IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 80 OF 2023
(On Appeal from the Magistrates Court of Fiji at Nadi in Criminal Action 998 of 2016)

BETWEEN : **LALINI RANJANA DEVI SHARMA**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Mr Y. Kumar instructed by Mr Jiten Reddy for Appellant
Ms R. Uce and Ms S. Naibe for Respondent

Date of Hearing: 13 August 2024
Date of Judgment : 16 August 2024

JUDGMENT

1. This is a timely appeal filed by the Appellant against the conviction and the sentence entered by the Learned Magistrate at Nadi in Criminal Action No. 998 of 2016.

2. The Appellant was charged with the following offences.

FIRST COUNT

Statement of Offence

FALSIFICATION OF DOCUMENT contrary to Section 160 (1) (a) of the Crimes Decree No. 44 of 2009

Particulars of Offence

LALINI RANJANA DEVI SHARMA on the 06th day of July, 2016, at Nadi in the Western Division, falsified Westpac Cheque number 000440 dated 07/07/16 by changing the amount.

SECOND COUNT

Statement of Offence

FALSIFICATION OF DOCUMENT contrary to Section 160 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

LALINI RANJANA DEVI SHARMA on the 06th day of July, 2016, at Nadi in the Western Division, falsified Bank of Baroda Cheque number 000440 dated 22/07/16 by changing the amount.

THIRD COUNT

Statement of Offence

THEFT contrary to Section 291 (1) (a) of the Crimes Decree No. 44 of 2009 Particulars of Offence LALINI RANJANA DEVI SHARMA between the 07th day of January 2016 to the 12th day of August 2016 at Nadi in the Western Division, dishonestly appropriated cash valued at $78,199.29 the property of J.K Builders.

3. On 18 August 2023, the Appellant was convicted on the first and the third count. She was acquitted on the 2nd count. She was sentenced on 30 August 2023 on first count to an imprisonment term of 2 years and on 3rd count to an imprisonment term of 3 years to be served concurrently.

4. The Appellant filed the following grounds of appeal:

   a. Appeal against conviction.

      i. That the Learned Trial Magistrate erred in law and in fact in finding the appellant guilty on 1 count of Falsification of Document and one count of Theft even though

there were so many inconsistencies, discrepancies, and contradictions in the evidence of the prosecution evidence.

ii. That the Learned Trial Magistrate erred in law and fact when he declined the oral application from appellant counsel for no case to answer under section 178 of Criminal Procedure Act 2009 when the prosecution failed to prove the case beyond a reasonable douht.

iii. That the Learned Trial Magistrate erred in law and fact when he failed to consider that when the trial date was confirmed on various occasions and the accused was present to present her defence case, but the court did not sit.

iv. That the Learned Trial Magistrate erred in law and in fact in not adjourning the trial by considering the medical condition of the Appellant.

v. That the Learned Trial Magistrate erred in law and in fact in not considering the medical certificate and medical reports of the Appellant on the day of the hearing.

vi. That the Learned Trial Magistrate erred in law and in fact in not considering the supporting medical certificate as the surname on the certificate was the surname of the Appellant's husband on the day of hearing.

vii. That the Learned Trial Magistrate erred in law and in fact in not considering the prescribed Criminal Procedure Code Form 62 (Medical Certificate for accused or witness of unfitness to attend Court)

viii. That the Learned Trial Magistrate erred in law and in fact in not understanding the medical terms of the Appellant's medical Report.

ix. That the Learned Trial Magistrate erred in law and in fact in not believing the Appellant's surgery and her medical conditions.

x. That the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting himself that the prosecution evidence before the Court had

serious doubts and as such the benefit of doubt ought to have been given to the Appellant.

xi. That the Learned Trial Magistrate erred in law and in fact in just letting only 5 prosecution witnesses give evidence instead of 12 witnesses.

xii. That the Learned Trial Magistrate erred in law and in fact in not calling the investigation officer to give evidence as he was one of the key witnesses.

xiii. That the Learned Trial Magistrate erred in law and in fact in not properly analyzing all the facts before him before he decided that the Appellant was guilty as charged on the charges of Falsification of Document and Theft.

xiv. That the Learned Trial Magistrate erred in law and in fact by coming with a premeditated mindset of the case.

b. Appeal against the sentence.

xv. That the Appellant's sentence was manifestly harsh, excessive, and wrong in principle in all the circumstances of the case.

xvi. That the Learned Trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into consideration relevant matters which could have led to a suspended sentence being imposed on the appellant.

xvii. That the Learned Trial Magistrate erred in law and in fact in passing a sentence of imprisonment which was a disproportionately severe punishment.

xviii. That the Learned Trial Magistrate erred in law and in fact in passing the sentence of imprisonment without considering the medical history, surgery and medical certificate of the Appellant.

xix. That the Learned Trial Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Act 2009 when he passed the sentence against the Appellant.

Grounds (i) and (x)

5. The Appellant in ground (i) contends that the Learned Trial Magistrate erred in law and in fact in finding her guilty even though there were so many inconsistencies, discrepancies, and contradictions in the evidence of the prosecution evidence. In-ground (x), it is contended that the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting himself that the prosecution evidence before the Court had serious doubts and as such the benefit of doubt ought to have been given to the Appellant.

6. The Appellant in her submission has not specified the so-called inconsistencies, discrepancies, and contradictions in the prosecution's evidence that the Learned Magistrate failed to consider. The Prosecution had relied on the evidence of the complainant (PW1), the company Office Administrator (PW2) and two bankers (PW3&4) in support of its case. It also relied on the documentary evidence in terms of three bank cheques and the Appellant's caution statement where he had made partial admissions.

7. The Learned Magistrate in paragraphs 23-27 of the Judgment has properly analysed the evidence of PW1 and PW2 in light of the partial admissions of the Appellant in accepting the version of events of the Prosecution case. At the hearing, when inquired about the so-called contradictions, the Counsel for the Appellant highlighted an inconsistency in the complainant's evidence regarding the number of staff employed at the complainant's office. The Counsel confirmed that this so-called inconsistency is the basis of the appeal ground (x). However, this inconsistency was not at all related to the trial issue and was not material enough to discredit the version of events of the Prosecution's case.

8. It is trite law that if there are inconsistencies, discrepancies, and contradictions and they are material and relevant to the facts in issue, they may lead the court to conclude that the witness

is generally not to be relied upon: alternatively, that a part of the witnesses' evidence is inaccurate, or the court may accept the reason the witness has provided for the inconsistencies, discrepancies, and contradictions and consider the witness to be reliable[1]. The basic principle is that discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be annexed with undue importance[2].

9. The trial court must address the inconsistency issues and record its findings in the judgement. I do not find such material inconsistencies, discrepancies or contradictions in the evidence adduced by the Prosecution and any infirmities in the Prosecution evidence that could give rise to serious doubts the benefit of which should have been given to the Appellant in respect of counts one and three. The Learned Trial Magistrate in fact acquitted the Appellant on count two because he entertained doubts about the Appellant's guilt.

10. The divisibility of credibility is accepted in our law. In **Chand v State**[3] Goundar J observed:

> The appellant's submission that just because the learned magistrate disbelieved part of the complainant's evidence, her entire evidence should be rejected as incredible and unreliable cannot be sustained in law. The law is that the court may believe part of witness's evidence and reject the rest. What is important is that the court should give reasons why the court is accepting or rejecting a witness's testimony, in part or in whole.

11. The Learned Trial Magistrate from paragraphs 29-33 of the Judgment gave reasons why he rejected part of PW1's evidence and entertained doubts in respect of the second allegation. Therefore, ground (i) and (x) should fail.

Ground (ii)

12. The Appellant contends that the Learned Trial Magistrate erred when he declined the oral application of the Appellant's Counsel for no case to answer.

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[1] Gyan Singh v Reginamm [1963] 9FLR 105
[2] Bharwada Bhoginbhai v State of Gujarat [1983] AIR 753

13. In paragraphs 6 and 7 of the Judgment, the Learned Magistrate had considered the application for no case to answer. The Court declined the oral application for no case to answer because it appeared to court that a case was made out against the Appellant sufficiently requiring her to make a defence. There was no requirement for Mr Turuva to get a copy of the transcripts to make further submissions because he was the counsel who defended the Appellant at that stage.

14. Section 178 of the Criminal Procedure Act 2009 (CPA), which deals with no case to answer applications, provides as follows:

> If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.

15. The test for no case to answer in the Magistrates' Court is adopted from the Practice Direction issued by the Queen's Bench Division in England and reported in [1962] 1 All E.R 448[4]. This test has been applied in Fiji in numerous cases[5]. Accordingly, the test under Section 178 of the Criminal Procedure Act has two limbs. The first limb of the test is whether there is no evidence to prove an essential element of the charged offence. The second limb of the test is whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict. A no case-to-answer application can be upheld on either limb.

16. The Counsel for Appellant in his submission has failed to show this Court that the Learned Trial Magistrate failed to apply either of these tests. Upon perusal of the evidence led by the Prosecution, it appears that the Learned Magistrate was justified in holding that there was evidence to prove essential elements of the charged offences and that the prosecution evidence was so manifestly credible and reliable that a reasonable tribunal could convict the Appellant on counts one and three. The Learned Magistrate should have acquitted the Appellant on count two at that stage. However, no prejudice was caused to her as she was acquitted at the end. There is no merit for this ground.

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[4] Moiden v R (1976) 27 FLR 200

[5] State v Aiyaz [2009] F86; 11.2008 (31 August 2009); The State v Lakhan v Criminal Appeal No. HAA 025 of 2016 (25 April 17)

Grounds (iii)- (ix)

17. The appeal grounds, (iii)-(ix) can be addressed together as they boil down to a single issue of whether the Learned Magistrate erred in not granting an adjournment and deciding to proceed to the Defence case in the absence of the Appellant.

18. Since the conviction had been entered in the absence of the Appellant, she should have made an application under Section 172 of the CPA before the same magistrate to get those orders vacated by satisfying the requirements under that section. Accordingly, the Learned Trial Magistrate had the discretion to set aside the conviction upon being satisfied that the absence was from causes over which the Appellant had no control and that there was an arguable defence on the merits. Since the Learned Trial Magistrate in his judgment has already made his decision on the issue of whether the absence was from causes over which the Appellant had no control, I would entertain this appeal on the basis that the conviction had become final, whereby the Learned Trial Magistrate was *functus officio*.

19. It is pertinent to set out briefly the sequence of events at the Magistrates Court as it sheds some light on the issues raised in these grounds of appeal. The Appellant pleaded not guilty to the above counts when she was arraigned. The Prosecution called four witnesses and tendered four documents. At the end of the Prosecution's case, Mr Turuva, the Defence Counsel, on 01 June 2022, made an oral application for no case to answer under Section 178 of the Criminal Procedure Act. This application was refused and the court was ready to proceed to the Defence case. However, the matter could not proceed immediately because Mr Turuva sought an adjournment.

20. The Defence case was then set for 17 June 2022. It could not however proceed on that day because the court was informed the Appellant was admitted to hospital. After that, the case was called on five occasions in Court, but the Learned Trial Magistrate was on leave on all those occasions. In the meantime, The Appellant changed her Counsel and retained Mr Y. Kumar instructed by Jiten Reddy Lawyers as her new counsel.

21. A date could not be secured for the Defence case until 2 November 2022 when in the presence of the Appellant and Mr Y. Kumar, they were told in Court of 17 November 2022 as the trial date for the Defence case. On 17 November 2022, Mr. Kumar appeared for the Appellant and informed the Court that the Appellant was sick. A sick sheet was submitted. The Learned Magistrate found the sick sheet questionable but granted an adjournment till 1 December 2022. The Appellant again failed to appear without any valid reason.

22. It was not until 16 February 2023 that a trial date of 26 July 2023 was set. On 26 July 2023, Mr. Kumar appeared but not the Appellant. Mr Kumar informed the court that the Appellant had just had major surgery. He submitted some medical documents to justify the non-appearance of the Appellant. The counsel however informed that he was ready to proceed. The court proceeded to trial *in absentia* and found the Appellant guilty on 1st and 3rd counts.

23. The Learned Magistrate in his Judgement observed that –

> *"a perusal of court record reveals the number of sick sheets submitted by the Accused to justify her non-appearance in Court as and when the case was called. It continued through the management of the case since 2016. There is (sic) almost more sick sheets by the Accused than Court documents in this file. The Court had hoped that it would have stopped but it continued after the close of the Prosecution case. The Court has been trying to close this case but for the non-appearance of the Accused on trial dates set. Indeed, there were dates where (sic) the Court did not sit, but that is no excuse to continuous (sic) flooding the Court through this case file with various medical documents".*

24. Sections 170 and 171 of the CPA deal with adjournments and trials *in absentia* in the Magistrates Court. I shall reproduce the relevant sections for easy reference.

Adjournments

170 (1)	During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion unless there is good cause, which is to be stated in the record.
(2)	For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.

(3) An adjournment under sub-section (1) must be to a time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective lawyers then present.

(4) During the adjournment of a case under sub-section (1), the magistrate may

(a) permit the accused person to leave the court until the further hearing of the case; or

(b) commit the accused to prison; or

(c) release the accused upon his or her entering into a bond (with or without sureties at the discretion of the magistrate) conditioned for his or her appearance at the time and place to which the hearing or further hearing is adjourned.

(5) If the accused person has been committed to prison during an adjournment the adjournment may not be for more than 48 hours.

(6) If a case is adjourned, the magistrate may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or to offer no evidence on the day fixed for the adjourned hearing, before adjudicating on the case.

(7) A case must not be adjourned to a date later than 12 months after the summons was served on the accused unless the magistrate (for good cause which is to be stated in the record) considers such an adjournment to be required in the interests of justice.

Non - appearance of parties after adjournment

171 (1) If at the time or place to which the hearing or further hearing is adjourned —

(a) the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and

(b) if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the accused person who has not appeared is charged with an indictable offence, or if the court refrains from convicting the accused person in his or her absence, the court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the court.

25. According to Section 170, the power of a magistrate to grant an adjournment is not unfettered. He or she must not normally allow any adjournment unless there is 'good cause', which is to be stated in the record. A "good cause" includes the reasonably excusable absence of a party or witness or a party's lawyer.

26. Section 170 of the CPA must be read and understood in the spirit of the notion of fair trial guaranteed in the Constitution[6] which encompasses inter alia the right of a person charged with an offence to be presumed innocent until proven guilty[7]; to have the trial begin and conclude without unreasonable delay[8]; to be present when being tried[9], and to call witnesses and present evidence, and to challenge evidence presented against him or her.[10] These rights should be taken into consideration in addressing the issue at hand because the Bill of Rights Chapter hinds the judicial branch of government at all levels.[11]

27. The question is whether the Learned Magistrate failed to appreciate that the Appellant had a good cause that made her absence reasonably excusable when the case was adjourned for the Defence case to proceed on 26 July 2023.

28. On 26 July 2023, the Defence Counsel Mr Kumar informed the court that the Appellant just had major surgery and submitted some medical documents. The Learned Magistrate rejected those documents for the following reasons which he recorded in at [14] of his Judgment:

> [a] The two medical certificates and a Discharge Summary from CWM Hospital dated 17/7/23 are under the name of a Ranjana Krishna who was admitted on 13/7/23 and discharged on 17/7/23. It is signed off by a Dr. Melvin Kumar. This document when read with the Medical Certificate dated 17/7/2023 and signed by Dr. Kumar reveals that Ranjana Krishna will be fit for full duty or light duty from 13/10/2023. This Ranjana Krishna is not the Accused in this case. The Prescription document dated 21/7/23 is also under the name of Ranjana Krishna, who is also not the Accused in this case.
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> [b] The MEDICAL CERTIFICATE FOR ACCUSED OR WITNESS OF UNFITNESS TO ATTEND COURT (Form 62 under the Criminal Procedure Code) dated 21/7/23 signed by a Dr. Nitik Ram of Positive Vibe Clinic discloses that Lalini Ranjana Sharma will be fit after 1/12/23 after a major surgery contrary to the finding by Dr. Kumar above. Nevertheless, Dr. Ram was not the surgical doctor. There is no evidence from medical documents tendered that she had a major surgery. There is no report from

[6] Section 7(5) of the Constitution
[7] Section 14(2)(a) of the Constitution
[8] Section 14(2)(g of the Constitution
[9] Section 14(2)(h) of the Constitution
[10] Section14(2)(l) of the Constitution
[11] Section 6(1) of the Constitution

the surgical doctor, if indeed she was subjected to the so-called major surgery. The certificate is dated 5 days away from her trial which highly questions the credibility of her claim of major surgery and Doctor Ram's finding.

[c] The medical document from Oceania Hospitals PTE LTD dated 12/7/23 states the name of a Lalini Sharma, who is highly likely the Accused in this case. However, this document is of no assistance at all to the Court. It is more of a report of a medical examination and nothing further. There is no accompanying explanatory document from the writer as to what it means especially since they are medical terms unknown to the Court.

[d] There are grave contradictions in the medical reports submitted that do not justify the Accused absence.

29. It is worth noting that before the medical documents were submitted to Court on 26 July 2023, the Appellant on 3 July 2023 had filed a Motion Application to vacate the trial fixed on 26 July 2023 for reasons deposed in her Affidavit in Support which I reproduce verbatim below:

I LALINI RANJANA DEVI SHARMA of Navo, Nadi, Clerk, make oath and say as follows:

1. That I am the accused in this matter and depose the facts herein from information contained in the file save and except where so stated to be on information and belief and where so stated, I verily believe them to be true.

2. That the hearing of this matter for continuation of the defence case has been fixed on the 26th day of July 2023.

3. That this matter is now being handled by Mr. Jiten Reddy of Jiten Reddy Lawyers.

4. That I had engaged the services of Mr. Reddy after close of the Prosecution case as my Lawyer Mr. Ravneet Charan withdrew from acting for me for reasons best known to him.

5. That I am advised by Mr. Reddy that he had already prepared for the hearing was ready for trial in spite of the fact that he did not have the privilege of the court records for the prosecution evidence.

6. That I now respectfully seek to vacate this hearing date and a fresh hearing date be fixed the following week from 26 July or any other date suitable to the honourable court.

7. That however, I have been advised by Mr. Reddy and I verily believe that the High Court at Suva through honourable Justice Rajasinghe has fixed a hearing date in State v Mohammed Iftikar Ali

Criminal Action No. HAC 76 of 2022 starting from 21st day of July 2023 till 26th July 2023 that coincides with my hearing date and I am advised by Mr. Reddy that High Court cases takes precedence over Magistrates Court matters. (Annexed herein and marked with letter "A" is a copy of our Dairy entry) which case is handled by Mr. Reddy and the honourable Judge wants to finish that matter between the said dates.

8. That I was advised that Mr. Reddy became very very sick with some cardiology issues after he took up my case and he has been very sick recently having come out of an Open Heart Surgery and has been put on sick leave until in or around mid-August 2023 by his surgeon. (Annexed herewith and marked with letter "B" is a true copy of his medical report.)

9. That in spite of being so sick, Mr. Reddy was ready to attend to this trial as he has been attending to his old matters against his doctor's orders so that he can conclude most of the old matters.

10. That Mr. Reddy was ready to travel to Nadi and conclude this matter on the 26" July 2023 hut I am advised by him that he cannot conduct the defence case in this matter because of the following reasons:-

(a). Firstly, because of trial date in the High Court set by honourable Justice Rajasinghe which coincides with this court date and Mr. Reddy will personally conduct the High Court matter.

(b). Secondly, my trial Counsel pulled out after the close of Prosecution case for reasons best known to him and I had to get alternative Counsel to conduct defence case.

(c). That at the time Mr. Reddy took up my case, his diary was free and that is the only reason Mr. Reddy had agreed to take up the matter.

(d). That I am also advised by Mr. Reddy that apart from the disclosures that are on hand, he does not know what transpired in this matter at the trial during the prosecution case and needed copy records pertaining to the prosecution evidence only to familiarize himself of the said proceedings before conducting the defence case.

(e). That Mr. Yogendra Kumar, an Associate Solicitor of Mr. Reddy had made an application in open court to get copy records for prosecution evidence only which were denied by the honourable court on the basis that we liaise with registry and uplift the same.

(f) That we did approach the Registry and we were advised that the honourable Presiding Magistrate has not made any orders for the copy records for the prosecution evidence to be provided to us.

(g). To that effect, I am prejudiced since Mr. Reddy will have no knowledge of what transpired at the trial during prosecution evidence.

11. That I am now advised by Mr. Reddy to make this application and kindly seek leave of the honourable Court that the hearing date for the 26th July 2023 for this matter be vacated and an adjournment be granted by few days only until the very next week either to the 31st July 2023 or August 1st at 2 pm, 3rd August, or the 5th August 2023 or any other dates suitable to the honourable Court that Mr. Reddy can appear.

30. This application on motion was placed before the Court for directions on 10 July 2023. The Learned Magistrate rejected the documents on the basis that the Appellant had more than 6 months to make such an application for vacation. Giving reasons for the rejection, the Learned Magistrate in paragraphs 16-19 of his judgment observed as follows:

> [16] ....Trial was only 2 weeks away and Mr. Reddy was not new to the case for he had been giving instructions and was well aware of what the case was about.
>
> [17] Additionally, there is nothing in the said proposed affidavit to indicate any health issue about the Accused. It was only after the return of their motion affidavit that the medical documents disclosing her purported major surgery appeared but for the serious contradictions therein questioning its credibility rendering it as highly questionable.
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> [18] The Accused has pursued so many avenues with medical excuses to avoid being answerable to the law about the allegations against her but the law has caught up with her. It is not in the interest of justice that the hearing be vacated yet again based on questionable medical documents when considered with the Accused attendance record of raising medical issues through her past Counsel on previous trial dates.
>
> [19] It is in the interest of justice that the case must conclude as it has already commenced and justice be delivered.

31. I cannot help but agree with the reasons given by the Learned Magistrate for rejecting the application filed on 3 July 2023 seeking vacation of trial and the medical documents submitted on 26 July 2023.

32. Although the Learned Magistrate's finding that the discharge summary from CWM Hospital and the medical certificate dated 13/07/2023, signed by Dr Melvin Kumar and the subsequent prescription dated 21/7/2023 did not belong to the Appellant may not be correct, it should be accepted that the medical certificate dated 13/07/2023 was inconsistent with that issued by Dr Nitika Ram in Form 2 of the CPA. There was no medical report certified by Dr Melvin Kumar that the Appellant underwent major surgery at the CWM Hospital. Dr Ram was not the surgeon who conducted the so-called surgery to certify the medical fitness of the Appellant. According to Dr Melvin Kumar, the Appellant will be fit for full duty or light duty from 13/10/2023 whereas Dr Ram certified that she would be fit after 1/12/ 2023.

33. However, the affidavit filed by the Appellant on 3 July 2023 suggested that she was fit to come to Court by 31 July 2023. In paragraph 11, she stated inter alia:-

> *I am now advised by Mr Reddy to make this application and kindly seek leave of the honourable Court that the hearing date for the 26th July 2023 for this matter be vacated and an adjournment be granted by few days only until the very next week either to the 31st July 2023 or August 1st at 2 pm, 3rd August, or the 5th August 2023 or any other dates suitable to the honourable Court that Mr. Reddy can appear.*

34. It appears that the Appellant had moved for an adjournment on 3 July 2023 purely on the basis that his new Counsel Mr Jiten Reddy was either not ready, unavailable, or not fit to appear on 26 July 2023. The self-contradictory affidavit destroyed the credibility of the reasons advanced on 26 July 2023 by the Appellant for an adjournment. According to paragraph 10 (a) of the affidavit, Mr Reddy was booked for another trial in Suva High Court before Rajasinghe J. where he was required to give priority. Then her statement in paragraph 10 (c) that when Mr Reddy took up her case his diary was free cannot be true. No responsible counsel would accept a new file if he were already booked for another trial.

35. The Appellant, while stating at the beginning of paragraph 10 that Mr Reddy was ready to travel to Nadi on 26 July 2023 to conclude the matter, in the following paragraphs (d-g), she stated

that her Counsel was unable to conduct the Defence case because he was not issued a copy record and therefore, was not aware of what transpired during the prosecution case.

36. Upon perusal of the affidavit and the questionable medical documents, I cannot help but conclude that the application for adjournment was made on 26 July 2023 to facilitate her Counsel to prioritise the Suva High Court matter and not because she was unable to attend court due to a medical condition. Therefore, the Learned Magistrate's observation that it was only after the rejection of the motion affidavit dated 3 July 2023 that the medical documents disclosing the Appellant's purported major surgery appeared was well founded.

37. While conceding that the Learned Magistrate's inability to comprehend the medical terms unknown to the Court may not be a good reason to reject the report dated 12/07/2023 issued by Oceania Hospital Pvt. Ltd, I accept his finding that it related merely to a medical examination and therefore was of no assistance to the court in deciding the issue on 'good cause'.

38. The Learned Magistrate was quite justified in expressing scepticism on the sincerity of the medical documents because of the past conduct of the Appellant who had pursued so many avenues with medical excuses to avoid being answerable to the law about the allegations against her.

39. The Appellant was charged with two summary offences. Therefore, Section 171(1)(a) is the relevant section that governs a situation where the accused is not present on the day the hearing or further hearing is adjourned. Accordingly, if the accused person fails to appear before the court which has made the order of adjournment, the court has the discretion to proceed with the hearing or further hearing as if the accused were present. However, the discretion must be exercised judiciously.

40. In **State v Agape Fishing Enterprises**[12] Goundar J observed as follows:

> The granting of an adjournment is a matter of discretion. The discretion must be exercised judicially so that the rights of the parties are not defeated and that no injustice are (sic)

[12] (2008) FJHC19: HAA 011.2008 (15 February 2008)

done to one or other of the parties (see. McCahill v State, Criminal Appeal No. 43 of 1980: Chand v State, Criminal Appeal No. AAU0056 of 1999S).

41. I am satisfied that the Learned Magistrates has considered all the relevant matters and exercised his discretion judiciously. He has recorded the reasons for his decision. Therefore, the grounds (iii)-(ix) should be dismissed.

Grounds (xi) and (xii)

42. The Appellant complains that the Learned Trial Magistrate erred in letting only 5 prosecution witnesses give evidence instead of 12 witnesses and in not calling the investigation officer to give evidence as he was one of the key witnesses.

43. In fact only four witnesses were called by the Prosecution and not five. There is no hard and fast rule that all the prosecution witnesses listed should be called at the trial. It is the prerogative of the Prosecution to decide on the number of witnesses it should call and which of the witnesses it should call. If the Prosecution fails to call a witness the Defence considered important to its case, then the Defence Counsel should have made an application that that witness be called before the Prosecution closed its case. No such application was made. The investigation officer no doubt plays an important role in any criminal investigation. However, the Appellant must show what prejudice was caused to the Defence by the Prosecution not calling the investigating officer as a witness at the trial. Grounds (xi and xii) are without merit.

Grounds (xiii) and (xiv)

44. The Appellant contends that the Learned Trial Magistrate erred in not properly analysing all the facts before him before he decided that the Appellant was guilty of the charged offences. However, the Appellant has not shown which fact or evidence the Learned Trial Magistrate failed to consider and how she was prejudiced by the alleged failure. The Appellant must show what evidence was at her disposal to create reasonable doubt in the Prosecution's case had she been allowed to present her evidence. The Learned Trial Magistrate had properly analysed all

the facts and evidence from pages 8-15 of the Judgment. He has made detailed reference to each of what the witnesses said and the contents of the documents tendered as exhibits.

45. Merely because the Learned Trial Magistrate had refused the application for no case to answer it cannot be assumed that he was driven by a premeditated mindset. There is no martial on the face of the record that Mr Kumar had made an application either before the Learned Trial Magistrate or at the Registry to obtain a copy record or that he was denied an opportunity for a file search after the change of solicitors. Therefore, these grounds should fail.

Appeal against the sentence - Grounds (xv), (xvi), (xvii) and (xix)

46. All the grounds for appeal against the sentence can be considered together. The grievance of the Appellant basically is that the sentence imposed by the Learned Magistrate was harsh and excessive in all the circumstances of the offence.

47. The appellate courts will approach an appeal against sentence using the principles set out in **House v The King**[13] and adopted in **Kim Nam Bae v The State**[14] and will interfere with a sentence if it is demonstrated that the sentencer made one of the following errors: -

i. Acted upon a wrong principle;
ii. Allowed extraneous or irrelevant matters to guide or affect him/her;
iii. Mistook the facts;
iv. Failed to take into account some relevant consideration.

48. Although the Appellant contended that the sentence was wrong in principle and that the Learned Magistrate erred in taking irrelevant matters into consideration and not taking into consideration relevant matters which could have led to a suspended sentence being imposed. she has not pointed out what sentencing principle that was not followed, what relevant matter that was not taken into account or what irrelevant matter that was taken into consideration.

[13] [1936] HCA 40; (1936) 55 CLR 499
[14] Criminal Appeal No. AAUO015

49. The Learned Magistrate had identified the correct maximum sentences for the offence of Falsification of Document (7 years imprisonment) and Theft (10 years imprisonment) in paragraphs 2 and 3 of the Sentence Ruling. He applied the existing sentencing tariffs prescribed for these offences. The applicable tariff for Falsification of Documents set in **State v Sakiusa Bole**[15] under the Penal Code. which was 18 months to 3½ years' imprisonment, remained unchanged when the Crimes Act 2009 came into being. In **Bole** Shameem J held:

> The maximum sentence for offences under Section 307 of the Penal Code is 7 years imprisonment. However, the tariff for breach of trust sentence ranges from 18 months to 3 ½ years' imprisonment. Higher terms are imposed where there is a serious breach of trust, committed over a long period of time. there has been no attempt at restitution and no remorse expressed nor a guilty plea.

50. The sentence imposed by the Learned Magistrate for the first count '(Falsification of Document) was 2 years imprisonment, well within the tariff range despite the Appellant being in gross breach of trust coupled with no attempt at restitution. no remorse expressed and no guilty plea.

51. The existing tariff for simple theft is 2 months to 9 months imprisonment[16]. This however was not a simple theft. The Appellant was employed by the complainant at the time of the alleged offence in a fiduciary relationship. This being a theft arising from a breach of trust between an employer and employee. the applicable tariff would be 18 months to 3 years imprisonment. In **Ratusili v State**[17], which established the tariff for Theft, the court prescribed an imprisonment term of up to 3 years when the offence involved a large sum of money in a breach of trust situation[18]. The sentence imposed on the Appellant was 3 years imprisonment. The top end of the tariff was justified given the gross breach of trust and the large sums of money involved.

52. In paragraph 29 of the Sentence, the Learned Magistrate considered the suitability of a suspended sentence although the Magistrates Court does not have jurisdiction to suspend a

[15] [2005] FJHC 470 (4 October 200)
[16] Niudamu v The State (2011) FJHC 661
[17] Crim. Appeal No HAA 11 of 2012 (1 August 2012)
[18] Also see Chand v State (2007) FJHC 65 HAA 30 of 2007

sentence of imprisonment if it exceeds two years[19]. The imprisonment term imposed on the Appellant was three years' imprisonment to be served concurrently. Therefore, the Learned Magistrate had no power to suspend the sentence. Even if he had that power, the circumstances of the case did not warrant a suspended sentence.

53. The Appellant contended that the Learned Magistrate's finding that she was in breach of trust was wrong or mistaken when no evidence was led of her good character. In paragraph 15 of the Sentence Ruling it is stated that the Appellant *"was an employee of the complainant and to be its accounts officer. As such trust by the complainant was upon her"*. There was no dispute that the Appellant was an employee entrusted to prepare the impugned cheques for the company. Only people with previously good character are given the position of trust and responsibility in institution and corporations.[20] The Learned Magistrate was quite right when he aggravated the sentence on account of breach of trust.

54. The Appellant further contended that if she was given an adequate and proper opportunity to mitigate she would have advised the Learned Trial Magistrate to take into consideration her support towards her elderly mother, no previous convictions, a person of good character and calling character witnesses to confirm her contribution to society, religious organization and charitable organizations. The Learned Magistrate had considered all the relevant aggravated and mitigating factors in the sentence. He also considered the appellant's medical condition although no weight was given due to the questionable medical reports at the trial. He had given the Appellant the benefit of a first offender and considered the Appellant's family background and her personal circumstances. Good character evidence is of no avail in breach of trust cases[21].

55. The two sentences were made to run concurrently. The sentence imposed by the Learned Magistrate was neither harsh nor excessive. Therefore, the grounds against the sentence should fail. However, Learned Magistrate has failed to fix a non-parole period which he was mandated to fix under Section 18(1) of the Sentencing and Penalties Act when the imprisonment term exceeds 2 years. Having considered the Appellant's potential for rehabilitation in view that she

[19] Section 26 (2) (b) of the Sentencing and Penalties Act
[20] Prasad v State [2017] JHC 227; HAA039.2016 (14 March 2017); State v. Isimeli Drodroveivali HAC0007.2002S
[21] Raj v State FJHC 12 (20 August 2014)

was a first offender. it is appropriate to fix a non-parole period of two years to be effective from the date she started her term of imprisonment.

56. The following Orders are made.

i. The Appeal against the conviction is dismissed.
ii. The Appeal against the sentence is dismissed.
iii. The conviction entered and the sentence imposed by the Learned Magistrate at Nadi are affirmed.
iv. A non-parole period of two years is fixed to be effective from the date the term of three years imprisonment started to run.

57. 30 days to appeal to the Court of Appeal if the Appellant so desire.

HIGH COURT OF FIJI
LAUTOKA

Aruna Wluthge
Judge

16 August 2024
At Lautoka

Solicitors:
Jiten Reddy Lawyers for Appellant
Office of the Director of Public Prosecution for State Respondent