IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 81 of 2017
[In the High Court at Suva Case No. HAC 56 of 2014]

BETWEEN	:	**VILISI TUITAVUKI**
		Appellant
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ('FICAC')**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. R. Aslam and Ms. Laite Bokini-Ratu for the Respondent**
Date of Hearing	:	**30 July 2021**
Date of Ruling	:	**30 July 2021**

RULING

[1] The appellant (06th accused in the High Court) had been charged with one count of Abuse of Office contrary to Section 139 of the Crimes Act, and 05 counts of Causing a Loss contrary to Section 324 (2) of the Crimes Act.

[2] The trial judge in the judgment had summarised the facts of the case as follows:

> *8. It was proved at the conclusion of the hearing that the first six accused persons, while performing and discharging different duties and responsibilities at different stages in the procurement process, have facilitated these one hundred and one (101) false transactions of purchasing stationery and hardware materials to the DECE. In doing so, they have committed these offences of Abuse of Office, Causing a Loss and Obtaining a Financial Advantage.*

9. *During these one hundred and one (101) transactions, the Accounts Section of DECE had paid 60 cheques, totaling to the full amount of $362,944.37 to Shavel Stationery, On Time Stationery and Phoenix Hardware, all of them owned by Mr. Shelveen Narayan, the eight accused. In the meantime Mr. Narayan, the eight accused had given the fourth accused, Ms. Laisa Halafi a sum of $65,200 for her role in arranging and organizing these false payments. The said money had been deposited by Mr. Shelveen Narayan into the bank account of the late husband of Laisa Halafi.*

10. *It was further proved, that Ms. Ana Laqere had signed all of these cheques as the counter signatory. Ms. Amelia Vunisea, as the signatory, had signed in fifty nine (59) cheques. Ms. Laisa Halafi had checked and signed the Payment Vouchers pertaining to thirteen (13) transactions. Ms. Vaciseva Lagai had certified the payments in Payment Vouchers pertaining to nine (9) transactions, while Ms. Vilisi Tuitavuki had checked and signed in the Payment Vouchers pertaining to five (5) transactions as "pass for payment". Mr. Kiniviliame Taviraki had raised two requisition orders pertaining to two (2) of these transactions.*

11. *Apart from that it was proved that Ms. Vilisi Tuitavuki as the Cashier, had issued number of manually written cheques in relation to some of these transactions. She has then entered wrong figures and details in the Payment Cash Book pertaining to two of these cheques. Ms. Vaciseva Lagai had signed and approved printed Purchase Orders when they were approved by Ana Laqere in FMIS.*

[3] At the end of the summing-up, all five assessors unanimously opined that the appellant was guilty of all counts. The Trial Judge had agreed with assessors and convicted the appellant as charged. On 10 May 2017 the appellant was sentenced to eight (08) years of imprisonment for the offence of Abuse of Office, contrary to Section 139 of the Crimes Act, and for four (04) years of imprisonment for each of the five counts of Causing a Loss, contrary to Section 324(2) of the Crimes Act. All the sentences were to be served concurrently. The trial judge also ordered that the appellant would not be entitled for any parole for a period of six (6) years.

[4] The appellant in person had appealed against conviction and sentence in a timely manner (31 May 2017) without however specifying any specific grounds of appeal. The Legal Aid Commission had tendered amended notice of appeal and written submissions on 09 June 2020 only against sentence. Therefore, the appellant (and her

counsel) should formally file an abandonment notice in Form 3 in terms of Rule 39 of the Court of Appeal Rules in respect of the conviction appeal. The respondent had filed its written submissions on 09 July 2020. The counsel for the appellant and the respondent had informed in writing that they would rely on their respective written submissions for a ruling at the leave to appeal stage without a hearing in open court or via Skype.

[5] The sole ground of appeal urged on behalf of the appellant is as follows:

> *(1) THAT the Learned Trial Judge erred in his sentencing discretion by enhancing the sentence with factors that are already subsumed as an element of the offence.*

[6] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

> *(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.

[8] The maximum penalty for Abuse of Office in terms of Section 139 of the Crimes Act is 10 years imprisonment. However, if the act is done or directed to be done for gain the maximum penalty is 17 years imprisonment. The maximum penalty for the offence of Causing a Loss under Section 324(2) of the Crimes Act is 05 years imprisonment.

01st ground of appeal

[9] The counsel for the appellant argues that the trial judge had considered the same factors which were part of the tariff and already used in determining the starting point in enhancing the sentence under aggravating factors thereby committing 'double counting'.

[10] The trial judge had taken level of authority and trust reposed in the position held by the appellant, and the level of prejudice caused to the victim in sentencing for Abuse of Office. He had said that if the level of authority and trust, and the prejudice caused are high, the court could go to the higher starting point and vice versa. Accordingly, the trial judge had come up with the following diagram with a range of sentences from one (1) year to twelve (12) years and according to the trial judge the sentencing court is to determine the appropriate starting point based on the level of culpability (vertical axis) and the prejudice/ harm caused (horizontal axis):

	High Level of Culpability	***Medium Level of Culpability***	***Lesser Level of Culpability***
High Level of Harm/ Prejudice with gain	*8-12*	*6-10*	*4-8*
Medium Level of Harm/Prejudice either with medium level gain or without gain	*6-10*	*4-8*	*2-6*
Lesser Level of Harm/ Prejudice either with less gain or without gain	*4-8*	*2-6*	*1-4*

[11] While the above sentencing range for Abuse of Office could be subjective depending on what a trial judge would perceive as 'lesser level', 'medium level' and 'high level' of culpability and harm/prejudice with or without gain, it is clear that the range of sentences the trial judge had relied on applies only in so far as picking a starting point is concerned and does not denote the sentencing tariff for Abuse of Office (which, if required, is yet to be laid down by the Court of Appeal or the Supreme Court according to the provisions of the Sentencing and Penalties Act) in the matter of the ultimate sentence. In other words the diagram depicting various sentence ranges would only apply to selecting a starting point of the sentencing process.

[12] Another important aspect of this exercise is that when a trial judge selects a starting point according to the above chart he has already considered the culpability and harm/prejudice with or without gain, for without going through that process he cannot decide where he would pick the starting point. The aggravating and mitigating factors would thereafter determine the final sentence.

[13] The trial judge had in the sentencing order elaborated what factors would generally go to determine level of culpability and level of harm/prejudice:

> *26. In order to determine the level of culpability, the court could consider the following factors; however, this is not an exhaustive list. They are:*
>
> *i. The level of contribution or the influence made by the accused in the commission of the offence,*
>
> *ii. The level of authority, trust and the responsibility reposed in the position held by the accused,*
>
> *iii. Has the accused influenced or pressured others to involve in the offence,*
>
> *iv. Nature and the manner in which the offence was committed or planned,*
>
> *v. Number of victims,*
>
> *vi. Whether the accused involved in the offence through force, coercion, exploitation or intimidation,*
>
> *vii. Not motivated by personal gain,*

viii. Opportunistic "one-off" offence with little or no planning,

27. The level of harm/prejudice can be determined by considering the level of gain and the impact on the victim.

[14] Then, the trial judge at paragraph 37 had stated what made him pick the starting point of 07 years:

37. Ms. Vilisi Tuitavuki, you being the Cashier, held a very important and responsible position in the procurement process. Apart from that you have checked and verified payment vouchers pertaining to five counts of Causing a Loss. Consequently, you have contributed to cause a loss of $13, 902.94 to the PWD. You have falsely entered details of payments into the Cash Payment Book and raised number of manual cheques in violation of regulations. Thus, you actively participated in committing these offences. Accordingly, I determine seven (7) years as the starting point for the offence of Abuse of Office and four (4) years for each count of Causing a Loss.

[15] The trial judge had however not stated under which column he picked 07 years as it could have been picked either from '***Medium Level of Culpability*** with ***High Level of Harm/Prejudice with gain'*** or '***High Level of Culpability*** with ***Medium Level of Harm/Prejudice either with medium level gain or without gain.'*** as under both categories the starting point of the sentence range is set as 6-10 years.

[16] The trial judge had then stated what he considered to be aggravating factors at paragraph 41 in enhancing the starting point of the sentence of 07 years by 03 years:

'41. All of these six accused held positions of responsibilities and trust in the procurement process of the DECE. Each of them were given authority to check and verify the process of purchase and payment at different stages. Instead of fulfilling those responsibilities and trust, you all chose otherwise to satisfy your avarice. By perpetrating these offences, you all have breached the trust and confidence reposed in you by the public of this country. You all have repeatedly and surreptitiously committed these crimes without any remorse or concern about the use of public funds and responsibility attached to it. I consider these factors as common aggravating grounds.'

> *56. Ms. Vilisi Tuitavuki, in respect of the discussed aggravating factors, I increase three (3) years for the offence of Abuse of Office and two (2) year for the each count of Causing a Loss, reaching an interim imprisonment period of ten (10) years for the offence of Abuse of Office and six (6) years for each counts of Causing a Loss. I reduce one (1) year in consideration of your age and family circumstances and further one (1) year for delay, making the final imprisonment period of eight (8) years for the offence of Abuse of Office and four (4) years for each count of Causing a Loss.'*

[17] The counsel for the appellant based on paragraph 37 and 41 argues that when the trial judge enhanced the initial sentence by 03 years he had considered the same factors that he had already taken into account in picking the starting point of 07 years committing 'double counting'.

[18] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'.

[19] "Double-counting" is reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. Firstly, the judge can only then use the aggravating features of the case which were not taken into account in deciding where the starting point should be. Secondly, many things which make the crime so serious have already been built into the tariff and judges should not treat as aggravating factors those features of the case which have already have been reflected in the tariff itself [vide **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018)]. Although, the formula that the trial judge had suggested in the diagram is not a sentencing tariff for Abuse of Office but how to arrive at the starting point, the same concerns on double counting may apply there as well.

[20] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) where it was stated that in many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without

saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. In **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) the Supreme Court pointed out another approach namely "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors and remarked that the two-tiered process (see **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability. The Court of Appeal recently considered the issue of double counting in **Naua v State** [2021] FJCA; AAU 056.2015(29 April 2021).

[21] Coming back to the complaint of double counting, after the trial judge had determined the starting point having considered the level of culpability and level of harm/prejudice with the ensuing loss, he could have considered only other factors as aggravating features, if any, to enhance the sentence. However, it appears from paragraph 41 that the trial judge had considered once again aspects of culpability and harm/prejudice, of course, along with breach of trust and confidence as aggravating factors.

[22] Therefore, it appears that to that extent there is some degree of double counting in the process of enhancing the sentence for aggravating features. Breach of trust and confidence, however, is not part of Abuse of Office and could have been taken into account as an aggravating factor [see **R v Stanbouli** [2003] NSWCCA 355 (04 December 2003) and **R v Martin** [2005] NSWCCA 190 (20 May 2005)]. The trial judge, however, had not given any discount for previous good character in mitigation on the premise that only the people with good character are given position of trust and responsibility in the public service (see **R v Gentz** [1999] NSWCCA 285 (09 September 1999) and **Fiji Independent Commission Against Corruption v Mau** [2011] FJHC 222; HAC089.2010 (14 April 2011).

[23] The appellant's counsel also argues that the appellant being the cashier was at the bottom of the hierarchical chain and her starting point should not have been 07 years

when two of the other accused who were supposedly the mastermind and the beneficiary were placed at 08 years.

[24] The respondent has submitted that the appellant's role was crucial for the commission of the offences as the cashier and her starting point could not be considered unduly higher compared to the other two.

[25] However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[26] Despite some degree of double counting, viewed in the light of the maximum sentence of 17 years of imprisonment one cannot say that there is a sentencing error in the ultimate sentence of 08 years or it is harsh, excessive and disproportionately severe requiring the intervention of the Court of Appeal.

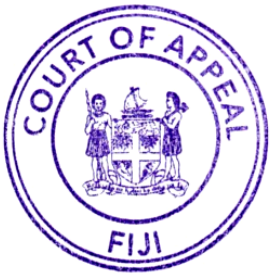
[27] It was held by the New South Wales Court of Criminal Appeal (NSWCCA) in **R v Gentz** [1999] NSWCCA 285 (09 September 1999) where the appellant had defrauded the government through fraudulent invoices and gained AUD 196,000.00:

> *'12. It is, I should add, not an unusual situation in the experience of the Courts that when persons do find themselves both charged and ultimately convicted of an offence of this nature, that are persons of impeccable prior character. For that very reason, namely their impeccable past good character, people are in fact appointed to positions of trust. It is when they abuse those positions of trust that the* ***question of general deterrence*** *comes most powerfully into play…'*

[28] Therefore, there is no reasonable prospect of success in appeal on this ground of appeal.

Order

1. Leave to appeal against sentence is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL