IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 025 OF 2020

[Magistrates Court Case No. 1126 of 2019]

BETWEEN: **RAVNESH VIDYA SAGAR**

Appellant

AND: **STATE (FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION)**

Respondent

Counsel : Mr. N. Sharma with Mr. Nair for Appellant
Mr. J. Work for Respondent

Date of Hearing: 10 June 2020
Date of Ruling: 17 June 2020

JUDGMENT

1. The Appellant was charged in the Magistrate's Court at Suva with one count of Falsification of Documents contrary to Section 160 (3) of the Crimes Act No. 44 of 2009 and one count of General Dishonesty-Obtaining a Gain contrary to Section 323 of the same Act. He pleaded guilty to the charges and, upon conviction, was sentenced on count one to an imprisonment term of 14 months and on count two to an imprisonment term of 18 months to be served concurrently.

2. Being aggrieved by the said conviction and the sentence, the Appellant filed a timely appeal in this Court.

3. The summary of facts agreed by the Appellant is as follows:

   I. The Accused in this case is Ravnesh Vidya Sagar (hereinafter referred to as Accused)".

II. The Accused was a Revenue collector in 2018 and was officially appointed as a revenue collector from 1st January 2019 to 31 December 2019.

III. The accused as a revenue collector was based at the Colonial War Memorial Hospital (hereinafter referred to as CWMH). His duties include collecting revenue for the government of Fiji in particular revenue and value added tax (VAT) received at CWMH. Additionally he was to draw receipts books from the Medical Superintendent (Accounts Section) and the frequency of lodgment of cash is on daily basis.

IV. During the alleged period from 18th October to 14th January 2019 the Accused was based at the Accident and Emergency (A&E) Unit at CWMH.

V. According to Joana Lesuma, the head of department CEMH Medical Records; the Accused was based at the A&E Department at CWMH as a revenue collector on 16 October 2018 and was on the morning shift from 7.10am to 4.30pm. She also confirmed from the staff register that the Accused was a revenue collector based at the A&E department on 14 January 2019 and was on the night shift from 11.30pm to 7.00am.

VI. It was identified that the Accused whilst collecting payments from the patients who had visited CMH A&E Unit to the alleged dates he issued original Fiji revenue receipts to PW4 and PW6 but made amendments on the book copies of those receipts.

a. Charge of Falsification of Document

VII. That between the 16th day of October 2018 and the 14th day of January 2019 at Suva in the Central division, the accused dishonestly falsified the original and copy of receipt no. 761918 and receipt no. 832330 with the intention of obtaining a gain from the Ministry of Health.

VIII. As per paragraph 6 of Accused dishonestly falsified receipt number 761918 by writing the amount of $54.50 on the original receipt instead of the amount of $109.00 which was paid by PW6.

IX. According to Sunny Kumar (PW-6) he visited CWMH on 16 October 2018 for eye examinations, he proceeded to the A&E department and paid the sum of $109.00 to the Accused for the service. He was given an original receipt number 761918 and he noticed that the receipt had the amount of $54.50 which was different to the amount he had paid of $109.00. Upon enquiring the accused then took the original receipt and wrote the amount of $109.00 over the amount of $54.50. PW-6 further noticed that there were no amendment made to the book copy.

X. The Accused dishonestly falsified receipt number 832330 by writing the name of Marsha Bill (PW-4) with the amount of $109.00 on the original receipt but the duplicate copy had the name of Samshun Nisha with the amount of $10.90.

XI. According to PW4 she visited the CWMH with her aunt to have an x-ray examination on her right leg. There were informed by the Accused that they needed to pay $109.00 as x-ray fees which they paid and were issued with the original Fiji revenue receipt number 832330 with the name of PW-4 and the amount of $109.00. When they visited CWMH the next day for her x-ray film they were told to produce the original receipt as proof of payment for the x-ray done. However, when the original receipt was being cross checked with the book copies, it was found that the original receipt had the right details whereas the book copies had the name of Shamshun Nisha with the amount of $10.90.

XII. The Accused dishonestly falsified receipt number 761918 and receipt number 832330 with the intention of obtaining a gain from the Ministry of Health.

a. Charge of obtaining a Gain

XIII. That between the 14th day of October 2018 and the 14th of January 2019 at Suva in the Central Division with the intention of obtaining a gain the Accused falsified receipts belonging to the Ministry of Health as a result obtained a gain in the sum of $196.20 from the Ministry of Health.

XIV. The Accused in receipt number 761918 wrote the amount of $54.50 on the original receipt with the name of Sunny Kumar however, on the carbon copies the name was the same but the amount was $10.90. As for receipt number 832330 the name on the original receipt was Marsha Bill with the amount of $109.90. The Accused falsified receipt number 761918 and receipt number 832330 with the intention of dishonestly obtaining a gain of $1916.20 from the Ministry of Health.

XV. The act by the Accused in falsifying the amounts on the original receipt and the carbon copies amounts to dishonesty as per the ordinary standards of reasonable and honest people.

XVI. According to Aseri Kula Matawale, senior accounts officer at CWMH (PW-7) revenue collectors should issue original receipt to their customers and whatever amount is received and shown on the original receipt should correspond or reflected in the carbon copies of the receipts.

XVII. The Accused was not supposed to be making amendments to both original and the carbon copies of the receipts. Thus the act by the Accused was dishonestly because the receipts were being altered and it violated regulations specified in the MHFM 2014.

XVIII. On the same note the Accused knew that it was wrong to falsify the Fiji Government receipts because the name of the customer and the amount paid and received on the original receipt should match the carbon copies.

XIX. According to Apete Rokovada, head cashier at CWMH (PW-5) the revenue received for the day is usually collected the next morning and a cash analysis sheet is done for banking. As per the cash analysis sheet dated 18 October 2018 the revenue received from A&E was $479.12 which included the revenue received from receipt number 761918 of $10.90. Furthermore, as per cash analysis sheet dated 15 January 2019, the revenue received from A&E was $1417.40 which included the revenue received from receipt number 832330 of $10.90.

XX. The Accused in his caution interview stated that he had given the money to PW-5 however, PW-5 confirmed that he was neither notified nor given any money by the Accused in relation to this matter.

XXI. Therefore in total the Accused had obtained a gain in the sum of $196.20 from the Ministry of Health.

XXII. The Accused admitted in his caution interview that he prepared receipt number 761918 and his signature is on the same receipt (Refer to Caution Interview Q&A 146 – 148). Additionally he admitted that he prepared number 832330 and his signature is on the same receipt (Refer to Caution Interview Q&A 243-246).

XXIII. The Accused was interviewed under Caution on the 27th of March 2019 and 30th July 2019 and was formally charged on the 30th July 2019 with one count of Falsification of Documents contrary to section 160 (3) and one count of General Dishonesty – Obtaining a Gain contrary to Section 323 of the Crime Act 2009 respectively and was produced in Court on the same day.

4. Before the hearing, the Appellant sought permission to withdraw the grounds of appeal filed against the conviction. That application is allowed. The appeal against conviction is dismissed. What remains to be decided in this appeal is the grounds of appeal against the sentence which are as follows:

a. The Learned Magistrate erred in law and in fact when he failed to give any appropriate discount for the mitigating factors of the Appellant.

b. The Learned Magistrate took irrelevant factors and failed to consider relevant factors in determining the sentence of the Appellant.

c. The Learned Magistrate relied on wrong principles in determining the sentence of the Appellant.

d. The Learned Magistrate failed to take into account the established tariff for such offences in sentencing the Appellant.

e. That the Learned Magistrate failed to take into account restitution of the sum reimbursed to the Complainant. Annexed and marked as "RVS2" is a copy of the letter from Ministry of Health confirming payment of the same.

f. That the Learned Magistrate failed to enquire and take into account the personal mitigating factors of the Appellant as follows:

   i. Age – 25 years – DOB 12/6/95
   ii. Married with 2 children aged 1 year and 6 months and another 2 months. Annexed and marked as "RVS3" are copies of the Birth Certificate.
   iii. Sole breadwinner.
   iv. His financial liabilities.

g. That the Learned Magistrate erred in law and fact by stating that breach of trust offenders require immediate custodial sentences as a deterrent which is contrary to section 4 (1) (a) of the Sentencing and Penalties Act 2009 and legal authorities in respect to such offences.

h. That the Learned Magistrate erred in law and fact in adopting a higher starting point for sentencing in respect of each count.

i. That the Learned Magistrate erred in law and in fact by imposing the custodial sentence of 18 months for both counts that is not only manifestly harsh but disproportionate and unjust in the prevailing circumstances.

j. The overall sentence was harsh and excessive considering the circumstances of the case.

5. This Court will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial Judge made one of the following errors:

(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.

6. Taken as a whole, the Appellant's complaint appears to be that the sentence imposed by the Learned Magistrate is harsh and excessive and/or wrong in principle. For the purpose of convenience, all the grounds can be considered and dealt with together.

7. At the hearing, the Counsel for Appellant conceded that the Learned Magistrate has taken into account the correct sentencing tariff for each offence and that the sentence fell within the

tariff. The Learned Magistrate selected the starting points for each offence within tariff although he has not given any reasons for selecting those starting points. The starting point picked for the 2nd count, 24 months, without giving any reasons in my opinion is not appropriate as such a practice may give rise to the assumption of double counting. The final sentences however, fell within the tariffs and therefore in the absence of evidence of double counting, the starting points selected are justified given the gross breach of trust situation in the offending.

8. At paragraph 5 of the Sentencing Ruling, the Learned Magistrate has taken into consideration the early guilty plea, remorse, cooperation with the police and previous good character as mitigating factors and has allowed a considerable discount for all those.

9. The Counsel for Appellant submitted that the Learned Magistrate failed to consider the early restitution done by the Appellant and his personal circumstances.

10. At the hearing, the Counsel for the Appellant, having conceded that the receipt to prove the fact of restitution was not tendered in the Magistrate's Court, argues that the Appellant was unrepresented at the Magistracy and therefore was handicapped in not having been informed of his right and given an opportunity to make an adequate mitigation submission.

11. It appears from the Record of the Magistrate's Court that the Appellant at the outset had waived his right to legal representation when it was duly explained. Upon being convicted on guilty pleas, the court had assigned the date 11 March 2020 for sentencing and mitigation submissions. On the said date the Appellant failed to appear and a bench warrant was issued. On the warrant returnable date (29.04.2020) the Appellant appeared in court with excuses. The bench warrant was cancelled. Without giving an opportunity to present a mitigation, the Learned Magistrate then and there proceeded to sentence the Appellant.

12. Since the Appellant was unrepresented, the Learned Magistrate should have informed the Appellant that he (the Appellant) had a right to present a mitigation submission. The Counsel for Respondent concedes that the Appellant who was unrepresented did not receive an adequate opportunity to present his mitigation.

13. According to the receipt issued on 10.08.2019 by the Ministry of Health and Medical Services, the Appellant had returned a sum of $109, well before the sentencing hearing. Unfortunately, this fact was not reflected in summary of facts filed on 7 November 2019 by the prosecution. Had the Appellant been given an adequate and informed opportunity to present this receipt, the Learned Magistrate could have taken the restitution as an important mitigating factor.

14. The Sentencing and Penalties Act dictates that in sentencing offenders the courts must have regard to any action taken by the offender to make restitution for the loss arising from the offence [S 4(2) (h)]. Independent of that, an early restitution can also be regarded as an indication of remorse. State v Prasad [2003] FJHC 320; HAC0009J.2002S (30 October 2003) State v Roberts [2004] FJHC 51; HAA0053J.2003S (30 January 2004).

15. Although personal and family circumstances have very little mitigation value (Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014), if given an informed and adequate

opportunity, the Appellant could have presented before the Learned Magistrate all the personal mitigating factors that he has presented to this Court, namely, that he was young 24 years of age; married with 2 children aged 1 year and 6 months and another 2 months; sole breadwinner and that his family ran the risk of being evicted from the rented house. Being deprived of an opportunity to present his mitigation, the Appellant was prejudiced at the sentencing.

16. The Counsel for Appellant in his written submission has criticized the application of two-tiered sentencing process as opposed to what is called the 'instinctive syntheses' in a case where the charges were based on the same facts and interrelated. He appears to have taken the view that the Learned Magistrate erred when he considered the tariff of the two cases separately with different starting points and adopting two deferent penalties for each offence.

17. In Qurai v State [2015] FJSC 15; CAV24.2014 (20 August 2015) the Supreme Court observed at [48] to [51]:

> [48] "The Sentencing and Penalties Decree does not provide any specific guideline as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.
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> [49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.

[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "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.

[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges."

18. In view of the above, I do not see any error on the part of the Learned Magistrate when he chose to exercise his sentencing discretion by adopting the two tired process. Furthermore, according to Section 17 of the Sentencing and Penalties Act, the Learned Magistrate has a discretion either to pass an aggregate sentence or pass two separate sentences for each offence although the offender was convicted of more than one offence founded on the same facts.

19. It is my considered view that arriving at a sentence of 18 months for both counts is not excessive in the circumstances.

20. The term of imprisonment imposed by the Learned Magistrate is less than two years. Therefore, the Learned Magistrate had discretion to suspend the sentence if he was satisfied that, in the circumstances of the case, it was appropriate for him to do so.

21. The question is whether the Learned Magistrate has properly considered the circumstances of the offence and the offender in arriving at a custodial sentence of such a magnitude.

22. In ordering an immediate custodial sentence, the Learned Magistrate remarked "The offending is a serious breach of the public service. Breach of trust offences require immediate custodial sentences as a deterrent".

23. The Counsel for the Appellant submits that the circumstances of the offender justify a suspended sentence in view that the Appellant was a young and first time offender and that he showed genuine remorse by restitution and early guilty plea.

24. In State v Prasad [2003] FJHC 320; HAC0009T.2002S (30 October 2003), the accused was convicted on his own plea of guilty to 12 counts of Larceny by Servant contrary to section 274(a)(i) of the Penal Code, Cap. 17 and was sentenced on each of the 12 counts to a term of 2 years imprisonment concurrent to each other, each term being suspended for a period of 3 years. In that case Gates J having extensively cited Barrick (1985) 91 Cr. App. R. 78, which set down sentencing guidelines in fraud cases, took the view that, given the exceptional circumstances present in favour of the accused, it was a fit case to suspend the sentence of imprisonment although it was a breach of trust case.

25. In State v Roberts [2004] FJHC 51; HAA0053J.2003S (30 January 2004), the accused, a loans officer at the Colonial National Bank, pleaded guilty to four counts of Larceny by Servant. The Learned Magistrate referred to the case of Barrick (supra) and imposed a sentence of 18 month term suspended for three years. The State appealed and it argued that although an 18 month term of imprisonment was unexceptionable in a case of serious fraud, the suspension of that sentence was wrong in principle. In the appeal, Shameem J affirmed the 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."

26. The authorities cited above show that imposition of custodial sentence in breach of trust cases is not a must and not automatic. Even if a custodial sentence is inevitable because of the breach of trust situation in the offending, that of itself should not automatically result in sentencer declining a suspended sentence. Generally, in breach of trust cases involving dishonest employees, suspension is only appropriate if special circumstances are present. Where the amount of money obtained is small the courts have tended to suspend the sentence for young and first offenders when strong mitigating circumstances are present. It is the duty of the sentencer to satisfy himself/herself to see if exceptional circumstances are present to justify a suspended sentence. In this exercise, the sentencer should rightly balance the competing interests of deterrence and denunciation on the one hand and the offender's potential for rehabilitation on the other.

27. The Appellant was a young (24y) first time offender. The Learned Magistrate accepted that he was genuinely remorseful by entering early guilty pleas. The Appellant made restitution well in advance before the sentencing hearing although he did not get an opportunity to bring this matter to the attention of the Learned Magistrate before the sentence. The amount misused was comparatively small. When taken together all these mitigating circumstances into consideration, immediate custodial sentence of 18 months is manifestly excessive.

28. If the Learned Magistrate had properly directed his mind to those circumstances, he would not have imposed a custodial sentence of such a magnitude. The Learned Magistrate was wrong in principle when he found that 'Breach of trust offences require immediate custodial

sentences as a deterrent', without, having due regard to other sentencing purposes, especially rehabilitation.

29. The Court should nevertheless pass a sufficient term of imprisonment to reflect public denunciation and general deterrence. An imposition of partially suspended sentence can achieve this object. The Appellant has already served nearly 2 months in the correction centre. Upon completion of 3 months of the term of imprisonment imposed by the Learned Magistrate, the rest of the sentence of 15 months should be suspended.

30. Following Orders are made.

i. The sentence imposed in the Magistrate's Court is quashed.

ii. An aggregate sentence of 18 months' imprisonment is imposed.

iii. The Appellant shall serve only 3 months in the correction centre with effect from the date of the original sentence (29.04.2020) and the balance period of 15 months of the sentence is suspended for 2 years.

32. The appeal is allowed to this extent.

33. I will now explain the suspended sentence to the Appellant.

Aruna Aluthge

Judge

At Suva

17 June 2020

Solicitors: **Nilesh Sharma Lawyers for Appellant**

Fiji Independent Commission against Corruption for Respondent