

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

CRIMINAL APPEAL NO. HAA 17 OF 2017

IN THE MATTER of an Appeal against the  
Sentence of the Magistrate's Court of Labasa in  
Criminal Case No. 206 of 2016.

BETWEEN :

METUISELA MASILAGO

APPELLANT

AND

STATE

RESPONDENT

**Counsel** : Appellant in Person  
Ms. Amelia Vavadakua for the Respondent

**Date of Hearing** : 25 October 2017

**Judgment** : 14 December 2017

### JUDGMENT

[1] The Appellant was charged before the Magistrates Court at Labasa in Criminal Case No. 206 of 2016 with one count of Theft, contrary to Section 291 of the Crimes Act No. 44 of 2009 ("Crimes Act"), as follows:

## CHARGE

### *Statement of Offence*

**THEFT:** Contrary to Section 291 of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**METUISELA MASILAGO**, on the 16<sup>th</sup> day of February 2016, at Labasa in the Northern Division, dishonestly appropriated \$76.00 cash the property of **DHARMESH LAL** with intent to permanently deprive the said **DHARMESH LAL**.

- [2] On 6 February 2017, the Appellant pleaded guilty to the charge, on his own free will, and also admitted to the summary of facts. During the proceedings in the Magistrate's Court, the Appellant had waived his right to counsel and defended himself.
- [3] On 18 July 2017, the Appellant was sentenced to a term of imprisonment of 13 months.
- [4] Aggrieved by this Order, the Appellant submitted an Appeal against the Sentence to this Court, on 20 July 2017. The Appeal was filed in person and was filed within time.
- [5] The grounds of appeal against Sentence taken up by him are the following:
  1. That the Sentencing Magistrate failed to make the present Sentence concurrent with a previous Sentence the Appellant was serving.
  2. That the Sentence imposed is outside the tariff for the offence of Theft.
  3. That the offence of Theft did not involve a large sum of money and there was no breach of trust.
  4. That the Sentencing Magistrate took his previous history as aggravating factors in passing his Sentence.
- [6] As can be seen from the above, the Appellant has filed the Appeal only against his Sentence.

- [7] During these proceedings in the High Court as well the Appellant chose to waive his right to counsel and defended himself.
- [8] Written submissions were filed by the State and also by the Appellant.

### Law and Analysis

- [9] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Court of Appeal of Fiji 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 CLR 499).”*

- [10] 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 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.

- [11] These principles were reaffirmed by the Fiji Supreme Court in *Naisua v. The State* [2013] FJSC 14; CAV 10 of 2013 (20 November 2013).

- [12] In terms of Section 291 of the Crimes Act “A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of



permanently depriving the other of the property.” The prescribed penalty for this offence is a term of imprisonment for 10 years.

[13] In *Ratusili v. State* [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

*“(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 sentences than opportunistic thefts.”*

[14] The Learned Magistrate has made reference to the above Judgment and tariff in his Sentence. He has considered that this was not the first time the Appellant had been convicted and sentenced for Theft.

[15] In *State v Prasad* Sentence [2017] FJHC 761; HAC 254.2016 (12 October 2017); His Lordship Justice Vincent Perera making reference to his Judgment in *Waqa v State* [2015] FJHC 729; HAA 017.2015 (5 October 2015); held that the tariff for the offence of Theft should be between 4 months to 3 years imprisonment.

[16] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*“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 time. As a matter of good*

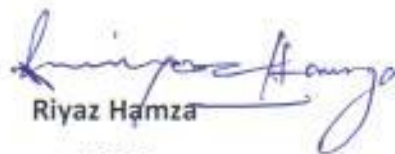
*practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

- [17] In this case, the Learned Magistrate has chosen 12 months as the starting point. Having regard to the objective seriousness of the offence it was well within his discretion to select 12 months as the starting point in this case.
- [18] In his sentence the Learned Magistrate has considered 'unlawfully taking money from the till' as an aggravating factor and has added 10 months for the aggravating factors. The State concedes that this is an element of the offence of Theft, specifically the element of 'dishonestly appropriating property'. In the instant case, it is cash belonging to the complainant.
- [19] However, considering all the facts and circumstances of this case and the fact that the incident of Theft had taken place in broad day light and in a public place (a Service Station), I am of the opinion that the addition of 10 months for aggravating factors was not unreasonable.
- [20] The Learned Magistrate reduced 3 months for the mitigating factors. Since the Appellant had pleaded guilty at the first available opportunity, the Magistrate has reduced a further 6 months from the sentence and arrived at a sentence of 13 months imprisonment.
- [21] Therefore, I am of the opinion that the Sentence imposed by the Learned Magistrate was just and equitable.
- [22] The Appellant is aggrieved that the Learned Magistrate has failed to make the present Sentence concurrent with a previous Sentence that he was serving. However, it is clear from the record that at the time this Sentence was passed (which was on 18 July 2017), the Appellant had already served his 8 months Sentence imposed for a previous offence. The said 8 months Sentence had been completed in May 2017. Therefore,

there was no possibility of making the present Sentence concurrent with the previous one.

### Conclusion

[23] In the light of the above, the Sentence imposed by the Learned Magistrate is affirmed and this Appeal is dismissed.

  
Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**



**At Suva**

**This 14<sup>th</sup> Day of December 2017**

**Solicitor for the Appellant : Appellant in Person.**

**Solicitor for the Respondent : Office of the Director of Public Prosecution, Labasa.**