

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 37 OF 2015

BETWEEN : **SANJEET NARAYAN**
APPELLANT

AND : **THE STATE**
RESPONDENT

Counsel : **Appellant in Person**
Mr. A. Singh for the Respondent

Date of Hearing : **12th of November 2015**
Date of Judgment : **26th of November 2015**

JUDGMENT

Introduction

1. The Appellant files this appeal against the Sentence delivered on 27th of July 2015 by the Learned Resident Magistrate in the Magistrates' court of Nadi. The Appellant is not represented by a Solicitor and filed the petition of appeal in person. Hence the grounds of appeal are not perfectly worded as it would have been done by a solicitor. I reproduce the grounds of appeal advanced by the Appellant as follows that;

i. The Sentence is being harsh and excessive and wrong in principle in all circumstances of the case,

- ii. *The Learned Magistrate erred in law in fact to take into consideration the main mitigation factor of restitution as it was the desire of the appellant with interest, submitting in written mitigation on the 13th day of July 2015,*
- iii. *The Learned Magistrate erred in law and in fact when he choose a starting point that lies at the upper end of such offences and compared to different case reference with higher tariffs.*
- iv. *The Learned Magistrate erred in law and by giving other deduction as the sentence was below 2 years which could be given as a suspended sentence,*
- v. *The Learned Magistrate erred in law to consider the Section 22 (1) and 22 (2) of the Sentencing and Penalties Decree 2009, in ordering to serve the current sentence consecutively to the pre existing sentence,*
- vi. *The Learned Magistrate erred in law and in fact never took into consideration when sentencing the appellant the relevant matters but in fact took irrelevant matters into consideration,*
- vii. *The Learned Magistrate erred in law and in fact never took into consideration as the appellant was a serving prisoner and showed genuine remorse in court and was lenient to the prosecution charging officers,*

2. Upon being served with the petition of appeal, the Respondent appeared in court on the 14th of October 2015 and both parties were directed to file their respective written submissions. Both parties filed their respective written submissions as per the direction and informed the court that they rely on those submissions and do not wish to make any oral submissions or arguments. Having carefully considered the grounds of appeal, and respective submissions of the parties, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant was charged in the Magistrate court for one count of Making of Without Payment contrary to Section 314(1) (a) (b) of the Crimes Decree. He pleaded guilty for this count on his own free will on 13th of July 2015. The learned Magistrate has then convicted Appellant for the said offence and sentenced him for an imprisonment period of 14 months on 27th of July 2015. The Appellant now appeals against the said sentence of the learned Magistrate.
4. Having carefully considered the submissions of the parties and grounds of appeal, it appears that all the grounds of appeal are founded on following main contentions, that;
 - i. The Learned Magistrate erred in law by ordering the Appellant to serve the sentence consecutive to his existing period of imprisonment,
 - ii. The Learned Magistrate erred in law by failing to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Decree.
 - iii. The Sentence is founded on wrong principles of tariff and irrelevant considerations

First Ground of Appeal

5. Section 22 (1) of the Sentencing and Penalties Decree gives a discretion to the sentencing judicial officer to decide whether any subsequent sentence of imprisonment should be served consecutively with any uncompleted sentence, which the accused is already serving at time of the sentencing. Section 22 (1) of the Sentencing and Penalties Decree states that;

“every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment”

6. The Supreme Court of Fiji Islands in **Vulawalu v State (2011) FJSC 6; CAV0006.2010 (8 April 2011)** while referring the observation made in **Philip Fong Toy v State (AAU0099/08)** has discussed the application of totality principle in a comprehensive manner, where it held that;

“In these proceedings, the Court of Appeal had referred to its decision in Philip Fong Toy v State AAU0099/08 and at para 12 said’

“The effect of the totality principle is to require a sentence when ordering a series of sentence to run consecutively to consider whether the total sentence is too much and will have a crushing effect on the offender. If a sentence concludes that making a series of sentence cumulative will have a crushing effect on the offender, then the sentence should be made concurrent. That is how the totality principle operates”

7. In this instant case, the learned Magistrate has made this sentence to be served consecutively to the incomplete sentence which the appellant was serving at that time. The learned Magistrate has found that the Appellant was going to complete his previously imposed sentence in 4 days’ time from his sentence that was on 1st of August 2015. Accordingly, it appears that making this sentence consecutive to the then existed sentence has certainly not made any crushing effect on the offender. Hence, I find this ground of appeal has no merit and fail.

Second Ground of Appeal

8. I now turn onto the second main contention, that the learned Magistrate failed to suspend the sentence.
9. Section 26 (1) of the Sentencing and Penalties Decree states that;

“On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances”.

10. Accordingly, it is the discretionary power of the court to impose a suspended sentence if it finds it is appropriate to do so considering the circumstances of the matter before it. The learned Magistrate has correctly and accurately found that a custodial sentence is warranted as you have 3 previous convictions of similar nature. I accordingly find that this ground of appeal has no merit and fail.

Third Ground of Appeal

11. I now draw my attention to the third main contention, that is founded on the ground that the sentence is wrong in principle. The appellant contended that the learned Magistrate erred in law by considering tariff limits of other offences in order to select the starting point at higher scale.
12. The learned Magistrate has considered the tariff limits applicable to the offences of theft and dishonesty in order to reach his starting point, which I find wrong in principle. The offence of Making of Without Payment does neither come under category of theft offences, nor under the offence of fraudulent or dishonest conduct. It is an offence stipulated under category of other property offence. Hence, to apply the tariff of the offence of theft certainly is wrong in principle.
13. There is no established tariff limit for the offence of Making of Without Payment under the Crimes Decree. Accordingly, it would be prudent to examine the sentencing principles in United Kingdom in respect of the offences of similar nature.
14. Section 3 (1) of the Theft Act of UK 1978 has defined the offence of Making of Without Payment as that;

“Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence”.

15. According to Section 4 (2) (a) of the Theft Act of UK, if the accused is convicted on an indictment, the maximum penalty for the offence of Making of Without Payment is 2 years of imprisonment. If the accused is convicted summarily, the maximum penalty is 6 month of imprisonment or a level 5 fine.
16. The new sentencing guideline issued by the Sentencing Council of UK, which will come into effect from 1st of February 2016, has given the tariff limit for the offence of Making of Without Payment from a discharge to 36 weeks of custody.
17. The offenders of this offence are normally motivated by their greediness or desire to live beyond their means. It can be seemed out from their desperation of hardship or sense of cunningness. Having considered the similar nature of the wording and the punishment stipulated under the Section 3 and 4 of the Theft Act of UK with Section 314 of the Crimes Decree, I propose to adopt a conditional discharge to 9 months of imprisonment as the appropriate tariff limit for the offence of Making of Without Payment. The determination of starting point depends on the role played by the accused in committing the offence, the level of planning and the amount of the loss caused to the victim.
18. In view of these reasons discussed above, it is my opinion that the learned Magistrate has erroneously selected 18 months as the starting point. The learned Magistrate has then added 12 months on the ground that the Appellant is a repeated offender, which is wrong in principle. The previous convictions of the accused person should not be considered as an aggravating factor in sentencing. It could be a reason to deny him any discount for his previous good character in mitigation. Accordingly, I find that there is a reasonable ground for me to intervene into the sentence given by the learned Magistrate in this case pursuant to Section 256 (3) of the Criminal Procedure Decree. Hence, I quash the sentence delivered by the learned Magistrate and substitute it with the following sentence.
19. The Appellant booked into the hotel on 28th of December 2012 and stayed there till 31st of December 2012. He left the hotel without paying the bill of \$ 641.50. It appears that this crime has not been committed out of desperation of hardship. Having considered the

level of planning and amount of money involved in this offence, I select 7 months as the starting point. In view of the early plea of guilty, I reduce 2 months and for other mitigatory factors I reduce a month to reach the final sentence of 4 months imprisonment period.

Conclusion

20. In my conclusion, I sentence you for four (4) months imprisonment for the offence of Making of Without Payment contrary to Section 314 (1) (a) (b) of the Crimes Decree, effective from 1st of August 2015.
21. The appeal is allowed to the above extent.
22. 30 days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

26th of November 2015

Solicitors : Office of the Director of Public Prosecutions