

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 13 of 2023**

**BETWEEN:**           **TAIYAB HUSSEIN**

**APPELLANT**

**AND:**                   **STATE**

**RESPONDENT**

**Counsel:**               **Mr. A. Sen for the Appellant**  
                                  **Ms. L. Latu for the Respondent**

**Date of Hearing:**       **18<sup>th</sup> June 2024**

**Date of Ruling:**       **2<sup>nd</sup> August 2024**

**RULING ON APPEAL AGAINST CONVICTION AND SENTENCE**

1. On the 19<sup>th</sup> of December 2022, the Labasa Magistrate’s Court found the Appellant guilty of the offence of **Criminal Trespass** contrary to section 387 (1) (c) of the Crimes Act 2009.
2. On the 22<sup>nd</sup> of February 2023, the Appellant was sentenced to 3 months imprisonment suspended for 2 years.
3. The Appellant was aggrieved with the conviction and filed the Notice and Grounds of Appeal on the 6<sup>th</sup> of March 2023.

## **Grounds of Appeal**

4. The Appellant submits that the Trial Magistrate erred in law and in fact in convicting the Appellant for Trespass when: -
  - (a) It was disputed that the Complainant did not have any interest in the land claimed by him.
  - (b) It was proved that the Complainant could not have any interest in the land which was claimed by him.
  - (c) The land in fact belonged to the Appellant.
5. The Learned Trial Magistrate erred in holding that the question of trespass would be decided on the credibility when in fact the chain of documentary evidence produced by the Appellant clearly showed that the Complainant did not have any leasehold interest but on the contrary the land was owned by the Appellant.
6. The Learned Trial Magistrate erred in failing to take into consideration the documentary evidence produced by the Appellant which unequivocally showed that it was the Appellant who owned the land which the Complainant had unlawfully claimed.
7. The Learned Trial Magistrate erred in law when convicting the Appellant for the case of Trespass when the documentary evidence confirming ownership of the subject land trespass was not challenged by the prosecution nor was it in any manner disputed to establish the fact that the Appellant was the lawful owner of the land which was claimed by the Complainant.
8. The Learned Trial Magistrate failed to take into consideration that the Appellant had necessary statutory approvals from the Director of Town and Country Planning, iTaukei

Land Trust Board (iTLTB) to undertake the development of the subject land which was alleged to be trespassed which remained unchallenged at the Trial of this action.

9. That the sentence imposed by the Learned Magistrate is harsh and unconscionable.

The Appellant therefore prays for the following: -

1. The findings of the Resident Magistrate be reversed, and Judgment be entered for the Appellant and the decision be set aside.
2. The Respondent be ordered to pay the costs of this appeal.
3. Such further and/or other relief as this Honourable Court may deem just and expedient.
4. The appeal was first called, and directions were made for the compilation of the Court records while a timetable was set for appeal submissions to be filed.
5. A considerable amount of time was spent on the compilation of the records as the Appellant insisted that the records as compiled were incomplete and did not accurately reflect the proceedings in the Court below.
6. Ultimately the Court found that the records as prepared were the only available records therefore the appeal should proceed. The Court also directed that in addition to the records themselves, the audio transcript of the proceedings would be made available to the parties.

### **The Submissions of the Appellant**

10. The Appellant submits that he was charged with the offence of Criminal Trespass contrary to section 387 (1) (c) of the Crimes Act, which provides as follows: -

*“Criminal trespass*

**387 (1)** A person commits a summary offence if he or she—

(a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate or annoy any person lawfully in possession of such property.

(b) having lawfully entered into or upon such property unlawfully remains there with intent to intimidate, insult or annoy any such person or with intent to commit any offence; or

(c) unlawfully persists in coming or remaining upon such property after being warned not to come thereon or to depart from the property.

Penalty — Imprisonment for 3 months, but if the property upon which the offence is committed is any building, tent or vessel used as a human dwelling, or any building used as a place of worship, or as a place for the custody of property, the offender is liable to imprisonment for one year.”

11. The Appellant further submits that in order to prove the charges, the prosecution had to prove the following:
  - (i) The Accused
  - (ii) Unlawfully persists in in coming or remaining on the complainant’s property.
  - (iii) After being warned not to come thereon
  
12. At the close of the State’s case, the defence called only one witness.
  
13. The Appellant submits that the record from the Magistrate’s Court is inaccurate and incomplete.
  
14. The complainant was challenged on his ownership of the land in question in cross examination and the complainant maintained that the Appellant had moved on to his land.

15. The appellant submits that the following issues arise as follows: -
- (a) That does such allegations satisfy the requirements of the section under which the appellant is charged?
- The answer is no. It is because there is no evidence to say that the appellant persisted in coming or remaining upon any property after being warned not to come thereon because the complainant never said anything remotely to suggest that the Appellant was warned not to come on the land.
- (b) Whose land was it? It is an unchallenged fact that the Appellant did not own the land. According to the iTaukei Land Trust Board, it was a dispute.
16. The Appellant submits that the Learned Magistrate failed to take into consideration the documents that were produced by the Appellant, as the defence exhibits.
17. The appellant submits that the chain of documentary evidence produced by the Appellant clearly showed that the complainant did not have any leasehold interest but on the contrary the land was owned by the Appellant.
18. The said exhibits conclusively establish that the land belongs to the Appellant and he had all the necessary approvals from the Director of Town and Country Planning/iTaukei Land Trust Board to undertake the development on the said land which was alleged to be trespassed which remained unchallenged at the Trial of this action.
19. The failure of the Learned Magistrate to take into consideration the defence exhibits was fatal. The said exhibits unequivocally showed that it was the Appellant who owned the land which the complainant had unlawfully claimed.

## **Submissions for the Respondent**

20. The Appellant was charged with the offence of Criminal Trespass, and he was represented by Maqbool & Associates at Trial.
21. The prosecution called 3 witnesses and tendered two exhibits at the Trial. At the close of the prosecution case, the Court found that there was a case to answer, and he presented his defence case on the 7<sup>th</sup> of June 2022.
22. The judgment was delivered on the 19<sup>th</sup> of December 2022, and he was convicted and later he was sentenced on the 22<sup>nd</sup> of February 2023 to 3 months imprisonment, suspended for 2 years.
23. The appellant has appealed the conviction and sentence and relies upon 6 grounds of appeal, the State in its submissions responds to each ground of appeal.
24. With respect to Appeal Ground 1 – the Respondent submits that the evidence led at the Trial establishes that the land in question, ITLTB Lease No. 4/9/41137 belongs to the Complainant. This evidence by the Complainant was not challenged by counsel in cross examination. This then bolstered the finding of the Magistrate when he found that the Complainant was the owner of the land in question and the evidence of the Appellant was given less weight as it was not first put to the prosecution witnesses. The Respondent submits that this ground of appeal is not made out.
25. For Appeal Ground 2 – the Respondent submits that the Magistrate did not only rely on the Complainant’s evidence, but instead relied on the evidence of the PW3, a ITLTB Estate Officer who testified on how he used his records as well as confirmation through GPS to confirm that the land in question was within ITLTB Lease No. 4/9/41137 and not 4/9/411367 as set out in the prosecution exhibit. The Magistrate also did not put much

weight to the appellant's defence. The Respondent submits that this ground of appeal is not made out.

26. For Appeal Ground 3 – this is related to Ground 2 and is also not made out.
27. For Appeal Ground 4 – the Respondent submits that the Complainant gave direct evidence that the land in question belonged to him and that he found the Appellant trespassing on his land. This evidence was corroborated by two other witnesses and counsel never put the Appellant's case to them in cross examination. This ground of appeal is not made out.
28. For Appeal Ground 5 – these statutory approvals were not able to be entered into evidence as the Trial counsel had not put these to the prosecution witnesses therefore the Appellant was unable to present the same in evidence. This ground of appeal is not made out.
29. For Appeal Ground 6 – the Respondent submits that the sentence is well within the settled tariff for such offences, and he was entitled to fully suspend the sentence. This ground of appeal is also not made out.
30. This evidence is solid and uncontested and affirmed by the learned magistrate himself. Based on the above, it is submitted that the magistrates did not err based on the above it is submitted. The respondent submits that the magistrate did not fall into error or make a mistake in law.
31. The respondents therefore prays that the appeal be dismissed with costs.

## Analysis

32. In ruling on this appeal, I refer to the judgment of the learned magistrate at paragraph 26 which has been referred to by the appellant. At the relevant portion of his judgment the learned magistrate stated this follows –

“PW3 is the crucial witness in this case. He testified that on 19/9/2019 he went to the land in question with police officers and conducted a survey at the place where the digging took place with the assistance of GPS. He confirmed that his finding was that upon GPS machine on the lease master, the lease that was given to PW1 and digging was encroached. PW3 confirmed that according to his inspection he had noticed that a drain was dug along the complainant’s lease by the Accused. PW3 further stated according to lease master, that piece of land belongs to PW1, however all of this agreement for lease subject to survey. He told the Court that the said land has been given to PW1 by the ITLTB for 99 years lease and the file number is 41137 and it can be confirmed from the lease document. However this piece of evidence remains unchallenged”

33. The Complainant, PW1 has already given sworn testimony that he had informed the Appellant that he was trespassing and he remained on the property despite being notified of the same, he remained until the Police and the ITLTB officers attended at the scene.
34. Appeals from the Magistrate’s Court are provided for at section 246 of the Criminal Procedure Act 2009, which states: -

“246 (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 judgment and sentence.”

35. The appeal is a timely appeal and the appeal is properly before the Court.
36. The Supreme Court confirmed this in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20<sup>th</sup> November 2013) as follows: -

“[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *House v The King* (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.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in *Chirk King Yam v The State* Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of *Kim Nam Bae's* case.”

37. In this case I have considered the records, in particular, the Judgment and the exhibits that were placed before the Court at the trial.
38. The evidence for the prosecution established the offence beyond a reasonable doubt. The Court was entitled to arrive at this decision. The defence put up by the Appellant was not

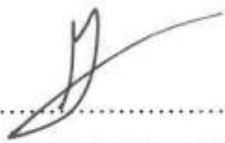
accepted by the Court as the same breached the principles of Browne vs Dunn (1994) AC 67.

39. I find that the Magistrate was entitled to arrive at the findings that he made in the Court below. I am satisfied that he did not act upon a wrong principle or that he allowed extraneous or irrelevant matters to guide or affect him. I also find that he considered all of the relevant facts and he did take into account all of the relevant facts before him at the Trial.
40. The sentence arrived at by the Court falls within the tariff and I find that the Court was entitled to fully suspend the sentence.
41. I find that the whole appeal must fail – Grounds 1 to 5 are not made out and the appeal against sentence is also dismissed.

**This is the Ruling in this matter: -**

1. **The appeal against the conviction entered on the 19<sup>th</sup> of December 2022 is dismissed, that conviction is affirmed.**
2. **The appeal against the sentence handed down on the 22<sup>nd</sup> of February 2023 is refused, that sentence stands.**
3. **Parties will bear their own costs.**



  
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**Mr. Justice Usaia Ratuville**  
**Puisne Judge**

**Solicitors:**

Sen Lawyers for the Appellant

Office of the Director of Public Prosecutions for the Respondent