IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 87 OF 2016

BETWEEN : **SOFIA SHAINAZ AZEEM HUSSEIN**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. V. Narara [LAC] for the Appellant
: Ms. S. Kiran for the Respondent

Date of Hearing : 13 March, 2017
Date of Judgment : 20 March, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court with the offence of Theft contrary to section 291 (1) of the Crimes Decree. It was alleged that on 16 June, 2016 the Appellant dishonestly appropriated 1 x black wallet containing cash of $150.00 the property of Miliana Baleasavu with the intention of permanently depriving the said Miliana Baleasavu.

[2] On 29 August, 2016 when the matter was called in the Magistrate's Court the Appellant who was represented by Legal Aid Counsel pleaded guilty to the charge after it was read and explained to her.

[3] After the summary of facts was admitted by the Appellant and the learned Magistrate been satisfied that the guilty plea was unequivocal the Appellant was convicted as charged.

SUMMARY OF FACTS

[4] The following summary of facts was admitted by the Appellant:

On the 16th day of June, 2016 at Super foods supermarket at the city mall at 1645hrs, one Sofia Shainaz Azmeen Hussein (B-1) Self-employed of Field 40, Lautoka stole a black purse containing $150.00 the property of Miliana Baleasavu (A-1) 37 years Food seller of Saru, Lautoka.

Briefly on the above time, date and place (A-1) was doing her shopping at the said supermarket with her five year old son namely Manani. (A-1) was packing potatoes at the potatoes shelf with her bag she was carrying on her shoulder and her black purse was inside. Whilst (A-1) was packing her potatoes, (B-1) came to her side and requested her to push some potatoes to her side as she wants some big potatoes. (A-1) was busy packing her potatoes her son was tugging on her shirt and wanted to tell her something but she was not too concerned. As (A-1) was busy packing the potatoes, (B-1) saw (A-1)'s bag open and saw the black wallet inside and took it and left out. Then (A-1) went to check out with her shopping and reached into her bag to get her purse and discovered it was missing. (A-1) checked her bag but couldn't find it. (A-1) told her son that someone had taken her purse but her son told her that he saw the Indian lady opening her bag and took out the purse. (A-1) was so surprised and left her shopping to look for the Indian lady in the mall but could not locate her.

Then (A-1) went to the market Police post and reported the matter to the Police. Later (B-1) was identified by the police and interviewed under caution in which she admitted stealing the purse containing $150.00 and she has thrown the black wallet inside a rubbish bin in the market. (B-1)

said that she has used the money for buying groceries and clothes. On evidence on hand, (B-1) was formally charged for the offence of Theft contrary to section 291 of Crimes Decree No. 44 of 2009. (B-1) was later bailed for Lautoka M/C on 18/07/16.

[5] After hearing mitigation on 28 November 2016 the Appellant was sentenced to 12 months imprisonment.

[6] The Appellant being dissatisfied with the sentence filed a timely appeal against sentence as follows:-

"1. *The Learned Magistrate erred in law and in principle when he sentenced the Appellant to a term of imprisonment without considering the fact that the Appellant was willing and was in the capacity to restitute the Complainant.*

2. *The Learned Magistrate erred in law when he stated that the Appellant had two previous convictions when she had only one that was dated back to 2010.*

3. *The Learned Magistrate erred in law and in principle when he stated that the offence in 2010 was committed in the same manner when he had not called for the 2010 file to be brought before his Court to assist him in making such determination.*

4. *That the sentence imposed by the Learned Magistrate is bad in fact and in law, excessive and harsh."*

GROUNDS OF APPEAL

GROUND ONE

The Learned Magistrate erred in law and in principle when he sentenced the Appellant to a term of imprisonment without considering the fact that the Appellant was willing and was in the capacity to restitute the Complainant

[7] Learned Counsel for the Appellant referred to paragraph 5 of the sentence where it was submitted as part of mitigation that the Appellant was willing to pay back the money stolen. Counsel further submitted that a condition of the Applicant's bail was not to interfere with witnesses as such the Appellant could not approach the complainant and repay the amount of $150.00. The only option available to the Appellant was to inform the court as part of her mitigation which was done.

[8] Counsel relied on the Supreme Court decision in *Manoj Khera vs. The State [2016] FJSC 2; CAV0003 of 2016 (1 April 2016)* in particular the effect of restitution on sentence at paragraph 7 Gates C.J. stated:

"...Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences..."

[9] Learned Counsel for the Respondent submits that the Appellant had received due discount for her willingness to restitute and if indeed the Appellant was genuine in paying then she could have handed the money to the court during mitigation. It was further submitted that as per the copy record the Appellant appeared in court on two occasions after pleading guilty and before sentence but she did not hand over any money.

[10] At paragraph 5 of the sentence the learned Magistrate mentioned the following in regards to the mitigation presented on behalf of the Appellant:

"In mitigation the Legal Aid Counsel said that you are 39 years old and married with 3 children. Youngest child is 18 years. You are unemployed. It was informed that you are remorseful and seek forgiveness. Also it was informed that you are willing to pay back the money. The Legal Aid Counsel asked for a lenient sentence."

[11] The mitigation was presented on 24 October 2016 and the following is noted in the copy record at page 11:

"... Willing to reinstate to complainant, she can pay $150.00..."

[12] In *State vs. Jocelyn Deo, Criminal Appeal no. HAA 0008 of 2005,* Shameem J. made a very valuable comment about restitution:

"...The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology.

[13] Section 4 (2) (h) of the Sentencing and Penalties Decree allows a sentencing court to consider restitution. The relevant section is as follows:-

"(2) In sentencing offenders a court must have regard to -

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree."

[14] The above provision of the Sentencing and Penalties Decree makes it mandatory for a sentencing court to consider restitution. There is no doubt an offer was made by the Appellant but was the offer followed up by any action for payment.

[15] The Appellant was caution interviewed on 29 June, 2016 and the following question and answer is relevant:

"Q. 47 Do you wish to say anything else in this matter?
A. I am willing to pay that Fijian woman $150.00 that I have stolen."

[16] In the record of charge statement dated 29 June, 2016 the Appellant once again reiterated her offer of restitution as follows:-

"Q.15 Now tell me what you want to say?

A. I admit that I have stolen the Fijian woman's purse at the Superfood Supermarket at the mall and I will pay the woman $150.00. I have the money with me".

[17] I accept that the Appellant had expressed her willingness to pay back the money stolen during Police investigation and during mitigation. Unfortunately the Appellant did not do anything to give effect to her offer during mitigation.

[18] In the copy record at page 11 counsel for the Appellant did inform the court that the Appellant was "willing to pay" and "can pay" but what was done by the Appellant to make the offer a reality. The same willingness was expressed by the Appellant when she was arrested by the Police.

[19] It appears from the mitigation of the Appellant that she was only making her willingness known to the court in respect of restitution without any genuine desire to pay. Had the Appellant been genuine in paying the victim counsel would have informed the court of when and how the money would be paid.

[20] The wordings of section 4 (2) (h) of the Sentencing and Penalties Decree demands action from an offender if restitution is to be meaningful, mere words are not sufficient.

[21] This ground of appeal fails due to lack of merits.

[22] As a matter of good practice a sentencing court when informed about restitution by an accused should make enquiries into the offer to ascertain its authenticity so that the victim can be compensated for the loss suffered and on the other hand act as a mitigating factor for the offender if restitution is made. Any restitution offered should be acted upon with urgency by the offender and not as a means to delay sentencing.

GROUND TWO

The Learned Magistrate erred in law when he stated that the Appellant has two previous convictions when she had only one that was dated back to 2010.

[23] Counsel for the Appellant submitted that the Appellant had two previous convictions, however, one is dated to the year 2000 which is over 10 years hence should have been disregarded by the learned Magistrate. The Appellant's conviction which is relevant is dated 29 September 2010 which means she kept a clean record for about 6 years.

[24] Counsel for the Respondent submits that at paragraph 6 of the sentence the learned Magistrate merely states the number of previous convictions of the Appellant but when sentencing the Appellant the learned Magistrate only took into consideration her conviction in 2010, therefore the conviction in 2000 was not used against her.

[25] At paragraph 6 of the sentence the learned Magistrate mentioned about the two previous convictions as follows:-

"You have 2 previous convictions. It does not seem that you have learnt a lesson or attempted to reform. However you pleaded guilty saving the Courts time."

[26] On 29 August, 2016 when the Appellant pleaded guilty she admitted to one previous conviction, but on 19 September, 2016 two previous convictions were shown to the Appellant which was subsequently admitted by her.

[27] Section 5 (1) (a) of the Rehabilitation of Offenders (Irrelevant Convictions) Act, 1997 (which came into force on 1 July, 1998 by Legal Notice No. 83) states that convictions which are more than 10 years are regarded as irrelevant. According to section 24 (2) anyone who intends to refer to an irrelevant conviction must seek leave of the Court. There is nothing in the copy record to show that on 19 September, 2016 the Prosecution had

obtained leave of the court to show the irrelevant previous conviction to the Appellant.

[28] I am satisfied that out of the two previous convictions shown to the Appellant in the Magistrate's Court one is irrelevant and should not have been considered by the learned Magistrate.

[29] The learned Magistrate erred when he took into account two previous convictions instead of one. Having come to the conclusion that the learned Magistrate erred when taking into account an irrelevant conviction, this court has to consider whether any substantial miscarriage of justice has arisen from the error of the learned Magistrate.

[30] In accordance with the tariff for subsequent offending for the offence of Theft in *Mikaele Ratusili v State Criminal Appeal No. HAA 011 of 2012* the relevant previous conviction is enough to bring the Appellant within the sentencing range of at least 9 months imprisonment.

[31] I therefore direct myself in accordance with section 256 (2) (f) of the Criminal Procedure Decree and dismiss this ground of appeal since no substantial miscarriage of justice has occurred.

GROUND THREE

The Learned Magistrate erred in law and in principle when he stated that the offence in 2010 was committed in the same manner when he had not called for the 2010 file to be brought before his court to assist him in making such a determination.

[32] Counsel for the Appellant submits that the learned Magistrate erred in suggesting that the offence of Theft committed in 2010 was committed in the same manner without calling for the file. The amount stolen in 2010 was $900.00 and the Appellant was sentenced to 3 months imprisonment suspended for 3 years and she was ordered to pay $900.00 back to the Complainant.

[33] Counsel for the Respondent submits that the learned Magistrate took judicial notice of an earlier matter where the Appellant was given a suspended sentence for the same offence committed in a similar manner. The comparison was for the offence committed rather than the amount involved because the Appellant had not learnt her lesson and re-offended in a similar manner again.

[34] At paragraph 9 of the sentence the learned Magistrate stated:-

"You were imposed with a suspended sentence in 2010 by this Court for the same offence which was committed by you in the same manner..."

[35] Since the offence committed by the Appellant in 2010 was one of Theft the learned Magistrate made a comparison between the two offences committed. In any event the comment made by the learned Magistrate at paragraph 9 of the sentence was after he had arrived at his final sentence and was considering whether to suspend the sentence or not.

[36] This ground of appeal is also dismissed.

GROUND FOUR

That the sentence imposed by the learned Magistrate is bad in fact and in law, excessive and harsh.

[37] Counsel for the Appellant admits that the offence committed by the Appellant was a subsequent offence, however, counsel states the starting point picked by the learned Magistrate of 18 months was excessive.

[38] Counsel further stated that the learned Magistrate relied on the case of *Ratusili* which was a case of breach of trust by an employee and the amount of money stolen was substantial. The starting point selected in *Ratusili's* case was 36 months.

[39] In the current case counsel submits there was no breach of trust and the amount stolen was minimal hence the starting point of 18 months was excessive.

[40] Finally counsel refers to paragraph 4 of the sentence where the learned Magistrate added 3 months as an aggravating factor on the basis that the offence of Theft was prevalent in the Society.

[41] In support of the above counsel relied on *Tuilaselase vs. State [2015] FJHC 920; HAA 33 of 2015 (25 November 2015)* where Aluthge J. had stated:-

"that the fact the offence was prevalent in society could not be considered as an aggravating factor and the learned Magistrate had fallen into error when he considered it."

[42] Counsel for the Respondent states that the learned Magistrate took a starting point of 18 months which was towards the higher end of the tariff. However, the learned Magistrate had given a reason for taking the higher end of the tariff which was this offence was a subsequent offending which would attract at least 9 months imprisonment. The Respondent submits that the starting point was correct in the circumstances.

[43] Moreover the Respondent concedes that the learned Magistrate had erred when he took prevalence of the offence of Theft as an aggravating factor.

STARTING POINT

[44] The Appellant argues that the learned Magistrate erred in selecting a high starting point of 18 months imprisonment which resulted in excessive punishment for the Appellant. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in *Laisiasa Koroivuki v The State, Criminal Appeal No. AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:

"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

[45] The maximum sentence for Theft is ten years imprisonment.

[46] In *Mikaele Ratusili v State, (supra)* Madigan J. after reviewing various and varying decisions on the tariff for larceny which offence has now been replaced by Theft established the tariff for Theft as follows at paragraph 13:-

"(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 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."

[47] The learned Magistrate selected a starting point of 18 months since the Appellant was charged for a subsequent offence. I do not accept that since there was no breach of trust and that the amount stolen was minimal the starting point was excessive.

[48] The starting point of 18 months imprisonment is in the middle range of the tariff. As per *Ratusili's* case the appropriate tariff for Theft for a subsequent offending should be between 9 months and 3 years imprisonment.

[49] The learned Magistrate was correct in selecting 18 months imprisonment as a starting point and there is no error in this regard.

[50] Moving onto the second limb of this ground that the learned Magistrate took as an aggravating factor the prevalence of the offence in the Society. I accept that the learned Magistrate erred when he considered the prevalence of the offence committed by the Appellant was an aggravating factor. This ground of appeal is allowed in part.

[51] For clarity and completeness I note that the learned Magistrate had not taken into consideration the following aggravating factor that is the Theft was committed in a Supermarket in broad daylight, for this aggravating factor I maintain the addition of 3 months as allowed by the learned Magistrate. I also accept as correct the deduction given by the learned Magistrate for mitigation and early guilty plea. This means there is no change to the final sentence of the Appellant.

[52] In view of the above and in the interest of justice I rely on section 256 (2) (a) of the Criminal Procedure Decree to confirm the final sentence of the Appellant.

[53] The learned Magistrate was also correct in declining to suspend the imprisonment term considering the circumstances of the offending and the Appellant's previous conviction.

ORDERS

1. The Appeal is dismissed.

2. The sentence of the Magistrate's Court is affirmed.

3. 30 days to appeal to Court of Appeal

Sunil Sharma

Judge

At Lautoka
20 March, 2017

Solicitors

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.