

Grounds of Sentence

- (i) *The Sentencing Magistrate misunderstanding in his sentencing in paragraph 11 that the first accused was related to the victim and the sentence of the accused was taken into breach of trust. Thus the sentencing Magistrate started in his sentencing with 20 months and add 8 months for aggravating factors as he mistook in his understanding that 2nd accused was related to the victim not the 1st accused. Furthermore, the accused was co-operated with the police and genuinely remorseful of his act and the sentencing Magistrate consider only 1 month for his mitigating factor and the accused has a dependent to look after.*

The Sentencing Magistrate could not understanding in his aggravating factor that the first accused was not related to the victim. The sentence could be imposed in the range between 2 to 9 months imprisonment and the sentence was imposed to the accused to 17 months 16 days imprisonment on the facts of breach of trust.

- (ii) *The Sentencing Magistrate failed to consider that the stolen item were recovered by the Appellant as he was genuinely remorseful of his act. As a matter of fact the stolen items were recovered and yet it was not considered and the sentence imposed was harsh and excessive. Furthermore, the sentencing Magistrate could consider the stolen items were recovered and the sentence of the appellant could be taken to lower range as the sentence was taken as a starting point of 20 months.*
- (iii) *Also the sentence imposed the non-parole period is too close to the head sentence which denies the rehabilitation of the offenders.*

Appeal Against the Sentence

2. I first draw my attention to discuss the laws relating to the appeal against the sentence. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (the 3rd of 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.”

3. The Fiji Court of Appeal in **Saqainavalu v State [2015] FJCA 168; AAU0093.2010 (the 3rd of December 2015)** has discussed the applicable principles of reviewing of a sentence by an Appellate Court, where it was held that:

“It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v. The State, unreported Cr. App. No. CAV0010 of 2013; the 20th of November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows;

(i) Whether the sentencing judge acted upon a wrong principle;

- (ii) *Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Whether the sentencing judge mistook the facts*
- (iv) *Whether the sentencing judge failed to take into account some relevant consideration.*

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate Court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)."

First Ground

4. The first ground is founded on the contention that the learned Magistrate mistakenly considered that the Appellant is related to the victim. On that basis the learned Magistrate had found this alleged incident involved with breach of trust, thus applied the category three of the tariff guideline of **Ratusili v State ([2012] FJHC 1249; HAA011.2012 (the 1st of August 2012))**.
5. The learned Counsel for the Respondent in her written submissions, specifically stated that the Appellant is not related to the victim. Neither the summary of facts nor the caution interview of the accused had disclosed about such a relationship between the Appellant and the victim. Therefore the sentence is founded on the wrong factual basis.
6. Based on his mistaken conclusion about the relationship between the Appellant and the victim, the learned Magistrate found the applicable tariff limit for this offence is 18 months to 3 years imprisonment. The learned Magistrate had picked twenty months as the starting point and added further eight months for the aggravating factors. He had given one month

discount for the mitigating factor and one-third discount for the early guilty plea, making the final sentence of eighteen months imprisonment.

7. In **Ratusili v State** has set the following tariff limits for the offence of theft.

"From the cases then the following sentencing principles are established:

- (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 sentence than opportunistic thefts."*

8. The learned Magistrate, though he had correctly identified the relevant tariff as outlined in **Ratusili (supra)**, had relied on the wrong tariff range based on his mistaken conclusion. The Appellant is not a first offender and had no relationship with the victim. Accordingly, the correct tariff range is category two of the Ratusili guideline.

9. In that context, I find there is a reason for me to intervene in the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Act. I accordingly set aside the sentence of the learned Magistrate and consider an appropriate sentence to reflect the seriousness and the appropriate culpability of the Appellant in this offence.

10. Except for the first ground, I find all other factors that the learned Magistrate considered as aggravating factors are correct. Having considered those aggravating and mitigating factors, including the early plea of guilty and the time spent in remand before the sentence, I sentence the Appellant to a period of eight months imprisonment. I do not find any appropriate circumstances to suspend the sentence. Accordingly, I do not suspend this sentence pursuant to Section 26 of the Sentencing and Penalties Decree.
11. The orders of the Court:
- i) The appeal is allowed,
 - ii) The sentence dated 11th of August 2020 is set-aside,
 - iii) The Appellant is sentenced to a period of eight months imprisonment to be commenced from the 11th of August 2020.
12. Thirty (30) days to appeal to the Fiji Court of Appeal.




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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

30th December 2020

Solicitors

Appellant In Person.

Office of the Director of Public Prosecutions for the Respondent.