IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

APPELLATE JURISDICTION NO. HAA 25 OF 2016

BETWEEN: **BOUGAINVILLE DIREWA DUVULOCO**

APPELLANT

AND: **STATE**

RESPONDENT

Counsel: **Mr. Kitione Vuataki for Appellant**

Mr. Alvin Sing for respondent

Date of Hearing: **1st November, 2016**

Date of Judgment: **15th November, 2016**

JUDGMENT

1. The Appellant was charged with one count of General Dishonesty Causing a Loss punishable under Section 324(1) of the Crimes Decree No. 44 of 2009.

2. The Appellant on his own accord pleaded guilty to the charge on the 5th of May, 2015 and the learned Magistrate proceeded to sentence him on the 27th of June, 2016.

3. The learned Magistrate sentenced the Appellant to 18 months' imprisonment with a non-parole period of 12 months.

4. The Appellant being not satisfied with the sentence has appealed against her sentence. Counsel for the Appellant on the 22nd of July, 2016 filed two grounds of appeal against sentence and on the 29th of September, 2016, filed notice of additional grounds of appeal with a motion advancing further two grounds.

5. There seems to be some disparity in relation to the motion filed on the 29th of September 2016 and the Notice of additional ground of appeal filed with it. The Respondent submits that as for the motion, the Appellant seeks orders for leave to be granted to adduce further evidence as well as leave to file two additional grounds whereas as for the Notice of additional ground of appeal, the Appellant is only advancing one additional ground to be considered apart from the ones already filed. Notwithstanding this disparity, in the interest of justice, the Court seeks to address all the grounds of appeal filed by the Appellant.

6. It appears that the Appellant is now advancing four grounds of appeal which are as follows:

   a. THAT the learned Magistrate erred in law and in fact in not taking full account of willingness of Appellant to pay the total amount of $5057.25 to the Complainant.

   b. THAT in all the circumstances the imposition of non-parole for 12 months was harsh and excessive to a first offender who had already been punished by loss of employment due to Club money linked to employment and who is willing to make reparation in future.

   c. THAT the learned Magistrate erred in law in lumping together discount for guilty plea and mitigating factors.

d. THAT the learned Magistrate failed to take into account or proper account of the mitigating factor of the Appellant being a university student and a short term of clanging the gates of prison upon her to meet the interests of punishment and deterrence by imprisonment and suspending the rest of the term in the interest of rehabilitation.

7. Summary of facts admitted by the Appellant is as follows:

The complainant is a Resort Manager of Lomani Island Resort. The accused is a hotel worker. At Lomani Island Resort there was a club for workers known as Veivuke Club. The accused was also the treasurer of the welfare fund her co-workers had formed and was responsible for keeping the money in a safe.

Money was deducted from the members pay as the amount they approved and cash was given to the accused by the accounts clerk of Lomani Resort, to be kept in the safe. At the end of the year, before Christmas, the members were supposed to be paid. Whilst the accused was the treasurer, between 1st January, 2013 and 23rd December2013, a sum of $5057.25 had gone missing.

Accused was not keeping cash in the safe and kept in a cabinet which she was not allowed to do. On 23rd day of December, 2013 accused was to pay the members in the Veivuke Club. Accused prepared the envelopes and then informed the complainant that the money was short. Upon the instructions of the complainant, accounts clerk checked the records and prepared an audit report which indicated a shortage of $5057.25.

Accused left Lomani Resort saying she was going to Mainland to arrange cash. In an e-mail to complainant, accused admitted mishandling the cash. The matter was reported to Police and 22 witness statements were recorded all stating that accused was the treasurer of Veivuke Club and was totally in charge of the cash.

Accused was interviewed under caution at Nadi Police Station Crime office whereby she stated that she does not know how the cash went short but knew before that cash was short and did not inform anyone.

Ground (a) Restitution

8. It appears that the Appellant's main contention in her appeal is that her sentence had not been suspended even though she pleaded guilty at the first available opportunity and expressed genuine remorse and willingness to restitute the total money entrusted to her.

9. Neither under the common law, nor under the Sentencing and Penalties Decree, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. Madam Justice Shameem *(as she then was)* followed Justice Gates *(as he then was)* decision in ***State v Mahendra Prasad*** HAC 009.20S quoting that:

> *"Where there is an earnest and sincere wish to effect reparation to the victim and where that wish is prompt and an expression of remorse, a suspended sentence is not wrong in principle".*

10. When considering a suspended sentence, the court should note the remarks in the case of ***State v Raymond Roberts*** HAA0053 of 2003S. where Justice Shameem *(as she then was)* held that:

> *"the principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleaded not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation".*

11. There is no evidence that by the time the sentence was pronounced on 27th of June, 2016, the money either fully or partially had been paid by the Appellant to the complainant or the relevant entity. The court record shows that the Appellant had indicated on the 5th of May, 2015, that she wishes to make restitution. Again when the matter was called on the 15th of June, 2015, the learned Magistrate was sick and the matter was adjourned to the

next date. On the 15th of September, 2015, Counsel for the Appellant, Ms. Sharma of the Legal Aid Commission sought further time as the Appellant had acquired employment. On the 3rd of November, 2015, the court record shows that no payment had been made by the Appellant and that court moved to fix the matter for sentencing. Again when the matter was called on the 4th of March, 2016, the Appellant sought a final date for payment as part of her mitigation. There is no record as to whether Court had granted the request. On 13th of May, 2016, Counsel for Appellant sought one month to pay the amount as part of mitigation. On the 13th of June, 2016, the Appellant informed Court that she had applied for loan to pay the amount. When the matter was set down for sentencing on the 27th of June 2016, the court noted that the accused had not made any restitution.

12. Under these circumstances, it cannot be said that the Appellant had made a genuine attempt at restitution. From the time the matter was initiated to the time sentence was pronounced, the time elapsed had been almost 1 year and 1 month. The Appellant failed to make at least a part payment indicating that her wish was genuine. She was merely paying lip service; she never committed herself to reparation in any substantial way. There had to be an earnest and sincerer wish to effect reparation and that wish had to be promptly made manifesting an expression of remorse.

13. The Appellant submits that the delay was due to difficulty in depositing the money in a bank account as the loss had been suffered not by the complainant but by Veivuke Club also known as 'Lomani Staff Savings Fund' and Veivuke Club did not have a bank account. There is no evidence that the Appellant had indicated to the learned Magistrate that she was encountering such a difficulty in settling the amount.

14. The Appellant has made an application by motion dated 9th September 2016 and seeks an order for leave to adduce further evidence under Section 257 of the Criminal Procedure Decree to prove that she had made an attempt to pay the money but failed due to aforementioned difficulty.

15. That Section states as follows:

> *257.– (1) In dealing with an appeal from a Magistrates Court the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a Magistrates Court.*
>
> *(2) When the additional evidence is taken by a Magistrate Court, such court shall certify the evidence to the High Court, which shall then proceed to determine the appeal.*
>
> *(3) Evidence taken under this Section shall be taken as if it were evidence taken at a trial before a Magistrates Court.*

16. It is settled that further evidence can be received after a guilty plea. Shameem J in ***Cumutanavanua v The State*** [2002] FJHC 9; HAA0086.2001s (28 March 2002) held that further evidence can be received after a guilty plea for the purpose of setting aside a guilty plea. This is not an appeal to set aside a guilty plea. In ***State v Mocevakaca*** [1990] FJHC 87; [1990] 36 FLR (14 February 1990), hearing an appeal against sentence, Fatiaki J received verbal evidence in the High Court and quashed a five-year sentence imposed by the Magistrates Court and the accused was bound over for two years.

17. The power of the court to receive evidence in an appeal against sentence and the approach to the exercise of the power, are subject to a well-settled rule of practice. In ***R v Smith*** (1987) 44 SASR 587 King CJ said at 588-589:

> *"The task of the Court of Criminal Appeal, speaking generally, is to see whether the trial judge went wrong on the material before him: R v Dorning (1981) 27 SASR 481 at 488. There is power to receive fresh evidence subject to certain conditions which are summarized in Dorning's case at 485.* ***The proper purpose of fresh evidence on an appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence but were***

not known to the sentencing judge so as to put them in a new light. It is not open to the Court of Criminal Appeal to intervene upon the basis of events which have occurred since the imposition of sentence, R v O'Shea (1982) 31 SASR 129 and fresh evidence is therefore not receivable to establish the occurrence of such events. A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence. *(emphasis added)*

18. The appellant has admitted categorically that the payment was made after the sentence in the Magistrates Court. It appears that the cheque in favour of 'Lomani Staff Saving Fund Association' had been drawn on the 8th September, 2016, even after filing this appeal in the High Court. The evidence sought to be led on this appeal will only establish the occurrence of events occurring after the passing of the sentence.

19. Even though the evidence sought to be admitted on appeal in a sense establishes the occurrence of events occurring after the passing of sentence, if it is done for the purpose of explaining the full extent and implications of the Appellant's condition or facts which existed at the time of sentence, then the leading of fresh evidence would not be impermissible.

20. The authorities show that it is permissible to have regard to events occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence. In ***R v Green*** *(1918) 13 Cr App R 200* evidence was admitted on appeal to show the true character and value of information given by the appellant to the Police before sentence, as disclosed by subsequent events. ***In R v Ferrua*** *(1919) 14 Cr App R 399* the evidence admitted on the appeal revealed how serious the appellant's state of health had been when he was sentenced. It was observed in ***Ferrua*** (supra): "*I think that the events occurring since sentence are admissible to show the extent and implications of the condition of health which the appellant was in when he was sentenced*".

21. I do not think it necessary to adduce additional evidence at this stage because the Appellant has admitted that the payment was done after the sentence. Even if it is proved that the payment was done after sentence to a different entity it will not throw light on matters that were before the learned Magistrate. If the Appellant can show that the payment was done to a different entity before the sentence and the learned Magistrate was unaware of that fact at the time of sentence, then leading of fresh evidence would be helpful to explain the facts which were before the Magistrate. However, in the present matter, though there was an expression by the Appellant for reparation, no reparation was made for more than a year from the time the matter was initialed to sentencing. Hence the Magistrate was right in not suspending the sentence. This ground of the Appellant does not have merit and therefore fails.

Ground (b) Fixing non-parole period by sentencing court

22. Section 2 of the Sentencing and Penalties Decree 2009 defines non-parole period as *"any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole".*

23. Section 18 of the Sentencing and Penalties Decree 2009 states:

> *"18. (1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.*
>
> *(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).*
>
> *(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.*

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented under a law making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6)."

24. In terms of the said Section 18, the Sentencing Court must fix a non-parole period which is six months less than the head sentence where the sentence imposed is more than two years. The decision in fixing a non-parole period being mandatory, reasons need not be given for doing so, that is, fixing "a" non-parole period which stands in contrast with Section 18(2), where reasons must be provided when the sentencing court does not fix a non-parole period. (*vide:* ***Rusiate Savu v. State*** [2014] FJCA 208; AAU0090.2012 (5 December 2014).

25. A discretion has been granted to the sentencing judge in terms of Section 18 (3) of the Sentencing and Penalties Decree when fixing a non-parole period but is silent as to how that period should be arrived at. Calanchini P in ***Paula Tora v. The State Criminal Appeal*** No.AAU 0063 of 2011 (27 February 2015) stated:

" The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27(2) of the Corrections Service Act, 2006 on the balance of the head sentence after the non-parole term has been served."

26. It would be seen therefore that there is no basis for the imposition of the non-parole period in terms of the statutory provisions as it stands now in Fiji except to say that when fixing a non-parole period it should be six months less than the head sentence. This would indicate that a period which is less than six months than the head sentence would be the maximum limit of the non-parole period. If the remission of one third is to be considered at the end of such a six months period, it may go against the spirit of section 4(1) of the Sentencing and Penalties Decree, 2009 in striking a balance between rehabilitation and deterrence. *Vide:* ***Naitini v State*** [2015] FJCA 154; AAU102.2010 (3 December 2015)

27. It will also be necessary to consider the personal circumstances of the offender when deciding on the minimum non-parole period, as to whether he/she was a first offender or a person with a history of having committed crimes of a similar or serious nature which may have already been considered when imposing the head sentence.

28. While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case. In doing so, it is desirable that the sentencing Judge takes into consideration the three objectives stated by Redlich JA and Osborn JA in **Kumova v. Queen** [2012]n VSCA 212 which I reproduced below:

> Redlich JA and Osborn JA stated:
>
> *"Like the head sentence, determination of the non-parole period involves the application of well settled principles and practices to the circumstances of the case. All factors are taken into account, first in determining the head sentence and then in fixing the non-parole period. The factors may be differently weighted at each stage of the exercise because there are different purposes behind each function. In fixing the proportion of the head sentence to be given to the minimum sentence there are sentencing principles in operation which, together with the individual circumstances of the case will determine the proportion which the non-parole period must bear to the head sentence.* ***First, like the head sentence, the non-parole period must also reflect the objective gravity of the offence so that the non-parole period should constitute the minimum period of imprisonment that justice requires the prisoner to serve. Secondly, punishment is mitigated in favour of the prisoner's rehabilitation. The benefit of the minimum term is for the purpose of the offender's rehabilitation. Thirdly, in fixing the minimum term, the interests of the community, which imprisonment is designed to serve, must be taken into account."*** *(Emphasis added).*

29. Section 18(3) of the Sentencing and Penalties Decree gives discretion to a Magistrate to impose a non-parole period. In the present matter, the learned Magistrate had exercised that discretion judiciously pursuant to Section 18(3) and (4) of the Sentencing and Penalties Decree. Therefore this ground fails.

Ground (c)

30. The second ground of appeal is that the learned Magistrate erred in law and fact when he failed to give a one-third discount to the Appellant independent of other mitigating factors.

31. In ***Balaggan v State*** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Justice Gounder observed:

> *"I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.*

32. The Approach to sentencing was set by the Fiji Court of Appeal in ***Naikelekelevesi v State*** [2008] FJCA 11; AAU0061.2007 (27 June 2008) as follows;

> *"In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case".*

33. The weight that is given to a guilty plea depends on a number of factors. In ***Daunabuna v State Criminal Appeal*** No. AAU0120/07 (4 December 2009), the Court of Appeal adopted a passage from ***R v Winchester*** (1992) 58 A Crim R 345 at 350 by Hunt CJ:

> *"A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some cases be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: Shannon (1979) 21 SASR 442 at 452; Ellis (1986 6 NSWLR 603 at 604. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in a trial. Obviously enough, the extent to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected): Beaven (unreported, Court of Criminal Appeal, NSW, Hunt, Badgery-Parker and Abadee JJ, 22 August 1991), at p.12.*
>
> *The important point to be made is that leniency is afforded upon the second ground as a result of purely utilitarian considerations, as with the 'discount' allowed for assistance given to the authorities: Cartwright (1989) 17 NSWLR 243; Gallagher (1991) 23 NSWLR 220; 53 A Crim R 248. The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay.*
>
> *Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed.* ***That does not mean that the sentencing judge should show a precisely quantified or***

quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown; *that was the point of this Court's decision in Beavan at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor."(emphasis added)*

34. The Appellant's guilty plea was clearly taken into account as a mitigating factor. The complaint relates to the weight that was given to the guilty plea by the learned Magistrate. After adjusting the sentence to reflect the aggravating factors, the learned Magistrate reduced the sentence by 18 months to reflect the mitigating factors that included the appellant's guilty plea. The Appellant received a substantial reduction of 50%. Therefore this ground fails.

Ground (d)

35. The Appellant complains that the learned Magistrate failed to take into account or proper account of the mitigating factor of the Appellant being a university student and a short term of 'clanging the gates of prison' upon her to meet the interests of punishment and deterrence by imprisonment and suspending the rest of the term in the interest of rehabilitation. Simply put, this ground of appeal is that the learned Magistrate erred in law and fact when he imposed a custodial sentence contrary to the objects of the Sentencing and Penalties Decree and where a suspended sentence would have been more appropriate given the circumstances of the case.

36. The learned Magistrate at paragraph 14 of his Sentencing Ruling has carefully considered the mitigating factors and deducted 18 months for the mitigating factors and for early plea of guilty. However, he has not taken into consideration the fact that the Appellant was a student at the University of the South Pacific as a mitigating factor although this fact was drawn to the Court's attention in her mitigation submission. In paragraph 21 of

his Ruling, the learned Magistrate, when considering a custodial sentence, while acknowledging that the Appellant was a university student having future prospects, ordered to serve the sentence with immediate effect.

37. In ***Balaggan v State*** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Justice Gounder observed:

> *"Neither under the common law, nor under the Sentencing and Penalties Decree, 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?*

38. The Appellant had not committed a serious offence. She was a first offender and had pleaded guilty at the first available opportunity. The amount involved was not that substantial. Even though she, in her capacity as the treasurer of the club, had breached the trust reposed in her by the membership by not keeping the money in a safe, she promptly accepted the responsibility and expressed her willingness for reparation.

39. For an Accused who is a University student a non-parole sentence of 12 months to reform while being punished as stated by the learned Magistrate at paragraph 21 of the Ruling is somewhat harsh and excessive in the circumstances in this case. Purpose of the Sentencing and Penalties Decree can best be guaranteed by balancing rehabilitation with punishment. Imprisonment is for punishment. Reformation by imposing a non-custodial term will allow the Appellant to further her studies and would lead to a reformed life after a short prison term. I agree that 'the longer the sentence the longer a first offender could

adapt to the negative influences of more hardened criminals and lead not to reform but to hate for a system'.

40. Therefore, I decide to partly suspend the sentence imposed by the learned Magistrate. A short string of 6 months for a first offender who has already lost her employment because of the offence would satisfy the balancing of competing interests to be achieved by the Sentencing and Penalties Decree.

41. Therefore, I order the sentence imposed by the learned Magistrate to be suspended for a period of two years after the Appellant has served six months in prison.

42. For the reasons given, the Appellant's sentence is varied. Out of 18 months' imprisonment, period of 12 months is suspended. The appeal against sentence succeeds to this extent.

Aruna Aluthge
Judge

At Lautoka
15th November, 2016

Solicitors: **Messrs Vuataki Law for the Appellant**
Office of the Director of Public Prosecution for the Respondent