IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0033OF 2006
& AAU0039 OF 2006
(High Court Criminal Case No. HAA024 of 2005)

BETWEEN: **THE STATE** ***Appellant***

A N D : **DHIRENDRA SINGH** ***Respondent***

Coram: **Ward, President**
Penlington, JA
McPherson, JA

Hearing: **Tuesday 19June 2007**

Counsel: **D Goundar for appellant**
D Prasad for the respondent

Date of Judgment: **Monday 25th June 2007**

JUDGMENT OF THE COURT

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[1] This is an appeal by the State against a decision of the High Court on appeal in which the learned judge reduced and suspended a sentence of imprisonment imposed by the magistrate.

[2] The respondent was, and apparently still is, the manager of the Amichandra Memorial School in Lautoka. He was charged with fifteen counts of fraudulent conversion of school funds and appeared in the Lautoka Magistrates' Court. He pleaded not guilty but was convicted on 25 October 2004 and was sentenced to two years imprisonment on each count concurrent.

[3] The offences had been committed over a period of fifteen months and amounted to a total sum of $11,409.00. The learned magistrate found that the appellant had used his position to circumvent the safeguards that were there to protect the school financially. It was, she found, a gross abuse of trust. She explained:

> "The effect on the school is clearly significant. From the evidence that was given it is clear that the school is a poor school, chronically short of funds and equipment. This loss was a very significant loss indeed for a non-profit organisation. ... The accused abused the trust placed in him by his fellow committee members, who were not strong enough, influential enough or educated enough to stand up to him. ... [H]e used his reputation and prominence to override others so he could commit these crimes. His offences were not isolated instances, but a calculated course of conduct."

[4] The respondent appealed to the High Court against both conviction and sentence. In a written judgment on conviction delivered on 26 April 2006, the learned judge dismissed the appeal against conviction. He concluded that decision with the following passage:

> "I refer to the decision of my learned Sister Justice Shameem in the *State v Semiti Cakau*, HAA 125 of 2004S. Although that case involved fraudulent falsification of accounts, the principles at large in fraud cases when it comes to sentencing are very similar.
>
> There are ample authorities supporting the proposition for custodial sentences on fraud and breach of trust offences. Custodial sentences are usually imposed in spite of the offender's good character. People of previously good character are often given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust that makes a custodial sentence inevitable except in the most exceptional cases where full restitution has been made. Non custodial sentences in those circumstances are not to be seen as offenders buying their way out of prison but as a measure of true remorse.
>
> I respectfully concur with my Sister Justice's observation in *Cakau* and accordingly I am going to allow this appellant approximately 1 month until the 4th of November 2005 to make good the money that he took from the school. If by that date the sum of $11,409.00 is repaid to the school to the satisfaction of the Director of Public Prosecutions then I will take [it] into account when considering this appeal. Subject to anything that the Director through his counsel may tell me or indeed the appellant's counsel may tell me.

Then accordingly I adjourn the sentence appeal part heard to the 4th November 2005 in the High Court at Suva 9.30am.

I will extend his bail until that date, but he needs to be very clear if that money has not been paid he is going to jail."

[5] When the court sat again to continue the appeal hearing against sentence the respondent had, not surprisingly, paid the full sum. The judge allowed the appeal again sentence, substituted a sentence of eighteen months imprisonment, presumably on each count concurrent, and suspended it for 3 years.

[6] In a lengthy judgment the learned judge correctly states that the law requires an error by the primary court "before the appellate court can enjoy the authority to disturb the decision subject to appeal". He continued:

> "This is for the reason that a Court of Appeal in criminal matters may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a different manner from the manner in which the sentencing judge exercised his or her discretion. ... Errors may involve the adoption by the primary judge of an incorrect principle, giving weight to some extraneous irrelevant matter, failing to give weight to some material considerations or a mistake as to the facts and the law."

[7] Having reached that conclusion the learned judge embarked on what appears almost to be a search for errors to justify the High Court's intervention. He found:

> "In her sentencing judgment; which took place the same day as the conviction; the learned magistrate failed to consider the availability of a suspended sentence as a non-custodial option for this misdemeanour offence. In addition while properly identifying the distinction between those misdemeanour convictions and the felony offence for larceny by servant it is clear that the learned magistrate was drawn towards the latter more serious offence as setting the basis for the starting point and tariff principles to be applied. The offence for larceny by servant carries a maximum sentence of 14 years in jail."

[8] He continued with the suggestion that the felony was less amenable to a suspended sentence and, on that basis, concluded:

> "... a misdemeanour offence may have been more amenable to the imposition of that non-custodial option. It is arguable that section 28(j) of the Constitution requires that such an enquiry be made at sentencing. Accordingly I find that these errors in the sentencing justify my reconsideration of the sentencing discretion exercised by the learned magistrate at first instance."

[9] Regrettably we find it hard to escape the conclusion that the judge was seeking to explain a decision already reached a month before in order to justify interference with the sentence of the lower court. Neither suggestion, namely that the magistrate had treated the case as one more akin to larceny by servant or that she did not consider a suspended sentence bear scrutiny.

[10] The first is presumably based on the opening paragraph in the learned magistrate's sentencing judgment where she stated:

> "These offences are misdemeanours and carry a maximum jail term of 7 years. This contrasts with the offence of larceny by servant which carries a term of 14 years. In this instance the offences committed by the accused have much factually in common with the offence of larceny by servant."

[11] We do not consider that passage supports the learned judge's first comment. On the contrary; whilst acknowledging the clear factual similarity between the two offences, she specifically contrasts them.

[12] The second suggestion is contradicted by the magistrate's explanation of the sentence:

> "There are almost no mitigating factors. The accused put the prosecution and witnesses to the trouble and expense of a lengthy hearing, there was no guilty plea, no expression or indication of remorse. Despite the considerable time which has elapsed since the funds were taken, nothing has been repaid.
>
> I take into account that the accused is a first offender and is aged 57. He also has 2 dependants. It has been put to me that the fact he is a locally prominent man is a mitigating factor. In one sense, this maybe true. In another sense, he used his reputation and prominence to

override others so he could commit these crimes. His offences were not isolated instances, but a calculated course of conduct. ... In the circumstances of these crimes, I do not consider these to be mitigating factors.

Given the gravity of the offences, I start at two years. I deduct one year for the mitigating factors referred to earlier and add one year for the aggravating factors.

As there was no guilty plea, no remorse, no attempt at restitution, an immediate custodial sentence is called for. You are sentenced to 2 years imprisonment on each count concurrent." (our emphasis)

[13] That passage shows clearly that the magistrate did consider the option of suspending the sentence and dismissed it as inappropriate in such a case. We can find no fault in her reasoning or conclusion.

[14] Unlike the learned judge, we consider there was no ground for interfering with the magistrate's decision on sentence. She explained it properly and, for the reasons stated, reached a thoroughly appropriate penalty.

[15] The judge took a different view. Having considered he had a reason to intervene he then took the initiative of giving the appellant an opportunity quite simply to buy himself out of prison. Quite apart from the clear lack of remorse remarked on by the magistrate, the judge appears to have overlooked the fact that the appellant had disputed the offences in the magistrates' court and continued to do so in the High Court. The course the judge took meant that he was being told that he should repay money for a crime he was still denying.

[16] It is difficult to understand where the decision to follow such a course arose. It cannot have been counsel's suggestion because instructed, as he must have been, that the appellant was not guilty, he was professionally prevented from suggesting restitution.

[17] However it arose, the fact is that, over the period from the offences in 1999 and 2000 to the trial in the Magistrates' Court in 2004 and to the appeal in the High Court in 2006, the appellant had made no attempt to pay the money. Instead as we have stated, he denied his guilt throughout.

[18] The judge explains his action by reference to the judgment of Shameem J in *Cakau's case*. It is instructive to see the words she used. Having pointed to the seriousness of any betrayal of trust, she continued:

> "It is for this reason, that a custodial sentence is inevitable except in those exceptional cases where full restitution had been effected, not to buy the offender's way out of prison, but as a measure of true remorse."

[19] We cannot understand how the learned judge could have found that repayment after such a long failure to do so and then only after the judge gave him the option to pay or go to jail could be considered any measure of true remorse. It appears to us to be a clear case of something Shameem J expressly excluded, namely a payment made by the appellant to buy his way out of prison.

[20] The judge's decision to allow the appellant time to pay was wrong and the manner in which it was stated was wrong. It could only have led the appellant to feel that an implicit bargain had been struck; i.e. fail to pay and you will go to prison, pay and you will not.

[21] Such implicit bargains were disapproved of by Salmon LJ in the case of *Collins v R* [1969] 53 Cr App R 385. That case had been adjourned and the accused bailed to allow him to assist the police locate stolen property; a course Salmon LJ described as not appropriate. He referred to the earlier case of *West v R* [1959] 43 Cr App R 109 in which Parker LCJ had pointed out that the court of appeal had disapproved of situations such as occurred in the case before us.

[22] *West's case* was one of fraudulent conversion. The sentencing court had allowed an adjournment after the sentencing judge had referred to the accused's ability to repay the sum taken and continued "I cannot order you to repay but I will postpone sentence if you are willing to promise me to come up for judgment in six months. Are you willing?" Parker LCJ commented:

> "That is just what this court has said ought not to be done. ... it is highly undesirable to postpone sentence and at the same time to turn the court into a money–collecting agency."

[23] The reference to money collecting is apt in the present case. As the judge's comments show, the school had clearly taken it as such:

> "However, between sentence and this appeal that full sum has now been repaid. The current school board had now filed a letter in support of the accused. This letter acknowledges the payment in full and indicates the victim's view that they no longer want any further action to be taken against the appellant"

[24] The first sentence of that passage also highlights another complaint which the State makes. Whilst it was strictly accurate, it was facile to describe the repayment as having been made between the sentence (i.e. in the magistrates' court) and the appeal when it had in fact only taken place as a result of the judge's intervention during the actual hearing of the appeal.

[25] Mr Goundar for the State has submitted that the judge's actions exceeded his powers under section 319 of the Criminal Procedure Code.

> "(1) At the hearing of an appeal, the High Court shall hear [the parties] and ... may thereupon confirm, reverse or vary the decision of the magistrates' court, ... or may 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 ...
>
> "(2) 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 therefore as it thinks ought to have been passed."

[26] Mr Goundar submits that the phrase in subsection (2) 'ought to have been passed' means 'ought to have been passed by the magistrate'. That is correct as was pointed out by this Court in *DPP v Gaj Raj Singh* [1978] 24 FLR 43 dealing with similar words in what was then section 300(2):

> "...section 300(2) limits the powers of the [High] Court in such cases to passing such other sentence 'warranted in law as it thinks ought to have been passed'. Unless that last phrase is interpreted to mean 'passed by the magistrate' that is the court from which the appeal is brought, the words would be meaningless".

That interpretation of the present section was approved in *Eri Mateni v The State* [1999] Crim App AAU 21/98, 14 May 1999.

[27] The judge in the present case accepted that the powers of the High Court on appeal are described in section 319 and continued:

> "Unlike many jurisdictions ... the powers given to the High Court on appeal are wide and unfettered. The Court if it thinks that a different sentence should have been passed can quash the original sentences and pass any other sentence warranted in law whether more or less severe."

[28] The judge was clearly wrong to suggest the powers are unfettered and to conclude therefore that it may pass any other sentence it considers should have been passed.

[29] However, we do not take the meaning of the section to be as restricted as the State contends. The principle explained in *Gaj Raj Singh's case* is that, where the High Court substitutes another sentence in an appeal, it may not exceed the magistrate's sentencing powers. In the present case, the sentence passed by the judge was within the sentencing powers of the magistrate.

[30] However, Mr Goundar's principal objection, understandably, is to the manner in which the judge effectively directed a step which would result in new evidence and then used that evidence to alter the magistrate's sentence which had, of course been passed before the new evidence existed. Further, it was evidence which ran directly counter to the situation upon which the magistrate had based her sentence.

[31] As the judge found, section 320 allows the High Court on appeal to consider additional evidence:

> "320. (1) In dealing with an appeal from a Magistrate's Court the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a Magistrate's Court.
> (2) ...
> (3) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at trial before a Magistrates' Court."

[32] We do not accept that the course taken by the judge in the present case can be covered by that provision. It is not uncommon for the High Court to have to consider an appeal where the evidence taken is unclear or appears to be incomplete. In some cases it will appear that an obvious element of the evidence has been omitted. Section 320 gives the court power to obtain such evidence. The evidence will concern matters existing at the time of the Magistrates' Court trial. We do not see section 320 as allowing the course taken in the present case whereby the court made an order to create fresh evidence and then proceeded to overturn the decision made by the magistrate before that evidence existed.

[33] The judge described the court's power:

> "In addition the court upon a suitable application being made may hear "fresh" evidence. Evidence otherwise unavailable to the primary court.
>
> Life does not stop at the point in time when the primary judge delivers a sentence. Life and circumstances can change. Those changes and circumstances must be taken into account by the appellate court when

> it exercises its discretion or view to reconsider a sentence of the first court. By way of example the courts have shortened or quashed sentences of imprisonment on appeal for the post sentence critically ill or those suffering from AIDS. If that is so that principle can well extend to an appellate court considering the accused's or indeed the victim's conduct post sentence as relevant to the exercise of the discretion in imposing a fresh penalty."

[34] We accept there are circumstances where events subsequent to the sentence may assist an appellant as in the case of *Joselyn Deo v The State* [2005] Crim App AAU 25/05, 11 November 2005. In the present case, had the court heard that the appellant had repaid the money of his own volition and before the appeal, it would have been a matter the court might have considered but, as we have said before, this was not such a case. In *Joselyn Deo's case* the Court pointed out the proper approach on appeal:

> "The appellate court will only interfere if there is no evidence upon which the sentencing magistrate could properly have based his decision or it was based on a wrong principle or mistake of law or is plainly unreasonable."

[35] In the present case the judge did not adopt that approach. Had he done so and had he not considered, wrongly, that the magistrate had failed to consider the option of suspending the sentence, we are sure he would have agreed the sentence was proper and should not be altered.

[36] We are satisfied that the sentence passed by the magistrate was correct and the learned judge erred in the manner in which he approached this appeal. He should not have reduced the sentence and he should not have suspended it.

[37] We allow the State's appeal against sentence.

[38] However, we must pass on to consider the consequence of that decision. We are not inclined to take the strict approach adopted by Salmon LJ in *Collins case* where the court quashed an order to pay compensation which had by then been paid:

"This court therefore ... quashes that part of the order. It is not for the court to speculate about what the result of that will be since the appellant has paid the compensation ..."

[39] Whilst we conclude the judge was wrong to tell the appellant to pay the money and, once it was done, use it as a reason to reduce and suspend the sentence, it is clear that the appellant made the payment in the belief he would avoid prison. We deplore the fact that it means he has bought his way out of prison and, more, because it was at the invitation of the judge. However, the appellant may be left with a justifiable sense of grievance if, having paid the money, he were to be ordered to serve his sentence.

[40] We consider the justice of the present situation is to restore the original sentence of two years on each count concurrent but to leave the sentence suspended.

[41] **Result**:

Appeal against sentence allowed.

Sentence of 18 months imprisonment quashed and a sentence of two years imprisonment on each count concurrent substituted. The whole sentence to be suspended for three years.

Ward, President

Penlington, JA

McPherson, JA

Solicitors:

Office of the Director of the Public Prosecutions, Suva for the Appellant
Haroon Ali Shah, Lautoka for the Respondent