

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 317 OF 2015

STATE

v

NOUSHEEN MEZBEEN HUSSAIN

Counsel: Ms. M. Khan with Ms N. Shankar for State
Mr. T. Toganivalu for Accused

Date of Judgment : 5 December 2019
Dates of Sentencing Hearing : 21, 29 January 2020
Date of Sentence : 31 January 2020

SENTENCE

1. After a full defended trial, Nousheen Mezbeen Hussain (hereinafter referred to as the 'offender') was convicted on three counts as per the following information:

First Count

Statement of Offence

THEFT: Contrary to section 291 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NOUSHEEN MEZBEEN HUSSAIN also known as Nousheen Mezbeen Ali, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division dishonestly appropriated \$15,362.78 belonging to Art

and Soul Limited with the intention of permanently depriving the said Art and Soul Limited of the said amount.

Second Count

Statement of Offence

OBTAINING PROPERTY BY DECEPTION: Contrary to section 317 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NOUSHEEN MEZBEEN HUSSAIN also known as **Nousheen Mezbeen Ali**, between the 8th day of February, 2012 and the 2nd day of March, 2012, at Suva, in the Central Division dishonestly obtained \$1,772.10 from Fiji Revenue and Customs Authority with the intention of permanently depriving Fiji Revenue and Customs Authority of the said amount.

Third Count

Statement of Offence

MONEY LAUNDERING: Contrary to section 69(2)(a) and (3)(b) of the Proceeds of Crime Act 1997.

Particulars of Offence

NOUSHEEN MEZBEEN HUSSAIN also known as **Nousheen Mezbeen Ali**, between the 1st day of January, 2012 and the 31st day of May, 2012, at Suva, in the Central Division used a total of \$17,134.88, that are the proceeds of crime, knowing or ought reasonably to have known that the \$17,134.88 is derived or realised directly or indirectly from some form of unlawful activity.

2. The offender now comes before this Court for sentence.

3. Brief facts of the case are that: the complainant ran an advertising and marketing business called 'Art and Soul Ltd'. The offender joined 'Art and Soul Ltd' in 2008 as an accounts person and remained there until she was terminated in 2012. The offender gradually built confidence with the complainant as a trusted accounts officer and handled and managed the whole of company's accounts. The internet banking platform was operated and managed by the offender. She had access to the online banking platform for the company and was given the password to access the bank account to settle the bills, pay the salaries of the staff and make other payments.
4. In 2012, the company was struggling to manage the finances, so PW 3 was hired to assist with the running of the business. PW 3 noted suspicious double payments and brought them to complainant's attention. Upon an inquiry, the bank confirmed that the narratives for the suspicious transfers were false and that the money was going into offender's bank account. The complainant found suspicious transfers done by the offender to be unauthorised. Upon this discovery, the offender admitted stealing money from Art & Soul Limited. She apologised to the complainant and restituted \$ 10,000/- whereupon her service was terminated.
5. At the trial, the offender admitted receiving a sum of \$15,362.78 into her bank account from Art & Soul Ltd. but denied stealing. The Prosecution proved that the offender had dishonestly appropriated a sum of \$15,362.78 belonging to the complainant with the intention of permanently depriving the complainant of the said money.
6. The offender also forged the signature of the complainant and provided incorrect and misleading information to FRCA in order to obtain a sum of \$1772.10 as a tax refund.
7. The offender received a total sum of \$17,134.88 from Art & Soul and FRCA into her bank account. Prosecution proved that the money was generated from two serious predicate offences, namely, Theft and Obtaining Property by Deception thus the money formed proceeds of crime. The offender was fully aware that the money was derived from her illegal activity. She used the financial system to transfer the illicit money from one account to another and for that purpose she used various misleading narration to disguise the true origin of illicit money.

As soon as the offender received money into her (salaries) bank account she either withdrew or transferred part of that money to a 'hidden' savings account to disguise the true origin of the proceeds of crime. Making withdrawals and transfers from a bank account which is tainted with illegality, the offender was using the illicit money in such a manner so as to disguise the true source of income and to make the money look legitimate and clean.

8. The maximum sentence prescribed for Theft is 10 years' imprisonment. The tariff ranges from 4 months to 3 years imprisonment (*Waqa v State* [HAA 17 of 2015]).
9. The offence of Obtaining Property by Deception carries a maximum sentence of 10 years' imprisonment. In *State v John Miller*, Criminal Appeal No. 29 of 2013S, Madigan J, recognized the tariff as being between 2 and 5 years with the minimum being reserved for minor spontaneous cases with little deception.
10. Since the Money Laundering is the most serious offence in the information, the justification for final sentence will be based on the sentence imposed on that offence.
11. Money Laundering", contrary to section 69 (2) (a) and (3) (a) of the Proceeds of Crimes Act 1997, carries a maximum penalty of a fine not exceeding \$120,000 or imprisonment for a term not exceeding 20 years, or both (count no.2). In *State v Josefa Saqanavere and Others*, Criminal Case No., HAC 251 of 2013S, The tariff for "money laundering" is now set at 5 to 12 years' imprisonment: see *State v Robin Surya Subha Shyam*, Criminal Case No. HAC 146 of 2010S; *State v Monika Monita Arora*, Criminal Case No. HAC 125 of 2007S, and *State v Doreen Singh*, Criminal Case No. HAC 086 of 2009S.
12. In selecting the starting point and determining what sentences are appropriate for offences of this kind, the courts should take into consideration the gravity of the offence and the harm caused to the complainant. The seriousness with which the Money Laundering is regarded by Parliament is reflected in the maximum sentence prescribed by the Proceeds of Crimes Act. The maximum sentence indicates that this offence has been considered by the Parliament as

a serious offence. However when one looks at the Hansard which I referred to in my Judgment, it is highly doubted that the Parliament had contemplated this type of cases to be dealt with under the Proceeds of Crimes Act which was enacted for a particular purpose.

13. This offence has been committed by a natural person without any involvement of a third person. The person who generated the proceeds of crime had used it for her own benefit thus the gravity of the money laundering feature is minimal. The harm caused to the financial system or the national economy is also negligible. Furthermore, there are no international implications involved in the crime. Therefore, it should attract a lesser sentence than what should have been attracted by an offender in a "classic money laundering case".
14. The offender laundered a sum of \$ 17,134.88. However, the victim impact statement and the evidence of the complainant indicate that the illegal activity of the offender has caused a considerable loss to the business of the complainant over a period of time. By the act of deception on the FRCA to obtain public funds, the offender has ultimately victimised the tax payers as a whole.
15. In view of these considerations, a starting point of 3 years is commensurate with the objective seriousness of the offence of Money Laundering. For the offence of Theft, I would select a starting point of 2 years and for Obtaining Financial Advantage by Deception 18 months.
16. I will now consider the aggravating features of the offences.
17. The offender joined the complainant's company in 2008 and gradually built confidence with the complainant as a trusted person. She managed the whole of company's accounts and affairs. She was given even the password for her to access the internet banking platform of the company. This facility was not available even to complainant's wife who was a director. By committing these offences, the offender has grossly breached the trust of her employer.

18. These offences were well planned and highly sophisticated. A 'hidden bank account' was maintained and various bogus narrations were used to cover-up the true nature of the fund transfers. The offence committed on FIRCA was so sophisticated that it was not detected until the police investigation into the theft took its course. The offences were committed over a lengthy period of time.
19. To cover up the charges, the complainant was trying to pass the responsibility to others. Having initially admitted the theft upon its discovery, the offender took a 'u turn' at the trial and blamed the complainant, who was his longtime trusted employer.
20. The Counsel for Defence has submitted a comprehensive written submission and two character references to this court seeking leniency for his client. I have carefully considered his submission and the authorities he has cited. I have also considered the supplementary submissions filed by both counsel on the subject of suspended sentence.
21. The offender, 32 years of age, is married with two children. The younger daughter is only 19 months old. She was serving as an Office Administrator at Fiji National University. She will definitely lose her job when the conviction is communicated. Her father has passed away recently and she, being the only child, looks after her sickly mother. It is submitted that the offender has obtained a substantial joint loan in 2019.
22. The Court is mindful of the plight of the 19 month old child when her mother goes to jail. The offender's capacity to repay the loan will also be badly affected. However by deciding to have a child and obtaining a loan while facing serious charges in a criminal case and instructing her counsel to fight a weak case to the end, she has mismanaged her affairs, putting herself into trouble.
23. The offender has no previous convictions. She had maintained a clean record. The complainant himself agreed that the offender was a 'very committed hard worker'. Unfortunately, she has earned this trust over a period of time to mislead the complainant and facilitate the crimes

she has eventually committed. Therefore, the offender will not earn the full benefit that is given to a first offender with a clean record.

24. The Defence Counsel has highlighted restitution as a mitigating factor. However, the offender, in a desperate attempt to defend herself, maintained in her evidence that the money paid to the complainant was not restitution for stolen money but a loan given to the complainant. In the submission for mitigation, the offender now concedes that the money paid to the complainant forms part restitution. In light of this conduct of the offender, the State Counsel has submitted that the offender should not be given any discount on account of restitution.
25. The offender has admitted her wrongdoing only when she was found guilty by court. Although her part restitution was immediate, she took a different stance at the police interview and the trial. She maintained her innocence until she was convicted. The Court had to go through a lengthy trial after the part heard trial before my predecessor was vacated. She was blaming the complainant right throughout for the payments she received when she knew that they were not authorised.
26. Section 4(2)(g) of the Sentencing and Penalties Act provides that, in sentencing offenders, a court must have regard to the conduct of the offender during the trial as an indication of remorse or the lack of remorse. Early guilty pleas, confessions, cooperation with police to conduct the investigation and restitution to the victim may be considered as evidence of such remorse.
27. In Prasad [2003] FJHC 320; HAC0009T.2002S (30 October 2003), the Court observed that '*...where the remorse was demonstrated to be genuine both to the complainant and to the court*'. In the present case, the complainant was not fully satisfied that the offender was genuinely remorseful.

28. The courts are generally concerned with the issue whether remorse is 'true' or "genuine". In State v Deo [2005] FJHC 64; HAA0008J.2005S (23 March 2005), Shameem J defined what might constitute a genuine remorse.

"The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology."

29. I do not think that the offender in this case is genuinely remorseful. However, in light of the admission made by the complainant that the offender made a part restitution of \$ 10,000, I will take that into account if I decide to award compensation to the complainant.

30. For the aggravating features referred to in Paragraphs 14- 16, I increase the sentence by 2 years to arrive at an interim sentence of 5 years' imprisonment. For the mitigating features and her family circumstances described above, a discount of 2 years is allowed to arrive at a final sentence of 3 years' imprisonment for the money laundering count.

31. Having considered the same aggravating and mitigating circumstances, I would impose a sentence of 18 months' imprisonment for the offence of Theft and 2 years' imprisonment for the offence of Obtaining Property by Deception, both sentences to be served concurrently with the sentence imposed on money laundering count.

32. The Defence Counsel has strenuously argued that, in view of the recent Sentence Ruling in State v Aiding Zhang [2017] HAC 061 of 2017 and for the circumstance which he calls exceptional, this is a fit case for a suspended sentence.

33. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence should only be exercised by a High Court where the custodial sentence does not exceed 3 years. Since the final sentence has not exceeded 3 years in this case, I now proceed to consider the application made on behalf of the offender for a suspended sentence.

34. In Aiding Zhang (supra), the offender was charged with one count of Obtaining Property by Deception and one count of Money Laundering involving a transaction of \$ 1,240,740.74. It was a well-planned, serious breach of trust case. That is the only case which I could trace in Fiji where the sentence in a money laundering case has been suspended. It appears that the suspension was solely based on the full restitution made by the accused upon his conviction.
35. It should be noted that the accepted tariff for the offence of Money Laundering does not prescribe a suspended sentence. It is well settled in Fiji that a suspension of sentence is warranted only in exceptional cases where there is no breach of trust and full restitution has been made as evidence of true and genuine remorse.
36. Examination of case law reveals that in breach of trust cases involving dishonest employees, suspension of sentence is only appropriate if there are exceptional circumstances. [Deo v State Cr App No AAU0025.2005S; 11 November 2005 at [26, 27].
37. I am not convinced that the circumstances highlighted under Paragraph 3.4 of the written submission of the Defence Counsel are exceptional.
38. In State v Roberts [2004] FJHC 51; HAA0053J.2003S (30 January 2004), Shameem J affirmed a suspended sentence imposed by the court below. Her Ladyship observed:

“The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation.

However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the

personal circumstances of the offender and the attitude of the victim” (emphasis added).

39. In Roberts (*supra*), the respondent had made attempts at restitution even before the bank discovered the theft. This was highly significant. Further full restitution took place, not because of the prosecution, but because his pastor counseled him and was able to persuade him to be responsible and accountable for his actions. In making restitution, the respondent was not buying himself out of trouble. The court found his remorse to be clearly genuine.

40. In the present case, the offender pleaded not guilty and maintained her innocence until she was found guilty by court despite her admission to stealing and reimbursement of \$ 10,000. The reparation offer made at the sentencing hearing is an attempt at buying herself out of trouble and therefore not genuine. The complainant had not accepted that she was genuinely remorseful and there was no evidence of reconciliation.

41. In Deo (*supra*), the Court of Appeal has emphasised the need to impose custodial sentences in gross breach of trust cases by an employee. The Court observed:

“During the course of the appeal, we have been referred to a number of cases of similar breaches of trust in the Fiji courts. In a surprising number, suspended sentences have been imposed. They have caused us some disquiet.

Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting such a sentence and, in all cases, the sentencing court should not be too quick to find such circumstances”

42. In State v Cakau Cr. App. No. HAA 125 of 2004S; 10 November 2004, Shameem J said at p.5:

“There is ample authority supporting the imposition of custodial sentences for serious fraud and breach of trust offences. Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust that renders serious fraud offences the worst type of offending in property-related cases. It is for this reason, that a custodial sentence is inevitable except in those exceptional cases where full restitution has been effected, not to buy the offender's way out of prison, but as a measure of true remorse”.

43. In light of the case authorities cited above, I have no other option but to impose an immediate custodial sentence in this case.
44. The complainant has acknowledged that he has already received a sum of \$ 10,000 from the offender. I have just been informed that the offender has deposited a sum of \$ 4,365 in favour of the complainant and \$ 1772.10 in favour of FRCA. In view of those payments, I would not award any further compensation to the complainant.
45. In addition to the custodial sentence, a fine of Thousand Dollars (\$ 1000) to be payable in two weeks is imposed and, in default, an additional imprisonment term of 3 months is imposed.
46. The offender is a young and first offender. Leniency by way of a sentence under tariff is to acknowledge that she had maintained a clean record over the past 32 years. The offender has a strong potential for rehabilitation. In view of that, I would not fix a non-parole period so as

to allow her to reap the full benefit of one third remission should she earn one during incarceration.

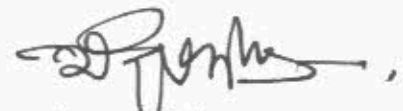
Summary

47. Nousheen Mezbeen Hussain is sentenced:
On the 1st count (Theft) to an imprisonment term of 18 months;
On the 2nd count (Obtaining Property by Deception) to an imprisonment term of 2 years and
On the 3rd count (Money Laundering), to an imprisonment term of 3 years.
All the above sentences are to be served concurrently.

In addition to the above custodial sentence, a fine of Thousand Dollars (\$ 1000) is imposed to be payable in two weeks, in default, an additional imprisonment term of 3 months is imposed.

48. Thirty days to appeal to the Fiji Court of Appeal.




Aruna Aluthge
Judge

At Suva

31 January 2020

Solicitors: **Director of Public Prosecution for State**
Toganivalu Legal for Accused