

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 56 of 2017

BETWEEN : **SERA TIVITORO TAWAKE**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. J. Singh [LAC] for the Applicant.
: Mr. A. Datt for the Respondent.

Date of Hearing : 12 July, 2017

Date of Ruling : 17 July, 2017

RULING

[Application for leave to appeal out of time]

BACKGROUND INFORMATION

- [1] The Applicant was charged in the Magistrate's Court with one count of Theft contrary to section 291 of the Crimes Act.
- [2] It was alleged that the Applicant between the 17th day of May, 2014 and 3rd day of March, 2015 at Tavua stole a HP Brand Laptop valued at

\$1,299.00 and cash of \$8,292.20 all valued at \$9,591.20 the property of Courts Fiji Limited, Tavua Branch.

- [3] On 17 January, 2017 the Applicant pleaded guilty to the charge after it was understood by her. Thereafter the Applicant admitted the summary of facts.

SUMMARY OF FACTS

- [4] The summary of facts admitted by the Applicant was as follows:

“Between the 17th day of May, 2014 and 3rd day of March, 2015 the Accused was employed by Courts Fiji Limited, Tavua Branch as a Branch Assistant Manager. Sometimes in February, 2015 the Courts Audit section found out that the stock was short at Courts Tavua Branch. The item short was a HP brand laptop valued at \$1,299.00. As per audit report and Westpac Bank Deposit slip No. 0163842 on 15/12/14 the Accused was supposed to deposit \$1,382.00 in the company account No. 9801256125 but she deposited \$862.00 where the short was \$520.00.

On 04/02/15 the Accused was supposed to deposit \$2,611.95 to the company account but she deposited \$2228.95 as per Westpac bank deposit slip No. 0180356 dated 11/02/15 and the short was \$383.00.

As per Audit report, on 25/02/15 the Accused was relieving the other cashiers when she received payments from the customers amounting \$6,782.20. This cash was kept by the Accused and the cash was not deposited into the company account.

Then on 03/03/15 the Accused was again relieving the cashiers when she received \$607.00 as payments from the customers. The Accused did

payment to her personal accounts and the rest she kept to herself. The Accused failed to deposit the sum of \$607.00 into the company account. After the Audit section found out that an HP Brand Laptop and cash was misused by the Accused, she was confronted and the Accused came to an agreement to do the payment to the amount which have been misused by her.

Later Accused was arrested and interviewed under caution in which she only admitted stealing \$1,500.00 from the company. The Accused was later charged for a count of Theft under section 291 of the Crimes Decree no. 44 of 2009. The Accused is bailed to appear Tavua M/C on 04/04/16.

- [5] Upon being satisfied that the Applicant had entered an unequivocal plea the learned Magistrate convicted the Applicant as charged.
- [6] After hearing mitigation on 24th January, 2017 the Applicant was sentenced to 2 years imprisonment without a non-parole period.
- [7] The Applicant being dissatisfied with the sentence by letter dated 20th April, 2017 which was received by the High Court Registry on 24th April, 2017 filed her appeal against sentence.
- [8] The Applicant is now represented by the Legal Aid Commission since the Applicant filed her appeal late by about two months leave must be obtained by the Applicant to appeal out of time.
- [9] The Applicant through her counsel has filed a Notice of Motion supported by her own affidavit sworn on 21 June, 2017. The application is opposed by the State which has filed an affidavit in reply of Sunil Raniga sworn on 27 June, 2017.

[10] Both counsel have filed written submissions and also made oral submissions for which the court is grateful.

LAW

[11] Section 248 (2) of the Criminal Procedure Act gives the court powers to enlarge the time within which an Applicant can file an appeal. Section 248 (2) states:

“... the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”

[12] The Supreme Court in *Kamlesh Kumar vs. The State, Criminal Appeal No. CAV 0001 of 2009* mentioned the following five factors by way of a principled approach which the Appellate Courts examine in respect of an application for the grant of an extension of time to appeal. These factors were:

- [i] The reason for the failure to file within time;
- [ii] The length of the delay;
- [iii] Whether there is a ground of merit justifying the appellate court’s consideration;
- [iv] Where there had been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- [v] If time is enlarged, will the Respondent be unfairly prejudiced?

DETERMINATION

REASON FOR THE FAILURE TO FILE APPEAL WITHIN TIME

- [13] The Applicant at paragraph 4 of her affidavit mentions the reason for the delay as her own decision not to file her appeal within time although she had a discussion with a Legal Aid lawyer within the appeal period.
- [14] The reason given by the Applicant is not satisfactory she had received legal advice and also had the opportunity to file her appeal within time but decided against doing so.

LENGTH OF DELAY

- [15] The Applicant was sentenced on 24th January 2017 she filed her appeal against sentence by letter dated 20th April, 2017 which was received by the High Court Registry on 24th April, 2017. After the appeal period had expired the length of delay was about two months which is not a substantial delay.

WHETHER THERE IS A MERITORIOUS GROUND JUSTIFYING THE APPELLATE COURT'S CONSIDERATION

- [16] Counsel for the Applicant submits that the proposed ground of appeal against sentence was meritorious since the sentence imposed was wrong in principle because the learned Magistrate had taken breach of trust factor when considering the starting point of the sentence as well as an aggravating factor. This had led to double counting resulting in excessive sentence.

[17] At paragraphs 9 and 10 of the sentence the learned Magistrate whilst considering the starting point stated the following:

“9. When considering the nature and circumstances of offending in this matter, I consider the offending in this case to be more fraud related than a simple theft matter. That being the position the tariff would be one of 18 months – 3 years imprisonment as mentioned in Mohammed Zohit Khan (supra).

10. I therefore commence your sentence at 2 years imprisonment.”

[18] Counsel argued that by considering the nature and circumstances of the offending at paragraph 9 of the sentence the learned Magistrate took into account breach of trust factor when selecting the starting point of the sentence.

[19] For the selection of a starting point the Court of Appeal in *Laisiasa Koroivuki vs The State, Criminal Appeal No. AAU 0018 of 2010* at paragraph 27 stated that the sentencing court must have regard to an objective seriousness of the offence committed without taking into account the mitigating and aggravating factors as follows:

“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.”

[20] For the offence of theft the tariff is settled. In *Mikaele Ratusili vs. State, Criminal Appeal No. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for the offence of theft as follows:

- “(i) For the 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.”*

[21] The learned Magistrate had correctly taken into account the tariff of the offending to be between 18 months and 3 years imprisonment (see *Mohammed Zohit Khan vs. State, Criminal Appeal Case No. HAA 24 of 2016*).

[22] The learned Magistrate then after having regard to the objective seriousness of the offence selected two years as starting point of the sentence which was at the lower range of the tariff.

[23] Having selected the starting point, the learned Magistrate correctly proceeded to consider the aggravating and mitigating factors. Although

the learned Magistrate considered the offending to be fraud related other than simple theft he applied the correct tariff. I do not accept the contention of the Applicant that the learned Magistrate had taken breach of trust factor in the starting point of the sentence. The learned Magistrate had correctly taken breach of trust factor as an aggravating factor at paragraph 6 of the sentence. In any event the final sentence of two years imprisonment is within the tariff for the offence of theft without a non-parole period which will assist in the rehabilitation of the Applicant.

[24] The proposed ground of appeal does not have any merits.

PREJUDICE TO THE RESPONDENT

[25] There is no evidence that the Respondent will be prejudiced if the Applicant is given leave to appeal out of time

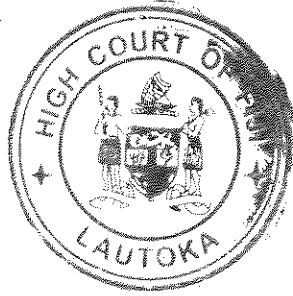
CONCLUSION


[26] Based on the reasons mentioned above this court is satisfied that the proposed ground of appeal argued by the Applicant is without any merits which does not justify this court's intervention in granting the Applicant an extension of time to appeal. Furthermore no good cause has been shown by the Applicant in support of her application although the length of delay is not substantial and that the Respondent will not be unfairly prejudiced if time to appeal is enlarged.

ORDERS

1. The application for leave to appeal out of time is refused.

2. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
17 July, 2017

Solicitors

Office of the Legal Aid Commission, Tavua for the Applicant.

Office of the Director of Public Prosecutions, Ba for the Respondent.