

IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 44 OF 2017

BETWEEN: SANTOK SINGH

APPELLANT

AND: FIJI NATIONAL PROVIDENT FUND BOARD (FNPF)

RESPONDENT

Counsel: Ms Litia Vateitei for Appellant
 Ms Rogovakalali for the Respondent

Date of Hearing: 31st October, 2017

Date of Judgment: 14th November, 2017

JUDGMENT

INTRODUCTION

1. The Appellant was charged in the Magistrates Court at Nadi (in Criminal case No. 1028 of 2010) with six counts of Failing to Pay Contributions to Fiji National Provident Fund contrary to Sections 13 and 49 (1) (b) of the National Provident Fund Act Cap 219.

2. The Appellant pleaded guilty to the charges and was convicted on all counts when he agreed the summary of facts filed by the FNPF.
3. On 28th March, 2017, the Appellant was imposed a fine of FJD 500 payable in one month and default of which an imprisonment of 50 days.
4. In addition to the fine, The Appellant was ordered to pay a sum of FJD 5451.00 as per paragraph 9 of the sentencing Ruling. The learned Magistrate further issued a warrant of seizure of property of his company if the Appellant failed to pay the said amount within one month. In the event there was no sufficient property, the learned Magistrate issued a committal warrant for a maximum period of 545 as per Section 37 (1) of the sentencing and Penalties Act 2009.
5. Being aggrieved by this decision, the Appellant filed his Notice of Appeal and grounds of appeal on the 27th of April, 2017, seeking the following orders:
 - (i) That the Petition of Santok Singh (Appellant) be heard.
 - (ii) Whilst the appeal is on foot, that the orders of the Magistrate Court be stayed.
 - (iii) Such further and other order(s) as this Honorable Court deems just.
6. The Appellant's grounds of appeal are as follows:
 - (i) That the sentence is harsh and excessive in the circumstances of the case.
 - (ii) That the learned Magistrate erred in law and fact in taking irrelevant matter into consideration while sentencing the Petitioner;
 - (iii) That the learned Magistrate did not give appropriate discounts on the mitigating factors.

The Law

7. This Court will approach an appeal against sentence using principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 and adopted by the Court of

Appeal in Kim Nam Bae v The State [1999] FJCA 21; AAU0015u.98s (26 February 1999).

8. In Bae v State (supra), the Fiji Court of Appeal observed:

“It is well established law that, before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)”.

9. The Supreme Court, in Naisua v State [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in Bae (supra):

“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

10. Section 49 of the Fiji National Provident Fund Act Cap 219 provides for the penalty for defaulters. Any person who fails to pay the Fund contributions or surcharges in violation of Section 49 of the FNPF Act shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding FJD 500.00 or to imprisonment for a term not exceeding 1 year or to both such fine and imprisonment.

11. Section 37 (1) of the Sentencing and Penalties Act 2009 provides as follows:

“The term for which a person in default of payment of a fine or an installment order may be imprisoned is 10 days for each penalty unit or part of a penalty unit then remaining unpaid, with a maximum of 24 months.”

ANALYSIS

Ground (i) *That the sentence is harsh and excessive in the circumstances of the case.*

12. The Appellant was charged in his capacity as the officer/director of his company who in terms of the Act, is deemed to be guilty of the offence committed by the company.
13. The Charge and the Notice attached to it has been served on the Appellant in February, 2011 and the Appellant had appeared in Court on 17th February, 2011 through a representative.
14. The learned Magistrate has passed the sentence on 28th March, 2017, after a lapse of approximately 6 years.
15. In delivering his sentence, the learned Magistrate ordered that the Appellant to pay as follows:
 - (a) The sum of FJD 488.28 in respect of employee namely Komal Priya Chand for count 3 to count 6.
 - (b) The sum of FJD 4,912.74 in respect of the Notice filed under Section 50 of the Fiji National Provident Fund Act Cap 219 being the total amount outstanding by the Appellant’s company for the other employees.
 - (c) Prosecution costs in the sum of FJD 50.00.
16. The Appellant was also ordered to pay a fine of FJD 500.00 within a month’s time from the date of judgment and in default the Appellant was to be imprisoned for 50 days.
17. The Court also ordered that failure to pay the sum of FJD 5451.00 as per paragraph 9 of the learned Magistrate’s Judgment will result in an issuance of warrant to seize the property of the Appellant within one month from the date of judgment. The Court held that in the event there is no sufficient property for the

Appellant, a committal warrant will be issued against the Appellant for a period of maximum 545 days as per Section 37 (1) of the Sentencing and Penalties Act 2009.

18. The learned Magistrate could have imposed a maximum fine of FJD 500.00 or an imprisonment for a term not exceeding 1 year or both such fine and imprisonment for each count. However, having considered Appellant's personal mitigation and Section 33 of the Sentencing and Penalties Act, he has ordered to pay only a fine of FJD 500 for all six counts. In the circumstances of this case, the fine imposed is very lenient.
19. The particulars of the offence show that the Appellant failed to pay FNPF contributions from August 2008 to February 2010. The sum of FJD 5451 ordered by the Court for the Appellant to pay is in respect of unpaid FNPF contributions for the period August 2008 to February 2010 as well as unpaid surcharges.
20. The Respondent submits that these contributions and surcharges remain unpaid until to date and therefore, the employees of the Appellant affected are not only losing out on their contributions paid but also on the yearly interest that they are entitled to had their contributions been paid on time.
21. The chronology of the Appellant's case shows the Appellant's lack of concern for the offence that he has committed and also shows irresponsibility on his part as an Employer of the Fiji National Provident Fund. The Court below has been nothing but lenient with the Appellant. He has been given more than enough time to clear his outstanding FNPF contributions.
22. In the Ruling, the Appellant was given one month to pay the FNPF contributions.
23. This ground of appeal lacks merit and should be dismissed.

Ground (ii) That the Learned Magistrate erred in law and fact in taking irrelevant matter into consideration while sentencing the Petitioner.

24. The Appellant has failed to specify as to which irrelevant matter the Court had taken into consideration while sentencing the Appellant. This ground of appeal is without merit and must fail.

Ground (iii) That the Learned Magistrate did not give appropriate discounts on the mitigating factors

25. At paragraph 4 and 7 of the Ruling, the learned Magistrate had given due consideration to the mitigating factors when sentencing the Appellant. The Appellant has failed to specify as to the "appropriate discounts" he is referring to that the learned Magistrate had failed to consider in sentencing. The learned Magistrate had even considered the guilty plea tendered a long time after the charge as a mitigating factor although the Appellant had wasted Court's time and resources. The Appellant had ample time to make the payment for nearly 6 years. This ground of appeal is without merit and must fail accordingly.
26. It is unfortunate that the matter continues to be prolonged in court for 6 years to date without any payments being made to the Fund on behalf of the workers.
27. In paragraph 8 of the Appellant's submissions, the Appellant states that there were other factors that contributed to the long history of the case and that it was not solely the absence of the Appellant that was the reason for the delay.
28. The law is clear on the obligations of all employers in Fiji to pay FNPF contributions for its workers by the end of the month. This is a statutory obligation and it is not the obligation of the Board to pursue employers first before any contributions payment is made.
29. The Appellant has blatantly disregarded the law, which amounts to a criminal offence.
30. If the Appellant had pleaded guilty to the charges, he ought to have done the needful and pay the FNPF contributions at his earliest instead of having to leave the matter pending for so long.
31. The employer deducted 8% from its employees' wages on the basis that it was to be paid to FNPF. Deduction of 8% from workers' wages belongs to workers. Workers have been kept waiting for approximately 6 years to yield their retirement savings.

Relevance of Daumaka Ltd v Fiji National Provident Fund [1998] FJHC 106

32. The Appellant has relied on the case of Daumaka Ltd v Fiji National Provident Fund [1998] FJHC 106 which is also a case where an employer had appealed against the Magistrates Court's decision on his sentence.
33. The Daumaka case (supra) is clearly distinguishable from the present case. In the Daumaka case, a comprehensive summary of facts had not been provided by the prosecution. In the instant case a comprehensive summary of facts had been provided to Appellant.
34. Secondly, the Magistrate in that case had given only 21 days to make the payment. There was no issue of delay of payment as opposed to the facts in the present case. The Appellant in the present case has failed to honour 'progressive approach' undertaken given to Court for a considerable period. In sentencing the Appellant, the learned Magistrate in the present case specifically stated in paragraph 5 of his Ruling as follows:

"There is nothing to show that you exercised due diligence. In addition, you had almost 6 years from 2011 after filing this case and you could have paid the amount as you agreed. However, you did not".

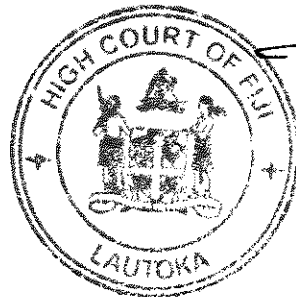
35. Thirdly, the circumstances of this case are to be distinguished from that of the Daumaka case in that the learned Magistrate in the Daumaka case had given no reasons for the penalties that were imposed. In the present case, the learned Magistrate at paragraph 7 of his Ruling considered the financial circumstances of the Appellant and imposed a fine of FJD 500.00 for all six counts and in default 50 days' imprisonment.
36. Fourthly, in that case, the appellate court did not have the opportunity to peruse the lengthy submission in mitigation made at the magistracy as the learned Magistrate had not recorded the mitigation submission in a satisfactory manner.
37. Finally, the learned Magistrate in that case had given no reasons for the penalties that were imposed. He had merely stated that he had considered the mitigating circumstances without saying what they were.

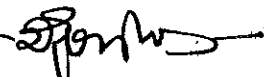
Appellant's ability to pay the unpaid FNPF contributions

38. The Appellant submits in paragraph 15 of his submissions that there was no enquiry into the Appellant's ability to pay and it is within the powers of this court to ask Counsel to submit on the same in this court.
39. The learned Magistrate has not conducted a means test. However, the Appellant was given more than sufficient time to clear the outstanding FNPF contributions before sentence and gave further one month to pay the fine and contributions.
40. It is evident from the court record that the Appellant never honoured the 'progressive approach' that he advised the Court that he would take in paying his dues. It appears from the Court Record that the Appellant had changed his plea as he saw fit without any concern for his employees.
41. The chronology of events leading up to the sentencing on the 28th of March, 2017 shows Court's leniency and accommodation of the Appellant's request that he be given time to pay the outstanding sum.
42. It also indicates the 'delaying tactics' used by the Appellant. When the Appellant's plea was first taken on the 09th June, 2014, he pleaded not guilty to the charges. Several adjournments took place until 11th of December, 2015 when the matter was set for hearing.
43. On this date, the Appellant advised the Court that he was taking a 'progressive approach' and wishes to make payments in 3 installments. This was allowed by the Court. The matter was then adjourned for mention on the 8th of March, 2016.
44. On the 8th of March, 2016, the Respondent advised the Court that the Appellant did not make any payments. Matter was then adjourned to 22nd March, 2016 for the Respondent to verify receipts produced by the Appellant in Court. The matter was subsequently adjourned to 22nd of March 2016 however, due to unavailability of Magistrate; the matter was adjourned to 8th of April, 2016.
45. On the 8th of April, 2016 the Appellant pleaded not guilty and a hearing date was fixed for the 09th of September, 2016.
46. On the 9th of September, 2016 the Appellant informed the Court that his lawyer will not be available on the day of the hearing. Matter was then adjourned to the

25th of November, 2016. On the 25th of November, 2016 the Appellant again informs the Court that he is taking a 'progressive approach'. The Appellant eventually admitted the offence and was convicted on the same day. Sentence was delivered on 28th of March, 2017.

47. The fact that the Appellant was allowed time on more than one occasion to clear the outstanding contributions is a clear indication that the Court was mindful of the Appellant's financial circumstances and his ability to pay his dues.
48. None of the grounds raised in the Appellant's appeal are meritorious.
49. For reasons given in this judgment, Appeal against sentence is dismissed. The decision of the learned Magistrates at Nadi is affirmed.
50. 30 days to appeal to the Court of Appeal.




Aruna Aluthge
Judge

At Lautoka

14th November, 2017

Solicitors: ASTA's Law for the Appellant
FNPF for the Respondent