too agree that the two terms of imprisonment should run concurrently. Accordingly, the total term of imprisonment imposed on the Appellant would be 32 months' imprisonment.

[41] In terms of the provisions of Section 18 of the Sentencing and Penalties Act, the Learned Magistrate had imposed on the Appellant a non-parole period which was 6 months less than the Head Sentence.

[42] Accordingly, I make order that the Appellant is to serve 32 months' imprisonment, with a non-parole period of 26 months imprisonment. For sake of clarity, this period of imprisonment to take effect from 2 March 2018, the date on which the Learned Magistrate originally imposed the sentence on the Appellant.

[43] In terms of Section 24 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act), the Learned Magistrate has computed that the Appellant had been in remand custody for a period of 4 months and 4 days, prior to his sentence and that this period shall be regarded as a period of imprisonment already served by him. For purpose of convenience, I order that the period of 4 months be regarded as the period of imprisonment already served by the Appellant.

Conclusion

[44] In light of the above, the final orders of this Court are as follows:

1. The Appeal against Sentence is allowed subject to the variation imposed by this Court.
2. The Sentence imposed by the Learned Magistrate, Magistrate's Court of Suva, on 2 March 2018, is quashed.
3. The following Sentence is substituted in its place:

   Head Sentence - 28 months' imprisonment.

   Non-parole period - 22 months' imprisonment.
4. The said Sentences to be effective from 2 March 2018.

HIGH COURT OF FIJI SUVA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 20th Day of March 2019

Solicitors for the Appellant : **Office of the Legal Aid Commission, Suva.**
Solicitors for the Respondent: **Office of the Director of Public Prosecutions, Suva.**