IN THE HIGH COURT OF FIJI

AT SUVA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO: HAA 005 of 2016

(MC Criminal Case No: 1624 of 2009)

ASLEEM KHAN

V

STATE

Counsel	:	Mr. I. Khan for Appellant
		Ms. J. Prasad for State
Date of Hearing	:	22nd March 2016
Date Judgment	:	29th April 2016

JUDGMENT

1. Appellant was convicted following a trial for one count of larceny by servant contrary to section 274(a)(i) of the Penal Code, 11 counts of forgery under section 341(1) of the Penal Code, 11 counts of uttering contrary to section 343 of the Penal Code and 11 counts of obtaining money on forged documents contrary to section 345 of the Penal Code. The Appellant was sentenced to 30 months imprisonment with a non-parole period of 24 months on 20/01/16.

2. There are 34 counts in the charge sheet in total. The first count is larceny by servant. Counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29 and 32 are forgery charges under section 341(1) of the Penal Code. All the forgery charges are identical except for the date of offence.

Counts 3, 6, 9, 12, 15, 18, 21, 24, 27, 30 and 33 are charges under section 343 of the Penal Code for the offence of uttering. These charges are identical except for the date of offence and the amount involved. Counts 4, 7, 10, 13, 16, 19, 22, 25, 28, 31 and 34 are charges under section 345 of the Penal Code for obtaining money on forged documents. These charges are also identical except for the date of offence and the amount. Therefore, the first four counts of the charge sheet are reproduced below for ease of reference as they represent the four types of the offences the Appellant was charged with. They are as follows;

FIRST COUNT

Statement of Offence (a)

Larceny by Servant: Contrary to section 274(a)(i) of the Penal Code, Cap 17.

Particulars of Offence (b)

ASLEEM KHAN s/o Ahmad Khan on the 23rd day of March, 2009 at Suva in the Central Division, being employed as a bank teller by Colonial National Bank, stole $50.00 cash, the property of Colonial National Bank of Fiji.

SECOND COUNT

Statement of Offence (a)

Forgery: Contrary to section 341(1) of the Penal Code, Cap 17.

Particulars of Offence (b)

ASLEEM KHAN s/o Ahmad Khan on the 15th day of May, 2009, at Suva, in the Central Division with intent to defraud, forged the signature of **SANGEETA DEVI PRASAD** d/o Shiu Prasad on the Colonial National Bank withdrawal slip of the account number 6968769, purporting the same to be genuine.

THIRD COUNT

Statement of Offence (a)

Uttering Forged Document: contrary to section 343 of the Penal Code, Cap 17.

Particulars of Offence (b)

ASLEEM KHAN s/o Ahmad Khan on the 15th day of May, 2009, at Suva in the Central Division knowingly and fraudulently uttered a Colonial National Bank withdrawal slip of the account number 6968769 for the sum of $80.00 knowing the same to be forged.

FOURTH COUNT

Statement of Offence (a)

Obtaining Money on Forged Document: contrary to section 345 of the Penal Code, Cap 17.

Particulars of Offence (b)

ASLEEM KHAN s/o Ahmad Khan on the 15th day of May 2009, at Suva in the Central Division with intent to defraud, obtained $80.00 by virtue of a forged Colonial National Bank withdrawal slip of the account number 6968769 knowing the same to have been forged.

3. The Appellant relies on the following grounds in this appeal against his conviction and sentence;

Appeal against Conviction:

"1. That the learned trial Magistrate erred in law and in fact in not taking into consideration the Appellant's submission on No Case to Answer at the end of the Prosecution case. Furthermore the learned trial Magistrate did not apply the relevant laws to the facts that were presented by the State.

2. That the learned trial Magistrate erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.

3. That the learned trial Magistrate failed direct himself on the question of burden of proof in that the Prosecution has to prove all the allegations against the Appellant's beyond all reasonable doubts and by such failure there was a substantial miscarriage of justice.

4. That the learned trial Magistrate erred in law and in fact in not properly analysing all the facts before him before he made a decision that the Appellant's were guilty as charged on the charges of Forgery and Uttering Forged Document.

5. That the learned trial Magistrate erred in law and in fact in not directing himself to the possible defense on evidence and as such by his failure there was a substantial miscarriage of justice.

6. That the learned trial Magistrate erred in law and in fact in not considering and/or rejecting he evidence of the Appellant.

7. That the learned trial Magistrate erred in law and in fact in convicting the Appellant on circumstantial evidence when there was no direct evidence against the Appellant that he has forged the signature of the Complaint.

8. That the learned trial Magistrate erred in law and fact in not adequately/sufficiently/referring/directing himself the Prosecution evidence against the Appellant on each count separately rather than outlining the Prosecution full evidence before the court to himself and as such by his failure there was a substantial miscarriage of justice.

Appeal against Sentence:

9. That the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

10. 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 relevant consideration in particular that the Appellant had paid the full amount that was the subject matter of the charge.

11. That the learned trial Magistrate erred in law and in fact in passing sentence of imprisonment for 30 months was disproportionately severe punishment contrary to section 25 of the Constitution of Fiji (1998) Section 11(1) of the 2013 Constitution of Fiji).

12. That the learned trial Magistrate erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 when she passed the sentence against the Appellant.

13. That the Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the court records in this matter."

Factual matrix

The Prosecution case

4. The Appellant was a teller at the Bank of South Pacific previously known as the Colonial National Bank during the time material to this case. There was an investigation conducted

against him based on a complaint made by one Sangeeta Devi Prasad regarding withdrawals made from her son's account and following this internal investigation, charges were laid against the Appellant by the bank.

5. According to the Respondent, the Appellant forged the signature of Sangeeta Devi Prasad on eleven withdrawal slips on different occasions and obtained money from the account 6968769 which belonged to the said Sangeeta Devi Prasad's son. The 11 withdrawal slips were tendered as PE-04 to PE-14. According to the Respondent, the Appellant also stole $50 by crediting only $141.44 when Sangeeta Devi Prasad deposited $191.44 to account no. 6968769 on 20/03/2009 (date of offence stated in 1st count seems to be incorrect). The relevant deposit slip was tendered as PE-15 and the bank statement of account no. 6968769 for the relevant period was tendered as PE-03.

6. The Respondent also tendered the cautioned interview of the Appellant as PE-01. The learned Magistrate had found that the admissions in the cautioned interview (PE-01) were made voluntarily after holding a *voir dire* on the admissibility of PE-01. The said decision of the learned Magistrate regarding the voluntariness of PE-01 is not challenged in this appeal.

7. In PE-01, the Appellant has admitted that he forged the signature of Sangeeta Devi Prasad on the withdrawal slips PE-04 to PE-14. The questions and answers in the cautioned interview regarding PE-04 are as follows (pages 138 – 141, Volume 1 of Magistrate Court Record "MC Record");

Q.19: So you admitting that you forged the signatures of Sangeeta Devi Prasad between 15/05/09 to 01/07/09 and obtained $2690.00 from account 6968769?

A.19: Yes.

Q.31: Look at this withdrawal slip dated 15.05.09 amounting $80.00 of account number 6968769 of Rahul Prasad (shown), who initialled this withdrawal slip and sign this slip?

A.31: myself.

Q.32: How you cash this withdrawal slip?

A.32: From the teller.

Q.33: How much you received from this withdrawal slip?

A.33: Full amount $80.00

Q.34: How you record this amount or where is this cash?

A.34: Form my mother's medicine.

Q.35: Did Sangeeta know that you are withdrawing $80.00 from her son's account on 15.5.09?

A.35: No.

8. According to PE-01, the Appellant has been questioned on all eleven withdrawal slips from PE-04 to PE-14 in the same manner as above, and his answers also had been in the same line. It is pertinent to note he had told the police that he received the money "from the teller". The police had not ascertained this 'teller' the Appellant was referring to. There was no evidence led of a person (teller) through whom the Appellant received the money. According to the evidence of prosecution witnesses and the submissions made, the position of the prosecution had been that the Appellant himself processed the withdrawal slips and obtained the money. Therefore, the version stated in the cautioned interview with regard to how the Appellant used PE-04 to PE-14 and how he obtained the money, is not consistent with the position taken by the prosecution based on their other evidence presented during the trial.

9. With regard to PE-15 upon which the 1st count is based, in the cautioned interview, the Appellant agrees that he accepted the deposit made by Sangeeta Devi Prasad on 20/03/09, but he says that the amount deposited by Sangeeta Devi Prasad was only $141.44 and not $191.44 as stated in PE-15. He says he may have written $191.44 in PE-15 by mistake.

10. The Respondent has not called Sangeeta Devi Prasad to give evidence during the trial. According to the Respondent, Sangeeta Devi Prasad's evidence was not necessary because the Appellant had admitted in his cautioned interview that he forged the signature of Sangeeta Devi Prasad. (Vide paragraph 3.12 of the Respondent's submission)

The Defence case

11. The Appellant in his evidence had said that though he was involved in processing PE-04 to PE-14, he did not obtain money and Sangeeta Devi Prasad herself signed on those slips. He had denied forging the signature of Sangeeta Devi Prasad on the said withdrawal slips.

12. The Appellant had admitted during cross examination that the answers he gave during the cautioned interview were true "at that time". At page 88 , Volume 1 of the MC Record, the following questions and answers are found;

    Q.: *And I'm further putting it to you that all the answers contained that you had admitted to the allegations are true?*

    A.: *As I admitted that time.*

    Q.: *No, the question is please listen to the question don't argue with me. The question is all the answers that you gave admitting the offence are true?*

    A.: *Yes that time it was true.*

Then at page 103, (while he was still under cross examination) it is recorded that;

Q: And because you have done this, this is what exactly you told the police the truth?

A: No. I'm telling the truth now. Not telling the truth what's on the caution interview because I listen to the police officers and they told me to say all these.

13. When the Appellant was cross examined with regard to Count 1, he had denied taking $50 and had stated further that there should be another part of PE-15 which is the bank's copy implying that all the documents relevant to the transaction is not before the court.

Manner of recording evidence

14. Before I turn to discuss the grounds of appeal, I consider it appropriate to note my observations on a matter which is not directly relevant to the grounds of appeal. That is, I note that, only the answers given by prosecution witnesses in their evidence in chief and re-examination are recorded in the court record. I found it extremely difficult to understand the import of certain answers given by those witnesses without any indication regarding the relevant question asked. The manner of recording evidence before a magistrate is provided in section 132 of the Criminal Procedure Decree 2009. In terms of section 132(1)(b)(ii), the evidence should always be recorded as a narrative or in the form of question and answer if the magistrate decides that a particular question and answer should be recorded in that manner.

The Grounds against Conviction

Ground 1

15. In this ground, the Appellant complains that the learned Magistrate erred by not considering Appellant's submission on *no case to answer* and that the learned Magistrate did not apply the relevant laws to the facts.

16. I note that the learned Magistrate has correctly identified the test to be applied in an application for *no case to answer* in his ruling on *no case to answer* dated 16/04/15. The learned Magistrate's analysis and the conclusion on the application for *no case to answer* is found at paragraph 9 of the said ruling which is reproduced below;

"After considering the above evidence I find that the ***prosecution has produced relevant and admissible evidence at this stage to satisfy all the counts in the charge****. Therefore I decide that there is a case against the accused and dismiss this application by the defence".* [Emphasis added]

17. From the contents of paragraph 9 above, I am not convinced that the learned Magistrate has considered whether there was evidence to prove all the elements of the offences the Appellant was charged with. In a trial before the Magistrate Court, the magistrate is the trier of law and also the sole trier of facts. That is the reason why the law provides that, in order to find that there is a case to answer with regard to a particular offence; not only that there should be evidence to prove all the elements of that offence, the evidence on each element should not be discredited during cross examination or should not be manifestly unreliable to the extent that no reasonable tribunal could safely convict the accused for the offence in question, based on that evidence.

18. Though the proper test is identified in the *no case to answer* ruling, there is no indication in the said ruling that the test was properly applied to the facts of the case. I find that this ground has merit.

Grounds 2 & 3:

19. Under second and third grounds, the Appellant submits that there were serious doubts in the prosecution case and that the learned Magistrate failed to direct himself on the burden of proof.

20. But in the corresponding submission, the Appellant says that the evidence contained doubts because there was no expert evidence before the court to prove the handwriting of the Appellant.

21. Apart from the admissions in PE-01, the Appellant had clearly stated in his evidence that he did sign on the relevant withdrawal slips and during cross examination, the Appellant had identified his signature on PE-04 to PE-14. During his examination in chief, the Appellant has also admitted that he wrote the driving license number of Sangeeta Devi Prasad on the withdrawal slip dated 01/07/2009 when the said slip was shown to him by the defence counsel.

22. It is plain that the handwriting of the Appellant had not become an issue at any stage during the trial. The Appellant has not made any submissions regarding the claim with regard to the question of burden of proof. These two grounds are not made out.

Grounds 4 & 7

23. Under ground 4, the Appellant claims that the learned Magistrate did not properly analyse the facts before he made the decision to find the Appellant guilty for the forgery and uttering charges. In the 7th ground, the Appellant alleges that the learned Magistrate erred by convicting the Appellant based on circumstantial evidence when there was no direct evidence that the Appellant had forged the signature of the complainant.

24. In the submission made on these two grounds the Appellant again says that there was no independent evidence before the court to prove that the Appellant had signed on the withdrawal slips. The content of the submission is not helpful to properly deal with the issues raised in the two grounds.

25. On the face of it, I find that the 7th ground is misconceived as it in fact seems to suggest that a court cannot find an accused guilty based on circumstantial evidence where there is no direct evidence.

26. Though I am mindful of the fact that the 4th ground of appeal is limited to the forgery and uttering charges and that the Appellant's corresponding submission is not sound, as I have already made a finding under the first ground of appeal that the learned Magistrate has not appropriately analysed the facts in relation to the elements of the offences at the no case to answer stage, I consider it appropriate to expand the scope of the 4th ground of appeal to cover all the charges in this case and to examine whether the conviction of the accused on all charges in this case are appropriately justified in the impugned judgment.

27. The learned Magistrate's analysis of the evidence which led him to find the Appellant guilty of the 33 counts involving forgery, uttering and obtaining money by virtue of forged documents is found in the three paragraphs from paragraph 17 to 19 in the impugned judgment. The said paragraphs 17, 18 and 19 reads as follows;

> *"17. Whilst admitting that the money was withdrawn from the account, the defence submitted that there is no evidence to show that the accused was the person who*

committed these offences. But in his caution statement the accused admitted forging the signature of the complainant and withdrawing the money from the account. Further he explained that the complainant was not aware about that and he used the money for medicine. He wanted to put the money back but before that the complainant informed the police.

18. The admissibility of this document was challenged by the defence based on alleged inducement by IP Monnsamy. Therefore after a voir dire hearing I found that this statement was given voluntarily and the Prosecution marked it as PE 01 in the trial proper.

19. Based on the above admissions, I find that the Prosecution has proved beyond reasonable doubt that the accused forged the signature of the complainant in the withdrawal slips (PE-03 to PE-14), used them to withdraw the money from the account without the knowledge of complainant. Accordingly the elements of Forgery, Uttering Forged Document and Obtaining Money using Forged Document have been satisfied" [emphasis added]

Consideration as to whether the admissions in the confession are true

28. At the outset, it is pertinent to note that there were three versions before the learned Magistrate which is relevant to forgery, uttering and obtaining money on forged documents charges (count 2 to court 34). The three versions are;

a) ***Version of the prosecution***

First and second prosecution witnesses gave evidence suggesting that the Appellant himself prepared the false withdrawal slips and he took money using those slips. Third prosecution witness was the police officer who tendered the cautioned interview of the Appellant. Therefore, according to the prosecution witnesses, no other person apart from the Appellant was involved with the transactions in question. Respondent maintains the same position in the written submissions filed for the purpose of this appeal.

b) ***Version in the cautioned interview (PE-01)***

According to the cautioned interview, though the Appellant admits that he forged the signature of Sangeeta Devi Prasad on PE-04 to PE-15, he says that he received the money "from the teller". The prosecution has not cross examined the

Appellant on this point. The prosecutor had in fact put to the Appellant that the admissions recorded in the cautioned interview tendered as PE-01 (which includes this version) are true.

c) ***Version of the Appellant in his evidence***

The Appellant has stated that he never forged the signature of Sangeeta Devi Prasad and she herself came to him with the withdrawal slips and he only authorised the withdrawals.

29. The version in the cautioned interview with regard to the manner in which the alleged forged documents were used is clearly not in line with the version of the prosecution witnesses. In another words, the learned Magistrate had before him, two versions presented during the prosecution's case with regard to the manner in which the Appellant used the documents in question apart from the Appellant's total denial when he gave evidence. However, the impugned judgment does not indicate the version which the learned Magistrate decided to accept.

30. The manner in which the Appellant used (uttered) the documents is also relevant in drawing an inference on the accused's intention when he created them. If the case is that no one other than the accused was involved in the transactions in question, then the Appellant seemed to have misappropriated the money which the Colonial National Bank placed in his custody to be used in transactions on behalf of the bank for its daily operations. If that's the case, the Appellant in fact does not need withdrawal slips PE-04 to PE-14 to steal the money and the purpose of those documents may have been to cover up his fraud. The extent and the nature of the offending is different if there was another teller involved in these transactions as stated in the cautioned interview (PE-01). If that is the case, the matter becomes more complex. I note that the first prosecution witness in her evidence has identified three types of teller codes on the withdrawal slips tendered as PE-04 to PE-14 (i.e. teller 1, teller 2 and teller 12).

31. Be that as it may, coming back to the cautioned interview, though the learned Magistrate has found that the admissions in the cautioned interview were made voluntarily after the *voir dire* trial, he has not considered whether the admissions in the said cautioned interview are true in his judgment.

32. It is pertinent to note that counts 2 to 34 in this case entirely depend on the admissions in the cautioned interview of the Appellant as the prosecution did not call Sangeeta Devi Prasad to give evidence that she did not sign on the withdrawal slips PE-04 to PE-14 and withdrew money based on those slips. The evidence of the three prosecution witnesses does not establish that the Appellant forged the signature of Sangeeta Devi Prasad on PE-04 to PE-14.

33. It is trite law that admissions in a cautioned interview should not be relied upon to find an accused guilty of an offence without first considering whether those admissions are true. The omission of the learned Magistrate in not considering the truth of the admissions in the cautioned interview of the Appellant, when there was an apparent inconsistency between certain admissions and the other evidence presented by the prosecution as I have highlighted at paragraph 30 above give rise to a substantial miscarriage of justice.

34. Now I wish to examine the reasoning pertaining to the four different offences in this case.

Forgery (Counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29 and 32)

35. As I have mentioned in paragraph 2 above, all the eleven counts of forgery are identical but for the date of offence. Accordingly, the forgery charges read as follows;

"***ASLEEM KHAN*** *s/o Ahmad Khan on the XXXX, at Suva, in the Central Division with intent to defraud, forged the signature of* ***SANGEETA DEVI PRASAD*** *d/o Shiu Prasad on the Colonial National Bank withdrawal slip of the account number 6968769, purporting the same to be genuine.*"

36. To establish forgery under section 341(1) of the Penal Code, the prosecution should prove that;

(1) the accused,

(2) with intent to defraud,

In the case of ***Welham v. DPP*** [1961] AC 103 HL, Lord Denning explained "intent to defraud' as follows;

"Put shortly "with intent to defraud" means "with intent to practice a fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough."

(3) made a false document,

(4) in order that it may be used as genuine.

37. I find that the forgery charges found in the charge sheet do not properly disclose the offence of forgery. The plain reading of the charge is that the offence committed by the Appellant is (with the intention to defraud), forging the signature of Sangeeta Devi Prasad purporting the same (the signature) to be genuine. The offence of forgery is making of a false document (with the intention to defraud), in order that it (the document) may be used as genuine. Placing somebody else's signature on a document with the intention to defraud, purporting that signature to be genuine does not constitute the offence of forgery stipulated in section 341(1) of the Penal Code. The prosecution should prove beyond reasonable doubt that the false document was made with intent to defraud, and also, in order that it may be used as genuine. This final element of the offence of forgery is missing in the forgery charges.

38. Coming back to the impugned judgment, despite the fact that the learned Magistrate has produced the proper elements of the offence of forgery at paragraph 16 of his judgment, in my view, the aforementioned defect in the charges has resulted in the learned Magistrate misdirecting himself that the admission to the effect that the Appellant forged Sangeeta Devi Prasad's signature is sufficient to constitute the offence of forgery under section 341(1) of the Penal code. The statement, "*Based on the above admissions, I find that the Prosecution has proved beyond reasonable doubt that the accused forged the signature of the complainant in the withdrawal slips (PE-03 to PE-14)*" found in paragraph 19 of the impugned judgment which appears to be the only reasoning for finding the accused guilty of all the forgery charges is my justification for arriving at the aforementioned conclusion.

39. The above conclusion of the learned Magistrate with regard to the forgery charges has three critical flaws.

    a) Firstly, he does not take into account all the proper elements of the offence in his analysis.
    b) Secondly, he does not properly and adequately analyse the evidence in relation to each element of the offence.
    c) Thirdly, he relies on the admissions in the cautioned interview to arrive at this decision, without first considering whether those admissions are true.

Uttering (Counts 3, 6, 9, 12, 15, 18, 21, 24, 27, 30 and 33);

Obtaining money by virtue of forged documents (Counts 4, 7, 10, 13, 16, 19, 22, 25, 28, 31 and 34)

40. The elements of the offence of uttering under section 343 of the Penal Code are;

(1) the accused;

(2) knowingly and fraudulently;

- In Black's Law Dictionary (6th edition), the term 'fraudulent intent' is defined as follows;

  "Such intent exists where one, either with a view of benefitting oneself or misleading another into a course of action, makes a representation which one knows to be false or which one does not believe to be true."

- According to the case of ***Welham v DPP*** (supra), 'intention to defraud' and 'fraudulently' imports the same meaning. *Archbold Hong Kong, Criminal Law, Pleadings , Evidence and Practice* 2013 (at page 1040) further explains this as follows;

  > "To defraud" or to act "fraudulently" is dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so: *Welham v DPP* [1961] AC 103, HL. The word dishonestly is inserted in difference to opinions, mostly *obiter*, expressed in several cases (eg *R v Sinclair* 52 Cr App R 618, CA; *Wai Yu Tsang v R* [1992] 1 AC 269, PC). In the leading case of *Welham*, however, there is no mention of any need to tell the jury that they must be satisfied that the accused was acting dishonestly. It is submitted that the reason for this is that their Lordships considered it beyond argument that intentionally to take a risk prejudicing another's right knowing that there is no right to do so, is dishonest."

(3) utters;

> In terms of section 4 of the Penal code, *"utter" includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question.*

(4) any forged document.

41. The elements of the offence of obtaining money by virtue of forged documents are as follows;

(1) the accused;

(2) with intent to defraud;

(3) obtains any money by virtue of any forged instrument;

(4) knowing the same to be forged.

42. The only justification for finding the Appellant guilty for the uttering charges and the obtaining money on forged documents charges is also found in paragraph 19 of the impugned judgment which I have reproduced at paragraph 29 above.

43. It is pertinent to note that paragraph 16 of the impugned judgment reflects the correct elements of the offence of uttering, but when it comes to the offence of obtaining money by virtue of forged documents the fourth element is omitted.

44. However, I find the same flaws I have identified in paragraph 41 above in the learned Magistrate's decision in finding the Appellant guilty for the charges of uttering under section 343 of the Penal Code and the charges of obtaining money by virtue of forged documents under section 345 of the Penal Code.

Larceny by servant (First Count)

45. The elements of the offence of larceny by servant under section 274(a)(i) of the Penal Code are as follows;

(1) accused;

(2) being a person employed in the capacity of a clerk or servant;

(3) steals any money;

(4) belonging to or in the possession or power of his employer;

46. This charge was based on the deposit slip tendered in evidence as PE-15 and the account statement PE-03. The first prosecution witness had not given evidence on PE-15. The second prosecution witness while identifying a discrepancy in the amount regarding the deposit made on 20/03/09 in the relevant deposit slip tendered as PE-15 and the relevant account statement tendered as PE-03, had given evidence to the effect that this discrepancy can be due to a human error. (Vide pages 59, 60, 62 and 63; Vol. I of MC Record)

47. In his cautioned interview, the Appellant clearly states that he only received $141.44 from Sangeeta Devi Prasad and he had written $191.44 on the slip by mistake.

48. At paragraph 22 of the impugned judgment (Page 127, Volume I of MC Record), it is stated that;

> "*....only reasonable inference I can draw from these documents as well as the evidence is that the accused whilst serving as an employee misappropriated the $50 which belonged to his employer at that time*".

49. I am unable to ascertain from the judgment, whether the learned magistrate in arriving at the above conclusion, had properly considered the evidence of the second prosecution witness who had clearly said in her evidence in chief that there are instances where bank employees make mistakes when they write the amount on the slips bearing in mind that the prosecution did not call Sangeeta Devi Prasad to say whether she gave the Appellant $191.44 on the day in question.

50. I also do not find in the judgment any consideration on whether or not the $50 alleged to have been stolen belonged to or was in the possession / power of the Colonial National Bank. Even if it is assumed that Sangeeta Devi Prasad did hand over $191.44 to the Appellant and the Appellant deposited only $141.44, on the face of it, the $50 does not seem to have reached the Colonial National Bank at the point he allegedly misappropriated the said $50.

51. Considering the above, I am compelled to make the finding that the learned Magistrate has not properly considered whether all the elements of the 1st count under section 274(a)(i) of the Penal Code have been proved beyond reasonable doubt.

52. In the circumstances, I find that the 4th ground against conviction which is based on the paucity of proper and adequate analysis in the decision of the learned Magistrate in finding the Appellant guilty of the offences charged, is well founded.

Ground 5

53. Under this ground the Appellant alleges that the learned Magistrate did not direct himself on a possible defence on the evidence.

54. According to the corresponding submission, this 'possible defence', the learned Magistrate did not take into account, is an affidavit purported to be of Sangeeta Devi Prasad dated 17/12/2009 which was simply filed in the Magistrate Court. Counsel for the

Appellant conceded during the hearing of this case that this affidavit was not tendered in evidence either by the prosecution or the defence. The Appellant has not even mentioned about this affidavit when he gave evidence.

55. This purported affidavit does not form part of the evidence which the learned Magistrate ought to have considered in deciding the case. This ground is without merit.

Ground 6

56. The complaint made by the Appellant on this ground is that the learned Magistrate erred by not considering or rejecting his evidence. However, according to the corresponding submission, the evidence to which the Appellant refers in this ground is the same purported affidavit of Sangeeta Devi Prasad which is mentioned in the previous ground. For the same reasons I have mentioned in relation to the previous ground, I hold that this ground is without merit.

Ground 8

57. The Appellant alleges under this ground that the learned Magistrate erred by not considering each count separately.

58. When there are multiple counts against an accused, no matter how tedious or time consuming it would be, the elements of the offence relevant to each count should be considered separately to find whether the accused is guilty or not guilty for each count in the charge sheet. However, I find nothing wrong in analysing multiple counts collectively in an appropriate case (e.g. where the rationale found in section 70(2) of the Criminal Procedure Decree 2009 can be applied in a case though the prosecution has for some reason decided not apply the said provisions), provided that the analysis in the relevant judgment reflects that all the elements relevant to each and every count have been considered.

59. In this case it is plain from the impugned judgment that the reasoning does not in any way cover the 34 counts the Appellant was charged with. This ground has merit.

Conclusion regarding the appeal against the conviction

60. In the light of the findings relating to ground 4 and ground 8 above, I am inclined to hold the view that a substantial miscarriage of justice has occurred in convicting the Appellant in this case for the offences he was charged with.

61. Therefore, I find that the appeal against the conviction should be allowed and the convictions on all the counts against the Appellant should be quashed.

Whether to order a retrial

62. Now the question is whether to order a new trial. In the case of ***Azamatula v State*** [2008] FJCA 84; AAU0060.2006S (14 November 2008) the Court of Appeal stated thus;

> *"[12] The power of a High Court judge to order a retrial is found in the provisions of section 319 of the Criminal Procedure Code. The power is discretionary and as such the power must always be exercised judicially (**Shekar v State** [2005] FJCA 18). As was said by the Privy Council in **Au Pui-kuen v Attorney-General of Hong Kong** ([1980] AC 351) 'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also **Ting James Henry v HKSAR** [2007] HKCFA 71). The overriding consideration in the exercise of the power is the interests of justice (**Aminiasi Katonivualiku v. The State** (CAV 0001/1999S; 17 April 2003).*
>
> *[13] In the case of **Au Pui-kuen** the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (**Togara v. State** (by Majority) [1990] FJCA 6)."*

63. The alleged offending of the Appellant in this case, which is, making false withdrawal slips and obtaining money held by a bank being an employee of that bank, is a fraud which is capable of causing anxiety on the minds of many who uses the services of financial institutions.

64. It is important to see that the general public is given the impression and also the assurance that the rule of law does not take this type of frauds lightly.

65. I am conscious of the fact that the alleged offence was committed in 2009. However, in my view, the public interest in prosecuting this type of offences outweighs the ordeal the Appellant may have to endure in facing a second trial.

66. In the circumstances, I consider it appropriate to order a new trial in terms of section 256(2)(c) of the Criminal Procedure Decree 2009.

Orders of the Court;

i.) Appeal allowed. The conviction and the sentence on all the counts against the Appellant in the magistrate court criminal case no. 1624 of 2009 are quashed;

ii.) Retrial ordered;

iii.) The case is listed for mention before the Chief Magistrate on 13th May 2016 at 9.30 a.m. to assign a different Magistrate to conduct the retrial;

iv.) The Appellant is warned accordingly and released on the same bail conditions imposed in the Magistrate Court.

HIGH COURT OF FIJI SUVA

Vinsent S. Perera
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Appellant : **Iqbal Khan & Associates, Ba.**
City Agents: O'Driscoll & Co., Suva.