

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 317 OF 2015

STATE

v

NOUSHEEN MEZBEEN HUSSAIN

Counsel: **Ms. M. Khan with Ms N. Shankar for State**
Mr. T. Toganivalu for Accused

Date of Ruling: **18 November 2019**

RULING

1. A Notice of Motion has been filed by the Applicant this morning seeking following orders:
 - (1). The matter be adjourned for a reasonable cause pursuant to Section 223(1)(a) of the Criminal Procedure Act 2009.
 - (ii). That parties be allowed to view the court transcripts of the trial of this matter in 2017 before Justice Wengappuli.

- (iii) That after hearing from the parties that the Applicant/Accused be granted a PERMANENT STAY in Criminal Case HAC 37 of 315.
2. The Notice of Motion is supported by an affidavit by the Applicant.
3. The Applicant was first arraigned in the year 2015. The final amended information that proceeded to trial is as follows:

First Count
Statement of Offence

THEFT: Contrary to section 291 of the Crimes Decree No. 44 of 2009.

Particulars of Office

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division dishonestly appropriated \$15,362.78 belonging to Art and Soul Limited with the intention of permanently depriving the said Art and Soul Limited of the said amount.

Second Count
Statement of Offence

OBTAINING PROPERTY BY DECEPTION: Contrary to section 317 of the Crimes Decree No. 44 of 2009.

Particulars of Office

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 8th day of February, 2012 and the 2nd day of March, 2012, at Suva, in the Central Division dishonestly obtained \$1,772.10 from Fiji Revenue and Customs Authority with the intention of permanently depriving Fiji Revenue and Customs Authority of the said amount.

Third Count

Statement of Offence

MONEY LAUNDERING: Contrary to section 69(2)(a) and (3)(b) of the Proceeds of Crime Act 1997.

Particulars of Offence

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division used a total of \$17,134.88, that are the proceeds of crime, knowing or ought reasonably to have known that the \$17,134.88 is derived or realised directly or indirectly from some form of unlawful activity.

4. The matter proceeded to trial in 2017 before Justice Wengappuli. The trial was aborted after calling two witnesses for the reasons stated in His Lordship's Ruling dated 14 February 2017. Accordingly, the assessors were discharged and a new trial was ordered.
5. The matter then proceeded to trial before me and a new panel of assessors on 12 November 2019.

6. The State has so far called three witnesses, Shiri Ram who is the complainant in this case, his ex-wife Felicia Verma and a former employee of the complainant's Company, Sydel Whippy.
7. After all the above mentioned three witnesses have given evidence, the last being on 15 November 2019; the Applicant has filed this Notice of Motion. The Applicant believes that she will be highly prejudiced by the following turn of events:
 - (i) Shiri Ram is lying again to the Court by now saying documents that he had said that I destroyed is now available again in a computer that he has discovered in October 2019;
 - (ii) Shiri Ram has mentioned in Court under oath on Thursday 14th November, 2019 that he had met and had lunch with a Prosecution witness who is yet to give her testimony even after he had been warned by the Court that he was still under oath and was not to talk to anyone about the case;
 - (iii) I have been prejudiced by Felicia Verma producing her undisclosed passport from the dock in Court without proper verification and has taken us by surprise.
 - (iv) Sydel Whippy is either lying or contradicting her evidence as Your Lordship will confirm from the Court Records of the previous trial in 2017 that she confirmed there were documents that she signed from me and

now she told the Court that there were no such documents but probably some email from me to Shiri Ram where she was only copied in.

8. The Applicant contends that the prejudicial effects cannot be cured by an adjournment or further disclosures or even the re-calling of witnesses and as a result she will not get a fair trial due to what she calls an abuse of the courts process.

Analysis

9. The Applicant is misconceived when she states that the trial was aborted due to the inconsistency of the two prosecution witnesses' testimonies, Shiri Ram and Sydel Whippy with regards to crucial documents that were required by the Defence. A perusal of the Ruling of Justice Wengappuli dated 14 February 2017 reveals that the trial had been adjourned and later abandoned because the Court was satisfied that some vital documents that might bolster the Defence case had not been disclosed to the Defence. The Court took the view that the denial of an opportunity to the accused to have those documents obtained from the prosecution would amount to 'withholding exonerating evidence'.
10. The position of the Applicant in her defence is that each cheque submitted for signature of the complainant had an attached voucher or excel spreadsheet which contained the breakdown of involved payments for the verification by Shiri of the nature of the payment before his signature was placed.
11. The Applicant says that the Shiri Ram is lying. It is deposed that Shiri Ram, in his witness statement to police, had told that after the Applicant left the

complainant's company, she had disposed off all the supporting documents, records, payment vouchers and other financial records. Nousheen also deleted all the soft copies [data] and there was no backups maintained for the transactions carried out by Nousheen. Shiri Ram in his testimony admitted that his statement to police is not correct as the soft copies of missing documents were recovered recently from a discarded computer.

12. Shiri Ram in his explanation said that he made such a statement to police because, in the circumstances that were present, he had genuinely believed that Nousheen had destroyed all the documents.
13. Evidence of Shiri Ram is that not all the payments done online were supported by vouchers or spreadsheets. Sydel confirmed that there were no paper documents for any salary for Art and Soul in April 2012 and that the salaries were paid online.
14. Shiri Ram in court has revealed that some material was recently found from a discarded computer. He did not say that the hard copies of vouchers or spreadsheets (in the printed form) were recovered. Therefore, he has not completely retracted his previous statement that 'supporting documents, vouchers and financial statements had been disposed off by Nousheen'.
15. Even if Shiri Ram had revealed at a pre-trial stage that he had recovered some soft copies from a discarded computer, it has to be accepted that without producing the hardcopies of vouches and spreadsheets (in the printed form), the Applicant would not be able to show to this court that Shiri Ram had given a written approval (signature) to those transactions.

16. Even the Applicant concedes that even if the trial is adjourned for Shiri Ram to produce these documents which he says he has found in this discarded computer there is no guarantee that it is not been manipulated or tampered with.
17. It is a matter for the assessors to decide whether the said supporting documents actually existed or they have been destroyed and if destroyed who was responsible for the destruction. If the assessors are convinced that Shiri Ram' s statement to police is inconsistent with his testimony in court, let them decide if the inconsistency has been satisfactorily explained. It is a matter for the assessors to decide who is telling the truth. If the assessors find that Shiri Ram is lying let them reject his evidence. It is entirely a matter for the assessors to decide at the end of the trial and not a ground for a permanent stay of proceedings.
18. There is no special permission required to view the records of the aborted trial in 2017. The Applicant through her lawyer could apply for a copy record on payment of the requisite fee.
19. If Shiri Ram or Sydel Whippy had in the aborted trial told the Court under oath that there were supporting documents, the proper course of action would have been to confront Shiri Ram and Sydel Whippy with their previous statements as they took stand. That is how a learned counsel should impeach the credibility of a witness. Asking for a permanent stay at this stage is just sounds an attempt at closing the stable door after the horse has bolted.
20. Shiri Ram has admitted in his evidence that he supplied incorrect information to Courts Co. when he said that Lakalaka was a permanent staff. He has given an

explanation for doing that. Let the assessors decide because Shri Ram had lied to a private company he should be treated a liar in this trial.

21. Lakalaka Vola one of the girlfriends of Shiri Ram was to be a witness for the prosecution. In the latest list filed, the State has informed that it would not be calling Lakalaka Vola. It was informed that Vola has left the country. In any event, it is matter for the Prosecution to decide which witness to call.
22. The Applicant alleges that it becomes highly prejudicial to her case that Shiri Ram admitted on oath that he had lunch with his another girlfriend Christina Lockington, who is going to be the next prosecution witness when Shiri Ram was still under oath and was warned at the lunch break that he was not to talk to anyone about the case.
23. The Court can't speculate that the Shiri Ram has discussed this case with Ms. Lokington during the lunch break. The Defence Counsel will certainly get an opportunity to cross- examine Ms. Lokington once she is called as a witness. It is again a matter for the assessors to decide what weight they should attach to Lokington's evidence and also that of Shiri Ram.
24. Felicia Verma pulling out her passport from her hand bag confirmed that she was not in Fiji on the date the cheque P7 had been signed. The Defence Counsel had the every opportunity to object or seek an opportunity to examine the passport and further cross-examine on this document with the permission of the Court and challenge her evidence. But he failed to do so.
25. Following Orders are made:

- (1). The application for an adjournment for a reasonable cause is dismissed.
- (ii). The application to view and obtain the court transcripts of the aborted trial of this matter in 2017 before Justice Wengappuli is allowed.
- (iii). The application for a Permanent Stay in Criminal Case HAC 37 of 315 is dismissed.



Aruna Aluthge

Judge

At Suva

18 November 2019

**Solicitors: Director of Public Prosecution for State
Toganivalu Legal for Accused**