IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE: HAA 32 OF 2016

BETWEEN	:	**ASHNEEL SANDIP LAL**
		APPELLANT
AND	:	**THE STATE**
		RESPONDENT
Counsel	:	**Ms P. Chand for the Appellant** **Mr S. Nath for the Respondent**
Date of Judgment	:	**3rd of January, 2017**

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the sentence imposed by the learned Magistrate of Nadi on the 8th of January 2016 on following grounds *inter alia;*

   i) The learned trial Magistrate erred in law and fact when he failed to consider that the Appellant was a first offender,

   ii) The learned Magistrate erred in law when he had sentenced Appellant of 205 counts of conversion,

2. Pursuant to the service of this Petition of Appeal, the Appellant and the Respondent appeared in court on the 25th of November 2016. The learned counsel for the Appellant and the Respondent informed the court that they wish to conduct the hearing by way of written submissions. I accordingly directed them to file their respective written submissions. However, only the Appellant filed his written submissions as per the directions. Having carefully perused the written submissions of the Appellant and the record of the proceeding of the Magistrates court, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant was charged in the Magistrates court for one count of Conversion contrary to Section 319 (1) (c) (ii) of the Crimes Decree and one count of Theft, contrary to Section 291 (1) of the Crimes Decree. He was first produced before the Magistrate Court of Nadi on the 13th of May 2015. Subsequent to few adjournments, the Appellant pleaded guilty for the two counts on the 1st of October 2015. The learned Magistrate then sentenced the accused for two (2) years and eight (8) months imprisonment for the first count and sixteen (16) months imprisonment for the second count, with two years of non-parole period. Both of the sentences to be served concurrently. Aggrieved with said sentence the Appellant filed this Petition of Appeal.

The Law

4. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states 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"

5. The Fiji Court of Appeal in ***Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998*** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, it states;

'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 of the relevant considerations, then the appellate court may impose a different sentence.'

6. The Fiji Court of Appeal in ***Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)*** 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".

Ground I

7. I now turn on to the first ground of appeal that is founded on the ground that the learned Magistrate has not taken into consideration that the Appellant was a first offender.

8. The sentencing court has to take into consideration the previous character of the offender in sentencing pursuant to Section 4 (2) (i) of the Sentencing and Penalties Decree. Section 5 of the Sentencing and Penalties Decree has stipulated the factors that need to be consider in order to determine the character of the offender.

9. The learned Magistrate in paragraph four and five of his sentence has specifically taken into consideration that the Appellant is a first offender among other mitigation grounds. The learned Magistrate has then given a sufficient discount for the mitigation factors. Accordingly, it is my view that the learned Magistrate has correctly and adequately taken into consideration that the Appellant is a first offender in his sentence. Therefore, I find no merit in ground one.

Ground II

10. The second ground of appeal is founded on the contention that the learned Magistrate erroneously sentenced the Appellant for 205 counts of Conversion.

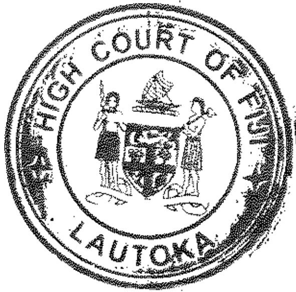
11. It appears that the learned Magistrate was not certain about the number of counts that he was sentencing. He has started the sentence in paragraph one stating that the Appellant was charged with 205 counts of conversion and one count of theft. However, in the second paragraph, the learned Magistrate has convicted the Appellant for two counts. Once again in paragraph twenty one, he has mentioned about 105 counts.

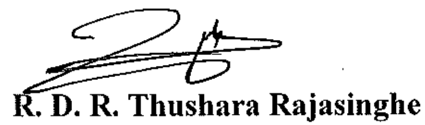
12. Be that it as may, the learned Magistrate at paragraph 27 of the sentence, has finally imposed that the sentence for count one and two be served concurrently and the final sentence is two years and eight months of **imprisonment**.

13. In view of the reasons discussed above, I do not find that the mention of 205 or 105 counts in the sentence has not prejudiciously affected the final outcome of the sentence. Therefore, I find the second ground of appeal has no merits and fails accordingly.

14. In conclusion, I refused and disallowed this appeal.

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





R. D. R. Thushara Rajasinghe

Judge

At Lautoka

3rd of January, 2017

Solicitors : **Office of the Legal Aid Commission**

Office of the Director of Public Prosecutions,