

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CRIMINAL APPEAL NO. AAU0025 OF 2001S  
(Suva High Court Criminal Case No. 19 of 1999)

BETWEEN: BABITA DEVI KUMAR VERMA Appellant  
(d/o Parmod Nath of Vuci Road,  
Nausori, Domestic Duties)

AND: THE STATE Respondent

Coram: Hon Jai Ram Reddy, President  
Hon Sir Mari Kapi, Justice of Appeal  
Rt Hon John Henry, Justice of Appeal

Hearing: Tuesday, 6<sup>th</sup> August, 2002, Suva

Counsel: Mr G.P. Shankar for the Appellant  
Mr J. Naigulevu for the Respondent

Date of Judgment: Friday, 16<sup>th</sup> August, 2002

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JUDGMENT OF THE COURT

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The Appellant was charged on three counts of Embezzlement by a Servant. She was tried in the High Court by Surman J. sitting with three assessors. All the three assessors found the Appellant not guilty on Count 1, and guilty on Counts 2 and 3. The learned Judge concurred, acquitted the Appellant on Count 1, and convicted her on Counts 2 and 3. He sentenced her to 6 months imprisonment on Count 2, and 12 months on Count 3, the sentences to run concurrently with each other. He suspended the 12 months sentence for 2 years and ordered her to pay \$300 in prosecution costs.

The Appellant has appealed to this Court against her conviction on Counts 2 and 3.

The evidence giving rise to Counts 2 and 3 can be briefly stated as follows:-

COUNT 2

On the 25<sup>th</sup> of September 1998 the Appellant received the sum of \$12,000 from Jagdish Chand (Chand), paid on behalf of his employer Kishore Rupen (Rupen). The \$12,000 represented the purchase price of motor vehicle registration No. DE 831 which the National Insurance Company Limited (the Company) agreed to sell to Rupen. The \$12,000 was paid in cash. According to Chand the Appellant first wrote out a receipt for \$10,000, and when he pointed out to her that he had paid \$12,000, the Appellant apologised for the mistake, corrected the receipt and gave it to him. This receipt bears the serial number 56688 and is dated 25/9/98. It was exhibited (Exhibit P7). However, the two carbonized duplicates of the same receipt, also exhibited, show \$8,000 and not \$12,000. The Appellant did not dispute that she received \$12,000. All the three receipts are in her handwriting and bear her signature. The Prosecution case against the Appellant was that of the \$12,000 received by her from Chand, the Appellant accounted to the Company for \$8,000, and dishonestly kept the remaining \$4,000. To conceal the fraud she deliberately falsified the two copies of receipt No. 56688 (Exhibits P4 and P9). The State also alleged that in order to mislead the Company's management and to camouflage the fraud the Appellant wrote out a bogus letter and cheque to Asco Motors dated 2<sup>nd</sup> October 1998. The cheque was for \$12,000, cancelled and left in the Company's folder for DE 831. No monies were due to Asco Motors.

The Appellant who gave evidence on oath, explained the discrepancy between the

original receipt No. 56688 and the two copies. According to her she was told by Mr Jai Maharaj (Maharaj), the Company's Administration Manager, that following a telephone conversation he had with Rupen, the purchase price of DE 831 was reduced from \$12,000 to \$8,000. She picked up the receipt book of a fellow employee of the Company, Sherase Peckham (Peckham), who also gave evidence, and wrote out the receipt for \$8,000, tore off the original from the book and then went to the interview room where she met Chand, who gave her \$12,000. She then returned to Maharaj and told him that Rupen had sent \$12,000 and not \$8,000 for the purchase of DE 831, whereupon Maharaj told her to amend the receipt to \$12,000. This the Appellant did. This account of events does not explain why she at first wrote out the receipt for \$10,000, and then changed to \$12,000 as testified by Chand. In any event, according to the Appellant of the \$12,000 received by her she gave \$8,000 to Peckham and \$4,000 to Maharaj. At the time she gave the \$4,000 to Maharaj, she pulled out the Company's note pad and wrote the following:-

***“\$8,000 given to Sheraz and 4,000 left with J. to be banked on Monday as discussed”***

According to the Appellant she signed the note and Maharaj initialled it. She tore the note from the pad and left it on DE 831 folder. The original note was not found. None of the Company's employees who testified had seen it. Maharaj had not seen it. The Appellant further testified that she photocopied the note, which she produced at the trial, and which was exhibited (P36). The Appellant did not offer any explanation as to why she photocopied this note. While the Appellant amended the original receipt No. 56688, she did not amend the copies, because in her words - “Sheraz had taken the book away from my table”.

Maharaj denied receiving the \$4,000.

The witness Peckham, also a Customer Services Officer, employed by the Company told the Court that the Appellant gave her the yellow copy of Receipt No. 56688 and \$8,000 in cash. She loaded the receipt into the Company's computer, and gave the \$8,000 to the Company's cashier for banking. The \$8,000 was counted by her with the Appellant. Apparently nothing was said to Peckham by the Appellant about the \$4,000, which she claimed she had left with Maharaj.

COUNT 3

Rupen testified that he gave \$10,500 to the Appellant on the 8<sup>th</sup> of December 1998. This was for the purchase of motor vehicle CZ 569 from the Company. The Appellant issued receipt No. 59004 bearing that date. The original receipt (Exhibit P7) is for \$10,500, although it appears that the figure "5" may have been overwritten on figure "2" on the receipt. The second copy of the receipt (the yellow copy) (Exhibit P27) shows \$10,200, but the "0" after "1" has been crossed off with a different pen. The third copy of the receipt (Exhibit P12) shows \$1,200. Significantly, there is a long gap or space between the figures "1" and "2" on this copy of the receipt.

The Company's Head Cashier, Radhina Sneh Datt (Datt) told the Court that she received \$1,200 from the Appellant on the 8<sup>th</sup> of December with the yellow and green copies of the receipt for that amount.

The Appellant admitted receiving \$10,500 in cash from Rupen. In her evidence she said:

*"Mr. Rupen handed me the cash of 10,500. I amended the white receipt from 10,200 to 10,500. I took the 10,500 with me and went to my table and I put a Rubber Stamp on the white receipt copy of the Receipt and initialled it."*

Her evidence was that she handed the money and the receipt book to the Head Cashier Datt. According to the Appellant's own evidence, on the 16<sup>th</sup> of December 1998, Maharaj questioned her about "the file CZ 569 and about missing funds." According to her she told Maharaj that she "never counted the money", but that he did. She was then sent home by Maharaj. The Appellant also testified that she received the yellow copy of receipt 59004 (Exhibit P27) in the mail with an attached letter, presumably some days after she was sent home. Exhibit 27, and the unsigned letter arrived in a Company envelope, addressed to the Appellant's mail box. The Appellant also claimed, that she photocopied the original of receipt No. 59004 (white copy), presumably before she gave it to Rupen. She claimed that on that photocopy she wrote the words "\$300 refunded to Kishore. \$10,200 receipted." She claimed that she signed the receipt and Maharaj initialled it. This document was not produced.

In any event, the State's case against the Appellant was that the Appellant received \$10,500 from Rupen for the Company. She accounted to the Company for \$1,200, and dishonestly kept the balance for herself.

On that evidence, the learned Judge and the assessors were unanimous in finding the Appellant guilty on Counts 2 and 3.

## THE APPEAL

At the hearing of this appeal the grounds of appeal as formulated and set out in the notice of appeal were not pursued. Instead, Mr G.P. Shankar who represented the Appellant in this appeal, (but not at her trial) confined himself to two issues. The first related to the learned Judge's treatment of Exhibit P36, and his directions to the assessors on it. Mr Shankar complained that the learned Judge misdirected the assessors on this issue, and did not put the Appellant's defence to the assessors adequately, and therefore there has been a miscarriage of justice.

The second issue arises from the way in which the learned Judge treated Exhibits 13 and 14. According to Mr Shankar taken together these Exhibits show, that the whole of the amount received for the sale of CZ 569, and the subject matter, of Count 3 has been accounted for, and the learned trial Judge misdirected himself and the assessors on this issue. We will now deal with matters raised by Mr Shankar under these two separate headings.

### Exhibit P.36 - Failure to put the Appellant's defence to the assessors

The guilt of the Appellant had to be judged in the light of all of the evidence adduced at the trial, including the Appellant's own evidence. Exhibit 36, which was produced by the Appellant is a photocopy of the original which the Appellant claimed she had left on the Company's file, relevant to motor vehicle DE 831. Maharaj denied seeing any such document on the file, neither did any of the other employees of the Company, who gave evidence. It is strange that the Appellant should have made and retained a photocopy of this document for

herself, when on her accounting there was no reason for her to do so. Other than admitting that the initial on Exhibit P36 was his, Mr Maharaj's entire evidence contradicted what appears on Exhibit 36. Furthermore, although the Appellant was represented by experienced Counsel the contents of Exhibit 36 was never put to Maharaj. Mr Shankar, urged upon us that Maharaj must be deemed to have read Exhibit 36, and that his initial signified his approval, or endorsement of the contents thereof. We cannot agree. Indeed, as stated earlier Maharaj's evidence is to the contrary. He denied receiving \$4,000. It was never suggested to him that he had received \$4,000 out of the \$12,000 paid to the Appellant by Chand. There was ample evidence upon which the learned Judge and the assessors could conclude, as they clearly did, that the Appellant failed to account to the Company for the \$4,000. In our view, the learned Judge's summing up to the assessors on Exhibit 36 was both adequate and fair. The learned Judge was perfectly justified in asking the assessors to treat Exhibit 36 with care. In our view, the Appellant's defence, that it was Maharaj who took the \$4,000, and not her, was put to the assessors, who clearly did not believe the Appellant. There is no basis for interfering with the findings of the learned trial Judge and the assessors, who saw and heard the witnesses in the case.

#### Non-direction - Exhibits 13 and 14

The alleged non-direction as to these two exhibits, did not feature in the original grounds of appeal. This was raised in the Appellant's written submissions to this Court on the 22<sup>nd</sup> of July 2002. As stated earlier, Rupen testified that he paid the Appellant \$10,500 in cash, and this was admitted by the Appellant. Exhibit 13 (Branch Detail List for Batch - F41) shows that only \$1,200 was received by the Company.

In Exhibit P14 (List of Cash Transactions 14/12/98) there is the following entry:-

	BATCH	DATE	TYPE	NUMBER	PAYMENT	AMOUNT
C.	F41	14/12/98	LOSS	60290570	CHEQ	9,000.00

Mr Shankar submitted that the \$9,000 shown in Exhibit 14, is part of the 10,500 paid by Rupen, and after allowing for the \$300 that the Appellant said she gave back to Rupen, the sum of \$10,200 is fully accounted for. With respect, this argument is untenable, and it flies in the face of the clearest evidence that the Appellant received \$10,500 in cash on the 8<sup>th</sup> of December 1998. There is no evidence that Rupen gave the Appellant a cheque for \$9,000 either on the 8<sup>th</sup> of December 1998 or the 14<sup>th</sup> of December 1998. Datt said that she received \$1,200 from the Appellant. The green copy of the receipt shows that \$1,200 was received. According to Datt, the yellow copy of the receipt which she saw on the day, also showed \$1,200. So what became of the \$9,000 cash not accounted for? Mr Shankar speculates, that either the Cashier or someone else in the Company, could have used the \$9,000 cash, and subsequently, presumably on the 14/12/98, paid back the amount to the Company with a cheque, hence the entry in Exhibit P14. There was not a shred of evidence before the Court to suggest that any such thing happened. There was the clearest evidence that \$10,500 was paid to the Appellant and she accounted for only \$1,200 to the Cashier Datt. The Appellant was not able to explain the different figures on the receipts. This is what she said in cross-examination:

**"Re Charge 3**

**Q. You helped out in dealing with the J.S. Hill Claim.**



- A. Yes.
- Q. Please see P.7 (white) and P.12(green) - see No. 59004.
- A. Yes.
- Q. Kishore gave you \$10,500 in cash.
- A. Yes.
- Q. P.7 - the while receipt is the Receipt to Mr. Kishore Rupen for that amount.
- A. Yes.
- Q. Please see P.26 and P.27 - 59004 - National Insurance Receipts.
- A. Yes.
- Q. The Receipt should be identical.
- A. Should be - but they are not.
- Q. You amended the P.7 (white).
- A. Yes.
- Q. You did not amend P.12 (the green copy).
- A. Correct.
- Q. You did not amend the yellow copy (P.27).
- A. Correct.
- Q. Look at P.7 - (white copy) - is that your signature.
- A. Yes.
- Q. \$10,500 was paid to you.
- A. Initially he paid \$10,500 - then he was refunded \$300 later.
- Q. If you change the white copy - you should amend the yellow and green too.
- A. Yes.
- Q. Please see P.13 - Computer printout re 9/12/98.
- A. Yes.
- Q. Do you see the entry - money received from Kishore Rupen was 1,200 with Receipt 59004.
- A. Yes.
- Q. That Receipt No. corresponds to the Receipt P.12 (green copy).
- A. Yes.
- Q. Receipt P.12 - is made out for 1,200 too.
- A. Correct.
- Q. Correct Radhina received the money from P.12 from you.
- A. I do not know the exact amount. It should have been \$10,500 but it was in a brown paper bag. I did not count it so I am not sure what amount."

Mr Naigulevu, for the State submitted that the \$9,000 entry in Exhibit 14 relates to the cheque for that amount that was raised, by the Appellant, payable to Asco Motors. It is dated 14 December 1998, as is the letter to Asco Motors. The Appellant of course denied raising and subsequently cancelling this cheque. She said someone who knew her computer access code could have done so. The learned Judge did draw the attention of the assessors to Exhibit

4.

P14 which shows a loss of \$9,000 under computer reference 60290570.

In our view there was ample evidence before the Court from which the learned Judge and the assessors could conclude, as they did, that the Appellant diverted the sum of \$9,300 out of the \$10,500 paid to her by Rupen to herself and we see no reason to interfere with that finding.

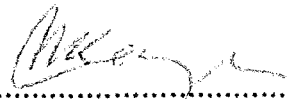
We do not see any merit in this ground of appeal.

Order:

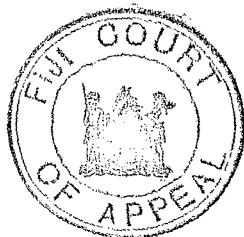
There is no merit in any of the grounds of appeal. We dismiss this appeal.



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Hon Jai Ram Reddy  
President



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Hon Sir Mari Kapi  
Justice of Appeal



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Rt-Hon John Henry  
Justice of Appeal

Solicitors:

Messrs G.P. Shankar & Co., Ba for the Appellant

Office of the Director of Public Prosecutions, Suva for the Respondent