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

CRIMINAL APPEAL NO. HAA 50 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: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**

APPELLANT

AND: **ASERI VAKATOTOVA VAKALOLOMA**

1ST RESPONDENT

AND **BENJAMIN PADARATH**

2ND RESPONDENT

Counsel : Mr. Rashmi Aslam with Mr. Sam Savumiramira for the Appellant
Mr. Filimoni Vosarogo for the 1st Respondent
Mr. Simione Valenitabua for the 2nd Respondent

Date of Hearing : 29 January 2020
Judgment : 10 March 2020

JUDGMENT

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

[2] The Fiji Independent Commission Against Corruption (FICAC), charged the 1st and 2nd Respondents, 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 1st Respondent, while the Second Count was a charge against the 2nd Respondent. 1st and 2nd Respondents pleaded not guilty to the charges against them and the matter proceeded to trial.

[4] At the conclusion of the trial, on 24 July 2018, the Learned Chief Magistrate found the 1st and 2nd Respondents guilty and convicted them of the said charges.

[5] Thereafter, on 22 August 2018, the 1st Respondent was sentenced to 12 months imprisonment, which term of imprisonment was suspended for 2 years; and the 2nd Respondent was sentenced to 14 months imprisonment, which term of imprisonment was suspended for 2 years.

[6] Aggrieved by the said Order, on 18 September 2018, the Appellant filed a Petition of Appeal in the High Court.

[7] However, on 4 December 2019, FICAC filed a Notice of Withdrawal of Appeal against the Sentence of the 1st Respondent. As such, this matter proceeds only in respect of the 2nd Respondent.

[8] This matter was taken up for hearing on 29 January 2020. 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.

[9] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

APPEAL AGAINST SENTENCE

1. The Learned Magistrate erred in law in failing to consider the principle of deterrence provided in the sentencing guidelines under the Sentencing and Penalties Act No. 42 of 2009.

2. The Learned Magistrate's sentence is manifestly lenient and grossly inadequate having regard to all the circumstances of the case.

3. The Learned Magistrate erred in fact and law in imposing suspended sentences without sentencing the Respondents to an immediate custodial sentence.

4. The Learned Magistrate erred in fact and law in attributing the delay of the proceedings to all parties in considering suspended sentences.

5. That the Fiji Independent Commission Against Corruption reserves the right to file additional Grounds of Appeal once the Court Records have been received.

The Law and Analysis

[10] Section 246 of the Criminal Procedure Act No 43 of 2009 (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.

[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."

<u>The Grounds of Appeal against Sentence</u>

[12] 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)."*

[13] 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."*

[14] 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.

[15] 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 **Naikelekelevesi –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."

[16] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[17] Section 4(2) of the Sentencing and Penalties Act provides that in sentencing offenders a Court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[18] In this case, the Appellant takes up the position that the Learned Chief Magistrate erred in law in failing to consider the principle of deterrence provided in the sentencing guidelines under the Sentencing and Penalties Act. The Appellant submits that the sentence imposed on the 2nd Respondent is manifestly lenient and grossly inadequate having regard to all the circumstances of the case.

[19] It is further submitted that the Learned Chief Magistrate erred in fact and law in imposing a suspended sentence without sentencing the 2nd Respondent to an immediate custodial sentence and that he erred in fact and law in attributing the delay of the proceedings to all parties in considering suspended sentences.

[20] The offences for which the two Respondents were charged are serious offences. However, I agree with the contention of the State that although the two Respondents were charged as principal offenders, considering all the facts and circumstances of this case, it is obvious that the level of culpability of the 2nd Respondent is greater.

[21] The Appellant states that the 2nd Respondent's culpability is greater due to the fact that the company that was incorporated (BECP Engineering Construction Fiji Limited) belonged to the 2nd Respondent's family and he was also a Director/Shareholder of the said company. By making a forged document, purportedly showing that Voreqe Bainimarama (The Prime Minister) was also a subscriber of the company, the 2nd Respondent, as Director/Shareholder of the company, would have benefitted. Further there is evidence in this case to establish that it was due to the insistence of the 2nd Respondent that the 1st Respondent prepared the forged document.

[22] In deciding on the sentence to be imposed on the 2nd Respondent, the Learned Chief Magistrate has considered the testimony of the character witness and also the written character references submitted on his behalf.

[23] The Learned Chief Magistrate has also referred to the fact that the 2nd Respondent has previous convictions. As per the previous convictions report filed in Court, 8 previous convictions have been recorded against the 2nd Respondent. At the time of sentencing two of the said previous convictions were active and relevant.

(i) Suva Magistrate's Court Case No.594 of 2011 **-** Giving False Information to a Public Servant – sentenced to 25 months imprisonment, with a non-parole period of 16 months, on 9 March 2016.

(ii) Suva Magistrate's Court Case No. 1142 of 2016 – Obtaining Property by Deception – sentenced to 12 months imprisonment, 6 months concurrent to his current sentence and other 6 months suspended for 2 years, on 21 April 2017.

[24] 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.

[25] 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.

[26] Based on the objective seriousness of the offence, the Learned Chief Magistrate has selected 18 months imprisonment as the starting point of the sentence.

[27] 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 Respondents were reflected in the particulars of the charge. For the said reason, the Chief Magistrate has not added any further penalty for aggravating circumstances.

[28] Considering the 4 months period that the 2nd Respondent was in remand for this case the Learned Chief Magistrate has deducted the said 4 months as time served and arrived at a final sentence of 14 months imprisonment.

[29] 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.*

[30] In terms of the above provisions, the Learned Chief Magistrate, has deemed it appropriate to suspend the sentence against the 2nd Respondent. Accordingly, the sentence of 14 months imprisonment has been suspended for 2 years.

[31] The primary reason for doing so is that the Learned Chief 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 Respondents in August 2018, it was nearly 9 years from the date of offending.

[32] The Appellant states that the Learned Chief Magistrate had erred in attributing the delay of the proceedings to all parties in considering suspended sentences. Having gone through the record of the proceedings, I agree with the Appellant that attributing the delay of the proceedings to all parties was incorrect. In fact the main cause of the delay during the trial could be largely attributable to the Respondents.

[33] However, the fact remains that this was an offence committed in 2009, for which sentence had been imposed in 2018. This is a delay of 9 years since the date of offending. This Court cannot ignore this factor.

[34] Furthermore, in terms of Section 26 of the Sentencing and Penalties Act the imposition of a suspended sentence was at the sole discretion of the Chief Magistrate. Although, the reasons provided by him for imposing a suspended sentence may have been inadequate, I am of the opinion that this Court should not interfere with the said sentence imposed by the Chief Magistrate.

[35] As stated before, 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.

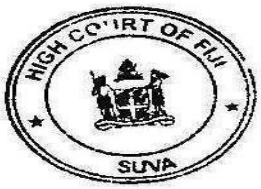
[36] For all the reasons aforesaid, I conclude that this appeal should stand dismissed and the sentence be affirmed.

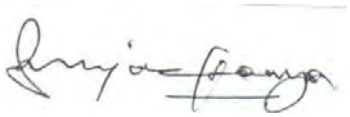
FINAL ORDERS

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

1. Appeal is dismissed.

2. The sentence imposed by the Learned Chief Magistrate, Magistrate's Court of Suva is affirmed.





Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 10th Day of March 2020

Solicitors for the Appellant:	**Office of the Fiji Independent Commission Against Corruption (FICAC), Suva.**
Solicitors for the Respondents:	**Mamlakah Lawyers, Barristers & Solicitors, Suva for the 1st Respondent.** **Valenitabua & Associates, Barristers & Solicitors, Suva for the 2nd Respondent.**