IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Decree 2009.

MUKESH SHANKARSINH PUROHIT

Appellant

CASE NO: HAA. 28 of 2016
[MC Suva, Crim. Case No. 813 of 2016]

Vs.

STATE

Respondent

Counsel	:	Mr. P. Sharma for Appellant Mr. M. Khan for Respondent
Date of Hearing	:	14 November, 2016
Date of Judgment	:	20 January, 2017

JUDGMENT

1. This is an appeal against the sentence imposed on the Appellant on 22/07/2016 in Magistrate Court Suva Criminal Case No. 813 of 2016.

2. The Appellant has been sentenced to an imprisonment term of 3 years and 11 months upon pleading guilty to the following charges;

FIRST COUNT
Statement of Offence (a)

USING FORGED DOCUMENT: contrary to section 157(1) of the Crimes Decree Number 44 of 2009.

Particulars of Offence (b)
MUKESH SHANKARSINH PUROHIT *on the 12th day of June 2015 at Suva in the Central Division used the birth certificate registration no. 1648145 knowing that the document was false and used it with the intention of dishonestly inducing Fiji Revenue and Customs authority Officers in their capacity as Public Officials to accept it as genuine and influenced the exercise of the Fiji Revenue and Customs Authority duty or functions.*

SECOND COUNT
Statement of Offence (a)
CONSPIRACY TO DEFRAUD - INFLUENCING A PUBLIC OFFICIAL: contrary to section 329(1) of the Crimes Decree Number 44 of 2009.

Particulars of Offence (b)
MUKESH SHANKARSINH PUROHIT *between the 10th day of June 2015 to the 12th day of August 2015 at Suva in the Central Division conspired with another person with the intention of dishonestly influencing Fiji Immigration Officers in the exercise of their duties in the issuance of a passport.*

Grounds of Appeal

3. The Appellant seeks to challenge the sentence imposed by the learned Magistrate on the following grounds of appeal:

    1) *That the learned Magistrate erred in fact when in relation to Count 1, whilst deducting 1 year for the appellant's previous good conduct as a first offender, he failed to take 1 year deduction into account in handing the provisional sentence of 4 years and the final sentence of 3 years and 11 months. That the provisional sentence should have been 3 years and the final sentence should have been 2 years and 11 months.*

    2) *The learned Magistrate erred in fact and in law when he only deducted 1 month from each Count of the Sentence as time served since the appellant was remanded by the Magistrate's Court on 20th May 2016 and sentenced on 22nd July 2016. Therefore 2 months and 2 days should have been deducted from each Count of the Sentence as time served.*

3) *The learned Magistrate erred in law and in fact when he only deducted 1 year for the appellant's previous good conduct as a first offender.*

4) *The learned Magistrate erred in law and in fact when he only deducted 1 year for the appellant's guilty plea for Count 2.*

5) *The learned Magistrate erred in law and in fact when he failed to give appropriate or adequate discount for the Appellant's approximately 1 month 3 weeks remand in the Department of Immigration Safe House in Veiuto, Nasese, in Suva from 13th October 2015 to 26th November 2015 and in Suva and Nadi from 13th May 2016 to 19th May 2016.*

6) *The learned Magistrate erred in law and in fact when he failed to give appropriate or adequate discount for the Appellant's approximately 5 months and 2 weeks remand at the Suva Remand Centre from 27th November 2015 to 12th May 2016.*

7) *The learned Magistrate erred in law and in fact when he failed to take into consideration the case authorities cited in the Appellant's Sentencing and Mitigation submissions.*

8) *The learned Magistrate erred in law and in fact when he failed to take into consideration all of the Appellant's Mitigation submissions.*

9) *The learned Magistrate erred in law and in fact in not suspending the sentence.*

10) *The Sentence is harsh and excessive in all circumstances of the matter.*

4. The Respondent has also filed a separate appeal under Case No. HAA 028/2016 against the sentence imposed by the learned Magistrate on two grounds that are based on the failure to impose a non-parole period. With the concurrence of the parties, the two appeals were consolidated and the said two grounds will be dealt with in this case. The grounds raised by the Respondent are;

1) *That the learned magistrate erred in law by failing to impose a non parole period pursuant to section 18(1) of the Sentencing and Penalties Decree 2009.*

2) *The learned magistrate erred in law by failing to give adequate reasons for not imposing a non parole period as required under section 18 (2) of the Sentencing and Penalties Decree 2009.*

Summary of facts

5. The summary of facts dated 22nd June 2016 filed in the Magistrate Court reads as follows;

1. *The accused, Mukesh Shankarsinh Purohit, aka Mukesh Rajpurohit and Mukesh Purohit is a citizen of India, who came to Fiji on approximately 20th August 2014 on a Student Visa to study Baking and Patisserie at Pacific Institute of Tourism at 33 Raojibhai Patel Street, Suva.*

2. *The accused first met the accomplice at Village 6, where the accused agreed to pay the accomplice $1500 to assist him to return to India since his passport no. J9 876225 was taken by the travel agent.*

3. *A sum of $1,500 was paid to the accomplice and 2 days later the accused received the birth certificate of Mukesh Rajpurohit registration no. 202837 from the accomplice. The birth certificate details stated the name of the child as Mukesh Rajpurohit, date of birth 7th July 1991 and place of birth Nadi Maternity Unit.*

4. *On 12th June 2015 the accused being a citizen of India produced a birth certificate of Mukesh Rajpurohit registration no. 2028737 with his joint card application form and passport sized photo to Monika Devi Ram a clerical Officer, Fiji Revenue and Customs Authority (a copy of birth certificate registration no. 2028737 and joint card application form is attached as PE 1).*

5. *At the time of producing the birth certificate registration no. 2028737 to Monika Devi, the accused knew that it was a false document and used it with the intention to dishonestly induce Monika Devi, a public official to accept it as genuine and issue a FNPF and FRCA joint card registration no. 18-9166807 to the accused. (a*

copy of the FNPF and FRCA joint card attached as PE 2). As a result the accused dishonestly influenced the exercise of Fiji Revenue and Customs Authority duties or function in the issuance of FNPF and FRCA joint card no. 18-9166807.

6. *Leba Drole, the Acting Registrar General at the Births, Deaths and Marriage Registry confirmed that birth registration no. 2028737 of Mukesh Rajpurohit was tampered into the system as there were no records for the accused. The same tampered birth certificate was used by the accused to obtain FRCA and FNPF joint card registration no. 18-9166807.*

7. *The FRCA and FNPF joint card registration no. 18-9166807 was used to apply for a Fiji Passport for Mukesh Rajpurohit. The accused signed and put his thumbprint on his Fiji passport application form brought by the accomplice and the same was lodged by the accomplice on 14th August 2014 at Fiji Immigration Office.*

8. *The immigration officials were dishonestly influenced in making passport no. 998293 for Mukesh Rajpurohit since the passport application stated that the accused was a Fiji citizen and contained a Fiji Birth Certificate of Mukesh Rajpurohit registration no. 2028737, FRCA and FNPF joint card of Mukesh Rajpurohit TIN no. 18-91668-0-7. (Attached is a copy of Passport application form as PE 3 and passport no. 998293 at PE 4).*

9. *Savila Devi, the immigration officer got suspicious regarding passport on 998293 and the matter was then referred to the Acting Senior Immigration Officer for investigation. The accused requested one Ronald to collect his passport from the Immigration Office. Ronald was investigated and asked to bring the accused at the immigration office. The accused came to immigration office and was interviewed. He admitted that he was introduced to the accomplice who arranged his Fiji Passport. The accused therefore paid the accomplice a sum of $1500.*

10. *The matter was then reported to Police whereby police investigations were conducted. The accused is charged with one count of Using forged document contrary to section 157(1) and count of Conspiracy to defraud influencing a public official contrary to section 329 (1) of the Crimes Decree no. 44 of 2009.*

Ground 1

6. On ground one, the Appellant points out to an error in the calculation of the 'provisional' sentence for the first count. The relevant paragraphs of the impugned decision are as follows;

> *"For the first count I adopt a starting point of 5 years imprisonment and I add 2 years for the aggravating factors set out above. I deduct 3 years for your guilty plea and a further 1 year for your previous good conduct as a first offender.*
>
> *For the first count your provisional sentence is 4 years imprisonment."*

7. Though the learned Magistrate had decided to add 2 years to the starting point of 5 years imprisonment in view of the aggravating factors and to deduct 4 years in view of the early guilty plea and the previous good character that leads to a term of 3 years, he had inadvertently concluded that the 'provisional' sentence for the first count is 4 years imprisonment.

8. Ground one succeeds.

Ground 2, 5 and 6

9. It is agreed by both parties that the Appellant had been kept in custody by the Department of Immigration from 05th October 2015, was charged on 20th May 2016 and was sentenced on 22nd July 2016. Accordingly, the Appellant had spent 09 months and 17 days in custody before he was sentenced.

10. Section 24 of the Sentencing and the Penalties Decree reads thus;

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

11. According to the above provisions, the period of time which the offender was held in custody prior to trial shall be regarded as a period of imprisonment already served by the offender unless the sentencing court orders otherwise. Therefore, in my view, if a sentencer decides that a particular period of time spent by an offender in custody prior to the date of the sentence should not be regarded as a period of imprisonment already served, the sentencer should give reasons for that decision.

12. The learned Magistrate had only considered one month as time served when he sentenced the Appellant on 22nd July 2016 though he had noted that the Appellant was in remand since 20th May 2015. No reason is given for his decision to do so. Further, I note that the learned Magistrate has not given his mind to the time spent in custody by the Appellant prior to 20th May 2015 when he sentenced the Appellant.

13. The Respondent had correctly conceded that the period of time commencing from 05th October 2015 up to 22nd July 2016 should be considered as a period of imprisonment already served by the Appellant.

14. I find that the learned Magistrate had erred by failing to comply with the provisions of section 24 of the Sentencing and Penalties Decree when he sentenced the Appellant.

15. In the light of the above, I find that the second, fifth and sixth grounds are made out.

Ground 3

16. During the hearing, counsel for the Appellant informed court that he does not wish to pursue on the third ground.

Ground 4

17. On ground four, the Appellant submits that the learned Magistrate erred in law by not granting an appropriate discount for the early guilty plea when he sentenced the Appellant for the 2nd count.

18. The learned Magistrate had selected 3 years as the starting point of the sentence for the second count, had increased the sentence by 2 years in view of the aggravating factors, deducted 1 year for the early guilty plea and 1 year for the previous good conduct of the Appellant.

19. In terms of section 4(2)(f) of the Sentencing and Penalties Decree, when sentencing an offender, the sentencing court must have regard to 'whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'. According to the past precedents, a discount equivalent to a one-third of the sentence is the appropriate weight that should be given to an early guilty plea and this discount should be given separately. The Respondent concedes that it is appropriate to grant a one-third discount in view of the Appellant's early guilty plea.

20. I find that ground four has merit.

Ground 7

21. On this ground, the Appellant submits that the learned Magistrate failed to consider the sentencing submissions filed on behalf of the Appellant in relation to the applicable tariff for the two offences.

22. In his Sentence, the learned Magistrate does not mention the tariff he applied in respect of the two offences but says that he adopted the tariff proposed by the Respondent. Upon perusing the written submission filed by the Respondent before the Magistrate Court which is found in the supplementary court record, I assume that the learned Magistrate followed the case of ***Sudakar v State*** ([2014] FJHC 688; HAA 16.2014) for tariff in relation to the first count and the case of

Hussein v State ([2012] FJHC 1085; HAA 006.2012) in relation to the second count.

23. In ***Sudakar*** (supra), De Silva J applied 3 to 6 years imprisonment as the tariff for the offence of uttering forged documents contrary to section 157 of the Crimes Decree 2009. In my view, this tariff is appropriate for the offence under section 157 of the Crimes Decree which carries a maximum penalty of 10 years imprisonment.

24. In ***Hussein*** (supra), Fernando J proposed 2 to 5 years as the tariff for conspiracy to defraud to obtain a gain under section 327 of the Crimes Decree.

25. It was a lapse on the part of the learned Magistrate not to identify the tariff in his sentence. However, there is no material before me to conclude that the learned Magistrate had erred in selecting the appropriate tariff for the two offences.

26. Given the above, ground seven fails.

Ground eight

27. On ground eight, the Appellant alleges that the learned Magistrate failed to take into account the mitigating circumstances urged by the Appellant. In my view, the only factor the learned Magistrate had omitted to take into account as a mitigating factor among the factors highlighted by the counsel for the Appellant is the fact that the Appellant had cooperated with the authorities. There is merit in ground eight.

Ground nine

28. The Appellant submits that the learned Magistrate erred by failing to suspend the sentence of the Appellant. As far as the issue of suspending the sentence is concerned, even if the error highlighted on ground one is rectified, the sentence the learned Magistrate would have arrived is 3 years imprisonment. In terms of section 26(2)(b) of the Sentencing and Penalties Decree, a Magistrate cannot

suspend a sentence which exceeds 2 years. Therefore, this ground is devoid of merit.

Ground ten

29. The final ground urged by the Appellant is that the sentence imposed by the learned Magistrate is harsh and excessive. The errors in the Sentence delivered by the learned Magistrate as identified above warrants this appeal against sentence to be allowed and the sentence to be quashed. Therefore, it would be a futile exercise to consider whether the sentence pronounced by the learned Magistrate is excessive or not and I will not deal with this ground.

Respondent's appeal

30. On the first ground of appeal, the Respondent submits that the learned Magistrate erred in failing to impose a non-parole period pursuant to section 18(1) of the Sentencing and Penalties Decree. I agree with the Respondent's submission in this regard. It is mandatory for a sentencing court to fix a non-parole period when sentencing an offender to be imprisoned for life or for a term of 2 years or more subject to the provisions of section 18(2) of the same Decree.

31. I also agree with the Respondent's submission that a sentencing court should give reasons if it decides to decline from fixing a non-parole period in terms of section 18(2) of the Sentencing and Penalties Decree.

Appellant's sentence

32. In the light of the above, the appeal against the sentence filed by the Appellant is allowed and the sentence imposed by the learned Magistrate dated 22nd July 2016 in Magistrate Court Suva Criminal Case No. 813 of 2016 is quashed.

33. Now, I would proceed to sentence the Appellant for the two counts.

34. The two offences were directed towards the officers of the Fiji Revenue and Customs Authority who deals with border control matters and national security. This is a serious aggravating factor. The fact that the Appellant is a young first offender and that he cooperated with the authorities from the inception would be considered as mitigating factors. Section 4(2) of the Sentencing and Penalties Decree also requires the sentencing court to regard the offender's culpability and degree of responsibility for the offence in determining the appropriate sentence. Accordingly I will be mindful of the circumstances under which the two offences were committed.

35. For the first count, I select 3 years imprisonment as the starting point. For the aforementioned aggravating factor I add 2 years and for the mitigating factors I deduct 2 years. Now the interim sentence is 3 years imprisonment. For the early guilty plea, I deduct one-third of that sentence which is 1 year. Accordingly, the sentence for the first count is 2 years imprisonment.

36. For the second count, I select 3 years imprisonment as the starting point. For the aforementioned aggravating factor I add 2 years and for the mitigating factors I deduct 2 years. Now the interim sentence is 3 years imprisonment. For the early guilty plea, I deduct 1 year of the said sentence. Accordingly, the sentence for the second count is 2 years imprisonment.

37. I am of the view that the Appellant's early guilty plea and the circumstances under which each offence was committed justifies each sentence which is below the tariff.

38. I order the two sentences to run concurrently. Therefore, the final sentence is 2 years imprisonment. I order that the Appellant is not eligible to be released on parole until he serves 16 months of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Decree.

39. Considering all the circumstances of this case, I consider it appropriate to partly suspend the sentence. Hence, I order that the Appellant serve 16 months of the

above sentence forthwith and the balance period of 08 months is suspended for 2 years.

40. I order that the time period the Appellant spent in custody to be regarded as a period of imprisonment already served in terms of section 24 of the sentencing and P D and I hold that the period to be considered as served should be 10 months.

41. Accordingly, the Appellant's sentence is substituted with an imprisonment term of 2 years. 16 months of that sentence should be served forthwith and the balance period of 08 months is suspended for 2 years. Considering the time spent in custody, the time remaining to be served from the date of the sentence is 06 months.

42. In the result;

a) The appeal is allowed;
b) The sentence imposed by the learned Magistrate on 22/07/2016 in Magistrate Court Suva Criminal Case No. 813 of 2016 is quashed;
c) The said sentence is substituted with an imprisonment term of 2 years with a non-parole period of 16 months. 16 months of the sentence to be served forthwith and the balance period of 08 months is suspended for 2 years. Considering the time spent in custody prior to 22/07/2016, the time remaining to be served from 22/07/2016 before the sentence is suspended is 06 months.

HIGH COURT OF FIJI SUVA

Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Victoria Chambers, Suva.
Solicitor for the Respondent : Office of the Director of Public Prosecution, Suva.