

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 07 of 2023

BETWEEN : **PHILIP JAGDISHWAR SINGH T/A NADI**
GENERAL TRANSPORT
APPELLANT

A N D : **FIJI NATIONAL PROVIDENT FUND**
RESPONDENT

Counsel : Ms. A. Degei for the Appellant.
: Mr. P. Dayal for the Respondent.

Date of Submissions : 25 July, 2023

Date of Hearing : 03 August, 2023

Date of Judgment : 11 August, 2023

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged for five counts of failing to pay contributions to the Fiji National Provident Fund contrary to section 37 (1) (a) of the Fiji National Provident Fund Act 2011 at Magistrate's Court, Lautoka.

2. The appellant first appeared in the Magistrate's Court on 12th December, 2022 and pleaded guilty after the charges were read and explained to the appellant in the Hindi language. On the same day the appellant admitted the summary of facts read.
3. The brief summary of facts were as follows:
 - a) The appellant being the sole proprietor of Nadi General Transport and registered as an employer with the Fiji National Provident Fund failed to pay members contribution in the sum of \$675.89 for his employee Semi Roqica for the period December, 2019 till April, 2020 which were due and payable at the end of each month.
 - b) In addition to the above, the appellant also failed to pay FNPF member's contributions for his employees in the total sum of \$25,647.79 inclusive of the amount mentioned in the charges for the period December, 2019 to December, 2020. A notice of unpaid contributions under section 108A of the Fiji National Provident Fund Act 2011 was issued to the appellant. The appellant failed to pay any amount mentioned above.
4. The learned Magistrate upon being satisfied that the appellant had entered an unequivocal plea of guilty on his freewill and the summary of facts read satisfied all the elements of the offences charged found the appellant guilty and convicted him accordingly. After hearing mitigation the following orders were made:
 - a) *The appellant to pay a fine of \$200.00 within 30 days from today and in default an imprisonment term of 20 days.*
 - b) *Pursuant to section 112(a) of the FNPF Act 2011, the appellant to pay the sum of \$675.89 being the outstanding contributions for the period*

December 2019 to April 2020 for Semi Roqica within three months (03) from today.

- c) Pursuant to section 108A of the FNPF Act 2011, the appellant to pay the sum of \$24,971.90 being outstanding contributions for the period December 2019 to December 2020 for other employees within three months (03) from today.*
- d) Pursuant to section 112(d) of the FNPF Act 2011, the appellant to pay the sum of \$12,977.08 being for interest lost on member's accounts for the period December 2019 to December 2020 within three months (03) from today.*
- e) Further the appellant to pay prosecution's cost in the sum of \$100.00 within three months (03) from today.*
- f) The warrant of seize on appellant's property if he fails to pay the aggregate sum of \$38,744.87 ordered as above within the given time. If there is no sufficient property in the appellant's name then a committal warrant to be issued against him for the maximum period of 24 months pursuant to section 37(1) of the Sentencing and Penalties Act 2009.*

APPEAL TO THE HIGH COURT

- 5. The appellant being aggrieved by the conviction and sentence filed a timely appeal in this court. On 29th June, 2023 this court granted the appellant time to file his amended grounds of appeal which has been attended to.
- 6. Both counsel filed written submissions and also made oral submissions during the hearing. This court acknowledges the well-researched and articulated submissions of the respondent's counsel. The amended grounds of appeal are as follows:

APPEAL AGAINST CONVICTION

The learned Trial Magistrate erred in law and in fact in convicting the appellant on a guilty plea on a charged offence and sentenced the appellant on an uncharged offence and as such there has been a substantial miscarriage of justice.

7. The appellant's counsel argued that the appellant was only charged and convicted for five counts of failing to pay contributions to the Fiji National Provident Fund. However, the learned Magistrate considered an uncharged offence in respect of unpaid FNPF members contributions and then sentenced the appellant for the uncharged offence thereby causing a substantial miscarriage of justice.
8. Counsel further submitted that sections 56 and 58 of the Criminal Procedure Act were not followed. There was no summons issued and the offence was not specified as additional charges and there were no particulars which supported the offence. The appellant did not know about the nature of and the reasons of the additional amounts to be paid and therefore the orders made offended the presumption of innocence and his right to be informed of the nature and reasons for the charge provided under section 14 (2) (a) and (b) of the Constitution.
9. The above submissions are misconceived there is no dispute that the appellant was charged for five counts only and he was convicted of these counts on his plea of guilty. Although the appellant was not charged for unpaid FNPF contributions for other employees in the sum of \$24,971.90 under the Fiji National Provident Fund Act a section 108A notice was raised and served on the appellant. The appellant was aware of the notice and he had admitted the same when the summary of facts was read. Section 108A is a specific provision which allows the above procedure if an accused is

convicted of an offence under section 37(1) a) or section 38 (3) of the Fiji National Provident Fund Act.

10. Section 108A of the Fiji National Provident Act is reproduced herewith for completeness:

[FNPF 108A] Notice of unpaid contributions

108A *If a notice of intention so to do is served by the prosecuting officer upon the defendant evidence may be given, at any trial for an offence under the provisions of sections 37(1) (a) or section 38(3), of other contributions unpaid at the date of the service of the summons upon the defendant, in respect of other employees, in the form of a certificate under the hand of the Chief Executive Officer or of any officer, servant or agent of the Board authorised in writing for the purpose by the Chief Executive Officer and, if the defendant is convicted of such offence, the court by which he or she is so convicted shall, without prejudice to any right under the provisions of section 108(1), order the defendant to pay to the Fund the amount of such unpaid contributions, together with any contribution unpaid at the date of trial in respect of the charge upon which the defendant has been convicted, and the provisions of the Crimes Act 2009 shall apply to any such contributions or any portion thereof so ordered to be paid.*

11. The appellant was charged under section 37 (1) (a) of the Fiji National Provident Act and a notice was issued and served by the Fund in respect of the unpaid contributions for the other employees. The orders by the learned Magistrate are specific to the charged offences and by virtue of section 108A notice for unpaid contributions owed to other employees. The Constitutional provisions mentioned by counsel do not apply since the appellant was not charged for the unpaid contributions in the sum of \$24,971.90. Section 14 (2) (a) and (b) of the Constitution is a protection for accused persons post charge. The appellant admitted his liability and offered to pay as well.

12. There is no error made by the learned Magistrate and this ground of appeal is dismissed as frivolous.

APPEAL AGAINST SENTENCE

13. That the appellant's appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.
- a) *That the Learned Trial Magistrate erred in law and in fact by failing to take into consideration the physical health of the appellant.*
 - b) *That the Learned Trial Magistrate erred in law and in fact by failing to carry out the means test for the appellant.*
 - c) *That the learned Trial Magistrate erred in law and in fact to establish that the appellant is no longer responsible for running the operations of Nadi General Transport.*
 - d) *That the Learned Trial Magistrate erred in law and in fact by failing to establish that the company Nadi General Transport has other beneficiaries apart from the appellant and that the appellant is not the only Director.*

LAW

14. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

15. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

16. The appellant’s counsel submitted that the sentence was harsh and excessive since the appellant’s physical health was not taken into account and that no means test was carried out by the learned Magistrate.
17. In his mitigation the appellant stated that he is employed and he earns \$300.00 weekly although he mentioned that he was being looked after by two employees, however, he did not elaborate but said that he employed them. I am sure if the appellant was of ill health he would have made this known to the learned Magistrate and he would have produced some evidence to support this. Raising an argument of ill health at this stage of the appeal is of no assistance to the appellant.

18. Furthermore, there was no need for any means test to be done since the appellant had informed the court that he earned \$300.00 weekly and had offered to pay \$300.00 monthly.
19. There is no need to address grounds (c) and (d) above since they are not relevant to the sentence. All the grounds of appeal against sentence are dismissed due to lack of merits.

ORDERS

1. The appeal against conviction is dismissed as frivolous;
2. The appeal against sentence/ orders are dismissed due to lack of merits;
3. The conviction, sentence/orders of the Magistrate's Court are affirmed;
4. The appellant is to pay the respondent costs of this appeal summarily assessed at \$500.00;
5. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka
11 August, 2023

Solicitors

Messrs Iqbal Khan & Associates for the Appellant.

Manager Legal, FNPF Legal Services for the Respondent.