IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 67 OF 2018

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Suva in Criminal Case No. 1535 of 2018.

BETWEEN : **SEFANAIA TURAGADAMUDAMU**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Appellant appears in person
Mr. Shirley Tivao for the Respondent

Date of Hearing : 30 May 2019

Judgment : 16 July 2019

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Suva.

[2] The Appellant was charged in the Magistrate's Court of Suva with one count of Theft, contrary to Section 291 of the Crimes Act No. 44 of 2009 (Crimes Act).

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

SEFANAIA TURAGADAMUDAMU, on the 05th day of September 2015, at Suva, in the Central Division, dishonestly appropriated (stole) 1 x Wallet containing $250.00 cash and assorted cards, the property of **RENEE KAMOE WASILE** with intention to permanently depriving the said property of **RENEE KAMOE WASILE.**

[3] The Appellant pleaded not guilty to the charge and the matter proceeded to trial. The Appellant had waived his right to counsel and thus appeared in person.

[4] At the conclusion of the trial, on 19 October 2018, the Appellant was found guilty and convicted of the charge.

[5] On 30 October 2018, he was sentenced to 30 months' imprisonment with a non-parole period of 22 months. Considering the period of 7 months spent in remand, the remaining period the Appellant would have to serve is 23 months' imprisonment with a non-parole period of 15 months

[6] Aggrieved by this Order the Appellant filed a timely Appeal against his conviction and sentence. The said appeal was filed in person by the Appellant.

GROUNDS OF APPEAL

[7] The Grounds of Appeal, which was filed by the Appellant, on 22 November 2018, are as follows (the Grounds stated below are as framed by the Appellant):

Grounds of Appeal Against Conviction

1. The Learned Magistrate erred in the law as the reasonable of the guilty plea cannot be by evidence.
2. The Learned Magistrate erred in the law in not independently analysing the evidence and failed to effectively canvas the defence encumbering the rights of the Appellant to a fair trial.
3. The Learned Magistrate erred in the law in using circumstantial evidence as the verification of the Appellant is overwhelming thereby prosecution had failed to discharge the burden of proof.
4. The Learned Magistrate erred in the law as prosecution has failed to prove the elements of the charge beyond reasonable doubt therefore a gross miscarriage of justice has occurred.

5. The Learned Magistrate erred in the law as the conviction is unsafe and is unsatisfactory resulting in the miscarriage of justice.
6. The Learned Magistrate erred in the law having regards to the entirety of the evidence in not pronouncing a no case to answer to exonerate the Appellant.

Grounds of Appeal Against Sentence

1. That the sentence should be quashed and be substituted by a verdict of acquittal.
2. That the sentence imposed is wrong in principle in regards to the circumstance of the case.
3. That the Learned Magistrate took wrong extraneous and irrelevant matters to guide and affect him.
4. That the non-parole sentence is discriminatory in nature as it does not allow any real rehabilitation.
5. That the non-parole sentence is unconstitutional as it provokes emotional, mental and physical torture.
6. That the Learned Magistrate imposed duplicity in the sentence: (1) 30 months imprisonment with 22 months non-parole and (2) 23 months imprisonment with 15 months non-parole.

[8] During the hearing of this matter both the Appellant and the Respondent were heard. The Respondent filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

THE LAW AND ANALYSIS

[9] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*
>
> *(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[10] Section 247 of the Criminal Procedure Act stipulates that "*No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"*(2) The High Court may —*

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

THE GROUNDS OF APPEAL AGAINST CONVICTION

[12] The Appellant has raised six grounds of appeal against his conviction. His primary grievance is that the Learned Magistrate has failed to properly analyze the evidence adduced by the prosecution. He also claims that the prosecution has failed to establish the case against him beyond reasonable doubt.

[13] In this case the Prosecution called two witnesses. The complainant, Reene Kamoe Wasile and her friend, Jennifer Joane. The case for the Prosecution is that on 5 September 2015, the complainant and her friend were in Suva City shopping. After doing some shopping, the complainant had given her wallet to her friend to place in her bag. Joane testified that the brand of the bag she was carrying was Ripcurl. It had no zip. Joane was carrying the bag on her shoulder.

[14] At the steps of the Atlas Shop in Mark Street, Suva, the Appellant had cornered and held Joane. He had held Joane by the shoulders and twisted her arms with his hands. At the time the Appellant had been facing her. She shouted for the Appellant not to touch her. He had been wearing a hat and he was having a small bag with him.

[15] Later, when the two women entered the Atlas store, they were advised by the security to check their bags. Once, Joane checked her bag, she realized that the complainant's wallet was missing. The complainant and Joane together with the security came out of the Atlas Store at which point, both of them had identified the Appellant. The Appellant had fled the scene. They had run after the Appellant, together with the

security. The security had then apprehended the Appellant. The Appellant was then handed over to the Police.

[16] Joane confirmed that it was the same person who had held her who was apprehended by the security. Even the complainant confirmed that it was the same person who was caught by the security.

[17] At the close of the Prosecution case, the Appellant had made an application for No Case to Answer. However, by his Written Ruling, dated 21 August 2018, the Learned Magistrate made Order refusing the application made by the Appellant and called for his defence.

[18] The Appellant exercised his right to remain silent.

[19] In his Judgment, the Learned Magistrate has duly identified the elements of the offence of Theft and analyzed the evidence led on behalf of the Prosecution. Since the Appellant had submitted that there was no proper evidence of identification, the Learned Magistrate has considered the evidence on identification in line with the guidelines given in ***R v Turnbull*** (1977) Q.B. 224, [1977] 63 Criminal Appeal Reports 132, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552, where the English Court of Appeal enunciated special guidelines to assess the quality of disputed visual identification.

[20] The Learned Magistrate has also referred to circumstantial evidence and stated that a fact can be proved not only by direct evidence, but by circumstantial evidence as well.

[21] Accordingly, he has come to the conclusion that the Prosecution has proved the offence of Theft beyond reasonable doubt.

[22] In my considered opinion the finding of the Learned Magistrate is correct. Therefore, I am of the opinion that the grounds of appeal against conviction are without merit.

THE GROUNDS OF APPEAL AGAINST SENTENCE

[23] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"…It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v. The King** [1936] HCA 40; [1936] 55 CLR 499)."*

[24] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"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. AAU 0015 of 1998. 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."

[25] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[26] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been

*adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

……..

[45] 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."

[27] In this case the Appellant has raised six grounds of appeal against his sentence. He takes up the position that the sentence imposed on him is wrong in principle considering the circumstances of the case. He also states that the Learned Magistrate erred by taking extraneous and irrelevant matters into account and not taking relevant matters into consideration.

[28] In passing the sentence the Learned Magistrate has referred to the maximum penalty for the offence of Theft and also considered the established tariff for the offence.

[29] Based on the objective seriousness of the offence, the Learned Magistrate has selected 18 months imprisonment as the starting point of the sentence.

[30] For the aggravating factors he has added 12 months imprisonment, bringing the sentence to 30 months imprisonment.

[31] The Learned Magistrate has accurately determined that there were no mitigating circumstances in the case. Thus, the sentence imposed on the Appellant was 30 months imprisonment. In terms of Section 18 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) a non-parole period of 22 months imprisonment was fixed.

[32] Pursuant to Section 24 of the Sentencing and Penalties Act, considering the fact that the Appellant was in custody for 7 months, the final sentence imposed on the Appellant was a Head Sentence of 23 months' imprisonment, with a non-parole period of 15 months' imprisonment.

[33] The Appellant submits that in doing so the Learned Magistrate has imposed duplicity in sentence. The Appellant has clearly misunderstood the provisions of Section 24 of

the Sentencing and Penalties Act. In actual fact, by adopting the provisions of Section 24 of the Sentencing and Penalties Act, a benefit has been granted to the Appellant, whereby the period of 7 months spent in custody has been regarded by Court as a period of imprisonment already served by him.

[34] The Appellant has also stated that fixing of a non-parole period is discriminatory and unconstitutional. This is assertion is manifestly erroneous. Section 18 of the Sentencing and Penalties Act permits a Court to fix a non-parole period, in terms of the provisions of that Section.

[35] Considering all the above, I am of the opinion that the grounds of appeal against sentence are also without merit.

[36] Therefore, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

CONCLUSION

[37] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Suva is affirmed.

HIGH COURT OF FIJI SUVA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 16th Day of July 2019

Solicitors for the Appellant : Appellant in Person.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.