IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

JEMESA MASIREWA

Appellant

CASE NO: HAA. 11 of 2023 **Vs.**
[Navua Magistrate's Court Criminal. Case No. 197 of 2022]

STATE

Respondent

Counsel : Appellant In Person
Mr. E. Samisoni for the Respondent

Hearing on : 02nd June, 2023
Judgment on : 15th June, 2023

JUDGMENT

Introduction

1. The Accused Appellant has preferred this appeal against the sentence.

2. He was charged with two counts one of theft contrary to section 29(1) of the Crimes Act and the second count of breach of order of suspended sentence contrary to section 28(1) and 26 of the Sentencing and Penalties Act. The Appellant has pleaded guilty and sentenced. The Appellant has himself drawn up this appeal against the said sentence dated 30th December, 2022. However, due to the delay by the prison authorities this has been filed on the 1st February, 2023. In these circumstances this appeal will be considered as being a timely appeal.

3. On the 21st November, 2022 the charges have been read and the Appellant has pleaded guilty to both these charges as evident from the Judge's notes. The sentence ruling had

then been pronounced on the 23rd December, 2022. According to which the learned Magistrate whilst stating that, "*the Accused pleaded guilty and the court accepted the guilty plea as unequivocal*", has proceeded to consider and determine the sentence. Though there were two charges to which the Appellant did plead guilty, the learned Magistrate has considered and determined the sentence only in respect of the theft count. The Appellant was imposed with a sentence of 11 months imprisonment for the count of theft which is count No. 1. However, the sentence ruling is silent as far as the second count of breach of suspended sentence is concerned.

Grounds of Appeal

4. The Appellant preferred this appeal on the grounds and basis that, *the learned Magistrate has taken into account irrelevant matters; erred in picking 12 months as the starting point; failed to take into account that the stolen goods were recovered and the Appellant was willing to pay for the stolen goods;* and *the sentence is harsh and excessive given the fact that the Appellant pleaded guilty at the outset and the one third benefit had not been afforded*.

5. On the perusal of the original court record the judge's notes and the sentence ruling I observe that the Appellant has tendered unqualified pleas of guilt which the learned Magistrate said was unequivocal but see no convictions being entered in respect of either count. The learned Magistrate has thus failed and not proceeded to enter and record convictions.

6. At the outset it is now necessary to determine if entering and recording of a conviction is a mandatory pre-requisite that should precede the sentence where an Accused person pleads guilty. As for the procedure in the Magistrate's Court section 174(1)(2) of the Criminal Procedure Act provides for the starting point.

7. Section 174(1) provides that when an Accused is brought before a Magistrate he shall be asked if he admits or denies the truth of the charges. Then 174(2) requires that if he admits the truth (pleads guilty) the court ***shall*** convict and proceed to sentence. This is in the mandatory form. Thus, at first blush it appears entering a conviction is a necessary step. However, section 174(2) specifically provides that the court should

proceed to sentence in accordance with the Sentencing and Penalties Act. The relevant section is section 15 of the Sentencing and Penalties Act which is 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.

8. Section 15(1) (a), (b), (c), (d), (g), (h) requires the ***recording*** of a conviction, and section 15(1) (e), (f) specifies that it may be ***with or without*** recording a conviction and as for section 15 (1) (i) and (j) it is ***without recording*** a sentence.

9. Readings section 174 (2) of the Criminal Procedure Act with section 15 of the Sentencing and Penalties Act the recording of a conviction is required only when section 15 so requires. Further, the use of the term ***recording a conviction*** in section 15

makes it apparent that the conviction should be expressly made by the magistrate and it should be a part of the recording and evident there from. Further if the court acts under section 15 of the Sentencing and Penalties Act to impose a jail term then the recording of a conviction is necessary. A term of imprisonment unless preceded by a conviction is thus irregular.

10. In the above circumstances the failure of the magistrate to convict the Appellant on his own pleas of guilt cannot be corrected in appeal nor is the High Court empowered under section 256 to enter a conviction in these circumstances. The order this court is empowered to make is to quash and set aside the sentence and to remit the matter with the opinion of the High Court to the Magistrate's Court as provided for by section 256(2)(b) of the Criminal Procedure Act. This is the statutory position.

11. However, I find that in certain circumstances, especially where the Accused has pleaded guilty and where the court has accepted the same to be unequivocal then such a plea of guilt may be considered to be a "conviction". In **State v Nakautoga** [1998] FJHC 21; Haa0130d.97s (26 February 1998), this legal position was accepted as follows:

> *"The section contains a clear mandatory direction that a person committing the offence shall be sentenced to immediate imprisonment upon conviction. The word "conviction" has been considered in many cases in many jurisdictions. In England, the leading authority is S v Recorder of Manchester & Ors [1971] A.C. 481 H.L. In Fiji it has been considered by the Court of Appeal in Siru Luluakalo v R. 8 F.L.R. 12, David Kio v R 13 F.L.R. 21 and Babu Ram v R. (Criminal Appeal No. 36 of 1974) and by the High Court in Waqavesi Bogitni v R 29 Fiji Law Reports 134 and Epeli Delai v The State (Criminal Appeal No. 22 of 1995). A relevant New Zealand authority is R v McLeod [1988] NZCA 102; [1988] 2 N.Z.L.R. 65. It is clear from these cases that the word "conviction" can have one of two meanings. That is either the finding of guilt or acceptance of a plea of guilty or the final judicial determination of the case. In S v Recorder of Manchester (supra) Lord Upjohn explained the distinction (at page 506) as:*
>
> *"The primary meaning of the word 'conviction' denotes the judicial determination of the case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence.....*
>
> *But the word 'conviction' is used also in a secondary sense, that is, to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by sentence".*

> *In my view the word "conviction" in Section 8 of the Dangerous Drugs Act (as amended) could only mean the finding of guilt or acceptance of a plea of guilty. It could not refer to the final judicial determination of the case because the section makes specific provision for sentence after this conviction. Therefore, if at the end of a defended hearing, the court finds the charge proved or (subject to any question of equivocality)* ***the accused pleads guilty to the charge, that constitutes a conviction****."*(emphasis added)

12. This legal position was once again accepted and affirmed in the case of the **State v Commissioner of Police and Attorney General ex parte Mahen Chand** [2001] HBJ 16/00S 7 February 2021 where it was held "*it is trite law now that a finding of guilty amounts to a conviction*".

13. In the present application the judge's notes as well as the sentence ruling does not contain an express conviction upon the guilty pleas. However, the learned Magistrate has accepted the guilty plea in paragraph 2 of the sentence ruling. Applying the above dicta I am inclined to consider the said guilty pleas and the acceptance thereof will amount to "convictions". Further, the Appellant does not deny that he was convicted. I also observe that in the warrant of commitment the Learned Magistrate does aver that the Accused was duly convicted in respect of the charges.

Considering the Grounds of Appeal

14. The main complaint of the Appellant is that his early guilty plea has not been considered. According to the sentence ruling the Learned Magistrate at paragraph 10 has only considered that the Accused was remorseful of his action. A reduction of 6 months was made in respect of the mitigating factors. Therefore, the learned Magistrate has not considered the early guilty plea. It is now settle that a convicted person may be entitled to a maximum of 1/3rd reduction at the discretion of court. The actual reduction will depend on the circumstances of each case. The Appellant was caught red handed in the act. However, he had pleaded guilty on the very first day. I would thus grant him a reduction of one month for his early guilty plea.

15. The final sentence is 11 months. The said one month will be deducted from the same and his sentence will now be 10 months. The final sentence is varied accordingly. However, this will be operative from 23rd December, 2022.

16. The tariff for repeated offenders of theft is a sentence of atleast 9 months (Ratusili v State) [2012] FJHC 1249; HAA 011.2012 [1st August, 2012]. The maximum sentence prescribed by section 29(1) of the Crimes Act is 10 years. Therefore, picking 12 months as the starting point is well with him the said tariff and reasonable. In the circumstances a finale sentence of 10 months is certainly not harsh or excessive.

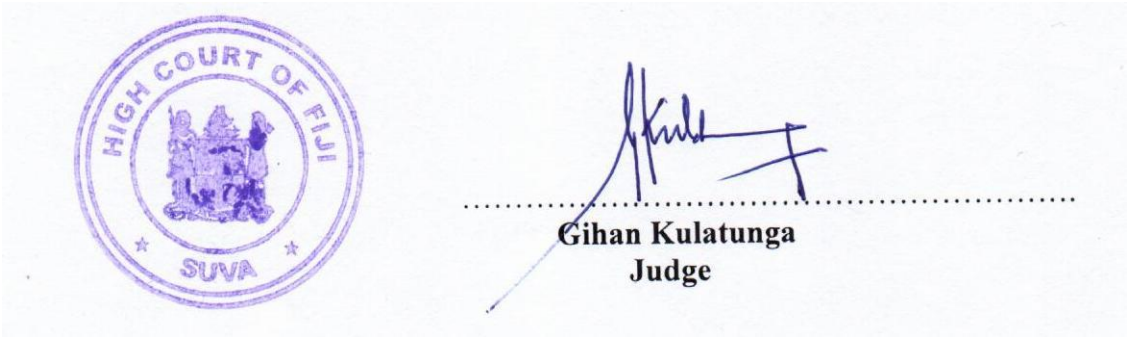
Sentence for Count 2

17. I observe that the learned Magistrate has not made any order as regards the second count. This I will deem it to be and considered that the learned Magistrate as having acted under section 28 (4) (c) and to have made no order with respect to the violation of the said suspended sentence.

18. Subject to the above variation to the sentence is affirmed and the appeal is allowed to that extent.

Orders of the Court:

1. Appeal against the sentence is partially allowed.
2. Sentence passed in the Magistrates Court on 23rd of December 2021 is quashed and a sentence of 10 months imprisonment is passed in substitution to run from 23rd of December 2021.



At Suva
15th June, 2023

Solicitors;
Appellant In Person
Office of the Director of Public Prosecutions for the State