IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 13 OF 2019

(Labasa Criminal Case No. 385/12)

BETWEEN : **VANI TILOCA BERA**

Appellant

AND : **STATE**

Respondent

Counsel : **Mr. Nilesh Sharma for Appellant**

Ms. A. Vavadakua for the Respondent

Date of Hearing: **11 October 2019**

Date of Judgment : **18 October 2019**

JUDGMENT

1. The Appellant with four others was charged with Theft contrary to Section 291 of the Crimes Act 2009 and convicted by the Learned Magistrate at Labasa.

2. On 13th May 2019, the Appellant was sentenced to a term of 12 months' imprisonment with 7 months of that sentence was to be served in prison and the remaining period of 5 months was suspended for 2 years.

3. The information on which the Appellant was charged is as follows:-

Statement of Offence

Theft: Contrary to Section 291 of the Crimes Decree 2009.

Particulars of Offence

ARCHANA INDRANI MURTI, ANJINI DEVI MANDRI, SHAHEEN SHABINA, SHAVIN MAHARAJ and VANE TIKOKA BERA between 1st day of October 2010 and 1st day of June 2011 at Labasa in the Northern Division being the employees of Westpac Bank Labasa branch and within capacity of their employment stole $182, 862.45 in cash, the property of Westpac Bank.

The Facts

4. The Appellant and the co-accused were employed at the Westpac Bank (the Bank), Labasa Branch, when the alleged theft took place. The Appellant had been work-

ing for the bank for nearly 20 years. The 1st accused was the Customer Relations Manageress who supervised the Appellant and the other accused.

Upon an internal investigation conducted by the Suva audit team on some suspicious transactions, it was revealed that the Appellant and other co-accused had appropriated money from the bank by putting incomplete withdrawal slips in the till when there were no sufficient funds in their bank accounts. When this was revealed, the Appellant at the internal investigation admitted that she took money on several occasions knowing that she did not have sufficient funds in her bank account. She took up the position that she was borrowing from the bank with the approval of the 1st accused who was the Customer Relations Manager (Manager). On the strength of the findings of the investigation, the Appellant and the other accused were dismissed from the bank immediately. Upon the termination of her service, the Appellant repaid in full the money she had appropriated from the bank. At the caution interview, the Appellant admitted taking money from the bank in breach of the established procedure. In court, the Appellant took up the same defence she had taken up at the internal investigation and denied being dishonest. The contents of the Record of Caution Interview were not contested and the same were admitted into evidence at the trial.

5. Being dissatisfied with the said judgment and the sentence, the Appellant filed her petition of appeal within time.

6. At the hearing stage, the Learned Counsel for Appellant indicated that the Appellant will not pursue the appeal against the sentence. Having been satisfied that the abandonment was on Appellant's own free will, the appeal against sentence is hereby dismissed. I now proceed to consider the grounds of appeal filed against the conviction.

7. The grounds of appeal against conviction are as follows:

i) The Learned Magistrate erred in law when he failed to consider or apply the principles of Joint Enterprise in reaching a finding of guilt against the Petitioner;

ii) The Learned Magistrate erred in law and in fact in reaching a finding of guilty against Petitioner when there was no evidence of any intention to permanently deprive the Bank;

iii) The Learned Magistrate erred in law and in fact in failing to consider all of the evidence as a whole in reaching a finding of guilty.

Analysis

Ground 1 – Failure of the Learned Magistrate to consider or apply the principle of joint enterprise.

8. As per the information, the Appellant had been jointly charged with four others for a theft of $182,862.45, committed over a period of eight months against the complainant bank in her capacity as an employee. The Appellant's contention is that the prosecution had run the case on the basis of the principle of joint enterprise but the Learned Trial Magistrate in coming to his judgment in respect of each accused failed to consider the said principle *vis-a-vis* the evidence led in trial.

9. Section 46 of the Crimes Act defines the notion of common enterprise as follows:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of

such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

10. The evidence led in trail does not reveal that the Appellant had shared a common intention with other co-accused in the prosecution of the theft although the *modus operandi* used had been the same in respect of each accused's case. They had used the same corrupt technique of not processing the withdrawals on the computer system so that the Suva Head Office could not detect their theft. Each accused had committed the offence in their individual capacities and the net result had been that a total sum of $182,862.45 was stolen from the complainant bank. In the circumstances of the offence, the proper course of action would have been to charge the accused separately in the same information under Section 60 of the Criminal Procedure Act to avoid multiplicity of actions and promote convenience of litigation and consistency in sentencing, if there being a conviction.

11. In ***State v Prasad*** [2009] FJHC 5; HAM127D.2008 (16 January 2009) Shameem J observed at [22]

"However where several accused are charged with a single offence based on the same facts, separate trials are undesirable. The reasons are obvious. Firstly separate trials for multiple accused are expensive and time-consuming. Secondly there is a real danger that different sets of assessors will reach conflicting conclusions on the same evidence leading to inconsistent verdicts. Thirdly there is a risk that different courts will impose inconsistent sentences, once a guilty verdict is recorded. In the interests of justice therefore a joint trial for multiple defendants charged with committing the same offence, is usually preferred"

12. Although it is arguable whether prosecution should have charged this accused with others in one count, the ultimate question is whether there was any prejudice caused to the accused persons when the charge was framed in such a way. It appears that the Appellant and the co-accused before trial had not raised any objection to the amended information. None of the accused who were all represented by counsel, made any application for severance. The reason why the defence had not taken-up any objection on the basis of misjoinder appears to be that the accused were quite comfortable in advancing a common defence that they were borrowing from the bank with the approval of the manager. They were not embarrassed in conducting their respective defences the way they were charged. The amended information rather benefited the defence case theory since they all wanted to tell the court that there was a special "procedure" in Labasa that allowed them to take money and the better way to show this was to show that others had done the same thing.

13. The Counsel for Appellant does not say that the charge filed in the court below is defective. His contention is that there is no evidence that the Appellant had shared a common intention with her co-accused and that the Learned Trail Magistrate had failed to find any evidence on the principle of joint enterprise in coming to the finding of guilt on Theft.

14. It has to be conceded that the Learned Trial Magistrate in his judgment has not specifically addressed or considered the principle of joint enterprise. However, in the circumstances of this particular case, there is no miscarriage of justice occasioned to this Appellant. The information had been filed on the basis of a finding of an internal investigation wherein the Appellant and other co-accused had admitted to taking money from the bank in violation of the accepted banking procedures. The amount of money each accused had appropriated was quantified and informed at the investigation and each one of them had admitted appropriating those amounts.

15. Having admitted appropriating the sum of money as quantified by the audit team at the internal investigation, each accused in their respective caution interviews maintained

those admissions. All the accused persons knew at the trial that the amount on the amended information was an approximation of the total amount they are alleged to have been stealing form the bank separately.

16. They, at the trial advanced a common defence that they were borrowing from the bank and that the payments were authorised by the 1st accused who was the manager. The contents of the records of caution interview were not challenged at the trial and the Appellant and the other co-accused were trying to establish the defence they had advanced at the internal investigation and at the caution interview. The question before the Learned Trial Magistrate was whether he could accept the defence that the payments were authorised by the bank, not the manager, or whether the Appellant had dishonestly appropriated the money belonging to the bank with the intention of permanently depriving the bank of that money.

17. I am not persuaded that any prejudice was caused to the Appellant although the Learned Trial Magistrate had failed to address his mind to the principle of joint enterprise. The Learned Trial Magistrate had considered the evidence against each accused separately and was satisfied that all the elements of Theft were made out against each accused.

18. The Appellant at the end of prosecution's case elected to remain silent. In the absence of any evidence from the Appellant, the inference as to the guilty mind or otherwise had to be drawn from the Appellant's unchallenged record of caution interview and other evidence adduced by the prosecution. This was done by the Learned Trial Magistrate at paragraphs 25 and 26 of the judgment. Although no distinct reference was made to each individual accused's case, in light of the common defence advanced by each accused, the Learned Magistrate appears to have addressed his mind to the mental element (*mens rea*) of the offence of Theft in respect of each accused on a common footing.

19. In her caution statement, the Appellant admits that the appropriation was not correct in relation to the accepted bank procedure. She told the police how she was filing incomplete withdrawal slips when there was no money in her bank account and putting them into the till in order to draw money from the bank. She admits that the transactions were not processed in the computer system. She admits obtaining a so called approval from the 1st accused when she as an experienced banker was quite aware that no such approval could be granted by a manager at the expense of accepted banking procedure. She states how she used the bank money to pay for her personal expenses such as her Home Theatre System.

20. Having turned his mind to the timing of the repayment, the Learned Trial Magistrate disbelieved the version of the Appellant that she meant to repay the money after her loan was approved form the bank. He found that the Appellant had dishonestly appropriated the money belonging to the bank with the intention of permanently depriving the bank of that money. There is overwhelming evidence against the Appellant which was properly considered by the Learned Trial Magistrate in coming to his conclusion. No prejudice was caused to the Appellant. I find no merit in ground one hence it is dismissed.

21. Grounds (ii) and ground (iii) could conveniently be dealt with together. The Appellant contends that the Learned Trial Magistrate failed to consider all the evidence as a whole in reaching a finding of guilt (ground 3) in particular that no evidence on the element of "Intention to Permanently Deprive the Bank" (ground 2).

22. According to Section 291 of the Crimes Act, the elements of the offence of Theft are that:

    i. The accused

    ii. Dishonestly appropriates,

    iii. Property belonging to another,

iv. With the intention of permanently depriving the other of the property.

23. There was no dispute at trial that the Appellant is the 5th accused. The Appellant in her caution interview admits that the money she appropriated belonged to the complainant bank. The only dispute is with regards to the 2nd and 4th elements of the offence of Theft.

Dishonest Appropriation

24. Section 290 of the Crimes Act defines the term 'dishonest' as follows:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

25. There is overwhelming evidence in the Appellant's record of interview and other evidence adduced by the prosecution as to how dishonest the Appellant had been in her dealings with the complainant bank, her employer for nearly 20 years. The Appellant was a senior bank officer. She ought to know the banking procedures and in her own record of interview she repeatedly admits that she had not followed the correct procedure. The Appellant reveals how she directed one of the tellers to fill in her withdrawal slip [Q & a 408] when she herself was a senior officer. She admits that she did not have sufficient money in her account when she was appropriating money. She admits that the withdrawals were not processed into the bank computer system [Q & A 92].

26. PW 1 (the Head Teller) testified that withdrawal slips had been incomplete. Incomplete withdrawal slips had been found in the cash till to account for the shortage of cash. PW.1 also testified that an overdraft facility had not been properly approved in favour of the Appellant at the time she was withdrawing money from the bank. The bank officers who conducted the internal investigation confirmed that none of the bank officers had any au-

thority to accept or do payments on incomplete withdrawal slips – not even the manager the 1st accused.

27. In view of the evidence led in trial, it is open for the Learned Trial Magistrate by drawing reasonable inferences to find that the Appellant had been dishonest.

28. The Appellant's Counsel has cited ***Ilai Derenalagi***, (1970) 16 FLR 131, and ***Brij Basi Singh*** [1971] 17 FLR 65 cases decided under the Penal Code (now repealed). Those case have no relevance to the present case. The Appellant in this case was charged under the Crimes Act which introduced drastic changes to the offence of Theft. Section 291 of the Crimes Act replaced the physical element of Theft namely, "takes and carries away anything capable of being stolen without the consent of the owner" under Section 259 of the Penal Code with an expanded element of "appropriates property belonging to another". The physical element as defined under Section 259 of the Penal Code was limited only to taking or carrying away of the property. Section 291 of the Crimes Act expanded the scope of the physical act to cover not only taking and carrying away, but also the assumption of the right of ownership, possession, or control (appropriation) of any property without the consent of the person to whom it belongs.

29. Based on the said judgments, the Counsel for Appellant contends that for the Appellant to be found guilty of Theft, there had to be evidence of dishonest intention 'at the time of taking' to permanently deprive the bank of the monies taken. The Appellant at the trial appears to have run her defence on the premise that her initial 'taking' was innocent and tried to raise the defence of "reasonable belief". The defence the Appellant raised would have been successful under the Penal Code section but not under the Crimes Act Theft definition which has done away with the terms 'take' and "carry away".

30. Prosecution proved that even the initial appropriation was dishonest. The Appellant at trial took up the position that the 1st accused in her capacity as the manager had authorised the payments which to her understanding constituted borrowings meant to be repaid. The Appellant however knew that the money did not belong to the manager and that the correct procedure was not followed in granting the so called approval. There was no documentation to show that a loan or overdraft was approved. PW.1 confirmed that there was no overdraft facility available for the Appellant during the time in question. The withdrawal slips were incomplete and not processed in the computer system. There was no specific time frame within which the repayment was to be made. The Appellant was well versed with the procedure of the bank; still she adopted a procedure which was not known to the accepted banking practice. She would have known that the manager had no authority to approve a payment in violation of the accepted procedure.

31. The Appellant had been taking money from the bank for over several months. She made the complete repayment only when the investigators found her guilty. The fact that the Appellant repaid after she was caught is not a defence to a theft although it would have served as a mitigating factor. A person's appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property [Section 292 (3) of the Crimes Act]. Although the Appellant had repaid the money in full after she was sacked, that gesture would not make her an innocent person.

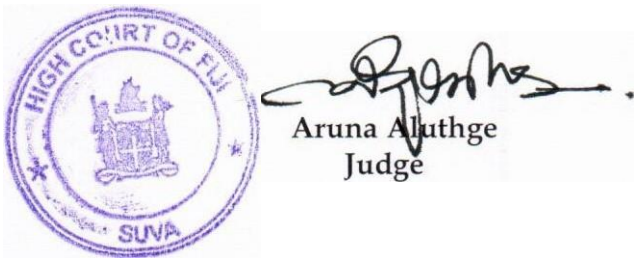
32. The Appellant used the appropriated money to pay for her personal expenses. She dealt with the bank money as her own, and her conduct manifestly speaks for her intention to permanently deprive the bank.

33. The Learned Trial Magistrate has correctly analysed the evidence and applied it to the law. He has given reasons for his decision. There is no error in his judgment. The Grounds (ii) and (iii) must fail.

34. Following Orders are made:

Appeal against conviction is dismissed.

The conviction recorded by the Magistrates Court at Labasa is affirmed.



At Suva

18 October 2019

Solicitors:

Nilesh Sharma Lawyers for the Appellant

Office of the Director of Public Prosecutions for the Respondent