

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 26 OF 2017

BETWEEN: **FICAC**

Appellant

A N D: **MELI LASEKULA BITU**

Respondent

Counsel: Ms. A. Lomani for Appellant
 Mr K. Tunidau for Respondent

Date of Hearing: 31st October 2017

Judgment: 20th February 2018

JUDGMENT

1. The Respondent had been charged in the Magistrate's Court in Suva with one count of Receiving a Corrupt Benefit, contrary to Section 137 (1) (a) (ii) of the Crimes Act and one count of False or Misleading Information, contrary to Section 333 (1) (a) and (b) (ii) and (c) (i) of the Crimes Act. Consequent upon the plea of not guilty of the Respondent, the matter was proceeded to Hearing. The Hearing commenced on the 13th of October 2014, and concluded on the 14th of October 2014. Subsequently, the learned Magistrate delivered his judgment, finding the Respondent guilty for both counts. The learned Magistrate then convicted and sentenced the Respondent for a period of fifteen (15) months imprisonment for the offence of Receiving a Corrupt Benefit and a period of four (4) months imprisonment for the offence of False or Misleading Information. It was ordered that both the sentences to be served concurrently. The learned Magistrate has then suspended the said sentence for a period

of three (3) years. Dissatisfied with the said sentence, the Appellant files this Petition of Appeal on the following grounds, *inter alia*;

- i) *The learned Magistrate erred in law in failing to consider the principle of deterrence provided in the sentencing guidelines under the Sentencing and Penalties Act No. 42 of 2009.*
- ii) *The learned Magistrate's sentence is manifestly lenient and grossly inadequate having regard to all the circumstances of the case.*
- iii) *The learned Magistrate erred in fact and law in imposing a suspended sentence without sentencing the Respondent to an immediate custodial sentence.*
- iv) *The learned Magistrate erred in fact and law in giving undue discount and weight to the previous good conduct of the Respondent as a first offender.*
- v) *The learned Magistrate erred in fact and law in stating that the prosecution submitted that the major mitigating factor in favour of the Respondent was his status as a first offender.*
- vi) *That the learned Magistrate erred in fact and law in stating that the absence of tariff in the two cases cited by prosecution was in reference to the offence of Obtaining A Gain.*

2. The Appellant and the Respondent were given directions to file their respective written submissions, which they filed as per the direction. The learned counsel for the Appellant and the Respondent informed the court that they do not wish to make any oral submissions. Having carefully considered the record of the proceedings in the Magistrate's Court, the grounds of appeal and the respective written submissions filed by the parties, I now proceed to pronounce my judgment as follows.

Background

3. The Respondent was employed as the Director, Asset Management Unit at the Ministry of Economy. He was tasked to manage the affairs relating to the Kalabu Tax Free Zone. On the 2nd of May 2013, he had experienced a pain and visited the CWM Hospital in Suva. While he was waiting at the Hospital for his treatments, he received a call from Mr. Robert Cromb, a Businessman and a tenant at the Kalabu Tax Free Zone, inquiring whether the Respondent was attending the meeting that was scheduled in the evening of that day. The Respondent had told Mr. Cromb that he could not attend to the meeting as he was waiting at the hospital in order to obtain treatment for his pain. Mr. Cromb had then told the Respondent to go and get his treatments at the Suva Private Hospital. He had offered the Respondent that he would pay the cost of the treatment. The Respondent accepted the said offer and admitted in at the Suva Private Hospital, where he had an appendicitis surgery. Mr. Cromb initially paid sum of \$12,592.95 as the estimated cost for the treatment. Upon the conclusion of the surgery and treatment, the Suva Private Hospital returned the Respondent a sum of \$3,030.21 as the actual cost incurred was \$9,247.00.
4. When he returned to work after the treatment, the Respondent had made a Declaration pursuant to Public Service Gift Policy, detailing about the money which he received from Mr. Cromb and the subsequent treatment and expenses he had incurred. He has stated that the cost for the treatment was \$12,593.00. Upon making inquiries of this declaration, the Ministry of Finance finally found that the actual expenses of the treatment were \$9,247.00 and not \$12,593.00 as declared by the Respondent in his declaration.

The Law

5. This appeal is against the Sentence imposed by the learned Magistrate. Hence, I now turn onto briefly discussed the laws relating to the applicable approach adopted by the appellate court in intervening into the sentences imposed by the lower court.

6. The Fiji Court of Appeal in Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998 found that:

"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 of the relevant considerations, then the appellate court may impose a different sentence."

7. The Fiji Court of Appeal in Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015) held that:

"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."

8. Goundar JA in Sagainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015) has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that:

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Natsua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

- i) Whether the sentencing judge acted upon a wrong principle;*
- ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
- iii) Whether the sentencing judge mistook the facts;*
- iv) Whether the sentencing judge failed to take into account some relevant consideration.*

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)".

Grounds of Appeal

9. Having carefully perused the grounds of appeal advanced by the Appellant and the written submissions filed by the learned counsel for the Appellant, I find that this appeal is mainly founded on the contention that the learned Magistrate erred in law and fact by imposing a suspended sentence without imposing an immediate custodial sentence. The learned counsel for the Appellant in her submissions, conceded that the final sentence of fifteen (15) months imprisonment for the first count and the four (4) months imprisonment for the second counts are well within the maximum imprisonment sentencing limit imposed by statutory law. (vide paragraph 15 of the written submissions of the Appellant).
10. The learned counsel in her written submission, submitted that the imposing of the suspended sentence was wrong in principles. The learned counsel further argues that

the learned Magistrate has failed to take into consideration the principle of deterrence as provided under Section 4 (1) of the Sentencing and Penalties Act. Moreover, the learned counsel submitted in her written submissions, that the learned Magistrate has erroneously taken into consideration the previous good behaviour of the Respondent in his favour.

11. The learned counsel for the Respondent in his written submissions, urges that the sentence imposed by the learned Magistrate is founded on accurate sentencing principles. He further submits that the learned Magistrate has clearly taken into consideration the principle of deterrence and principle of rehabilitation pursuant to Section 4 (1) (f) of the Sentencing and Penalties Act.

Purpose of the Sentence

12. Section 4 (1) of the Sentencing and Penalties Act states that:

- i) *The only purposes for which sentencing may be imposed by a court are*
- a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
 - b) to protect the community from offenders;*
 - c) to deter offenders or other persons from committing offences of the same or similar nature;*
 - d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
 - e) to signify that the court and the community denounce the commission of such offences; or*
 - f) any combination of these purposes.*

13. Having carefully perused this sentence, I find that the learned Magistrate has properly considered the seriousness of this offence. He has then concluded that this offending deserve a sentence of imprisonment. Having reach to fifteen (15) months of imprisonment for the first count and four (4) months of imprisonment for the second

count, the learned Magistrate had then proceeded to consider whether it is appropriate to impose an immediate custodial sentence or not. Accordingly, I find that the sentence is founded on the principle of deterrence and also on the principle of rehabilitation pursuant to Section 4 (1) (c), (d) and (f) of the Sentencing and Penalties Act.

Previous Good Character

14. The learned counsel for the Appellant in her submissions contends that the learned Magistrate has given an undue discount and weight to the previous good character of the Respondent as a first offender. However, in paragraph fifteen of her written submissions the learned counsel for the Appellant has specifically submitted that the Appellant does not challenge the length of the sentence imposed by the learned Magistrate. The learned counsel for the Appellant further reaffirmed this position in open court on the 19th of February 2018. The learned counsel further submitted on the 19th of February 2018, that the main contention of the Appellant is founded on the correctness of the suspended sentence.
15. The learned Magistrate in his sentence, has considered the previous good conduct of the Respondent as a first offender as the only mitigating factor in his favour. The learned Magistrate has then deducted three months for the offence of Receiving a Corrupt Benefit and two months for the False and Misleading Information for his previous good conduct. Having done that, the learned Magistrate has reached to the final sentence of fifteen (15) months for the first count and four (4) months for the second count. He then proceeded to consider whether to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Act. The learned Magistrate has not considered the status of the Respondent as a first offender in suspending the sentence. Since the Appellant does not challenge the length of the sentence, I do not find any necessity in discussing the status of the Respondent as a first offender in this appeal.

Suspended Sentence

16. Section 26 (1) of the Sentencing and Penalties Act has stipulated that a sentencing court has a discretionary jurisdiction to fully or partly suspend the sentence if it is satisfied that such a suspension is appropriate. Section 26 (1) states that:

"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."

17. The Court of Appeal of New Zealand in **R v Petersen (1994) (2) NZLR 533, at 539,** has discussed the appropriate facts that a court should consider in suspending a sentence in an inclusive manner. Eichelbaum CJ in **Petersen (supra)** held that:

"Thomas at pp 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrence the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately."

18. Eichelbaum CJ in **Petersen (supra)**, went on and further held that:

"In concluding our consideration of the principles we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response."

19. According to the comprehensive observation made by Eichelbaum CJ in **Petersen (supra)**, the sentencing court could consider the following factors, though they are not exhaustive, in determining whether it is appropriate to impose a suspended sentence, *inter alia*:

- i) The age of the offender,
- ii) Previous good record, or a long period free of criminal activity,
- iii) The need of rehabilitation,
- iv) The likely response of the offender to the sentence,
- v) Whether the suspended sentence act as a strong deterrent to the offender,
- vi) The gravity of the offence, such as diminished culpability arising through lack of pre-meditation or the presence of provocation.
- vii) Whether the offender cooperated with the authority, (*vide : Hakik v State [2016] FJHC 682; HAA15.2016 (1 August 2016).*)

20. The nature of these two offences falls within the scope of the offences involved with dishonesty and breach of trust. Having taken into consideration the nature of these offences, I now draw my attention to discuss the sentencing approaches adopted by the courts in Fiji in respect of offences involved with dishonesty and breach of trust.

21. The Fiji Court of Appeal in Deo v The State [2005] FJCA 62; AAU0025.2005S (11 November 2005) has extensively discussed the appropriate approach in suspending a sentence in relation to an offence, involved with breach of trust, where it was held that:

"Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting such a sentence and, in all cases, the sentencing court should not be too quick to find such circumstances.

That applies with particular emphasis in cases involving betrayal of a position of trust where matters of personal mitigation will usually be subordinate to the seriousness of the offence. In most such cases, the offenders share many common aspects of mitigation: most are first offenders, most will, as a result of their fraud, have lost a good job and have little chance of ever being given such responsibility again and almost all will never commit a similar crime in future. Similarly, most are relatively well educated and so will find it easier than many released from prison to find at least reasonably remunerated employment in future.

Therefore we would suggest that, in such cases, personal mitigation should carry less weight than it might in other crimes. The same will generally apply to efforts at rehabilitation. The result is that it must only be in the most exceptional cases of breach of trust that the court should consider personal mitigating factors are sufficient to outweigh the seriousness of the crime to the extent of allowing a suspended sentence."

22. Justice Shameem in State v. Raymond Roberts (HAA 0053 of 2003 S) found that:

"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. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim."

23. In view of the above judicial precedents, the courts in Fiji have adopted a cautionary approach in suspending of sentences for the offences involved with dishonest and breach of trust. The court has not completely ruled out the possibility of the suspending of sentences, though it proposes that a custodial sentence is inevitable for the offences involved with breach of trust. The court could impose a suspended sentence for the offences involved with breach of trust, if the sentencing court is satisfied that there are exceptional circumstances that sufficiently justify it.
24. In this case, the learned Magistrate has first found that a sentence of imprisonment was required for these offences. Having reached to a sentence of fifteen (15) months imprisonment for the first count and four (4) months imprisonment for the second count, the learned Magistrate has then proceeded to consider whether he could suspend the sentence. In doing that, the learned Magistrate has taken into consideration the following factors, *inter alia*:
- i) The nature of the offending,
 - ii) The level of trust reposed in the position held by the Respondent,
 - iii) The position of the Respondent in his community,
 - iv) The attempts that the Respondent has made to rehabilitate,

- v) His support to his family,
- vi) The ability of the Respondent to contribute to the community,
- vii) The character references given by the referees.

25. The learned counsel for the Appellant, in her submission relies on State v Seru ([2014] FJMC 74; Criminal Case 1816.2012 (7 May 2014)) and Deo v State [2011] FJHC 372; HAA010.2011 (6 July 2011) in order to substantiate her submission that this offence warrants an immediate custodial sentence.
26. The accused in State v Seru (supra) had been charged in the Magistrate's Court with one count of Destroying Evidence, contrary to Section 189 (a) of the Crimes Act and one count of Receiving Corrupt Benefit, contrary to Section 137 (1) (a) (ii) of the Crimes Act. Upon his plea of guilty, the accused was sentenced for a period of eight (8) weeks for the first count and fifteen (15) months of imprisonment for the second count. The accused was a Police Officer, who had unlawfully received a sum of \$450 in order to destroy some of the evidence that were required in a judicial proceedings.
27. In Deo v State (supra), the High Court found that the twenty months of imprisonment period for each of seven counts of Receiving Corrupt Benefits as an appropriate punishment. In Deo v State (supra) the accused was a Police Officer, who had obtained money from two individuals whom were under the police investigation. He had obtained these money with the promise that he would terminate those police investigations that were pending against these two individuals.
28. In this case, the Respondent had received money from one of the tenant and businessman who is doing business at Kalabu Tax Free Zone, where the Respondent was the Director of the Asset Management Unit. According to the evidence adduced in the hearing, Mr. Cromb had actually made this offer, when he heard from the Respondent that he was at the CWM Hospital, waiting for treatment. The Respondent then accepted the said offer and admitted in to Suva Private Hospital in order to undergo the surgery, for which Mr. Cromb deposited a sum of \$12, 592.95 as the estimated cost of the treatment. According to the evidence given by the Respondent in the trial, his appendices were ruptured when he was admitted to the Suva Private

Hospital. (*vide*; page 39 of the record of the proceedings in the Magistrate's Court). Subsequent to his surgery and treatments, the Hospital has returned him sum of \$3,030.21 as the actual cost of the treatments was \$9,247.00. The Respondent has then made a declaration to the Ministry of Finance, explaining the circumstances that led him to accept this offer. He has falsely stated in the declaration that the cost of the treatment was \$ 12,592.95.

29. In view of the factual circumstances of this case, I find the factual background of this case is distinguished from **State v Deo** and **State v Seru** (*supra*).
30. It is not the duty of the Appellate court to substitute its own views or opinion with the findings of the lower court. The test is to determine whether the learned Magistrate has properly reached to his conclusion, considering the evidence that was placed before him and also on the appropriate legal principles without reaching to a plainly unreasonable conclusion. The Fiji Court of Appeal in **Sharma v State** (*supra*) held that:

"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".

31. Moreover, the Fiji Court of Appeal in **Deo v State** (*supra*) has expounded that:

"The appellate court will interfere only if there is no evidence upon which the sentencing magistrate could properly have based his decision or it was based on a wrong principle or mistake of law or is plainly unreasonable.

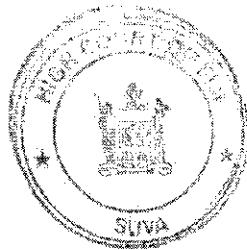
That is not what the learned judge did. The judgment shows that the learned judge reached a different conclusion about the genuineness of the appellant's remorse following a careful reassessment of the same

evidence as had been before the magistrate. That was not the proper approach. The question should have been whether the magistrate had evidence upon which he could have reached the decision he did and not simply to substitute the appellate judge's own opinion."

32. The learned Magistrate has undoubtedly taken into consideration the evidence that were adduced during the course of the hearing and the submissions in mitigation with the supporting documentations, before he reached to his conclusion in this sentence. Having done such, the learned Magistrate has found that the interests of sentencing the Respondent can be achieved by suspending the sentence for a period of three years.
33. In view of the reasons discussed above, I am satisfied that the learned Magistrate has properly exercised his discretionary jurisdiction in suspending the sentence pursuant to Section 26 of the Sentencing and Penalties Act. Therefore, I do not find any merits in the grounds of appeal advanced by the Appellant.

The orders of the Court:

- i) The Appeal is dismissed,
34. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
20th February 2018

Solicitors
Office of the Fiji Independent Commission Against Corruption for the Appellant,
Tunidau Lawyers for the Respondent.