

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 119 of 2017

BETWEEN : **CARPENTERS FIJI LIMITED** trading as **MH HYPERMARKET**

APPELLANT

A N D : **FIJIAN COMPETITION AND CONSUMER COMMISSION** (formally known as Fiji Commerce Commission)

RESPONDENT

Counsel : Mr. E. Narayan for the Appellant.
: Ms. C. Choy for the Respondent.

Date of Hearing : 24 May, 2018
Date of Judgment : 22 June, 2018

JUDGMENT

1. This court on 14 February, 2018 granted the appellant leave to appeal out of time, in compliance with that order the appellant filed and served a petition of appeal in respect of its appeal against conviction and sentence.

BACKGROUND INFORMATION

2. On 9 February, 2017, the respondent commenced criminal proceedings by way of Summons, charging the appellant with the following offence:

To Carpenters Fiji Limited T/A MH Hypermarket of Naviti Street, Lautoka.

You are hereby commanded to appear at nine o'clock in the forenoon of the 2nd day of May 2017 at the Magistrate's Court at the Court House Lautoka, there to answer the charge(s) set out hereunder and be dealt with according to law.

Provided that your personal attendance will be excused and the case may then be disposed of in your absence if:-

- (a) You admit the offence and plead guilty in writing or*
- (b) You appear by advocate*

Statement of Offence

Offering for Sale Certain Non-Price Control Items at a price different to the Price Being Displayed on the Shelve, contrary to Section 77(1) (g), (2) and Section 129(3) of the Commerce Commission Decree No. 49 Decree of 2010.

Particulars of Offence

Carpenters Fiji Ltd T/A MH Hypermarket did on the 24th day of December, 2014 at Lautoka in the Western Division being a trader was offering for sale certain non-price control items at a price different to the price being displayed on the shelve, namely 5 pkts of 100g of Suhana Meat Masala at \$4.19 per pkts instead of 3.99 per pkt the price displayed on the shelve and approximately 55 bars of 80g of Giv

Beauty soap at \$0.89 per bar instead of \$0.69 per bar the price displayed on the shelves.

3. The Summons was served on the Shop Manager Asha Chand. On 2 May, 2017 no appearance was made on behalf of the appellant in the Magistrate's Court. The case was adjourned to 11 July, 2017 for formal proof.
4. On 11 July, 2017 again there was no appearance on behalf of the appellant and the case proceeded to hearing. On 15 August, 2017 the learned Magistrate found the appellant guilty as charged thereafter on 12 September, 2017 the appellant was fined the sum of \$20,000.00.
5. Both counsel filed written submissions and also made oral submissions at the hearing of the appeal for which the court is grateful.
6. The following grounds of appeal were submitted by the appellant in its petition of appeal dated 20 February, 2018:
 - (a) *The learned Magistrate erred in law and in fact when it accepted that the Summons was served on the Appellant when in fact the Summons was not served at the registered address of the Appellant being Argo Street, Walu Bay, Suva and not being in accordance to section 156(1)(b) of the Commerce Commission Act 2010.*
 - (b) *The learned Magistrate erred in law and in fact in conducting a hearing of the matter on 11th July, 2017 when in fact the personal appearance of the Appellant had not been dispensed with under section 83 of the Criminal Procedure Act 2009.*
 - (c) *The learned Magistrate erred in law and in fact by hearing and making judgment on PP case no. 4 of 2017 whilst the matter had been dealt with in Lautoka Magistrate's Court Action no. 7 of 2015 which was dismissed for want of prosecution on 30th January, 2017.*

- (d) *The learned Magistrate erred in law and in fact in imposing a penalty of \$20,000.00 when the maximum penalty a Magistrate can impose after a matter is formally proved is 10 penalty units if the Accused does not appear at the time and place appointed by the Summons under section 167 of the Criminal Procedure Act 2009.*
- (e) *The learned Magistrate erred in law and in fact when in fact the Respondent has not proved in accordance with section 77 (1)(g) of the Commerce Commission Act 2010 that the Appellant was “making a representation concerning that a price advantage of goods or services exist if it does not.*
- (f) *The learned Magistrate erred in law and in fact by hearing the matter and perusing the evidence produced in court by the Respondent when in fact the same was irregularly obtained as there was no search warrant tendered as evidence and as required under section 126 (3) of the Commerce Commission Act 2010.*
- (g) *The learned Magistrate erred in law and in fact in perusing and accepting the evidence produced in court by the Respondent when as per section 119(6) of the Commerce Commission Act 2010 any incriminating information furnished against the Appellant should not be admissible in any court or Tribunal other than the Small Claims Tribunal.*
- (h) *The learned Magistrate erred in law and fact by taking into consideration previous convictions of the Appellant in paragraph 8 of the Sentence when in fact the Respondent did not give notice to the Appellant of not less than 7 days prior to the conviction as required under section 84(4) (a) (b) of the Criminal Procedure Act 2009.*

- (i) *The learned Magistrate erred in law and in fact in imposing a harsh and excessive sentence against the Accused without hearing the matter on merits and according ample opportunity to the accused to present its case to the Honourable Court.*

APPEAL AGAINST CONVICTION

GROUND ONE

7. *The learned Magistrate erred in law and in fact when it accepted that the Summons was served on the Appellant when in fact the Summons was not served at the registered address of the Appellant being Argo Street, Wala Bay, Suva and not being in accordance to section 156(1) (b) of the Commerce Commission Act 2010.*
8. Counsel for the appellant submitted that the Summons was wrongly served on the Shop Manager Asha Chand since the appellant was a limited liability company its registered office ought to have been served.
9. The counsel further submitted that the service of the Summons was irregular since it was not in accordance with section 156(1) (b) of the Commerce Commission Act 2010.
10. At the outset it is important to state that by virtue of the Commerce Commission (Budget Amendment) Act 2017 the name of the Fiji Commerce Commission was changed to Fijian Competition and Consumer Commission and also its substantive legislation was to be known as Fijian Competition and Consumer Commission Act 2010.
11. Section 156(1) (b) of the Fijian Competition and Consumer Commission Act 2010 states:

“(1) where under this [Act] a document or a notice may be, or is required to be, given to a person, the document or notice may be given -

(b) in the case of a body corporate -

(i) by delivering it to the secretary of the body corporate personally;

(ii) by leaving it at the registered office of the body corporate or at the place or principal place of business of the body corporate in Fiji with a person apparently employed there.

(iii) by sending it by post to the registered office of the body corporate or to the place or [principal] place of business; or ...”

12. The counsel for the appellant placed emphasis on the fact that the Act provided for service at the registered office of the appellant company or by delivering it to the Secretary of the appellant who also operates from the registered office.
13. Counsel relied on the decision of the High Court in *Rajendra Prasad Brothers Ltd trading as Rajendra's Food Town v The Fiji Commerce Commission, Criminal Appeal Case No. HAA 46 of 2014* where the issue in respect of the non-service of the new fixed price formula by the Fiji Commerce Commission was their failure to notify the appellant in accordance with section 156(1) (b) of the Commerce Commission Act (as it was then).
14. In that case the learned Magistrate had accepted that the email notification by the Commission was sufficient mode of delivery. On appeal it was held by the High Court that the email notification was contrary to the requirements of section 156(1) (b) of the Fijian Competition and Consumer Commission Act.
15. The situation in the instant appeal is different since the Shop Manager who was an employee of the appellant was served at the principal place of business. There is no dispute that MH Hypermarket operates from Naviti Street, Lautoka which is the principal place of business for MH Hypermarket. Furthermore, before the service of the Summons the prosecution witness had sighted the certificate of registration of this supermarket.

16. Section 156 of the Fijian Competition and Consumer Commission Act explains the mode or manner of service of documents. This section makes reference to the phrase “a document or a notice”.
17. The phrase “a document or a notice” in section 156 is to be given a wide meaning to achieve the purpose of the Act this is to say that the word “document” includes a Summons for the purposes of achieving the objectives mentioned in the Act.
18. Where a body corporate has a chain of supermarkets or outlets operating in Fiji it would be irrational to think that the Commission would be expected to serve the registered office of a body corporate every time there is an alleged infringement. To alleviate such difficulties the legislators had given options for service of documents on a body corporate.
19. The Shop Manager of MH Hypermarket Asha Chand was served at the principal place of business of the body corporate. This was a correct service of the Summons on the appellant as required by section 156 (1) (b) (ii) of the Fijian Competition and Consumer Commission Act. If the appellant neglected to respond or defend the charge then it was up to them.
20. There was no need to serve the registered office of the appellant since MH Hypermarket operated from Naviti Street, Lautoka which was the principal place of the appellant’s business and the service of the Summons was effected on an employee of the appellant.
21. There is no error made by the learned Magistrate when he proceeded to hear the matter in the absence of the appellant company which had been properly served.
22. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

The learned Magistrate erred in law and in fact in conducting a hearing of the matter on 11th July, 2017 when in fact the personal appearance of the Appellant had not been dispensed with under section 83 of the Criminal Procedure Act 2009.

23. Counsel for the appellant submitted that the Magistrate's Court in the absence of the appellant could have exercised its discretion to adjourn the matter and issue a warrant since the appellant faced a criminal charge. Counsel further submitted that the court had not correctly dispensed with the appearance of the appellant in the matter.
24. According to the copy record the matter was called on 2 May, 2017 since there was no appearance on behalf of the appellant a formal proof date was assigned. The date for formal proof was correctly assigned in the circumstances of the case. The sentence for the offence under section 129 (3) of the Fijian Competition and Consumer Commission Act was a fine.
25. Section 83 of the Criminal Procedure Act does not apply since the learned Magistrate had not dispensed with the personal attendance of the appellant which had not pleaded guilty in writing or had made an appearance by a lawyer. Section 171 of the Criminal Procedure Act was applicable since the learned Magistrate was satisfied that the appellant had been served but had failed to appear in court.
26. Section 171 (1) of the Criminal Procedure Act states:

“(1) If at the time or place to which the hearing or further hearing is adjourned —

(a) the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed

with the hearing or further hearing as if the accused were present; and

(b) if the complainant does not appear the court may dismiss the charge with or without costs.”

27. In view of the above provision of the law, the learned Magistrate had given a formal proof date which was a hearing date. There was no appearance made on behalf of the appellant so the court proceeded with the formal proof. The discretion to proceed in the absence of the appellant was properly exercised.
28. The learned Magistrate exercised his discretion judicially under section 171 of the Criminal Procedure Act hence the issuance of a bench warrant for the non-appearance of the appellant never arose. Once a date is assigned by a court and proper service had been effected it is the responsibility of that accused to oblige.
29. This ground of appeal is also dismissed due to lack of merits.

GROUND THREE

The learned Magistrate erred in law and in fact by hearing and making judgment on PP case no. 4 of 2017 whilst the matter had been dealt with in Lautoka Magistrate’s Court Action no. 7 of 2015 which was dismissed for want of prosecution on 30th January, 2017.

30. The counsel for the appellant submitted that the respondent had instituted similar proceedings against the appellant for the same offending. On 30th January, 2017 the earlier matter was listed for mention to fix a hearing date but due to the non-appearance of the Prosecutor the appellant was discharged.
31. Counsel further submitted in his written submission that re-instituting the same charge against the same appellant was wrong since the matter cannot be raised again as the case was “supposedly

finished” and that the respondent should be prevented from multiplying judgments and creating unnecessary confusions.

32. This submission by counsel is misconceived, the appellant was discharged due to non-appearance of the Prosecutor by no means it meant that the matter had been finalised on merits. The doctrine of res judicata did not apply since the appellant had not been convicted or acquitted. The appellant was discharged hence there was no bar or estoppel against the respondent from recharging the appellant.
33. This ground of appeal is also dismissed due to lack of merits.

GROUND FOUR

The learned Magistrate erred in law and in fact in imposing a penalty of \$20,000.00 when the maximum penalty a Magistrate can impose after a matter is formally proved is 10 penalty units if the Accused does not appear at the time and place appointed by the Summons under section 167 of the Criminal Procedure Act 2009.

34. The counsel for the appellant submitted that after the matter was formally proved the maximum penalty the Magistrate’s Court could have imposed was 10 penalty units which was \$1,000.00 in fine. The learned Magistrate erred when he imposed a fine of \$20,000.00 or 200 penalty units. Counsel relies on section 167 of the Criminal Procedure Act 2009 in support of his submission.
35. There is no doubt that the matter proceeded to formal proof after the appellant was not represented in court. Counsel admits the above in the following words at paragraph 33 of his submissions:

“We submit that the summons dated 9th February, 2017 was served on the appellant however, due to an erroneous oversight, it was overlooked and necessary representations were not made on the material day in court resulting in the matter proceeding to formal proof.”

36. Section 167 (1) of the Criminal Procedure Act states:

“This section applies to any case in which an accused person is charged with any offence punishable with imprisonment for a term not exceeding 12 months and/or a fine not exceeding 10 penalty units, and where the accused person —

(a) does not appear at the time and place —

(i) appointed by the summons; or

(ii) by any bond for his appearance that he or she may have entered into; and

(b) personal attendance has not been dispensed with under section 83.”

37. Section 167 of the Criminal Procedure Act only applies to offences where the punishment does not exceed 12 months imprisonment and/or a fine of 10 penalty units which is \$1,000.00 in the absence of the accused and where the personal attendance of the accused had not been dispensed with. The appellant was charged and convicted under the Fijian Competition and Consumer Commission Act which prescribes the punishment under section 129(3) of the Fijian Competition and Consumer Commission Act as follows:

“The maximum penalty of an offence under a provision of this [Act] committed by a body corporate is a fine that is five times the fine provided for in the provision or , as the case may be a fine that is five times the fine provided for in sub section (1)”

38. Section 129(1) mentions a fine not exceeding \$10,000.00 the appellant being a body corporate the maximum fine was not to exceed \$50,000.00. The learned Magistrate imposed a fine of \$20,000.00.

39. In the current situation section 167 of the Criminal Procedure Act did not apply, the Fijian Competition and Consumer Commission Act was

applicable as a specific legislation which overrides the Criminal Procedure Act being a legislation of general application.

40. The learned Magistrate had correctly sentenced the appellant in accordance with section 129 of the Fijian Competition and Consumer Commission Act and there is no error made by the learned Magistrate.
41. This ground of appeal is also dismissed due to lack of merits.

GROUND FIVE

The learned Magistrate erred in law and in fact when in fact the Respondent has not proved in accordance with section 77 (1)(g) of the Commerce Commission Act 2010 that the Appellant was “making a representation concerning that a price advantage of goods or services exist if it does not.

42. The counsel for the appellant submitted that the respondent had failed to prove the elements of the charge.
43. The appellant was charged with offering for sale certain non-price control items at a price different to the price displayed on the shelves contrary to section 77(1)(g),(2) and 129(3) of the Fijian Competition and Consumer Commission Act 2010. The particulars of the offence were as follows:

“Carpenters Fiji Ltd T/A MH Hypermarket did on the 24th day of December, 2014 at Lautoka in the Western Division being a trader was offering for sale certain non-price control items at a price different to the price being displayed on the shelves, namely 5 packets of 100g of Suhana Meat Masala at \$4.19 per packets instead of \$3.99 per packet the price displayed on the shelves and approximately 55 bars of 80g of Giv Beauty soap at \$0.89 per bar instead of \$0.69 per bar the price displayed on the shelves.”

44. Section 77(1) (g) and 77(2) of the Fijian Competition and Consumer Commission Act states:

(1). *A person shall not, in trade or commerce, in connection with the supply or possible supply of goods and services or in connection with the promotion by any means of the supply or use of goods or services-*

...

(g) *make a representation concerning that a price advantage of goods or services exists if it does not.*

(2). *A person who contravenes this section shall be guilty of an offence.”*

45. The Prosecution witness Nilesh Prasad said that he was a Price and Income Inspector for the respondent and his duties under the Act was to carry out price control inspections, rent inspections, and attend to any complaints or any other duties assigned by the respondent. He said that on the 24th December, 2014 he was assigned to carry out price control inspections in Lautoka City area with another Price and Income Officer namely Harish Chand. He said that on that particular day at about 10.45am they entered the MH Hypermarket located at Naviti Street, Lautoka and introduced themselves as the Commission Inspectors to one Krishneel Ravinesh Reddy who introduced himself as the Manager of the Supermarket. The witness said that after obtaining his permission to inspect the Supermarket they carried out the inspection. The witness further gave evidence as follows:

“I noted that the trader was offering for sale certain non-price control items at a different price rather than the price displayed for the same items in the Supermarket namely 5 x 100 grams Suhana Meat Masala. The price display of the item was \$3.99 but the trader was offering for sale at \$4.19 each. Also approximately 55 x Giv Beauty Soap, the display price of the item was 69 cents but the trader was offering for sale at 89 cents each. After noting the breaches in my inspection report form which was acknowledged by the Manager of the Supermarket and

also counter signed by my accompanying Inspector. Then on the 30th day of December 2014, I caution interviewed the Manager of MH Hypermarket Mr Krishneel Ravinesh Reddy. In his caution interview he admitted that the Supermarket has made a mistake and apologised for the offence. He also confirmed that the pictures taken during the day of my inspection were the same photographs taken for the two items in the Supermarket. I then after sighting the certificate of registration warned Mr Krishneel Ravinesh Reddy that Carpenters Fiji Ltd T/A MH Hypermarket will be prosecuted for breach of Section 77 (1) (g) of Commerce Commission Decree 2010.”

46. The witness further tendered the Inspection report marked as exhibit 1 and the pictures of the items which were on sale with different prices as exhibit 2. The caution interview was tendered as exhibit 3.
47. The counsel for the appellant submitted that it was not proved that the appellant had offered for sale those items in question at a different price. This court disagrees. There was evidence before the court that the displayed prices were different from the price that was offered for sale at the check-out.
48. The representation was made at the shelve indicating a price advantage which did not in reality exist because at the check-out a higher price was programmed. There is no need for a customer to be a complainant or for a receipt to be produced to substantiate the price difference.
49. The authorised officer representing the respondent saw the difference in pricing which was immediately brought to the attention of the Manager of the Supermarket who admitted the error. The offence is a strict liability offending where the intention of the trader does not matter. The fact that the trader was involved in overwriting the price at the check-out was sufficient to establish the fact that the price mentioned at the shelve was different from the price at the check-out.

50. The prosecution had proven all the elements of the offence beyond reasonable by the evidence of Nilesh Prasad and the exhibits tendered.
51. This ground of appeal is also dismissed due to lack of merits.

GROUND SIX

The learned Magistrate erred in law and in fact by hearing the matter and perusing the evidence produced in court by the Respondent when in fact the same was irregularly obtained as there was no search warrant tendered as evidence and as required under section 126 (3) of the Commerce Commission Act 2010.

52. The counsel for the appellant submitted that the Magistrate's Court had incorrectly relied on the evidence produced in court which was obtained in breach of section 126(3) of the Fijian Competition and Consumer Commission Act since no search warrant was issued.
53. The prosecution witness Nilesh Prasad under the Fijian Competition and Consumer Commission Act was authorised to carry out routine inspections amongst other duties.
54. When the witness entered the Supermarket in question he introduced himself to the Manager of the Supermarket who had allowed the witness to carry out his lawful duties. After breaches were noted an inspection form was completed (prosecution exhibit no. 1) which was acknowledged by the Manager of the Supermarket. The items in question were photographed (prosecution exhibit no.2).
55. Section 126 of the Fijian Competition and Consumer Commission Act gives the officers of the Fijian Competition and Consumer Commission powers to enter any premises he knows or reasonably suspects to be used in contravention of the Act. Here it was a routine inspection which was within the parameters of the Act. The issuance of a search warrant under section 126(3) is not a mandatory requirement.

56. Section 126 (3) states:

“(3) A Resident Magistrate who is satisfied upon the information of an officer of the Commission that there is reasonable cause to suspect that any place has been or is being or is likely to be used in connexion with a contravention of this [Act] or for the keeping of records relating to a contravention of this [Act] or for the keeping of records relating to a contravention of this [Act] may issue his search warrant directing the officer of the Commission to enter the place specified in the search warrant for the purpose of his exercising therein the powers conferred on an inspector by this [Act].”

57. Here the officer representing the respondent had obtained permission from the Manager. No items were seized only pictures were taken.

58. There is no error by the learned Magistrate in hearing the evidence of the prosecution witness who had correctly tendered the photograph of the items offered for sale which was lawfully obtained. There was no need for the respondent to obtain a search warrant in the circumstances of the case.

59. This ground of appeal is also dismissed due to lack of merits.

GROUND SEVEN

The learned Magistrate erred in law and in fact in perusing and accepting the evidence produced in court by the Respondent when as per section 119(6) of the Commerce Commission Act 2010 any incriminating information furnished against the Appellant should not be admissible in any court or Tribunal other than the Small Claims Tribunal.

60. The counsel for the appellant relies on section 119(6) in support of his argument. For completeness the entire section 119 of the Fijian Competition and Consumer Commission Act is reproduced herewith:

“ (1) In relation to any matter relevant to the operation or enforcement of this [Act], an officer of the Commission may require a person (either by oral or written requisition) to furnish -

(a) any information;

(b) any records or a copy thereof,

in the person's possession.

(2) For the purpose of subsection (1) a person shall be taken to be in possession of -

(a) information, if he has the information or is entitled to access to the information;

(b) records, if he has them in his possession or if he has them under control in any place whether for his own use or benefit or for another's use or benefit and although another person has the actual possession or custody of the records.

(3) A requisition made under subsection (1) may require that the information or records or copy thereof be furnished -

(a) to the officer or inspector of the Commission;

(b) at the place the requisition is made or at another place;

(c) forthwith or at, by or within a time specified;

(d) in person, or by certified mail or in another manner specified;

(e) by means of, or accompanied by, verification in the form of, a statutory declaration made in accordance;

(f) in the case of information, orally or in writing.

(4) A person shall not -

(a) refuse or fail to furnish any information, records or a copy thereof as required of him under this section;

(b) in response to a requisition made under this section furnish information, records or copies thereof that is or are false or misleading in a material particular,

is guilty of an offence under this [Act]. If the offender is a natural person - \$1,000 and imprisonment for 12 months and if the offender is a body corporate - \$5,000.

(5) A person shall not be entitled to refuse or fail to furnish information or records or a copy thereof on the ground only that the information, or records or copy thereof would tend to incriminate him.

(6) If in response to a requisition authorized by paragraph (a) of subsection (1), a person furnishes information that would tend to incriminate him in any offence, other than an offence defined in paragraph (b) of subsection (4), the information furnished shall not be admissible in evidence against him in proceedings in any court or tribunal other than the Small Claims Tribunal.

This subsection does not apply to information as to the name and address of the person or as to his ownership of, control over or position in, any business.

(7) Where a person records or stores any matter by means of a mechanical, electronic or other device, the duty imposed by this section to produce any records containing those matters shall be construed as including a duty to produce the matters in written form if that is demanded.

The duty imposed by this section to produce a copy of any records shall be construed as a duty to produce a clear reproduction.

(8) An inspector or officer of the Commission may take notes or copies of or extracts from records or a copy thereof produced under this section.

(9) Records furnished under this section may be retained for so long as it is necessary to do so for the purposes of this [Act], but the person otherwise entitled to possession thereof, if he so requests it, is entitled to be furnished as soon as practicable with a copy thereof certified by the Commission to be a true copy and such a certified copy shall be received in all courts and elsewhere as evidence of the matters contained therein as if it were the original.

(10) It is a reasonable excuse for the purposes of subsection (3) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

(11) The Commission may, if satisfied that for any reason it is desirable to do so, give directions prohibiting or restricting the disclosure of matters contained in documents or information given to the Commission.

(12) A person who contravenes subsection 1 is guilty of an offence. For a natural person a fine of \$1000 or for 12 months and for a body corporate \$5000."

61. The incriminating information before the court was the caution interview of the Manager employed by the appellant who voluntarily and on his own freewill gave his interview to the officer of the respondent. Section 119 (6) of the Fijian Competition and Consumer Commission Act provides protection to the person who furnishes information that would tend to incriminate him in any offence, other than an offence defined under section 119 (4) (b).
62. In this case section 119 (6) of the Act was not breached since the response of the Manager in the caution interview was not related to a requisition request under section 119. In any event the appellant had

been charged under section 77 of the Fijian Competition and Consumer Commission Act and not under section 119.

63. This ground of appeal is also dismissed due to lack of merits.

GROUND EIGHT

The learned Magistrate erred in law and fact by taking into consideration previous convictions of the Appellant in paragraph 8 of the Sentence when in fact the Respondent did not give notice to the Appellant of not less than 7 days prior to the conviction as required under section 84(4) (a) (b) of the Criminal Procedure Act 2009.

GROUND NINE

The learned Magistrate erred in law and in fact in imposing a harsh and excessive sentence against the Accused without hearing the matter on merits and according ample opportunity to the accused to present its case to the Honourable Court.

64. Since both the grounds of appeal address the issue of sentence discretion of the sentencing court it is only proper that both the grounds be dealt with together.
65. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.
66. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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.”*

67. The complaint raised in ground 8 is that the appellant was not given a seven (7) days' notice before the Magistrate's Court took into consideration the previous convictions of the appellant at paragraph 8 of the sentence.

68. At paragraph 8 of the Sentence the learned Magistrate stated:

“I have considered the facts of the case and the previous convictions.”

69. Counsel relied on section 84(4)(a)(b) of the Criminal Procedure Act unfortunately there is no such provision in the Criminal Procedure Act, the relevant section is section 83 (4) (b) of the Criminal Procedure Act which states:

“(4) Where a magistrate-

(a) convicts an accused person; and

(b) it is proved to the satisfaction of the court that not less than 7 days prior to the conviction a notice was served on the person in the prescribed form and manner specifying any alleged previous conviction

of the accused of an offence proposed to be brought to the notice of the court in the event of his conviction of the offence charged; and

(c) the accused is not present in person before the court—the court may take account of any such previous conviction so specified as if the accused had appeared and admitted it.”

70. When it comes to sentencing an accused person who has been found guilty of committing an offence the Sentencing and Penalties Act applies. Section 4(2) (i) of the Sentencing and Penalties Act provides that in sentencing offenders a court must have regard to-

“(i) the offenders previous conviction...”

71. Section 5 of the Sentencing and Penalties Act states the factors to be considered in determining the character of an offender. When an offender is sentenced for a new offence the previous convictions have limited relevance. The previous conviction only deprives an offender of any discount for good character (*See State v Tomasi Turuturuvesi [2011] HAA 6 of 2011(13 July, 2011)*).

72. In this situation there is nothing to suggest that the learned Magistrate had used the previous convictions of the appellant as an aggravating factor to enhance the sentence. Section 129(1) of the Fijian Competition and Consumer Commission Act has prescribed a fine not exceeding \$10,000.00 and for an offence committed by a body corporate a fine of five times can be imposed which is \$50,000.00 (section 129(3) Fijian Competition and Consumer Commission Act).

73. The counsel for the appellant argues that the respondent should have served on the appellant a 7 days’ notice of their previous convictions.

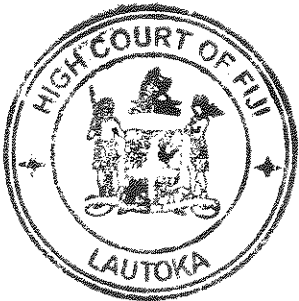
74. The Sentencing and Penalties Act does not impose any such seven days requirement. The learned Magistrate correctly relied on section 129 of the Fijian Competition and Consumer Commission Act. It is

also noted that the appellant is not disputing the convictions but is raising a procedural issue which does not affect the sentence imposed.

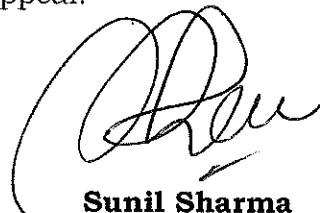
75. Section 83 of the Criminal Procedure Act does not apply in sentencing an offender due to the introduction of the Sentencing and Penalties Act. The learned Magistrate was correct in imposing a fine of \$20,000.00 no error can be attributed to the learned Magistrate in the exercise of his sentencing discretion. The fine is neither harsh nor excessive considering the circumstances of the offending.
76. The above grounds of appeal are also dismissed due to lack of merits.

ORDERS

1. The appeal against conviction and sentence is dismissed due to lack of merits.
2. The sentence of the Magistrate's Court dated 12 September, 2017 is affirmed.
3. 30 days to appeal to Court of Appeal.



At Lautoka
22 June, 2018



Sunil Sharma
Judge

Solicitors

Messrs Patel Sharma Lawyers, Suva for the Appellant.

Fijian Competition & Consumer Commission, Legal Department for the Respondent.