IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 027 OF 2017S

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

APPELLANT

AND : VILIAME KATIA

RESPONDENT

Counsels : Mr. R. Aslam, Ms. A. Lomani and Ms. L. Bokini for Appellant
Mr. R Vananalagi and Mr. J. Daurewa for Respondent

Hearing : 21 and 22 June, 2018

Judgment : 28 June, 2018

JUDGMENT

1. On 29 March 2017, in the Suva Magistrate Court, the respondent (accused) in the presence of his counsel, elected a Magistrate Court trial on all the following charges:

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 which the Official Receiver held the sum in trust and to the Government of Fiji.

SIXTHCOUNT

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 Nukutaumaki 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.

2. In fact, count no. 5, 6, 7 and 11 are indictable offences that can be tried summarily, on an election by the accused, pursuant to section 4(1)(b) of the Criminal Procedure Act 2009. Count no. 8, 9 and 10 are summary offences, triable only in the Magistrate Court, by virtue of section 4(1)(c) of the Criminal Procedure Act 2009. Count no. 1, 2, 3 and 4 stemmed from the Penal Code, Chapter 17 and may be tried in the Magistrate Court, pursuant to section 5(2) of the Criminal Procedure Act 2009. So, the Suva Magistrate Court, had the jurisdiction to deal with the above charges, according to law.

3. According to the court record, the respondent choose to communicate in the English language. The charges were read and explained to him, and he appeared to have understood the same. Out of his own free will, he pleaded guilty to the above eleven (11) counts in the charge. According to the count record, the appellant asked the court for the matter to be transferred to the High Court. The learned Magistrate rightly told the appellant to make a proper application.

4. On 18 April 2017, in the presence of his counsel, the prosecution presented the following summary of facts to the accused in court:

    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.

Count 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 NO. 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.

COUNT 10

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.

COUNT 11

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. According to the court record, the accused, in the presence of his counsel, admitted the above summary of facts, on 18 April 2017. The court record showed that, the court again advised the appellant, to make a proper application for the matter to be transferred to the High Court. The court said it would rule on the application on 3 May 2017. On 3 May 2017, according to the

court record, the court convicted the accused as charged on all the eleven counts in the charge. It also ruled against the appellant's application to transfer the matter up to the High Court for sentencing. The court recorded its reasons in a 3 pages ruling, which is contained in the court record. It was not clear from the court record, as to when the court ruled against the appellant's application to transfer the case to the High Court for sentencing. Was it before or after the accused's conviction? Clarification on this point was important because section 190 (1) of the Criminal Procedure Act 2009 only comes into operation once an accused is convicted. According to the appellant, the learned Magistrate ruled against the appellant's application under section 190 (1) of the above Act first, before he convicted the accused. The respondent was unable to assist on this point.

6. In any event, the matter was adjourned for sentencing on 18 May 2017. However on that date, the parties filed their pre-sentence submissions. The matter was then adjourned to 1 June 2017 for sentencing. On 1 June 2017, as recorded by the appellant in their petition of appeal, the court in 26 pages, sentenced the respondent, as follows:

> **"...3. THAT the Learned Magistrate sentenced the Respondent to two years imprisonment on the first count, eight months imprisonment on the second count, eight months imprisonment on the third counts, two years imprisonment on the fourth count, ten years imprisonment for the fifth count, ten years imprisonment for the sixth count, four years imprisonment for the seventh count, four years imprisonment for the eighth count, three years imprisonment for the ninth count, six years imprisonment for the tenth count and four years imprisonment for the eleventh count.**
>
> **4. THAT the Learned Magistrate sentenced the Respondent to a custodial sentence of 14 years imprisonment with a non-parole period of 12 years..."**

7. The appellant was not happy with the above decision. It appealed to the High Court, on the following grounds:

> **"...5. THAT being dissatisfied with the aforesaid sentence, the Appellant wishes to appeal to your Lordship's Court on the following grounds:**
>
> **(i) The Learned Magistrate erred in law and fact when the Court failed to transfer the matter to the High Court for sentencing having regard to all the circumstances of the case.**
>
> **(ii) The Learned Magistrate erred in law in exceeding the jurisdiction of the Court during the sentencing process.**

(iii) **The Learned Magistrate's sentence is manifestly lenient having regard to all the circumstances of the case.**

WHEREFORE the Appellant prays that this Honourable Court sets aside the Sentence delivered by the Learned Resident Magistrate and Order that the Respondent be sentenced afresh in the High Court..."

8. On 21 and 22 June 2018, I heard the parties in court. I have carefully read and considered the Magistrate court record and the parties' written submissions. I have also carefully considered their verbal submissions. I will now deal with the appeal grounds

Appeal Ground No. (i): The Learned Magistrate erred in law and fact when the court failed to transfer the matter to the High Court for sentencing having regard to all the circumstance of the case

9. The answer to the appellant's complaint in Appeal Ground No. (i) lay in the meaning of section 190 of the Criminal Procedure Act 2009, and the effect to be given to it. It is a question of finding out the intention of Parliament as expressed in the words of the section. The words of the section must be given its plain literal meaning. Section 190 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 that 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..."**

10. When a Magistrate transfers a case to the High Court for sentencing, or refuses to do the same, pursuant to section 190 (1) of the Criminal Procedure Act 2009, the magistrate is actually exercising a judicial discretion. What is a judicial discretion? Wendy Lacey, a Law Lecturer at the University of Adelaide, Australia, said as follows in 2003:

> "...Defining Judicial Discretion
>
> Judicial discretion – the result of its exercise is referred to herein as a discretionary decision – is exercised when a judge is granted a power under either statute ('statutory discretion') or common law that requires the judge to choose between several different, but equally valid, courses of action. As de Smith has stated:
>
> > [The] legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem. [9]
>
> Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case. As Hawkins has observed, discretion is 'the space ... between legal rules in which legal actors may exercise choice'. [10]
>
> In speaking of autonomy and choice, however, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles, [11] or by reference to a list of relevant factors to be considered. [12] While discretion permeates both the common law and many, if not most, statutory instruments, discretionary powers are never absolute and must also be exercised within a broader legal and social context. [13] As Schneider has remarked, 'limitations on discretion are as inevitable and abundant as the sources of discretion ... discretionary decisions are rarely as unfettered as they look'.[14]
>
> In Australia, judges have also developed principles for the review by appellate courts of discretionary decisions and this indirectly regulates the exercise of discretionary powers. The leading authority in this regard in House v The King. [15] This case established that appealable errors committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration. [16] However, it will not be enough that the appellate court would have exercised the discretion differently. [17] Instead, the discretion must involve an error of law which has led to 'an unreasonable or plainly

unjust', [18] result, or has involved a 'substantial wrong', [19] before the discretion will be taken to have been improperly exercised by the lower court [20]..."

Source: Melbourne Journal of International Law [2004], MelbJIInt Law 4

11. In **House** v **The King** [1936] 55 C.L.R. 499, 504-505, the High Court of Australia, said as follows:

> "...The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred..."

12. In **Robert Tweedle Macahill** v **Reginam**, Criminal Appeal No. 43 of 1980, page 7, the Fiji Court of Appeal, when discussing a Magistrate's discretionary powers in granting or refusing an application for an adjournment, said as follows:

> "...We proceed now to deal with the first question, namely, was the learned Magistrate correct in refusing to grant the adjournment sought. Such a refusal is a matter of law. The granting of an adjournment is always the exercise of a judicial discretion. Although the Court of Appeal is slow to interfere with the exercise of that discretion, yet, as is said by Atkin L. J. in Maxwell v Keun (1928 1 K. B. 645, 653 CA):
>
> > "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

Similar orders, overruling a judgment denying an adjournment, were made in re M (1968) 1 W.L.R. 1897; Priddle v Fisher (1968) 1 W.L.R. 1478; and Royal v Prescott Clarke (1966) 1 W.L.R. 788..."

The above comments, it would appear, also applied to a Magistrate who grants or refuses to grant an application by a prosecutor to transfer a matter to the High Court for sentencing, pursuant to Section 190 (1) of the Criminal Procedure Act 2009.

13. When refusing the appellant's application to transfer the matter to the High Court for sentencing, pursuant to section 190 (1) of the Criminal Procedure Act 2009, did the learned Magistrate act on a wrong principle? Did he allow extraneous or irrelevant matters to guide or affect him? Did he mistake the facts? Did he fail to take into account some material consideration? Was the learned Magistrate's decision, on the facts, plainly unreasonable and unjust? Has the learned Magistrate's decision caused a substantial wrong? Has the result of the learned Magistrate's decision led to defeating the rights of the parties and had led to an injustice?

14. I have carefully read the court record and the learned Magistrate's ruling on 3 May 2017 in an attempt to answer the above questions. I have considered the parties' written and verbal submissions. Section 190 (1) of the Criminal Procedure Act 2009 directs the learned Magistrate to look at and seriously consider certain factors contained in the section, before he makes his discretionary decision. First, section 190 (1)(a) required him to make sure the accused "was over the age of 18 years, and is convicted by a Magistrate for an offence". Here, the respondent was a person over 18 years. Did the learned Magistrate deliver his section 190(1) ruling first before he convicted the accused, or was it the other way around? The appellant submitted, the learned Magistrate delivered his section 190(1) ruling first, **before** he convicted the accused on the charges on 3 May 2017. The respondent did not contest this point. If the appellant was correct, then the learned Magistrate would have erred. A ruling under section 190 (1) of the Criminal Procedure Act 2009 cannot be made **before** a conviction. A conviction is a pre-condition to the exercise of a discretion under the above section. (section 190(1)(a) of the Criminal Procedure Act 2009). Second, the learned Magistrate must form his opinion on the "nature of the offence" and "the circumstances surrounding its commission" (section 190(1)(b) of the Criminal Procedure Act 2009). On this issue, the nature of the charges as contained in paragraph 1 hereof, and how it was committed and the sums involved

as explained in the prosecution's summary of facts, as contained in paragraph 4 hereof, had to be seriously considered by the learned Magistrate. To my mind, having served 15 years in the Magistracy in Fiji (1994 to 2009), I have never heard of any alleged theft of over $4,000,000 been dealt with in the Magistrate Court. If anything, the sum involved should have alerted the learned Magistrate that this was a case for the High Court, when it comes to disposition. A Magistrate Court is a court of summary jurisdiction which required simple cases to be disposed off quickly, to avoid case backlog. Attending to complicated cases which should be sent to the High Court for disposition will slow down the Magistrate Court's ability to dispose off cases. In our last High Court Case Management meeting earlier this year, it was found that 1,500 extended jurisdiction cases were still pending in the Suva Magistrate Courts. This should occupy the learned Magistrate's time rather than complicated cases such as the one now under appeal.

15. In any event, the learned Magistrate rightly acknowledged, in his 3 May 2017 ruling, that both the appellant and the respondent agreed the offences were serious. They agreed the respondent systematically defrauded the complainants over a number of years. The learned Magistrate agreed that the purpose of sentence would be deterrence. The learned Magistrate was aware that the accused was 38 years old and a first offender – not unusual for people who commit this type of offence. Why the learned Magistrate did not send the case to the High Court for sentencing pursuant to section 190 of the Criminal Procedure Act 2009 baffles me. He had formed the view "that by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused", the circumstances of the case were serious, and a deterrent sentence was needed. (Section 190(1)(b) of the Criminal Procedure Act 2009).

16. Yet in paragraphs 12, 13, 14, 15, 16 and 17 of his 3 May 2017 ruling , he said the following:

> "...12. **The maximum penalty that can be imposed by this court for an offence is 10 years imprisonment and for consecutive sentences it can impose up to 14 years imprisonment [section 7 (1) and (2) of the Decree].**
>
> 13. **In my view even though there are number of aggravating factors presents in this case and warrants an higher sentence by this court or the High Court there would be some grounds that would be in advantage of the accused and would reduce his final sentence.**

14. **For example the court has to consider his personal mitigating factors and need to give some deduction. Further he pleaded guilty and need the full credit and this means he is entitle for full 1/3 deduction from his final sentence.**

15. **Even though the court can impose consecutive sentence for all these counts considering the totality principle the final sentence should not be also harsh and excessive.**

16. **Hence, I am in the opinion that the final sentence for this accused is within the range of this court and there is no justification to transfer this matter to the High Court as requested by the Prosecution.**

17. **Accordingly, I dismiss this application and invite both parties to file sentencing and mitigation submission for sentencing..."**

17. Of the 11 counts in the charge, the fourth count, "embezzlement by servant", contrary to section 274 (b)(ii) of the Penal Code, carried a maximum penalty of 14 years imprisonment, the fifth and sixth count, "abuse of office for gain", contrary to section 139 of the Crimes Act 2009, carried a maximum penalty of 17 years imprisonment per count. For the above three counts, a total of $4,118,447.43 was allegedly involved. On count no. 4, the maximum penalty was 14 years imprisonment, 4 years more than a magistrate's power, who is limited to 10 years imprisonment per count (section 7 (1)(a) of the Criminal Procedure Act 2009). Count no. 5 and 6, the maximum penalty per count was 17 years imprisonment, 7 years more than a Magistrate's sentencing power. On a plain reading of Parliament's intention as expressed in section 190 (1)(b) of the Criminal Procedure Act 2009, it was obvious that the "circumstance of the case were such that greater punishment should be imposed in respect of the offences than the Magistrate has power to impose". By deciding as he did, as highlighted in paragraph 16 hereof, the Magistrate had acted on a wrong principle, that is, he had not followed Parliament's directions as embodied in section 190 (1)(b) of the Criminal Procedure Act 2009. Although, he had formed the opinion that the "nature of the offences" and "the circumstances surrounding its commission" were serious and deserved a deterrent sentence (paragraph 11 of his 3 May 2017 ruling), and that his sentencing powers per count was limited to 10 years (paragraph 12 of his 3 May 2017 ruling), and mindful that the maximum sentences for count no. 4, 5 and 6 were more than 10 years imprisonment, he deliberately ignored the commands of section 190 (1)(b) of the Criminal Procedure Act 2009 "that greater punishment should be imposed in respect of the

offence than the magistrate has power to impose". By ignoring the commands of section 190 (1)(b) of the 2009 Act, the learned Magistrate had acted on a wrong principle. It was mandatory for courts of law to follow the will of Parliament as expressed in the words of section 190 (1)(b) of the Criminal Procedure Act 2009.

18. Furthermore, he allowed irrelevant matters to guide him. In paragraphs 13, 14 and 15 of his 3 May 2017 ruling, the learned Magistrate was already considering the aggravating and mitigating factors in the case. The prosecution's sentence submission, recorded from pages 121 to 308 of the court record, was filed on 18 May 2017. The accused's plea in mitigation and sentence submission, recorded from pages 309 to 313 of the court record, was filed on 17 May 2017. The filing of the above papers by the parties were confirmed in the court record. Yet 14 to 15 days earlier on 3 May 2017, the learned Magistrate was already considering the aggravating and mitigating factors in the case, even before they were formally submitted. By doing so, in the words of **House v The King** (supra), he "allowed extraneous or irrelevant matters to guide his discretionary decision". The above matters are only to be considered **after** the parties had submitted them. In a sense, he was pre-judging the case, before the aggravating and mitigating factors were formally submitted. He had allowed irrelevant matters to guide him, that is, allowing the matters highlighted in paragraph 16 hereof to guide him. He did not take into account the material consideration, that is, the seriousness of the charges, especially count no. 4, 5 and 6, and the huge amount of money involved, that is, $4,118,447.43. The learned Magistrate's decision was plainly unreasonable and unjust to the people the respondent had offended against.

19. Given the above, I allow the appellant's appeal on Appeal Ground No. 1. In my view, the learned Magistrate did not properly apply himself to the appellant's application to transfer the case to the High Court for sentencing pursuant to section 190(1) of the Criminal Procedure Act 2009, on 3 May 2017. In my view, he misread section 190(1) of the Criminal Procedure Act 2009 and misapplied it. He failed to follow Parliament's commands as embodied in the words of section 190(1) of the Criminal Procedure Act 2009. In the words of **House** v **The King** (supra), he applied the wrong principle, he allowed irrelevant matters to guide him and failed to take into account material matters in making his decision. His decision was plainly unreasonable. His purported sentence on 1 June 2017 were null and void, and thus set aside. Because of this, it was unnecessary to consider Appeal Ground No. (ii) and (iii)

20. I now make the following orders and directions:

(i) This case is transferred back to the learned Magistrate Shageeth Somaratne;

(ii) The learned Magistrate is directed to read the court's judgment, and directed to correct himself within the terms of this judgment;

(iii) The learned Magistrate, as a result of the above, is directed to exercise his discretion correctly by transferring this case to the High Court for sentencing, pursuant to section 190 (1) of the Criminal Procedure Act 2009;

(iv) The Magistrate Court is to treat the above matters as urgent;

(v) The case is to be returned to this court by 20 July 2018, to check that the above orders are complied with, and the due process of law to continue.

(vi) The respondent (accused) is remanded in custody subject to the orders of this court.

Salesi Temo

JUDGE

Solicitor for Appellant	:	**Office of Fiji Independent Commission Against Corruption, Suva**
Solicitor for Respondent	:	**R. Vananalagi, Barrister and Solicitor, Suva.**