

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 381 OF 2013

BETWEEN: **MOSESE VAKATALE**

Appellant

AND: **STATE**

Respondent

Counsels : **Appellant in person**
Mr. S. Babitu for the Respondent

Date of Hearing : **23 January 2014**

Date of Judgment : **7 February 2014**

JUDGMENT

1. The appellant was charged before the Lautoka Magistrate with one count of Theft contrary to Section 291 of the Crimes Decree and one count of Breach of Order Suspending Sentence contrary to Sections 26 and 28 (1) & (2) of the Sentencing and Penalties Decree.
2. The appellant pleaded guilty to the first charge and he was convicted of both charges and sentenced for 12 months imprisonment for the first charge and 2 years imprisonment for the second charge on 15th August 2013.
3. The facts of the case are the appellant had hired the taxi of the complainant and got off with the complainant's bag and ran away. The incident was reported and when the appellant was arrested and caution interviewed, appellant admitted the offence.
4. This appeal was filed on 9th September 2013 within time.

5. The grounds of appeal are :

- (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive.
- (ii) That the aggravating factors considered by the learned Magistrate are not recognized by law.
- (iii) That the second charge was not put to him for a plea.

Ground (i) Sentence harsh and excessive

6. The learned Magistrate had selected a starting point of 6 months following the tariff judgments *Waisale Vakarauvanua v State* [2002] FJHC 116; HAA51J.2004S, *Niudamu v The State* [2011] FJHC 661; HAA 028.2011(20 October 2011). For aggravating factors 18 months were added. The aggravating factors recognized by the learned Magistrate are;

- (i) The offending was well planned and executed.
- (ii) The bag of money is not recovered.
- (iii) Putting the members of the community at risk of not being provided services by the taxi service.

7. A period of 6 months was deducted for the mitigating factors arriving at the sentence of 18 months. Further 6 months were deducted for the early guilty plea.

8. The learned Magistrate had followed relevant tariff judgments and arrived at a correct starting point. The period added for the aggravating factors and period deducted for mitigating circumstances are justifiable and reasonable. Therefore, there is no merit in the first ground of appeal and it fails.

Ground (ii)

The learned Magistrate had considered aggravating factor not recognized by law

9. The fact that offending was well planned and executed and putting members of the community at risk of not being provided services by the taxi service are grounds accepted as aggravating factors.

10. The fact that the bag of money is not recovered cannot be considered as an aggravating factor.

11. This position was affirmed by Hon. Mr. Justice Paul Madigan in *Soko v State*, [2011] FJHC 777; HAA 031.2011 (29 November 2011) where he held that "*Items being recovered are often points of mitigation relied on by convicted accused persons, but it's not appropriate to reverse the point and make lack of recovery an aggravating feature.*"

12. This point was also highlighted by Hon. Mr. Justice Priyantha Nawana in **Vasuca v State** [2012] FJHC 1244; HAA 03.2012(31 July 2012):

“As regards ‘not all items were recovered’, it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently the fact that all or some items of property were not recovered cannot be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa.”

13. The learned Magistrate had taken a starting point of 6 months.

14. Tariff for the offence of theft was discussed in several cases. In **Saukilagi v State** the Court accepted between 2 to 9 months as tariff for simple theft:

*“The tariff for simple larceny on first conviction is 2-9 months (**Ronald Vikash Singh v. State** HAA 035 of 2002) and on second conviction a sentence in excess of 9 months. In cases of the larceny of large amounts of money sentences of 1 ½ years imprisonment (**Isoa Codrokadroka v. State** Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (**Sevanaia Via Koroï v. State** Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between victim and the defendant. The method of stealing is also relevant.”*

15. As the appellant is not a first offender, the starting point of 6 months taken by the learned Magistrate is at the lower end and the Magistrate had justified it by adding 18 months for aggravating factors. The final sentence is lenient and not a day too long in the circumstances. There is no merit in this ground as well.

Ground (iii)

16. When a person pleads guilty to another criminal offence within the operational period of a suspended sentence, by the operation of law the suspended sentence become alive. There is no need to record a separate plea as the suspended sentence become alive by operation of law.

17. The appellant was convicted on 18.1.2010 and this offence was committed on 27.10.2012, within the operational period of the suspended sentence.

18. Section 28 (4) of the Sentencing and Penalties Decree is as follows:

If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a fine not exceeding 100 penalty units and in addition **court must restore the sentence or part sentence held in suspense and order the offender to serve it**, but if the court considers that exceptional circumstances exist that make this unjust, the court may instead-

- (a) Restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
- (b) In the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or
- (c) Make no order with respect to the suspended sentence.

19. The learned Magistrate had considered this section in his sentence. He had stated that there are no exceptional circumstances for him to consider. He had made following sentencing remark;

'MOSESE VAKATALE, it seems that you have not utilized the opportunity given to enjoy your liberty and rehabilitate yourself in order to live a life away from crime. It seems that you do not wish to become a better person but continue to be on the opposite side of the law. You had no respect for the complainant when you stole his property and ran away. You simply acted as if your conduct was lawful when the law is clear that such conduct is a criminal offence known in law as theft. You are simply a lazy person surviving on the hard work of honest and law abiding citizens for which you should be ashamed for. The law will protect them from such people like you.'

20. Therefore the learned Magistrate had clearly considered that all relevant circumstances before making the appellant to serve the suspended sentence.

21. Further, according to Section 28 (5) of the Sentencing and Penalties Decree:

Any order for an offender to serve a term of imprisonment under sub-section (4) **must be served-**

- (a) Immediately; and
- (b) Unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.

22. There is no merit in this ground of appeal and it fails.

23. For the reasons given above the appeal against the sentence is dismissed.

Sudharshana De Silva
JUDGE

At Lautoka
07th February 2014

Solicitors : **Appellant in Person**
 Office of the Director of Public Prosecutions for Respondent