IN THE SUPREME COURT OF FIJI

AT SUVA

(Petition for Review)

CRIMINAL APPEAL NO.CAV 003/2012

BETWEEN:

MUNESH CHAND ***Petitioner***

AND:

THE STATE ***Respondent***

Coram: **Hon. Justice Sathyaa Hettige, Judge of the Supreme Court**
Hon. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Justice Paul Madigan, Judge of the Supreme Court

Date of Hearing: **11th April, 2013**

Counsel: **Petitioner in person**
Office of the DPP for the State

Date of Judgment: **24th April, 2013**

JUDGMENT OF THE COURT

Justice Sathyaa Hettige

[1] This application has been filed pursuant to section 8 (5) of the Administration of Justice Decree 9 of 2009 for review of the Judgment of Supreme Court dated the 21st August 2012 which dismissed the Special Leave of Appeal application of the petitioner against the sentence on a charge of Larceny By Servant before the High Court at Suva.

[2] The Supreme Court derived powers to review its own Judgments pronouncements earlier under section 122 (5) of the Constitution.

Section 122 (5) of the Constitution provided as follows:

"*The Supreme Court may review any Judgment, pronouncement or order made by* it" (the Constitution was abrogated by the Amendment Act No. 14 of 2009)

[3] Same provisions are contained in section 8 (5) of the Decree 9 of 2009 and the petitioner is seeking a re-exercise of the judgment of this court to grant special leave to appeal against the sentence in the criminal case on the following grounds dated the 17th March 2013:

(i) In Terms of section 8 (2) of the Sentencing and Penalties Decree 9 of 2009 when sentencing an offender the court must promote consistency of approach and the court failed to apply section 8 (2) (a) of the Decree.
(ii) The court did not consider or overlook some of the mitigating factors.
(iii) The court failed to consider section 4 (2) h of the Sentencing and Penalties Decree and the petitioner's attempt to pay back the money was not considered.
(iv) The court did not consider section 16 (1) (c) of the Sentencing Decree of 2009 in regard to rehabilitation when sentencing.
(v) The trial Court Judge erred, after fixing the starting point of the sentence and considering the same aggravating factors, adding a further period of 3 years,and punished the petitioner twice creating an error.
(vi) The learned Judge erred when sentencing and imposing a further period of 3 years as a non-parole period and harshly punished.
(vii) The court erred when sentencing the petitioner for 4 years with non-parole period of 3 years which deprived him of his remission of the sentence he is legally entitled to.

[4] On the 9th April 2013, when this matter was taken up to support the review application the petitioner appeared in person and made submissions on the above grounds of appeal.

[5] It must be stated that most of the matters raised by the petitioner as grounds of review the Supreme Court has considered and dealt with when hearing the special leave to appeal application which was dismissed by the Judgment dated 21st August, 2012.

[6] In **Silatolu & Others v The State** Criminal Appeal No. CAV0002 of 2006 the court said that "*a court of final appeal has the power in truly exceptional circumstances to recall its order even after they have been entered, in order to avoid irremediable injustice*." (Emphasis added)

[7] It is also to be noted that the cases that have been decided on review matters in Fiji, Privy Council, House of Lords and High Court of Australia have established that the power of appellate courts to reopen and review their orders should be exercised with great caution.

[8] In **Autodesk Inc. v Dyason** (No.2) (1993) 176 CLR 300 at 303 Mason J said:

> "*What must emerge, in order to enliven the exercise of the jurisdiction is that the court has apparently proceeded according to some misapprehension of the facts and the law and this cannot be attributed solely to the neglect of the party seeking the rehearing. The purpose of jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re- argue their cases"*

[9] Petitioner's Special leave to appeal application which was decided on the 21st August, 2012 was only challenging the sentence which is alleged to have been given by the trial judge as excessive and harsh.

[10] Having heard the submissions of the petitioner we arrive at a firm conclusion that all the grounds of appeal except the issues 5 and 7 regarding the sentence tariff issue on additional 3 years and the issue on remission petitioner is entitled to, have been carefully dealt with by the Supreme Court in the final judgment and there is no merit in these grounds of appeal for this court to review it again.

[11] However, grievance of the petitioner with regard to increase of the sentence by an additional three years by the trial Judge and the petitioner will be deprived of his

remission as a result of the 3 years non-parole period of sentence are matters which this court thinks as appropriate to reconsider in the interest of justice in this application as urged by the petitioner.

[12] In fact the court was not appraised of the issue of law by the petitioner previously regarding the deprivation of the petitioner's entitlement of full remission as a result of the non parole period of three years which appear to have caused prejudice to the petitioner as he alleges. The petitioner invited court's attention to the principle issue of deprivation of his remission due to non-parole period of 3 years. However, the additional 3 years increase of the sentence for aggravating circumstances were considered by court in earlier appeals. We will deal with this issue after the legal position on review applications in Fiji and other jurisdictions are discussed.

[13] Justice Dalveer Bhandari of the Supreme Court of India in his article on "**The Concept of Finality of Judgment**" referred to his Judgment in Indian Council for **Enviro-Action v Union of India & Others** Petition No.967/1989 decided on 18/07/2011 and reproduced the paragraph 114 which reads as follows:

> "*The maxim "interest rei publicae ut sit finis litium" says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage it is necessary to put a quietus. It is rare in an adversarial system, despite Judges of the highest court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door for a further appeal could be opening a flood gate which will cause more wrongs in the society at large at the cost of rights."(*emphasis added)

[14] The honorable court in that case examined the law relating to jurisdiction of court on review matters in other countries including Fiji. Paragraph 150 of the above article by Justice Dalveer Bhandari deals with the legal position in Fiji as follows:

> "*The Supreme Court of Fiji Islands is incorporating Australian, and British case law summarized the law applicable to review of its judgments. It has been held the Supreme Court can review its judgments pronounced or orders made by it. The power of the appellate courts to re-open and review their orders is to be exercised with great caution*."

JURISDICTION TO REVIEW

[15] In **Autodesk Inc. v Dyson** (No.2) (1993) 176 CLR 300 at 301-303 Mason CJ said

> "*What must emerge in order to enliven the exercise of the jurisdiction is that the court has apparently proceeded according to some misapprehension of the facts or the relevant law and .... this cannot be attributed solely to the neglect of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases*"

[16] In Timoci Silatolu & Others v State criminal Appeal No. CAV 002 of 2006 the court said: "*A court of final appeal has power in truly exceptional circumstances to recall its orders even after they have been entered in order to avoid irremediable injustice.*" (emphasis added)

> *"…What represents "truly exceptional circumstances" is of course not able to be defined but would include the discovery of matters proving the occurrence of a substantial miscarriage of justice and proof to the court that it had previously acted under misapprehension of facts or the relevant law.*" (See Tej Deo v State (Civil Appeal No. CAV 0017of 2008)

[17] The petitioner in this case submitted that the trial Judge imposed a sentence of 3 years as the starting point of the sentence and further added another 3 years for the aggravating circumstances. Thereafter the Judge deducted 2 years for mitigating factors. The petitioner says that the concurrent sentence of 4 years imprisonment on each count was harsh and excessive and not in line with tariffs for offences of this nature.

[18] It also transpired at the hearing that the petitioner was charged for 3 counts of Larceny By Servant involving only a total sum of F$ 5436.39 and the sentence imposed on him was not in line with the sentencing tariffs decided in similar cases. However, when supporting this matter for review the petitioner moved that his sentence of 4 years be reduced to 3 years enabling him to get his remission of the sentence.

[19] Now we will consider whether his sentence of 4 years is against the Sentencing and Penalties Decree of 2009 as alleged by the petitioner. At this stage, it is useful to

mention the sentencing Judgment of Judge Gounder in the case of **State** v **Akanisi Panapasa** Criminal Case No. HAC 034 of 2009 decided on the 3rd November 2011. In that case Ms Akanisi Panapasa had joined Budget Rent A Car at Walu Bay after leaving secondary education and had worked her way up to branch manager after some 14 years. She then systematically stole F$48,874.10 over next two and half years. Justice Gounder sentenced her to 4 years imprisonment in totality after adding 3 years to the starting point of 3 years to reflect aggravating factors and ordered that she serve 3 years imprisonment before being eligible for parole. (emphasis added).

[20] It must be stated that the nature of the theft involved in this application is much more serious than the case of Akanisi Panapasa. The theft of money by using the computer is a Hi-Tec computer fraud which is more sophisticated. The amount of money defrauded was greater than that of the Akanisi case as the petitioner was charged initially. The tial Court, Court of Appeal and Supreme Court have carefully considered the sentencing guidelines put forward in the English case of John Barrick (1985) 81 Cr. Appeal R 78. Therefore, we do not think that the petitioner will succeed on the ground that the sentence was harsh and excessive. Accordingly we do not think that the sentence passed by the trial Court is excessive and harsh in the circumstances of the case.

Control of Discretionary power on sentencing

[21] However, it is important to mention that sentencing power of a judge may be controlled by the appellate court if the sentence is unreasonable. The principles on judge's sentencing power have been discussed by **Viscount Simon in Charles Osenton & Co. v Johnston** (1942) AC 130 as follows:

> "*The Appellate tribunal is not at liberty merely to substitute its own exercise of discretion already exercised by the Judge. In other words the appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant consideration .. then the reversal of the order on appeal would be justified"*

[22] Furthermore, in **R.v Cranssen** (1936) 55 CLR 509. The principles upon which the exercise of sentencing discretion should be reviewed have been discussed in similar terms as follows:

> *"Jurisdiction to review such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence or that they think the sentence was over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised……. The court may have mistaken or been misled as to the facts or error of law may have been made. The effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself when considered in relation to the offence and the circumstances of the case may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide court of first instance restrains the intervention of this court in cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority."*

[23] We, in the circumstances of the case, do arrive at a decision that the sentence of 4 years imposed in totality on the petitioner when exercising the discretion of the trial Judge does not seem to be an unreasonable sentence. As such, we see no reason or compelling circumstances shown to review the judgment of this court.

[24] It must be stated that this is a case where the petitioner has committed a serious offence of breach of trust involving a large sum of money of a Government company even though the petitioner was charged only for 3 counts of Larceny By Servant. Petitioner fraudulently stole the company money using the computer in a systematic way from February to November 2009 which he planned within a short span of time. The petitioner is also not a first offender.

[25] However, we will now carefully deal with and reconsider the imposition of the non-parole period of 3 years which was not raised in the special leave to appeal application by the petitioner. Since this matter involves a legal issue we allowed the petitioner to raise that issue and support the review application.

[26] The petitioner cited the Court of Appeal case of **Dwayne Hicks v State** (2009) FJCA 42; AAU0021.2007 dated 27 January 2009 which has decided a similar issue with regard to remission entitlement in support of his case.

[27] In that case the appellant came to court on the basis that the Prison authorities failed to give the appellant the remissions for good behavior to which he claims to be entitled. In that case Justice John E Byrne said that:

> "*….In my view this is incorrect, because section 63 of the Prisons Act (Cap 86) on which the Solicitor general's Office relied makes it clear that every convicted criminal prisoner under sentence of imprisonment for any period exceeding one calendar month shall be eligible for a 1/3 of his total sentence of imprisonment provided he has shown satisfactory industry and been of good conduct. These matters obviously are for the Prison authorities. They are the only ones who can say whether a prisoner has been of good conduct and shown satisfactory industry*"

[28] Section 63 (1) of the Prisons Act (Cap.86) as amended provides as follows:

> *"Every convicted criminal prisoner under sentence of imprisonment for any period exceeding one calendar month, whether one sentence or cumulative sentences, and whether suffering extramural punishment or not, shall, after serving one month's imprisonment be eligible by satisfactory industry and good conduct, to a remission of one-third of his total sentence of imprisonment."*

[29] Even though there seems to be a miscalculation of the number of months of the total sentence to which the petitioner in that case was entitled, it is obviously clear from the Provisions contained in section 63 of the Prisons Act that 1/3 of the total sentence has to be taken as the correct eligibility criteria for the remission of the sentence if we agree with the rule proposed by Byrne J in Dwayne Hicks case. Accordingly, in this case the total sentence imposed by the court is 4 years of imprisonment which is the original sentence. The petitioner in this application is accordingly, entitled to a 1/3 of the sentence of 4 years imprisonment provided the petitioner has shown satisfactory industry and been of good conduct according to the rule proposed in Dwayne Hicks case in the Court of Appeal.

However, this is a matter that the Prison Authorities would decide and this court cannot interfere with the opinion of the Prisons Authorities. (emphasis added)

[30] Furthermore, it is important to mention that the Prisons Act (Cap. 86) was repealed by the Prisons and Corrections Act of 2006 which came into force on the 27th June 2008. The new Prisons Act of 2006 provides for 1/3 remission of the sentence of a convicted criminal prisoner in section 27(2) and section 28(1) of the Act as follows:

> Section 27 (2) reads "*For all the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month."*
>
> Section 28 (1) of the Act reads that, "*The remission of sentence that is applied at the initial classification thereafter be dependent on the good behavior of the prisoner, and it may be forfeited and then restored, in accordance with Commissioner's Orders."*

[31] It can be seen that the sections 27(2) and section 28(1) of the new Prisons Act of 2006 has dropped the words *"total"* and *"satisfactory industry"* which were there in the original Act.(Cap. 86). However, the new provisions contained in section 27 (2) of the Act are clear that a convicted prisoner is eligible to a 1/3 of the sentence for any term of imprisonment exceeding one month, provided the prisoner shows good behaviour during the term of the sentence.

[32] It is useful to consider the judgment of the Supreme Court of Fiji in **Maturino Roago v State** Crim. Appeal No. CAV0003 of 2007 (unreported) which referred to the above Dwayne Hicks case and discussed the principle proposed. In that case the court observed that there is a problem with the view expressed by Justice Byrne sitting as a single Judge in **Dwayne Hicks v State** (supra).

[33] The court in paragraph 28 of Maturino Roago case, further said that

> "*Our example above is of a primary sentence of 15 years which equates to10 years with one-third remission. Under section 33 the court fixes a*

minimum sentence of a number of years between 10 to 15 years. Let us say it is fixed at 12 years ……..We now apply the rule proposed in Dwayne Hicks case and apply one-third remission to the minimum sentence so fixed. That results in a release date after 8 years. Therefore the exercise of the power under section 33 is wholly ineffective".

[34] In the above case of Maturino Roago the court has discussed and expressed the view that the intention of the legislature when enacting the Penal Code Amendment of 2003 was to ensure that the amendment law should be effective by fixing the minimum sentence. It appears that in any event, the minimum sentence fixed by the court should be more than the two-third period of the total sentence to be served and it can be seen if the full remission is given to the prisoner the whole purpose of the amended law becomes ineffective.

[35] It must be stated that there is undoubtedly, a purpose of enacting the amending law requiring the court to fix the minimum sentence when sentencing the convicted criminals. The provisions contained in the 2003 amendment of the Penal Code which has now been repealed by the Crimes Decree of 2009 is an attempt to preserve the public confidence in the administration of justice. The provisions contained in the Sentencing and penalties Decree of 2009 which came into force on 1st February 2010 seems to be an affirmation of sentencing practice that has been in force in Fiji. We agree with the view opined by the Supreme Court in Maturino Roago case (supra) regarding the effect of the Penal Code amendment of 2003 which was repealed by the Crimes Decree. It appears that the issue of full remission entitlement under the Prisons Act (Cap 86) as amended by 2006 Prisons and Corrections Act could be considered only after the minimum sentence of 3 years is served by the prisoner. If the early release of the petitioner is effected before the non-parole period is served the whole purpose of the Crimes Decree to protect the society and the community from crime offenders would make the law contained in the Crimes Decree of 2009 ineffective and unworkable.

[36] Section 18 of the Sentencing and Penalties Decree of 2009 which came into force in February 2010 provides for fixing the non-parole period when sentencing a convicted offender by a sentencing court, to be imprisoned for life or for a term of 2 years or more during which time the offender is not eligible to be released on parole. It can be seen that by the introduction of Sentencing and Penalties Decree of 2009 which came into force in February 2010 a more liberal approach has been brought in to deal with the convicted offenders.

Section 18 (1) reads as follows:

> "*Subject to sub-section 2, when a court sentences an offender to be imprisoned for life or for a term of two years or more the court must fix a period during which the offender is not eligible to be released on parole*."

[37] On perusal of the above provisions of law in section 18 of the Decree of 2009 on sentencing the court must fix the term during which the petitioner is not eligible for early release on parole. That is the law in force in Fiji. The law requires that the prisoner will have to serve the fixed term of imprisonment which is 3 years in this case. The petitioner may succeed in getting a remission after serving the non-parole period of imprisonment.

[38] However, petitioner contends that the court should consider his case in a more a lenient way and come to a fair and appropriate finding, having taken into consideration the fact that the petitioner was charged for 3 counts of Larceny By Servant involving only a sum of F$5436.39 after the Information was amended by the Director Of Public Prosecutions and all his mitigating circumstances whereas the petitioner had been punished with the higher end of the sentence with a non-parole period of 3 years. It must be stated the petitioner should have raised the issue of deprivation of full remission entitlement under the Prisons Act of 2006 in the Special leave to Appeal application which was decided on the 21st August 2012. We regret to note this court now cannot consider any ground of appeal in the review application unless the petitioner establishes truly exceptional and compelling reasons for this court to intervene. Had the petitioner raised the issue on deprivation of full remission the court could have considered and decided in favour of the petitioner if the petitioner was able to satisfy court on the threshold criteria contained in section 7 (2) of the Supreme Court Act 1998.

[39] It was held in the Supreme Court of Sri Lanka in the case of **Jeyaraj Fernandopulle** v **Premachandra de Silva** (1996) 1 Sri L.R.70 (Five Judge bench decision) that:

> "*when the Supreme Court has decided a matter, that matter is at end, there is no occasion for other judges to be called upon to review or revise a matter. The Supreme Court is a creature of statute and its powers are statutory. The court has no jurisdiction conferred by the Constitution or*

any other law to rehear, review, alter or vary its decision . Decisions of the Supreme Court are final."

[40] It would appear that the petitioner relentlessly pursues and makes an attempt to re-argue the appeal on the same grounds and a new ground on non-parole period and full remission issue which was not raised in the Special Leave to Appeal application and seek relief from this court.

[41] We conclude that, in the circumstances, this is a vexatious and futile application for review and an abuse of the court process as this matter has been determined by the Supreme Court with due regard to law and all the circumstances. The court makes a note that this kind of applications should not be encouraged as it is a waste of time of the court.

[42] Accordingly application for review is dismissed.

Hon. Justice Sathyaa Hettige
Judge of the Supreme Court

Hon. Justice Suresh Chandra
Judge of the Supreme Court

Hon. Justice Paul Madigan
Judge of the Supreme Court

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