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

CRIMINAL APPEAL NO. HAA 09 OF 2023

IN THE MATTER of an Appeal from the Decision of the Magistrate's Court of Lautoka, in Criminal Case No. 703 of 2012.

BETWEEN : **JOTISH CHAND**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. Samuela Heritage for the Appellant
Mr. Unal Lal for the Respondent

Dates of Hearing : 5 March and 21 March 2024

Judgment : 12 June 2024

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Lautoka, in Criminal Case No. 703 of 2012. At the material time, the Appellant was a Police Constable attached to the Lautoka Police Station.

[2] The Appellant was first produced in the Magistrate's Court of Lautoka, on 30 November 2012, charged with one count of Conspiracy to Pervert the Course of Justice, contrary to Section 190 (b) of the Crimes Act No. 44 of 2009 (Crimes Act); and one count of

Destroying Evidence, contrary to Section 189 (a) of the Crimes Act [Vide page 35 of the Magistrate's Court Record]. The Appellant pleaded not guilty to the charges.

[3] After many adjournments, the hearing in the matter commenced on 24 September 2019, before the Learned Resident Magistrate, Mr. Bandula Gunaratne. Prior to the closure of the case for the prosecution, leave was sought by the prosecution to file an Amended Charge.

[4] On 4 November 2019, Learned Resident Magistrate made a Ruling permitting the Amended Charge to be filed [At pages 88-91 of the Magistrate's Court Record]. As per the Amended Charge filed in the Magistrate's Court of Lautoka, the Appellant was charged with one count of Conspiracy to Pervert the Course of Justice, contrary to Section 190 (b) of the Crimes Act [Vide page 34 of the Magistrate's Court Record]. The Amended Charge read as follows:

CHARGE

Statement of Offence (a)

CONSPIRACY TO PERVERT THE COURSE OF JUSTICE: Contrary to Section 190 (b) of the Crimes Act of 2009.

Particulars of Offence (b)

JOTISH CHAND, between the 15th day of January 2011 and the 7th day of February 2011, obstructed the course of justice in the alleged case of CPU (Central Processing Unit) theft reported by **NAZIA FARINA BANO,** by writing an unsigned withdrawal statement of the said **NAZIA FARINA BANO.**

[5] On 26 November 2019, the Appellant took his plea on the Amended Charge and pleaded not guilty. Thereafter, the matter proceeded to trial on the said Amended Charge.

[6] On 11 November 2020, the prosecution closed its case. At this stage, the defence made an application that the Appellant had No Case to Answer.

[7] After several adjournments, the matter came up before the Learned Resident Magistrate, Mr. Jagath Hemantha. On 28 February 2022, it is recorded that both the Director of Public Prosecutions (DPP) and the Counsel for the Appellant have agreed

and consented to accept or adopt the evidence led before the previous Resident Magistrate [Vide page 29 of the Magistrate's Court Record].

[8] Accordingly, by his Ruling dated 11 April 2022, the Learned Resident Magistrate, Mr. Jagath Hemantha held that the Appellant had a Case to Answer and called for his defence [The No Case to Answer Ruling is found at pages 61-69 of the Magistrate's Court Record].

[9] The Appellant exercised his right to remain silent and the matter was fixed for Judgment.

[10] On 13 September 2022, the Appellant was found guilty of the charge and convicted. On 14 February 2023, the Appellant had been imposed a sentence of 5 months imprisonment which term of imprisonment was suspended for a period of 3 years.

[11] Aggrieved by the said Order, on 13 March 2023, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.

[12] This matter was taken up for hearing before me on 5 March and 21 March 2024. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[13] As per the Grounds of Appeal filed by the Appellant the Grounds of Appeal are as follows:

Grounds of Appeal against Conviction

(1) That the Learned Trial Magistrate erred in law and in fact in not taking into consideration the laws on "Double Jeopardy" in the instant case where the Appellant was charged for the same offence when the matter was heard before the Fiji Police Force Tribunal who acquitted the Appellant on the said charge and he was reinstated and as such there has been a substantial miscarriage of justice.

(2) That the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made

by the Prosecution witnesses and as such there has been a substantial miscarriage of justice.

(3) That the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

(4) That the Learned Trial Magistrate erred in law and in fact in not directing himself adequately and/or taking into consideration the ingredients of the offence the Appellant was charged with.

(5) That the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence evidence and as such by his failure there was a substantial miscarriage of justice.

Grounds of Appeal against Sentence

(6) That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

(7) That the Learned Trial Magistrate erred in law and in fact in not taking relevant (factors into) consideration when sentencing the Appellant.

That the Learned Trial Magistrate erred in law and in fact in not taking into consideration the question of post charge delay and after the Appellant was charged when the incident had happened in 2011 and as such ought to have taken into consideration the above facts in giving the Appellant discount due to delay and as such there has been a substantial miscarriage of justice.

(8) That the Learned Trial Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Act 2009 when he passed the sentence against the Appellant.

[14] As can be observed there are five Grounds of Appeal against conviction; and three Grounds of Appeal against sentence.

The Law and Analysis

[15] 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."

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

"(2) The High Court may —

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

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

(c) order a new trial; or

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

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

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

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

The Grounds of Appeal against Conviction

Ground 1

[17] The first Ground of Appeal against conviction is that the Learned Trial Magistrate erred in law and in fact in not taking into consideration the laws on "Double Jeopardy" in the instant case where the Appellant was charged for the same offence when the matter was heard before the Fiji Police Force Tribunal who acquitted the Appellant on the said charge and he was reinstated and as such there has been a substantial miscarriage of justice.

[18] The Appellant contends that he had already been dealt with for this matter by the Fiji Police Force Tribunal which had acquitted him of the charge. To confirm this position, the Learned Counsel for the Appellant referred to page 103 of the Magistrate's Court Record, where there is a 'Minute' issued by the Internal Affairs Unit/Western Division, Western Division Police Headquarters, Lautoka, dated 29 January 2018.

[19] As per the said Minute it confirms that PC 3375 Jotish Chand (the Appellant) appeared before the Tribunal proceedings on 7 January 2017 charged for Conduct Prejudicial to Good Order and Discipline of the Force. The Minute states further that the Appellant had pleaded not guilty to the charge and that the Tribunal Officer later acquitted the Appellant due to insufficient evidence and the non-appearance of key witnesses.

[20] The Fiji Police Force Tribunal is established in terms of the Police Act No. 10 of 1965 and Regulations Promulgated in terms of the provisions of the Act.

[21] The Appellant relies on Section 14 (1) (b) of the Fiji Constitution 2013 (Constitution) which provides as follows:

> *"A person shall not be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."*

[22] The Learned Counsel for the Appellant had taken up the issue of double jeopardy before the Learned Resident Magistrate Mr. Bandula Gunaratne, on 22 August 2017 [Vide pages 14 - 18 of the Magistrate's Court Record]. Having considered the submissions made by both the State and the Appellant, on 24 September 2019, the Learned Resident Magistrate had rejected the application.

[23] The Learned Resident Magistrate relied on Section 14 (4) (a) of the Constitution, which provides that a law is not inconsistent with sub-section 14 (1) (b) to the extent that it authorizes a Court to try a member of a disciplined force for a criminal offence despite his or her trial and conviction or acquittal under a disciplinary law [Vide pages 22 - 23 of the Magistrate's Court Record].

[24] It is manifest from the above Constitutional provisions that the findings of a Disciplinary Tribunal is no bar to criminal proceedings being instituted against a member of a disciplined force.

[25] In any event, it is clear that the issue of double jeopardy had been taken up by the Learned Counsel for the Appellant prior to the commencement of the trial and the Learned Resident Magistrate had duly dealt with the matter. As such, I find that the first Ground of Appeal against conviction is without merit.

Ground 2

[26] The second Ground of Appeal against conviction is that the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the prosecution witnesses and as such there has been a substantial miscarriage of justice.

[27] The Learned Magistrate's Judgment is found at pages 53 to 60 of the Magistrate's Court Record. He has duly summarized the evidence of the two prosecution witnesses Nazia Farina Bano and Assistant Superintendent of Police (ASP) Simione Bale [From pages 55-58 of the Magistrate's Court Record]. He has then analysed the evidence in relation to the elements of the offence [From pages 58-60 of the Magistrate's Court Record]. Accordingly, the Learned Magistrate has found the Appellant guilty of the charge and convicted him. The transcripts of the evidence (proceedings) given by the two prosecution witnesses Nazia Farina Bano and ASP Simione Bale, is found at pages 117 to 133 of the Magistrate's Court Record.

[28] During the hearing of this matter, the Learned Counsel for the Appellant submitted that the unsigned withdrawal statement or letter of the complainant, which was a crucial piece of the evidence in the case, had not been tendered as evidence. I concede that this position is correct.

[29] However, the Learned Magistrate has given sufficient reasons as to why he was accepting the evidence of the two prosecution witnesses as credible and reliable. In this regard, I wish to make specific reference to paragraphs 27, 28 and 29 of the Learned Magistrate's judgment:

> *27. If the complainant had made a statement to withdraw the investigation she would not have come to the OC to follow up the progress of the investigation. There is no reason for me to disbelieve the evidence of the PW1. Her evidence is consistent per-se and inter-se. The evidence of the PW1 was corroborated by the evidence of PW2. Credibility of both the witnesses was not impeached. There are no material contradictions of evidence of PW1 and PW2 running to the root of the evidence.*
>
> *28. I find that these evidence clearly establish beyond reasonable doubt the fact that the complainant did not have any intention to withdraw her own complaint.*
>
> *29. Further I find that at all the time material to the recording of the complainant's statements, the accused was the Investigating Officer who had handled the*

relevant file. And also during all the time relevant to the missing of a statement and receipts, the accused was the Investigating Officer who had handled the relevant file. At all the time the complainant's meeting with the OC, he had called the accused to relay the updates.

[30] For the aforesaid reasons, I find that the Learned Magistrate has adequately directed himself with regard to the evidence of the prosecution witnesses in coming to his finding. As such, I find that this Ground of Appeal against conviction is without merit.

Grounds 3 and 5

[31] These two Grounds of Appeal against conviction are identical (they are repetitive). That the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

[32] During the hearing of this matter the Learned Counsel for the Appellant submitted that the Appellant is no longer relying on these two Grounds of Appeal. As such, the said two Grounds of Appeal have been abandoned.

Ground 4

[33] This Ground of Appeal against conviction is that the Learned Trial Magistrate erred in law and in fact in not directing himself adequately and/or taking into consideration the ingredients of the offence the Appellant was charged with.

[34] Section 190 of the Crimes Act is reproduced below:

"A person commits a summary offence if he or she —

(a) conspires with any other person to knowingly and maliciously accuse any person falsely of any crime; or

***(b) conspires to do anything to obstruct, prevent, pervert or defeat the course of justice;** or*

(c) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from appearing and giving evidence, or endeavours to do so; or

(d) obstructs or in any way interferes with or knowingly prevents the execution of any legal process (civil or criminal); or

(e) in any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice."

[Emphasis is mine].

[35] The Appellant has been charged in terms of Section 190 (b) of the Crimes Act for Conspiring to Obstruct the Course of Justice.

[36] I find that the Learned Magistrate has correctly outlined the elements of the offence of Conspiring to Obstruct the Course of Justice in his judgment as follows: [At page 55 of the Magistrate's Court Record].

1. The accused
2. Conspired to do anything (any act)
3. With intent to obstruct, prevent, pervert or defeat the course of justice

[37] Section 190 (b) of the Crimes Act, which is law creating the offence, does not specify a fault element. However, the Learned Magistrate has identified the fault element for the offence as "intention". Although, the Learned Magistrate has not specifically stated so, this would be in terms of the provisions of Section 23 (1) of the Crimes Act which provides: *If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*

[38] During the hearing of this matter, the Learned Counsel for the Appellant submitted that the term 'conspired' should be construed in terms of Section 49 of the Crimes Act. His contention was that a conspiracy to commit a criminal offence should always be with another.

[39] Section 49 of the Crimes Act defines the term "Conspiracy", which is commonly regarded as an inchoate crime or incomplete crimes. Inchoate crimes are acts taken toward committing a crime or acts that constitute indirect participation in a crime. Although these acts are not themselves crimes, they are illegal because they are

conducted in furtherance of a crime. Other classic examples of inchoate crimes would be Attempts, Aiding and Abetting (sometimes referred to as Complicity), Common Purpose (sometimes referred to as Common Intention) and Incitement.

[40] The above are situations where criminal responsibility maybe extended to persons other than the principal perpetrator of the offence. Part 7 of the Crimes Act (Sections 44-49) is titled Extensions of Criminal Responsibility, and contains provisions governing Attempts (Section 44), Complicity and Common Purpose (Section 45), Offences Committed by Joint Offenders in Prosecution of Common Purpose (Section 46), Innocent Agency (Section 47), Incitement (Section 48), and Conspiracy (Section 49).

[41] However, this Court cannot accept the proposition that the term 'conspired', as found in Section 190 (b) should be construed in terms of Section 49 of the Crimes Act. Furthermore, Section 190 (b) of the Crimes Act should be distinguished from Section 190 (a). Section 190 (a) of the Crimes Act clearly provides that a person commits a summary offence ***if he or she conspires with any other person*** to knowingly and maliciously accuse any person falsely of any crime. However, Section 190 (b) provides that a person commits a summary offence ***if he or she conspires*** to do anything to obstruct, prevent, pervert or defeat the course of justice.

[42] From a reading of the above it is manifest that for an offence in terms of Section 190 (a) of the Crimes Act to be committed one person must conspire with another to commit the offence. However, it is my opinion that, an offence in terms of Section 190 (b) of the Crimes Act can be committed by that person alone.

[43] For the aforesaid reasons, I find that the said Ground of Appeal against the conviction is without merit and should be rejected.

The Grounds of Appeal against Sentence

[44] 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)."*

[45] 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."

[46] 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.

[47] 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."

[48] There are three Grounds of Appeal against sentence raised by the Appellant.

(1) That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

(2) That the Learned Trial Magistrate erred in law and in fact in not taking relevant (factors into) consideration when sentencing the Appellant. That the Learned Trial Magistrate erred in law and in fact in not taking into consideration the question of post charge delay and after the Appellant was charged when the incident had happened in 2011 and as such ought to have taken into consideration the above facts in giving the Appellant discount due to delay and as such there has been a substantial miscarriage of justice.

(3) That the Learned Trial Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Act 2009 when he passed the sentence against the Appellant.

[49] I find that the above three Grounds of Appeal against sentence are interconnected and can be addressed together.

[50] The first Ground of Appeal against sentence is that the sentence is manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

[51] The Learned Magistrate's Sentence is found at pages 36 to 39 of the Magistrate's Court Record. As per Section 190 of the Crimes Act the maximum penalty for the offence of Conspiring to Obstruct the Course of Justice is 5 years imprisonment. The Learned Magistrate has noted that he is unable to find out any established tariff for the offence. However, he has stated that offences such as Conspiracy to Pervert the Course of Justice and Perjury should normally attract immediate custodial sentences. In support of this contention, the Magistrate has referred to the Magistrate's Court Suva case of ***State v. Verma*** [2013] FJMC 160; Criminal Case 1699.2010 (22 April 2013).

[52] Accordingly, considering the circumstances of the offending in this case, the Learned Magistrate has taken a starting point of 4 months imprisonment. He has duly considered the aggravating factor (that the Appellant being a Police Officer and the Investigating Officer of the complainant's report had breached the trust of the complainant) and increased the sentence by 3 months. For the mitigating factors (primarily the fact that the Appellant was a first offender and was remorseful for his actions and sought forgiveness and leniency from Court) the Learned Magistrate has given a discount of 2 months. Accordingly, he has arrived at a final sentence of 5 months imprisonment.

[53] Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (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.*

[54] From a reading of the above Section it is manifest that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or part of the sentence.

[55] The Learned Magistrate in deciding whether to suspend the sentence against the Appellant has duly considered the post charge delay in these proceedings. At paragraph 14 of the Sentence, the Learned Magistrate states as follows: *"14. You have been sentenced on a serious offence. An immediate custodial sentence warrants against the accused in this instance. However, I consider the delay occurred in disposing this case. This case has been hanging over your head for the last 10 years. You are a first offender. I consider that you have a previous good conduct. Having considered overall facts and*

circumstances in this case as discussed above and Section 4 of the Sentencing and Penalties Act, I find that suspension of your full imprisonment term is justified. Accordingly, I suspend the 5 months imprisonment term for a period of 3 years."

[56] In the circumstances, it cannot be said that the sentence imposed by the Learned Magistrate is harsh and excessive.

[57] At paragraph 4 of the sentence, the Learned Magistrate has stated that he is taking into consideration Sections 4 and 15 of the Sentencing and Penalties Act in deciding the appropriate sentence to be imposed on the Appellant. Therefore, it is clear that the Learned Magistrate has duly taken into consideration the relevant provisions of the Sentencing and Penalties Act prior to passing the final sentence imposed on the Appellant.

[58] Considering the aforesaid, I am of the opinion that the Grounds of Appeal against sentence are without merit.

Conclusion

[59] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

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

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka in Criminal Case No. 703 of 2012 is affirmed.

HIGH COURT OF FIJI LAUTOKA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA
This 12th Day of June 2024

Solicitors for the Appellant:	**Messers Iqbal Khan & Associates, Barristers & Solicitors, Lautoka.**
Solicitors for the Respondent:	**Office of the Director of Public Prosecutions, Lautoka.**