IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 028 OF 2020

[Magistrates Court Case No. 567 /20]

BETWEEN:

1. **KUNAL EDWIN PRASAD**
2. **JAGJEET SINGH**
3. **ASHWIN CHANDRA**

Appellants

AND:

STATE

Respondent

Counsel : Appellants in Person
Mr. E. Samisoni for Respondent

Date of Hearing: 16 June 2020

Date of Judgment: 01 July 2020

JUDGMENT

1. The Appellants were charged in the Magistrate's Court at Suva with one count each of Criminal Trespass contrary to Section 387 (1) (a) (3) and Theft contrary to Section 291 (1) of the Crimes Act No. 44 of 2009. All of them pleaded guilty to the said charges and upon conviction, First and Third Appellants were sentenced to an aggregate imprisonment term of 10 months' with a non-parole period of 8 months and 3 weeks while the Second Appellant was sentenced to an aggregate imprisonment term of 9 months with a non-parole period of 7 months and 3 weeks.

2. Being aggrieved by the said sentences, the Appellants filed a joint appeal in this Court on the following grounds (in verbatim):

I. That the sentencing Magistrate failed to give sufficient credit for mitigating circumstances, factors of remorseful [sic] thus consideration [sic] accused previous convictions.

II. That the sentencing Magistrate has failed to consider the fact while preparing the sentencing delivering:

a. That the stolen items were fully recovered
b. That the accused all did cooperate and offer assistance to the police during investigation guilty remorsefully confess in caution interview statement.
c. While considering suspend [sic] sentence see: paragraph 190 (?) considered accused previous conviction thus punished accused as double jeopardy.

3. The facts agreed by the Appellants in the Magistrate's Court are as follows:

- On 30th day of March, 2020 at about 4.00pm at Matuku Street, Samabula, Melvin Fong [A-2] 21 years, Mechanic of 10 Miles, Veisari, Lami and Ashwin Ram Goundar [A-1] 25 years, Mechanic of Tokotoko Back Road, Navua when they saw the occupants of a Black Toyota Alpha hybrid taxi registration number LT 3950 loading tyres from the Sakura Car yard into the said taxi.

- On the above date, time and place [A-1] and [A-2] were walking towards [A-2]'s vehicle when they saw the said taxi parked on the Courts driveway beside the Sakura Car yard while Kunal Edwin Prasad [Accused-1] 34 years, Farmer of Bau Road, Nausori and Jagjeet Singh [Accused-2] were picking tyres from over the fence of the Sakura Car yard and loading it into the said taxi while Mukesh Kumar [A-3] 56 years, taxi driver of Lakena Road, Nausori was sitting on the driver's seat with Ashwin Chandra [Accused-3] 41years, self-employed of Kasavu village, Baulevu.

- [A-1] then informed their foreman about what they had seen and the taxi registration number whereby it was reported to Police.

- Police officers from Samabula Police Station then obtained the ownership details of the said taxi whereby they proceeded to A-3's residence.

- Upon arriving at [A-3]'s residence, [A-3], [Accused-1], [Accused-2] and [Accused-3] were all at the said place with the 5 x 15 inch mag wheel tyres.

- [A-3], [Accused-1], [Accused-2], [Accused-3] were all arrested and all the tyres were seized before they were escorted to Samabula Police Station.

- The said tyres were then later identified by [A-1] which were the same that was stolen from their car yard.

- [Accused-1] was interviewed under caution whereby he admitted committing the offence. [Please refer to Q & A 43 – 72].

- [Accused-2] was interviewed under caution whereby he admitted to committing the offence. [Please refer to Q & A 29 – 77].

- [Accused-2] was interviewed under caution whereby he admitted committing the offence. [Please refer to Q & A 25 – 54].

- All the three Accused persons were jointly charged for one count of Criminal Trespass Contrary to section 387 (1) (a) of the Crimes Decree No. 44 of 2009 and one count of Theft: Contrary to Section 291 (1) of the Crimes Act No. 44 of 2009.

4. This Court will approach an appeal against sentence on the basis of 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.

5. In deciding an appeal against sentence this Court will also bear in mind the observations made by the Court of Appeal in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015):

> *"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"*

Grounds I and II

6. The Appellants' complaint with regard to the first two grounds appear to be that the sentences imposed by the Learned Magistrate are harsh and excessive because the Learned Magistrate failed to take into consideration the relevant mitigating factors. For the purpose of convenience, the first two grounds can be considered and dealt with together.

7. The Learned Magistrate correctly identified the maximum sentences prescribed for each offence (1 year imprisonment for Criminal Trespass and 10 years' imprisonment for Theft) and took into account the correct sentencing tariffs (1 month to 9 months' imprisonment for Criminal Trespass as per **Buli v State** [2011] FJHC 696 and 4 months to 3 years' imprisonment for Theft as per **Waqa v State** HAA 017.2015 (5 October 2015)].

8. The Learned Magistrate decided to impose an aggregate term of imprisonment pursuant to Section 17 of the Sentencing and Penalties Act (SPA) as both offences were committed in the same transaction and based on same facts. The totality principle has not been violated in the application of the said Section 17.

9. Theft was the offence comparatively more serious of the two and the Learned Magistrate having considered the objective seriousness of the offences selected the starting point of 12 months for the aggregate sentence. The starting point picked is in conformity with Koroivuki principle and was located in the lower range of tariff band [for Theft]. The final sentence fell well within the tariff.

10. The Learned Magistrate enhanced the aggregate sentence by 3 months for each Appellant to reflect the aggravating circumstances mentioned in the Sentencing Ruling. The Appellant's do not have any issues with those aggravating factors and the enhancement of 3 months.

11. The issues concern the Learned Magistrate's lack of consideration of three mitigating circumstances, namely, that the stolen items were fully recovered, co-operation and assistance given to the police during investigation and the remorse indicated by the confessions recorded in their respective caution interview statements and early guilty pleas.

12. The Learned Magistrate quite correctly considered the mitigating circumstances of each Appellant separately at paragraphs 10, 13 and 17. It appears that the Learned Magistrate has considered all the mitigating factors presented before him on 7 May 2020 by each Appellant. As per the record, the fact that the stolen items were fully recovered has not been brought to the attention of the Learned Magistrate as a mitigating factor by any of the Appellants and the same has not been listed as a mitigating factor in the Ruling.

13. At the sentencing hearing, all the Appellants were unrepresented. Because of that, they would have been handicapped as they did not receive an informed opportunity to make adequate mitigation submissions. Although the fact of recovery of stolen property was not brought to the attention of the Learned Magistrate as a mitigating factor, the summary of facts admitted by the Appellants revealed that information. Therefore the Learned Magistrate could have taken this factor into consideration if he considered this as an important mitigating factor. He has not done that.

14. The Sentencing and Penalties Act dictates that, in sentencing offenders, the court must have regard to any action taken by the offender to make restitution for the loss arising from the offence [Section 4 (2) (h)]. Independent of that, an early restitution can also be regarded as an indication of remorse. **State v Prasad** [2003] FJHC 320; HAC0009T.2002S (30 October 2003), **State v Roberts** [2004] FJHC 51; HAA0053J.2003S (30 January 2004).

15. According to the Summary of Facts admitted, the stolen items were recovered by the police in a seizure based on information provided by an informant, and not as a result of 'any action taken by the offender to make restitution for the loss arising from the offence'. There can be no doubt that the recovery mitigated the harm caused to the victim. However, the recovery in this case in my opinion cannot be regarded as an indication of remorse on the part of the Appellants. Therefore it cannot be said that the Learned Magistrate erroneously failed to take this consideration into account as an indication of remorse.

16. The Learned Magistrate gave full 1/3 discount to reflect the early guilty plea. This will account both for the contrition and the benefit accrued to the criminal justice system in terms of saving its resources. However, the confessions made at the caution interviews by the Appellants can hardly be regarded in the circumstances of this case as 'co-operation given to police' or indication of genuine remorse. The Appellants were caught red handed with the stolen items immediately after the offending and in that context they were obviously left with no other option but to admit the offences.

17. The Learned Magistrate has given an adequate consideration to the mitigating factors. It is my considered view that the final aggregate sentence is neither harsh nor excessive in the circumstances.

Ground III

18. The term of imprisonment imposed by the Learned Magistrate for each Appellant has not exceeded two years. Therefore, the Learned Magistrate had discretion to suspend the sentence if he was satisfied that, in the circumstances of the case, it was appropriate for him to do so. There is no guidance or particular criteria provided in the Sentencing & Penalties Act as to how a sentencer should exercise his or her discretion.

19. The Courts in Fiji have addressed this issue in number of cases and **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) is one of them. In that the case the Court observed at [20]:

> *"Neither under the common law, nor under the Sentencing and Penalties Decree, 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?"*

20. The Appellants argue that the Learned Magistrate fell into an error by taking the previous convictions of the Appellants into consideration in deciding whether to suspend the sentences. They term this so called error as "double jeopardy", a punishment twice for the same offence.

21. I think the Appellants are misconceived *vis-a'-vis* the notion of double jeopardy. The Learned Magistrate has not punished the Appellants twice for the same offence. He has never enhanced the punishment on account of the past criminal history of the Appellants. Instead, he had directed his judicial mind to the factual scenario presented before him in the exercise of his discretion.

22. When the Records of Previous Convictions were tendered in the Magistrate's Court, the 1st Appellant admitted 2 active previous convictions and the 3rd Appellant 61 active previous convictions. The 2nd Appellant admitted 4 previous convictions, but none of them were active by that time.

23. In ordering an immediate custodial sentence for the 1st Appellant, the Learned Magistrate remarked:

"You are not a first offender. You were convicted and sentenced twice during the last 10 years. Despite the leniency shown to you by previous sentencing courts, you continue to commit these offences."

24. In ordering an immediate custodial sentence for the 3rd Appellant, the Learned Magistrate remarked:

"You are not a first offender. You were convicted and sentenced 61 times during the last 10 years. However, you continue to commit these offences."

25. The 2nd Appellant had no active previous convictions and the Learned Magistrate considered him to be a first offender. An adequate discount was allowed to reflect his clear record.

26. It appears that the presence of previous convictions was not the only consideration that has lead the Learned Magistrate to order a custodial sentence. The Learned Magistrate has taken into consideration the rehabilitation prospects of each offender, the seriousness of the offence (Theft) and the value of property stolen, and the planning and sophistication of the offending.

27. There is no automatic entitlement to a suspended sentence. It is the duty of the sentencer to satisfy himself/herself to ensure that exceptional circumstances are present to justify a suspended sentence. In this exercise, the sentencer should rightly balance the competing interests of deterrence, denunciation and protection of the society on one hand and the offender's rehabilitation potential on the other. What the Learned Magistrate has done was just that.

28. In this case, the circumstances of the offences and those of the offender justify a suspended sentence in view of the reasons recorded by the Learned Magistrate. The courts should pass a sufficient term of imprisonment to reflect public denunciation and deterrence. The Sentence passed by the Learned Magistrate should not be interfered with.

29. Following Order is made.

30. The appeal against sentences is dismissed.

Aruna Aluthge
Judge

At Suva
1 July 2020

Solicitors: Appellants in Person.
Director of Public Prosecution for Respondent.