

IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 48 OF 2018

IN THE MATTER of an Appeal from the decision of the Magistrate's Court, Suva, in Criminal Case No. 737 of 2011.

BETWEEN: ASERI VAKALOLOMA

APPELLANT

AND: FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)

RESPONDENT

Counsel : Mr. Filimoni Vosarogo for the Appellant
Mr. Rashmi Aslam with Mr. Sam Savumiramira for the
Respondent

Date of Hearing : 4 December 2019

Judgment : 9 March 2020

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Suva.

- [2] The Fiji Independent Commission Against Corruption (FICAC), charged the Appellant and Benjamin Padarath, in the Magistrate's Court of Suva, with the following offences:

FIRST COUNT

Statement of Offence (a)

FORGERY: Contrary to Section 341(1) of the Penal Code, Cap 17.

Particulars of Offence (b)

ASERI VAKATOTOVO VAKALOLOMA, between the 14th day of October 2009 to the 31st day of December 2009, at Suva, in the Central Division, with intent to defraud, forged a document namely, the Articles of Association for BECP ENGINEERING CONSTRUCTION FIJI LIMITED whereby making a false page 27 of the said Articles of Association by altering the particulars of subscribers from one Adishwar Padarath of 57 Duncan Road, Domain, Suva, to Voreqe Bainimarama of 228 Ratu Sukuna Road, Domain, Suva, and placed his signature as the witness to the signature purported subscribers.

SECOND COUNT

Statement of Offence (a)

FORGERY: Contrary to Section 341(1) of the Penal Code, Cap 17.

Particulars of Offence (b)

BENJAMIN PADARATH, between the 14th day of October 2009 to the 31st day of December 2009, at Suva, in the Central Division, with intent to defraud, forged a certain document namely, the Articles of Association for BECP ENGINEERING CONSTRUCTION FIJI LIMITED whereby making a false page 27 of the said Articles of Association by altering the particulars of subscribers from Adishwar Padarath of 57 Duncan Road, Domain, Suva, to Voreqe Bainimarama of 228 Ratu Sukuna Road, Domain, Suva, and placed his signature as one of the subscribers.

- [3] As could be observed, the First Count above was a charge against the Appellant (The 1st Accused), while the Second Count was a charge against Benjamin Padarath (The 2nd Accused). The Appellant pleaded not guilty to the charge against him and the matter proceeded to trial.
- [4] At the conclusion of the trial, on 24 July 2018, the Learned Chief Magistrate found the Appellant guilty and convicted him of the said charge.
- [5] Thereafter, on 22 August 2018, the Appellant was sentenced to 12 months imprisonment, which term of imprisonment was suspended for 2 years.
- [6] Aggrieved by the said Order, on 6 September 2018, the Appellant filed a Petition of Appeal in the High Court. The said Petition of Appeal was in respect of both his conviction and sentence.
- [7] This matter was taken up for hearing on 4 December 2019. Counsel for both the Appellant and the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [8] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

APPEAL AGAINST CONVICTION

1. **THAT** the learned trial magistrate erred in law and fact when he failed to properly evaluate the whole evidence according to the elements of the charge and subsequently failing to consider the absence of evidence against the Appellant:
 - (a) Being involved in the prohibited act of the offence of forgery;
and
 - (b) The necessary fault element of intent to defraud necessary to meet the charge, the failure of which led to a judgment that was unsatisfactory and unsafe.
2. **THAT** the Learned Trial Magistrate erred in law and fact when he failed to properly address the evidence applicable to each element

of the charge distinctly and separately as required by law, in light of the Prosecution case being run against the Appellant being a principal offender, the failure of which resulted in a judgment which was perverse and unsatisfactory.

3. **THAT** the Learned Trial Magistrate erred in law when he failed to identify the evidence against the Appellant that satisfied the element of *“the making of a false document that it may be used as genuine”*, the failure of which resulted in a judgment passed in consequences of an error of law and is therefore perverse and unsafe.
4. **THAT** the Learned Trial Magistrate erred in law and fact when found that the Appellant had prepared a false document when in light of the evidence, the Appellant had acted on instruction of client who had signed the document that he witnessed.
5. **THAT** the Learned Trial Magistrate erred in law and fact when he found that there was intent to defraud when no such evidence existed or produced by the Prosecution and such failure resulted in a miscarry and unsafe judgment.

APPEAL AGAINST SENTENCE

6. **THAT** the sentence passed relied on the wrong tariff which resulted in the sentence being manifestly excessive.
7. **THAT** the sentence against the Appellant is disproportionate in all the circumstances of the case and failed to properly consider relevant issues and took into account irrelevant matters resulting in a sentence which is manifestly excessive.

The Law and Analysis

[9] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate’s Courts). The Section is re-produced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[10] Section 247 of the Criminal Procedure Act stipulates that *“No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.”* The provisions of Section 247 are not relevant and applicable in relation to this matter, as the Appellant was found guilty and convicted at the conclusion of the trial.

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

“(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”

The Grounds of Appeal against Conviction

[12] There are five Grounds of Appeal against conviction. Grounds of Appeal 1, 2, 4 and 5 are said to be on matters of fact as well as on a matters of law. Ground of Appeal 3 is said to be on a matter of law. However, in perusing this Ground of Appeal it is clear that reference is made to the evidence as well. Thus, it is my opinion that Ground of Appeal 3 is also on a matter of fact and law.

[13] Ground of Appeal 1 is that the Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the whole evidence according to the elements of the charge. The other four Grounds of Appeal are also in relation to the different elements of the charge and that there was a failure on the part of

the Learned Trial Magistrate to identify and evaluate the available evidence to establish or prove the said elements. For this reason, it is the opinion of this Court that all five Grounds of Appeal are inter-connected. Therefore, I deem it appropriate to discuss or analyse all five Grounds of Appeal against conviction together.

[14] Section 341 (1) of the Penal Code provides that Forgery of any document, which is not made felony under this or any other Act for the time being in force, if committed with intent to defraud, is a misdemeanor.

[15] The Penal Code defines a Felony to mean an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more. A misdemeanor has been defined to mean any offence which is not treason or a felony.

[16] Forgery is defined in Section 332 of the Penal Code. The Section is reproduced below:

“(1) Forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Division the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as provided in this Division.

(2) It is immaterial in what language a document is expressed or in what place within or without the Commonwealth it is expressed to take effect.

(3) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.

(4) The crossing on any cheque, draft on a banker, post office money order, postal order, coupon, or other document the crossing of which is authorized or recognized by law, is a material part of such cheque, draft, order, coupon, or document.”

[17] Therefore, as stated in Section 332 (1), Forgery ***is the making of a false document in order that it may be used as genuine***. [Emphasis is mine]. The term “false document” has been defined in Section 333 of the Penal Code in the following manner:

“(1) A document is false if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor

authorize its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false-

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; or

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it.

(2) A document may be a false document for the purposes of this Division notwithstanding that it is not false in any such manner as is described in subsection (1)."

[18] Section 334 of the Penal Code stipulates that *"An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document."*

[19] Therefore, for the prosecution to prove the First Count against the Appellant it was required to establish beyond reasonable doubt the following elements:

1. That the Appellant;
2. Between 14 October 2009 and 31 December 2009;
3. At Suva, in the Central Division;
4. With intent to defraud;

5. Forged a document namely, the Articles of Association for BECP Engineering Construction Fiji Limited whereby making a false page 27 of the said Articles of Association by altering the particulars of subscribers from one Adishwar Padarath of 57 Duncan Road, Domain, Suva, to Voreqe Bainimarama of 228 Ratu Sukuna Road, Domain, Suva and placed his signature as the witness to the signature purported subscribers.

[20] In his judgment the Learned Chief Magistrate has duly identified the aforesaid elements of the offence. Since in terms of the provisions of Section 332 (1) of the Penal Code, Forgery is defined as the making of a false document, in order that it may be used as genuine, the Learned Chief Magistrate has identified the elements of Forgery in the said manner.

[21] During the trial the prosecution led the evidence of the following three witnesses:

1. Josevata Koroi – Former Acting Assistant Town Planner Suva City Council (SCC) [Magistrate’s Court Copy Record pages 78-79].
2. Abhi Ram – Former Registrar of Companies [Magistrate’s Court Copy Record pages 80-81].
3. Ilaisa Bacau – Investigating Officer at FICAC [Magistrate’s Court Copy Record pages 82-88].

[22] The prosecution also tendered the following documents in support of their case:

- (i) Exhibit P1 – Statement made to FICAC by the Prime Minister Josaia Voreqe Bainimarama, on 26 April 2011.
- (ii) Exhibit P2 – Description of the property at 228 Ratu Sukuna Road (Computer Screen Shot from records maintained at SCC).
- (iii) Exhibit P3 – Memorandum of Association of BECP Engineering Construction (Fiji) Limited, dated 14 October 2009 (5 page document).
- (iv) Exhibit P4 – Page 27 of the Articles of Association of BECP Engineering Construction (Fiji) Limited (The purported false document).
- (v) Exhibit P5 – FICAC search list of Benjamin Padarath’s dwelling house, dated 3 February 2011.

(vi) Exhibit P6 – Record of caution interview for Benjamin Padarath.

(vii) Exhibit P7 – Record of caution interview of Aseri Vakaloloma.

[23] The Appellant elected to give evidence under oath, while Benjamin Padarath (The 2nd Accused) exercised his right to remain silent. A record of the Appellant's testimony is found from pages 89-90 and 95-101 of the Magistrate's Court Copy Record.

[24] The statement made to FICAC by the Prime Minister Josaia Voreqe Bainimarama, on 26 April 2011 (Prosecution Exhibit P1), was tendered to Court by consent of the prosecution and the Appellant. Counsel for the 2nd Accused had intimated that the 2nd Accused does not agree to the said statement being tendered in evidence as of consent.

[25] The said statement is found at pages 130 and 131 of the Magistrate's Court Copy Record. Therein, it is stated by Josaia Voreqe Bainimarama his official quarters as Commander of the Republic of Fiji Military Forces and Prime Minister are at 1 Dakai Street and 228 Ratu Sukuna Road, Muanikau. He states that he did not know Benjamin Padarath personally and never at any time accompanied him to Aseri Vakaloloma & Associates Office in Toorak. He also confirms that the signature alongside Voreqe Bainimarama, 228 Ratu Sukuna Road, Domain, Suva, (on document P4), was not his signature.

[26] The first prosecution witness was Josevata Koroi. He had been employed at the SCC for 43 years and had retired in 2013. In 2011, he was serving as the Acting Assistant Town Planner for the SCC.

[27] The witness testified that as per his records the house at 228 Ratu Sukuna Road belonged to the Crown. It used to be occupied by the Chief Justice. However, in 2011, (at the time FICAC was conducting investigations into this case), the Prime Minister was occupying the residence. In confirmation of this fact, the witness tendered to Court Prosecution Exhibit P2, which is a Computer Screen Shot from records maintained at the SCC.

- [28]** The next prosecution witness was Abhi Ram, the Registrar of Companies. In 2011, he was an Acting Registrar of Companies. The witness testified that BECP Engineering Construction (Fiji) Limited was duly registered with the Registrar of Companies, on 14 October 2009. A copy of the Memorandum of Association of the company was tendered to Court as Prosecution Exhibit P3.
- [29]** At page 5 of P3, the names of the Subscribers (shareholders) of the company have been listed. Accordingly, the Subscribers are Benjamin Padarath, of 3 Alladyce Road, Domain, Suva, (Director) and Adishwar Padarath, of 57 Duncan Road, Suva, (Director). Both Subscribers have placed their signature on the said document. These signatures have been witnessed by the Appellant, Aseri Vakaloloma of Vakaloloma & Associates, 57 Amy Street, Toorak, Suva.
- [30]** The Articles of Association of BECP Engineering Construction (Fiji) Limited have also been tendered to Court. It is a 27 page document. At page 27, it is endorsed by the two named Subscribers (Benjamin Padarath and Adishwar Padarath) that they agree to the said Articles of Association. The signatures of the two Subscribers at page 27 of the said Articles of Association have also been witnessed by the Appellant, Aseri Vakaloloma of Vakaloloma & Associates, 57 Amy Street, Toorak, Suva, on 14 October 2009.
- [31]** The witness Abhi Ram testified that if an alteration or an amendment is to be made to the listed Subscribers, a special resolution has to be passed by the company and relevant forms have to be completed. These documents should then be submitted to the Registrar of Companies for the amendment to be effected. He testified that neither any such resolution nor Prosecution Exhibit P4 was given to the Registrar of Companies for any amendment to be made to the named Subscribers.
- [32]** However, the witness testified thus (at page 81 Magistrate’s Court Copy Record) “if any false information is included in a public document and we register it. Any false information we register. It is capable of use being defrauded (capable of being used to defraud).”

- [33]** The final witness for the prosecution was Ilaisa Bacau, Investigating Officer of FICAC. He testified as to the investigation he carried out in this case. Having obtained the search warrant, he had conducted a search at the 2nd Accused, Benjamin Padarath's residence at 57 Duncan Road, Domain, Suva, on 3 February 2011. During the search, several documents had been taken into custody. This included Prosecution Exhibit P4, the purported false document.
- [34]** The witness had also conducted the caution interview of the 2nd Accused, Benjamin Padarath. He had also been the witnessing officer during the conducting of the caution interview of the Appellant.
- [35]** That was the case for the prosecution.
- [36]** The Appellant testified that he is a lawyer by profession, having graduated in 2000. He had commenced private practice in 2008. He confirmed that he had witnessed the signatures of Benjamin Padarath and Adishwar Padarath as the Subscribers in the Memorandum of Association and the Articles of Association of BECP Engineering Construction (Fiji) Limited, at the time the company was registered with the Registrar of Companies on 14 October 2009.
- [37]** He testified that somewhere in 2009, the 2nd Accused had instructed him to prepare the document P4. He had acted on the said instructions. The witness agreed that he prepared the said document and witnessed the signatures of Benjamin Padarath and Voreqe Bainimarama on the said document. He also confirmed that he placed the seal of his law firm on the said document.
- [38]** The Appellant testified that he had requested the 2nd Accused to provide him with further documents, including the company resolution for change of Directors, in order to lodge P4 with the Registrar of Companies.
- [39]** In his judgment the Learned Chief Magistrate has briefly summarized the evidence led in the case.

- [40] The Appellant contends that the Learned Chief Magistrate erred in law and fact when he failed to properly evaluate the totality of the evidence in this case according to the elements of the charge.
- [41] In support of this contention, the Appellant referred to the cases of ***Campbell v. Director of Public Prosecution for the Commonwealth of Australia*** [1995] Victoria Reports 82; 1995 2VR 654 (21 December 1994); and ***Sheila Sebastian v. R Jawaharaj & Another*** Supreme Court of India, Criminal Appeal Nos. 359-360 of 2010 (11 May 2018).
- [42] However, having perused the aforesaid two Judgments, I agree with the counsel for the Respondent, that the above two cases must be distinguished from the facts and circumstances of this case, especially in relation to the fault element required to prove a case of Forgery, in terms of Section 341 (1) of the Penal Code.
- [43] In terms of the Penal Code the requisite fault element to establish a case of Forgery is the intention to defraud. As stated before, Section 334 of the Penal Code stipulates that *“An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.”*
- [44] In the instant case, the Appellant admits that he prepared the purported document P4 on the instruction of his client Benjamin Padarath. He also admits that he had witnessed the signatures of Benjamin Padarath and Voreqe Bainimarama on the said document.
- [45] The Registrar of Companies, Abhi Ram testified that if an alteration or an amendment is to be made to the listed Subscribers or shareholders in a company, a special resolution has to be passed by the company and relevant forms have to be completed. No such resolution was made available to the Appellant at the time he prepared the

document P4. The Appellant testified that he had requested the 2nd Accused to provide him with the said documents, including the company resolution for change of Directors, in order to lodge P4 with the Registrar of Companies. This shows that the Appellant was well aware that further documents were required prior to an alteration or amendment being made to the listed Subscribers or shareholders in a company. Notwithstanding, the Appellant had gone ahead and prepared the purported document P4.

[46] In terms of the law, Forgery is the making of a false document in order that it may be used as genuine. In terms of Section 333 (1) of the Penal Code *“A document is false if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorize its making”*.

[47] It is clear from the statement made by the Prime Minister Josaia Voreqe Bainimarama that he never made or authorised the making of any such document.

[48] Section 332 (3) of the Penal Code provides that Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.

[49] From all the facts and circumstances of this case, I am of the opinion, that the prosecution has established beyond reasonable doubt that at the time the Appellant made or prepared document P4, he was making a false document in order that it may be used as genuine, in terms of the provisions of Section 332 (1) of the Penal Code.

[50] Furthermore, since at the time the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded, in this instance the said Josaia Voreqe Bainimarama, the intention to defraud is presumed to exist in terms of the provisions of Section 334 of the Penal Code.

[51] Considering all the above, I am of the opinion that the prosecution has established beyond reasonable doubt that the Appellant Forged a document namely, the Articles of Association for BECP Engineering Construction Fiji Limited whereby making a false page 27 of the said Articles of Association by altering the particulars of subscribers

from one Adishwar Padarath of 57 Duncan Road, Domain, Suva, to Voreqe Bainimarama of 228 Ratu Sukuna Road, Domain, Suva and placed his signature as the witness to the signature purported subscribers, with the intention to defraud.

[52] Therefore, the finding of the Learned Chief Magistrate that the prosecution has established the charge against the Appellant beyond reasonable doubt is justified. I find that all the Grounds of Appeal against conviction are without merit and the said Grounds of Appeal are rejected.

The Grounds of Appeal against Sentence

[53] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*“...It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v. The King* [1936] HCA 40; [1936] 55 CLR 499).”*

[54] These principles were endorsed by the Fiji Supreme Court in *Naisua v. The State* [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*“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. AAU 0015 of 1998. 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.”*

[55] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (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.

[56] In **Sharma v. State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

*"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikелеkelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] 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."

[57] In this case, the Appellant has filed two Grounds of Appeal against his sentence. The Appellant contends that the sentence passed relied on the wrong tariff which resulted in the sentence being manifestly excessive and also that the sentence against him is disproportionate in all the circumstances of the case and failed to properly consider relevant issues and took into account irrelevant matters resulting in a sentence which is manifestly excessive.

[58] The Appellant argues that the case warranted a recording of a non-conviction according to law and even the imposing a suspended sentence was excessive. In support of this contention, the Appellant makes reference to Sections 15 and 16 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act").

- [59] The Appellant was charged in terms of the provisions of Section 341 (1) of the Penal Code which provides that Forgery of any document, which is not made felony under this or any other Act for the time being in force, if committed with intent to defraud, is a misdemeanor.
- [60] In passing his sentence the Learned Chief Magistrate has stated that since the Appellant has been convicted of a misdemeanor under the Penal Code, the maximum sentence is 2 years imprisonment.
- [61] Although, the Learned Chief Magistrate has referred to the case of **State v. Sinha** [2010] Fiji High Court 589; HAC15.2009L (10 December 2010); where the maximum penalty for Forgery in that case had been 14 years and the tariff was said to be between 18 months to 3 years, he has expressly stated that since this offence is a misdemeanor, the tariff will be readjusted to fit into the maximum penalty of 2 years imprisonment.
- [62] In determining the starting point within a tariff, the Court of Appeal, in **Laisiasa Koroivuki v. State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

- [63] Based on the objective seriousness of the offence, the Learned Chief Magistrate has selected 18 months imprisonment as the starting point of the sentence.
- [64] Although, during the sentencing submissions, the State made reference to several aggravating factors the Learned Chief Magistrate has stated that there were no special aggravating features for this offence as the actions of the Appellant were reflected in

the particulars of the charge. For the said reason, the Chief Magistrate has not added any further penalty for aggravating circumstances.

[65] For the Appellant's previous good conduct, the Learned Chief Magistrate has granted him a concession of 6 months, thereby arriving at a sentence of 12 months imprisonment.

[66] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[67] In terms of the above provisions, the Learned Chief Magistrate, has deemed it appropriate to suspend the sentence against the Appellant. Accordingly, the sentence of 12 months imprisonment has been suspended for 2 years.

[68] The primary reason for doing so is that the Learned Magistrate had acknowledged the fact that this matter was pending in Court since 2011. The period of offending was between October and December 2009. Thus at the time sentence was to be imposed on the Appellant in August 2018, it was nearly 9 years from the date of offending.

[69] Therefore, this Court is of the opinion that the Learned Magistrate has considered all the relevant factors in arriving at his sentence. The final sentence imposed on the Appellant cannot be said to be harsh, excessive or unreasonable.

[70] Considering all the above, I am of the opinion that the grounds of appeal against sentence are also without merit.

Conclusion

[71] For all the reasons aforesaid, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[72] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Chief Magistrate Magistrate's Court of Suva is affirmed.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva

This 9th Day of March 2020

Solicitors for the Appellant :
Solicitors for the Respondent:

Mamlakah Lawyers, Barristers & Solicitors, Suva.
Office of the Fiji Independent Commission Against
Corruption (FICAC), Suva.