IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

High Court Criminal Appeal No. HAA 33 of 2019

BETWEEN : STATE

AND : VINAY JAMES MADHAVAN

Counsel : Appellant in person
Mr Niudamu for the Respondent

Date of Hearing : 10 July 2019

Judgement : 10 September 2019

JUDGMENT

1. The Appellant is unrepresented. He is sentenced on 19 March 2019 for 22 months imprisonment and the sentence is partially suspended. He filed his application seeking leave to appeal out of time and the grounds of appeal on 17 May 2019. However, the Appellant stated that he initially filed an appeal on time, but the remand authorities did not take steps to forward it to the court. He further

submitted to court that since he did not get any response from court, he filed the present application again on 17 May 2019 for leave to appeal out of time together with his grounds of appeal.

2. The Respondent informed court that they would not oppose the application for leave to appeal out of time. Having considered the reasons for the delay, length of delay, merits of his appeal and the fact that the Respondent has no objection, this court decided to grant leave to appeal out of time.

3. The Appellant was charged for one count of theft contrary to Section 291(1) of the crimes Act. The particulars of the offence are as follows;

> "Vinay James Madhavan and Nirlesh Niraj Naicker between the 1st day of January 2013 and 3rd day of May 2013 at Lautoka in the Western Division dishonestly appropriated cash of $11,000 the property of Computech Electronics with the intention to permanently deprive the said Computech Electronics".

4. The Appellant was charged jointly with another Accused on 06 May 2013 and he had pleaded not guilty to the original charge. On 25 September 2017 when the case was set down for hearing, the prosecution filed an amended charge bringing down the stolen amount from $ 43,506.35 to $ 11,000. The Appellant and the other Accused pleaded guilty to the amended charge on the same day.

5. On 09 October 2017 the Appellant and the other Accused admitted the summary of facts and the following is recorded by the learned Magistrate;

> "Accused pleads guilty on his own freewill. They admitted the summary of facts which are sufficient to prove the elements of charge. Their plea is unequivocal. Therefore, I find Accused guilty for the charge."

6. Later the counsel for the Appellant and the other Accused had sought time for restitution. After a number of adjournments, the other Accused had deposited $ 5500 in court as restitution on 28 June 2018. However, the Appellant had sought further time for restitution. But the Magistrate's Court record does not reflect that the Appellant had made any restitution until he was sentenced 17 months later.

7. The Appellant had been initially represented by a private counsel in the Magistrate's Court. On 15 February 2019, the Appellant had waived his right to counsel and the court had taken the plea again. The Appellant pleaded guilty again and upon admitting the summary of facts he was convicted as charged. Subsequently on 19 March 2019 the Appellant is sentenced to 22 months imprisonment and 12 months of the sentence is suspended for 5 years.

8. Being aggrieved by the sentence the Appellant submits the following grounds of appeal;

    i. The learned Magistrate had picked a higher starting than prescribed by case law
    ii. The learned Magistrate failed to give a proper discount on guilty plea
    iii. The learned Magistrate erred in law when he failed to take into account all mitigation of Appellant
    iv. There is a disparity of sentence as there was a single count for both the Accused
    v. The learned magistrate failed to direct the Appellant to pay the $2000 that he had arranged
    vi. Restitution
    vii. The learned magistrate erred in law when he took breach of trust to picking a starting point as well as an aggravating factor

9. Section 247 of the Criminal procedure Act provides 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 Magistrate court, except as to the extent, appropriateness or legality of the sentence."

10. In an appeal against the sentence the appellate court will consider interfering with the sentence if the court below has made any of the following errors (*Bae v State* [1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499);

    (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;

Ground I and VII

11. The maximum punishment for theft under Section 291(1) is ten years imprisonment. Although the tariff for theft is 4 months to 3 years (Waqa V State HAA 17 of 2015), the courts have adopted 18 months to 3 years as the tariff for theft offences arising out of breach of trust: State v Vatunalaba [2010] FJHC 99; HAC134.2008S (31 March 2010).

12. Nevertheless, the learned sentencing Magistrate has considered the tariff for theft in this case as 4 months to 3 years. Subsequently he has picked 24 months as the starting point based on the circumstances of the case, relative seriousness of the offence and the position held by the Appellant.

13. The Appellant contends that the learned Magistrate has erred in picking a higher starting point. He relies on the decision in Korovuki V State (2013) FJCA 15;AAU0018/2010 to support his contention.

14. In Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013) the Court of Appeal stated that;

> "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."

15. It appears that the learned Magistrate has considered the position held by the Appellant when deciding the starting point. Later he has considered the trust reposed on the Appellant, obviously due to his position, as an aggravating factor to enhance the sentence. I am of the view that it is wrong in principle to consider aggravating features to select a starting point. Further it appears that the learned Magistrate has picked a higher starting point in view of the tariff that he has adopted.

16. It is my considered opinion that the appropriate tariff that the learned Magistrate should have adopted was 18 months to 3 years as the offence that the Appellant is charged with arises out of a breach of trust situation. The criteria he used to pick a starting point is wrong in principle.

17. However, in view the objective seriousness of the offence I do not find any reason to interfere with a starting point of 24 months as it falls well within the lower range of the appropriate tariff of 18 months to 3 years.

Ground II

18. The Appellant submits that the learned Magistrate failed to give a proper discount for the early plea. Section 4(2)(f) of the Sentencing and Penalties Act provides that the court must have regard to whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so. It is a long-standing practice to give discount to a timely plea as it is considered as expression of remorse. Early plea saves courts time and prevents witnesses from going through the difficulty of giving evidence. However, the discount to be given is a matter of discretion for the court to exercise based on the circumstances.

19. In Basa v State [2006] FJCA 23; AAU0024.2005 (24 March 2006) it was observed that;

> "The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably".

20. In the present case the Appellant pleaded guilty after more than four years. Yet I have taken into account the fact that he pleaded guilty soon after the amended

charge was filed. The learned Magistrate has stated that he will give a 25% discount for the guilty plea and the sentence is adjusted from 30 months to 22 months. However, if 25% discount was applied, the correct sentence should have been 22 months and 2 weeks. Therefore, it appears that the Appellant has received more than 25 % when he was given a discount for his guilty plea and it is only a little less than 1/3 discount.

21. In Rainima v State [2015] FJCA 17; AAU0022.2012 (27 February 2015) it was observed that;

> "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."

22. The learned Magistrate has quoted a portion from the decision in Rainima v State (supra) which relates to a plea of guilty at a later stage involving vulnerable witnesses when giving the 25% discount. It should be noted that the issue of vulnerable witnesses has no relevance to the present case.

23. In paragraph 47 of Rainima v State (supra) Justice Madigan has stated;

> "Pleas of guilty made at later stages than earliest opportunity cause more difficulties in the assessment of how much discount should be afforded to them. It is not for this Court to suggest an appropriate sliding scale because it must remain a matter of judicial discretion. We would however make three points very clear in this regard:
>
> (i) A plea of guilty before trial must be afforded <u>some</u> discount given that the cost of trial (including time and cost of assessors) is saved.
>
> (ii) A plea of guilty at a later stage before a trial involving a vulnerable witness must be given a meaningful discount (say 20-

25%) to recognize the fact that the vulnerable witness is not put through the ordeal of giving evidence.

(iii) A plea during trial after an accused has heard unshakeable evidence of a victim/complainant or after an inculpatory caution interview has been admitted into evidence is not deserving of any discount whatsoever."

24. In any event I am of the view that the Appellant is not entitled to 1/3 discount for his guilty plea as he has pleaded guilty after more than 4 years and on the day of the hearing. However, the discount of 8 months can be reasonably accounted for the guilty plea as the Appellant has pleaded guilty on the same day that the amended charge was filed. Therefore, I am of the view that the Appellant has received sufficient discount for his guilty plea. Since the Appellant has received a proper discount for the plea this ground of appeal fails.

Ground III

25. The Appellant submits that the learned Magistrate erred in law when he failed to take into account all the mitigating factors. The Appellant states that he cooperated with the police as he had admitted to the offence. However, the Appellant had filed voir dire grounds in the Magistrate's Court stating that he was coerced to admit to the offence. It should be noted that the Appellant cannot rely on the admissions made to the police as a mitigating factor now, as he has taken a different stand in his voir dire grounds.

26. I am of the view that once an Accused person informs court that he admitted to the offence without his own freewill, he cannot at a later stage, seek discount for his sentence saying that he cooperated with police by admitting to the offence. Besides, the Appellant has only submitted the following as his mitigation;

    a. 40 years
    b. Married with 4 children
    c. Manager at an earth moving company

d. Earns $ 200 per month
e. Have paid half of the amount and yet to pay $ 2000
f. Studied at university of Fiji
g. Suffered a lot due to pending of the case for over 6 years

27. The learned Magistrate has deducted 6 months for the above factors. Although the Appellant has stated that he paid half of the amount it does not seem correct as it was only the second Accused who has paid half of the amount as restitution. Even after adjournments for more than 17 months, it does not appear that the Appellant showed any genuine intention for reparation. Therefore, it is a mistake of fact for the learned Magistrate to consider that the Appellant paid half of the amount as a mitigating factor.

28. However, the learned Magistrate has not taken previous good character into account when sentencing the Appellant. The prosecution has informed the learned Magistrate that the Appellant has no previous convictions. The learned Magistrate has failed to take that in to account as a relevant consideration. Although the personal circumstances of the Appellant do not bear much mitigatory value I am of the view that 6 months discount is justifiable when his previous good character is taken into account with other personal circumstances. Therefore, I do not find it necessary to interfere with the discount given for mitigation.

Ground IV, V and VI

29. The Appellant submits that he was jointly charged with the second Accused for the same offence of theft and only the Appellant got a partial imprisonment. It should be noted that both the Appellant and the other Accused were sentenced to 22 months. However, the learned Magistrate has suspended the sentence of the other Accused as he had done restitution. Obviously, the learned Magistrate has considered restitution by the other Accused as an expression of remorse.

30. In Vunituraga v State [2018] FJCA 248; AAU62.2014 & AAU41.2015 (19 December 2018) it was observed that;

> "The principle of parity of sentence does not necessarily mean that each criminal co-offender will always receive the same sentence. Where there are differences in terms of culpability or criminality, antecedents and character of co-offenders, a disparity in sentence is justified".

31. The learned Magistrate has given reasons for partial suspension of the Appellant's sentence and full suspension of the other Accused's sentence. Therefore, it cannot be considered as a disparity in the sentence.

32. In State v Roberts [2004] FJHC 51; HAA0053J.2003S (30 January 2004) Justice Shameem discussed the approach of the courts having analyzed a number of cases in regard to restitution;

> "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".

33. Therefore, it appears that restitution has always been considered as a ground to consider suspension of a sentence. But suspension of sentence is only considered where an early restitution is made as true expression of remorse and not just an attempt to buy one's way out of prison. (**State V Cakau** HAA125 of 2004S).

Expression of genuine remorse is signified with early reparation. Seeking time to do restitution pending sentence cannot be considered as genuine remorse.

34. In this case the Appellant had been given sufficient time to restitute. However, he has not shown any expression of remorse by effecting restitution. The learned Magistrate has judiciously considered the issue of restitution when he partially suspended the sentence. I do not find any justification to intervene with the partial suspension of the Appellant's sentence. For the foregoing reasons I decide that those grounds of appeal have no merits.

35. 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".

36. Although the learned Magistrate has arrived at the final sentence on wrong principles, on mistaken facts and without taking into account some relevant considerations, I am of the opinion that the final sentence falls within the

permissible range. Further the partial suspension by the learned Magistrate has been done with justifiable reasons.

37. In view of those reasons I do not find it necessary to intervene with the final sentence imposed by the learned Magistrate.

38. Accordingly, the appeal is dismissed.

30 days to appeal to the Court of Appeal.

Rangajeeva Wimalasena

Acting Judge

Solicitors:

Appellant in person

Office of the Director of Public Prosecutions for the Respondent