THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0001 of 2019
[In the High Court at Suva Case No. HAC 443 of 2018S]

BETWEEN	:	**VILIAME KATIA**
		Appellant
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION [FICAC]**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Naivalu for Appellant**
	:	**Mr. R. Aslam and Ms. L. Bokini for Respondent**
Date of Hearing	:	**20 November 2020**
Date of Ruling	:	**23 November 2020**

RULING

[1] The appellant had been charged with one count of Abuse of Office for Gain (count 1) contrary to section 111 of the Penal Code, two counts of Abuse of Office for Gain (counts 5 and 6) contrary to section 139 of the Crimes Act, 2009, two counts of Forgery (count 2 and 3) contrary to section 341(1) of the Penal Code, two counts of Forgery (count 7 and 11) contrary to section 156(1) of the Crimes Act, 2009, one count of Embezzlement by Servant (count 4) contrary to section 274(b)(ii) of the Penal Code, one count of False Information to Public Servant contrary to section 201 of the Crimes Act, 2009, one count of Unauthorised Modification of Data contrary to section 341(1) of the Crimes Act, 2009 and one count of Obtaining Financial Advantage contrary to section 326(1) of the Crimes Act, 2009.

[2] The charges read as follows.

FIRST COUNT

Statement of Offence

ABUSE OF OFFICE FOR GAIN: contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence

VILIAME KATIA between 1 July 2008 and 31 January 2010, at Suva in the Central Division, whilst being employed in the Public Service as the Acting Deputy Official Receiver, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely causing payments amounting to FJD $339,201.05 to be processed by the Accounts Section of the Office of the Official Receiver, and which sum was drawn from the Official Receiver's Bankruptcy Account, which was an act prejudicial to the rights of the creditors for whom the Official Receiver held the sum in trust and to the Government of Fiji.

SECOND COUNT

Statement of Offence

FORGERY: Contrary to Section 341 (1) of the Penal Code Cap 17

Particulars of offence

VILIAME KATIA between 1 July 2008 and 31 January 2010, at Suva in the Central Division, with intent to defraud, made false documents, namely internal memorandums purported to have been made by one Laise Dawai, employed with the Office of the Official Receiver in Lautoka, and forged the signature of the said Laise Dawai on the said internal memorandums in order to facilitate the unlawful payment of monies from the Official Receiver's Bankruptcy Account to himself.

THIRD COUNT

Statement of Offence

FORGERY: Contrary to Section 341(1) of the Penal Code Cap 17.

Particulars of Offence

VILAIME KATIA between 1 July 2008 and 31 January 2010, at Suva in the Central Division, with intent to defraud, made false documents, namely emails from one Laise Dawai, employed with the Office of the Official Receiver in

Lautoka, in order to state that purported creditors were willing to accept reduced payments from their bankrupt debtors in order to facilitate the unlawful payment of monies from the Official Receiver's Bankruptcy Account to himself.

FOURTH COUNT

Statement of Offence

EMBEZZLEMENT BY SERVANT: Contrary to Section 274(b)(ii) of the Penal Code Cap 17

Particulars of Offence

VILIAME KATIA between 1 July 2008 and 31 January 2010, at Suva in the Central Division, being employed in the Public Service as the Acting Deputy Official Receiver, embezzled monies in the sum of FJD $339,201.05 from the Official Receiver's Bankruptcy Account which had been entrusted to his office by virtue of his employment.

FIFTH COUNT

Statement of Offence

ABUSE OF OFFICE FOR GAIN: Contrary to Section 139 of the Crime Act No. 44 of 2009.

Particulars of Offence

VILIAME KATIA between 1 February 2010 and 31 July 2014, at Suva in the Central Division, whilst being employed in the Public Service as the Acting Deputy Official Receiver, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely causing payments amounting to FJD $2,472,161.18 to be processed by the Accounts Section of the Office of the Official Receiver, and which sum was drawn from the Official Receiver's Bankruptcy Account, which was an act prejudicial to the rights of the creditors for whom the Official Receiver held the sum in trust and to the Government of Fiji.

SIXTH COUNT

Statement of Offence

ABUSE OF OFFICE FOR GAIN: Contrary to Section 139 of the Crimes Act No.44 of 2009.

Particulars of Offence

VILIAME KATIA between 1 July 2014 and 31 December 2015, at Suva in the Central Division, whilst being employed in the Public Service as the Acting deputy Official Receiver, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely causing payments amounting to FJD $1, 307,085.20 to be processed by the Accounts Section of the Office of the Official Receiver, and which sum was drawn from the Official Receiver's Liquidation Account, which was an act prejudicial to the rights of the Government of Fiji;.

SEVENTH COUNT

Statement of Offence

FORGERY: Contrary to Section 156 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

VILIAME KATIA between 1 February 2010 and 31 December 2015, at Suva in the Central Division, made false documents, namely emails that were purported to have been sent to him by one Sanaila Nukutaumaki, employed with the Office of the Official Receiver in Lautoka, in order to dishonestly induce public officials employed within the office of the Official Receiver in Suva, to accept them as genuine in order to dishonestly obtain gains from the Official Receiver's Bankruptcy and Liquidation Accounts for himself.

EIGTH COUNT

Statement of Offence

FALSE INFORMATION TO PUBLIC SERVANT: Contrary to Section 201 of the Crimes Act No. 44 of 2009

Particulars of Offence

VILIAME KATIA between 1 February 2010 and 31 December 2015, at Suva in the Central Division, gave a person employed in the Public Service, namely one Abhi Ram, the Acting Official Receiver, information which he knew to be false, namely the falsified emails and accompanying minutes written by him onto the printed emails, knowing it to be likely that he would thereby cause the said person, employed in the Public Service to approve payments to be made to purported creditors which the said person employed in the Public Service ought not to have done if the true state of facts were known to the said person employed in the Public Service.

NINETH COUNT

Statement of Offence

UNAUTHORISED MODIFICATION OF DATA: Contrary to Section 341 (1) of the Crimes Act 2009.

Particulars of Offence

VILIAME KATIA between 1 February 2010 and 31 December 2015, at Suva in the Central Division, being the Acting Deputy Official Receiver, knowingly caused the unauthorised modification of data held in a computer at the Office of the Official Receiver in Suva, namely the editing of official bankruptcy and liquidation records and addition of false debtor and creditor records into the FOX PRO SYSTEM used by the Office of the Official Receiver and was reckless as to whether the said modification would impair the reliability and security of such data.

TENTH COUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE: Contrary to Section 326(1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

VILIAME KATIA between 1 February 20110 and 31 December 2015, at Suva in the Central Division, engaged in conduct, namely falsified emails purporting to have come from one Sanaila Nukuaumaki of the Office of the Official Receiver in Lautoka and wrote false minutes to accompany the printed falsified emails as well as the unauthorised modifying of official bankruptcy and liquidation data contained in the FOX PRO SYSTEM used by the Office of the Official Receiver, and as a result of such conduct, obtained a financial advantage amounting to FJD $3,779,246.38 from the Office of the Official Receiver's Bankruptcy and Liquidation Accounts knowing that he was not eligible to receive the said financial advantage.

ELEVENTH COUNT

Statement of Offence

FORGERY: contrary to section 156(1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

VILIAME KATIA on or around 14 January 2016, at Suva in the Central Division, made false documents, namely a Court Order on Winding Up dated 28 May 1992 purported to have been made by the High Court of Fiji at Lautoka and Proof of Debt General Forms, with the intention of dishonestly inducing public officials employed within the Office of the Official Receiver in Suva, to accept them as genuine in order to dishonestly influence the exercise of the public duties and functions of the said public officials.

[3] The High Court had stated in the judgment dated 28 June 2018 that count no. 5, 6, 7 and 11 were indictable offences triable summarily at the election of the appellant pursuant to section 4(1)(b) of the Criminal Procedure Act 2009. Counts 8, 9 and 10 had been identified as summary offences triable only in the Magistrates Court by virtue of section 4(1)(c) of the Criminal Procedure Act 2009 and counts 1, 2, 3 and 4 had been offences under the Penal Code and may be tried in the Magistrates Court pursuant to section 5(2) of the Criminal Procedure Act 2009. According to the sentencing order of the High Court dated 28 December 2018, the appellant had elected to be tried in the Magistrates Court in respect of the offences where he had the right of election and the rest of the offences could be tried in the Magistrates Court by operation of law. Thus, the High Court had determined in the judgment delivered on 28 June 2018 that Suva Magistrates Court had jurisdiction to deal with all charges according to law. The appellant does not challenge this position.

[4] The appellant represented by his counsel had pleaded guilty to all charges against him voluntarily and on his own free will on 29 March 2017 and the summary of facts had been admitted by the appellant on 18 April 2017. The learned Magistrate having been satisfied that it was a voluntary plea of guilty tendered by the appellant having understood the full consequences, had convicted him of all counts as charged on 03 May 2017. The summary of facts stated the following,

> *1. The accused in this case is VILIAME KATIA aged 37 years of Lot 28 Bryce Street, Raiwaqa, Suva (hereinafter referred to as "The Accused")*
> *2. The accused was employed in the Office of the Official Receiver as the Acting Deputy Official Receiver from 1 July 2008 to 14 January 2016 and was based at their Suva Office at all times material to this case.*
> *3. The accused, by virtue of his employment as the Acting Deputy Official Receiver, was a person employed in the Public Service within the meaning of section 4(1) of the Crimes Act 2009 at all times material to this case.*
> *4. The Office of the Official Receiver acts as "Receiver" through the instructions of the High Courts of Fiji as a result of creditors' petitions against debtors considered to be bankrupt individuals or liquidated firms and acts as the Trustee for funds received from such petitions. The Office of the Official Receiver has offices located in Suva, Lautoka and Labasa; however, all payments are processed by the Accounts Section based at their Suva Office.*
> *5. The office of the Official Receiver, in order to fulfil its duties as trustee of liquidation and bankruptcy funds, operates two (2) bank accounts, namely the Official Receiver's Bankruptcy Account (hereinafter referred to as the*

"Bankruptcy Account") and the Official Receiver's Liquidation Account (hereinafter referred to as the "Liquidation Account").

6. The accused, by virtue of his employment as the Acting Deputy Official Receiver, had the fiduciary duty to ensure the proper safekeeping and management of the funds held within the Bankruptcy and Liquidation Accounts, at all times material to this case.

7. The Office of the Official Receiver, in order to keep accurate debtor and creditor records for Bankruptcy and Liquidation matters, held all records within a computer system known as the FOX PRO SYSTEM which was contained within a computer located within the premises of the Office of the Official Receiver, at all times material to this case.

8. The FOX PRO SYSTEM contained individual ledger accounts for all creditors and debtors, the various amounts paid by the debtors who would be the bankrupt individuals and liquidated firms, the amounts paid to creditors and the balances available for each accounts

9. The accused was fully aware of the FOX PRO SYSTEM's functions, the fact that the FOX PRO SYSTEM was open to editing and also knew that the system was used by the Office of the Official Receiver to report bankruptcy information requested by financial institutions and stakeholders at all times, material to this case.

Counts 1 – 4

10. Between 1 July 2008 and 31 January 2010 the accused arbitrarily caused the accounts section of the Office of the Official Receiver to process 89 falsified payment amounting to $339,201.05 from the Bankruptcy Account for his own gain (Please see breakdown in Annexure 1). [Annexure 1 not included].

11. As per paragraph 10, the accused made false document, namely typed false internal memorandums purported to have been made by one Ms. Laise Dawai, an employee of the Official Receiver's Office in Lautoka, before printing out the same and forging the signature of the said Ms Dawai onto the falsified internal memorandums.

12. Furthermore as per paragraph 10, the accused would then proceed to type false emails from Ms Dawai before printing the same and attaching the above-mentioned false internal memorandums.

13 As per paragraphs 10 – 12, the accused would state in the falsified emails and internal memorandums, that certain creditors had agreed to take part or reduced payments from debtors who owed them money and thus needed their payments processed.

14. The accused would then place his own minute onto the falsified emails and produce them before the Accounts Section of the Official Receiver's Office in order to have them process payments to purported creditors.

15. The accused would thereafter pick up the cheques, made out to the purported creditors, and encash the same for his own personal use.

16. As a result of the Accused's actions, bona fide creditors lost their rights to claim a part or the whole of the $339,201.05 and the Government of Fiji, through the Office of the Official Receiver, was unable to keep a proper accounting of the funds entrusted to it.

Counts 5 - 8

17. Between 1 February 2010 and 31 July 2014 the accused arbitrarily caused the accounts section of the office of the Official Receiver to process 906 falsified payments amounting to $2,472,161.18 from the Bankruptcy Account for his own gain. (Please see breakdown in Annexure 2). [Annexure 2 not included].

18. Further, between 1 July 2014 and 31 December 2015 the accused arbitrarily caused the Accounts Section of the Office of the Official Receiver to process 420 falsified payments amounting to $1,307,085.20 from the Liquidation Account for his own gain (Please see break down in Annexure 3). [Annexure 3 not included].

19. As per paragraphs 17 and 18 the accused would use a computer that held the FOX PRO SYSTEM within the office of the Official Receiver to edit the official bankruptcy and liquidation records of the Government of Fiji by adding false debtor and creditor information.

20. Subsequently, the accused then made false documents, namely emails that were purported to have been made by and sent from one Mr. Sanaila Nukutamaki, an employee of the Official Receiver's Office in Lautoka stating that certain creditors, which he had created in the FOX PRO SYSTEM has agreed to take part or reduced payments from debtors who owed them money and thus needed their payments processed.

21. The accused would then print out the falsified emails and write his own minutes onto them as purported endorsements of the falsified claims.

22. Thereafter, the accused would then produce the falsified emails and claims with his accompanying minutes before one Mr. Abhi Ram, who was employed in the public service as the Acting Official Receiver, in order to induce the said Mr. Abhi Ram into believing the falsified claims were genuine and approving the same for payment.

23. The accused would then produce the falsified emails and claims along with the approvals from Mr. Abhi Ram before the Accounts Section of the Official Receiver's Office in order to have them process payments to purported creditors.

24. The accused would thereafter pick up the cheques, made out to the purported creditors, and encash the same for his own personal use.

25. As a result of the accused's actions, bona fide creditors lost their rights to claim a part or the whole of the $2, 472,161.18 from the Bankruptcy Account and $1,307,085.20 from the Liquidation Account and the Government of Fiji, through the Office of the Official Receiver, was unable to keep a proper accounting of the funds entrusted to it.

Count 9

26. Between 1 February 2010 and 31 December 2015, the accused, without authorisation, modified the computer data containing the official liquidation and bankruptcy records contained within the FOX PRO SYSTEM and held by the Office of the Official Receiver for the Government of Fiji.

27. As per paragraph 26, the accused would add falsified debtor and creditor information into the records held by the FOX PRO SYSTEM and, at

the time, was reckless as to whether the modifications he made, by way of the false information that he had added, would impair the reliability and security of such important data that was relied upon by the office of the Official Receiver as well as financial institutions and stakeholders who required accurate bankruptcy and liquidation records for their use.

Count10

28. As a result of his actions, as set out in paragraphs 17 – 27, the accused obtained a total financial advantage of $3,779,246.38 from the Bankruptcy and Liquidation Accounts, between 1 February 2010 and 31 December 2015, all while knowing that he was not eligible to receive the said advantage.

Count11

29. On 14 January 2016, the accused made a false document, namely a Court Order on Winding Up dated 28 May 1992 purported to have been made by the High Court in Lautoka as well as Proof of Debt General Forms.
30. As per paragraph 29, the accused intended to use the false documents to induce public officials within the office of the Official Receiver's Accounts Section to accept them as genuine and process payments that had been falsified by the Accused for his own gain.

CONCLUSION

31. The accused was produced in the Suva Magistrate Court and charged with eleven (11) counts of Abuse of Office for Gain, Forgery, Embezzlement by Servant, Giving False Information to Public Servant, Unauthorized Modification of Data and Obtaining Financial Advantage on 18 November 2016
32. The accused pleaded Guilty to all 11 counts on 29 March 2017.
33. Finally, to date, the accused has not made any attempt at restitution for the total sum of $4,118,447.38 that he embezzled and falsely obtained from the Official of the Official Receiver's Bankruptcy and Liquidation Accounts from 2008 to 2015..."

[5] The respondent seems to have made an application to the learned Magistrate before he was convicted that the case be transferred to the High Court in terms of section 190 (1) of the Criminal Procedure Act, 2009 for sentencing which the Magistrate had refused on 03 May 2017 by way of a separate ruling. The respondent had submitted to the High Court that the refusal preceded the conviction though both happened on the same day and that position had not been challenged by the appellant. Obviously, the Magistrate was possessed of the summary of facts on or before 18 April 2017 and was in a position to make an order into the respondent's application to transfer or not

to transfer the case for sentencing. Only the actual transfer, if made, under section 190 (1) cannot precede the conviction; not the decision to or not to transfer. Such a transfer could be ordered only after the conviction is entered.

[6] The Magistrate had sentenced the appellant on 01 June 2017 to a sentence of 14 years of imprisonment after entertaining submissions from both parties on 18 May 2017.

[7] The respondent had appealed against the sentence as well as the refusal by the Magistrate to transfer the case for sentencing to the High Court. The High Court in its judgment dated 28 June 2018 had decided that refusing to transfer the case for sentencing was wrong and accordingly, the sentence imposed on the appellant by the Magistrate too had been set aside. The High Court had sent the case back to the Magistrates court with a direction to the Magistrate to exercise his discretion correctly by transferring the case to the High Court in terms of section 190 (1) of the Criminal Procedure Act, 2009 for sentencing.

[8] Accordingly, the Magistrate had transferred the case to the High Court by his order made on 10 July 2018 under section 190(1) of the Criminal Procedure Act, 2009 for sentencing. After hearing both parties, the appellant had been sentenced by the High Court on 28 December 2018 as follows.

> *'(i) Count 1: Abuse of Office for Gain - 2 years imprisonment*
> *(ii) Count 2: Forgery - 1 year imprisonment*
> *(iii) Count 3: Forgery - 1 year imprisonment*
> *(iv) Count 4: Embezzlement by Servant - 5 years imprisonment*
> *(v) Count 5: Abuse of Office for Gain - 14 years imprisonment*
> *(vi) Count 6: Abuse of Office for Gain - 14 years imprisonment*
> *(vii) Count 7: Forgery - 6 years imprisonment*
> *(viii) Count 8: False Information to Public Servant - 3 years imprisonment*
> *(ix) Count 9: Unauthorized Modification of Data - 6 years imprisonment*
> *(x) Count 10: Obtaining a Financial Advantage - 6 years imprisonment*
> *(xi) Count 11: Forgery - 6 years imprisonment.'*

[9] The High Court judge had set out in paragraphs 28 and 29 of the summing-up how the appellant received the final total sentence of 23 years subject to a non-parole period of 22 years.

[10] The High Court judge had explained the reasons why he was making the sentence of 14 years on count 5 consecutive to the sentence of 06 years on count 7 and 03 years of imprisonment on count 8 making the total sentence of 23 years. The appellant has not joined issue with it. The respondent has justified the imposition of consecutive sentences on the principles enunciated in **Dakuidreketi v Fiji Independant Commission Against Corruption** [2017] FJCA 117; AAU0099.2014 (14 September 2017) which was affirmed in **Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC) [2018] FJSC 4; CAV0014.2017 (26 April 2018), Sauduadua v State** [2019] FJCA 86; AAU0053.2016 (6 June 2019), **Clarkson v Regina** [2007] NSWCCA 70 and **R v KM; R v Linh Van Nguyen; R v John Nguyen; R v John Tran** [2004] NSWCCA 65.

[11] Paragraph 28 and 29 of the sentencing order are as follows.

> *28. Mr. **Katia**, you engineered 1,415 fraudulent transactions within the Official Receiver's Office to steal $4,118,477.43 of trust money. In other words, you were entrusted with this money, and as a trustee, you stole this money. The level of deceit and evil you perpetuated among your co-workers and supervisors to steal the money was the height of all evil. You smiled at them and behind their back, stole the $4 million dollar plus. You made a mockery of not only the Official Receiver's Office, but also the High Court, by pretending to be a judge issuing court orders. You had made no restitution or attempted to do the same. You have not explained where the money is, nor how it was used. It appears you are willing to serve, from your point of view, a short prison sentence, come out and enjoy the fruits of your crime. Because of the above, and the need to punish you in a manner that is just in all the circumstances, and in the interest of justice, I direct that the sentence in count no. 5 be made consecutive to the sentences in count no. 7 and 8, making a total sentence of 23 years imprisonment.*
>
> *29. Because of the totality principle of sentencing, I direct that all the sentences in the other counts, be made concurrent to the 23 years sentence mentioned above. The final total sentence is 23 years imprisonment.*
>
> *30. Mr. Viliame **Katia**, for the eleven offences you committed against the Office of the Official Receiver at Suva in the Central Division, between 1 July 2008 and 31 December 2015, I sentence you to 23 years imprisonment, with a non-parole period of 22 years, effective forthwith.*

[12] Being aggrieved by the sentence, on 25 January 2019 through his lawyers Law Naivalu (Barristers and Solicitors) the appellant had filed a timely petition of appeal on two grounds of appeal. The same law firm had tendered written submissions on 03 August 2020.The respondent had filed its written submissions on 04 September 2020.

[13] Grounds of appeal urged on behalf of the appellant against sentence were as follows.

> *1. The Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive and he failed to take into consideration the case authorities provided on behalf of the Appellant.*
>
> *2. The Learned Judge erred in law when he failed to follow the principle of sentencing in Veresa v State AAU 101/13.*

[14] However, in the written submissions filed on behalf of the appellant it has been stated that the appellant would not proceed with the first ground of appeal but rely only on the second ground of appeal. The counsel for the appellant reiterated this position at the oral hearing of the leave to appeal application.

[15] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008). **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[16] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The**

State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(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.*

[17] The pith and substance of the appellant's sole ground of appeal appears to be that the High Court had erred in law in imposing a sentence in excess of the sentencing powers of the Magistrates court. The argument is primarily built on section 256(3) of the Criminal Procedure Act, 2009. He also relies on several past decisions including **Veresa v State** [2017] FJCA 107; AAU101.2013 (14 September 2017).

[18] Section 256(3) of the Criminal Procedure Act, 2009 is as follows.

> *'(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.*

[19] The Supreme Court without specifically referring to section 256(3) had the occasion to comment on the power of the appellate court in appeal regarding sentence powers in **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013).

> *'[24] ..... (v) The appeal court must, if it substitutes its own sentence on appeal or by way of revision of the Magistrates Court's sentence, keep within the powers of the Magistrates Court. The High Court cannot substitute a Magistrates Court sentence with one which only the High Court can impose. The Magistrate is limited to a maximum term of imprisonment on each offence of 5 years [section 7 CPC] now 10 years [section 7(1)(a) CPD] and in total to 14 years where there are two or more distinct offences [section 12 CPC and section 7(2) CPD]. An exception would lie where legislation has specifically enhanced the power of the Magistrate to sentence beyond the usual limit.'*

[20] In **Radodro v State** [2000] FJCA 31; AAU0032U.99S (17 November 2000) the Court of Appeal stated [citing Mateni v State [1999] FJCA 30; Aau0021u.98s (14 May 1999)] on section 319(3) of the Criminal Procedure Code which is similar to section 256(3) as follows.

> *'Counsel for the respondent has conceded that while the High Court has jurisdiction to increase a sentence on appeal from the Magistrate's Court, it is limited to the imposition of sentence to the maximum applicable to the Magistrate's Court under s 319 (2) of the* ***Criminal Procedure Code*** *(Cap 21)'*

[21] The Court of Appeal in construing the old subsection in 1978 *i.e.* section 300(2) of the C.P.C. (now replaced) which is similar to earlier section 319(2) stated in **Director of Public Prosecutions v Singh** [1978] FJCA 21; Criminal Appeal 2 of 1978 (22 March 1978) [the same as The DPP v Gaj Raj Singh 24 FLR 43] that *"on appeal against sentence from a Magistrates' Court the Supreme Court (now High Court) may increase the sentence up to, but not beyond, the limit of the magistrates' jurisdiction in that respect."* The court also said that the phrase *"ought to have passed"* must mean ought to have been passed *"by the Magistrate"*.

[22] In **Mateni v State** [1999] FJCA 30; Aau0021u.98s (14 May 1999) referring to Section 319(2) of the Criminal Procedure Code Cap. 21 [which is identical with section 256(3)] the Court of Appeal said citing The DPP v Gaj Raj Singh 24 FLR 43 that *'We take the same view and hold that the High Court cannot on appeal from a Magistrates' Court vary the sentence to a point beyond the maximum permitted to the Magistrates' Court.'*

[23] Therefore, the legal position on the power of the High Court under section 256(3) of the Criminal Procedure Act, 2009 to quash the sentence passed by the Magistrates Court and pass such other sentence in appeal could be considered as well-settled. In doing so, the High Court cannot impose a sentence in excess of sentencing powers of the Magistrates court because it could only pass a sentence in appeal which ought to have passed by the Magistrate.

[24] The above are the past decisions which the appellant has cited in his written submissions in support of his argument that the High Court had acted outside the sentencing powers of the Magistrate (**State v Low** [2016] FJHC 739; HAC151.2016 (19 August 2016) cited by the appellant has no relevance to the issue at hand in this appeal).

[25] While those above four decisions have set down sound law in interpreting section 256(3) of Criminal Procedure Act, 2009, none of them, however, applies to the appellant's legal contention, for in his case the learned High Court judge had not acted under section 256(3) of the Criminal Procedure Act, 2009 but had simply sentenced the appellant consequent to the Magistrate having transferred the appellant for sentencing under section 190(1) of the Criminal Procedure Act, 2009. In other words, unlike in the past cases relied on by the appellant, the High Court was not sitting in appeal over his case but only as a court of original jurisdiction sentencing the appellant as if the High Court had convicted him.

[26] Section 190 of the of the Criminal Procedure Act, 2009 reads as follows:

> *"...(1) Where –*
>
> *(a) A person over the age of 18 years is convicted by a magistrate for an offence; and*
> *(b) The magistrate is of the opinion (whether by reasons of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose -*
>
> *the magistrate may, by order, transfer the person to the High Court for sentencing.*
>
> *(2) If the person is transferred under sub-section (1) to the High Court, a copy of the order for transfer and of the charge in respect of which the person was convicted shall be sent to the Chief Registrar of the High Court.*
>
> *(3) The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.*

(4) A person transferred to the High Court under this section has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court.

(5) The High Court, after hearing submissions by the prosecutor, may remit the person transferred for sentence in custody or on bail to the Magistrates Court which originally transferred the person to the High Court and the person shall then be dealt with by the Magistrates Court, and the person has the same right of appeal as if no transfer to the High Court had occurred..."

[27] The learned Magistrate had stated the serious nature of the charges as one of the reasons for the transfer of the appellant to the High Court for sentencing under section 190 of the Criminal Procedure Act, 2009 in the transfer order dated 10 July 2018.

[28] It is very clear from the wordings of section 190(1)(b) and (3) that the purpose of transferring an accused to the High Court under 190 of the Criminal Procedure Act, 2009 is to enable the High Court to treat as if the accused had been convicted by the High Court and impose a sentence within the sentencing powers of the High Court. If the High Court cannot pass a sentence greater than the sentencing powers of the Magistrate court on such an accused, there is no purpose of the transfer as the Magistrate court itself could impose a sentence within its sentencing powers.

[29] If the appellant's argument that the High Court could not have imposed a sentence beyond the sentencing powers of the Magistrates court is to be adopted, section 190 of the Criminal Procedure Act, 2009 would become redundant. Such an interpretation will not only cause violence to the plain and clear provisions of the law but also will defeat the intention of the legislature completely and render that provision nugatory. Therefore, for that reason alone (if not for any other reason) such a construction should be avoided.

[30] The appellant calls **Veresa v State** (supra) in aid to buttress his legal argument and has made it the foundation of his argument. In ***Veresa*** the Director of Public Prosecutions had initiated proceedings in the High Court by appealing against the sentence of imprisonment of 8 years, on a count of rape, pronounced after trial before the Magistrate's Court. Having considered the learned Magistrate's sentencing decision, the learned High Court judge had entertained serious reservations, and not only about the fact that it was partially suspended but also that the total sentence was

clearly not commensurate with the gravity of the offence. Therefore, the High Court judge had decided that the sentence should be revised by enhancing the quantum and the suspension should stand rescinded. In order to achieve that end, disregarding the statutory limitations that operated to fetter his powers through the provisions of section 256 (3) of the Criminal Procedure Act, 2009, the learned Judge resorted to a course of 'judicial activism', when he invented a novel method to pass a sentence of 17 years against the appellant. The learned High Court judge by reading section 256 (2) (e) in conjunction with section 190 of the Criminal Procedure Act and assuming purported statutory power upon himself to impose a severe sentence, had handed down the impugned sentence. The Court of Appeal held that the law does not permit the High Court judge to adopt the kind of course of action that he had resorted to in the matter. The Court of Appeal allowed the appeal against the sentence of 17 years, set it aside, reinstated the previous sentence without any suspended period.

[31] Therefore, the reason why the Court of Appeal intervened in the matter of sentence imposed by the High Court judge in ***Veresa*** was because he had wrongly assumed jurisdiction under section 190(1) of the Criminal Procedure Act, 2009 purportedly acting under section 256(1)(e) while exercising appellate jurisdiction under section 256 of the Criminal Procedure Act. The obvious reason to adopt this course of action by the High Court judge was to circumvent the limitation placed by section 256(3) of the Criminal Procedure Act in terms of sentencing powers of the High Court sitting in appeal as already discussed above.

[32] In contrast, in the instant case the High Court had legitimately acted upon an order made by the Magistrate in terms of section 190(1) of the Criminal Procedure Code and therefore was not fettered by the sentencing limitation imposed by section 256(3) of the Criminal Procedure Act unlike in ***Veresa***. The rationale behind the decision in ***Veresa*** cannot be imported to the appellant's case.

[33] Therefore, ***Veresa*** is not an authority that would assist the appellant in sustaining his sole ground of appeal.

[34] Since the appellant has relied only on the single ground of appeal by asking the question whether the High Court judge had erred in law when he failed to follow the principle of sentencing in ***Veresa***, the answer has to be firmly in the negative. ***Veresa*** never sought to set down a principle of law to say that the High Court in acting under 190 (3) of the Criminal Procedure Act, is impeded by limitations of the sentencing powers of the Magistrate Court or put it in another way, the High Court cannot pass a sentence in excess of the sentencing powers of the Magistrate Court in acting under section 190(3) of the Criminal Procedure Act, 2009 and exercising sentencing powers of the High Court.

[35] Therefore, there is no sentencing error demonstrated by the appellant based on the sole ground of appeal which has any reasonable prospect of success in appeal. In addition to the above argument on his only ground of appeal, the appellant has not demonstrated any other sentencing error in the impugned sentencing order of the High Court either.

[36] As I have already discussed, it could now properly be said regarding the single ground of appeal relied on by the appellant that it has absolutely no possibility of success and its unsuccessful outcome is so obvious that it cannot be reasonably said to be arguable having a reasonable prospect of success. Therefore, the appellant's appeal is frivolous [vide paragraph [25] of **Naisua v State** (supra)] and is liable to be dismissed in terms of section 35(2) of the Court of Appeal Act.

Order

1. Leave to appeal against sentence is refused.
2. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL