

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 37 OF 2017

BETWEEN: **1. VILIMONE KOIROKO**
 2. NEIMUSO RASAKU

Appellants

A N D: **STATE**

Respondent

Counsel: Ms. L. David for 1st Appellant
 Ms. T. Kean for 2nd Appellant
 Ms M. Konrote for Respondent

Date of Hearing: 05th February 2018/20th March 2018

Judgment: 22nd March 2018

JUDGMENT

Introduction

1. The first and second Appellant had been charged in the Magistrate's Court in Suva with one count of Forgery, contrary to Section 156 (1) (a) (b) of the Crimes Act and one count of Using Forged Document, contrary to Section 157 (1) (a) (b) of the Crimes Act. The particulars of the offences are that:

Forgery

"Vilimone Koiroko and Neimuso Rasaku on the 13th day of February 2015, at Suva in the Central Division, with intention to defraud, made a false document by forging the signatures of members of Yavusa Leikoro

& Yavusatina of Toge Village, Ba on the letter of authority to assign members shares with intention that it will be used to dishonestly induce I-Taukei Land Trust Board in their capacity as a public official to accept it as genuine and dishonestly obtain a gain of \$ 33,110.56 from I-Taukei Land Trust Board.

Using Forged Document

Vilimone Koiroko and Neimuso Rasaku on the 13th day of February 2015, at Suva in the Central Division, knew that the letter of authority to assign members shares of Yavusa Leikoro & Yavusatina of Toge Village, Ba was a false document and used it with the intention to dishonestly induce I-Taukei Land Trust Board in their capacity as a public official to accept it as genuine and dishonestly obtain a gain of \$ 33,110.56 from I-Taukei Land Trust Board.

2. Both the Appellants had pleaded guilty in the Magistrate's Court for these two counts on the 27th of February 2017. On the 6th of April 2017, the two Appellants admitted the summary of facts. The learned Magistrate then convicted and sentenced each of them for a period of 31 months and 15 days for each of these two counts, with non-parole period of 20 months. The learned Magistrate further ordered that both the sentences to be served concurrently. Aggrieved with the said conviction and the sentence, the two Appellants file these Petitions of Appeal on the following grounds, *inter alia*;

First Appellant

Appeal Against Conviction

- i) *The learned Magistrate erred in law and in fact when he convicted the Appellant for the offence of Forgery when the Summary of Facts outlined and tendered by the Prosecution failed to prove all the elements of the offence.*

Appeal Against Sentence

- ii) *That the learned Magistrate erred in principle by relying on erroneous factors which may result in enhancing the sentence.*

- iii) *The sentence passed by the learned Magistrate is manifestly harsh and excessive taking into consideration of all circumstances of the matter.*

Second Appellant

Appeal Against Conviction

- i) *That the learned Magistrate erred in law and in fact when he considered the facts and evidence in the summary of facts which do not support the elements of the offence by the Appellant.*

Appeal Against Sentence

- ii) *That the learned Magistrate erred in law in sentencing the Appellant without sufficient weight being given to the fact that he was a first offender.*

- iii) *That the learned Magistrate erred in principle and also erred in exercising his sentencing discretion by relying on the erroneous fact of no restitution being done by the Appellant. As per his sentence in paragraph 15 "Even though the people in your villages who are the beneficiaries of this trust seem to have forgiven you both for these crimes, up to now you both have taken no genuine effort to retribute these amounts. Hence, you both will be given a custodial sentence..." By considering this fact the learned Magistrate may have enhanced the sentence which was unfair to the Appellant.*

3. The court directed the Appellants and the Respondent to file their respective written submissions, which they filed as per the direction. The matter was then set down for the hearing on the 6th of February 2018. On the 6th of February 2018, the learned counsel for the Appellants and the Respondent inform the court that they rely on their

written submissions and do not wish to make any oral submissions. However, the court invited the learned counsel for the Appellants and the Respondent, on the 20th of March 2018, to clarify some of the grounds that they have discussed in their respective written submissions. Accordingly, the learned counsel for the Appellants and the Respondent made their respective oral submissions. During the course of her submissions, the learned counsel for the first Appellant informed the court that the first Appellant wishes to abandon the second ground of appeal against the sentence. Having carefully perused the record of the proceedings in the Magistrate's Court and the respective written and oral submissions of the parties, I now proceed to pronounce my judgment as follows.

Appeal against the Conviction

4. The grounds of appeal against the conviction filed by the two Appellants are founded on the same contention, that the summary of facts as admitted by the two Appellants has not disclosed and proved one of the essential elements of the two offences, that the two Appellant has dishonestly obtained a gain.
5. Section 174 of the Criminal Procedure Act has provided the procedure of recording the plea of the accused in the Magistrate's Court, where it states that:
 - i) *The Substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
 - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*
6. According to Section 174 of the Criminal Procedure Act, the Court is required to provide the Appellants the substance of the charge, including the facts pertaining to all essential elements of the offences and give them an opportunity to inform the Court

either they admit or deny the truth of the charge. If the Court satisfies that the Appellants have admitted the truth of the charge, the Court shall then proceed to convict the Appellants and sentence them accordingly.

7. The learned counsel for the two Appellants submitted in their respective written submissions that the summary of facts that was provided in the Magistrate's Court does not disclose that the two Appellants have dishonestly obtained any financial gain. Therefore, the convictions entered by the learned Magistrate against the two Appellants are not in accordance with the Section 174 of the Criminal Procedure Act.
8. The learned counsel for the Respondent in her written submissions urged the Court that the summary of facts sufficiently and accurately discloses that the two Appellants had dishonestly obtained a financial gain by forging and uttering this alleged document. The learned counsel further submitted that the two Appellants has admitted in their respective caution interviews, that they have obtained the money, that were tendered in the Magistrate's Court as part of the summary of facts.
9. For the purpose of clarity and convenience, I will reproduce the summary of facts that was filed in the Magistrate's Court in verbatim as follows:

“On the 13th of March, 2015 a complaint was made by PW1 (Nemani Qaravatu) at Totogo Police Station regarding the misuse of Toge Town Land Funds and forgery of signatures of members of Yavusa Leikoro and Yavusatina of Toge Village on a Letter of Authority to Assign Member Shares which was lodged at I-Taukei Land Trust Board along with a Deed of Trust for the purpose of appointing new trustees to be holders of the trust property known as Toge Town Land. The letter of authority to assign members shares was forged by Vilimone Koiroko (hereinafter referred to as A1) and Neimuso Rasaki (hereinafter referred to as A2) as they needed 60% consent from the members of Yavusa Leikoro and Yavusatina of Toge Village to be appointed as the new trustees.

When the term of the former trustees Mosese Tamailagi (PW2), Kaliova Tanele (PW3) and PW1 had come to an end in 2015 there had been no village meeting held for the appointment of new trustees.

PW1 upon enquiry at I-Taukei Land Trust Board was informed that the trustees for Toge Town Land had been changed to A1, A2 and another and that \$33, 000.00 had been deposited into the new trustees bank account held with Home Finance Bank account no. 11710s40. PW1 stated that this had been done without the knowledge of the Toge Village Community.

COUNT 1

On the 13th day of February, 2015 A1 and A2 made a false document by forging the signatures of members of Yavusa Leikoro & Yavusatina of Toge Village on the Letter of Authority to Assign Member Shares (herein attached as PE1) with the intention that it would be used to dishonestly induce I-Taukei Land Trust Board in their capacity as a public official to accept it as genuine and as a result to appoint A1 and A2 with another as Trustees over the Deed of Trust for Yavusa Leikoro & Yavusatina (herein attached as PE2)

COUNT 2

On the 13th day of February, 2015, A1 and A2 knowing that the Letter of Assign Members Shares of Yavusa Leikoro & Yavusatina of Toge Village was a false document used it with the intention of dishonestly inducing I-Taukei Land Trust Board in their capacity as a public official to accept it as genuine and as a result dishonestly obtained \$33, 110.56 from I-Taukei Land Trust Board which was trust property belonging to Yavusa Leikoro & Yavusatina. This money was deposited into HFC bank account no. 11710s40 under Yavusa Leikoro and Yavusatina account name in which A1, A2 and another were signatories. This money was also withdrawn by A1, A2. (Bank statement attached as PE3).

A1 was cautioned interviewed on 1st of August, 2015 where he made full admissions about the alleged offence (caution interview herein attached as PE4). A2 was cautioned interviewed on the 31st July, 2015 where he made full admissions about the alleged offence. (caution interview herein attached as PE5).

10. Section 156 (1) (a) and (b) of the Crimes Act defines the offence of forgery as:

- i) A person commits an indictable offence (which is triable summarily) if the person makes a false document with the intention that the person or another person will use it —*
 - a) to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and*
 - b) if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function.*

11. Accordingly, the main elements of the offence of forgery are that:

- i) The accused,*
- ii) Made a false document with the intention that another person will use it,*
- iii) To dishonestly induce a third person to accept it as genuine in his capacity as a public official,*
- iv) If it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function.*

12. Section 157 (1) (a) (b) of the Crimes Act defines the offence of Using a Forged Documents, where it states that:

- i) A person commits an indictable offence (which is triable summarily) if the person knows that a document is a false document and uses it with the intention of—*
 - a) dishonestly inducing another person in the other person's capacity as a public official to accept it as genuine; and*

b) if it is so accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function.

13. Accordingly, the main elements of the offence of Using a Forged Documents are that:

- i) The Accused,
- ii) Knowing that the document is a false document,
- iii) Uses it with the intention of dishonestly induce another person to accept it as genuine in that person's capacity as a public official,
- iv) If so accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function.

14. As discussed above, the Appellants' contention is founded on the last element of these two offences, that is "dishonestly obtaining a gain". The learned counsel for the Appellants submit that in order to disclose the "dishonestly obtaining a gain", the summary of facts has to disclose that the two Appellants had used the money obtained from I-Taukei Land Trust Board for their own benefit. I do not find that this argument has any merits. It is sufficient to disclose that the two Appellants have received money from the I-Taukei Land Trust Board based on the forged document which they have forged and submitted.

15. The summary of facts discloses that the two Appellants had forged the signatures of the members of Yavusa Leikoro & Yavusatina of Toge village on the letter of authority to assign members shares. Having tendered that forged letter of authority, they have become the trustees for the deed of trust for Yavusa Leikoro & Yavusatina. Based on that forged document, the I- Taukei Land Trust Board has given the two Appellants sum of \$33,110.56. The two Appellants had deposited the said money into the bank account number 1170s40 at the HFC Bank. The two Appellants have then withdrawn money from that HFC Bank Account.

16. In view of the two caution interviews, it is clear that the two Appellants had admitted that they have withdrawn money from the HFC account No 1170s40. (*vide the caution interview of the two Appellants*).
17. Accordingly, the summary of facts has specifically dislocated that the two Appellants obtained sum of \$33,110.56 from the I-Taukei Land Trust Board and deposited the said money into the HFF Bank Account No 117s40. Having relied on the forged letter of authority, the I-Taukei Land Trust Board had given the two Appellants this money. It is further disclosed that the two Appellants had later withdrawn that money from the account No 117s40.
18. Two Appellants were represented by their lawyers in the Magistrate's Court when the summary of facts was provided to them. The two Appellants had admitted the summary of facts in the Magistrate's Court on the 6th of April 2017. The learned Magistrate then convicted and sentenced the two Appellants on the 13th of July 2017.
19. In view of the reasons discussed above, I find that the summary of facts has properly disclosed all the main elements of the two offences, which the two Appellants had admitted in the Magistrate's Court. The learned Magistrate has then convicted and sentenced the two Appellants as required under the Section 174 of the Criminal Procedure Act. Accordingly, I do not find any merits in this ground of appeal against the conviction.

Appeal Against the Sentence

First Ground of Appeal of the first Appellant and the Second Ground of Appeal of the Second Appellant.

20. I now turn onto the first ground of appeal of the first Appellant and the second ground of appeal of the second Appellant against the sentence. Both of the grounds are founded on the same contention, where the Appellants argue that the learned Magistrate in paragraph fifteen of the sentence has considered the non-restitution by the two Appellants, to enhance the sentence.

21. The learned Magistrate in paragraphs six and seven of his sentence has correctly identified the maximum sentences for these two offences and the applicable tariff limits for them. The tariff for the offences of Forgery and Using Forged Documents is 3 to 6 years of imprisonment period (Sudhakar v State [2014] FJHC 688; HAA16.2014 (22 September 2014) Rarawa v State [2017] FJHC 50; HAA57.2016 (1 February 2017)) Having considered the objective seriousness of the accused, the learned Magistrate has then selected four years as the starting point.

22. In paragraph ten, the learned Magistrate has discussed the aggravating factors as follows:

“These offences were well planned and executed by both accused. Through these offending a substantial amount was obtained from i-taukei Land Trust Board. For these aggravating factors, I add 2 years to reach 6 years for both counts.”

23. Accordingly, it is clear that the learned Magistrate has considered the planning of this offence and the amount of money obtained from the I-Taukei Land Trust Board as aggravating grounds and increased the sentence by 2 years. The learned Magistrate has not considered the non-restitution as an aggravating ground to enhance the sentence.

24. Having discounted two years for the mitigating grounds, another 1/3 for the early pleas of guilty, and another 15 days for the time spent in remand custody, the learned Magistrate has reached to the final sentence of 31 months and 15 days imprisonment period.

25. The learned Magistrate, in paragraph fifteen of the sentence, has considered whether to suspend the sentence or not. The learned Magistrate has then considered that there is a lack of genuine effort of restitution, among other grounds which he has taken into consideration in determining whether to suspend the sentence or not. At the conclusion, the learned Magistrate found that the Appellants are not entitled for a suspended sentence.

26. Section 26 (2) of the Sentencing and Penalties Act has defined the jurisdictional limitation of the sentencing court in exercising its discretion of suspending the sentence, where it states that:

i) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

a) does not exceed 3 years in the case of the High Court; or

b) does not exceed 2 years in the case of the Magistrate's Court.

27. Accordingly, the Magistrate's Court has jurisdiction to suspend a sentence only if the sentence does not exceed the period of two years. In this case, the learned Magistrate has reached to a final sentence of 31 months and 15 days, which exceeds the 2 years period. Therefore, the learned Magistrate has no jurisdiction to suspend the sentence pursuant to Section 26 (2) (b) of the Sentencing and Penalties Act. Hence, I find that the conclusion of the learned Magistrate in paragraph fifteen of his sentence has no legality.

28. In view of the reasons discussed above, I find that the learned Magistrate has not considered the non-restitution by the two Appellants to enhance or increase the sentence. Moreover, I find that the learned Magistrate has no jurisdiction pursuant to Section 26 (2) (b) of the Sentencing and Penalties Act, to suspend a sentence of 31 months and 15 days. I accordingly find this ground of appeal has no merit.

Ground 1 of the Second Appellant

29. This ground is founded on the contention that the learned Magistrate has not given sufficient weight to the fact that the second Appellant was a first offender.

30. The learned Magistrate in paragraph 11 of the sentence has considered that the second Appellant was a first offender as a mitigating ground. However, the learned Counsel for the second Appellant submitted that, though the learned Magistrate has considered it as

a mitigating ground, he has given the both Appellants a same discount of two years, where the first Appellant was not a first offender.

31. The learned Magistrate in paragraph eleven has considered the following grounds as mitigating factors for the two Appellants, that:

1st accused,

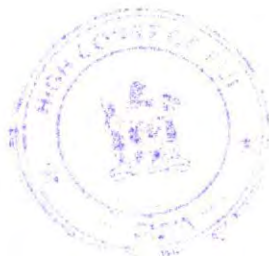
- a) *40 years old,*
- b) *Single parent to 2 young children,*
- c) *Co-operated with the police,*
- d) *Farmer,*
- e) *Seeking forgiveness and no to re-offend,*


2nd accused,

- a) *First Offender,*
- b) *34 years old,*
- c) *Married with 6 children,*
- d) *Farmer,*
- e) *Co-operated with the police.*

32. In view of the above mitigating grounds that have been taken into consideration by the learned Magistrate, it is clear that he has considered two distinct sets of mitigating factors, though some of them are same, in respect of each Appellant. Accordingly, I am satisfied that the learned Magistrate has considered that the second Appellant was a first offender as a mitigating ground. Therefore, I do not find any merit in this ground of Appeal.
33. Moreover, I find that the final sentence of 32 months and 15 days is well below the sentencing tariff limit of 3 to 6 years. The learned Magistrate has not given any reasons for imposing such a sentence below the tariff limit. However, I do not wish to disturb the sentence imposed by the learned Magistrate at this stage.

34. In conclusion, I refuse and dismiss the Petitions of Appeal filed by the first and second Appellant.
35. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
22nd March 2018

Solicitors
Office of the Legal Aid Commission for both Appellants.
Office of the Director of Public Prosecutions for the Respondent.