

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO: HAA 017 of 2015**  
**MC Suva Criminal Case No: 1334 of 2015**

**APIMELEKI RAIROBA WAQA**

**V**

**STATE**

Counsel : F. Vosarogo for Appellant  
          : T. Qalinauci for Respondent  
Date of Hearing : 17<sup>th</sup> September 2015  
Date of Judgment : 05<sup>th</sup> October 2015

**JUDGMENT**

1. The Appellant was charged in the Magistrate Court of Suva for one count of Theft contrary to section 291(1) of the Crimes Decree 2009 on 24<sup>th</sup> July 2015. The charge reads as follows;

*Statement of Offence*

THEFT: contrary to Section 291(1) of the Crimes Decree Number 44 of 2009.

*Particulars of Offence*

APIMELEKI RAIROBA WAQA on the 22<sup>nd</sup> day of July, 2015 at Nabua in the Central Division, dishonestly appropriated (stole) 1 x Samsung Galaxy S4 Mobile phone valued at \$400.00, the property of Angela Kumar d/o Raja Ram

2. On 10<sup>th</sup> August 2015, the Appellant pleaded guilty to the offence as charged. He was represented by the Legal Aid.

3. On 17<sup>th</sup> August 2015, he was sentenced to 7 months imprisonment with a non-parole period of 4 months. It was ordered that he serve 4 months with immediate effect and the balance 3 months suspended for 12 months.
  
4. The summary of facts admitted by the Appellant were as follows;  
*“On the 22<sup>nd</sup> day of July 2015, at 1.30pm, along Bailey Bridge, Nabua, Angela Kumar [PW 1], 42 years, Self Employed of 15 Willow Street, Nakasi was selling her produce at the market along Ratu Mara Road, Nabua.*  
*[PW1] was leaning on the counter browsing through her Facebook when Special Constable 4100 Apimeleki Rairoba Waqa [Accused], 21 years, Police Officer of Sukanaivalu Road, Nabua came from behind and grabbed her mobile phone Samsung S4 valued at \$400.00 and fled.*  
*The Accused ran through the cross cut behind British Tobacco and up Sukanaivalu Road, Nabua, whereby [PW1] followed in a vehicle of a fish seller Imran Khan [PW2], 27 years, Fish Seller of Nepani.*  
*They saw the [Accused] walking along Sukanaivalu Road changing his T-shirts. [PW-1] called out for help to get the [Accused] whereby the public on the road made a chase where the [Accused] cross cut through a track which leads to the Army Camp. The [Accused] was then arrested by the Army officers.*  
*The report was lodged at Nabua Police Station. Investigations were carried out. The mobile phone was recovered from the [Accused].*  
*The [Accused] was interviewed under caution whereby he admitted to the allegation put to him and also re-construction was also conducted during the interview.*  
*The [Accused] was subsequently charged for a count of Theft contrary to Section 291(1) of the Crimes Decree Number 44 of 2009.”*
  
5. According to the relevant court record of the Magistrate Court, on 10<sup>th</sup> August 2015, the above summary of facts were read out in court and interpreted in i-Taukei language. The Appellant had understood the facts and had admitted them. The Legal Aid has filed a comprehensive written submission on 12<sup>th</sup> August 2015 on mitigation.
  
6. The learned Magistrate noted that the facts of the case were serious and called for a deterrent sentence though the Appellant is a young first offender as the Appellant being a Police Officer stole from a member of the public in broad daylight. It appears that the

learned Magistrate was guided by this reasoning to select the starting point of 12 months imprisonment.

7. The aggravating factors which the learned Magistrate considered to increase the sentence by 3 months were;
  - a) The planning involved where the Appellant was ready with a T-shirt to change on the way after committing the crime
  - b) Concerted effort by the members of the public and the victim to apprehend the Appellant
  - c) No respect for the property rights of the complainant and the mobile phone valued at \$400 was not surrendered voluntarily
  
8. It is evident that the learned Magistrate has given her mind to all the factors highlighted on behalf of the Appellant in mitigation. The learned Magistrate has given a one-third deduction on account of the early guilty plea and has given a 3 month deduction thereafter based on the other mitigating factors. In brief, the mitigating factors were as follows;
  - a) Appellant is a young offender of 21 years of age who is single with a 3 year old daughter and unemployed at the time of sentencing
  - b) Comes from a broken family where he and his siblings are raised by his aunt. He is looking after the younger siblings who are attending secondary school
  - c) He was desperate for money to visit his child with some groceries which was the reason to steal the phone
  - d) He is remorseful
  - e) Early guilty plea
  
9. Being aggrieved by the sentence pronounced by the learned Magistrate, the Appellant appeals the sentence on the following grounds;
  - a) *That the sentence against the Appellant was harsh and excessive in all circumstances of the case.*
  - b) *That the learned Magistrate failed to apply proper and appropriate sentencing principles as well as appropriate deductions for mitigation including (but not conclusively) the young first offender principle of the Appellant.*

- c) *That the learned Magistrate failed to consider the fact that the stolen item was returned within a short time to the complainant when sentencing the Appellant.*
- d) *That the learned Magistrate's use of the non-parole period resulted in an unfair sentence to the Appellant and one that grieves any proper assessment of facts and law in the matter.*
- e) *That no consideration for a one third reduction was made by the learned Magistrate, the absence of which resulted in an unfair sentence.*
- f) *That the learned Magistrate had considered extraneous issue in sentencing and failed to consider appropriate issues of mitigation which rendered the sentence manifestly excessive and unreasonable in law.*

#### **Tariff for Theft under section 291 of the Crimes Decree**

10. After considering a number of decisions of this court on tariff for the offence of Theft, I find that the court has opined the lower end to be 2 months imprisonment and the higher end to be 3 years imprisonment. (See *Navitalai Seru v State* [2002] FJHC 183, *State v Saukilagi* [2005] FJHC 13, *Chand v State* [2007] FJFC 65, *Kaloumaira v State* [2008] FJHC 63, *Chand v State* [2010] FJHC 291, *Ratusili v State* [2012] FJHC 1249, *State v Koroinavusa* [2013] FJHC 243, *Lal v State* [2013] FJHC 602, *State v Batimudramudra* [2015] FJHC 495).
11. An imprisonment of 2 to 9 months has been the tariff recognised under the now repealed Penal Code for a first offender who commits the offence of Theft. Section 262 of the Penal Code specified three different penalties for the offence of Theft as follows;
  - a) First offence of Theft (simple larceny) – 5 years
  - b) Simple larceny committed after having been previously convicted of a felony – 10 years
  - c) Simple larceny committed after having been previously convicted of a misdemeanour – 07 years
12. However, it is pertinent to note that the Crimes Decree 2009 does not specify different penalties for Theft based on previous convictions. The only penalty provided under section 291(1) of the Crimes Decree is an imprisonment for 10 years.

13. In view of the fact that the Crimes Decree has increased the maximum penalty for Theft from 5 years as stipulated in the Penal Code to 10 years, it is logical that the tariff for Theft should also be increased. Further, it is no longer the law in Fiji to recognise a different sentence or a tariff for Theft for offenders with previous convictions.
14. Considering all the above factors and the decisions of this court, I am inclined to hold the view that the tariff for Theft is 4 months to 3 years imprisonment.

#### **Fixing a non-parole period for a sentence of imprisonment up to one year**

15. It is pertinent to note the following sections of the Sentencing and Penalties Decree 2009 concerning the fixing of a non-parole period.

*“18(1) - Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court **must** fix a period during which the offender is not eligible to be released on parole.*

*18(3) - If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court **may** fix a period during which the offender is not eligible to be released on parole.*

*18(4) - Any **non-parole period** fixed under this section **must be at least 6 months less than the term of sentence**” [emphasis is mine]*

16. Considering subsections 18(1) and 18(3) above and also the mandatory requirement for any non-parole period to be at least 6 months less than the term of sentence as provided in subsection 18(4), it is not apposite to fix a non-parole period when sentencing an offender to be imprisoned for a term of less than one year.
17. The non-parole period of 4 months fixed by the learned Magistrate in this case, which is only 3 months less than the head sentence is wrong in law.

#### **Was the Appellant a Police Officer and its relevance to sentencing**

18. The Counsel for the Appellant argued that the learned Magistrate had erroneously considered that the Appellant is a Police Officer when it has been submitted in

mitigation that he is unemployed. The Respondent submits that the Appellant was a Police Officer until the date of this hearing, as the Police Headquarters was unaware of this offence. It was submitted that he was working as a special constable who is paid only if and when he report for work. I note that the summary of facts clearly states that the Appellant is a Police Officer and the same facts had been admitted by the Appellant after being translated and explained to him. What is stated in the submission on mitigation is that the Appellant is '*currently unemployed*'. Therefore, the learned Magistrate did not err in considering that the Appellant was a Police Officer at the time of the offending.

19. However, the fact that the Appellant was a Police Officer cannot be considered as an aggravating factor in view of the facts of this case as the Appellant had not used the privileged or the trusted position as a Police Officer in any manner to commit the offence.
20. It is pertinent to note that the fact that he as a Police Officer was charged with the duty of protecting the public, would certainly affect the weight that could be attached to mitigating factors such as he is a first offender and that he chose to steal from a member of the public because he was desperate for money.

#### **Whether the sentence is harsh and excessive**

21. I would now endeavour to consider the appropriate penalty for this case with the view of considering whether the sentence imposed by the learned Magistrate is harsh and excessive. Taking into account the tariff of 4 months to 3 years imprisonment, I select the starting point as 4 months imprisonment.
22. I find the following to be the aggravating factors of this case;
  - a) Use of force to commit Theft.

Though the Appellant is charged with Theft, I note that he used force on the victim at the time of committing the offence as he wrenched the phone from her. Therefore, the Prosecution in this case appear to have opted a lesser offence. However, for the purpose of sentencing, I consider this use of force as an aggravating factor.

b) The planning involved in order to conceal his identity.

I agree with the learned Magistrate when she concluded that there was planning involved as the Appellant had come prepared to change his clothes.

c) This offence was committed in broad daylight in a marketplace and even after realising that he was identified and located by the victim, Appellant tried to run away until he was finally caught by Army Officers. This depicts his recalcitrant attitude and indifference to the tranquillity of the society.

d) The Appellant chose a lady who is 42 years old who is making her living from selling her own produce at the market as his victim.

23. I add 24 months to the starting point of 4 months in order to reflect the above aggravating factors.

24. Now the sentence is 28 months. Considering his guilty plea on the second day the matter was called, I deduct 9 months.

25. I take into account the same mitigating factors identified by the learned Magistrate. However, as mentioned above, the weight that could be attached to the mitigating factors are adversely affected by the fact that the Appellant was a Police Officer. Further, I do not find this to be an opportunistic theft considering the Appellant's own submission in mitigation that he was desperate for money to visit his child at the time the offence was committed. It is obvious that the Appellant was in fact looking for an opportunity to steal in view of his desperate need for money and the fact that he came prepared to change his T-shirt after committing the offence.

26. Accordingly, I deduce 12 months as the appropriate discount for the mitigating circumstances of this case. After deducting the said 12 months from the 19 months sentence I arrived at the previous stage upon discounting for the early guilty plea, the Appellant's final sentence is 7 months imprisonment.

27. Hence, I hold that the sentence of 7 months imprisonment imposed by the learned Magistrate is the appropriate sentence in this case.

### **Suspending the sentence**

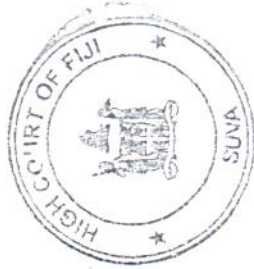
28. Though the learned Magistrate has suspended the final 3 months of the sentence, I note that the learned Magistrate has not given any reason for arriving at that decision to suspend the sentence.
29. I find that it is appropriate to consider suspending the Appellant's sentence under section 26(1) of the Sentencing and Penalties Decree 2009 based on the following grounds;
- a) The objective seriousness of the offence committed;
  - b) The Appellant is a young first offender who is 21 years of age;
  - c) The fact that he was a student at the Maritime School as submitted by Mr. Vosarogo during the hearing;
  - d) In order to encourage the Appellant to acquire a suitable qualification so that he can secure a respectable livelihood without being a miscreant; and
  - e) Giving him the benefit of the doubt in assuming that this is a one-off wrong decision he made in his life.
30. Unfortunately, to avoid a wrong message being sent out to the society and to reflect the public denunciation against this type of behaviour, the Appellant cannot escape serving at least a short duration of his imprisonment term. Therefore, suspending part of the sentence pursuant to section 26(1) of the Sentencing and Penalties Decree is appropriate in this case.

### **Conclusion**

31. Considering the above, I order that the Appellant serve the first 2 months of the imprisonment sentence of 7 months imposed by the learned Magistrate and the balance 5 months be suspended for 18 months.



32. For the reasons given above, it is not proper to fix a non-parole period in relation to this sentence. The non-parole period fixed by the learned Magistrate is therefore removed.
33. To this extent, the sentence imposed by the learned Magistrate on 17<sup>th</sup> August 2015 in Criminal Case No: 1334 of 2015 is hereby varied.



Vincent S. Perera  
JUDGE

**Solicitors for the Appellant :**  
**Solicitor for the Respondent:**

**Mamlakah Lawyers, Barristers & Solicitors, Suva**  
**Office of the Director of Public Prosecution, Suva**