

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

**MISCELLANEOUS APPLICATION NO. HAA 07 OF**  
**2022**

**IN THE MATTER** of an Application by the Director of Public Prosecutions in terms of Section 248 (2) and (3) of the Criminal Procedure Act 2009.

**AND IN THE MATTER** of an Appeal from the decision of the Magistrate's Court of Nadi, in respect of Criminal Case No. 839 of 2015

**BETWEEN:**           **THE STATE**

**APPLICANT**

**AND:**                 **ABHINESH AJEET SINGH**

**RESPONDENT**

**Counsel**            :     Ms. Jayneeta Prasad for the Applicant  
  Mr. Wasu Pillai for the Respondent

**Date of Hearing** :     27 October 2022

**Date of Judgment:**   26 May 2023

**JUDGMENT**

[1] This is an Application filed by the Director of Public Prosecutions (DPP) seeking an enlargement of time for the lodging of a Petition of Appeal against the decision made by the Magistrate's Court of Nadi, in Criminal Case No. 839 of 2015.

- [2] By way of an Amended Charge, the Respondent was charged before the Magistrate's Court of Nadi, with the following offences:

**FIRST COUNT**

***Statement of Offence (a)***

**THEFT**: Contrary to Section 291 (1) of the Crimes Act No. 44 of 2009.

***Particulars of Offence (b)***

**ABHINESH AJEET SINGH**, between the 1<sup>st</sup> day of April 2014 to the 31<sup>st</sup> day of August 2015, at Nadi, in the Western Division, dishonestly appropriated \$258,361.42, the property of **SUNFLOWER AVIATION LIMITED**, which was money received from payments made by clients of the company which was deposited into his bank accounts, namely Bank of the South Pacific account no 7559416 and Westpac Bank account nos 9803629253 and 9803553503, with the intention of permanently depriving **SUNFLOWER AVIATION LIMITED** of the said property as per schedule 1.

**SECOND COUNT**

***Statement of Offence (a)***

**THEFT**: Contrary to Section 291 (1) of the Crimes Act No. 44 of 2009.

***Particulars of Offence (b)***

**ABHINESH AJEET SINGH**, between the 1<sup>st</sup> day of April 2014 to the 31<sup>st</sup> day of August 2015, at Nadi, in the Western Division, dishonestly appropriated \$272,200.00, the property of **SUNFLOWER AVIATION LIMITED**, which was money received by him for payments which were supposed to be made to the Fiji Revenue and Customs Authority, with the intention of permanently depriving **SUNFLOWER AVIATION LIMITED** of the said property.

- [3] The Respondent pleaded not guilty to the charges and the matter proceeded to trial from 30 November 2021 to 7 December 2021.

- [4] At the conclusion of the case for the prosecution, a No Case To Answer application was made by the Respondent. On 10 December 2021, the Learned Resident Magistrate found that the No Case To Answer application had merit and accordingly acquitted the Respondent of the charges.
- [5] Aggrieved by this Order the State has filed this instant Application by way of a Notice of Motion to Appeal out of Time. The Notice of Motion, which was filed on 24 March 2022, is supported by an Affidavit in Support, filed on the same day, by Maciu Nacauculevu, the Senior Litigation Officer, of the Office of the DPP.
- [6] On 11 May 2022, the Respondent, Abhinesh Ajeet Singh, filed an Affidavit in Opposition to this Application.
- [7] This matter was taken up for hearing before me on 27 October 2022. Counsel for both the Applicant and the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

**THE AFFIDAVIT IN SUPPORT FILED BY MACIU NACAUCAULEVU**

- [8] The Notice of Motion to Appeal out of Time, is supported by an Affidavit in Support filed by Maciu Nacauculevu, the Senior Litigation Officer, in the Office of the DPP. Therein, he deposes that he has been a Senior Litigation Officer with the Office of the DPP for the past 21 years. He is currently based in Lautoka since April 2014.
- [9] He submits that the prosecution against the Respondent in the Nadi Magistrate's Court was handled by the Office of the DPP. The Respondent pleaded not guilty to the two charges of Theft instituted against him and the matter proceeded to trial. By her Ruling dated 10 December 2021, the Learned Magistrate acquitted the Respondent at the end of the case for the prosecution (at No Case To Answer stage). A copy of the Amended Charge Sheet has been annexed to the Affidavit as EXHIBIT MN 1 and a copy of the Ruling, dated 10 December 2021, has been annexed as EXHIBIT MN 2.
- [10] The Officer further deposes that the appeal period for this matter lapsed on 7 January 2022. As per the procedure set out in the ODPP Appeal Guidelines 2018, all

legal opinions relating to appeals must be sent to the Appeals Division in Suva to be vetted by a Senior Officer in the Appeals Division.

- [11] Due to this internal administrative process, the appeal proceedings were instituted 69 days after the appeal period had lapsed.
- [12] Furthermore, the Officer deposes that the Office of the DPP was awaiting the Judgment of the case *Ilaisa Cakau v. The State* [2022] FJCA 29; AAU049.2016 (03 March 2022); which dealt with matters relative to the proposed Grounds of Appeal in this application. A copy of the Judgment, dated 3 March 2022, has been annexed as EXHIBIT MN 3.
- [13] Thereafter, the decision to appeal against the Learned Magistrate's Ruling was endorsed by the DPP. A copy of the proposed Petition of Appeal has been annexed as EXHIBIT MN 4.
- [14] The Officer submits that he verily believes that the delay in filing the appeal proceedings against the Ruling of the Learned Magistrate is not unreasonable in the circumstances and that this appeal has a reasonable prospect of success. Therefore, the Officer moves that leave be granted to the State to appeal this matter out of time.

#### **THE AFFIDAVIT IN OPPOSITION FILED BY THE RESPONDENT, ABHINESH AJEET SINGH**

- [15] In his Affidavit in Opposition the Respondent deposes that he resides at Lot 20 Transville Road, Namaka, Nadi.
- [16] The Respondent objects to the Affidavit in Support filed by Maciu Nacaucaulevu, the Senior Litigation Officer, in the Office of the DPP. The Respondent submits that when someone is authorized to depose evidence on behalf of another or a statutory body or a company, it should be usually accompanied by a written authorization and not a mere statement. For this reason, the Respondent deposes that the State's Affidavit ought to be struck out as it does not display authority to depose evidence on behalf of a Constitutional Office and, in any event does not have the sanction of the DPP.
- [17] The Respondent further deposes that the sole reason advanced by the State for the delay in filing this application is due to internal administrative processes within the

Office of the DPP. The Respondent submits that this should not be a consideration that this Court should consider as “good cause” in terms of the provisions of Section 248 (2) and 248 (3) of the Criminal Procedure Act.

[18] Accordingly, the Respondent prays that this application be dismissed.

#### **PROPOSED GROUNDS OF APPEAL AGAINST THE ORDER OF THE RESIDENT MAGISTRATE**

[19] Following are the proposed Grounds of Appeal filed by the Applicant:

- (i) That the Learned Resident Magistrate erred in law and in fact by not allowing the Appellant (Applicant) to tender crucial documentary evidence, namely, official receipts issued by the Fiji Revenue and Customs Service (previously the *Fiji Revenue and Customs Authority*) to Sunflower Aviation Limited during prosecution’s case merely due to the absence of related raw data which had been used to prepare said receipts vis-a’-vis an absence of any challenge to the authenticity, admissibility and contents of the said receipts.
- (ii) That the Learned Resident Magistrate’s persistent interference with prosecution’s case had adversely impacted prosecution’s ability to fully present its case which caused evidentiary gaps resulting in the finding of No Case To Answer.
- (iii) That the Learned Resident Magistrate’s continuous interference during prosecution’s case amounted to an apprehension of bias towards the Appellant’s (Applicant’s) Counsel and prosecution’s case overall which resulted in an unjust acquittal thereby causing a substantial miscarriage of justice.

#### **THE LAW**

[20] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate’s Courts). The Section is re-produced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

*[Emphasis is mine].*

**[21]** Section 248 (1) of the Criminal Procedure Act provides that *“Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant’s lawyer, and (filed) within 28 days of the date of the decision appealed against.”*

**[22]** However, Section 248 (2) of the Criminal Procedure Act sets out that *“The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”*

**[23]** Section 248 (3) of the Criminal Procedure Act stipulates:

*“For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —*

*(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*

*(b) any case in which a question of law of unusual difficulty is involved;*

*(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;*

*(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."*

**[24]** Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*"(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

## PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS

[25] It has now been well established that there are several factors that an Appellate Court needs to take into consideration when dealing with such applications.

[26] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters. These factors are:

- (i) The reasons for the failure to file within time;
- (ii) The length of the delay;
- (iii) Whether there is a ground of merit justifying the appellate court's consideration;
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced?

## ANALYSIS

[27] In this case the Respondent was acquitted of the two charges of Theft by the Learned Magistrate of Nadi, on 10 December 2021. In terms of Section 248 (1) of the Criminal Procedure Act, an appeal against this decision had to be filed within 28 days of the decision. The appealable period lapsed on 7 January 2022.

[28] Furthermore, since this was an order of acquittal, in terms of Section 246 (2) of the Criminal Procedure Act, the filing of an appeal required the sanction in writing of the Director of Public Prosecutions.

[29] This application was filed in the High Court of Lautoka on 24 March 2022. Thus, these proceedings have been instituted about 75 days after the appeal period had lapsed (although the Applicant has computed the delay as 69 days).

[30] The reasons provided by the State for the delay in filing the appeal is that it was due to internal administrative processes and furthermore, that the DPP was awaiting the Judgment of the case *Ilaisa Cakau v. The State* (supra).

[31] In terms of Section 248 (2) of the Criminal Procedure Act it is stated that the Magistrates Court or the High Court may, at any time, for good cause, enlarge the



period of limitation prescribed by this Section for filing of an appeal. Section 248 (3) of the Criminal Procedure Act broadly sets out as to what good cause shall deem to include. In terms of Section 248 (3) (b) this includes cases where the sanction of the DPP is required in terms of the law.

[32] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), the Supreme Court has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters.

[33] In the instant case, although the reasons for the failure to file the appeal within time may be acceptable, the length of the delay is a period of 75 days. The said length of delay must be considered in light of the usual appealable period, which in this instance is 28 days. Therefore, the State has taken more than double the time of the usual appealable period to institute these proceedings. Therefore, the length of the delay in instituting these proceedings, in my view, is not reasonable.

[34] However, in terms of the principles set out in *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), even where there has been substantial delay, nonetheless the Appellate Court has to consider whether there are grounds of appeal that will probably succeed. In other words, whether there is a ground of merit justifying this Court's consideration.

[35] Therefore, it is necessary for this Court to go into the proposed Grounds of Appeal filed by the State to determine this fact.

### **Ground 1**

[36] The first Ground of Appeal is that the Learned Resident Magistrate erred in law and in fact by not allowing the Applicant to tender crucial documentary evidence, namely, official receipts issued by the Fiji Revenue and Customs Service (previously the *Fiji Revenue and Customs Authority*) to Sunflower Aviation Limited during prosecution's case merely due to the absence of related raw data which had been used to prepare said receipts vis-a'-vis an absence of any challenge to the authenticity, admissibility and contents of the said receipts.

[37] In this case the prosecution had to prove beyond reasonable doubt, in respect of the first charge, that the Respondent, on the relevant dates stated in the charge (1 April

2014 to the 31 August 2015), at Nadi in the Western Division, had dishonestly, appropriated, the sum of \$258,361.42, the property belonging to Sunflower Aviation Limited, with the intention to permanently deprive the said Sunflower Aviation Limited of the said property (as per Schedule 1).

[38] In respect of the second charge, the prosecution had to prove beyond reasonable doubt that the Respondent, on the relevant dates stated in the charge (1 April 2014 to the 31 August 2015), at Nadi in the Western Division, had dishonestly, appropriated, the sum of \$272,200.00, the property belonging to Sunflower Aviation Limited, with the intention to permanently deprive the said Sunflower Aviation Limited of the said property.

[39] The Crimes Act provides explanations as to what is meant by dishonesty; as to what is meant by appropriation of property; as to what is meant by property belonging to another; and also as to what is meant by intending to permanently deprive another of his property.

[40] "Dishonesty" is a state of mind of the Respondent. In order to determine whether the Respondent had a dishonest mind, a two-tiered approach has to be adopted as defined in Section 290 of the Crimes Act.

*(a) dishonest according to the standards of ordinary people; and*

*(b) known by the defendant (Respondent) to be dishonest according to the standards of ordinary people.*

First, according to the ordinary standards of reasonable and honest people, Court has to decide whether what was done by the Respondent was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. [Dishonest according to the standards of ordinary people-which is an objective test].

If it was dishonest by those standards, then Court must consider whether the Respondent himself has realized that what he was doing was dishonest by those standards. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the Respondent

himself knew that he was acting dishonestly. It is dishonest for the Respondent to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting in the manner he did. [Known by the Respondent to be dishonest according to the standards of ordinary people-which is a subjective test].

Therefore, to prove the case against the Respondent the prosecution would have had to establish beyond reasonable doubt that the Respondent acted dishonestly [and thereby appropriated the sums of money stated in the two counts, which is the property of Sunflower Aviation Limited].

[41] The prosecution would have also had to prove beyond reasonable doubt that the Respondent, appropriated the property of Sunflower Aviation Limited. At law, property belongs to a person if that person has possession or control of the property. This is outlined in Section 289 of the Crimes Act.

[42] 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In this regard, the provisions of Section 293 (1) and (2) of the Crimes Act is relevant and is reproduced below:

*"(1) for the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.*

*(2) Sub-section (1) applies to a case where a person obtains possession of property (innocently or not) without committing theft, and there is a later assumption of rights without consent by keeping or dealing with it as owner."*

[43] Furthermore, the prosecution would have had to prove beyond reasonable doubt that the Respondent intended to permanently deprive Sunflower Aviation Limited of their property. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct.

[44] It must be remembered, that no witness can look into an accused's mind and describe what his state of mind was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or

intention of an accused can only be inferred based on relevant proven facts and circumstances.

[45] Furthermore, Section 300 of the Crimes Act provides:

*“(1) For the purposes of this Division, if —*

*(a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and*

*(b) the person’s intention is to treat the thing as the person’s own to dispose of regardless of the other’s rights; the person has the intention of permanently depriving the other of it.”*

[46] The Learned Magistrate in her No Case To Answer Ruling, which is found from pages 30 to 55 of the Magistrate’s Court Record, had duly made reference to the said elements the prosecution has to prove at paragraph 47 of the Ruling.

[47] During the trial at the Magistrate’s Court of Nadi, the prosecution had called 10 witnesses in support of their case. The Learned Magistrate has duly summarized the evidence of the said prosecution witnesses from paragraphs 5 - 41 of her Ruling [pages 38 – 49 of the Magistrate’s Court Record].

[48] At this stage, the Counsel for the State had indicated that there was no further evidence to offer and had closed the case for the State. Thereafter, Counsel for the Respondent had made an application that the Respondent had No Case To Answer.

[49] The Learned Magistrate had then gone on to duly analyse the available evidence led by the prosecution and come to a finding that the Respondent has no case to answer in respect of the two charges [pages 49 – 55 of the Magistrate’s Court Record].

[50] It must be borne in mind that the first Ground of Appeal taken up by the Applicant is directly in relation to Count 2. In the written submissions filed on behalf of the Applicant, the Learned State Counsel has stated as follows:

*“4.5 Count 2, was in relation to FRCS payments that the complainant had given to the accused to pay FRCS. An FRCS officer had been called to give evidence about the payments. She had from the system of FRCS prepared a spreadsheet indicating all*

*payments received. When prosecution sought to tender the receipted payment spreadsheet (which had been disclosed to defence), Counsel for the defendant objected on documentary hearsay and unfair prejudice. Court Record page 327 is relevant.*

*4.6 The Applicant submits that the spreadsheet was created by the witness giving evidence, that is, she was the maker of the document. She as she had testified had used a software to get data which she cleaned to make it reader friendly.*

*4.7 In relation to documentary hearsay, the Fijian Courts are bound to follow, the Evidence Act and Common Law. The issue of documentary hearsay considered in the case of **State-v-Tirikula [2008]** FJHC Crim. Case No.: 105 of 2006 (19 March 2008); where it was stated:.....*

*4.8 It is very clear that the document was not captured as documentary hearsay and should not have been refused to be admitted in evidence.*

*4.9 The Court Record is unclear of what had been said to the prosecutor to suddenly decide not to rely on a spreadsheet which only moments ago the prosecutor wishes to rely on. The audio transcript will need to be relied on to fill the gaps.*

*4.10 The Applicant submits that as demonstrated above, there is high prospect of succeeding in this Ground of Appeal as the document in question was wrongly excluded.”*

**[51]** However, having carefully examined the material available before me, I am not in a position to agree with the said submissions made by the Learned Counsel for the State.

**[52]** It must also be emphasized that the Learned State Counsel who appeared on behalf of the State in the Magistrate’s Court of Nadi, had conceded that the prosecution has not sufficiently made out a case against the Respondent in respect of Count 2.

**[53]** Therefore, I am of the opinion that the proposed first Ground of Appeal is without merit.

### **Grounds 2 and 3**

[54] The second and third Grounds of Appeal are interconnected. Thus they will be discussed together. The second Ground of Appeal is that the Learned Resident Magistrate's persistent interference with prosecution's case had adversely impacted the prosecution's ability to fully present its case which caused evidentiary gaps resulting in the finding of No Case To Answer. The third Ground of Appeal is that the Learned Resident Magistrate's continuous interference during prosecution's case amounted to an apprehension of bias towards the Applicant's Counsel and prosecution's case overall which resulted in an unjust acquittal thereby causing a substantial miscarriage of justice.

[55] Having analysed the available evidence led in this case, I am unable to come to the conclusion that the Learned Magistrate had persistently interfered or continuously interfered during the prosecution's case or that due to this factor it had adversely impacted the ability of the prosecution to fully present its case.

[56] Therefore, I am of the opinion that the proposed second and third Grounds of Appeal are also without merit.

[57] Furthermore, it is the opinion of this Court that all these factors must be evaluated with the prejudice that could be caused to the Respondent, if leave is granted to file this Appeal out of time.

[58] The date of alleged offending in this matter is between 1 April 2014 and 31 August 2015, which is over 9 years ago.

[59] This Court cannot disregard or ignore the aforesaid prejudice that would be caused to the Respondent if leave is granted to file this Appeal out of time at this stage.

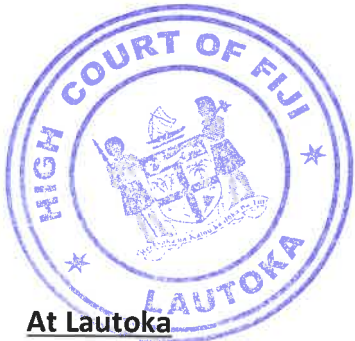
[60] For all the reasons aforesaid, I conclude that enlargement of time to file this Appeal out of time should not be granted and that the application should stand dismissed.

### **FINAL ORDERS**

[61] In light of the above, the final orders of this Court are as follows:

1. Leave for enlargement of time to file Petition of Appeal is disallowed.

2. The application is dismissed.
3. There will be no order for costs.



At Lautoka

**This 26<sup>th</sup> Day of May 2023**

  
**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

**Solicitors for the Applicant:**  
**Solicitors for the Respondent:**

**Office of the Director of Public Prosecutions, Suva.**  
**Messrs Gordon & Co., Barristers & Solicitors, Lautoka.**