

**IN THE ANTI-CORRUPTION DIVISION OF THE  
HIGH COURT OF FIJI AT SUVA**

**APPELLATE JURISDICTION**

**Criminal Appeal No. HACDA 002 of  
2022S**  
[Anti-Corruption Division Court  
Criminal Case No. MACD 07/21]

**BETWEEN: FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION  
(FICAC)**

**AND: PRIME FIJI LIMITED**

**APPELLANT**

**RESPONDENT**

**For the Appellant: Ms. Fatafehi S.  
For the Respondent: No appearance**

**Date of Ruling: 10<sup>th</sup> April 2024**

**RULING ON APPEAL AGAINST SENTENCE**

1. On the 24<sup>th</sup> of November 2021, the High Court set aside the Magistrate's order acquitting the Accused Company and entered a conviction instead for the first and second count in the Charge.
2. The matter was then remitted to the Magistrate's Court for sentencing on 13 June 2022. The Learned Magistrate made orders pursuant to section 15 (1) (h) of the Sentencing and Penalties Act 2009, and recorded convictions against the Respondent but discharged the offender.
3. The Appellant, being dissatisfied with the sentence, then filed a petition of appeal on 18<sup>th</sup> July 2022.
4. The Appellant relies on the following grounds of appeal: -
  - (i) That the Learned Magistrate erred in law and in facts in concluding the (that) it could not monetarily fine the Accused as it is unable to conduct the means test.
  - (ii) That the Learned Magistrate erred in law and in facts in not considering the legal principles of deterrence while sentencing the Accused.

5. The Respondent has never appeared and in a ruling dated 20 October 2023, the Court determined that the Respondent has been duly served with the appeal papers therefore the Appellant could proceed with the appeal in the absence of the Respondent.

#### The Charge

6. The Accused Company was charged in the Magistrate's Court in MACD Criminal Case No. 65 of 2021SUV; CF 927 of 2016: -

#### **COUNT ONE**

##### **Statement of Offence**

**FORGERY**: Section 156 (1) of the Crimes Act 2009

##### **Particulars of Offence**

**PRIME FIJI LIMITED** a limited liability Company having its registered address at 17 Ackland Street, Viria West Vatuwaqa, Suva, between 1<sup>st</sup> April 2016 and the 30<sup>th</sup> of April 2016 partly at Suva in the Central Division made a false document namely the Performance Security of Westpac Banking Corporation for the Performance Guarantee No. FRA/TIISP/15-67, Streetlight renewals amounting to FJ\$351, 865.00 purported to have been issued by the Westpac Banking Corporation, with intent to dishonestly induce Fiji Roads Authority officials in their capacity as public officials to accept it as genuine and to dishonestly influence the exercise of their function.

#### **COUNT TWO**

##### **Statement of Offence**

**USING FORGED DOCUMENT**: Section 157 (1) of the Crimes Act 2009

##### **Particulars of Offence**

**PRIME FIJI LIMITED** a limited liability Company having its registered address at 17 Ackland Street, Viria West Vatuwaqa, Suva, between 1<sup>st</sup> April 2016 and the 30<sup>th</sup> of April 2016 partly at Suva in the Central Division used a false document, which PRIME FIJI LIMITED knew to be false, namely the Performance Security of Westpac Banking Corporation for the Performance Guarantee No. FRA/TIISP/15-67, Streetlight Renewal amounting to FJ\$351, 865.00, with intent to dishonestly induce Fiji Roads Authority officials in their capacity as public officials to accept it as genuine and to dishonestly influence the exercise of their function.

7. Originally the Magistrate's Court had acquitted the Respondent Company and the Appellant had appealed against that acquittal. The appeal was heard on the 24<sup>th</sup> of March 2021 and the appeal ruling was delivered on the 24<sup>th</sup> of November 2021.

## Ruling on Appeal against Acquittal

8. In his Ruling Justice Wimalasena stated the following: -

“20. The plain reading of section 156 (1) shows that the only physical element of the offence of Forgery is “making the document” and limbs (a) and (b) are only extensions of intention., which are the fault elements of the offence. The fault elements in the offence of Forgery is twofold;

(a) Firstly it must be proven that there was an intention that the person who made the document or another person will use it to dishonestly induce a third person in the third person’s capacity as a public official to accept it as genuine; and

(b) Secondly it must be proven that there was an intention to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function if the document was so accepted.

21. Therefore it is not necessary for the document to be accepted or to actually obtain again cause a loss or influence the exercise of a public duty or function to prove the offence of Forgery. It appears that the learned Magistrate is misconceived as she believed that the phrase “if it is so accepted” requires that condition to actually occur and the document to be accepted to constitute the offence. As the counsel for the Appellants quite rightly pointed out it would be impossible to prove the offence of Forgery if limb (b) of section 156 is a physical element and if it is always necessary to occur.

9. The Court therefore quashed the decision of the Magistrate’s Court to acquit the Respondent Company. In addition the case was sent back to the Magistrate’s Court for sentencing and the Appellant was further ordered to serve a copy of the Judgment on the Respondent Company.

10. On the 13<sup>th</sup> of June 2022, the Magistrate made the following sentencing remarks: -

“26. The charges under this case as intended by the legislature have only placed imprisonment as the likely penalty and not a fine. As discussed above herein at paragraph 24, this cannot be applicable as the offender is a corporation.

27. However, a fine can be imposed if the court considers section 15 (1) (f) and section 31 (3) of the Sentencing and Penalties Act 2009 however the “means to pay” has not been examined by the court because the appeal and sentencing was conducted in absentia. As such it is not a prudent option to take.

28. While the situation is not ideal, the court takes solace from section 15 (1) (h) of the Sentencing and Penalties Act 2009, which in the opinion of the court based on the

circumstances as highlighted above-herein provides a sentencing option which is most suited to this case given the circumstances.

29. That is, pursuant to section 15 (1) (b) of the Sentencing and Penalties Act 2009, the convictions are recorded against Prime Fiji Limited however the offender is discharged.”

11. The Appellant was aggrieved at the sentence and filed the current appeal that is now before the Court.
12. On the first call of the appeal on the 22<sup>nd</sup> of August the Appellant advised the Court that they needed further time to serve the Respondent. The Respondent had been sentenced in absentia and had never entered any appearance through these proceedings. The Appellant was given time to amend the Petition of Appeal and to serve the Respondent.
13. On the 12<sup>th</sup> of October 2022 the Appellant filed the Affidavit of Service deposed by Riazmin Nisha confirming that on the 19<sup>th</sup> of August 2022 she attempted to serve the Director of the Respondent, Mr. Shane Halliday by registered mail to his last known address, 10 Stricta Place, NSW.
14. On the same date, 12<sup>th</sup> October 2022, Frank Tora, the investigating officer employed by the Appellant also attempted to serve the Respondent at Lot 17 Ackland Street, Vatuwaqa, Suva, the registered office of the Respondent in Fiji. On that day however, he found that the premises was now occupied by the Ministry of Women and Poverty Alleviation, and he left a copy of the Amended Petition at the premises.
15. On the 17<sup>th</sup> of October 2023, Nilesh Chand, Operations Manager with DHL Express (Fiji) Ltd deposed an affidavit. He deposed that on the 19<sup>th</sup> of August 2022, he received documents from the Fiji Independent Commission Against Corruption (FICAC), the Appellant. He was requested to serve the said documents to Mr. Shane Halliday, 10 Stricta Place, NSW.
16. On the 23<sup>rd</sup> of August 2022, shipment No. 4210724195 was delivered to Mr. Shane Halliday at the above mentioned address and he indorsed the delivery. Mr. Halliday provided his identification after which the documents were handed over to him.

17. After considering the above evidence the Court found that the Respondent had been dully served and the Court ordered that the appeal hearing may proceed in his absence. The Appellant was then directed to file appeal submissions.

### The Appeal Submissions

18. The Appellant filed appeal submissions on the 14<sup>th</sup> of December 2023.

19. Section 246 of the Criminal Procedure Act 2009 sets out the provisions relating to appeals to the High Court and section 256 of the same Act sets out the powers of the High Court on appeal.

20. The Appellant prays that the sentence handed down by the Magistrate's Court on the 13<sup>th</sup> of June 2022, be set aside and the Respondent be sentenced afresh for counts 1 and 2.

21. The Appellant then made submissions under each ground of appeal as follows: -

(i) ***That the Learned Magistrate erred in law and in facts in concluding the (that) it could not monetarily fine the Accused as it is unable to conduct the means test.***

- The Magistrate failed to consider section 32 (2) of the Sentencing and Penalties Act 2009 and the relevant section provides as follows:

“32(1) If a court decides to fine an offender it must determine the amount of the fine and the method of payment by taking into account, as far as is practicable, the financial circumstances of the offender and the extent of the burden that its payment will impose.

(2) A court is not prevented from fining an offender in circumstances where it is unable to determine the financial circumstances of the offender.”

- The Appellant submits that the “prudent approach” adopted by the Court failed to consider the objective seriousness of the offending and ignored the aims and objectives of sentencing as set out in the Sentencing and Penalties Act 2009.
- The Appellant concedes that the Court had correctly identified the maximum penalty of 10 years imprisonment and also correctly identified the accepted tariff, from 3 to 6 years imprisonment as set out in Rarawa vs State [2017] FJHC 50 and State vs Khan [2013] FJHC 621.

- The Appellant however submits that the Magistrate focused too much on the fact that the Respondent was absent, and this detracted from the original purpose for sentencing and from other relevant considerations for sentencing.
- The Appellant reiterates that section 32 (2) of the Sentencing and Penalties Act allows the Court to impose an appropriate fine even in situations where the Court is unable to determine the financial circumstances of the offender.
- The Learned Magistrate did not apply his discretion properly in electing to discharge the Respondent Company. In doing this, the Court also closed off any form of punitive action that could be taken by the Appellant against the Respondent Company.

(ii) ***That the Learned Magistrate erred in law and in facts in not considering the legal principle of deterrence while sentencing the Accused.***

- Section 4 (1) and (2) of the Sentencing and Penalties Act outlines sentencing guidelines which the sentencing Court ought to consider in handing out sentences that are appropriate for the cases.
- In the case of Kumar vs State [2022] FJCA 164, the Court of Appeal analysed the provisions of section 4 and held that if “a sentencing regime is far too lenient or too harsh it will not serve the purpose of sentencing.”
- The Appellant submits that the position taken by the Magistrate is in contrast to the seriousness of the offending in this case. The two offences in the charge, Forgery and Using Forged Document are both serious in nature as they are both indictable offences triable summarily with a maximum sentence of 10 years imprisonment.
- The offending company, the Respondent was found to have forged a document belonging to Westpac Bank, a major financial institution and was also found to present the forged document to a statutory body in order to win a contract to provide streetlights.
- The offending ultimately affected the taxpayers of Fiji, as the forged document was discovered and rejected, and ultimately the donors withdrew the funding and the shortfall had to be paid by the Government of Fiji.
- The Learned Magistrate failed to take into account the objective seriousness of the offending and was unnecessarily concerned with the fact that there was no actual gain or loss from the offending. The Appellant submits that the Learned Magistrate failed to see the big picture and thus affected the offending.
- The Appellant respectfully submit that the Learned Magistrate erred in fact and in law by not considering the legal principle of deterrence whilst sentencing the Respondent company.

- The Appellant therefore prays for the sentence to be set aside and the Court to sentence the Respondent afresh.

### Analysis

22. This an appeal against the sentence – where the sentencing Magistrate correctly identified the maximum sentence and the accepted sentencing tariffs applicable for such offences. After that exercise the Court then went on to apply section 15 (1) (h) of the Sentencing and Penalties Act 2009 – recording the conviction on both counts and discharging the Respondent.
23. The justification given by the Learned Magistrate was that the offender Company was a corporate body thereby ruling out a sentence of imprisonment and a fine was the only viable alternative. Ultimately the Magistrate found that he was not in a position to levy a fine as he was unable to conduct a means test to determine the Respondent’s means to pay any fine.
24. The Supreme Court in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20<sup>th</sup> November 2013) stated as follows: -

“[19] 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) 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.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in *Chirk King Yam v The State* Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of *Kim Nam Bae's* case.”

25. In the case of Kim Nam Bae –v- State [1999] FJCA 21; AAU 15 of 1998 (26<sup>th</sup> February 1999) the Court of Appeal stated as follows: -

“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) 55 CLR 499).”

26. After considering the record and the submissions as well as the 2 grounds of appeal, the Court makes the following findings: -

- (i) The sentencing Court acted upon the wrong principles – the Court completely ignored the principle of deterrence bearing in mind the facts of the offending in this case, that required specific deterrence for the offending company and general deterrence for similarly situated companies. In discharging the offender Company, the Court effectively hamstrung the Appellant from ensuring that the Respondent was held accountable for their illegal actions.
- (ii) The Magistrate allowed the fact that the offending company was not present at the sentencing and the fact that there was no actual loss of funds, to impact the sentence. The Court also failed to consider the specific provisions of section 32 (2) of the Sentencing and Penalties Act, which allowed him to fine an offender, notwithstanding the fact that he could not ascertain the offender’s means as they were absent.
- (iii) There is no evidence that the Magistrate mistook the facts of this case. He correctly identified all the relevant facts in this case, however he fell into error in handing down the sentence.
- (iv) The Court failed to consider that the offence does not require proof of actual loss or unlawful gain by the offender. In the sentencing remarks he also failed to consider the context of the offending and the objective seriousness of the offending. This may have contributed to a sentence that was far too lenient from the facts of this particular case.

27. The Court therefore finds that the Appellant had successfully made out the two grounds of appeal and established that the Magistrate fell into error in handing down the sentence in this case.



28. That being the case, the sentence handed down on the 13<sup>th</sup> of June 2022 is hereby quashed.

29. I will hear sentencing submissions from the Appellant before I proceed to re sentence the Respondent Company.

30. So ordered.

**This is the Ruling in this matter: -**

- 1. The order discharging the Respondent Company on the 13<sup>th</sup> of June 2022 is hereby quashed and set aside.**
- 2. The Appellant will make sentencing submissions after which the Respondent will be sentenced afresh by this Court.**

**30 days to appeal**

  
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**Mr. Justice Usaia Ratuveli**  
**Puisne Judge**



*cc: - Office of Fiji Independent Commission Against Corruption  
-Prime Fiji Limited*