

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 162 OF 2014

BETWEEN : DHIRENDRA NANDAN

Appellant

AND :

STATE

Respondent

**Counsel: Appellant in Person
 Mr. Semi Babitu for Respondent**

**Date of Hearing: 9 September 2014
Date of Judgment: 19 September 2014**

JUDGMENT

1. The applicant was charged before Lautoka Magistrate Court with one count of Theft contrary to Section 291(1) of the Crimes Decree and one count of Obtaining Property by Deception contrary to Sections 317 (1) of the Crimes Decree No. 44 of 2009.
3. The particulars of the offences are that on 11th August 2012 the appellant with others went to drink at Saweni beach with a Japanese female student and stole her purse and used the credit card in the purse to buy goods at MH supermarket. The value of items stolen was \$60 and value of goods obtained was \$340.
4. The applicant pleaded guilty and convicted. He was sentenced on 10th June 2014 for 11 months and 5 days sentence for each charge to run concurrently and consecutive to the sentence he is already serving.
5. This appeal was filed within time on 12th June 2014.
6. The grounds of Appeal are:

- (i) Learned Magistrate had erred in ordering this sentence to run consecutively.
 - (ii) Learned Magistrate failed to deduct the correct time period in remand from this sentence.
7. Both parties have filed written submissions. State Counsel in his written submissions has stated that learned Magistrate had followed a wrong tariff for the 2nd count had failed to give full credit to the time period in remand.
 8. The learned Magistrate had followed correct Guide line judgments and selected a correct starting point for the 1st count. The final sentence is also within tariff. For the 2nd count the learned Magistrate had followed the judgments for Obtaining Financial Advantage by Deception and selected a starting point of 24 months.
 9. The tariff for Obtaining Property by Deception is same as the tariff for Obtaining Financial Advantage by Deception as held by Hon. Mr. Justice Paul K. Madigan in **State v Miller** [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014).
 10. Therefore the tariff and starting point selected by the learned Magistrate is correct. The final sentence is outside the tariff, however considering the facts of this case, I do not intend to disturb the sentence.

1st Ground

11. The learned Magistrate had not given any reasons for making the sentence consecutive.
12. The Section 22 (1) of the Sentencing and Penalties Decree was given a wide interpretation by the Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013):

"[22] The situation that presents itself to the Court therefore, and a proposition advanced by counsel for the appellant is this: there being no guidance from authorities of higher courts on concurrent or consecutive sentencing, we are left only with the legislation (Sentencing and Penalties Decree) which states that subsequent sentences must be served concurrently with existing sentences.

*[23] Guidance for this situation can still be gleaned from the earlier decision of the Supreme Court in **Joji Waqasaga v State** [2006] FJHC 6 CAV 0009U.2005S (8 June 2006) by analogy. If the Court said (and it did) that where the "default" position was consecutive, then a Court would have to give "reasoned justification" to depart from that position in making sentences concurrent, then a Court must now when the "default" position is concurrency make a reasoned justification to depart from the "default" position in making sentences consecutive or partly consecutive."*

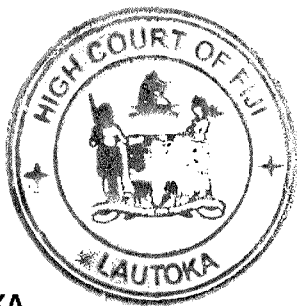
13. The learned Magistrate had not given any reasons for making the sentence consecutive. There is no reasoned justification for making the sentence consecutive.

14. This background warrants this court to exercise its powers in terms of Section 256 (2) (a) of the Criminal Procedure Decree to vary the operation of the sentence ordered by the learned Magistrate. Thus sentence in this case is made concurrent to the sentence already serving by the appellant.

2nd Ground

15. The appellant had stated that he was in remand for a period of 5 months for this case. That is wrong. He was in remand from 2.9.2013 to 27.9.2013. He was granted bail on that day. He was in remand for another case thereafter. That time period is deducted in the sentence of CF 471/09 (HAA 9 of 2014). Therefore there is no merit in this ground and it fails.

16. Appeal is allowed. Operation of the sentence is varied.



AT LAUTOKA
19th September 2014


Sudharshana De Silva
JUDGE

Solicitors: **Applicant in Person**
 Office of the Director of Public Prosecution for the Respondent