

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 017 OF 2013S

BETWEEN

SANJAY SINGH VERMA

APPELLANT

AND

THE STATE

RESPONDENT

**Counsels : Mr. I. Khan for Appellant
Mr. L. Fotofili for Respondent**

Hearing : 27th August, 2013

Judgment : 27th September, 2013

JUDGMENT

1. On 4th April 2013, the appellant (accused), in the presence of his counsel, appeared in the Suva Magistrate Court, on the following charge:

FIRST COUNT

Statement of Offence

FORGERY: Contrary Section 341 (1) of the Penal Code Act

17.

Particulars of the Offence

SANJAY SINGH VERMA on the 10th day of July 2008, at Suva, in the Central Division, with intent to defraud forged the signature of **AMIT PRASAD** on the Tax Invoice Number 0343 purporting the same to be genuine.

SECOND COUNT

Statement of Offence

UTTERING FORGED DOCUMENT: Contrary to Section 343 of the Penal Code Act 17.

Particulars of Offence

SANJAY SINGH VERMA on the 10th day of July 2008, at Suva, in the Central Division, knowingly and fraudulently uttered a forged Tax Invoice Number 0343 at the Small Claims Tribunal, Suva.

2. He pleaded not guilty to the charge, and the trial proper began. The prosecution called 5 witnesses and then closed its case. The defence made a submission of no case to answer. On 11th April 2013, the court dismissed the submission of no case to answer, and called on the defence to make its defence. They choose to remain silent, and called no witness.
3. On 17th April 2013, the court delivered its judgment. It found the accused guilty as charged on the two counts and convicted him accordingly. On 22nd April 2013, the court sentenced the accused to two years imprisonment on each count, both to run concurrently. The total sentence was therefore 2 years imprisonment, effective from 22nd April 2013. The court did not set any non-parole period.
4. At first, the accused (appellant) was not happy with his conviction. He filed an appeal against conviction on 19th April 2013. He was also not happy with his sentence. He filed an amended Petition of Appeal against conviction and sentence on 31st May 2013. On 10th June 2013, the appellant filed amended grounds of appeal against conviction and sentence. Altogether, the appellant filed 23 grounds of appeal.

5. The appeal grounds were as follows:

1. **THAT** the failure of the Defence Counsel prior to the trial of the Appellant to make an application for recusal of the Learned Trial Magistrate on instructions of the Appellant caused a substantial miscarriage of justice.

PARTICULARS

- (i) That the Appellants' Trial Counsel failed to make application when he was instructed by the Appellant to make an application to recuse the Learned Trial Magistrate on the basis of bias which the Learned Trial Magistrate had knowledge.
 - (ii) That the Appellant's Trial Counsel failed to follow the instructions of the Appellant to recuse the Learned Trial Magistrate and to present before him all the correspondences that were exchanged between the Accused, the Learned Trial Magistrate and the Chief Magistrate.
 - (iii) The Appellant had complained to the Learned Trial Magistrate as to the criticism that was made by the Learned Trial Magistrate to the Appellant in Open Court whereby there was a heated argument between the Learned Trial Magistrate and the Appellant before the trial.
 - (iv) The Appellant thereafter wrote to the Chief Magistrate making an official complaint regarding the conduct of the Learned Trial Magistrate.
 - (v) That prior to the judgment of the Learned Trial Magistrate on the **17th day of April 2013** the Chief Magistrate had written to the Appellant on the **12th day of March 2012** and the Learned Trial Magistrate regarding the complaint made by the Appellant.
2. **THAT** the Learned Trial Magistrate ought to have recused himself after the Appellant had lodged an official complaint regarding the Learned Trial Magistrate's conduct and as such the Learned Trial Magistrate on his own volition after he had knowledge that the Appellant had complained against him and that he had responded to his complaint to the Chief Magistrate and thereafter hearing the case of the Appellant in the circumstances raised a perception of bias and hence there was a substantial miscarriage of justice.
 3. **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into consideration the Appellant's submission on **No Case to Answer** at the end of the Prosecution case. Furthermore the Learned Trial Magistrate did not apply the relevant laws to the facts that were presented by the State.
 4. **THAT** the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.
 5. **THAT** the Learned Trial Magistrate misdirected and/or wrongly directed himself on the question of burden of proof and by such failure there was a substantial miscarriage of justice.

6. **THAT** the Learned Trial Magistrate erred in law and in fact in not properly analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charges of **FORGERY and UTTERING FORGED DOCUMENT**.
7. **THAT** the Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence on evidence and as such by his failure there was substantial miscarriage of justice.
8. **THAT** the Learned Trial Magistrate erred in law and in fact in rejecting the evidence of **Mr Rajeshwar Lal** on the basis that the evidence of contention that **Mr Rajeshwar Lal** did not put forward the proposition that **Mr Amit Prasad** had signed the **Tax Invoice 0343** after removing the said invoice from the Invoice Book was never put to **Rajeshwar Lal** when he was called.
9. **THAT** the Learned Trial Magistrate erred in law and in fact in not attaching appropriate weight to the differences in the signatures of **Mr Amit Prasad** in **Defence Exhibit No. 1** and **Defence Exhibit No. 2**.
10. **THAT** the Learned Trial Magistrate erred in law and in fact in concluding that if the Court was of the view that the signature reflected on **Invoice No. 0343** is forged based on the evidence before the Court the second count of **Uttering** will automatically be proved.
11. **THAT** the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof that the Appellant needed to explain the “**missing signatures**” and the difference on the “**Issued dates**” of **Invoice No. 0342** and **Invoice No. 0343**.
12. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to give proper weight to the fact that the signatures of **Amit Prasad** in the Defence **Exhibit No. 1 and 2** were markedly different.
13. **THAT** the Learned Trial Magistrate erred in law and in fact in not considering that **Mr Semi Cakacaka** identified the signature in the **Defence Exhibit No. 2** as true and did not remember the **Defence Exhibit No. 1** at all whereas **Amit Prasad** identified the signatures in the **Defence Exhibit No. 1** as his and not the one in **Defence Exhibit No. 2**.
14. **THAT** the Learned Trial Magistrate erred in law and in fact in finding that there was no need for expert evidence to say that what reflects on the first copy of **Invoice No. 0343** was placed by somebody else but not **Mr. Amit Prasad**.
15. **THAT** the Learned Trial Magistrate erred in law and in fact in convicting the Appellant on circumstantial evidence and on inference drawn from silence of the Appellant when there was no direct evidence against the Appellant or there was any irresistible inference that the Appellant had committed the offence.

16. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to find that there was no evidence as to the dates on which the offences occurred.
17. **THAT** the Learned Trial Magistrate erred in law and in fact in not talking into account that **Amit Prasad** lied to the Court about the kinds of service he provided from his garage and that it was only on cross-examination that he accepted that he provided services other than automobile wiring.
18. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to give sufficient weight to the evidence of the Investigating Officer who have evidence that there was no evidence against the Appellant to call him for Caution Interview and to lay charges against him.
19. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to find that both **Mr Semiti Cakacaka** and **Mr Amit Prasad's** testimony were manifestly unreliable.

APPEAL AGAINST SENTENCE

20. **THAT** the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.
 21. **THAT** the Learned Trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into consideration.
 22. **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into consideration the provisions of the **Sentencing and Penalties Decree 2009** and in particular **Sections 4, 15 and 26** when sentencing the Appellant.
 23. **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into consideration the submission by the State that the Appellant be given a suspended sentence and not an immediate custodial sentence.
6. The parties have filed their written submissions, and I have carefully read and considered them. In dealing with the grounds of appeal, I will not deal with each grounds separately, unless absolutely necessary. This is because some of grounds advanced, involved the same issues, and thus will be dealt with together, as a matter of convenience.

Appeal Grounds No. 5 (1) and 5 (2): Bias Complaint Against Learned Trial Magistrate:

7. On Appeal Ground No. 5 (1), I have carefully read the whole record to find out whether or not, this ground was substantiated. The court record did not substantiate the allegations as particularized in paragraph 5 (1) (i) and (ii) hereof. The trial Magistrate took over the case from another Magistrate

on 10th August 2012. Thereafter, he dealt with the case twice on 24th September 2012 and 3rd April 2013, before he started with the trial on 4th April 2013. Nowhere in the record did the defence ever initiate any application to the trial Magistrate to recuse himself, on the ground of bias.

8. Yet when looking at the original Magistrate court record, it was found that, the appellant filed a notice of motion and an affidavit in support on 15th March 2012, asking the then trial Magistrate to recuse himself, on the ground of perceived bias. He filed a submission on the same on 4th June 2012, citing the relevant laws on bias. On 18th July 2012, the then trial Magistrate dismissed the recusal application in a 11 pages ruling. I referred to the above to show that the accused and his counsels, knew what to do, if they really wanted the second trial Magistrate to recuse himself, on the ground of perceived bias. However, the record showed they choose to do nothing, and continued with the trial proper from 4th April 2013. On the available evidence, from the court record, Appeal Ground 5 (1) is not made out, and I therefore dismiss it.

9. The answer to Appeal Ground No. 5 (2) followed the answer to Appeal Ground No. 5 (1). The accepted procedure in recusing oneself from presiding in a case, was that the matter must be initiated by the filing of a notice of motion and affidavit in support, as exhibited by the defence in this case, when they applied for the first trial Magistrate to recuse himself. It is not acceptable for a trial Magistrate to recuse himself or herself from any case on any flimsy ground. To do so would create an intolerable strain on the Magistracy, and also encourage “Magistrate Shopping”. On my reading of the court record, there was no reason for the trial Magistrate to recuse himself from this case, and consequently, I dismiss Appeal Ground No. 5 (2).

Appeal Ground No. 5 (3): No Case to Answer Submission:

10. I have carefully read and considered the court record and the Learned Magistrate’s ruling on the “no case to answer submission”. In my view, the Learned Magistrate took into consideration both parties’ submissions on the issue, considered the relevant laws in detail, and applied the relevant laws to the facts of the case. In my view, he reached a correct conclusion on the “no case to answer submission”, and found a case to answer against the accused. In my view, this ground fails, and I dismiss it accordingly.

Appeal Grounds No. 5 (4) and 5 (5): Burden and Standard of Proof:

11. I have carefully looked at the court record, and the Learned Magistrate's judgment dated 17th April 2013, to find out whether or not these grounds of appeal were made out. In paragraphs 3 and 4 of his judgment, the Learned Magistrate correctly covered the issues concerning the burden and standard of proof. In my view, these grounds of appeal were not made out, and I dismiss them accordingly.

Appeal Grounds No. 5(6), 5(8), 5(9), 5(12), 5(13), 5(14), 5(16), 5(17), 5(18) and 5(19): Issues of

Fact:

12. All the complaints in the above appeal grounds concerned issues of fact. I have carefully read all the prosecution's witnesses' evidence, including the parties "Agreed Facts", filed on 23rd February 2012. As it is well settled, the Learned Magistrate, was the judge of fact and law in the Magistrate Court. On issues of fact, it was the Learned Magistrate's prerogative, as judge of fact and law, to accept and/or reject any evidence, based on his assessment of the credibility or otherwise of the witnesses. In his judgment, the Learned Magistrate had given detailed reasons of why he accepted the prosecution's version of events, as opposed to the defence's version of events. He gave his reasons of why he accepted the evidence of some witnesses, and rejected others. He was entitled to do so as the judge of fact. After looking at the court record, I found that none of the complaints, made in the above appeal grounds, are valid. I therefore dismiss them accordingly.

Appeal Ground No. 5(7): Possible Defence:

13. This ground of complaint was not clearly made out, because the appellant did not refer to the particular type of defence made out on the evidence. The complaint was therefore unclear, and I therefore dismiss the same.

Appeal Ground No. 5(10):

14. I have read the court record and the Learned Magistrate's judgment. I have also considered the parties' "Agreed Facts". In my view, the appellant's complaint was misplaced. I agree with the Learned Magistrate's comments in paragraph 57 of his judgment. He had not erred. This ground is therefore dismissed.

Appeal Ground No. 5(11): Shifting the Burden of Proof:

15. The defence complained that the trial Magistrate had shifted the burden of proof that the appellant need to explain the “missing signature” and the difference on the issue dates of Invoice No. 0342 and Invoice No. 0343. I have read the court record, and the Learned Magistrate judgment to find out whether or not the above complaint was made out. In my view, this complaint was made, without taking into account, the whole context of the judgment. What the Learned Magistrate was referring to was the evidential burden, not the standard burden of proof beyond reasonable doubt, which of course, lies on the prosecution from the start to the end of the trial. In my view, this complaint is misplaced, and I dismiss it accordingly.

Appeal Ground No. 15(15): Circumstantial Evidence:

16. I have read the record and the Learned Magistrate’s judgment, to find out whether or not, the above complaint was made out. In the parties’ “Agreed Facts”, it was accepted that the accused lodged a \$760 claim against one Semiti Cakacaka in the Suva Small Claims Tribunal. It was agreed that in supporting his claim, he submitted Tax Invoice No. 0343. It was agreed that he filled in all the entries in the Tax Invoice, except its signature. The Tax Invoice belonged to Amit Prasad. Mr. Prasad said he did not sign the invoice. After listening to all the witnesses, and after considering the “Agreed Facts”, and after carefully writing out his reasons in his judgment, the Learned Magistrate used circumstantial evidence to conclude that it was the accused (appellant) who forged Mr. Prasad’s signature on Tax Invoice No. 0343. In my view, he was entitled to do so, as Judge of fact. In my view, this ground was not made out, and I dismiss it accordingly.

Appeal Grounds No. 5(20); 5(21); 5(22) and 5(23): The Sentence is Harsh and Excessive:

17. In my view, the appeal grounds mentioned above could be summarized as that mentioned in Appeal Ground No. 5(20), that is, the sentence is harsh and excessive. I have carefully read and considered the Learned Magistrate’s sentencing remarks. I agree with all the matters mentioned by the Learned Magistrate, except using 18 months to 3 years as the tariff for the offences, when the maximum sentence per count was 2 years imprisonment. A tariff sentence cannot exceed the maximum sentence imposed by the offence. So in this case, the tariff of 18 months to 3 years, is fundamentally defective in that the maximum penalty of the offence was 2 years imprisonment. Therefore, the whole sentence calculation was wrong.

18. In my view, taking into account the aggravating and mitigating matters the Learned Magistrate identified in his judgment, the justice of this case would require a sentence of 9 months imprisonment. For the above reasons, the Magistrate Court sentence on 22nd April 2013 is quashed and set aside, and 9 months imprisonment is substituted thereof, effective from 22nd April 2013.
19. In summary, the appellant's appeal against conviction is denied. His appeal against sentence is allowed, to the extent that his previous 2 years imprisonment is quashed and set aside, and 9 months imprisonment is substituted thereof, effective from 12th April 2013. I order so accordingly.

Salesi Temo
Judge

Solicitor for Appellant : **I. Khan & Associates, Lautoka.**
Solicitor for Respondent : **Office of the Director of Public Prosecution, Suva.**