IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.
[APPELLATE JURISDICTION]

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ("FICAC")

Appellant

CASE NO: HAA. 31 of 2020
[MC Nausori, Crim. Case No. 108 of 2019] **Vs.**

ADI FILOMENA ADIBALENAVURAVURA SERAU

Respondent

Counsel	**:**	Ms. F. Pulewai for the Appellant Mr. F. Vosarogo with Mr. J. Cakau for the Respondent
Hearing on	**:**	28 September 2020
Judgment on	**:**	25 November 2020

JUDGMENT

Introduction

1. The respondent was charged before the Magistrate Court at Nausori for one count of obtaining a financial advantage contrary to section 326 (1) of the Crimes Act 2009. The charge filed on 24/07/19 reads thus;

> *Statement of Offence (a)*
> **OBTAINING A FINANCIAL ADVANTAGE:** contrary to Section 326 (1) of the Crimes Act Number 44 of 2009.
>
> *Particulars of Offence (b)*
> **ADI FILOMENA ADIBALENAVURAVURA SERAU** between 1st of

June 2017 and 31st December 2017 at Korovou, Tailevu in the Central Division, whilst being the Finance Clerk at the iTaukei Land Trust Board Korovou office, engaged in conduct namely receiving cash payments made to iTaukei Land Trust Board and failed to deposit the same into the iTaukei Land Trust Board account and as a result of that conduct obtained a financial advantage in the sum of FJ$12,174.90 for herself knowing that she was not eligible to receive that financial advantage.

2. The respondent was convicted upon pleading guilty to the above charge on 27/02/20. On 04/05/20 the Learned Magistrate sentenced the respondent to a term of 02 years imprisonment and suspended the said sentence for a period of 03 years.

3. Being aggrieved by the sentence imposed on the respondent, the appellant had taken steps to file a timely appeal raising the following grounds of appeal;

1. *The learned Magistrate's sentence is manifestly lenient and inadequate considering the nature and gravity of the offence.*
2. *That the Learned Magistrate erred by imposing a suspended sentence considering the seriousness and breach of trust involved.*
3. *The Learned Magistrate erred in law and fact by using the restitution as obvious basis to suspend the sentence.*
4. *The Learned Magistrate took into account extraneous factors that were not supported by evidence during the sentencing hearing.*
5. *The Learned Magistrate failed to consider the principle of deterrence provided in the Sentencing guidelines under the Sentencing and Penalties Act No 42 of 2009 adequately.*

Discussion

4. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> "*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 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) 55 CLR 499).*"

5. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had, (a) acted upon a wrong principle; (b) allowed extraneous or irrelevant matters to guide or affect him; (c) mistook the facts; or (d) did not take into account some relevant consideration.

6. Even though there are five grounds of appeal, given the submissions made on behalf of the appellant it was clear that central to all five grounds is the complaint that the Learned Magistrate had erred when he suspended the sentence imposed in this case. The appellant does not claim that the term of two years imprisonment that was imposed is inadequate. Therefore, I decided to examine the issue whether the Learned Magistrate had erred in exercising his sentencing discretion in suspending the sentence imposed on the respondent, having regard to the issues raised in each ground of appeal.

7. To state the facts very briefly, the respondent while being employed as a finance clerk at the iTaukei Land Trust Board, during the period from 1st of June 2017 and 31st December 2017, had misappropriated a total sum of FJ$12,174.90, a sum received by her as payments made to the iTaukei Land Trust Board. According to the summary of facts filed before the Learned Magistrate the respondent had issued 'unofficial receipts' in relation to these payments to the respective payees. These receipts are identified as unofficial because they were not official receipts of the iTaukei Land Trust Board which were either system generated or manual, but receipts from normal receipt books that are readily available at bookstores and other shops.

8. The above facts clearly indicate that there was a serious breach of trust and this was a well-planned crime. The offence was committed over a period of six months and the amount that was misappropriated was substantial. The institution defrauded was none other than the iTaukei Land Trust Board, the institution that deals with iTaukei land leases. Thus, it was in fact the land owners who were ultimately defrauded by the respondent. As highlighted by the appellant in the written

submissions filed in this case, the iTaukei Land Trust Board is established to 'secure, protect and manage land ownership rights assigned to the iTaukei landowners and to facilitate the commercial transactions that revolve around its use'. Accordingly, this offence committed by the respondent is very serious and it warrants a sentence to be imposed for the purpose of punishing the offender, to deter the offender and other persons from committing offences of the same or similar nature in relation to government and/ or public institutions and to signify the denunciation of the commission of such offences by the court and the community.

9. Nevertheless, it should also be noted that in the instant case, the respondent had pleaded guilty to the offence though it was not an early guilty plea, thereby saving the time and the resources the court and the prosecution would have exerted if the matter was to proceed for trial. The respondent was 37 years old and a first offender. Moreover, there was full restitution.

10. In view of the relevant tariff applied and the strong mitigating factors, it was open for the Learned Magistrate to arrive at the term of imprisonment for 02 years. As mentioned above, the appellant does not assail the said term of imprisonment, the grievance is about the suspension of the total sentence.

11. At the outset, I wish to place on record certain observations in relation to the sentencing tariff which is identified for the offence in question, obtaining a financial advantage contrary to section 326(1) of the Crimes Act.

12. In sentencing an offender, the Sentencing and Penalties Act 2009 requires the relevant court to first have regard to the maximum penalty prescribed for the offence. This is in terms of section 4(2)(a) of the Act. 'Current sentencing practice and the terms of any applicable guideline judgment' comes next. The maximum penalty prescribed for the offence of obtaining a financial advantage contrary to section 326 of the Crimes Act is 10 years imprisonment. However, the current sentencing tariff identified for this offence is an imprisonment term between 02

years to 04 years (***FICAC v Mohammed*** [2015] FJHC 479; HAC349.2013).

13. It is pertinent to note that, at present in Fiji, the sentencing tariffs appear to have gained precedence over the legislature so much so that it is often noted that contrary to section 4(2)(a) of the Sentencing And Penalties Act, the maximum penalty prescribed by the legislature is totally ignored in sentencing an offender. The tariff identified in relation to the offence relevant to the instant case is one good example. Where the legislature has set the maximum penalty at 10 years for the offence of obtaining a financial advantage, in ***Mohammed*** (supra), the High Court has imposed a ceiling of 04 years which compels especially the Magistrates Courts to start the sentence and also to end up at a final sentence between 02 years and 04 years. In fact the proper sentencing range prescribed by law for this offence is a term of imprisonment between 0 to 10 years.

14. With regard to a particular offence, where the crime can be categorized into different levels depending on the seriousness of the nature and/or the circumstances of the offending, then there may be a necessity to introduce sentencing tariffs (e.g. child rape and adult rape in relation to the offence of rape). Moreover, where there are several offences of similar nature, but with different maximum penalties where the legislature had attributed different levels of seriousness, again it would make sense to have different sentencing tariffs for such offences (e.g. offences against property under part 16 of the Crimes Act). However, like in the instant case where the prescribed maximum penalty for the relevant offence is 10 years, no purpose is achieved by setting a tariff for the offence in general, with a higher limit substantially lower than the maximum penalty prescribed by law, other than to encourage sentencing courts to disregard the said maximum penalty and impose penalties well below the said prescribed penalty. In my view this is not an outcome the legislature would have anticipated.

15. In my view, either there should only be a starting point identified for this particular offence in general; or, different sentencing ranges should be identified based on the seriousness of the offending. If different sentencing ranges could be identified, then

it is necessary that the higher end of the sentencing range for the most serious offence to be 10 years which is the maximum penalty prescribed by law. For these reasons, I respectfully differ with the relevant sentencing tariff proposed in ***Mohammed*** (supra). I would however, limit my observations only to the offence relevant to this case.

16. For the reason that this offence under section 326 comes under 'fraudulent conduct' (part 17), the monetary value of the fraudulent conduct is invariably relevant when assessing the seriousness of the relevant crime committed. In my view, the most serious form of offence under section 326 would be when a government institution or a public entity is the target of the crime. Therefore, in my considered view, where the financial advantage in question had been obtained from a government institution or a public entity and the relevant advantage is a sum of $10,000 or more, the appropriate tariff should be 05 years to 10 years imprisonment where the starting point should be 5 years imprisonment. The 5 year term which is the lower end is suggested only considering the fact that the crime is targeted against a government institution or a public entity and therefore the nature and the level of breach of trust if the crime is committed by an employee can be regarded as an aggravating factor among other aggravating factors to further add to the starting point. Even though strong mitigating factors may bring the final sentence below 05 years and therefore even to 02 years where a Magistrate Court could consider whole or partial suspension, such a tariff itself could be regarded as a deterrent through proper awareness.

17. A range of 02 years to 07 years imprisonment may be appropriate where the amount involved is less than $10,000 though a government institution or a public entity was involved and in any other case where a government institution or a public entity is not involved irrespective of the value of the advantage obtained. Under this category of offending, 02 years should be the starting point. The breach of trust where an employee is the offender and also the fact that a government institution or a public entity is the target of the crime if that is the case, should be

regarded as aggravating factors among other suitable factors.

18. Now, I would turn to examine the grounds of appeal in this case. Under the first ground of appeal, the appellant had highlighted the case of ***FICAC v Bano*** [2017] CF 467/17 (03 July 2017) where the accused who was a revenue collector of the High Court Civil Registry was sentenced to a custodial term of 01 year and 11 months upon pleading guilty to one count of falsification of documents contrary to section 160(3) of the Crimes Act and one count of obtaining a financial advantage contrary to section 326(1) of the Crimes Act. In that case the financial advantage obtained was $11,715.60 which were monies paid to the registry as filing fees. The offence was committed over a period of 03 months. It is pointed out that the court took into account the need for deterrence in view of the position of trust held by the accused and the ensuing breach in imposing the said sentence.

19. The next case referred to by the appellant is the case of ***FICAC v Valesu*** [2020] FJHC 254; HAC069.2019 (20 March 2020) where the accused who was employed as a Land Acquisition Officer at the Water Authority of Fiji had misappropriated a total sum of $334,496.18 over a period of four years. He was charged with one count of abuse of office, one count of forgery, and one count of obtaining a financial advantage. Goundar J imposing a term of 06 years imprisonment with a non-parole term of 04 years upon the said accused pleading guilty to the charges, has made the following remarks;

> *[12] When a person in a public service flout policies and procedures designed to protect the public purse for his own benefit, the harm is to the employer's reputation and to the public who are deprived of services as a result of loss of public funds. The courts duty is to denounce such conduct and send a clear message that a substantial prison sentence will be imposed on those who abuse public funds for their own benefit.*

20. In the case of ***State v Roberts*** [2004] FJHC 51; HAA0053J.2003S (30 January 2004), Shameem J made the following remarks which I concur with;

> *"The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there*

is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation."

21. Even where the accused pleads guilty in a case involving fraudulent conduct where there is a serious breach of trust, where the amount of money misappropriated is high and where there is no restitution, a custodial sentence would be warranted given the purposes for which a sentence should be imposed as provided under section 4(1) of the Sentencing and Penalties Act. More specifically, the need to protect the community from offenders, the need to deter offenders or other persons from committing offences of the same or similar nature and the need to signify the denunciation of the crime by the court and the society. However, if the accused is a first and a young offender, and if there is full restitution and where the accused had pleaded guilty, even if there is a serious breach of trust, a partially suspended sentence would be just in all circumstances as opined by Aluthge J in ***Sagar v FICAC*** [2020] HAA 027/2020 (17 June 2020).

22. There appear to be a misconception however, that suspending a sentence promotes rehabilitation. Simply suspending a sentence and allowing an accused to walk back to the society without having to serve a custodial sentence *per se* does not promote or facilitate rehabilitation. What is provided in section 4(1)(d) of the Sentencing and Penalties Act is to 'to establish conditions so that rehabilitation of offenders may be promoted or facilitated' and the said provisions do not suggest that simply suspending a sentence would promote rehabilitation. If a sentence is imposed to achieve the purpose of rehabilitation, there should be appropriate conditions imposed in that regard. When a sentence is suspended for a particular period the fact that the said offender is compelled to be of good behavior during that period would only have a deterrent effect, but it cannot be regarded as an effective condition to promote or facilitate rehabilitation. In my view, in fact, it is the Fiji Corrections Services that conduct proper rehabilitation programmes for offenders.

23. As regards to restitution, in my view, the time it was done should not reduce its value as a mitigating factor. The provisions of section 4(2)(h) of the Sentencing and

Penalties Act is pertinent in this regard and in terms of the said provisions even the willingness to comply with any order for restitution should be considered by the sentencing court. The said provisions list restitution as a separate factor to be taken into account when sentencing an offender and not as a factor indicative of remorse as viewed in certain cases decided before Sentencing and Penalties Act was legislated. Remorse is also listed separately under section 4(2). In my view, full restitution at any stage before sentencing is a valid reason to consider in favour of suspending a sentence.

24. Having considered the facts and the circumstances of the case at hand and the decisions alluded to above, I am inclined to form the view that suspending the whole sentence imposed in this case had in fact rendered the sentence to be manifestly lenient and inadequate. The institution that fell victim to this crime committed by the respondent is a government institution; the amount misappropriated was substantial; the crime was committed over a period of six months; and it had involved pre-planning and a special devious method was employed. Given these circumstances the main purpose of imposing a sentence in this case should be to deter any other person whether it is a public servant or otherwise with similar impulses of stealing from government or public institutions.

25. A message should not be transmitted to the community that one can receive a suspended sentence and walk out of court after stealing public funds by reimbursing the amount so stolen. Such a message would encourage offenders to engage in stealing public funds with the confidence that they can receive a suspended sentence by reimbursing the relevant amount if and when they get caught. Therefore, in this case the ends of justice would be served by partially suspending the sentence as suggested by Aluthge J in ***Sagar*** (supra).

26. On the other hand, there are no factors in this case that, in the words of Grant Actg. CJ in ***DPP v Jolame Pita*** (1974) 20 FLR 5, 'would render an immediate imprisonment inappropriate'. In the said case Grant Actg. CJ observed thus;

"*Once a court has reached the decision that a sentence of imprisonment is warranted*

there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, ***there must be factors rendering immediate imprisonment inappropriate.***"
[Emphasis added]

27. The Learned Magistrate in the instant case had failed to consider the need for deterrence given the serious breach of trust and the fact that public funds handled by a government institution was misappropriated when he decided to suspend the whole sentence. The strong need for deterrence in this case does not render immediate imprisonment inappropriate. In the circumstances, the first ground of appeal should be decided in favour of the appellant. The issues raised on grounds of appeal two, three and five have already been dealt with in the above discussion.

28. The fourth ground of appeal is devoid of merit. The appellant claims that the Learned Magistrate had taken into account extraneous factors because of the remarks in the impugned decision to the effect that time was given for the respondent to reimburse the total amount that was misappropriated because of the situation in the country owing to the COVID-19 pandemic. No error could be attributed to this statement made by the Learned Magistrate.

29. All in all, this appeal should be allowed.

Conclusion

30. Having decided that the Learned Magistrate has erred in suspending the entire sentence imposed on the respondent, now the question is what would be the appropriate term the respondent should serve before the remaining term is

suspended and whether I should at this juncture implement such term of imprisonment.

31. At the time the offence was committed the respondent was not a young offender and the guilty plea was not an early guilty plea. Considering these factors along with the other circumstances of the offending, I am of the view that the respondent should have been made to serve the first six months of the sentence forthwith and the remaining term should have been suspended for 03 years.

32. I note that the offence was committed in 2017 and the respondent was charged on 24/07/19. The respondent had entered the guilty plea on 27/02/20 and was sentenced on 04/05/20.

33. In ***Roberts*** (supra) having made strong remarks on the necessity to impose custodial sentences in breach of trust cases, the court finally affirmed the suspended sentence of 18 months imprisonment imposed by the Magistrates Court against the appellant who had pleaded guilty to four counts of larceny by servant, for the following reasons;

> *Further, the offences were committed in 2001, and he has suffered the consequences of his offending (both financially and socially) while his case was pending in the Magistrates' Court. To impose a custodial sentence now, when he has begun to pick up the pieces of his life, would lead to injustice.*

34. Though I would not necessarily describe it as 'injustice', I too have reservations similar to what is alluded to above, in imposing a custodial term on the respondent at this stage. Especially in view of the fact that the term I have considered appropriate for the respondent to serve is only 06 months before the remaining term is suspended. The respondent had faced a criminal case and had lost her job. The conviction in this case may affect future employment. Though it is the respondent herself who is to be blamed for what she had to go through, incarcerating her for six months at this stage where she had moved on with her life in my view is not appropriate. I may have decided otherwise if the part of the custodial term to be served was a longer term.

35. However, at the same time, as I have mentioned above, a message should not be conveyed to the community and to the would-be offenders that if one get caught stealing public funds, simply returning the amount stolen would prevent any form of further sanction.

36. Having considered all the circumstances, I have decided that it would be appropriate to impose a substantial fine in this case in terms of section 31 of the Sentencing and Penalties Act, without ordering the sentence imposed on the respondent to be partially suspended at this stage. I have in fact taken steps to inquire on the ability of the respondent to pay such a fine on the last court date.

37. Accordingly, I hereby impose a fine of $1800 on the respondent in addition to the sentence imposed by the Learned Magistrate on 04/05/20. The respondent should pay this fine at the High Court Registry on or before 25/01/21 and the failure to pay that fine should result in the respondent being imprisoned for a term of six months or less depending on the default, in accordance with section 37 of the Sentencing and Penalties Act.

Orders;

a) The appeal against the sentence is allowed;
b) A fine of $1800 is imposed on the respondent in addition to the sentence imposed by the Learned Magistrate on 04/05/20 in MC Nausori, Crim. Case No. 108 of 2019; and
c) The aforementioned fine to be paid on or before 25/01/21 at the High Court Registry.

Vinsent S. Perera
JUDGE

Solicitors:
Fiji Independent Commission against Corruption for the Appellant
Vosarogo Lawyers, Suva for the Respondent