IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL CASE NO. HAA 7 OF 2019

BETWEEN: **ALICK THAGGARD** **APPELLANT**

A N D: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION [FICAC]**

RESPONDENT

Counsel: Mr. Amani Bale for the Appellant
Ms. F. Puleiwai for the Respondent

Date of Hearing: 18th June 2019

Date of Judgment: 22nd November 2019

J U D G M E N T

1. The Appellant had been charged in the Magistrate's Court in Labasa with one count of False Information to Public Servant, contrary to Section 143 (a) of the Penal Code and one count of Conversion, contrary to Section 279 (1) (c) (i) of the Penal Code. The particulars of the offences are that:

FIRST COUNT

Statement of Offence

FALSE INFORMATION TO PUBLIC SERVANT: *Contrary to Section 143 (a) of the Penal Code.*

Particulars of Offence

ALICK THAGGARD *between 1st March 2004 and 31st December 2006 at Labasa in the Northern Division gave* ***SITERI WAQA*** *the Rural Advisory Assistant, Northern, a person employed in the public service, false information that Ministry of Multi Ethnic Affairs grant applied for was for the purpose of building a Community Hall when his plan was to build a Church, which he knows to be false, knowing it to be likely that he will thereby cause* ***SITERI WAQA*** *to approve such application, which she ought not to do if the true state of facts in respect of the Multi Ethnic Affairs grant application were known to her.*

SECOND COUNT

Statement of Offence

CONVERSION: *Contrary to Section 279 (1) (c) (i) of the Penal Code, Cap 17.*

Particulars of Offence

ALICK THAGGARD *between 1st March 2004 and 31st December 2006 at Savusavu in the Northern Division whilst being entrusted with property namely FJD$11,000 by the Ministry of Multi Ethnic Affairs, in order that he may apply for building a Community Hall for the Vatukaroa community, fraudulently converted the said sum for the use or benefit of building a Methodist Church instead.*

2. Subsequent to the hearing of this matter, the learned Magistrate in his judgment dated 31st of August 2018, found the Appellant guilty of both counts and convicted him to the same accordingly. On the 12th of October 2018, the learned Magistrate sentenced the Appellant to a period of six months imprisonment for the offence of False Information to a Public Servant and a period of 31 months imprisonment, with 24 months of non-parole period for

the offence of Conversion. He had further ordered that both sentences to be served concurrently.

3. Aggrieved with the said conviction and the sentence the Appellant files this notice of motion seeking leave of the court to file his grounds of appeal as he failed to file his appeal within 28 days of the conviction and the sentence. The notice of motion is being supported by an affidavit of the Appellant, explaining his reasons for this application. He then filed a supplementary affidavit, providing further reasons. The Respondent filed an affidavit of Jonial Gupta, stating the objections of the Respondent. The learned counsel for the Appellant and the Respondent then filed their respective written submissions on the issue of leave to appeal out of time. Additionally, the learned Counsel for the Appellant and the Respondent have filed written submissions on the proposed grounds of appeals and consented to have the hearing of leave and the hearing of the appeal together.

4. According to Section 248 (1) of the Criminal Procedure Act, an appeal has to be lodged within 28 days of the date of the decision appealed against. However, Section 248 (2) of the Criminal Procedure Act states that the High Court may at any time, for good cause, enlarge the period of limitation as stipulated under Section 248 of the Act. Moreover, the Section 248 (3) of the Criminal Procedure Act has provided certain factors that should be considered as good cause under Section 248 (2) of the Act. They are that:

> *For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —*
>
> *(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
>
> *(b) any case in which a question of law of unusual difficulty is involved;*

(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.

5. The Supreme Court of Fiji in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** has outlined some of the factors that court could take into consideration when it determines an application of this nature. Gates CJ held that:

"Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:

i) The reason for the failure to file within time.
ii) The length of the delay.
iii) Whether there is a ground of merit justifying the appellate court's consideration.
iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
v) If time is enlarged, will the Respondent be unfairly prejudiced?

6. The Appellant filed this notice of motion on the 17th of April 2019, that is nearly six months after the sentence dated 12th of October 2018. The Appellant stated in his two affidavits that his ability to initiate this appeal was restricted as he has been incarcerated. He had initially tried to file his ground of appeal by giving it to a prison officer but it had not eventuated. Sometimes later he had obtained the assistance of an ex-police officer to draft his appeal grounds and file it in the Court of Appeal Registry, which was also failed as the ex-police officer never returned. The Appellant then requested his wife to look for a

private lawyer and she had taken nearly three months to visit various lawyers in Labasa but none of them accepted his appeal matter. Finally in January 2018, his wife managed to obtain the service of Lal Patel Bale Lawyers. The Appellant then found another obstacle, this time he had lost the disclosures of the matter. It took another three months to obtain the disclosures and finalized the notice of motion and the accompanied affidavit. Eventually, nearly six months after his sentence, the Appellant managed to file this Notice of Motion seeking the leave of the court to file his appeal against the conviction and the sentence.

7. The rights of appeal must be exercise according to the framework of the procedures as stipulated by the provisions of the Criminal Procedure Act. The purpose of such a procedure is to bring the litigation to finality. However, on certain grounds the court can grant leave to file the appeal out of the stipulated time. It is a discretion of court and must be exercised judicially. The general approach in this jurisdiction has been to extend the time up to 3 months, however, beyond that an extension become more difficult and discretion becomes less likely to be exercised by the court. (**Koro v State (2008) FJCA 17, Kumar v State; Sinu v State (supra))**.

8. In this matter, the delay is substantive as the Appellant failed to bring up his appeal for nearly six months after the sentence. That being the case, the court must then carefully scrutinize the reason for such a substantive delay.

9. The Appellant in his initial affidavit stated, he had been trying to secure a lawyer to appeal his case since the time of his conviction. His wife had seen number of lawyers in Labasa but none of them accepted his case, until Lal Patel Bale lawyers agreed with it. (*vide paragraph 6 and 7 of the affidavit dated 17th of April 2019*). However, in his supplementary affidavit, the Appellant had changed his initial version and said that once he was convicted, he tried to file his appeal through the prison officers, but they have misplaced his appeal grounds. He has not specifically stated when he tried to file this appeal, whether it was within the 28 days of the sentence or after the 28 days' time period. Aside from that, he had made another attempt to file his appeal with the assistance of an

ex-police officer but that was also ended with a failure. Then only the Appellant launched his protracted search of finding a suitable lawyer to file his appeal. Accordingly, it appears that the Appellant has provided two versions for the delay. The first affidavit states that he had started to look for a lawyer since the time of his conviction, but the second affidavit states he started to look for a lawyer after he failed twice to properly lodge his appeal grounds.

10. Even after he found a suitable lawyer in January 2019, he had taken another three months to file this motion. The Appellant says that he had to wait for nearly three months to obtain the copies of the disclosures. The Appellant has not revealed from whom or from where he had obtained these disclosures. Since the Appellant was represented by the Legal Aid Commission during the hearing in the Magistrate's Court, he would have easily obtained copies of those documents from the Legal Aid Commission.

11. Having taken into consideration the reasons discussed above, I find the delay is substantive and the reasons for the delay are also not reasonable.

12. I now draw my attention to the proposed grounds of appeal in order to determine whether they have a reasonable chance of success. The proposed grounds of appeal of the Appellant are that:

APPEAL AGAINST CONVICTION

i. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of* ***FALSE INFORMATION TO PUBLIC SERVANT****: Contrary to section 143 (a) of the Penal Code, Cap 17, as the Penal Code had been repealed at the time the Accused/Applicant was charged with the offences and replaced with the Crimes Decree 2009 at the time of conviction.*

ii. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of* ***CONVERSION****: Contrary to section 279 (1) (c) (i) of the Penal Code, Cap 17 as the Penal Code had been repealed at the time the Accused/Applicant was charged with the offences and replaced with the Crimes Decree 2009 at the time of conviction.*

iii. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant of* ***FALSE INFORMATION TO PUBLIC SERVANT****: Contrary to section 143 (a) of the Penal Code, Cap 17, as the events of this charge were between ten (10) and twelve years old at the time, and outside the period of limitation at the time of conviction.*

iv. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant by incorrectly applying inappropriate and irrelevant aggravating factors including that the offences took place over 12 years ago, at the time of conviction.*

v. ***THAT*** *the Learned Magistrate erred in Law and in fact when convicting the Accused/Applicant by failing to examine the issues of the length of delay in bringing the charges against him, the time that had since lapsed since the alleged offence, the reason for the delay in bringing the charges and the undue prejudice that this had on the accused as a result.*

13. The first two grounds of appeal against the conviction are founded on the contention that the Penal Code had been repealed at the time the Appellant was charged, hence, the two charges under the Penal Code were defective.

14. Section 393 of the Crimes Act states that the Penal Code still applies to any offence committed against the Penal Code prior to the commencement of the Crime Act. Section 393 states that:

> *"For all purposes associated with the application of Section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Act, and for the purposes of the proceedings relating to such offences the Penal Code shall be deemed to be still in force."*

15. In view the Sections 392 and 393 of the Crimes Act, I find the first two groups of appeal have no prospects of success.

16. The fourth ground of appeal is founded on the basis that the Appellant was charged with the offence of Conversion outside the period of time limitation to institute the proceeding. There is no such limitation to institute criminal proceedings for the offence of conversion. Hence, this ground of appeal also has no chance of success.

17. Fifth and Sixth grounds of appeal stand on the contention the learned Magistrate erred in law and fact in convicting the Appellant by incorrectly applying irrelevant aggravating factors and also failed to take into consideration the length of delay. The learned Magistrate is required to take into consideration the evidence presented before him during the course of the hearing and apply them with the relevant law to satisfy whether the prosecution has proved the main elements of the offence. The aggravating factors or the delay should not be taken into consideration when the learned magistrate determine the guilt of the Appellant. Hence, I find the fifth and sixth grounds of appeal against the conviction also have no chances of success.

18. The third ground of the appeal is formed on the basis that the charge of the False Information to Public Service had filed in breach of Section 187 of the Criminal Procedure Act. The Section 187 of the Criminal Procedure Act states that:

i) This section applies to all offences the maximum punishment for which does not exceed imprisonment for 12 months or a fine of 10 penalty units unless a longer time is allowed by any law for the laying of any charge for an offence under that law.

ii) No offence shall be triable by a Magistrates Court, unless the charge or complaint relating to it is laid within 12 months from the time when the matter of the charge or complaint arose.

iii) The court shall order the dismissal of any proceedings which are in breach of this section.

19. In pursuant of Section 187 of the Criminal Procedure Act, any offence which carries a maximum punishment of 12 months or less or a fine of 10 penalty units, must be instituted within 12 months from the time the charge or the complaint arose.

20. The maximum punishment for the offence of False Information to Public Servant, contrary to Section 143 (a) of the Penal Code is 12 months. Hence, it comes under the category of the offences as defined under Section 187 (1) of the Criminal Procedure Act. The alleged offending has taken place between 1st of March 2004 and 31st of December 2006. The Appellant was charged in the Magistrate's Court for this offence on the 20th of October 2016, that is nearly ten years after the alleged period of this offence. As a result of that, it is clear that the first count in the charge had instituted in breach of the section 187 of the Criminal Procedure Act. Therefore, the first count should not be proceeded and the learned Magistrates should have dismissed it pursuant to Section 187 (3) of the Criminal Procedure Act. Wherefore, I find the conviction and the subsequent sentence imposed against the Appellant in relation to the first count of False Information to Public Servant is not valid and wrong in law. Accordingly, I quash the conviction and set aside the sentence of the offence of False Information to Public Servant.

21. I now proceed to discuss the proposed grounds of appeal against the sentence of the second count.

APPEAL AGAINST SENTENCE

i. ***THAT*** *the Leaned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by incorrectly applying inappropriate and irrelevant aggravating factors including that the offences took place over 12 years ago, at the time of conviction.*

ii. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by failing to examine the issues of the length of delay in bringing the charges against him, the time that had since lapsed since the alleged offence, the reason for the delay in bringing the charges and the undue prejudice that this had on the accused as a result.*

iii. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused//Applicant by applying the higher end of the tariff set down in State v Pauliasi Vadunalaba HAC 134 of 2008 for* ***CONVERSION****: Contrary to section 279 (1) (c) (i) of the Penal Code, Cap 17 as the Penal Code, the highest end of sentencing tariffs should be solely reserved for those offenders who commit gross of serious offences within this type of offence, which this Accused/Applicant did not.*

iv. ***THAT*** *the Learned Magistrate erred in Law and in fact when sentencing the Accused/Applicant by applying/utilizing the "objective seriousness" of the offending as establish in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010, amounting to a double counting of the aggravating factors in this matter.*

v. ***THAT*** *the Learned Magistrate erred in Law and in fact by failing to review similar tariff cases adequately when determining the starting point for the Accused/Applicant's sentence.*

vi. ***THAT*** *the sentence is manifestly harsh an excessive in the circumstances.*

22. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** has discussed the applicable scope of the appellate jurisdiction in respect of the sentences imposed by the lower courts, where it was held that:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."*

23. Accordingly, even if there is an error in the exercise of the sentencing discretion, the Appellate court still could dismiss the appeal if the Appellate court considers that the sentence falls with the permissible range.

24. The acceptable tariff limit of the offence of conversion is 18 months to 3 years. (**State v Pauliasi Vadunalaba (HAC 134 of 2008, Dali v State [2017] FJHC 419; HAA014.2017 (7 June 2017**). The learned Magistrate has clearly taken into consideration the correct tariff limit and reached to the final sentence of thirty one months, which is within the applicable tariff limit. In view of the guidelines stipulated in **Sharma v State [Supra)** I find the proposed grounds of appeal against the sentence of the second count have no chances of success.

25. In conclusion, I grant following orders,

i) The leave to file the appeal out of time in respect of the proposed grounds of appeal 1, 2, 4, 5 and 6 against the conviction and grounds of appeal against the sentence is refused,

ii) Leave is granted to the ground of appeal 3 against the conviction,

iii) The conviction of the first count of False Information to Public Servant is quashed and the subsequent sentence for the False Information to Public Servant is set aside.

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

R.D.R.T. Rajasinghe
Judge

At Suva
22 November 2019

Solicitors
Lal Patel Bale Lawyers for the Appellant.
Fiji Independent Commission Against Corruption for the Respondent.