

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 45 of 2019

BETWEEN : **THE STATE**

APPELLANT

A N D : **MOHAMMED ILIYAZ KHAN**

RESPONDENT

Counsel : Ms. S. Naibe for the Appellant.
: Mr. K. Tunidau for the Respondent.

Date of Hearing : 30 July, 2020
Date of Judgment : 14 August, 2020
Date of Submissions : 02 September, 2020
Date of Sentence : 04 September, 2020

SENTENCE

1. By judgment dated 14th August 2020, the respondent (hereinafter referred to as the accused) was found guilty and convicted by this court after a successful appeal by the state against the acquittal of the accused. The accused was charged in the Magistrate's Court at Lautoka with one count of larceny by servant contrary to section 274 (a) of the Penal Code Cap 17 (now repealed) and one count of theft contrary to section 291 (1) of the Crimes Act 2009.
2. The brief summary of facts is as follows:

The respondent was employed by a motor vehicle spare parts shop namely City Spares at its Lautoka Branch as a Manager. In the year 2010 there was an audit carried in which it was revealed that spare parts worth \$71, 368.78 had been stolen after the stock cards were falsified.

3. At trial the prosecution exhibited 826 stock cards pertaining to 826 different spare parts which were under the control of the accused. The evidence revealed that all the stock cards were falsified by entering wrong receipt numbers. The prosecution witnesses informed the court that the false entries on the stock cards were the handwritings of the respondent. The prosecution also adduced evidence that there were frequent cash deposits into the bank accounts of the respondent.
4. The matter was reported to the police and after an investigation the respondent was charged and produced in court.
5. The maximum penalty for the offence of larceny by servant is an imprisonment of 14 years. The maximum penalty for the offence of theft is 10 years imprisonment.

TARIFF

6. Considering the serious nature of the offence of larceny by servant an acceptable tariff for this offence is between 2 years to 3 years imprisonment.
7. In *Panniker v State HAA No. 28 of 2000, (15 May, 2000)* Pathik J. adopted the English Court guidelines in dishonesty cases mentioned in the case of *John Barrick [1985] 81 Cr. App. R 78 at 82*. The guidelines are as follows:

- i) *the quality and degree of trust reposed in the offender including his rank;*
- ii) *the period over which the fraud or the thefts have been perpetrated;*
- iii) *the use to which the money or property dishonestly taken was put;*
- iv) *the effect upon the victim;*
- v) *the impact of the offences on the public and public confidence;*
- vi) *the effect on fellow-employees or partners;*
- vii) *the effect on the offender himself;*
- viii) *his own history;*
- ix) *those matters of mitigation special to himself such as illness, being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial;*
- x) *any help given by him to the police.*

8. In *State v Raymond Roberts [2004] FJHC 51*, Shameem J. observed:

"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 custodian 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."

9. In *State v Mahendra Prasad* [2003] FJHC 320; HAC0009T of 2002S (30 October 2003), Gates J. (as he was then) after considering the case of *Barrick* had stated at paragraph 26:

"The court confirmed a tariff of between 2 to 3 years imprisonment for the medium range offences where sums of between £10,000 [F\$30,000] to £50,000 [F\$150,000] were involved. It would not be usual to suspend the sentence in cases of serious breach of trust. A sentence of 2 years immediate imprisonment was upheld."

10. For the offence of theft in *Ratusili v State* [2012] FJHC 1249; HAA011.2012 (1 August 2012) Madigan J. set the following tariff limits for the offence of theft, where his lordship held that;

"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 "*

11. The learned counsel for the accused provided the following personal details and mitigation on behalf of the accused:

- a) The accused is a first offender;
- b) He is 43 years of age;
- c) Married with no children;

- d) Sole bread winner of the family;
- e) Looks after his elderly mother;
- f) Involved in community outreach work;
- g) Seeks the court's leniency.

AGGRAVATING FACTORS

12. The following aggravating factors are obvious in this case:

a) **BREACH OF TRUST**

The accused was employed as a branch Manager, he was in charge of the shop which was under his control. The accused grossly breached the trust of his employer by his actions.

b) **PLANNING**

The facts of this case suggest a systematic, well-orchestrated plan put into action over a period of time.

c) **SUBSTANTIAL VALUE INVOLVED**

The accused stole a substantial amount of properties valued at \$71,000.00.

13. The offences of larceny by servant and theft for which this accused has been convicted are offences founded on the same facts and are of similar character, I therefore prefer to impose an aggregate sentence for the two offences in accordance with section 17 of the Sentencing and Penalties Act.

14. Considering the objective seriousness of the offending, I select a starting point of 2 years imprisonment (lower range of the tariff). I add 3 years for the aggravating factors, the interim sentence is 5 years imprisonment for the mitigating factors I reduce the sentence by 2 ½ years. The aggregate sentence is now 2 ½ years imprisonment. The accused has been in remand for about 21 days in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence by 1 month the final aggregate sentence is 2 years 5 months imprisonment.
15. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
16. Under section 18 (1) of the Sentencing and Penalties Act, I impose 1 year 10 months as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and to meet the community expectation which is just in the circumstances of this case.
17. I am satisfied that the term of 2 years and 5 months imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.
18. Mr. Khan you have committed serious offences on your employer who had trusted you to the extent that he bestowed upon you the control of a shop. You are a selfish and greedy person who deprived the victim of a substantial value of properties.

19. There is no doubt that this was a calculated and systematic fraud which would not have been unraveled until an audit was carried out. You will have to pay for your crimes by an immediate imprisonment term. Your counsel has urged this court to consider a suspended sentence there is nothing compelling for this court to exercise such a discretion in your favour. A suspended sentence in a case of well-planned theft and gross breach of trust by an employee in a position of trust over a period of time who does not show any remorse and/or make any restitution does not deserve any mercy from this court.
20. In summary I impose an aggregate sentence to 2 years and 5 months imprisonment with a non-parole period of 1 year and 10 months imprisonment to be served before the accused is eligible for parole.
21. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

04 September, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Kevueli Tunidau Lawyers for the Accused/Respondent.