

**IN THE COURT OF APPEAL
AT SUVA**

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0066 OF 2011

BETWEEN : **JAI SURENDRA PRAKASH SHARMA**

APPLICANT

AND : **FIJI INDEPENDENT COMMISSION
AGAINST CORRUPTION**

RESPONDENT

COUNSEL : **Mr. A. Kohli for Applicant**

: **Mr. V. Perera and Ms R. Drau for Respondent**

Date of Hearing : **01 July 2013**

Date of Ruling : **05 July 2013**

RULING

[1] Following a trial in the High Court at Labasa, the applicant was convicted of the following offence:

Statement of Offence [a]

OFFICIAL CORRUPTION: Contrary to Section 106(a) of the Penal Code Cap 17.

Particular of Offence [b]

Jai Surendra Prakash Sharma between the 06th day of October 2004 and 30th day of November 2006 at Labasa in the Northern Division, corruptly gave a benefit namely the repayment of Merchant Finance and Investment Company Limited loan “MC15816115 Motor” for Semi Matalau, a person employed in the public service as a Divisional Planning Officer Northern on account of having being awarded Road upgrading Contracts by the said Semi Matalau.

- [2] On 27 May 2011, the applicant was sentenced to 4 years’ imprisonment consecutive to a pre-existing sentence of 2 years’ imprisonment imposed on 21 April 2011 for causing payment of money by false pretence. The applicant’s total sentence was 6 years’ imprisonment for two separate offences effective from 21 April 2011.
- [3] On 24 June 2011, the applicant filed a timely Notice of Appeal raising the following grounds of appeal:
- (1) The learned trial judge erred in law in ruling that there was a case to answer.
 - (2) The learned trial judge erred in law and in fact in failing to evaluate all the evidence after the verdict had been delivered by the assessors.
 - (3) The learned trial judge erred in law and in fact in failing to ensure that the charges against them had been prove beyond reasonable doubt.
 - (4) The learned trial judge erred in law and in fact in imposing a sentence of 4 years imprisonment.

[4] This appeal falls within the ambit of section 21 (1) of the Court of Appeal Act, which states:

A person convicted on a trial before the High Court may appeal under this Part to the Court of Appeal –

- (a) Against his conviction on any ground of appeal which involves a question of law alone;
- (b) With the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
- (c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[5] At the hearing of the application for leave, Mr. Kohli informed the court that he was handicapped by lack of judge's notes to argue the grounds against conviction. After making brief submissions on ground 1, he focussed his submissions on the ground of appeal against sentence.

[6] The grounds of appeal against conviction are indeed vague and lack particulars of the alleged errors. In *Vulaca v State* - Majority Judgment [2011] FJCA 39; AAU0038.2008 (29 August 2011), the Court expressed disapproval that grounds should be drawn with vagueness and said at paragraph [15]:

The Appellate courts have always stressed that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what they have to respond to.

- [7] Due to the inadequacy in the grounds of appeal against conviction, it is not possible to assess whether they are arguable. Leave to appeal against conviction is refused.
- [8] The maximum sentence prescribed for official corruption under the Penal Code (now repealed) was 7 years imprisonment. The learned judge referred to the case of *State v Pita Koni Alifereti* Criminal Case Nos. HAC018/05 and 040 of 2007, where the offender was sentenced to a total term of 4 years' imprisonment for three separate counts of official corruption involving a total amount of benefit that was substantially higher than the amount of benefit involved in the present case.
- [9] The learned judge picked 4 years as his starting point and added 2 years to reflect the following aggravating factors at paragraphs [25] and [26]:

The aggravating factors are that you breached the trust expected of you by the community, by not performing the

contract for the expected standards, and in terms of your contract.

Further you have prevented honest competitive contractors from tenders being awarded to them by your conduct with the connivance of with the 1st Accused.

[10] Whether the factors identified by the learned judge in fact aggravated the offence is an arguable issue.

[11] The second arguable point relates to the lack of weight the learned judge gave to the previous good character of the applicant. The learned judge said at paragraph 29:

You have a previous conviction for which you are now serving a custodial sentence and therefore you are not entitled to a discount for previous good character.

[12] It is clear that the learned judge considered the character at the time of the sentencing and not at the time of the offending. At the time of the offending, the applicant was a person of previous good character. Furthermore, the learned judge failed to direct his mind to section 5 of the Sentencing and Penalties Decree, which provides:

In determining the character of an offender a court may consider (amongst other matters):

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender;
- (b) the general reputation of the offender; and

- (c) any significant contributions made by the offender to the community, or any part of it.

[13] The third arguable point relates to the totality principle. In *Vulawalu v State* [2011] FJSC 6; CAV0006.2010 (8 April 2011) the Supreme Court adopted what was said in *Waqasaqa v The State* [2006] FJSC 6; CAV0009U.2005S (8 June 2006) at paragraph [34]:

Of course, the sentencing judge or magistrate is always required to consider the totality of the aggregate sentence in order to ensure that it is just and appropriate. Sentencing is never a mere matter of arithmetic. The court must always step back and take a last look at the total just to see if it looks wrong.

[14] Further, the Court of Appeal in *Philip Fong Toy v The State* AAU0099/08 said at paragraph [12]:

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

[15] The reasons for ordering the applicant's sentences to run consecutively are contained at paragraph [32] of the learned judge's sentencing remarks:

Further I consider this as a serious offence as mentioned before. 2nd Accused is already serving a jail term, which is for a totally separate offence. He has not shown any

remorse. Considering the above I order that this sentence of 4 years imprisonment to run consecutively with any other uncompleted sentences of imprisonment.

[16] When considering the totality principle, the issue is not the lack of remorse or separate offences. The issue is whether the total sentence will have a crushing effect on the offender.

[17] For these reasons, I grant leave to appeal against sentence.

[18] **Result**

Leave to appeal against conviction refused.

Leave to appeal against sentence allowed.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Kohli and Singh for Applicant
Fiji Independent Commission Against Corruption.