IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 57 of 2019

BETWEEN : **SULIASI SUKANAIVALU**

APPELLANT

A N D : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

RESPONDENT

Counsel : Ms. J. Singh for the Appellant.
: Ms. F. Puleiwai for the Respondent.

Date of Hearing : 15 June, 2020
Date of Ruling : 29 June, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Lautoka as follows:

COUNT ONE

Statement of Offence

SOLICITING AN ADVANTAGE: Contrary to section 3 of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

SULIASI SUKANAIVALU on or about the 19th day of October, 2012 in Lautoka in the Western Division whilst being a prescribed officer namely an Assistant Complaints Officer of the Fiji Independent Commission Against Corruption without the general or special permission of the President, solicited an advantage of $500.00 from one Muneshwar Avikash Vinod.

COUNT TWO

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE: Contrary to section 326 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SULIASI SUKANAIVALU on or about the 19th day of November, 2012 in Lautoka in the Western Division engaged in a conduct namely intervened in the recovery of a debt from one Aseri Cama for one Muneshwar Avikash Vinod and as a result of the said conduct obtained a financial advantage for himself namely $400, knowing that he is not eligible to receive that financial advantage.

COUNT THREE

Statement of Offence

FALSE STATEMENT ON OATH: Contrary to section 177 (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SULIASI SUKANAIVALU on the 11th day of December, 2012 in the Western Division being required by law to make an Affidavit for the purpose of certifying the service of a Notice of Hearing dated 12th

November, 2012 issued by the Small Claims Tribunal Western Division, willfully made a statement which is material for the said purpose namely that the said Notice of Hearing was served on one Aseri Cama on the 29th November, 2012 at Lauwaki village, and he knew the statement to be false.

2. The appellant had pleaded not guilty to all the counts and the matter proceeded to hearing in the Magistrate's Court. The prosecution called six witnesses whereas the appellant through his counsel exercised his right to remain silent and did not call any witness.

3. On 15th April, 2019 the appellant was found guilty of all the three counts and convicted accordingly.

4. After considering mitigation and sentence submissions the appellant was sentenced to 56 months imprisonment and fined 10 penalty units in default 100 days imprisonment with a non-parole period of 3 years.

BRIEF SUMMARY OF FACTS

5. On the 16th October 2012, Muneshwar Avikash Vinod (PW1) lodged a report at the FICAC office, Lautoka in regards to one Aseri Cama, (PW2) of Lauwaki Village, Lautoka who had sold him 3 blocks of land for $3,000.00 each.

6. PW1 stated that he had entered into an oral agreement with Aseri that $1,400.00 was to be paid upfront and thereafter to pay $100.00 every month for each block of land. PW1 stated that he paid $1,500.00 as a deposit on 21 August, 2012 and thereafter he paid the sum of $300.00 for the 3 blocks of land on 01 September, 2012. Both payments were

receipted by Aseri. PW1 further stated he was building his house when some members of the *mataqali* from Lauwaki village stopped him.

7. The accused informed PW1 to go and lodge his grievances with the iTaukei Lands Trust Board (TLTB) since FICAC did not handle such complaints, thus PW1 went to TLTB and they were able to assist him with another piece of land, however there were again some issues with that piece of land and PW1` decided to come again to FICAC office for further assistance him.

8. The accused again received PW1's complaint and informed him that it was a Small Claims Tribunal matter in respect of his claim against Aseri Cama. The accused told PW1 to get a form from the Small Claims Tribunal office.

9. The accused filled the form and attached all the documents before informing PW1 to have the same signed before a Justice of Peace and thereafter to have the same filed at the Small Claims Tribunal registry. PW1 attended to the same and then had it filed at the registry.

10. On 12th of November, 2012, PW1 went back to the accused and asked him to assist him with the service. The accused informed PW1 to wait for him and they will go together to serve the documents on Aseri. The accused and PW1 went to Lauwaki village to serve the Small Claim Tribunal Claim and Notice of Hearing on Aseri Cama. The date given by the Small Claims Tribunal registry was 28th November, 2012 for the hearing. Upon arrival at Lauwaki village, no one was at the residence of Aseri, so the accused and PW1 left the notice on the front porch.

11. On that same day Aseri Cama came back from a church gathering and saw the notice on his front porch he tried contacting PW1 but was not

successful until 13th November 2012. PW1 told Aseri to go and see the accused at the FICAC office.

12. On 15th of November, 2012, Aseri went to the FICAC office where the accused asked Aseri to pay the total sum of $2,050.00 as mentioned in the Small Claims Tribunal form. Aseri requested if he could pay the said sum in installments, to which the accused agreed.

13 On the 19th of November 2012, Aseri went to the FICAC office again where he clarified with the accused whether to pay the money to him or to PW1. Aseri was advised by the accused that he could pay the money to him and he will prepare a receipt and thereafter will give the money to PW1 once the whole sum is collected.

14. The sum of $400.00 cash was then paid to the accused who confirmed that the sum of $400.00 was received by him. On the same day PW1 followed up with the accused about his complaint but was not informed about the payment made by Aseri. However, the accused asked PW1 for $500.00 since his wife was sick and he needed the money. PW1 withdrew cash of $500 and gave it to the accused in his office.

15. On 28 November, 2012, PW1 attended to his case at the Small Claims Tribunal where he was told that the affidavit of service was not yet to be received by the registry. PW1 met the accused on that same date and inquired about the affidavit of service which the accused stated that he had forgotten at his house but he will attended to it and have it filed thereafter. PW1 also informed the accused his case will be called again at the Small Claims Tribunal on 14 December, 2012.

16. Again in December 2012, Aseri went to the FICAC office to pay another installment to the accused and was informed by one Aporosa Mairewa,

that he was not supposed to be paying money to the accused but to the Small Claims Tribunal registry.

17. On 10 January, 2013, immediately after the order was given by the Referee at the Small Claims Tribunal, the order was served on Aseri here PW1 then came to know about $400.00 that was already paid to the accused on 19th November 2012, which is the same date PW1 had given the $500 to the accused.

18. On the 28th day of January, 2013, PW2 formally lodged a complaint at the FICAC office against the accused for failing to pay him the sum of $400.00.

19. Furthermore, in his Affidavit of Service, the accused had mentioned that he had served Aseri with the true copy of the Claim and Notice of Hearing at Lauwaki village, Saweni on the 29th November 2012 when in fact the documents were served on Aseri on 12th November, 2012. The affidavit of service was sworn by the accused before a Commissioner for Oaths to whom the accused had stated false information regarding the date of service of the Small Claims Tribunal form and the Notice of Hearing to Aseri.

20. After investigations were conducted the accused was interviewed under caution and thereafter he was charged for the above three counts.

21. The appellant being aggrieved by the conviction and sentence filed the following amended grounds of appeal through his counsel.

APPEAL AGAINST CONVICTION

1. *The learned Magistrate erred in law and in fact when he failed to address the issue that the Prosecution has proved each element of the offence beyond reasonable doubt.*

2. *The learned Magistrate erred in law and in fact when he failed to consider the entire evidence on its totality for all the charges laid against the Appellant.*

3. *The learned Magistrate erred in law and in fact when he had failed to properly evaluate the defence of the Appellant.*

APPEAL AGAINST SENTNECE

1. *The learned Trial Magistrate erred in law and in fact when he failed to decide that the sentence for the three charges against the Appellant ought to run concurrently as they were all committed within the same transaction.*

2. *The learned Magistrate erred in law and in fact when he also imposed a fine of 10 penalty units which carries 100 days of imprisonment in default as this is "double punishment".*

3. *The learned Magistrate erred in law and in fact when he did not give enough discount for the Appellant's mitigating factors.*

4. *The leaned Magistrate erred in law and in fact when he gave a non-parole period of 3 years depriving the Appellant an opportunity for rehabilitation*

22. Both counsel filed substantive and supplementary submissions and also made oral submissions during the hearing for which this court is grateful.

APPEAL AGAINST CONVICTION

1. *The learned Magistrate erred in law and in fact when he failed to address the issue that the Prosecution has proved each element of the offence beyond reasonable doubt.*

2. *The learned Magistrate erred in law and in fact when he failed to consider the entire evidence on its totality for all the charges laid against the Appellant.*

3. *The learned Magistrate erred in law and in fact when he had failed to properly evaluate the defence of the Appellant.*

23. In my view all the above grounds can be dealt with under the following sub headings:

(a) Proof beyond reasonable doubt of each element of the offences

24. The appellants counsel argued that in the judgment the learned Magistrate had failed to address the issue that the prosecution has proved each element of the offences beyond reasonable doubt.

25. The appellant's counsel in her written submissions and oral arguments focused her attention in respect of the count of soliciting an advantage being count one and obtaining a financial advantage being count two.

26. In respect of count one the counsel submits that there was no evidence in respect of the final element of the offence that the appellant had solicited an advantage when he obtained $500.00 from Muneshwar for his sick wife since it had nothing to do with the appellant being a FICAC officer. Counsel argues there was no promise or advantage given to the complainant by the appellant and that intention being a fault element of this offence the appellant in his caution interview had stated that he had taken the money as a loan.

27. Finally, counsel submits that there was no evidence to suggest that the appellant had offered to return a favour as a FICAC officer and that the transaction that had accrued did not give rise to the offence of soliciting an advantage therefore the appellant was wrongly convicted.

28. The above submission is misconceived firstly the offence of soliciting an advantage does not have the intention of the appellant as an element of the offence. The following are the elements of the offence of soliciting an advantage:

a) A prescribed officer;
b) Without the general permission of the President;
c) Solicits any advantage.

29. It was undisputed at the trial that the appellant was a FICAC officer and he did not have the permission of his appointing authority to ask for the sum of $500.00 from the complainant.

30. Section 2 (2) (b) of the Prevention of Bribery Act states:
" (b) a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands, invites, asks for or indicates

willingness to receive, any advantage, whether for himself or for any other person."

31. Advantage in section 2 (1) (a) of the Prevention of Bribery Act is defined as:

"any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description."

32. The complainant had told the court that it was the appellant who had asked for $500.00 for his wife's treatment which was handed over in cash to the appellant whilst he was employed as a FICAC officer. From the evidence of the complainant he had gone to FICAC to lodge a complaint regarding his land matter and he was assisted by the appellant. The complainant was assisted by the appellant in lodging his small claim tribunal forms and so on. It was during this time the appellant had asked for $500.00 from the complainant which he had given to him.

33. The appellant also did not deny receiving the $500.00 as a loan from Muneshwar per his charge statement, the fact that the appellant had asked for the money which was given to him the offence was committed. It is immaterial for what purpose the appellant had received the money.

34. In respect of the second count of obtaining a financial advantage the appellant's counsel argued that the evidence did not reveal that the appellant knew or believed that he was not entitled to receive the money from Aseri Cama. In his caution interview the appellant had stated that he believed that he was helping Muneshwar (PW1). Muneshwar had informed him that he wanted full payment of $1,800.00 so the appellant

kept the money. Counsel submits that there was no evidence that the appellant was not entitled to receive the money from the complainant.

35. The above submission is also misconceived the appellant knew that there was a Small Claims Tribunal proceedings instituted by the complainant Muneshwar against Aseri for the payment of $1800.00. The appellant also knew that any payment by Aseri ought to be made to the complainant, and not to him. The appellant in his caution interview admitted receiving $400.00 cash from Aseri and without giving it to the complainant used the money.

36. Furthermore, the complainant informed the court that he had met the appellant before this matter ended up in court where the appellant had told the complainant Muneshwar to lie to the FICAC officer during the investigations that the appellant had already paid the $400.00 to the complainant.

37. A perusal of the Magistrate's Court judgment dated 15th April, 2019 shows that the learned Magistrate had considered each charge separately from the other and he had discussed the elements of each charge in light of the evidence adduced before coming to a conclusion.

38. No error can be attributed to the learned Magistrate in this regard.

(b) Failure to consider evidence for all the charges

39. The appellant's counsel argued that the learned Magistrate failed to consider the entire evidence in its totality for all the charges.

40. As I have mentioned above the judgment has clearly detailed the elements of each count separately and the learned Magistrate has taken the evidence in respect of these counts separately as well.

41. When evaluating the evidence the learned Magistrate took care in treating the evidence in respect of each count separately from the other. The judgment of the learned Magistrate has been specific to each count including the evidence which was properly and correctly taken into consideration.

42. There is no error made by the learned Magistrate under this heading.

(c) Failure to properly evaluate the defence case

43. The appellant was represented by counsel at trial after the no case to answer ruling the appellant exercised his right to remain silent and did not call any witness.

44. The defence of denial was obvious from the cross examination of the prosecution witnesses. The learned Magistrate had taken the defence position into account at paragraphs 25, 32, and 34 of the judgment.

45. From the evidence adduced and the cross examination undertaken the learned Magistrate was mindful of the appellant's defence of denial and he had correctly concluded that the defence was unable to create a reasonable doubt in the prosecution case and that all the prosecution witnesses were not discredited.

46. All the grounds of appeal against conviction are dismissed due to lack of merits.

APPEAL AGAINST SENTENCE

1. *The learned Trial Magistrate erred in law and in fact when he failed to decide that the sentence for the three charges against the Appellant ought to run concurrently as they were all committed within the same transaction.*

2. *The learned Magistrate erred in law and in fact when he also imposed a fine of 10 penalty units which carries 100 days of imprisonment in default as this is "double punishment".*

3. *The learned Magistrate erred in law and in fact when he did not give enough discount for the Appellant's mitigating factors.*

4. *The learned Magistrate erred in law and in fact when he gave a non-parole period of 3 years depriving the Appellant an opportunity for rehabilitation*

LAW

47. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

48. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"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. AAU0015 at [2]. 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."

49. All the grounds of appeal can be dealt with under different sub heading since the main complaint raised is that the sentence is excessive.

(a) Concurrent sentence should have been appropriate

50. The appellant's counsel submits that all the offences were committed as part of the same transaction and therefore all the counts should have been concurrent to each other.

51. At paragraph 17 of the sentence the learned Magistrate had observed as follows:

"I find that these offences have been committed in the same transaction. However, whilst first two counts have been committed to the victims, the third count is with regard to the due process of law. I am of the view that you previously being an officer of the Small Claim Tribunal and having the special knowledge has tampered with the due process of the Tribunal as

such I am of the view that first two counts should run concurrent to each other and third count should run consecutively.

52. Under section 22 (1) of the Sentencing and Penalties Act all sentences must be concurrent with any uncompleted sentence or sentences of imprisonment unless directed by the court to be consecutive.

53. In my judgment when a sentencing court imposes a consecutive sentence he or she should give a reason why such a position/course is being taken. The learned Magistrate gave an explanation why he made the third count consecutive to the first two counts at paragraph 17 of the sentence as mentioned above.

54. The comments or observations made by the learned Magistrate are justified in the circumstances of the offending which was meant to act as a deterrent. However, the learned Magistrate did not direct his mind to the totality principle in that the final sentence for all the counts were 56 months of imprisonment with a fine of $1,000.00 in default 100 days of imprisonment. This means the appellant has to serve 4 years and 8 months imprisonment and upon default in payment of fine another 3 months and 10 days is to be added. In essence in default of payment of fine the appellant is to serve 4 years 11 months and 10 days imprisonment with a non-parole period of 3 years.

55. In my view considering the totality principle of sentencing the final sentence in its current form is excessive particularly so when 2 years imprisonment for the third count of false statement on oath is made consecutive to the other two counts.

TOTALITY PRINCIPLE

56. The totality principle of sentencing is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences or when making sentences consecutive.

57. In *Mill v The Queen [1988] HCA 70* the High Court of Australia in its judgment cited D.A. Thomas, Principles of Sentencing (2nded. 1979) pp. 56-57 as follows:

"the effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms; 'when a number of offences are being dealt with and specific punishment in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic producers. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

58. In Fiji the above principles have been approved and applied by the court in many cases a few to mention are *Tuibua v The State, [2008] FJCA 77, Taito Raiwaqa v The State, [2009] FJCA 7* and *Asaeli Vukitoga v The State, Criminal Appeal No: AAU 0049 of 2008.*

59. Whilst the overall criminality of the appellant cannot be doubted, however, in my considered view the total sentence has a crushing effect on the appellant. This ground of appeal is allowed.

(b) Fine of 10 penalty units

60. The appellant's counsel submitted that apart from the imprisonment term the learned Magistrate imposed a fine of $1,000.00 in default 100 days imprisonment which is excessive. The counsel further says that the appellant had lost his employment as a result of the allegations which was punishment in itself.

61. This court accepts that section 12 (2) of the Prevention of Bribery Act makes it mandatory for a fine and an imprisonment term to be imposed for the offence of soliciting an advantage the learned Magistrate had acted in compliance with the law unfortunately he did not give any reason as to how he had arrived at the fine of $1,000.00. Ms. Puleiwai in her fairness did concede that the fine was on the higher side of the scale which is obvious.

62. This ground of appeal is also allowed.

63. The maximum sentence for the offence of Soliciting an Advantage under section 12 (2) of the Prevention of Bribery Act is a fine of $100,000.00 and 1 year imprisonment. The appellant was sentenced to 8 months imprisonment with a fine of $1,000.00 in default 100 days imprisonment for this count.

64. The maximum sentence for the offence of Obtaining Financial Advantage is 10 years imprisonment, the accepted tariff is between 2 to 4 years imprisonment. The appellant was sentenced to 32 months imprisonment

for this count which was made concurrent to the above count of Soliciting an Advantage.

65. The maximum sentence for the offence of False Statement on Oath is 7 years imprisonment, there is no accepted tariff for this offence. The appellant was sentenced to 2 years imprisonment for this count.

66. Considering the circumstances of the offending and the culpability of the appellant it is my view that 2 years imprisonment for the offence of False Statement on Oath was justified. Although I have already accepted the reasons of the Magistrate's Court as to why the sentence in this offence was made consecutive to the other two sentences, however, I am not satisfied that 2 years sentence of imprisonment from this count be wholly consecutive in light of the appellant's mitigation was a justified exercise of the sentence discretion.

67. Since I will be allowing the appeal against sentence there is a need to revisit the sentence imposed. In this regard there is no need for me to consider the third and the fourth grounds of appeal against sentence.

68. In the interest of justice and in accordance with section 256 (2) of the Criminal Procedure Act, the sentence of the Magistrate's Court is quashed and set aside.

69. This court accepts the sentence of the Magistrate's Court in respect of the first and second count to be 32 months imprisonment. However, in respect of the fine of $1,000.00 in default 100 days imprisonment it is noted that the learned Magistrate did not undertake a means test to satisfy himself as to the amount of fine to be imposed.

70. It is a fact that the appellant had lost his employment with FICAC when the investigation started (also admitted by the respondent's counsel) and there was no evidence that the appellant was employed elsewhere at the time of the sentence. It would have been helpful if the learned Magistrate had elicited some information about the financial position of the appellant at the time of the sentence and undertaken a means test before imposing a fine of $1,000.00.

71. Considering the fact that the appellant had lost his employment and started serving an immediate imprisonment term, in my view a fine of $200.00 in default 1 month imprisonment will meet the ends of justice.

72. The appellant is sentenced to 32 months imprisonment for one count of Obtaining Financial Advantage contrary to section 326 of the Crimes Act and 8 months imprisonment for one count of Soliciting an Advantage contrary to section 3 of the Prevention of Bribery Act no.12 of 2007. The offence of Soliciting an Advantage makes a fine mandatory which I have sanctioned at $200.00 in default 1 month imprisonment. Both these sentences are to be served concurrently as mentioned by the Magistrate's Court.

73. To this sentence, 12 months imprisonment for one count of False Statement on Oath is made consecutive. This means the total term of imprisonment to be served by the appellant is 44 months imprisonment. In my view the 12 months consecutive sentence acts as a deterrent factor without having a crushing effect on the appellant.

74. In summary the appellant is sentenced to 3 years and 8 months imprisonment and is also fined the sum of $200.00 in default 1 month imprisonment for one count of soliciting an advantage, one count of

obtaining a financial advantage and one count of false statement on oath with effect from 6th May, 2019.

75. In law this sentence cannot be suspended, however, as per section 18 (1) of the Sentencing and Penalties Act a non-parole period of 2 years is to be served before the appellant is eligible for parole. This non-parole period will assist in the rehabilitation of the appellant.

ORDERS

1. The appeal against conviction is dismissed.

2. The appeal against sentence is allowed.

3. The appellant is sentenced afresh to 3 years and 8 months imprisonment and is also fined $200.00 in default 1 month imprisonment with a non-parole period of 2 years with effect from 6th May, 2019 for all the three counts.

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
29 June, 2020

Solicitors

Office of the Legal Aid Commission for the Appellant.
Legal Officer, Fiji Independent Commission against Corruption for the Respondent.