

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

CRIMINAL APPEAL NO. HAA 15 OF 2020

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Suva in Criminal Case No. CF 1275 of 2019.

BETWEEN : TOMASI TURUTURUVESI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant appears in person
Mr. Rajneel Kumar for the Respondent

Date of Hearing : 27 August 2020

Judgment : 13 October 2020

JUDGMENT

- [1] This is an Appeal made by the Appellant against his sentence imposed by the Magistrate's Court of Suva.
- [2] The Appellant was charged in the Magistrate's Court of Suva with one count of Theft, contrary to Section 291 (1) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [3] The Charge Sheet filed against the Appellant referred to the following Charge:

Statement of Offence (a)

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

Particulars of Offence (b)

TOMASI TURUTURUVESI, on the 24th day of August 2019, at Suva, in the Central Division, dishonestly appropriated (stole) Samsung Note 4 mobile phone valued at \$2500.00 and Samsung J7 Pro Mobile phone valued at \$700.00, all to the total value of \$3200.00, the property of **SANDIP SURAJ PRASAD** with the intention to permanently deprive the said **SANDIP SURAJ PRASAD** of his property.

- [4] Even during the proceedings before the Magistrate's Court the Appellant was unrepresented.
- [5] On 16 September 2019, the Appellant pleaded guilty to the charge. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, on 17 October 2019, the Appellant had been convicted of the charge on his own plea.
- [6] On 24 October 2019, another Learned Resident Magistrate had sentenced the Appellant to a term of 12 months imprisonment. This term of 12 months imprisonment was consecutive to any other unfinished sentences the Appellant was serving at the time.
- [7] Considering the 2 months the Appellant had spent in remand the final sentence imposed on the Appellant was 10 months imprisonment, consecutive to any unfinished sentences.
- [8] Aggrieved by this Order the Appellant filed a Notice of Appeal against his sentence. The said appeal was received in the Registry of the High Court of Suva on 24 March 2020, and as such was over 4 months out of time.

[9] However, the State does not object to an enlargement of time been granted to the Appellant in respect of this appeal.

[10] During the hearing of this matter both the Appellant and the Learned State Counsel were heard. The Appellant and the Respondent also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

GROUND OF APPEAL

[11] The Grounds of Appeal against sentence, which was filed by the Appellant, are as follows (the Grounds of Appeal stated below are as framed by the Appellant):

Grounds of Sentence Appeal

1. That the Learned Magistrate erred in law and in fact when he made both sentences consecutive [sentence in this matter and in the connected Criminal Appeal HAA 16 of 2020] without giving a cogent reason for making the sentences consecutive. Failure to give reasoning had caused an error in sentencing principles.
2. That the Learned Magistrate erred in law and in fact when he failed to consider the totality principle and making the sentences consecutive has a crushing effect on the Appellant.
3. That the Learned Magistrate conviction erred in law and in fact when he considered the previous convictions of the appellant as an aggravating factor for his sentence and by doing such the Magistrate has breached the sentencing principles.

THE LAW AND ANALYSIS

[12] 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 reproduced 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.

[13] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the charge against him, 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."*

[14] 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."

THE GROUNDS OF APPEAL AGAINST SENTENCE

[15] 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)."

[16] 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."

[17] 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.

[18] 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:

" 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."

[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:

"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."*

[19] It must be emphasized that the principles enumerated in the above case authorities should be considered in the light of Section 247 of the Criminal Procedure Act which 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 Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

- [20] The Appellant states that the Learned Magistrate erred in law and in fact when he made both sentences consecutive without giving a cogent reason for making the sentences consecutive. The two sentences he is referring to are the sentence in this matter and the sentence imposed in the connected Criminal Appeal HAA 16 of 2020 (Magistrate's Court of Suva Criminal Case No. CF 43 of 2019).
- [21] The Appellant is completely misconceived in law. Firstly the sentences in the said two cases were imposed by two different Magistrates on different dates. The sentence in the instant case was imposed by Resident Magistrate Mr. Asanga Bodaragama, on 24 October 2019. The sentence in the connected criminal appeal matter was imposed by Resident Magistrate Mr. Kashyapa Wickaramasekara, on 10 February 2020.
- [22] Therefore, at the time the sentence in the instant case was being imposed on the Appellant, which was on 24 October 2019, there was no possibility for the Learned Magistrate to even consider making the said sentence concurrent with the sentence in the connected criminal appeal matter which was pending before another Magistrate.
- [23] The Appellant alleges that the Learned Magistrate erred in law and in fact when he failed to consider the totality principle and by making the sentences consecutive. The Learned Magistrate has given justifiable reasons for making this sentence consecutive with two other custodial terms of imprisonment.
- [24] Section 22 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") deals with concurrent or consecutive sentences. For ease of reference the section is reproduced below:

22.-(1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.

(2) Sub-section (1) does not apply to a term of imprisonment imposed-

(a) in default of payment of a fine or sum of money;

(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;

(c) on a habitual offender under Part III;

- (d) *on any person for an offence committed while released on parole; or*
- (e) ***on any person for an offence committed while released on bail in relation to another offence.***
- (3) *Every term of imprisonment imposed on a person in default of payment of a fine or sum of money shall, unless otherwise directed by a court, be served-*
 - (a) *consecutively on any uncompleted sentence imposed on the person in default of payment of a fine or sum of money; but*
 - (b) *concurrently on any uncompleted sentence imposed on that person.*
- (4) *Every term of imprisonment imposed on a prisoner by a court in respect of a prison offence or an escape offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.*
- (5) *Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on parole in relation to another sentence of imprisonment imposed on that person must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment which the offender may be required to serve in custody on cancellation of the parole order.*
- (6) ***Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on bail in relation to any other offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.***

Emphasis is mine.

[25] From the above it is clear that there are numerous situations where a Court could impose a consecutive sentence on an offender. In this matter the Learned Magistrate has specifically provided reasons as to why he is not imposing a concurrent sentence on the Appellant. The Learned Magistrate has stated as follows:

"11..... On 17.10.2019 this Court sentenced you for two separate custodial terms of imprisonment in CF 1120/2016 and in CF 2138/2018.

12. You are already a serving prisoner. As per Section 22 (1) of the Sentencing and Penalties Act *"every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment"*. However, this provision is subject to sub-section (2). As per section 22 (2) (e) sub-section (1) does not apply *"on any person for an offence committed while released on bail in relation to another offence."*

13. I observe this offence was committed on 24.08.2019. Thus, this offence was committed while you were released on bail for the aforesaid CF 1120/2016 and in CF 2138/2018. Therefore section 22 (1) has no application in this instance.

14. As I already held that your past criminal record is a clear testimony that you are a serious threat to the society as you have a tendency to commit crimes while you are at large. You commit criminal offences at regular intervals at the expense of vulnerable victims. Therefore, I order this sentence to take effect consecutive to any other unfinished sentences."

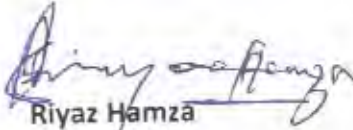
- [26] The Appellant further states that the Learned Magistrate erred in law and in fact when he considered the previous convictions of the Appellant as an aggravating factor for his sentence and by doing such the Magistrate has breached the sentencing principles.
- [27] This Court has gone through the sentence imposed by the Learned Magistrate in this case. Although the Learned Magistrate has referred to the Appellant's past criminal record, he has not considered this as an aggravating factor in deciding the sentence to be imposed on him. The Learned Magistrate has correctly stated that the Appellant will not earn any discount for past good conduct.
- [28] Considering all the above facts and circumstances, I am of the opinion that the Appellant's Grounds of Appeal against sentence are without merit. Therefore, I see no reason to interfere with the final sentence imposed on the Appellant by the Learned Magistrate.

CONCLUSION

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

1. The Appeal against sentence is dismissed.
2. The sentence imposed by the Learned Magistrate, Magistrate's Court of Suva is affirmed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva

This 13th Day of October 2020

Solicitors for the Appellant :
Solicitors for the Respondent:

Appellant in Person.
Office of the Director of Public Prosecutions, Suva.