**IN THE HIGH COURT OF FIJI**
**AT LAUTOKA**
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL CASE NO. HAA120 OF 2017**

**(Magistrates' Court Case No. 679 of 2017)**

**BETWEEN:** **PAWAN RAVIKESH KUMAR**

*APPELLANT*

**AND:** **THE STATE**

*RESPONDENT*

**Counsel:** **Mr A R Singh for Appellant**
**Ms L Latu for the Respondent**

**Date of Hearing:** **19 December 2017**

**Date of Judgment:** **22 December 2017**

# JUDGMENT

[1] This is a timely appeal against both conviction and sentence.

[2] The appellant was charged with one count of bribery of a public official contrary to section 134 (1) (a) (i) (b) of the Crimes Act 2009. On 1 September 2017, he appeared in the Magistrates' Court at Lautoka and elected to be tried in the Magistrates' Court. He was represented by counsel of his choice. The appellant was released on bail and the case was adjourned to 2 October 2017 for plea to be taken.

[3] On 2 October 2017, the appellant appeared with his counsel of choice and pleaded guilty to the charge. The appellant was convicted after he admitted the facts tendered by the

prosecution. In mitigation, the appellant informed the court that he was 20 years old, married, had a 7-month old child and was the sole breadwinner for his family. He was a first time offender and was remorseful.

[4] On 1 November 2017, the learned Magistrate sentenced the appellant to 18 months imprisonment. The grounds of appeal are as follows:

(i) **That** the Learned Magistrate erred in fact as the summary of fact contradicted the particulars of the charge resulting in a miscarriage of justice.

(ii) **That** the Learned Magistrates erred in fact since the summary of facts did not prove a particular element of the charge which read 'provides a benefit namely cash of $200.00 since no evidence was adduced or provided in the summary of facts that $200.00 cash was offered by the Appellant and thereby resulting in a miscarriage of justice.

(iii) **That** the Learned Magistrate erred in fact since there was no physical evidence of the $200.00 cash obtained and presented by the prosecution and this directly contradicted the particulars of offence which stated that the Appellant provide[d] a benefit of $200.00 cash thereby resulting in a miscarriage of justice.

(iv) **That** the Learned Trial Magistrate erred in law and fact by failing to adequately consider the contradictory evidence and the lack of evidence in support of all the elements of the charge which was in favour of the Appellant being acquitted.

(v) **That** the Learned Magistrate erred in law and fact since there was no prove of the Actus reus in the summary of facts that the Appellant physically did hand over $200.00 cash to the complainant resulting in a miscarriage of justice.

(vi) **That** the Learned Magistrate erred in fact since there was no evidence provided to support the existence of $200.00 cash and that this $200.00 cash was provided as a benefit by the Appellant to the complainant resulting in a miscarriage of justice.

(vii) **That** the Appellant appeals against sentence on the grounds that it is manifestly harsh, excessive and wrong in principal(sic) under the circumstances of the case.

(viii) **That** the Appellant appeals against sentence on the grounds that the Learned Magistrate did not consider the lack of actus reus in the summary of facts.

**Limited right of appeal from a plea of guilty**

[5] The right of appeal is statutory. Section 246(1) of the Criminal Procedure Act 2009 governs the right of appeal from the Magistrates' Court to the High Court. Section 247 of the Criminal Procedure Act 2009 restricts appeals from pleas of guilty. That section states:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

[6] Although there is a statutory limitation placed on a right appeal against guilty plea, there are exceptions. It is a century old rule that 'if there is any ambiguity in the plea it must be treated as a plea of not guilty and the trial must proceed in the ordinary way (*Rex v Golathan* (1915) 84 LJKB 758, 759). The rule is that not only should the plea be unambiguous but that it should be made in full understanding of all that it implies (*R v Vent* (1935) 25 Cr App R 55).

[7] In *Gyan Deo v State* (19760 22 FLR 1, Chief Justice Grant referred to the English case of *R v Forde* [1923] 2 KB 400 and held that an appeal against conviction can be entertained on a plea of guilty if it appears upon the admitted facts that the appellant could not in law have been convicted. In this case, the accused pleaded guilty to making a false statement contrary to section 113 (1) (b) of the Penal Code. This section required proof that the accused was by an Ordinance endowed with authority to make the document which contained the false statements. The accused admitted completing a document, which he was authorized to make under the provisions of Traffic Regulations 1974, recording the result of a driving test by falsely stating that the driver had passed. The Court considered the definition of Ordinance under the Interpretation Ordinance 1967 and concluded that

the definition did not include subsidiary legislation. The Court held that upon the admitted facts the appellant cannot in law stand convicted of the offence charged.

**Whether the appellant's guilty plea was ambiguous?**

[8] The question that arises from all six grounds of appeal against conviction is whether the appellant could be convicted of the offence charged upon the admitted facts? The appellant was charged as follows:

**Statement of Offence [a]**

**BRIBERY OF PUBLIC OFFICIAL:** - Contrary to Section 134 [1] [a][i][b] of the Crimes Act, 2009.

**Particulars of Offence [b]**

**PAWAN RAVIKESH KUMAR** on the 1st day of September, 2017 at Lautoka in the Western Division without lawful authority or reasonable excuse, provides a benefit namely Cash of $200.00 to **Police Constable JOSES BALEIKASAVU** a public official with the intention of influencing the said public official in the exercise of his duty.

[9] Section of 134 of the Crimes Act 2009 states:

(1) A person commits an indictable offence (which is triable summarily) if-

*(a)* the person without lawful authority or reasonable excuse:-
- (i) provides a benefit to another person; or
- (ii) causes a benefit to be provided to another person; or
- (iii) offers to provide, or promises to provide, a benefit to another person; or
- (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

*(b)* the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the officer's duties as a public official.

Penalty – Imprisonment for 10 years.

(2) In a prosecution for an offence against sub-section (1), it is not necessary to prove that the defendant knew –

*(a)* that the official was a public official; or

*(b)* that the duties were duties of a public official.

[10] The offence charged required proof that the accused without lawful authority or reasonable excuse provided a benefit to a public official with the intention of influencing the public official in the exercise of his duty.

[11] The facts tendered in support of the charge stated that on 1 September 2017, a police officer flagged down the appellant's vehicle to stop at a random roadside checkpoint. Instead of stopping the vehicle, the appellant drove off with the vehicle. The police officer pursued the appellant and managed to stop his vehicle. He told the appellant to get off the vehicle and handover the vehicle key to him. The appellant approached the officer and begged him to release the vehicle in return for $200.00 cash. The appellant was arrested and charged with bribery.

[12] Counsel for the appellant submits that the particulars of the offence contradicted the admitted facts and that the facts did not prove the physical element of the charged offence, resulting in a miscarriage of justice. The charge alleged that the appellant provided $200.00 cash to a police officer while the facts stated that the appellant offered $200.00 cash.

[13] The word provide is not defined in the legislation. The dictionary meaning of 'provide' is 'to give, supply or make it available' (*Oxford Advanced Learner's Dictionary*, 7th ed, 2005). The ordinary meaning of 'provide' does not include the act of making an offer. The act of making an offer is caught by subsection (1) (a) (iii) of section 134. The phrase used in that section is 'offers to provide'. In that regard, the admitted facts proved an offence under section 134 (1) (a) (iii) and not an offence under section 134 (1) (a) (i). Counsel for the State concedes this point but submits that the appellant was not prejudiced by the error. I agree.

[14] The appellant was represented by counsel. Counsel took no issue in the Magistrates' Court that the appellant was prejudiced by contradiction in the facts alleged in the charge and the facts admitted by the appellant. There is no suggestion that counsel was flagrantly incompetent for not taking any issue with the facts tendered in support of the charge when the appellant entered the guilty plea. The charge was not defective in law. The charge gave the appellant reasonable notice of the allegation against him. The issue was not whether the appellant provided or offered to provide a benefit. The real issue was whether the appellant without lawful authority or reasonable excuse offered a benefit to a police officer with the intention of influencing the officer in the exercise of his duty. The appellant admitted facts that stated he offered to provide $200.00 cash to a police officer.

[15] The complaint in ground three that the admitted facts did not state that the appellant had the $200.00 cash in his person to make the offer to the police officer is misconceived. Section 134 does not require proof that the benefit that is offered as a bribe has to be in the physical possession of the accused. Mere offer of the benefit without lawful authority or reasonable excuse to a public official with the intention of influencing the officer in the exercise of his or her duty is bribery within section 134.

[16] The admitted facts stated that the appellant begged the police officer to release his vehicle and in return he offered to provide the officer with $200.00 cash. The question is whether the offer of benefit was made with the intention of influencing the police officer in the exercise of his duty. Counsel for the appellant has not taken any issue regarding whether the temporary impounding of vehicle was within the exercise of the police officer's duty when the appellant failed to stop his vehicle when directed to do so by the officer. The failure to stop the vehicle at the roadside checkpoint was unlawful. The police officer was within his authority not to release the vehicle after the appellant had disobeyed lawful direction to stop his vehicle at the roadside checkpoint. When the appellant offered to provide $200.00 cash to the police officer for release of his vehicle, he had an intention of influencing the officer in exercise of his duty. The admitted facts proved the offence charged.

[17] The conviction for bribery is affirmed.

**Whether there is an error in the exercise of the sentencing discretion?**

[18] Unfortunately, counsel for the appellant has not made any submission on the appeal against sentence. The main complaint is that the sentence is manifestly excessive and wrong in principle in all circumstances of the case.

[19] In sentencing the appellant, the learned Magistrate used the two-tiered approach. He referred to the UK Sentencing Guidelines for bribery and categorized the offending in the present case to fall within Category 2 of those Guidelines, with a tariff of 18 months to 4 years imprisonment. The learned Magistrate used a starting point of 2 years and adjusted the sentence to reflect the mitigating and aggravating factors. The sentence was increased by 6 months to reflect the fact that the appellant had driven off without stopping at the checkpoint and then insisted on the police officer to take the bribe as aggravating factors.

[20] The mitigating factors were the appellant's youth (20 years), early guilty plea, remorse and previous good character. The appellant was given a discount of 12 months to reflect the mitigating factors. The final sentence was 18 months imprisonment. The learned Magistrate considered suspension but decided not to suspend the sentence.

[21] On appeal, a sentence is reviewed for errors in the exercise of the sentencing discretion. Although not raised by counsel for the appellant, there is an error of principle in the exercise of the sentencing discretion. In sentencing the appellant, the learned Magistrate determined the appellant's criminality for the purpose of punishment based on the UK Sentencing Guidelines. The UK Sentencing Guidelines has no legal force in Fiji. Those Guidelines are based on a sentencing regime applicable to UK.

[22] The maximum penalty for bribery under section 134 is 10 years imprisonment. In sentencing, the court must first consider comparable domestic cases to identify the tariff to give effect to the principle of uniformity, and after identifying an appropriate range,

sentence the offender based on the facts of the particular case to give effect to the proportionality principle. The learned Magistrate made an error of principle when the appellant's criminality was assessed using the UK Sentencing Guidelines.

[23] A comparable domestic case is *Fiji Independent Commission Against Corruption v Niraj Singh* unreported Cr Case No HAC004 of 2010; 19 March 2010. In that case, the offender, who was a court officer, solicited and accepted $100.00 cash from a member of the public in order to expedite her Small Claims Tribunal appeal. He was convicted of both soliciting and accepting bribe on his plea of guilty and sentenced to 8 months imprisonment and fined $200.00. In sentencing the offender, Justice Priyantha Fernando said at p 3:

> As I mentioned before bribery is a crime which should not be treated leniently. It affects the whole public service and general public will loose faith and confidence in the justice system. Therefore deterrent and adequate punishment should be imposed and I decline to suspend the sentence.

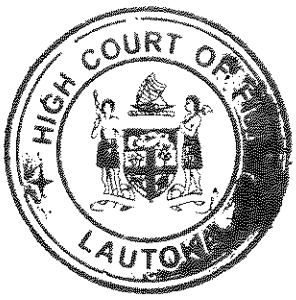
[24] I endorse the above remarks.

[25] The appellant's criminality is similar to that of the criminality in the case of *Singh*. In *Singh*, he was a public official who solicited and took bribe from a member of the public. In the appellant's case, he was a member of the public who offered a small amount of cash to a police officer to
get himself off for breaking the law. A custodial sentence is inevitable. However, the mitigating factors are compelling. The appellant is a young and a first time offender. He entered an early guilty plea and is genuinely remorseful. There is no aggravating factor. In all circumstances, 6 months' imprisonment reflects the criminality involved. Suspension is inappropriate.

**Orders of the Court:**

[26] Appeal against conviction dismissed.
Appeal against sentence allowed.

The sentence of 18 months' imprisonment is set aside and substituted with a sentence of 6 months' imprisonment effective from 1 November 2017.

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**Hon. Mr Justice Daniel Goundar**

**Solicitors**:

Aman Ravindra-Singh Lawyers for the Appellant

Office of the Director of Public Prosecutions for the Respondent