

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 100 OF 2017**

**BETWEEN** : **KALIVATI VOLAVOLA**  
**APPELLANT**

**A N D** : **THE STATE**  
**RESPONDENT**

**Counsel** : Ms. L.M. Ratidara [LAC] for the Appellant.  
: Mr. T. Qalinauci for the Respondent.

**Date of Hearing** : 29<sup>th</sup> November, 2017

**Date of Judgment** : 1<sup>st</sup> December, 2017

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**JUDGMENT**

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**BACKGROUND INFORMATION**

- [1] The Appellant was charged in the Magistrate's Court for the offence of Theft contrary to section 291 (1) of the Crimes Act. It was alleged that on 15<sup>th</sup> September 2015 the Appellant had dishonestly appropriated cash of

\$311.10 the property of Outrigger Resort with the intention of permanently depriving the said Outrigger Resort.

- [2] On 22<sup>nd</sup> May, 2017 when the matter was called in the Magistrate's Court the Appellant pleaded guilty to the charge after it was read, explained and understood by him.
- [3] After the summary of facts was admitted by the Appellant and the learned Magistrate being 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 15<sup>th</sup> of September, 2015 Russell Blaik (A-1), 50 yrs, Resort Manager, Outrigger Resort Staff Quarters reported that Kalivati Waqa Volavola (B-1), 27 yrs, Hotel Worker, Sila Village, Sigatoka was on the night shift at the Front Desk at Outrigger Resort and stole cash that was paid to him for the guest hotel bill amount to \$311.10.*

*On the above mentioned date, time and place (B-1) was on night shift as a reservation when he served a guest who came to pay their hotel bill before checking out. The guest paid \$977.00 which was their hotel bill on their stay at the resort to (B-1). (B-1) whilst receiving the cash payment from the guest he transferred the amount of \$665.90 to the account and he pocketed \$311.10. On the 06<sup>th</sup> October, 2015, Ranjeet Singh (A-2), 30 yrs, Revenue Auditor, Kulukulu conducted his auditing of sales from the Front Desk and found out that \$311.10 was missing from the payment done from a guest on 15/09/15. (A-2) reported the missing cash to (A-1) and*

*investigation was conducted whereby (B-1) was question and he admitted stealing \$311.10.*

*The matter was later reported to the Police and (B-1) was arrested, caution interviewed and admitted stealing \$311.10. He was charged for one count of Theft: Contrary to Section 291(1) of Crimes [Act] No. 44 of 2009 and bailed to appear at Sigatoka Magistrate Court on 16/01/17.*

[5] After hearing mitigation, on 26<sup>th</sup> July, 2017 the Appellant was sentenced to eight (8) months imprisonment.

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

*"1. The Learned Trial Magistrate erred in law and in fact when he failed to suspend the sentence after the Appellant had made full restitution to the court.*

*2. The Learned Trial Magistrate erred in law and in fact when he wrongly calculated the one third discount for his early guilty plea and ultimately coming to a wrong sentence term.*

*3. The Learned Trial Magistrate erred in law and in fact in failing to suspend his sentence on account of his status as a first offender."*

[7] Both counsel have filed helpful written submissions and also made oral submission during the hearing for which the court is grateful.

[8] During the hearing counsel for the Appellant abandoned ground two of the appeal.

## **DETERMINATION**

- [9] Counsel for the Appellant submits that although the Appellant was guilty of a breach of trust the amount stolen was relatively small compared to most breach of trust cases.
- [10] Furthermore, counsel argues that the Appellant had made full restitution which shows genuine remorse by the Appellant including his guilty plea. The Appellant was a first offender who had learnt his lesson having spent his time incarceration.
- [11] Counsel finally submits that justice will be served if the balance sentence of the Appellant was wholly suspended as a measure of rehabilitation. The Appellant is expected to be released in January, 2018 from the Corrections Center.

## **RESTITUTION**

- [12] At paragraphs 10 and 11 of the sentence the learned Magistrate states the following about restitution:

*"10. You told the court that you're 28 years of age, single, unemployed, seek forgiveness and promised not to reoffend and also restitute the complainant with the sum of \$311.10 by paying the same to Court on the 04/07/2017.*

*11. The court had received the sum on the 04/07/2017 and receipt furnished to the accused person (RR No. 569793)."*

- [13] The learned Magistrate had taken into consideration the restitution made by the Appellant in his sentencing but it appears that the essence of the

payment made by the Appellant was misconstrued. At paragraph 15 of the sentence the learned Magistrate states:

*“15. The court had accounted and included the same as mitigating factors discount; but let me make this crystal clear, that the court would not account for such restitution as a mode of paying your way out of incarceration.”*

### **GUILTY PLEA**

- [14] From the record of proceedings, it is obvious to me that the Appellant never disputed his guilt. From the summary of facts when the employer investigated the complaint of missing money the Appellant admitted the allegation thereafter when interviewed by the police under caution he admitted the allegation and finally when he appeared in court he pleaded guilty at the earliest opportunity.
- [15] The above sequence of events and the restitution made does indicate a genuine remorse by the Appellant.
- [16] The Supreme Court of Fiji in *Manoj Khera -v- the State [2016] FJSC 2; CAV 0003 of 2016 (1 April, 2016)* had mentioned about the effect of restitution on sentence, at paragraph 7 Gates C.J. had stated:  
*“...Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences...”*
- [17] In *State -vs. - Jocelyn Deo, Criminal Appeal No. HAA 0008 of 2005*, Shameem J. made a valuable comment about restitution in the following words:

*“... 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.”*

[18] Section 4 (2) (h) of the Sentencing and Penalties Act 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 [Act].”*

[19] The above provision of the Sentencing and Penalties Act makes it mandatory for a sentencing court to consider restitution.

[20] I accept that the learned Magistrate had taken into account the restitution made by the accused, however, he did not consider restitution as genuine remorse in reducing the harshness of the final sentence.

[21] The final sentence of 8 months imprisonment was within the ambit of section 26 (2) (b) of the Sentencing and Penalties Act which gave the court powers to suspend the final sentence.

[22] At paragraph 18 of the sentence the learned Magistrate had stated *“I do not have any compelling reasons to suspend this term”* it was important for the learned Magistrate to consider the special circumstances that were available to the Appellant before deciding not to suspend the sentence. I accept that in breach of trust cases involving dishonest

employees, suspension of an imprisonment term is only appropriate if there are special circumstances present.

- [23] The Court of Appeal in *Joselyn Deo -vs- The State, Criminal Appeal no . AAU 0025 of 2005s (11 November, 2005)* at paragraph 27 confirmed the above in the following words:

*“Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting such a sentence and, in all cases, the sentencing court should not be too quick to find such circumstances.”*

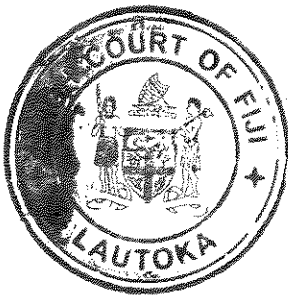
- [24] In the present case, the amount stolen by the Appellant was \$311.10 which was paid by the Appellant in full. The sum of money stolen was relatively small when compared to similar cases (see *State -v- Cakau, Criminal Appeal No. HAA 125 of 2004s (10 November, 2004)*). The Appellant had admitted his guilt when confronted by the employer, during police investigation and when he appeared in court. The Appellant was 27 years of age at the time of the offending and a first offender.

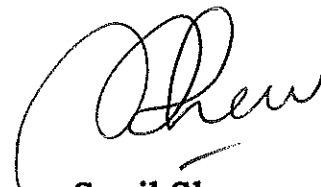
- [25] Had the learned Magistrate directed his mind to these circumstances, he would have concluded that the Appellant was genuinely remorseful and had attended to all that could be expected of him in the situation. For these reasons the learned Magistrate erred in the exercise of his sentencing discretion in not suspending the Appellant’s sentence.

## **ORDERS**

1. The appeal against sentence is partly allowed.
2. The term of imprisonment of 8 months is wholly suspended for 2 years with effect from 26<sup>th</sup> July, 2017.\*
3. The Appellant is to be immediately released from the Corrections Center.
4. 30 days to appeal to the Court of Appeal.

\*The effect of a suspended sentence is explained to the Appellant.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

1<sup>st</sup> December, 2017

### **Solicitors**

**Office of the Legal Aid Commission, Sigatoka for the Appellant.**  
**Office of the Director of Public Prosecutions for the Respondent.**