

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

CRIMINAL APPEAL NO. HAA 13 OF 2022

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Ba, in Criminal Case No. CF 179 of 2021.

BETWEEN : **RAVNEEL KUMAR**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. Niven Padarath for the Appellant
Ms. Saini Naibe for the Respondent

Dates of Hearing : 20 June 2022 and 14 July 2022

Judgment : 12 August 2022

JUDGMENT

- [1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Ba.
- [2] In the Magistrate's Court of Ba, the Appellant was charged with 5 counts of Theft, contrary to Section 291 (1) of the Crimes Act No. 44 of 2009 (Crimes Act), as follows:

COUNT-1

Statement of Offence (a)

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

Particulars of Offence (b)

RAVNEEL KUMAR, on the 31st day of December 2020, at Ba Town, in the Western Division, dishonestly appropriated \$150.00 from BSP ATM, Ba Branch, the property of **RANEEL KUMAR**, with the intention of permanently depriving the said **RANEEL KUMAR** of his property.

COUNT-2

Statement of Offence (a)

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

Particulars of Offence (b)

RAVNEEL KUMAR, on the 12th day of January 2021, at Ba Town, in the Western Division, dishonestly appropriated \$150.00 from BSP ATM, Ba Branch, the property of **RANEEL KUMAR**, with the intention of permanently depriving the said **RANEEL KUMAR** of his property.

COUNT-3

Statement of Offence (a)

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

Particulars of Offence (b)

RAVNEEL KUMAR, on the 8th day of January 2021, at Ba Town, in the Western Division, dishonestly appropriated \$300.00 from BSP ATM, Ba Branch, the property of **RANEEL KUMAR**, with the intention of permanently depriving the said **RANEEL KUMAR** of his property.

COUNT-4

Statement of Offence (a)

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

Particulars of Offence (b)

RAVNEEL KUMAR, on the 3rd day of January 2021, at Ba Town, in the Western Division, dishonestly appropriated \$500.00 from BSP ATM, Ba Branch, the property of **RANEEL KUMAR**, with the intention of permanently depriving the said **RANEEL KUMAR** of his property.

COUNT-5

Statement of Offence (a)

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

Particulars of Offence (b)

RAVNEEL KUMAR, on the 2nd day of January 2021, at Ba Town, in the Western Division, dishonestly appropriated \$300.00 from BSP ATM, Ba Branch, the property of **RANEEL KUMAR**, with the intention of permanently depriving the said **RANEEL KUMAR** of his property.

- [3] The Appellant was first produced in Court on 12 April 2021. He had waived his right to counsel and was unrepresented. On the same day, his plea had been taken. Accordingly, the Appellant pleaded guilty to all five counts in the charge sheet. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily [As per page 27 of the Copy Record of the Magistrate's Court].
- [4] It seems that on the same day the Summary of Facts had been filed in Court [As per pages 10 and 11 of the Copy Record of the Magistrate's Court] and submissions in mitigation heard. Thereafter, the matter had been fixed for sentence.
- [5] The sentence in the matter had been postponed several times, firstly due to the regular sittings of Courts not been held due to the outbreak of the coronavirus pandemic in Fiji and secondly due to the non-availability of a Resident Magistrate. On

29 March 2022, the Appellant had been found guilty on his own plea, convicted and sentenced.

- [6] The Appellant had been imposed a sentence of 14 months imprisonment. He was ordered to serve 3 months imprisonment immediately. The balance period of 11 months imprisonment was suspended for 3 years.
- [7] Aggrieved by the said Order, on 13 April 2022, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.
- [8] This matter was taken up for hearing before me on 20 June 2022 and 14 July 2022. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [9] The Appellant had also filed a Notice of Motion seeking bail pending appeal (Criminal Miscellaneous Case No. HAM 67 of 2022). The said Notice of Motion was supported by an Affidavit in Support filed by the Appellant. In addition, an Affidavit in Support has also been deposed and filed by Raneel Kumar, the complainant in the matter, who is the Appellant's older brother.
- [10] On 16 May 2022, this application had been withdrawn by the Appellant and accordingly struck out by Court.
- [11] During the hearing of this matter, the Counsel for the Appellant urged Court to take into consideration the contents of the said Affidavits filed by the Appellant and the complainant in determining this matter. Although it would be possible for Court to do so, it must be borne in mind that most of the matters stated in the said Affidavits had not been urged in the proceedings before the Magistrate's Court.
- [12] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

1. The Learned Magistrate erred in law and in fact to enter a plea when the plea entered by the Appellant was equivocal. The following is relied on by the Appellant:
 - a. The plea of guilty was entered without proper legal advice on the implication of the plea and the likely effect of the plea.
 - b. The Learned Magistrate erred in law when the consequences of the plea of guilty was not explained to the Appellant.
 - c. The plea of guilty was entered on the understanding that a non-custodial sentence is likely to be given considering the circumstances of the case.

2. The Learned Magistrate erred in law at paragraph 9 of the sentence by misdirecting herself on the tariff set in *State v Pauliasi Vatunalaba*, (High Court Suva) Criminal Case No. HAC 134 of 2008, when the tariff set in *State v Pauliasi Vatunalaba* was on the context of a relationship between an employer and employee.

3. The Learned Magistrate erred in law and in fact when the sentence was not suspended pursuant to Section 26 of the Sentencing and Penalties Act. The Learned Magistrate ought to give more consideration to the following:
 - a. The Appellant was a first-time offender.
 - b. The complainant had reconciled and no longer wanted to pursue his complaint.
 - c. The circumstances of the case did not amount to serious offence.

4. The Learned Magistrate erred in law and in fact when the request for a discharge without conviction was refused when:
 - a. The complainant had reconciled and no longer wanted to pursue this complaint.
 - b. The Appellant was a first-time offender.
 - c. The Appellant was a University Student.
 - d. The overall circumstances of the case justified a discharge without conviction.

[13] As can be observed Ground 1 is a Ground of Appeal against the conviction; and Grounds 2-4 are Grounds of Appeal against the sentence.

The Law and Analysis

[14] 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.”

[15] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the respective charges 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.”*

[16] 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 Ground of Appeal against Conviction (Ground 1)

[17] At the outset, it must be mentioned that, in terms of Section 247 of the Criminal Procedure Act it is stated where the Appellant has pleaded guilty to the charge/s against him, as in this case, no Appeal shall be allowed against his conviction. An

Appeal may only be permitted in respect to the extent, appropriateness or legality of the sentence.

- [18] However, this Ground of Appeal against conviction is that the Learned Magistrate erred in law and in fact to enter a plea when the plea entered by the Appellant was equivocal.
- [19] The Appellant is alleging that the plea of guilt was entered without proper legal advice on the implication of the plea and the likely effect of the plea. Therefore, that his plea was equivocal. However, when examining the Magistrate's Court Case Record in the matter, it is recorded [At page 27 of the Copy Record of the Magistrate's Court] that the Appellant was explained his right to counsel and that he had waived his right to counsel. This is depicted by the abbreviations WRTC. Therefore, it is clear that the Appellant had on his own accord chosen to waive his right to counsel.
- [20] The Appellant is further alleging that the Learned Magistrate erred in law when the consequences of the plea of guilt was not explained to him and that the plea of guilt was entered on the understanding that a non-custodial sentence is likely to be given considering the circumstances of the case. Therefore, that his plea was equivocal. I concede that there is no mention in the record as to the Learned Magistrate explaining to the Appellant the consequences of his guilty plea. However, the Appellant cannot now submit that he entered the guilty plea on the understanding that a non-custodial sentence is likely to be given to him considering the circumstances of the case.
- [21] During the hearing of this matter the Learned Counsel for the Appellant submitted that the Summary of Facts did not make reference to two of the main elements of the offence of Theft, namely dishonest appropriation and the intention of permanently depriving the owner of the stolen property Raneel Kumar. Instead that the Summary of Facts makes reference to the lack of consent, which is not an element of the offence of Theft.
- [22] Section 291 (1) of the Crimes Act No 44 of 2009 (Crimes Act) provides: *A person commits a summary offence (Theft) if he or she dishonestly, appropriates property*

belonging to another, with the intention of permanently depriving the other of the property.

- [23] If this matter had proceeded to trial, the prosecution would have had to prove beyond reasonable doubt, in respect of each of the five charges, that the Appellant, on the relevant dates (stated in the charges), at Ba in the Western Division, had dishonestly, appropriated, property belonging to Raneel Kumar (the sums of money stated in each count), with the intention to permanently deprive the said Raneel Kumar of his property.
- [24] The Crimes Act provides explanations as to what is meant by dishonesty; as to what is meant by appropriation of property; as to what is meant by property belonging to another; and also as to what is meant by intending to permanently deprive another of his property.
- [25] “Dishonesty” is a state of mind of the Appellant. In order to determine whether the Appellant had a dishonest mind, a two-tiered approach has to be adopted as defined in Section 290 of the Crimes Act.

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant (Appellant) to be dishonest according to the standards of ordinary people.

First, according to the ordinary standards of reasonable and honest people, Court has to decide whether what was done by the Appellant was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. [Dishonest according to the standards of ordinary people-which is an objective test].

If it was dishonest by those standards, then Court must consider whether the Appellant himself has realized that what he was doing was dishonest by those standards. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the Appellant himself knew that he was acting dishonestly. It is dishonest for the Appellant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or

genuinely believes that he is morally justified in acting in the manner he did. [Known by the Appellant to be dishonest according to the standards of ordinary people-which is a subjective test].

Therefore, to prove the case against the Appellant the prosecution would have had to establish beyond reasonable doubt that the Appellant acted dishonestly [and thereby appropriated the sums of money stated in the five counts, which is the property of Raneel Kumar].

[26] The prosecution would have also had to prove beyond reasonable doubt that the Appellant, appropriated the property of Raneel Kumar. At law, property belongs to a person if that person has possession or control of the property. This is outlined in Section 289 of the Crimes Act.

[27] 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In this regard, the provisions of Section 293 (1) and (2) of the Crimes Act is relevant and is reproduced below:

“(1) for the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.

(2) Sub-section (1) applies to a case where a person obtains possession of property (innocently or not) without committing theft, and there is a later assumption of rights without consent by keeping or dealing with it as owner.”

[28] Furthermore, the prosecution would have had to prove beyond reasonable doubt that the Appellant intended to permanently deprive Raneel Kumar of his property. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct.

[29] It must be remembered, that no witness can look into an Appellant's mind and describe what his state of mind was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an Appellant's state of mind. Knowledge or intention of an Appellant can only be inferred based on relevant proven facts and circumstances.

[30] Furthermore, Section 300 of the Crimes Act provides:

“(1) For the purposes of this Division, if —

(a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and

(b) the person’s intention is to treat the thing as the person’s own to dispose of regardless of the other’s rights; the person has the intention of permanently depriving the other of it.”

[31] In this case, the Appellant was admitting liability by pleading guilty to the charges. As such, the Learned Magistrate had to be satisfied of the Appellant’s guilt based on the Summary of Facts.

[32] In terms of Section 174 (1) of the Criminal Procedure Act: *The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*

[33] Section 174 (2) provides as follows: *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*

[34] The truth of the charges would usually be established by way of the Summary of Facts, which must contain a narration of facts to support all the elements of the offence. Therefore, the Summary of Facts must necessarily be read in conjunction with the charges in the case, which would set out the particulars of the offence.

[35] In her sentence, the Learned Magistrate has stated as follows [At paragraphs 3 and 4]:

“3. The accused informed the Court that he was ready for his plea. The charge was read, explained and understood by the accused and he pleaded guilty to the charges on his own free will.

4. The accused understood and he admitted to the Summary of Facts that was read to him in Court. Briefly; the accused and the victim are biological brothers and they are staying in the same house. The accused withdrew money on (5) five separate

occasions, a total sum of \$1,400, from the Bank of South Pacific (BSP) ATM situated in Ba Town. On 12/1/21, at 5.20 p.m, the victim checked his BSP account through online banking and he discovered that someone had withdrawn money from his bank account. The victim didn't make those withdrawals from BSP bank. The matter was reported to the Police. During the investigation, the Police obtained the complainant's BSP bank statement and they recovered a CCTV footage. The victim viewed the CCTV footage and he identified the accused in the footage. The accused was arrested. The accused confessed on each count of the allegation during his caution interview".

[36] I find that the Learned Magistrate had been duly satisfied with the Appellant's guilty plea to the charges and his admission to the Summary of Facts. Therefore, the Learned Magistrate had been satisfied that the Appellant's plea of guilt had been unequivocal. Accordingly, she had found the Appellant guilty on his own plea and convicted him of all charges.

[37] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in this matter.

[38] For the aforesaid reasons, I find that the Ground of Appeal against the Conviction is without merit.

The Grounds of Appeal against Sentence

[39] 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)."*

[40] 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.”*

[41] 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.

[42] 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 **Naikелеkelevesi –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."

Ground 2

[43] This Ground of Appeal against sentence is that the Learned Magistrate erred in law at paragraph 9 of the sentence by misdirecting herself on the tariff set in ***State v Pauliasi Vatunalaba***, (High Court Suva) Criminal Case No. HAC 134 of 2008, when the tariff set in ***State v Pauliasi Vatunalaba*** was on the context of a relationship between an employer and employee.

[44] In ***State v Pauliasi Vatunalaba*** [2010] FJHC 99; HAC134.2008S (31 March 2010); His Lordship Justice Daniel Goundar has clearly expressed that *“The tariff for theft offences arising from breach of trust range from 18 months to 3 years imprisonment. Suspended sentences are reserved for cases where the offenders have shown remorse or the value of the property is small.”*

[45] Therefore, it is clear that the Learned Magistrate had made reference to the above case to depict the tariff for the offence of Theft arising out of breach of trust. She has explained that the Appellant was the biological brother of the complainant and that they lived in the same house. This clearly is a breach of trust.

[46] In ***Ratusili v. State*** [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

“(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 sentences than opportunistic thefts.”

[47] In this case, the Learned Magistrate has taken the tariff for the offence of Theft as between 18 months to 3 years imprisonment, since it was theft arising out of a breach

of trust. I am of the opinion that there was no error of law on the part of the Learned Magistrate in doing so.

[48] For these reasons, I find that this Ground of Appeal against sentence is without merit.

Grounds 3 and 4

[49] Ground 3 is that the Learned Magistrate erred in law and in fact when the sentence was not suspended pursuant to Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act). Ground 4 is that the Learned Magistrate erred in law and in fact when the request for a discharge without conviction was refused.

[50] It is further submitted that the basis for the above two Grounds of Appeal is that, the Appellant was a first time offender and a University student; that the complainant had reconciled and no longer wanted to pursue the complaint; and that the overall circumstances of the case justified a suspended sentence and a discharge without conviction.

[51] Since in my opinion, these two grounds of appeal are interconnected, it will be discussed together. It must also be emphasized that in this case the Learned Magistrate has in fact suspended part of the sentence imposed on the Appellant, but not the whole of the sentence.

[52] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

- [53] From a reading of the above section it is clear that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or part of the sentence.
- [54] I am of the opinion that the Learned Magistrate has duly provided her reasons as to why she was suspending only part of the sentence imposed on the Appellant and not the whole sentence.
- [55] The Appellant also contends that the Learned Magistrate erred in law and in fact entering a conviction against the Appellant and failing to exercise his discretion under Section 15 (1) (f) and Section 16 of the Sentencing and Penalties Act.
- [56] Section 15 of the Sentencing and Penalties Act stipulates the range of sentencing orders which a Court could impose. Section 15 (1) of the Act reads as follows:

15. — (1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this Decree —

(a) record a conviction and order that the offender serve a term of imprisonment;

(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;

(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;

(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];

(f) with or without recording a conviction, order the offender to pay a fine;

(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(h) record a conviction and order the discharge of the offender;

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(j) without recording a conviction, order the dismissal of the charge; or

(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

[57] Section 16 of the Sentencing and Penalties Act provides:

16. — (1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including —

(a) the nature of the offence;

(b) the character and past history of the offender; and

(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

[58] In *State v Batiratu* [2012] FJHC 864; HAR001.2012 (13 February 2012); His Lordship Chief Justice Anthony Gates held as follows:

"[29] The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:

(a) The offender is morally blameless.

(b) Whether only a technical breach in the law has occurred.

(c) Whether the offence is of a trivial or minor nature.

(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.

(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.

(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.”

[59] In this regard, the Learned Magistrate has duly taken into account all the relevant considerations and has come to a finding that entering a non-conviction against the Appellant was not warranted.

[60] In her sentence, the Learned Magistrate has stated as follows [At paragraph 21]:

“21. The accused’s request for a conviction not to be recorded also lacks merits; the accused’s offending was repeated over a short span of time and with the amounts of monies being withdrawn on each occurrence being more than the previous amounts withdrawn, thus I find it to be calculated and of pure greed. On the same basis, the withdrawals only came to an end when the brother discovered the withdrawals and reported the matter to which was dealt with soon thereafter. In light of the nature of offending and this Court’s finding on the character of the accused from this offending, the Court declines his request for a conviction not to be recorded.”

[61] I am satisfied that the Learned Magistrate has provided sufficient and adequate reasons for refusing the request for discharge without conviction.

[62] Considering the aforesaid, I am of the opinion that these two Grounds of Appeal against sentence are also without merit.

Conclusion

[63] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

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

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Ba in Criminal Case No. CF 179 of 2021 is affirmed.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

This 12th Day of August 2022

**Solicitors for the Appellant :
Solicitors for the Respondent:**

**Samuel Ram Lawyers, Barristers and Solicitors, Ba.
Office of the Director of Public Prosecutions, Lautoka.**