IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL APPEAL NO. HAA 007 OF 2023
[Labasa Magistrates Court CF No: 497/21]

BETWEEN : **VIKASH CHETTY**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Mr A Sen for the Appellant
Ms L Latu for the State

Date of Hearing : **2 March 2023**
Date of Judgment : **31 March 2023**

JUDGMENT

[1] **Procedural Background**

On 14 October 2021, the appellant was produced in the Magistrates' Court, charged with one count of theft contrary to section 291(1) of the Crimes Act. The charge alleged that the appellant between 24 September 2021 and 6 October 2021 dishonestly appropriated $11,080.00 cash belonging to his employer, Paradise Beverages Fiji Ltd. The charge further alleged that the appellant at the time of appropriation had the intention to permanently deprive his employer of the said cash. The charge was explained to him in court but his plea was deferred to allow him time to engage legal counsel. He was released on bail.

[2] On 16 February 2022, the appellant appeared in court without legal representation and pleaded guilty to the charge. The appellant's bail was extended and the case was adjourned to 22 April 2022 for facts and mitigation.

[3] On 22 April 2022, the appellant did not appear in court and a warrant was issued for his arrest.

[4] However, on 20 May 2022, the appellant voluntarily appeared in court. He maintained his guilty plea and admitted facts tendered in support of the charge. The court record shows that the learned magistrate noted the following mitigation:

- 43 years old
- Married 2 children
- Working at Supermarket at Savusavu
- Earning $200/week
- Admitted to mistake
- Paid $1000
- Seek me(sic) time [seek more time]
- Looking after children and elderly mom
- Seek forgiveness from Court

[5] After hearing mitigation, the learned magistrate adjourned the case to 15 June 2022 for sentencing.

[6] On 15 June 2022, the appellant sent a medical sick sheet to the court registry to explain his non-appearance in court. Thereafter the case was adjourned on numerous occasions because the appellant did not appear in court for his sentencing. Eventually, on 9 January 2023, when the appellant appeared in court, the learned magistrate sentenced him to 2 years imprisonment with a non-parole period of 18 months.

[7] **Grounds of Appeal**

On 19 January 2023, the appellant filed a timely appeal against sentence. His grounds of appeal are:

1. **THAT** the Learned Magistrate erred in law when sentencing the Appellant by adding 12 months for aggravating factors for pre-planning when the same could not have been accounted as an aggravating factor.

2. **THAT** the Learned Magistrate erred in law when sentencing the Appellant after the Appellant pleaded guilty on the first available occasion to him and that the Honourable Court was wrong to say that that he was not remorseful when she enhanced the sentence.

3. **THAT** the Learned Magistrate erred in law when sentencing the Appellant by failing to give credit for the early guilty plea, restitution and the remorse of the Appellant.

4. **THAT** the Learned Magistrate erred in law by failing to take into consideration that the Appellant had made substantial restitution and he was ready and willing to take full restitution.

5. **THAT** the Learned Magistrate erred in law when sentencing the Appellant by failing to consider a non-custodial sentence.

6. **THAT** the Judgement of the Learned Magistrate is perverse, contrary to the Constitution of the Republic of Fiji and must be set aside and the sentence to be quashed.

[8] The principles governing review of the sentencing discretion of the courts are settled. An appellate court will only interfere if there is an error in the exercise of the

sentencing discretion (*Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013)).

[9] **Ground one**

The appellant was employed as a Salesperson by Paradise Beverages Fiji Limited when he received an advanced payment of $11,080.00 from a customer for sale of liquor. The money belonged to his employer. Instead of depositing the money into his employer's bank account the appellant took it for his own use. He went on a spending spree and electronically remitted about $10,000.00 to an overseas account, which he later realised was a cyber scam.

[10] Although the facts did not support a systematic defrauding over a period of time, the appellant took a calculated step to take the money belonging to his employer for his own use. He electronically remitted a significant amount of that cash overseas. After stealing the money, the appellant lied to his employer that he had deposited the proceeds of sale into the company's bank account. He made a false deposit slip to conceal his dishonesty. When the employer found out that the money had not been deposited into the company's bank account they reported the matter to the police.

[11] There was some degree of pre-planning by the appellant to steal from his employer for his own benefit. The learned magistrate properly considered pre-planning as an aggravating factor and this ground of appeal lacks merit.

[12] **Grounds two-six**

The remaining five grounds can be considered together.

[13] The learned magistrate gave detailed reasons for the sentence she imposed on the appellant. She considered the maximum penalty for theft provided in the Crimes Act and the guidelines/tariff set out by Madigan J in *Ratusili v State* [2012] FJHC 1249; HAA011.2012 (1 August 2012). She picked 2 years as a starting point because the sum involved was substantial. She enhanced the sentence by 12 months to reflect pre-planning and breach of trust as aggravating factors. She gave a discount of 6

months for early guilty plea and a further 6 months to reflect the appellant's mitigating factors such as age, previous good character, family circumstances, remorse and him being a victim of a financial cybercrime. She considered suspension of sentence but decided against it. She concluded that the appellant was not genuinely remorseful and the need for general deterrence outweighed the personal need of the appellant to rehabilitate as the case involved fraud by an employee and breach of trust.

[14] After the appellant was arrested, he made full admissions to police under caution. But he only made up for the monetary loss after he was charged with theft. On 28 October 2021 he paid back $4000.00 into his employer's bank account.

[15] Although the learned magistrate mistook the restitution amount paid to be $1000.00, she did not err in finding the appellant was not genuinely remorseful to deserve a suspended sentence.

[16] The appellant was released on bail on the day he was first produced in court on 14 October 2021. He pleaded guilty to the charge on 16 February 2022. He expressed his willingness to fully compensate his employer on 20 May 2022 when he presented his mitigation in court. He prolonged his sentencing by missing court appearances on four occasions. He was sentenced on 9 January 2023, giving him plenty time and opportunity to pay full restitution.

[17] Section 4 (2) (h) of the Sentencing and Penalties Act states:

> In sentencing offenders a court must have regard to any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or willingness to comply with any order for restitution that a court may consider under this Act.

[18] The timing of making restitution is relevant when assessing whether the offender is buying himself out of trouble or is genuinely remorseful. If an early guilty plea is

accompanied with a full and prompt restitution made immediately after the theft is detected then a suspended sentence may be justified depending on the circumstances of the case. Otherwise, in breach of trust cases, custodial sentences are inevitable.

[19] In *State v Roberts* [2004] FJHC 51; HAA0053J.2003S (30 January 2004) Shameem J summarized the principles as follows:

> 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 custodial 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.

[20] In *Deo v The State* [2005] FJCA 62; AAU0025.2005S (11 November 2005) the Court of Appeal stated:

> [27] Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting such a

sentence and, in all cases, the sentencing court should not be too quick to find such circumstances.

[28] That applies with particular emphasis in cases involving betrayal of a position of trust where matters of personal mitigation will usually be subordinate to the seriousness of the offence. In most such cases, the offenders share many common aspects of mitigation; most are first offenders, most will, as a result of their fraud, have lost a good job and have little chance of ever being given such responsibility again and almost all will never commit a similar crime in future. Similarly, most are relatively well educated and so will find it easier than many released from prison to find at least reasonably remunerated employment in future.

[29] Therefore we would suggest that, in such cases, personal mitigation should carry less weight than it might in other crimes. The same will generally apply to efforts at rehabilitation. The result is that it must only be in the most exceptional cases of breach of trust that the court should consider personal mitigating factors are sufficient to outweigh the seriousness of the crime to the extent of allowing a suspended sentence.

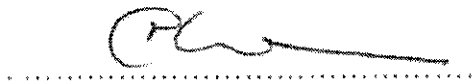
[21] In the present case, the seriousness of the crime clearly outweighed the appellant's personal mitigating factors. The stolen amount was substantial. The appellant only paid back $4000.00. The victim lost about $7000.00 which had not been compensated by the appellant as of to date. It was open on the facts for the learned magistrate to conclude that the appellant was not genuinely remorseful despite his early guilty plea and his willingness to full restitution after he was charged with theft.

[22] These grounds of appeal have not been made out and the appeal must be dismissed.

[23] **Result**

Sentence affirmed.

Appeal dismissed.



Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

A K Singh Law for the Appellant