

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: HAA 010 of 2009**

**BETWEEN:**

**MARIKA SILIWALE**

***Appellant***

**AND:**

**STATE**

***Respondent***

Date of Hearing: 30<sup>th</sup> July 2009

Date of Judgment: 10<sup>th</sup> September 2009

Counsel: Appellant in person  
Mr. L. Savou for State

**JUDGMENT**

[1] The appellant and his co-accused pleaded guilty to a charge of larceny in the Magistrates' Court. The charge alleged that they stole \$10,433.81 cash belonging to Flour Mills of Fiji Limited.

[2] The appellant was sentenced to 2 years imprisonment while the co-accused was bound over in the sum of \$200.00 to keep peace and to be of good behavior for 2 years. The appellant appeals against sentence alone. He advanced a number of grounds in his Petition of Appeal but at the hearing of the appeal, the main complaint was the disparity in the sentences imposed on the co-accused.

[3] Disparity in the sentences imposed on two or more offenders for the same offence can give rise to a justifiable sense of grievance to the offender with the higher sentence. In ***Joji Waqasaqa v. The State*** Criminal Appeal No. CAV009 of 2005S the Supreme Court said:

“It is clearly established that an unjustified and disproportionate disparity between the sentences imposed upon co-accused may result in an otherwise appropriate sentence being reduced on appeal.”

[4] The same principle was applied by the Court of Appeal in ***Sakeasi Ratumaiya v. The State*** Criminal Appeal No. AAU0060 of 2005S.

[5] The case of ***Ratumaiya*** adopted the principles enunciated by the New Zealand Court of Appeal in ***R v. Lawson*** [1982] 2 NZLR 214:

“Sentencing is not an exact science and the circumstances of one offender can rarely be compared with those of another. The sentencing judge must not only consider the relative involvement of the individuals in the offence but also the mitigating factors affecting each. But a marked difference in the sentences imposed on co-offenders, and for which no justification can be shown, may be of importance to the administration of justice generally in that such a marked and unjustified difference will tend to bring the administration of justice into disrepute. The courts must bear in mind that public confidence in the administration of justice is best

preserved if justice appears to be administered even-handedly. It is for this reason that the disparity in sentences imposed on co-offenders may justify a reduction in the sentence imposed on one which would otherwise be appropriate.”

- [6] The learned Magistrate’s reasons for the disparity in the sentences are contained in the sentencing decision:

“Accused 1:

I have noted your mitigation and I have also taken into account the circumstances surrounding the offence. I also note that you have been in and out of Prison on similar charges – last being 2006 for House Breaking, Entering & Larceny. As such I start on the higher scale of the tariff.

I start with 4 years and I reduce your sentence by 1 year for your mitigating factors and I further reduce your sentence by 1/3 for your guilty plea. As such you are sentenced to 2 years imprisonment.

Accused 2:

I have noted your mitigating factors. You are a first offender and a sole breadwinner of the family. You are also gainfully employed. I also take note that this was not preplanned. Because you are a first offender and have pleaded guilty I will give you a bound over in the sum of \$200.00 to keep peace and to be of good behavior for 2 years under Section 41 of the Criminal Procedure Code.”

- [7] Clearly the disparity in the sentences was due to the fact that the appellant was not a first time offender while his co-accused was a person of previous good character. According to the record the appellant has seventeen previous convictions since 2000. Most of his convictions are theft related. His last

conviction was on 23 January 2006 for house breaking entering and larceny. He was sentenced to 2 years imprisonment for that offence. His earlier sentences were either suspended or he was bound over. In these circumstances, the learned Magistrate was justified to take the view that a deterrent sentence was called for in the case of the appellant.

[8] In **Vilame Cavuilagi v. State** *Criminal Appeal No. HAA0031 of 2004* Winter J said:

“Repetitive, recidivist offending must inevitably lead to longer sentences of imprisonment unless the offender can demonstrate special circumstances that motivate the court to sentence otherwise. This principle meets three of society’s needs. Firstly it might act as a deterrent to the offender and others who fall into a pattern of semi-professional crime to support themselves. Second society is entitled to sideline or warehouse repeat offenders out of the community for longer periods of time so that at least during the term of incarceration they cannot wreck havoc on the lives of law abiding citizens. Third offenders deserve punishment that fits the circumstances of the crime.”

[9] The appellant was no doubt a repeat offender. No special circumstances existed to impose a sentence below the tariff for this type of offending. In **Waisale Vakarauvanua v. The State** *Criminal Appeal No. HAA0051 of 2004S*, Shameem J considered the tariff for this offence:

“The tariff for a first conviction for simple larceny is 2-9 months imprisonment (**Ronald Vikash Singh v. State** HAA0035 of 2002, **Josevata Taucilagi v. The State** *Crim. App. No. HAA0096 of 2002S*). On a second conviction, a sentence in excess of 9 months imprisonment (the length being dependent on the value of the goods stolen and the circumstances of the stealing) is appropriate.

Suspension should be considered for first offenders especially in cases of petty theft.”

- [10] In the present case, substantial cash was stolen and nothing was recovered from the appellant. The only mitigating factor in the case of the appellant was his guilty plea. He was not entitled to any discount for previous good character, given his past criminal record.
- [11] On the other hand, the co-accused was a first time offender. He was a construction worker and was supporting his *defacto* wife. In his case, the items bought using the stolen money were recovered from him. The imposition of a non custodial sentence on the co-accused was not wrong in principle.
- [12] The personal circumstances of the appellant were different from the co-accused. He was not a first time offender and nothing was recovered from him.
- [13] Therefore the disparity in the sentences is justified. The appellant should not feel aggrieved by the disparity because previously he had been given non custodial sentences but he had made no effort to reform himself.
- [14] I do not find any merit in the appeal. The appeal against sentence is dismissed.

Daniel Goundar  
**JUDGE**

At Lautoka  
10<sup>th</sup> September 2009

**Solicitors:**

Appellant in person  
Office of the DPP for State