

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO.AAU 0097 of 2013**  
**(Supreme Court Criminal Petition No. CAV 0019 of 2014,**  
**High Court Criminal Appeal No. 17 of 2013, Magistrate**  
**Court of Suva Criminal Case No. 1699 of 2010)**

**BETWEEN** : **SANJAY SINGH VERMA**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : Basnayake JA  
Lecamwasam JA  
Prematilaka JA

**Counsel** : Mr. G. O' Driscoll for the Appellant  
Ms. J. Prasad for the Respondent

**Date of Hearing** : 10 November 2017

**Date of Judgment** : 30 November 2017

**JUDGMENT**

**Basnayake JA**

[1] This appeal was remitted by the Supreme Court to be heard by a Full Court of the Court of Appeal. The hearing has to be on two specified grounds of appeal on its merits.

- [2] The appellant was convicted on 17 April 2014 in the Magistrate's Court of Suva for committing forgery contrary to section 341 (1) of the Penal Code and for uttering forged documents contrary to section 343 of the Penal Code. He was sentenced to two years imprisonment on both counts. The sentences were to run concurrently. The appellant appealed against the conviction and the sentence to the High Court. On 27 September 2013 the learned High Court Judge while dismissing the appeal on the conviction allowed the appeal on the sentence by reducing it to 9 months with effect from 12 April 2013.
- [3] The appellant appealed to the Court of Appeal. On 25 July 2014, the Court of Appeal by a single Judge dismissed the appeal under section 35 (2) of the Court of Appeal Act. The reason for dismissal was that none of the grounds raised a question of law only, as required by section 22 (1) of the Court of Appeal Act. The appellant appealed to the Supreme Court by way of special leave.
- [4] The Supreme Court on 23 October 2015 having granted special leave and considering the hearing of the application for special leave to appeal as the hearing of the appeal, quashed the decision of the single Judge of the Court of Appeal and ordered to remit the appeal for the Full Court of the Court of Appeal to determine the appeal on its merits in respect of the Magistrate's refusal to uphold the submission of no case to answer and the approach to the burden of proof which had been identified as involving questions of law only.

### **The facts in brief**

- [5] The appellant is Verma. Semiti Cakacaka is his neighbour. Verma's lights on the wall were damaged by Cakacaka. Verma got the services of Prasad to repair the lights for a payment of \$550.00. Verma sued Cakacaka in the Small Claims Tribunal (SCT). Cakacaka received summons from SCT. The summons carried a copy of a receipt allegedly issued by Prasad. Cakacaka questioned Prasad. Prasad denied to having issued the receipt. Prasad said that he has no license to do domestic wiring. He has a license only to do auto electrical work. The receipt is concerning house wiring. After a hearing

the tribunal made an award against Cakacaka. Thereafter, the appellant was interviewed under caution by the police and statements of witnesses were recorded. The investigating officer got orders from the officer in charge of crime to charge the appellant. The investigating officer said in evidence that there was not sufficient evidence to charge the appellant and it was done as he was told to do so by the officer in charge (pg. 229 on top and 289 at the bottom of the Record of the High Court). There is no evidence of a complaint of forgery having been made to the police by Prasad against the appellant either.

### **Evidence of the prosecution**

- [6] **Semiti Cakacaka** (pgs. 225-228) had been serving as an officer in the BSP Bank for more than 20 years. The appellant had been his neighbour. The appellant had made a claim from Cakacaka for damages caused to his (appellant's) fence and the lights. Cakacaka did not deny responsibility. He also did not say whether the fence and the lights had been repaired and if so by whom. He said that he received summons. Attached to the summons was an invoice. The invoice was from Amiti Auto Electricals (pg. 306) under invoice No. 343 and dated 10.7.08. He had seen Prasad (owner of Amiti Auto Electricals) and shown the invoice. Prasad had told him that he (Prasad) has no license for house wiring. He is an automotive electrician. He (Prasad) had denied any work done by him and also issuing the receipt to the appellant. This is the first time that Prasad met Cakacaka.
- [7] Under cross examination this witness had admitted to filing two affidavits of Prasad in the Magistrate's Court. Both affidavits contained the same material. The date of one affidavit is 2. 12. 2009. The other is dated 6.4.2010. He said that the signature of Prasad in the affidavit dated 6.4.2010 is different to the signature in the questioned invoice. This was to prove that it was not Prasad who had signed the invoice. The defence suggested to the witness that the signature of Prasad contained in the affidavit dated 2.12.2009 is similar to the signature found in the invoice. It was also suggested that that is the reason why a second affidavit had to be filed. The signature of this affidavit was made to look



different to the signature of the invoice. However, Prasad had denied the signature in the affidavit dated 6.4.2010. Prasad admitted the signature contained in the affidavit dated 2. 12. 2009. The learned counsel appearing for the appellant had even invited the learned Magistrate to examine the signatures contained in the invoice and the two affidavits. The defence case is that it was Prasad who signed the invoice. The defence also suggests that the signature on the affidavit dated 2. 12. 2009 and the signature contained in the invoice is similar while the signature contained in the affidavit dated 6. 4. 2010 is completely different.

At page 227 of the Record of the High Court

*Q. Affidavit on 2.12.2009 signature is very similar to invoice?*

*A. No.*

*Q. You made him to depose another affidavit with the different signature after you realized earlier signature is similar?*

*A. No.*

- [8] The witness admitted to having used the story that the accused forged the signature of Prasad in the SCT. The witness appealed against the decision of the SCT unsuccessfully to the Magistrate's Court and the High Court. The witness also admitted that he was asked to pay \$760.00 and he already paid \$100.00 to the appellant.
- [9] **WDC/3142 Arieta** was the investigating officer. She said that the appellant was interviewed by him under caution and statements of witnesses were also recorded. After recording the caution interview he said he got instructions from the crime O.I.C. to charge the appellant although there was no sufficient evidence. She said that he recorded statements of Cakacaka, Prasad and Lal. Under cross-examination he said that Lal corroborated the appellant's version. He said the appellant was charged as he was instructed to do so by the crime O.I.C. According to him the appellant was charged while there was not enough evidence.
- [10] **Amrit Prasad** (230-232 & 237-239) said he does only vehicle wiring. He said Mr. Cakacaka saw him and told him that he got summons in a case and inquired whether the

invoice was prepared by him. He admitted that it is a company invoice. He denied that it was prepared by him and denied the signature in it. He said the appellant was his good friend. He said he never employed other persons to do electrical services in houses. He also said that he was not in the garage that day. However he did not say how he remembered, after several years and without even looking at a record, that he was not in the garage. Did he say this to convince court that he could not have signed the invoice? He also said that it was the appellant who had written the contents. However he did not see him doing it. The appellant had admitted that the contents were written by the appellant as Prasad did not have the education to do it. The only question was as to who signed it. Under cross-examination Prasad said that he could not recall whether he met the appellant on 10.7.2008 in the garage as it was 5 years ago. Prasad admitted to having employed Lal.

At page 231

*Q. He worked as an electrician to you. It was more to auto electrical?*

*A. He was doing auto electricals with me. I don't know about the other work he did.*

*Q. He will tell that in court, you sent to the accused (appellant's) house twice?*

*A. I never.*

*Q. I was told that you did wiring in Tamavua Police Post?*

*A. I do not recall (why did not he deny?).*

*Q. Did you give samples of your signature to investigating officers?*

*A. I do not recall. Cakacaka come (came) with a police officer.*

- [11] He also said that he could not recall giving two affidavits in the Magistrate's Court in support of Cakacaka. When he was shown the two affidavits dated 2. 12. 2009 and 6. 4. 2010, he identified the signature of the first affidavit as his and denied the signature in the other.

At page 238

*Q. Invoice book was wet?*

*A. Garage was leaking.*

*Q. I put it to you deliberately made it wet with some oily substance to make obscure?*

*A. No. No. No. The garage was leaking....*



- [12] Answering to court he said that the date of the invoice No. 342 is 5. 7. 2008. No. 343 is 10. 7. 2008 and 344 is 14.7.2008. He denied to court that the carbon copy of the invoice No. 342 carries his signature. The court then asked the following questions.

Page 239

*Court: Do you find invoices in "X" (invoice book containing pages 301 to 399) where you have signed?*

*Witness: After perusing the book for a while going through page by page "I see only one-374.*

*Defence: His signature is there in 383 as well....*

*Court: Is it your signature?*

*Witness: No Sir.*

*Defence: It is similar to 383? Isn't it?*

*Witness: It is different.*

*Defence: It is similar to 342?*

*Witness: No. It is different.*

*Defence: I invite the court to look at invoice No. 383's signature and others...*

- [13] **Riteshwar Aman Lal (233-235)** was called by the prosecution only to be cross examined by the defence. He was not treated as an adverse witness. He said during the period 1.1.2008 and 31. 7. 2008 he worked with Amit Prasad. He said that Prasad had sent him to the appellant's house twice to repair a light broken on the fence. On 10.7.2008 the appellant had paid \$550.00 to Prasad. He said that the invoice was prepared by the appellant at the instance of Prasad and the invoice was signed by Prasad. He said that at Prasad's place house wiring and general mechanical work also was done apart from auto work. He identified the signature of the invoice as Prasad's. It was suggested that it was the date and the amount that helped him identify the signature. His evidence has not been challenged.

- [14] With this evidence the prosecution closed its case. The defence thereafter made an application for no case to answer. However the learned Magistrate after hearing submissions of both parties refused the application of the defence in a written ruling (Top page 263 and bottom pg. 314) and called for the defence. Thereafter the appellant too

closed the case for the defence without calling any evidence. On 17 April 2013 the learned Magistrate convicted the appellant on both charges and sentenced him to 2 years imprisonment on each charge and ordered the sentence to run concurrently.

### **Many unanswered questions**

- [15] I have already mentioned that Prasad never complained that his signature had been forged. Prasad had a license to do auto electrical work. Prasad did not have a license to do house wiring. When a receipt is shown to Prasad to find out whether it was Prasad who signed it, Prasad could have either admitted or denied it. Why should he say that he has no license to do house wiring? If it was not the signature of Prasad and Prasad never received money and had not done any repair work for the appellant, Prasad would have promptly questioned the appellant being his good friend. There is no evidence of Prasad questioning the appellant. Did Prasad get frightened for accepting payment for something he was not authorized to do?
- [16] When the receipt book (marked X) was shown Prasad was able to identify only one signature as his (No. 374). His evidence in court was that all the receipts were signed by him. If all the receipts are signed by him why could he not identify more than one signature of his? Of the two affidavits of Prasad filed by Cakacaka, Prasad identified his signature only in one affidavit. The defence invited the learned Magistrate to compare that signature with the signature in the invoice on the basis that they look alike.
- [17] Lal gave unchallenged evidence in favour of the appellant. Lal said that it was he who did the repair and the money was paid by the appellant to Prasad in his presence. He further said that it was Prasad who invited the appellant to write on the invoice. The writing is copied to the invoice book. Why should the appellant write an invoice leaving a carbon copy? If he wanted to do something indiscreet he could have done it by removing an invoice. Against this Prasad has a reason not to place his signature on the book for something done illegally. Lal said that they used to do house wiring and the appellant's work was done by him on behalf of Prasad.



[18] The appellant got an award against Cakacaka on the invoice that is disputed. This award was challenged unsuccessfully in the Magistrate's Court and the High Court. The investigating officer said that he could not find sufficient evidence to charge the appellant and it was done on the instructions of his O. I. C.

[19] What is the prima facie evidence to call for the defence? It was the mere suspicion that the carbon copy did not contain the signature. The appellant was suspected of stealing the invoice book to forge Prasad's signature. There is no such evidence and no such allegation either. It was a mere conjecture. I am of the view that the prosecution has failed to establish a prima facie case and the learned Magistrate should have acquitted the appellant without calling for a defence.

#### **The first ground to be reviewed as per the judgment of the Supreme Court**

[20] *"That the learned appellate Judge erred in law when at paragraph 10 pg. 6 of this judgment he found that the learned trial Magistrate reached a correct conclusion on the no case to answer without himself analyzing and taking into consideration the facts and the law that was before the learned trial magistrate"*

[21] Section 178 of the Criminal Procedure Act is concerning trials in the Magistrate's Court. It states that, *"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defense the court shall dismiss the case and shall acquit the accused"*. It appears that the learned Magistrate has considered the authorities involving *"no case to answer"*. When there is no evidence to prove an essential element of the offence concerned and when the evidence adduced by the prosecution is so discredited or is so manifestly unreliable that no reasonable tribunal could rule the accused convict" (**Moidean v Reginam** Cri App No. 41 of 1976, Also 1962 1 All ER 448).



- [22] Having relied on the authorities the learned Magistrate states as follows: *“Now at this juncture there are two conflicting versions, about this signature, one is favourable to the prosecution while the other supports the case theory of the defense”* (Top page 271 and bottom pg. 321). The learned Magistrate further states that, *“the court has not decided yet as to whose testimony is to be accepted, trusted and relied upon. All what appears on the face of the hearing proceedings is that the prosecution has managed to tender evidence to court which is capable of negating the proposition that, “there is no evidence against the accused on any element of the two charges. So far led evidence has managed to touch all the necessary and essential elements of the two charges and reflect “some evidence” to each and every element.....It is still premature to determine whose evidence is untrustworthy or unreliable”*.
- [23] I am of the view that the learned Magistrate has erred in the above pronouncement. The section (178) requires the court to decide whether a case is made out or not. The only dispute in this case is as to who signed the invoice. The prosecution was not able to prove at the close of the prosecution case that it was the appellant who signed the invoice. Against this there is unchallenged evidence of Lal who testified that it was Prasad who placed his signature in his presence. Prasad denied to having signed the invoice. The other reliable evidence would have been an expert opinion which the prosecution has failed to obtain.
- [24] Against this backdrop the appellant produced several leads to conclude that it was not an act of the appellant. The signature is supposed to be of Prasad. Although Prasad denied that it was his signature, the defence gave a reason for Prasad to deny that it was his signature. The invoice is concerning a house wiring. Prasad had no license for house wiring. Prasad knows that if he admits the signature he will be in hot water. Prasad is concerned about the interest the police has over this case. According to the evidence of the investigating officer the officer in charge of crimes had a great interest in this case. It is apparent that it was Cakacaka who was instrumental in pushing the police. It was Cakacaka who produced two affidavits of Prasad in the Magistrate’s Court. I have dealt on this matter elsewhere.

[25] As against Prasad's denial Lal gave unchallenged evidence in favour of the appellant. Lal said it was he (Lal) who did the repair for Prasad in the appellant's house and the appellant paid Prasad and the receipt invoice was issued. The invoice in the document has been scored off and written by hand "Receipt". The receipt book marked "X" was never shown to Lal to ascertain why the signature does not reflect on the carbon copy. Apart from that, Lal's evidence is without blemish.

[26] Now where is the prima facie evidence either direct or circumstantial to prove the charges against the appellant? There is no dispute about the writings in the invoice. This writing reflects on the carbon copy too. If the appellant wanted to steal an invoice why should he write in the invoice book with a carbon paper?

### **Judgment of the High Court**

[27] Paragraph 10 of the judgment (Top pg. 42 and bottom pg.101) states, "*I have carefully read and considered the court record and the learned Magistrate's ruling on the "no case to answer submission". In my view, the learned Magistrate took into consideration both parties submissions on the issue, considered the relevant laws in detail and applied the relevant laws to the facts of the case. In my view he reached a correct conclusion on the 'no case to answer submission' and found a case to answer against the accused (appellant). In my view this ground fails and dismiss it accordingly.*"

[28] The learned High Court Judge has not taken the trouble at all in considering the evidence to ascertain whether there was a prima facie case or not. With regard to the burden of proof too the learned High Court Judge in appeal has concurred with the learned Magistrate with no analysis whatsoever.

[29] I am of the view that there is not an iota of credible evidence to establish a prima facie case against the appellant. While holding thus I am of the view that this court does not need to go further and pursue with regard to the correctness of shifting the burden of proof adverted to in grounds 3 and 4 of the appeal. For the above reasons I quash the



conviction of the learned Magistrate and also set aside the Judgment of the High Court dated 27 September 2013 and acquit the appellant of both charges.

**Lecamwasam JA**

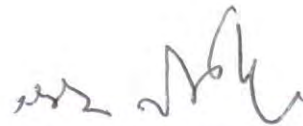
[30] I agree with the reasoning and the findings of Basnayake JA.

**Prematilaka JA**

[31] I have read in draft the judgment of Basnayake JA and agree that the appeal be allowed.

**The Orders of the Court are:**

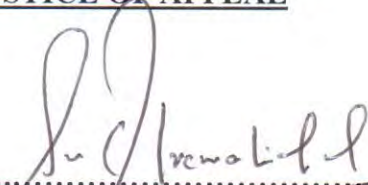
1. *Appeal allowed*
2. *Conviction of the Magistrate set aside.*
3. *Judgment of the High Court set aside.*
4. *Appellant is acquitted of both charges.*



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**Hon. Mr. Justice E. Basnayake**  
**JUSTICE OF APPEAL**



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**Hon. Mr. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



.....  
**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**