

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL CASE NO. HAA 2 OF 2019

BETWEEN: **NALENDRAN SWAMY** **APPELLANT**

A N D: **THE STATE** **RESPONDENT**

Counsel: Mr. S. Sharma for the Appellant
 Ms. D. Rao for the Respondent

Date of Hearing: 18th June 2019

Date of Judgment: 30th October 2019

J U D G M E N T

1. The Appellant was initially charged in the Magistrate's Court in Labasa on the 6th of December 2011, with Fifty Seven counts of Theft contrary to Section 291, Forgery contrary to Section 156 (1) of the Crimes Act and Using Forged Documents contrary to Section 157 of the Crimes Act. The Appellant had pleaded not guilty to all Fifty Seven counts. Hence, the matter had proceeded to hearing. On the 27th of November 2018, the Prosecution had rolled up and compressed the above fifty seven counts to three counts pursuant to Section 70 of the Criminal Procedure Act. According to the amended charge, the Appellant was

charged with one count of Forgery contrary to Section 156 (1) of the Crimes Act, one count of Using Forged Documents contrary to Section 157 of the Crimes Act and one count of Theft contrary to Section 291 (1) of the Crimes Act. The particulars of the offences are that:

COUNT 1

Statement of Offence (a)

FORGERY: *Contrary to Section 156 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

NALENDRAN SWAMY on the 11th day of November, 2011 to 16th day of July, 2012 at Labasa in the Northern Division, with intent to defraud, forged the signature of JASHMEET SHELVIN KUMAR, on the ANZ withdrawal slip.

COUNT 2

Statement of Offence (a)

USING FORGED DOCUMENT: *Contrary to Section 157 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

NALENDRAN SWAMY on the 11th day of November 2011 to 16th day of July, 2012 at Labasa in the Northern Division, knowingly and fraudulently used ANZ Bank slips with ANZ account number 8117104 for the sum of \$2876.00 knowing the same to be forged.

COUNT 3

Statement of Offence (a)

THEFT: *Contrary to Section 291(1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence (b)

NALENDRAN SWAMY on the 11th day of November, 2011 to 16th day of July, 2012 at Labasa in the Northern Division, dishonestly appropriated sum of \$2876.00 the property of **JASHMEET SHELVIN KUMAR** with intention to permanently deprive the said **JASMEET SHELVIN KUMAR**.

2. On the 29th of January 2019, the Appellant pleaded guilty to all three counts and then admitted the summary of facts read over to him by the prosecution. The learned Magistrate then convicted and sentenced the Appellant to a period of 2 and ½ years for the count of Forgery, 2 and ½ years for the count of Using Forged Document and twelve months for the count of Theft. Aggrieved with the said conviction and the sentence, the Appellant filed this Petition of Appeal on the following grounds, which I reproduce as follows:

- i) *That the learned Magistrate erred in law and in fact in not taking into account that the appellant attempted to retribute the complainant and after being advised by the prosecution the appellant deposited the money into his solicitors account for safe keeping.*
- ii) *That the learned Magistrate erred in law and in fact in not giving any discount to the restitution of the appellant.*
- iii) *That the learned Magistrate erred in law and in fact in not considering imposing a suspended sentence when there was little deception.*

- iv) *That the learned Magistrate erred in law and in fact in not taking into account the progressive approach taken by the appellant and pleading guilty in a matter was pending for over five years on fault of the State in not laying the amended charge in the beginning.*
- v) *That the learned Magistrate erred in law and in fact in not taking into account special circumstances such as appellant being a first offender and restitution before considering the suspended sentence.*
- vi) *That the learned Magistrate erred in law and in fact in directing the money held by the solicitors of the appellant to be paid to the ANZ Bank when there was no facts that ANZ bank have suffered losses and damages and neither the bank is the complainant.*

3. Before I proceed to discuss the above grounds of appeal, I invited the learned counsel for the Appellant and the Respondent to make further legal submissions on the following two grounds, that:
 - i) Whether the learned Magistrate had jurisdiction to hear these three counts pursuant to Section 4 of the Criminal Procedure Act,
 - ii) Whether the summary of facts has disclosed the main elements of the count of Forgery, Using Forged Documents, and theft.
4. The Appellant was initially charged with certain number of counts of Forgery and Using Forged Documents. Then those counts were compressed to one count of Forgery contrary to Section 156 (1) of the Crimes Act and one count of Using Forged Documents contrary to Section 157 of the Crimes Act.

5. Section 156 (1) of the Crimes Act has defined the offence of Forgery as follows that:

“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.”*

6. Accordingly, the main elements of the offence of Forgery as stipulated under Section 156 (1) of the Crimes Act are that:

- i) The Accused,
- ii) Makes a false document,
- iii) With the intention to use it by himself or by another person,
- iv) To dishonestly induce a third person in the third person’s capacity as a public official to accept the said false documents as genuine,
- v) If the said document is accepted, to dishonestly obtains gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or function,

7. Moreover, Forgery is an indictable offence which is triable summarily pursuant to Section 156 (1) of the Crimes Act.

8. Section 157 (1) of the Crimes Act has defined the offence of Using Forged Document.

“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"*

9. Accordingly, the main elements of the offence of Using Forged Document are that:

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

10. In pursuant of Section 157, the offence of Using Forged Document is an indictable offences which is triable summarily.

11. I first draw my attention to discuss the jurisdiction of the Magistrate's Court in relation to indictable offences which are triable summarily. Section 4 (1) of the Criminal Procedure Act deals with the jurisdiction of the High Court and the Magistrate's Court in relation to the offences as stipulated under the Crimes Act. Section 4 (1) of Criminal Procedure Act states that:

"Subject to the other provisions of this Decree—

- a) *any indictable offence under the Crimes Decree 2009 shall be tried by the High Court;*

- b) *any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and*
- c) *any summary offence shall be tried by a Magistrates Court”*

12. Section 4 (1) (b) of the Criminal Procedure Act states that any indictable offence which is triable summarily shall be tried by the High Court or a Magistrates Court at the election of the accused. Hence, it is the right of the accused to elect the forum if he is being charged with an indictable offence which is triable summarily. Unless the accused elects Magistrates Court as the forum, the Magistrates Court does not have the jurisdiction to hear any indictable offence which is triable summarily.
13. Having carefully perused the record of the proceedings in the Magistrate’s court, I find that the accused had not elected the Magistrate’s Court as the forum in which this matter to be tried pursuant to Section 4 (1) (b) of the Criminal Procedure Act. The learned Magistrate had neither invited nor given an opportunity to the accused or his counsel to make such an election before taking the plea for the three offences as charged in the amended charge. Under such circumstances, the learned Magistrate had no jurisdiction to proceed with the counts one and two, thus making the conviction and the sentence imposed against the Appellant in relation to Forgery and Using Forged Document a nullity. In view of the above findings, the conviction and the subsequent sentence in relation to count one and two of the charge cannot be stand.
14. Be it as it may, I now take my attention to the summary of fact. For the convenient, I shall now reproduce the summary of facts as submitted by the States in the Magistrate’s Court as follows:

“On the 29th day of August, 2012 at Labasa Police Station a report was received from one Jashmeet Shelvin Kumar [A-1] aged 17 years a school student that cash was withdrawn from his ANZ bank with account number 8117104 with a sum of \$2876.00.

Upon receiving of the report D/CPL 2794 Sanjeet [C-1] was appointed to be the investigation officer. Documentary investigation was carried out and it was revealed that since 11th day of November, 2011 to 16th day of July, 2012 on 19 separate occasions ANZ Bank withdrawal slips was used with the above account number and different amounts of money was withdrawn. The said documents were uplifted by [C-1] and further more investigations were conducted. A through search in the CCTV footage of the bank was conducted. It was identified that Nalendran Swamy [Accused] aged 23 years a USP Student from Siberia Labasa on the 19 separate occasions had used the uplifted ANZ Bank withdrawal slips to withdraw the amounts.

[Accused] was brought in under arrest where he was caution interviewed and he admitted to the allegations made against him. [Accused] was shown with the ANZ Bank withdrawals slips and admitted that he forged the signatures of the [Victim] and withdrew the amounts from the bank. [Accused] was formally charged for the offence of Forgery, using forged document and theft."

15. According to the main elements of the offences of Forgery and the Using Forged Document, the person who was influenced by the forged document must be a public officer. The public officer then has to accept the forged document as a genius document.
16. Section 4 of the Crimes Act defines the public officer as:

"public official" means—

- i) the President or Vice-President;*
- ii) any person who is appointed or nominated under the provisions of any Act or promulgation or decree or by election, including all—*
- iii) Ministers;*

- iv) *Members of Parliament of Fiji; and*
- v) *Local Government Councillors;*
- vi) *any person employed in the public service;*
- vii) *any person holding an office under the Constitution of Fiji;*
- viii) *any judge or magistrate, or any person holding any other judicial or quasi-judicial office;*
- ix) *any person who holds or performs the duties of an office established by or under any law;*
- x) *any person who is an officer or employee of a government authority or agency, whether or not the authority or agency is established by an Act;*
- xi) *any person who is a contract service provider for a government contract; and*
- xii) *any person who is an officer or employee of a contracted service provider to or under a government contract.*

17. According to the Summary of Facts, the Appellant had produced the forged documents to ANZ Bank, which is a private bank operating in Fiji. Obviously, neither ANZ bank nor the employees of the bank are considered as public officer pursuant to Section 4 of the Crimes Act. Hence, the summary of facts does not reveal that the Appellant had used these alleged forged documents to induce a public officer in order to accept them as genuine documents.

18. The main elements of the offence of Theft are that:

- i) The Accused,
- ii) Dishonestly,
- iii) Appropriates the property belonging to another,
- iv) With the intention of permanently depriving the other of that property.

19. The summary of facts do not reveal any of the elements of the theft. It only states that the Appellant had used the ANZ bank withdrawal slips to withdraw the money. Moreover, the summary of facts states the Appellant had admitted in his caution interview that he had forged the signature and withdraw the money from the Bank.
20. Section 174 (1) and (2) of the Criminal Procedure Act provides the procedure to be followed in order to convict an accused on his own plea of guilty. Section 174 (1) and (2) 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.*
21. In view of the above discussed reasons, it is clear that the learned Magistrate has convicted the Appellant without stating the correct substance of the charge or the complainant to the Appellant. Accordingly, I find the learned Magistrate has not properly convicted the Appellant to the three counts as stipulated under Section 174 (1) and (2) of the Criminal Procedure Act.
22. I accordingly, quash the convictions for the three counts and set aside the sentence imposed by the learned Magistrate on the 5th of February 2019.
23. The States requested a re-trial for this matter. However, the learned counsel for the Appellant emphasized the post charge delay. The Appellant was initially charged for this matter in 2012. Nearly five Resident Magistrates had presided over this matter over the period of seven years. The charges have been hanging over the Appellant over the last

seven years. The delay is substantive, thus have denied the Appellant his right to conclude his trial without reasonable delay. Therefore, I find an order of re-trial would probably prejudice the interest of the Appellant. I accordingly refuse to order a re-trial.

24. The orders of the court,

- i) The convictions for the offences of Forgery, Using Forged Document and Theft are quashed and the respective sentences are set aside.

25. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva

30th October 2019

Solicitors

Messrs. Samusamuvodre Sharma Law for the Appellant.
Office of the Director of Public Prosecutions for the State.