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

CRIMINAL APPEAL NO.AAU 085 of 2017
[In the High Court at Suva Case No. HAC 56 of 2014]

BETWEEN	:	**ANA LAQERE**
		Appellant
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ('FICAC')**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. J. Singh 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 (01st accused in the High Court) had been charged with one count of Abuse of Office contrary to Section 139 of the Crimes Act, and 35 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, OnTime 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 had unanimously opined that the appellant was guilty of all counts. The trial judge had agreed with the assessors and convicted the appellant as charged. On 10 May 2017 the appellant was sentenced to ten (10) 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 35 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 eight (8) years.

[4] The appellant in person had appealed against conviction and sentence in a timely manner (09 May 2017). The Legal Aid Commission had tendered an amended notice of appeal against conviction and sentence and written submissions on 02 February 2021. Thereafter, the appellant had filed an abandonment notice in Form 3 in terms of

Rule 39 of the Court of Appeal Rules in respect of the conviction appeal on 02 March 2021. The respondent had filed its written submissions on 02 March 2021. 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 grounds of appeal urged on behalf of the appellant against sentence are 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;*
>
> *(2) The Learned Trial Judge erred in law and in fact when he sentenced the Appellant for Abuse of Office for gain, when the Appellant was only convicted for Abuse of Office.*

[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 of 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] It appears that in the written submissions the counsel for the appellant had couched and presented this ground of appeal in such a way as to include a complaint of double counting as a result of the trial judge further enhancing the sentence by considering factors already subsumed as an element of the offence. However, in effect the counsel 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) in any given case:

	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, may 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 level of 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 other aggravating and mitigating factors would thereafter determine the final sentence.

[13] There is, however, a fine line between factors considered to determine the level of culpability and harm/prejudice on the one hand and the other aggravating factors on the other. There could be overlapping of some factors in this process, for there is a wide spectrum of considerations under 'culpability' and 'harm/prejudice'. This is partly due to the use of wide concepts such as 'culpability' and 'harm/prejudice' to determine the starting point and the multitude of factors that have been and could be included and accommodated within them. That is why, as discussed below, it is

important for the appellate court to focus on the ultimate sentence rather than each step in the sentencing process in the original court when a sentence is challenged in appeal.

[14] The trial judge had in the sentencing order elaborated as to 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.'*

[15] Then, the trial judge at paragraph 32 -34 had stated what made him pick the starting point of 08 years:

> *32. It was proved that Ms. Laqere and Ms. Halafi were the main perpetrators of these crimes. Ms. Halafi has organized and facilitated these false transactions with Mr. Shelveen Narayan. She was the one who mainly coordinated the movement of documents and cheques between the DECE and Mr. Narayan. Hence, the level of culpability of Ms. Halafi is very high.*
>
> *33. Ms. Laqere had a greater responsibility to protect the public funds via her official position. She was entrusted with great amount of responsibility in order to ensure the proper and accurate procurement process. Instead of doing so, she manipulatively used her responsibilities and authority in order to commit these crimes. She is the mastermind behind this scam, while Laisa Halafi acted as the liaison of it. In doing*

that they have facilitated these sixty false payments to materialize, totalling to the full amount of $362,944.37. Both of you with the assistance of other accused have carried out this crime over the period of nearly five months.

34. Accordingly, I find the level of culpability and the prejudice caused by these two accused fall within the highest range of tariff limit. In view of that, I select 8 years as the starting point for the offence of Abuse of Office for each of them. I further determine 4 years as the starting point for each counts of Causing a Loss. In respect of the offence of Obtaining a Financial Advantage, I select 4 years as the starting point.

[16] The trial judge had therefore selected the lower end of high level of culpability and high level of harm/prejudice with gain as the starting point *i.e.* from the range of 08-12 years.

[17] The trial judge had then stated what he considered to be aggravating factors at paragraph 41, 42 and 52 in enhancing the starting point of the sentence of 08 years by 04 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.'

42. Ms. Ana Laqere, you admitted in your evidence that this scam took place under your leadership in the Accounts Section. You have provided a feasible environment for your co- offenders to carry out this scandalous crime. You, not only used your position and authority to carry out this crime, but were vindictive towards the officers who detected these false payments.

52. 'Ms. Ana Laqere, in respect of the discussed aggravating factors, I increase four (4) years for the offence of Abuse of Office and two (2) years for the each count of Causing a Loss, reaching an interim imprisonment period of twelve (12) years for the offence of abuse of office and six (6) years for each counts of Causing a Loss. I reduce one year in consideration of your age and family circumstances and further

one (1) year for delay, making the final imprisonment period of ten (10) years for the offence of Abuse of Office and four (4) years for each count of Causing a Loss.'

[18] The counsel for the appellant based on paragraphs 32, 33 and 41 read with 26 argues that when the trial judge enhanced the initial sentence by 04 years he had considered the same factors that he had already taken into account in picking the starting point of 08 years committing 'double counting'. This argument is not without merit.

[19] 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'.

[20] "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.

[21] 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).

[22] 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 and 42 that the trial judge had considered once again more or less similar aspects of culpability and harm/prejudice, of course, along with other factors such as breach of trust and confidence, abuse of public funds with no remorse, the appellant being vindictive towards the officers who detected the false payments etc. as aggravating factors.

[23] Therefore, it appears that to some extent there is a degree of double counting in the process of enhancing the sentence for aggravating features. However, the trial judge had considered some other factors too as aggravating the offences in enhancing the sentence. For e.g. 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 anyway 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).

[24] The appellant's counsel also argues that given her employment position the appellant was not actively involved in the crimes but the facts suggest otherwise. The trial judge

had *inter alia* identified her as the mastermind and her having been vindictive towards the officers who detected these false payments.

[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 10 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.

02nd ground of appeal

[29] The appellant's contention is that the trial judge had sentenced her for Abuse of Office for gain when she was only charged and convicted for the offence of Abuse of Office.

[30] The trial judge had not sentenced the appellant for any other offence other than Abuse of Office. There is no distinct offence called Abuse of Office for gain. In terms of section 139 of the Crimes Act, 2009 the maximum penalty for Abuse of Office is 10 years imprisonment but if the act is done or directed to be done for gain the maximum penalty is 17 years of imprisonment.

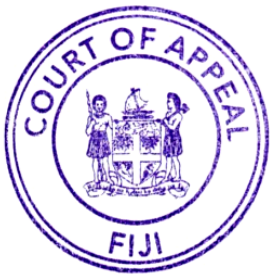
[31] The respondent submits that the particulars in the information clearly indicated that the appellant had carried out the offending of Abuse of Office for the purpose of gain and during the trial it had been proved that there had indeed been such a gain.

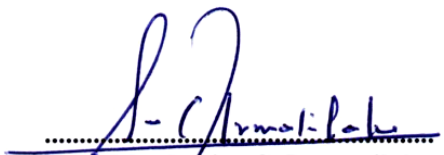
[32] In the circumstances, the maximum penalty of 17 years of imprisonment would apply and the trial judge had made no error in stating it to be so.

[33] Therefore, this ground of appeal is misconceived and it has no prospect of success at all in appeal.

Order

1. Leave to appeal against sentence is refused.





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