

**IN THE HIGH COURT OF FIJI AT SUVA**

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

**IAZ ALI DEAN**

**Appellant**

**CASE NO: HAA. 02 of 2020**

[MC Nausori, Crim. Case No. 747 of 2017] **Vs.**

**STATE**

**Respondent**

**Counsel** : Ms. S. Hazelman for the Appellant  
Ms. W. Elo for the Respondent

**Hearing on** : 09 June, 2020

**Judgment on** : 12 June, 2020

**JUDGMENT**

1. The above named appellant (“the appellant”) was produced before the Magistrates Court at Suva on 30/11/17. According to the amended chargesheet filed on 28/12/17, the charges read thus;

**FIRST COUNT**

*Statement of Offence (a)*

**THEFT:** contrary to Section 291 (1) (c) of Crimes Act Number 44 of 2009.

*Particulars of Offence (b)*

**IAZ ALI DEAN** between the 1<sup>st</sup> day of January 2012 and 30<sup>th</sup> of December 2014 at Nausori in the Central Division dishonestly appropriated 29 Cheque Leaf numbers 000056 to 000085 from BSP Bank Cheque book of account number 0008681446 valued at \$2.90 with the intention of permanently depriving the said SHIVANGNI NARAYAN LAL.

**SECOND COUNT**

*Statement of Offence (a)*

**CAUSING A LOSS:** contrary to Section 324 (1) (c) of Crime Act Number 44 of 2009.

*Particulars of Offence (b)*

**IAZ ALI DEAN**, between the 21<sup>st</sup> day of November 2017 and the 23<sup>rd</sup> day of November 2017 at Nausori in the Central Division, dishonestly caused a loss of \$7565.00 to **PACIFIC AUTO TRADERS**.

2. On 28/05/19, the appellant had pleaded guilty to the second count above and had pleaded not guilty the first count.
3. The summary of facts had been read over to the appellant on 10/06/19 and the appellant had been convicted as charged on the second count upon admitting those facts. The appellant had been sentenced on 03/12/19 to a term of 36 months' imprisonment with a non-parole period of 30 months.
4. The appellant had taken steps to file an appeal against the conviction and sentence on 09/12/19, in person.
5. This court dismissed the appeal against the conviction in view of the provisions of section 247 of the Criminal Procedure Act 2009 ("Criminal Procedure Act"), on 02/04/20. Section 247 of the Criminal Procedure Act reads thus,

*Limitation of appeal on plea of guilty and in petty cases*

247. *No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.*

6. I had the occasion to point out in the case of *Raisokula v State* [2018] FJHC 148; HAA24.2017 (2 March 2018), that the aforementioned provisions under section 247 of the Criminal Procedure Act are unambiguous and therefore, the High Court cannot entertain an appeal against a conviction entered by the Magistrates Court on a plea of guilty.
7. An accused who is convicted on an equivocal plea of guilty can invoke the revisionary jurisdiction of the High Court under section 260 read with section 262 of the Criminal Procedure Act. The said sections reads thus;

*Division 2 – Revision by the High Court Power of High Court to call for records*

260. (1) *The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to –*

*(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and*

*(b) the regularity of any proceedings of any Magistrates Court.*

*(2) The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken.*

...

*Power of High Court on revision*

262. (1) *In the case of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –*

*(a) in the case of a conviction, exercise any of the powers conferred on it as a*

*court of appeal by section 256 and 257; and*  
*(b) in the case of any order other than an order of acquittal, alter or reverse such order.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.*

*(3) The High Court shall not impose a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been imposed by the court which imposed the original sentence.*

*(4) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.*

*(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.*

8. Section 260(1) alluded to above gives the High Court the power to call for a record of any criminal proceedings before any Magistrates Court for the purpose exercising the revisionary jurisdiction.
9. Gates CJ (as he was then) explains the power vested with the High Court in terms of section 260 of the Criminal Procedure Act, in the case of *State v Batiratu* [2012] FJHC 864; HAR001.2012 (13 February 2012) as follows;

*“[4] The case was reported in the media. At that stage there may have been uncertainties as to the basis for the sentence. Accordingly I called for the record of the proceedings so that it could be examined. This is a power given to the High Court by section 260 of the Criminal Procedure Decree [formerly section 323 of the Criminal Procedure Code]. Section 260 follows the spirit of the supervisory jurisdiction in civil and criminal proceedings given to the High Court by section 6(3) of the Administration of Justice Decree 2009, which was formerly provided by section 120(6) of the 1997 Constitution.”*

10. In my view, the power vested with the High Court to call for a record of any criminal proceedings before any Magistrates Court could be exercised *ex mero motu* or at the instance of a party. The use of the word 'may' in section 260(1) of the Criminal Procedure Act indicates that the High Court is granted with the discretion to call for such record under the said section. However, if the High Court receives a report under the hand of the Chief Justice which requests a particular record to be called, there is no discretion and the High Court shall call for that record exercising the power vested in terms of the said section 260(1).
11. It is pertinent to note that the Magistrates Court is also vested with the power to call and examine any criminal proceedings before a court of a class inferior to the court by virtue of section 261(1) of the Criminal Procedure Act, which is similar to the power vested with the High Court in relation to the criminal proceedings before the Magistrates Court, by virtue of section 260(1).
12. Section 262 of the Criminal Procedure Act provides that the power of revision of the High Court can be exercised on three occasions. They are;
  - a) In the case of any proceedings in a Magistrates Court the record of which has been called for [Section 260(1)]; or
  - b) [In the case of any proceedings in a Magistrates Court the record of] which has been reported for orders [Section 260(2)]; or
  - c) [In the case of any proceedings in a Magistrates Court the record of] which otherwise comes to its knowledge.
13. Section 262(5) of the Criminal Procedure Act provides that no proceeding by way of revision shall be entertained at the instance of the party who could have appealed where an appeal lies from any finding, sentence or order. Since an appeal cannot be brought against a conviction entered on a plea of guilty in terms of section 247 of the Criminal Procedure Act, section 260(5) is not a bar for an accused who claims that

he had been convicted on an equivocal plea of guilty to bring proceedings by way of revision under section 260(1) of the Criminal Procedure Act.

14. The revisionary jurisdiction is a discretionary remedy and unlike on appeal, a party does not have a right to have issues adjudicated by the court. Moreover, unlike appellate jurisdiction, revisionary jurisdiction is limited to examining two issues as provided under section 260(1) of the Criminal Procedure Act. They are;

- (a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and
- (b) the regularity of any proceedings of any Magistrates Court.

15. Equivocality of a plea is usually challenged based on errors apparent on the face of the record (the summary of facts does not reflect the elements of the offence, proper procedure was not followed when recording the plea, or violation of the rules of natural justice) and involves questions of legality, jurisdiction and/or procedural impropriety. Such issues should in fact be adjudicated under revisionary jurisdiction as opposed to appellate jurisdiction.

16. In the case at hand, after the appeal against the conviction preferred by the appellant was dismissed for want of jurisdiction, an amended petition of appeal (against the sentence) was filed by the Legal Aid Commission on behalf of the appellant, raising the following grounds of appeal;

- 1. *That the Learned Magistrate had acted in wrong principle.*
- 2. *That the Learned Magistrate erred in law and in fact when he considered extraneous factors to guide him when sentencing.*
- 3. *The Learned Magistrate had not taken into relevant factors when sentencing.*

17. However, when I went through the (certified copy of the) Magistrates Court record before the hearing, I noted that the allegation on the first count of theft [section 291

of the Crimes Act] according to the particulars of offence is that the appellant stole 29 cheque leaves belonging to one Shivangni Narayan Lal, and the allegation on the second count of causing a loss [section 324 of the Crimes Act] is causing a loss of \$7565 to Pacific Auto Traders. According to the summary of facts said to have been admitted by the appellant (“summary of facts”), the cheque leaves relevant to the first count belongs to Pacific Auto Traders.

18. The summary of facts reads thus;

*Between 3<sup>rd</sup> day of May, 2012 and 30<sup>th</sup> day of January 2014 at Nausori Iaz Ali Dean (Accused) 44 years, shop keeper of Tavakubu, Lautoka used 5 x Cheque leafs belonging to Pacific Auto Traders and cost a loss of \$7565.00. The above Cheque was from BSP Bank, account number 0008681446.*

*Between 21<sup>st</sup> day of November, 2017 and 23<sup>rd</sup> day of November, 2017 (Accused) bought the following items using the said Cheque:*

- 1. 4 x N70Z battery valued \$1,050.00*
- 2. Engine Oil valued \$590.00*
- 3. Engine Oil valued and 2 x NS60 battery valued \$580.00*
- 4. 4 x NS40 battery, 10 x 4 litres ATF engine oil valued \$2,625.00*
- 5. 5 x NS40 battery, 7 x N70Z battery, 10 x 15W40 engine oil and 2 x Head lamp total value of \$2,720.00*

*Later on the 27<sup>th</sup> day of November, 2017 (PW -2) was informed by BSP Bank that the account of Sandwich Quickies was closed and not to receive that Cheque any more.*

*Matter was reported and the accused was caution interviewed whereby he admitted to the allegation of using the Cheque. Accused was arrested in Sigatoka whereby the Cheque butts was found with him and later on the Accused was charged for the offence of **Causing Loss Contrary to Section 324 (1) of the Crimes Act of 2009.***

19. Therefore, it is clear that either the particulars of the first count to which the appellant had pleaded not guilty are incorrect or the summary of facts which the appellant is said to have admitted contains incorrect facts. I was also troubled by the reason for the appellant to plead not guilty to the first count where the allegation is stealing 29 cheque leaves worth \$2.90, but to plead guilty to the second count where the allegation is that he caused a loss of \$7565 by using 5 of those 29 cheque leaves that he had allegedly stolen according to the first count.
20. When this issue was raised before commencing the hearing on 09/06/20, both counsel did not have a clear answer, but the explanation provided by the appellant confirmed that the summary of facts in this case contains incorrect facts and it does not provide a truthful account of the circumstances relevant to the allegation against the appellant.
21. Given that it had come to my knowledge that the plea was equivocal based on what I have observed on the face of the record and for the reason that the trial in relation to the first count is yet to commence, I considered it appropriate to invoke the revisionary jurisdiction of this court in terms of section 260(1) read with section 262(1) of the Criminal Procedure Act to set aside the conviction entered against the appellant on the second count along with the ensuing sentence, so that the Magistrates Court can deal with the second count afresh together with the first count. Both counsel agreed with this course of action and in addition the counsel for the respondent further said that she will take steps to look into the charges.
22. This case highlights the need for the prosecutors to be cautious in drafting the summary of facts and also for the Learned Magistrates to carefully assess the summary of facts and the chargesheet before entering a conviction on a plea of guilty. Especially when it comes to summary of facts drafted by a police prosecutor, the Learned Magistrates should be mindful of the possibility of the prosecutor miscomprehending the facts of the case and also the possibility of the accused failing to notice the inaccuracies in the summary of facts when the summary of facts are




read in court.

23. Moreover, in a situation like in this case where there are more than one charge which are connected and the accused had pleaded guilty to one or more charges but not all where the court has to proceed to trial in respect of the contested charges, the Learned Magistrates should be mindful of the possibility for inconsistencies to surface between the summary of facts agreed to by the accused and the facts that are later proved in relation to the contested charges, for the same reason mentioned above.
24. Given the decision to set aside the sentence for the reasons mentioned above, this appeal should be dismissed.

**Orders of the Court;**

- i.) The appeal is dismissed;
- ii.) The conviction entered on the second count against the appellant, in Nausori Magistrates Court Criminal Case No. 747 of 2017 and the ensuing sentence are set aside; and
- iii.) The Learned Magistrate handling the aforementioned case is directed to proceed in relation to the second count afresh along with the first count.



  
Vinsent S. Perera  
JUDGE

**Solicitors;**

**Legal Aid Commission for the Accused  
Office of the Director of Public Prosecutions for the State**