IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 23 OF 1993
(High Court Criminal Case No. 5 of 1993)

BETWEEN:

VISHWAJIT PRASAD s/o Shiu Prasad — Appellant

- and -

THE STATE — Respondent

Appellant in Person
Mr I. Wikramanayake for the Respondent

Date of Hearing: 16th May, 1994
Delivery of Judgment: 24th May, 1994

JUDGMENT OF THE COURT

This is an appeal against sentence only.

On 24th November, 1993 the Appellant pleaded guilty before the High Court at Suva to a total of 27 counts - 9 for forgery. 9 for uttering a forged document and 9 for obtaining money on forged document.

The total amount alleged to have been defrauded by the Appellant in terms of the Information was almost $37,000. The Appellant also consented in writing to the Court taking into account 45 additional counts not included in the Information. These involved forgery of 15 different cheques uttering them and obtaining money on them. The grand total amount defrauded came to nearly $78,000 arising out of forgeries of a total of 24 cheques.

The learned trial Judge (Fatiaki J.) convicted the Appellant on each of the counts contained in the Information. After taking evidence as to Appellant's antecedents and having heard him in mitigation the learned Judge sentenced the Appellant as follows:

> *"12 months imprisonment on each of the forgery counts,*
>
> *18 months imprisonment on each of the counts involving uttering of forged document, and*
>
> *4 years imprisonment on each count of obtaining money on a forged document".*

All the sentences were ordered to run concurrently.

The effective total sentence was, therefore, 4 years only.

The Appellant complains that this sentence is too harsh bearing in mind -

(i) that he is a first offender,

(ii) that he pleaded guilty,

(iii) that substantial refund has been made,

(iv) that he is the sole breadwinner in the family,

(v) that laxity in the accounting system placed him in a situation of great temptation,

(vi) that non-custodial sentences were imposed in some similar cases.

The Appellant was not represented either in the Court below or in this Court. However, he is an educated person and has not suffered any disadvantage as a result of not being represented by counsel.

Brief facts of this case including the Appellant's background are as follows:

> He is about 27 years of age, is married and has 2 children, one about 5 years old and the other an infant.
>
> The Appellant was employed by the Fiji Teachers Union as an Administrative Officer. He was charged amongst other duties with the responsibility of preparing cheques. In the course of his discharging his duties and over a period 6 months between January and July 1991 he defrauded his employers of a total of about

$78,000. The system he adopted entailed the endorsement and encashment of pre-signed blank cheques and altering the amounts on cash cheques. When the forgery was discovered he made a full confession to the officials of the Fiji Teachers Union.

His employers have recovered all the monies which were the subject of the 9 counts in the Information alleging obtaining money on forged document. This they did by selling the Appellant's vehicles and other items. In respect of the balance amounting to about $40,000 a compensation order was made by the trial Judge pursuant to Section 160(2) of the Criminal Procedure Code. A further Order was made under Section 164(e) of the Criminal Procedure Code whereby certain property seized by the Police from the Appellant were to be handed over to the Fiji Teachers Union. The Appellant was dismissed from employment immediately after the defalcations were discovered in July, 1991.

Before passing sentence on the Appellant the trial Judge made, inter alia, the following observations -

"Each of the offences with which the accused has been convicted carries a maximum penalty of 14 years imprisonment which is an indication of the seriousness with which the offence is viewed by our legislators.

This was undoubtedly a systematic fraud and a gross abuse of the trust which his employers had reposed in the accused. Whilst the nature and extent of the fraud could not have been perpetrated had his employers been more vigilant and careful in the signing of cheques that factor may explain but does not excuse the accused's criminal activities.

To his credit the accused on being taxed by his employers freely admitted his dishonesty and has `repaid' $19,200 of the total monies defrauded. He is also a first offender.

I have also taken into account his plea of "guilty" and his clear desire to put this entire "affair" behind him as exemplified by his consent to this Court taking numerous other similar offences into consideration.

The accused asks for leniency and is clearly remorseful. He has a young family who are unfortunately the innocent victims of his crime. But dishonesty is not an appropriate manner of providing for the needs of one's family. Indeed many families in this country struggle to exist on much less without resorting to dishonesty.

The total sum defrauded by the accused is on all accounts a substantial one and will have an immediate and direct effect on the financial resources of his employer and indirectly impact on the funds of the superannuation scheme on which some of the cheques were drawn."

It is, therefore, clear that the learned Judge took into account everything that could be said in favour of the Appellant. However, the thrust of the Appellant's contention is that insufficient weight was given to the fact that he was a first offender and as such an immediate custodial sentence should have been avoided. Indeed in his written plea to this Court the Appellant says that the same Judge is reported to have observed in another case that -

".... Courts ought to bend backwards to avoid immediate custodial sentence for first offenders."

Mr I. Wikramanayake (Assistant Director of Public Prosecutions) submitted that the sentence on the Appellant was neither wrong in principle nor manifestly excessive.

We are aware that in some countries the courts are required, with certain exceptions, to obtain and consider a pre sentence report before forming the opinion that an offence was so serious that only a custodial sentence could be justified. In New Zealand there are a number of restrictions placed against imprisonment of offenders particularly offenders against property. (See Sections 6 and 7 of the Criminal Justice Act.) We do not have any legal restrictions in this country with regard to imprisonment of persons seventeen years and over. Where imprisonment is an option the matter is left to the discretion of the sentencing court. However, criminologists recognise that a prison sentence should be the last resort especially where a first offender is concerned unless the charge is very serious or the offender is dangerous and imprisonment is called for in the public interest or in the interest of the offender himself. The brutalizing effect of imprisonment on a first offender especially where imprisonment is for a long period is now well-recognised. However, we are satisfied that in this case the learned trial Judge was justified in imposing an immediate custodial sentence notwithstanding the fact that the Appellant was a first offender, had pleaded guilty, had shown remorse and that a substantial amount had been recovered. This is so because the amount

defrauded was large, the Appellant was both a servant and in a position of trust and he operated in a systematic way to defraud his employer over a period of time.

Nevertheless, it is the length of the immediate prison sentence that has exercised our mind having regard to all the mitigating factors.

The cases cited before us both by the Appellant and the Respondent indicate that the sentences in similar though not necessarily the same type of cases can range from a probation order to 4 years imprisonment. In between these extremes there are several instances of shorter prison sentences a number of which were suspended. But in these latter cases either the amount defrauded was not as large, the number of counts were fewer or the offender was under 21 years of age, or a combination of 2 or more of these factors was present.

As no two cases are exactly alike in every respect and as each case should be decided on its own particular facts and circumstances what we need to seek is a consistency of approach rather than uniformity of sentence. On the material before us it would appear that a 4-year sentence is normally reserved for the worst type of obtaining monies by deception cases. Although we have noted the aggravating features of the case before us we have

also taken into account the mitigating factors and are of the view that this case does not fall in the `worst case' category. Consequently, we have come to the conclusion that a sentence of 4 years imprisonment was on the excessive side. A sentence of 2 1/2 years imprisonment would have been the more appropriate punishment. Given the Appellant's background and bearing in mind his young family a shorter sentence would have, in our view, the same deterrent effect as a 4-year sentence.

As regards the compensation order of $40,000 made against the Appellant, we note that no inquiries were made as to the Appellant's means. Section 160(2) of the C.P.C. under which the Order was made reads as follows:

> *"160.-(1) ....*
>
> *(2) Any person who is convicted of an offence may be ordered to pay compensation to any person injured by, or who suffers damage to his property or loss as a result of, such offence and such compensation may be either in addition to, or in substitution for, any punishment or other sentence.*
>
> *(Section amended by 16 of 1973, s. 6.)"*

The words "either in addition to, or in substitution for, any punishment or other sentence" in the above sub-section suggest that a compensation order could (though not necessarily) be regarded as a form of punishment.

However, there can be no objection to combining a compensation order with a significant custodial sentence provided

the offender has the means to pay the compensation ordered (see Dorton (1987) 9 Cr. App. R. (S.) 514).

The Appellant informed this Court that he has no house, no land and no monies to satisfy the compensation order. The learned counsel for the Respondent confirmed this and stated that any effort to enforce the compensation order would be "throwing away good money for bad". Clearly the Appellant does not presently have the means to pay any part of the compensation, let alone the whole of it. With the number of convictions recorded against him and with the stigma of imprisonment attaching to his name the Appellant is still less likely to be able to pay the compensation after his release from prison as the prospect of his obtaining any gainful employment would be minimal. To allow this substantial compensation order to hang over his head indefinitely in these circumstances would be to allow an oppressive order to stand. It could kill any incentive on the part of the Appellant to rehabilitate himself.

Judge Lois G. Forer, an American judge who is a great advocate of "compensation to victims of crime" approach has nevertheless this to say in her widely read book "Criminals and Victims" -

> *"Utter economic and emotional destruction of a defendant and of his family would rarely, if ever, confer a benefit upon the community".*

We agree.

We are mindful that the Fiji Teachers Union has a right, if it chooses to do so, to take civil proceedings against the Appellant in an endeavour to recoup the balance of its losses. However, we are satisfied that it would be wrong in principle in the particular circumstances of this case to allow the compensation order to stand.

In the outcome, therefore, we allow the appeal, set aside the 4-year imprisonment sentence imposed on each of the counts of obtaining money on a forged document and in lieu thereof substitute a sentence of 2 1/2 years imprisonment, all sentences to be concurrent and to run from the date of sentence, i.e. 24th November, 1993.

We further quash the order of compensation of $40,000 made under Section 160(2) of the Criminal Procedure Code.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Mr Justice Savage
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal

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