

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO. HAA 24 OF 2019**

**BETWEEN:**                   VENINA ADIMOILABASA BOLATAGICI  
  RATUMAINACEVA

**APPELLANT**

**A N D:**                       THE STATE

**RESPONDENT**

**Counsel:**                   Mr. F. Vosarogo for Appellant  
  Mr. R. Kumar for Respondent

**Date of Hearing:**       31<sup>st</sup> October 2019

**Date of Judgment:**   30<sup>th</sup> April 2020

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## **J U D G M E N T**

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**Introduction**

1. The Appellant filed this petition of appeal against the conviction and the sentence of the learned Magistrate of Suva dated the 19th of July 2019 on the following grounds, *inter alia*:
  - i) *That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the summary of facts provided by the prosecutions and to*

*ascertain whether all the essential elements of the offence of theft in law is provided in the facts, the failure of which led to a judgment that was unsafe and unsatisfactory and amounts to a miscarriage of justice.*

- ii) That the learned trial Magistrate erred in law when she failed to properly address the evidence necessary to be present in a charge of this nature and to ascertain whether the Appellant could properly be convicted of the charge on a guilty plea, the failure of which resulted in a judgment which was perverse and amounts to a miscarriage of justice.*
- iii) That the learned trial Magistrate erred in law when she failed consider whether the Appellant was properly explained the consequences of the plea as advised by counsel in relation to the seriousness of the offence, the failure of which resulted in a judgment passed in consequence of an error of law and is therefore perverse and unsafe.*
- iv) That the Appellant didn't receive competent advice on the charge, evidence and the consequences of the plea and the guilty plea was therefore unsafe and unsound.*
- v) That the learned trial Magistrate erred in law when she failed not to accept the guilty plea as the evidence to sustain the charge was not contained in the summary of facts nor in the evidence and such failure resulted in a miscarry and unsafe judgment.*
- vi) That the sentence passed against the Appellant is disproportionate in all the circumstances of the case and failed to properly consider relevant issues and took into account irrelevant matters resulting in a sentence which is manifestly excessive.*

2. Upon being served with the summons, the Respondent appeared in court. The court directed the Appellant and the Respondent to file their respective written submissions, which they submitted as per the directions. Subsequently, the matter proceeded to the hearing on the 28th of August 2018. The learned counsel for the Appellant, and the Respondent made their respective oral arguments and submissions. Having carefully taken into consideration the record of the proceedings in the Magistrate's Court, the respective

written and oral submissions of the parties, I now proceed to pronounce the judgment as follows.

### **Factual Background**

3. The Appellant was charged in the Magistrate's Court of Suva with one count of theft, contrary to Section 291 of the Crimes Act on the 2nd of September 2016. The particulars of the offence are that:

#### *Statement of Offence*

*THEFT: Contrary to Section 291 of the Crimes Decree number 44 of 2009.*

#### *Particulars of Offence*

*VENINA ADIMAILABASA BOLATAGICI RATUMAINACEVA, between the 1st of January 2015 to the 23rd of July 2015, at Suva in the Central Division, dishonestly appropriate cash of \$22, 442.47 and stock of \$1, 421.70 to the total value of \$23, 810.17 the property of POST FIJI LIMITED with intention to permanently deprive the said POST FIJI LIMITED of its property.*

4. Subsequent to several adjournments, the Appellant had pleaded not guilty to the offence on the 20th of June 2017. Hence, the matter had been fixed for the hearing on the 28th of August 2018. On the 28th of August 2018, the Appellant had informed the court that she wishes to change her plea. Accordingly, the Appellant had pleaded guilty to the offence. Once again several adjournments had been granted for the summary of facts. The Appellant had admitted the summary of facts when it was read and explained to her on the 18th of June 2019. Consequently, the learned Magistrate had convicted and sentenced the Appellant for three (3) years and four (4) months of imprisonment. The learned Magistrate had not fixed a non-parole period. Aggrieved with the said conviction and the sentence, the Appellant filed this appeal.

### Grounds I, II, V

5. Having carefully perused the grounds of appeal, I find the grounds I, II, and V against the conviction are founded on the contention that the summary of facts had not disclosed the main elements of the offence, thus making the conviction unsafe and wrong in law. Therefore, I shall deal with these three grounds together.
6. The learned counsel for the Appellant submitted that the summary of facts had not disclosed the elements of "dishonest" and "the intention of permanently depriving the other of the property" in order to establish the offence of theft.
7. Section 174 of the Criminal Procedure Act has provided the procedure to be followed if an accused pleads guilty in the Magistrate's Court. Section 174 (1), (2), and (3) of the Criminal Procedure Act states that:
  - i) *The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
  - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*
  - iii) *If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.*
8. The substance of the charge or the complaint includes the charge and the summary of facts. The charge states the nature of the offence and reasonable information about the nature of the offence. (*vide Section 58 of the Criminal Procedure Act*) The summary of facts outlines the evidential background of the main elements of the offence as charged. Hence, it is the primary document that provides the learned Magistrate the evidential background of the alleged offence. Therefore, the learned Magistrate has to ascertain whether the summary of



facts reveals the main elements of the offence as charged. If it does not reveal the main elements of the offence, the accused cannot admit the truth of the charge as per Section 174 (1) of the Criminal Procedure Act. Under such circumstances, the learned Magistrate is not allowed to proceed in convicting the accused pursuant to Section 174 (2) of the Criminal Procedure Act.

9. The main elements of the offence of theft are that:

- i) The Accused,
- ii) Dishonestly appropriates,
- iii) Property belonging to another,
- iv) With the intention of permanently depriving the other of the property.

10. Section 291 of the Crimes Act has introduced far-reaching changes to the scope of the definition of theft. Unlike the previous regime under the Penal Code, Section 291 introduces a new definition of mental element for theft. Under the Penal Code, the mental element had been defined as "fraudulently and without a claim of right made in good faith" (*vide Section 259 of the Penal Code*). Section 291 of the Crimes Act has introduced a more widely mental element of "dishonestly."

11. Section 290 of the Crimes Act defines the meaning of "dishonest" as:

*For the purposes of this Part, dishonest means—*

- a) dishonest according to the standards of ordinary people; and*
- b) known by the defendant to be dishonest according to the standards of ordinary people.*

12. Section 291 of the Crimes Act has not limited the existence of the intention of permanently depriving the other of the property at the time of the appropriation. Thus extending the criminal responsibility to an innocent acquisition followed by a dishonest

decision to assume the rights by keeping or dealing with it as the owner without the consent of the owner. (*vide Section 293(2) of the Crimes Decree*).

13. Section 300 of the Crimes Act has defined the intention of permanently depriving the other of the property.

- i) *For the purposes of this Division, if—*
  - a) *a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and*
  - b) *the person's intention is to treat the thing as the person's own to dispose of regardless of the other's rights;*  
*the person has the intention of permanently depriving the other of it.*
- ii) *For the purposes of this section, a borrowing or lending of a thing amounts to treating the thing as the borrower's or lender's own to dispose of regardless of another's rights if, and only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.*
- iii) *For the purposes of this section, if—*
  - a) *a person has possession or control (lawfully or not) of property belonging to another; and*
  - b) *the person parts with the property under a condition as to its return that the person may not be able to perform; and*
  - c) *the parting is done for purposes of the person's own and without the other's authority, the parting is taken to amount to treating the property as the person's own to dispose of regardless of the other's rights.*

14. The summary of facts reveals there was a shortage of \$23,810.17 during the time the Appellant was in charge of the Dravuni Post Office. It was the responsibility of the Appellant to maintain the records of the cash book. Moreover, the summary of facts states the Appellant had no authority to grant credit sale without prior approval from the Head of

Retail. The Appellant had claimed that she had given the money to the people in Dravuni on credit, but they did not pay it back. However, there are no documents to substantiate her claim.

15. The mitigation submissions filed by the Appellant had stated the Appellant accepts the full responsibility of the offence. It has further stated that the Appellant had committed the offence in order to provide her family.
16. Lord MacDermott in S v Recorder of Manchester and Others (1971] AC 481) has discussed the evidential importance of sentencing hearing in determining the guilty or innocent. Lord MacDermott found that:

*"The evidence relevant to the commission of an offence is generally relevant to the sentence. That part of the hearing which is directed to the sentence may well cast new light on the question of guilt or innocence. I think it is safe to say that this has long been recognised and the tenor of English law has been against erecting any barrier between these two parts or stages which would place them, as it were, in watertight compartments and so reduce the scope of judicial ascertainment and discretion"*

17. In view of the above finding of Lord MacDermott, I am of the opinion the court could obtain assistance from the facts that emerge during the sentencing hearing to reassertion or reaffirm the position of the accused. Sometimes, especially in uncontested matters, the truth emerges in bit and pieces.
18. The summary of facts has revealed the Appellant was in charge of the Post Office when the said amount of cash gone missing. She had not obtained the necessary prior approval to give credits. There are no documents to substantiate her claim that she gave credit to the public. Accordingly, it is clear that she had disposed of the money and items that belonged to the Post Fiji as her own and regardless of the rights of the Post Fiji. Moreover, the Appellant had admitted the full responsibility of committing this offence in her mitigation.

She had done so in order to provide her family. Hence, I find the summary of fact has disclosed the element of "intention of the permanently depriving the other of the property."

19. The evidence provided by the summary of facts has clearly established the conduct of the Appellant was dishonest according to the standards of ordinary people, and she had realized what she was doing was dishonest according to those standards. Therefore, it is my view that the summary of facts has disclosed the element of "dishonestly." Hence, I find the grounds of appeal I, II, and V have no merits and fail accordingly.

#### **Grounds III & IV**

20. The grounds of appeal III and IV are based upon the allegation that the counsel of the Legal Aid Commission was incompetent and provided no sound legal advice. I find the issue of determining the competence of a counsel is beyond the appellate jurisdiction of this court. The appeal focuses on the correctness of the decision. It does not focus on the judicial officer or the counsels who represented the parties in the lower court. Therefore, I dismiss these two grounds of appeal.

#### **Ground VI**

21. The ground of appeal against the sentence is founded on the contention that the sentence is excessive and harsh.
22. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (the 3rd of December 2015)** has discussed the scope of the appellate jurisdiction in respect of the sentences imposed by the lower courts, where it was held that:

*"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".*

23. Accordingly, even if there is an error in the exercise of the sentencing discretion, the Appellate Court still could dismiss the appeal if the Appellate Court considers that the sentence falls with the permissible range.
24. The Supreme Court of Fiji in **Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (the 4th of May 2006)** held that: .

*"It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence"*

25. Accordingly, the Appellate Court focuses on the correctness and the appropriateness of the final sentence and not much on each step in the reasoning process. Hence, the Appellate Court does not usually intervene in the sentence imposed by the lower court, if the final sentence falls within the acceptable sentencing range.
26. Justice Madigan in Ratusili v State ([2012] FJHC 1249; HAA011.2012 (the 1st of August 2012)) has set the following tariff limits for the offence of theft.

*"From the cases then the following sentencing principles are established:*

- 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 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 sentence than opportunistic thefts."*
27. The learned Magistrate had correctly identified this is a case of breach of trust involving a large sum of money. Accordingly, she had selected 18 months as a starting point. After that, she had increased five years for the gravity of offending. Unfortunately, she had not specified what the reasons or the facts that she had considered as the gravity of offending are. She had then deducted 18 months for other mitigating grounds, reaching five years. The learned Magistrate has then erroneously deducted 1/3 for the early guilty plea at the first available opportunity. The final sentence is three (3) years and four (4) months, which is above the applicable tariff limit for the offence of theft involved with breach of trust and a large sum of money. Actually, the Appellant had pleaded not guilty at the first available opportunity, and took the matter to the hearing. She finally changed her plea on the hearing date. Hence, she was entitled to some discount but not 1/3 as given by the learned Magistrate.

28. In view of the reasons discussed above, I find the sentence is founded on wrong sentencing principles and approaches. Moreover, it is excessive and harsh. It is in that context; I find there is a reason for me to intervene in the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Act. I accordingly set aside the sentence of the learned Magistrate and consider an appropriate sentence in order to reflect the seriousness and the appropriate culpability of the Appellant in this offence.
29. The summary of facts does not reveal any aggravating circumstances of the offending. It only discloses the manner the offence was committed. Having taken into account the level of the breach of trust and the amount of money involved, I sentence the Appellant for twenty (20) months imprisonment. I reduce one month for the time the Appellant had spent in remand custody prior to the sentencing pursuant to Section 26 of the Sentencing and Penalties Act. Hence, the final sentence is nineteen (19) months imprisonment.
30. Having considered the personal circumstances of the Appellant and the possibility of rehabilitation, it is my opinion that ten (10) months of the non-parole period would sufficiently serve the purpose of the sentence. I accordingly order that the Appellant is not eligible for parole for a period of ten (10) months.
31. In conclusion, I make the following orders:
  - (a) The appeal against the conviction is dismissed.
  - (b) The appeal against the sentence is allowed,
  - (c) The sentence imposed by the learned Magistrate on the 19th of July 2019 is set aside.
  - (d) The Appellant is sentenced for a period of nineteen (19) months of imprisonment with a non-parole period of ten (10) months pursuant to Section 18 (1) of the Sentencing and Penalties Act, The sentence to be effective from the 19th of July 2019.

32. Thirty (30) days to appeal to the Fiji Court of Appeal.



R.D.R.T. Rajasinghe  
**Judge**

**At Suva**

30<sup>th</sup> April 2020

**Solicitors**

Office of Vosarogo Lawyers for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.