IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 59 OF 2018

BETWEEN : **VULA DUACAKE**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Mr. M. Naivalu for the Appellant.
	:	Ms. L. Latu for the Respondent.
Date of Hearing	:	23 November, 2018
Date of Judgment	:	06 December, 2018

JUDGMENT

Background Information

1. The appellant was charged in the Magistrate's Court at Ba for the following offences:

Statement of Offence

RECEIVING STOLEN PROPERTY: Contrary to section 306(1) of the Crimes Act 2009.

Particulars of Offence

VULA DUACAKE on 2nd day of May, 2017 at Ba Town in the Western Division, dishonestly received a mobile phone valued at $245.00 the property of **SANGEETA LATA** knowing or believing the mobile phone to be stolen.

Statement of Offence

ABSCONDING BAIL: Contrary to section 26(1) of the Bail Act of 2002 as amended by section 2 of the Bail (Amendment) Decree No. 28 of 2012.

Particulars of Offence:

VULA DUACAKE on 3rd day of July, 2017 at Ba Town in the Western Division,being bailed by Ba Magistrate Court Criminal Case No. 340/17 to attend Ba Magistrate Court on the 31st August, 2017, failed to present himself before Ba Magistrate Court without reasonable excuse.

2. On 13th August, 2018 the appellant in the presence of his counsel pleaded guilty to the charge of receiving stolen property and thereafter admitted the summary of facts after it was read to him.

3. The learned Magistrate after being satisfied that the guilty plea was unequivocal convicted the appellant as charged.

SUMMARY OF FACTS

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

"On 02nd day of May 2017 at 1430 hrs Sangeeta Lata (PW-1) 38yrs, Receptionist of Varadoli, Ba reported that her Samsung brand mobile phone valued at $245.00 went missing from her workplace at Dr. Sanjesh Singh's Clinic in Ba Town.

On the above mentioned date and time (PW-1) was at work. Whilst at work (PW-1) left her mobile phone on her table at the front desk and went to the back of the office. (PW-1) returned to the front desk and discovered her mobile phone missing from her table. (PW-1) reported the matter to the Ba Police Station. Upon investigation the mobile phone was recovered from one Asena Naivolia, (PW-2) 24yrs, casual worker of Yalalevu, Ba. (PW-2) stated that the accused sold her the mobile phone for $70.00.
Accused was arrested, interviewed under caution and admitted committing the offence. Accused was formally charged for one count of Receiving stolen property contrary to Section 306 (1) of the Crimes Act of 2009, Accused appearing in custody for Court.

5. After considering mitigation on 21st August, 2018 the appellant was sentenced to 12 months imprisonment.

6. In respect of the charge of absconding bail on 13 August, 2018 the appellant in the presence of his counsel pleaded guilty to the charge and thereafter admitted the summary of facts after it was read to him.

SUMMARY OF FACTS

7. The following summary of facts was admitted by the appellant:

"On 03rd July, 17 at about 0900 hrs at Ba Magistrate Court the accused was bailed by Ba Magistrate Court. On 31st August, 2017 at about 0900 hrs at Ba Magistrate Court whilst on bail the accused failed to present himself at Ba Magistrate Court.

On 02/11/17 the accused was arrested and caution interviewed and was formally charged for the offence of absconding bail and is in custody for court."

8. The learned Magistrate after being satisfied that the guilty plea was unequivocal convicted the appellant as charged.

9. After hearing mitigation, on 21 August, 2018 the appellant was sentenced to 5 months and 16 days imprisonment. This sentence was

made consecutive to 12 months imprisonment in CF 340 of 2017 (receiving stolen property).

10. The total term of imprisonment to be served by the appellant is 17 months and 16 days without a non-parole period.

11. The appellant being dissatisfied with the sentence filed a timely appeal against sentence as follows:

"i). The net sentence imposed was excessive and wrong in principle;

ii). The learned Magistrate erred in not taking into account relevant factors;

iii). The learned Magistrate had not placed sufficient weight to the mitigating factors when sentencing the Appellant."

12. Both counsel have filed written submissions and also made oral submissions during the hearing for which this court is grateful. This court also wishes to acknowledge the assistance of state counsel in filing supplementary case authority.

LAW

13. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

14. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

15. From the grounds of appeal it is obvious that the appellant's contention is that the sentence is wrong in principle which has resulted in a harsh and excessive sentence. The appellant seeks a suspended sentence.

16. All the grounds of appeal can be dealt with together.

17. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:

"(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the

commission of such offences; or

(f) any combination of these purposes."

18. Section 4(2) states the different factors which a court must take into account when sentencing an offender. Section 15(3) inter-alia states that sentences of imprisonment should be regarded as the sanction of last resort.

19. The learned counsel for the appellant submits that although the learned Magistrate had mentioned rehabilitation in his sentence he failed to reduce the head sentence.

20. At paragraph 15 of the sentence the learned Magistrate mentioned the following about rehabilitation:
"For your rehabilitation, I exercise my discretion and decide not to impose a non-parole period against you."

21. Counsel relies on the case of *Eva Tagilala aka Ivamere Biaukula and Mereoni Vosita, Criminal Appeal No. HAA 90 of 2016* where both the appellants were convicted of one count of theft on their own plea. This court had reduced the sentence from 20 months imprisonment to 11 months imprisonment for stealing groceries worth $77.18 from a supermarket. The appellant's were sentenced afresh. The head sentence of 11 months imprisonment did not have a non-parole period, the reason for this was to assist the appellants in rehabilitation.

22. In the instant situation the learned Magistrate did not impose a non-parole period the appellant therefore has the advantage of receiving one third remission at the discretion of the Commissioner of Corrections Services. This in my view was favourable to the appellant.

23. It was open to the learned Magistrate to reduce the head sentence and then in accordance with section 18(3) of the Sentencing and Penalties

Act impose a non-parole period. The learned Magistrate did not do this since he had rehabilitation in mind a non-parole period would have defeated this purpose.

FAILURE TO TAKE INTO ACCOUNT RELEVANT FACTORS

24. Counsel for the appellant submits that the learned Magistrate had failed to consider some relevant factors in favour of the appellant in his sentencing. Further counsel states a complete stranger came to the appellant asking for $30.00 which the appellant gave and kept the phone. After the phone was not collected by the stranger the appellant sold the phone to one Asena. On this basis counsel submits the appellant had no way of knowing or reasonably suspecting that the phone was stolen.

25. This submission of counsel is misconceived since the appellant as per his caution interview had admitted knowing the phone was stolen yet he received it and then sold it. The following questions and answers in the caution interview of the appellant dated 29 June, 2017 supports the above.

26. In question and answer 12 the appellant stated that the stolen item was given to him by a stranger who had asked for $30.00 to keep the item and that the stranger will return on Friday to take the same. In question and answer 22 the stranger did not return on Friday so the appellant kept the phone for two weeks until he sold it to one Asena for $70.00. In question and answer 23 when asked whether he knew that the phone was stolen the appellant's answer was yes. In question 24 the appellant was asked why did he take the phone knowing it was stolen the appellant answered there was an expectation that the stranger would return on Friday since he had paid $30.00 and when he failed to return the appellant sold the phone to Asena.

27. The culpability of the appellant is very much obvious in the circumstances of the offending.

NOT PLACING SUFFICIENT WEIGHT TO THE MITIGATING FACTORS

28. Counsel submits that the appellant was a first offender, he was 29 years of age, married, had pleaded guilty, was gainfully employed as a mini van driver earning $100 weekly, the property was recovered, he was remorseful and had sought forgiveness of the court. The court ought to have given further reduction in view of these mitigating factors.

Criminal Case No. 340/17 (Receiving Stolen Property)

At paragraph 5 of the sentence the learned Magistrate took the following mitigating factors into account:

- *This being your first offence;*
- *Your guilty plea;*
- *Cooperated with police by admitting the offence;*
- *Stolen item was recovered.*

Criminal Case No. 520/17 (Absconding Bail)

At paragraph 5 of the sentence the learned Magistrate took the following mitigating factors into account:

- *Guilty plea and remorse.*

29. The offence of receiving stolen property under the Crimes Act carries a maximum term of imprisonment of 10 years. The tariff for this offence is between 1 year to 3 years imprisonment (see *Tukei Taura v State, Criminal appeal NO. HAA 103: 104 of 2002* and *Ilaitia Turaga v State, Criminal Appeal NO. HAA 82 of 2002.*

30. The appellant was sentenced to 12 months imprisonment for this file.

31. The offence of absconding bail under the Bail Act carries a maximum imprisonment term of 12 months or $2,000.00 fine. The tariff for this offence is from a suspended sentence to 6 months imprisonment *(see James Ashwin Raj vs. The State, criminal appeal case no. HAA 032 of 2008 (18 April, 2008).* The appellant was sentenced to 5 months and 16 days imprisonment for this file.

32. At this point this court would like to state that the above tariff for the offence of absconding bail has been reviewed by Madigan J. in *Saula Lagalavesi v. State, criminal appeal nos. HAA 83 of 2018 and HAA 77 of 2018 (23 November, 2018).* The tariff now is from a suspended sentence to 9 months imprisonment. Furthermore, it is noted that the learned Magistrate had given the appellant a reduction of 14 days for the time spent in remand for breaching his bail condition which should not have been allowed. Section 24 of the Sentencing and Penalties Act does provide for time in custody to be deducted unless a court otherwise orders be regarded as a period of imprisonment already served. In such an offending an accused person by breaching his bail condition is deemed to have waived his right to receive such a reduction and therefore should not be allowed to take advantage of his wrong doing and be rewarded with a reduction for remand period at the same time.

33. Madigan J. in *Saula Lagalavesi (supra)* at paragraphs 17 and 18 made the following pertinent comments regarding remand period for such an offending:

Paragraph 17

"...any time spent in custody before conviction for this offence cannot be allowed to be discounted from the term imposed by the Magistrate. It

is time he is spending in custody as a result of dishonouring the terms of his bail."

Paragraph 18

"To allow otherwise would be to reward such an accused for breaching his bail conditions."

34. Both the sentences were to be served consecutively bringing the total imprisonment to 17 months and 16 days without a non-parole period.

35. A perusal of the sentence shows the learned Magistrate had given a reduction for the mitigating factors advanced on behalf of the appellant, however, when one looks at the sentence arrived at for the count of absconding bail it is obvious that the sentence was excessive considering the facts and circumstances of the offending. Moreover the appellant had pleaded guilty at the first available opportunity and had expressed remorse as noted by the learned Magistrate. Although the appellant was arrested for failing to come to court he had cooperated with the police which was not taken into account as a mitigating factor. The learned Magistrate fell in error when he relied on an incorrect tariff which he mentioned was from a suspended sentence to 9 months imprisonment (the appellant is lucky that at the time of his sentence the old tariff for the offence of absconding bail was applicable). This resulted in an excessive sentence.

36. As a general rule it is not for an Appellate Court to revisit mitigation which were all before the Magistrate at the time of sentencing unless manifest injustice will be caused to the appellant (see *Josaia Leone & Sakiusa Naulumatua vs. State [2011] HAA 11 of 2011 (8 July, 2011).* In the judgment of this court there has been an injustice caused to the appellant since the sentence of 5 months and 16 days for absconding bail was on the higher side of the tariff. At paragraph 9 of the sentence the learned Magistrate stated the following:

"In light of the circumstances of offending, your mitigation, prescribed penalty and tariff for this type of offence, I order that you be sentenced to 6 months imprisonment."

37. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 had stated that an Appellate Court does not use the same methodology of sentencing as the Sentencing Court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by determining the facts the sentence was unreasonable or unjust in the following words:

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing Judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

38. In view of the above, there was an error made by the learned Magistrate in the exercise of his discretion considering the facts and circumstances of the offence which led to an excessive sentence. In accordance with section 256 of the Criminal Procedure Act and in the interest of justice the sentence of 5 months and 16 days will be reduced to 4 months imprisonment.

39. The above sentence is not based on a mathematical calculation since the task of a Sentencing Court is not to add and subtract from an objectively determined starting point but to balance the various factors and make a value judgment as to what is the appropriate sentence in all the circumstances of the case.

40. The appellant had pleaded guilty, expressed remorse, cooperated with the police, did not resist arrest and lost his employment since he was a mini van driver.

41. The appeal against sentence is allowed.

42. The question before this court is whether or not the sentence of 4 months imprisonment for this count is to be served consecutively to the sentence in count one of 12 months imprisonment as ordered by the learned Magistrate.

43. The learned Magistrate had correctly considered both the counts as serious, when an accused is granted conditional bail by the court it's incumbent upon the accused to ensure that he or she follows the conditions. Any breach of a bail condition will have serious consequences since a degree of trust is bestowed upon the accused by the court. In this case the appellant was arrested and brought to court he informed the court that he forgot the date. This reason was not accepted by the learned Magistrate.

44. In order to give effect to the deterrence factor and to ensure that the appellant is punished for the offence of absconding bail a consecutive sentence is warranted a concurrent sentence will not achieve the objectives of a penalty.

45. The total sentence for both the counts is 16 months imprisonment. The question now is whether the appellant's sentence should be

suspended in accordance with section 26(2) of the Sentencing and Penalties Act and whether his sentence offends the totality principle of sentencing.

46. At paragraph 14 of the sentence in Criminal case no. 340 of 2017 the learned Magistrate mentions the following about why he refused to suspend the sentence.

"Your sentence will not be suspended as I don't see any exceptional circumstances that warrant suspending your sentence. You are to serve an immediate prison term of 12 months."

47. In respect of Criminal Case No. 52 of 2017 the learned Magistrate did not direct his mind towards suspending the sentence in this file.

48. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the term of imprisonment either wholly or partially if the court considers it to be appropriate to do so in the circumstances of the case.

49. The discretion to suspend the term of imprisonment must be exercised judiciously after identifying special reasons for doing so.

50. In order to suspend the sentence of the appellant this court has to consider whether the punishment is justified taking into account the seriousness of the offences committed by the appellant. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the

factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

51. This court accepts that there are some factors in favour of the appellant such as he was a first offender, 29 years of age at the time of the offending and a person of generally good character who committed an isolated offence, pleaded guilty, stolen phone was recovered, and he cooperated with police. On the other hand, the appellant has committed serious offences which require the imposition of a penalty to deter others and to send a signal to the community and like minded people that the court will not tolerate such behaviour.

52. After carefully weighing the factors in favour of the appellant and the serious nature of the offences committed, I am compelled to state that the special and general deterrence factor has been taken into account with the 3 ½ months imprisonment term served by the appellant.

53. This court in the interest of fairness and justice takes a look at the current sentence of 16 months and whether it offends the totality principle of sentencing.

54. The totality principle of sentencing is a recognised principle of sentencing formulated to assist a court when sentencing an offender for a number of offences.

55. In *Mill v The Queen [1988] HCA 70* the High Court of Australia in its judgment cited D.A. Thomas, Principles of Sentencing (2nded. 1979) pp. 56-57 as follows:

"the effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms; 'when a number of offences are being dealt with and specific punishment in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

56. In Fiji, the above principles have been approved and applied by the court (see *Tuibua v The State, [2008] FJCA 77, Taito Raiwaqa v The State, [2009] FJCA 7)* and *Asaeli Vukitoga v The State, Criminal Appeal No: AAU 0049 of 2008.*

57. The consecutive sentence of 16 months for the two offences is in effect within the tariff of the first count which is favourable to the appellant. The sentence does not have a crushing effect on the appellant.

58. I consider there are special reasons for suspending the new sentence of 16 months imprisonment partially for one count of receiving stolen property and one count of absconding bail. The appellant has served 3 ½ months imprisonment which this court feels is appropriate punishment in the circumstances of the offending the balance of his sentence is suspended for 3 years.

ORDERS

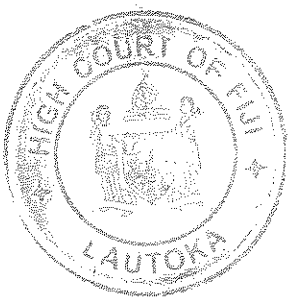
1. The appeal against sentence is allowed.

2. The sentence of the Magistrate's Court is quashed and set aside.

3. The appellant is sentenced to 16 months imprisonment with effect from 21 August, 2018 since the appellant has served 3½ months imprisonment the balance of his sentence is suspended for 3 years from today.

4. The appellant is to be immediately released from the Corrections Centre.

5. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
6 December, 2018

Solicitors

Messrs Law Naivalu for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.