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

CRIMINAL APPEAL NO. HAA 17 OF 2022

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Lautoka, in Criminal Case No. 815 of 2016.

BETWEEN	:	**ASHWIN CHAND**
		APPELLANT
AND	:	**THE STATE**
		RESPONDENT

Counsel	:	The Appellant appears in person Mr. Muhammed Rafiq for the Respondent
Date of Hearing	:	15 November 2022
Judgment	:	15 February 2023

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Lautoka, in Criminal Case No. 815 of 2016.

[2] In the Magistrate's Court of Lautoka, the Appellant was charged with one count of Theft, contrary to Section 291 (1) of the Crimes Act No. 44 of 2009 (Crimes Act), as follows:

CHARGE

Statement of Offence (a)

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

Particulars of Offence (b)

ASHWIN CHAND, on the 25th day of October 2016, at Lautoka, in the Western Division, dishonestly appropriated 1x Toyota Prius Hybrid valued at $22,000.00, the property of **AUTOMART LIMITED**, with the intention of permanently depriving the said **AUTOMART LIMITED**.

[3] The Appellant was first produced in the Magistrate's Court of Lautoka, on 27 October 2016. On 15 November 2016, his plea had been taken and he had pleaded not guilty to the charge.

[4] On 25 March 2022, the Appellant's plea was taken once again. 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 [As per page 26 of the Copy Record of the Magistrate's Court].

[5] It seems that on the same day the Summary of Facts had been filed in Court and the Appellant had admitted to same [As per pages 26 and 32 of the Copy Record of the Magistrate's Court]. Thereafter, the matter had been fixed for sentence.

[6] On 1 April 2022, the Appellant had been found guilty on his own plea, convicted and sentenced.

[7] The Appellant had been imposed a sentence of 15 months imprisonment to be served consecutive to his current sentence [As per pages 6 to 11 of the Copy Record of the Magistrate's Court].

[8] Aggrieved by the said Order, on 1 April 2022, the Appellant filed a timely appeal in the High Court. The papers filed were in respect of both his conviction and sentence. However, it is clear from the Grounds of Appeal filed that the said grounds were only in respect of the sentence imposed by the Learned Resident Magistrate.

[9] This matter was taken up for hearing before me on 15 November 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.

[10] The Grounds of Appeal taken up by the Appellant are as follows:

1. That the sentencing Magistrate erred in law while selecting the starting point from the top end of the tariff without giving any reasonable justification.
2. That the sentencing Magistrate failed to impose a concurrent sentence on the present term of two (2) years, eighteen (18) months non–parole of which the Appellant was serving.
3. That the sentencing Magistrate while considering whether to suspend the sentence considered the Appellant's previous convictions to punish as double jeopardy.
4. That the sentencing Magistrate failed to give a discount for guilty plea and also failed to give a discount for remand period under Section 24 of the Sentencing and Penalties Act.
5. That the sentencing Magistrate erred in law, thus mistook the fact that the Appellant was serving a two years sentence and eighteen months non–parole which was imposed by the High Court in case number HAC 115/2020.

[11] As can be observed all the Grounds of Appeal are against the sentence. Even during the hearing of this matter the Appellant confirmed that he is only appealing against the sentence.

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 re-produced 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 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."*

[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."

[15] During the hearing of this matter, the Learned State Counsel took up a preliminary objection that the Appellant has not complied with the provisions of Sections 248 and 249 of the Criminal Procedure Act. Section 248 stipulates that every appeal shall be in the form of petition in writing signed by the Appellant or the Appellant's lawyer. Section 249 of the Criminal Procedure Act refers to the form and contents of the Petition of Appeal, while Form 31 of the Criminal Procedure Act sets out the specimen format of a Petition of Appeal.

[16] The Learned Counsel for the State submitted that although the Appellant is self-represented, it is noteworthy that he is not new to the Criminal Justice System in Fiji considering the amount of previous convictions he has in his name, dating back to 1998. It was submitted that the Appellant has access to laws and resources required to prepare documents and submissions while being in Prison and that he has taken matters up to the Court of Appeal and Supreme Court, where he has appeared in person.

[17] In this case it is clear that the Appellant has not strictly complied with the provisions of Sections 248 and 249 in filing this appeal. However, since the Appellant is unrepresented, I am of the opinion that this appeal should be decided on its merits in the interest of justice.

The Grounds of Appeal against Sentence

[18] 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)."*

[19] 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."*

[20] 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.

[21] 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."

Ground 1

[22] This Ground of Appeal against sentence is that the Learned sentencing Magistrate erred in law while selecting the starting point from the top end of the tariff without giving any reasonable justification.

[23] The Learned Magistrate has made reference to the fact that the maximum punishment for the offence of Theft in terms of Section 291 of the Crimes Act is 10 years imprisonment.

[24] She has correctly made reference to the case of ***Ratusili v. State*** [2012] FJHC 1249; HAA011.2012 (1 August 2012); where 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."

[25] In this case, the Learned Magistrate has selected a starting point of 18 months imprisonment. She has stated that she was doing so to reflect the Appellant's disrespectful behaviour towards the complainant's property rights. I am of the opinion that there was no error of law on the part of the Learned Magistrate in doing so.

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

Grounds 2 and 5

[27] Since in my opinion Grounds 2 and 5 are interconnected they will be discussed together. Ground 2 is that the sentencing Magistrate failed to impose a concurrent sentence on the present term of two (2) years, eighteen (18) months non–parole of which the Appellant was serving. Ground 5 is that the sentencing Magistrate erred in law, thus mistook the fact that the Appellant was serving a two years sentence and eighteen months non–parole which was imposed by the High Court in case number HAC 115/2020.

[28] The Learned Magistrate has ordered the Appellant to serve 15 months imprisonment consecutive to his current sentence.

[29] From the reading of the sentence, I find that in sentencing the Appellant the Learned Magistrate has only made reference to Magistrate's Court Suva, Criminal Case No. 1704 of 2020. In that case, the Appellant had been sentenced to a term of 8 months, 2 weeks and 4 days, on 15 December 2021.

[30] In my opinion reference by the Learned Magistrate to current sentence is the sentence imposed by the Magistrate's Court Suva in Criminal Case No. 1704 of 2020.

[31] Therefore, as per the order of the Learned Magistrate the 15 months term of imprisonment imposed by her in the present case would commence after the

Appellant has served the sentence of 8 months, 2 weeks and 4 days, imposed by the Magistrate's Court Suva, on 15 December 2021.

[32] However, as at 1 April 2022, the Appellant had also been imposed a sentence of 2 years' imprisonment, with a non-parole period of 18 months' imprisonment, by the High Court of Suva in Criminal Case No. HAC 115 of 2020. This sentence had been imposed by the High Court on 11 February 2022. In sentencing the Appellant the High Court of Suva had made order that this term of imprisonment would be concurrent to the prison sentence the Appellant was currently serving for Magistrate's Court of Suva Criminal Case No. 1704 of 2020.

[33] It is apparent that the Learned Magistrate was unaware of the sentence imposed by the High Court of Suva at the time she had imposed the sentence on the Appellant in the instant case. I reiterate that her reference to current sentence is a reference to the Magistrate's Court of Suva Criminal Case No. 1704 of 2020.

[34] As per Section 22 (1) of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act), it is stated that 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.

[35] The Learned Magistrate has made no specific direction in respect of the sentence of 2 years' imprisonment, with a non-parole period of 18 months' imprisonment, imposed by the High Court of Suva in Criminal Case No. HAC 115 of 2020. Therefore, it is only just that the said sentence of 2 years' imprisonment, with a non-parole period of 18 months' imprisonment, be concurrent with the 15 months imprisonment ordered by the Learned Magistrate in this matter.

Ground 3

[36] This Ground of Appeal against sentence is that the sentencing Magistrate while considering whether to suspend the sentence considered the Appellant's previous convictions and this amounted to double jeopardy.

[37] 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.

[38] 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.

[39] I am of the opinion that the Learned Magistrate has duly provided her reasons as to why she was not suspending the sentence imposed on the Appellant in part or in whole.

At paragraph 16 of the sentence, the Learned Magistrate states as follows:

"You are not a first offender, your last previous conviction was for a case of Obtaining a Financial Advantage by Deception on 15 December 2017 (should be 2021) with a sentence of 8 months, 2 weeks and 4 days without any parole period. You have a total of 47 previous convictions with one to which you are currently serving that is within the operational 10 year period. However, I note that the previous convictions submitted by the Prosecution is not the latest report. Nevertheless, you are someone who knows the law and knows the consequences of breaking the law. Theft is a prevalent offence in society and must be deterred by similar offenders".

[40] Considering the aforesaid, I am of the opinion that this Ground of Appeal against sentence is without merit.

Ground 4

[41] This Ground of Appeal against sentence is that the sentencing Magistrate failed to give a discount for guilty plea and also failed to give a discount for remand period under Section 24 of the Sentencing and Penalties Act.

[42] The Learned Magistrate has stated at paragraph 13 of the sentence that the Appellant had not entered an early guilty plea. It is manifest that the Appellant had entered his guilty plea over 5 years after this matter was filed against him. Therefore, the Learned Magistrate cannot be faulted for not giving any discount for the Appellant's belated guilty plea.

[43] Furthermore, at paragraph 3 of the sentence, the Learned Magistrate states as follows:

> *"On the 15th of November 2016, you were read the charge, you understood the charge and you pleaded not guilty. There were admissions in your caution interview and you wished to challenge the admissions. The matter was adjourned for 5 mentions for your voir dire grounds and to allow for legal assistance. The matter delayed further when you were on bench warrant and due to the drastic reduced Court operations during the pandemic. On 18th March 2022, you were produced in Court as you are now a serving prisoner. You sought time to consider your stance in the matter and requested for a copy of the summary of facts."*

[44] I concede that the Learned Magistrate has not made any reference to the time spent in remand by the Appellant in terms of Section 24 of the Sentencing and Penalties Act. However, going through the Magistrate's Court record, I find that the Appellant had been granted bail on the very first day he was produced in Court namely 27 October 2016. He had furnished bail and was released from custody on 15 November 2016.

[45] Therefore, I am of the opinion that this Ground of Appeal against sentence has no merit.

Conclusion

[46] Accordingly, I conclude that the conviction and sentence imposed by the Learned Magistrate be affirmed, subject to the fact that the sentence of 2 years' imprisonment, with a non-parole period of 18 months' imprisonment, imposed by the High Court of Suva in Criminal Case No. HAC 115 of 2020, on 11 February 2022, be concurrent to the 15 months imprisonment ordered by the Learned Magistrate in this matter.

FINAL ORDERS

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

1. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka in Criminal Case No. 815 of 2016 is affirmed.

2. For the avoidance of any doubt the sentence of 15 months imprisonment will be concurrent to the sentence of 2 years' imprisonment, with a non-parole period of 18 months' imprisonment, imposed by the High Court of Suva in Criminal Case No. HAC 115 of 2020, on 11 February 2022.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
This 15th Day of February 2023

Solicitors for the Appellant : **Appellant Appears in Person.**
Solicitors for the Respondent: **Office of the Director of Public Prosecutions, Lautoka.**