IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HACDA 004 OF 2024S

BETWEEN: **KAUTANAGAUNA SEAQAQA RAIQEU** **APPELLANT**

A N D: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ["FICAC"]** **RESPONDENT**

Counsel: Mr. S. Komaisavai for Appellant
Ms. L. More for Respondent

Date of Hearing: 05th February 2025

Date of Judgment: 14th May 2025

J U D G M E N T

1. The Appellant had been charged in the Magistrate's Court in Suva, along with two others, with one count of Conspiracy to Defraud, Causing A Loss; contrary to Section 328 (1) of the Crimes Act, and eleven counts of General Dishonesty - Causing A Loss; contrary to Section 324 (1) of the Crimes Act. Following the hearing of this matter, the Learned Magistrate, in his judgment dated 18th of April 2024, found the three Accused, including the Appellant in

this appeal, guilty of the offences with which they were charged. On the 7th of July 2024, the Learned Magistrate sentenced the Appellant to five years of imprisonment and did not impose any non-parole period. Aggrieved by the conviction, the Appellant filed this appeal on the following grounds.

GROUND 1

That the Learned Magistrate who presided over this matter erred in law and in fact when he failed to comply with an Order of the High Court to prioritize this matter so that it was not concluded within 12 months, thereby prejudicing the Appellant's constitutional right to a fair and speedy trial.

GROUND 6

That the Learned Magistrate erred in law and in fact when he did not give proper weight nor warned himself that if a FICAC witness was an accomplice that it must corroborate that evidence and that it was not safe to convict a person on uncorroborated testimony as evidenced by Ulamila Raikoti (PW3)

GROUND 7

That the Learned Magistrate erred in law and in fact when he did not give proper weight to the testimony of Ulamila Raikoti (PW3) that the Appellant had no involvement in the case let alone corroborating it.

GROUND 8

That the Learned Magistrate erred in law and in fact when he did not give proper weight to the written Mitigation of the Appellant in as far as the conflicting testimonies of Ulamila Raikoti (PW3) which was clearly discredited by another FICAC witness Apolonia Vaivai (PW13) giving rise to an unfair trial as FICAC had not discharged its duty to the requisite criminal standard of beyond all reasonable doubt.

GROUND 9

That the Learned Magistrate erred in law and in fact when he did not give proper weight that doubt had arisen or had been created owing to the laxity in the use of the computer portals by Post Fiji staff during its peak periods of operation.

GROUND 10

That the Learned Magistrate erred in law and in fact when he did not direct/warn FICAC to give proper weight to the issue of bogus TMO's created from Suva could be any party, owing to no production in Court of any forensic proof of the Appellant's electronic finger prints, password or otherwise.

GROUND 11

That the Learned Magistrate erred in law and in fact when he did not give proper weight to the issue of discovery with real time CCRTV cameras and official attendance log entries, to confirm that the raising of the bogus TMO's from Fiji Post outstations around Fiji exactly matched the Appellant's criminal activity at his work station in Suva.

GROUND 12

That the Learned Magistrate erred in law and fact when he did not give proper weight and direction to FICAC to make an objective assessment that the Appellant may have been an unwitting pawn in a grand scheme by perpetrated by other unscrupulous individuals within Post Fiji in Suva. This has happened before during Ratu Mara's first tenure as Prime Minister.

GROUND 13

That the Learned Magistrate erred in law and in fact when he did not give proper weight and caution to the issue that FICAC investigators might have deliberately withheld vital information from the Defense on the much published crash of the Point of Sale [POS] Program in 2010, Fiji Post chair Colonel Naivalurua, implemented this software when it was only 60% operational. This led to Tellers creating their

own TMO payments which raises doubt on FICAC's claims as to the Appellant's real role in the matter.

GROUND 14

That the Learned Magistrate erred in law and fact when he did not give proper weight to the fact that FICAC investigators had deliberately withheld vital information from the Defense that the crash alluded to above caused the literal stop of the "pay in and pay out" of monetary transactions affording Tellers an open season of sorts at the expense of the Appellant to do their own TMO's.

2. Having carefully considered the grounds of appeal, it is convenient to summarize the main grievances of the grounds of appeal against the conviction as follows:

   i) The delay following the ruling dated 12th of April 2021 delivered by Wimalasena J, directing the Learned Magistrate to conclude the hearing within a year from the date of the said ruling,

   ii) The Learned Magistrate erroneously considered the evidence of the third Prosecution witness, who was an accomplice,

   iii) The Respondent failed to properly investigate and present evidence regarding the Fiji Post's "point of sale" system.

The Delay

3. The Appellant, along with two others, was charged in the Magistrate's Court on the 27th of March 2013. However, the matter proceeded at a snail's pace without reaching a hearing. Hence, the Appellant made an application in the High Court on the 2nd of July 2020, seeking an order to stay the proceedings in the Magistrate's Court. Wimalasena J in the High Court, having heard the application, ruled on the 12th of April 2021, refusing to grant an order to

stay proceedings but directed the Learned Magistrates to conclude the hearing within 12 months of the order.

4. Unfortunately, the Learned Magistrate did not conclude the hearing within a year of Wimalasena J's ruling; instead, he began the hearing on the 11th of May 2022 and concluded it on the 27th of May 2022. As outlined above, the judgment was delivered on the 18th of April 2024, and the sentence was pronounced on the 7th of July 2024.

5. Having comparatively reviewed the approaches of the jurisdictions of New Zealand, Canada, England, and the European Court of Human Rights, the Fiji Court of Appeal in **Mohammed Sharif Sahim v State (Misc Action No 17 of 2007)** found that the governing principle in an application to stay of proceedings is always to consider whether an Accused person can be tried fairly without any impairment in the conduct of his defence. If the Court reaches an affirmative conclusion, the Prosecution should not be stayed solely on the grounds of unreasonable delay. The Fiji Court of Appeal held that:

> *"In an earlier decision of this court, of Seru and Stephens, prejudice was presumed because of the length of delay and the history of the case. What the court did not address was the availability of alternative remedies in the absence of proof of actual prejudice.*
>
> *The correct approach of the court must therefore be two pronged. Firstly, is there unreasonable delay and a breach of Section 29 (3) of the Constitution? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the*

proportionate reduction of sentence or in the imposition of a non-custodial sentence."

6. The Fiji Court of Appeal in **Mohammed Sharif Sahim (supra)** asserted that the above-stated approach would preserve the rights stipulated under Section 29 (3) of the Constitution (Presently Section 15 (3) of the Constitution of 2013) without taking the excessive and exorbitant step of terminating the proceedings in criminal actions.

7. The Supreme Court of Fiji in **Nalawa v State (2010) FJSC 2; CAV0002.2009** (13 August 2010) upheld the approach enunciated in Mohammed Sharif (supra) and found that:

> *"That right has been expressed in numerous cases at Common Law and the following principles may now be stated as basic to the Common Law;*
>
> i) *Even where delay is unjustifiable a permanent stay is the exception and not the rule,*
> ii) *Where there is no fault on the part of the prosecution, very rarely will a stay be granted,*
> iii) *No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held, and*
> iv) *On the issue of prejudice, the trial court has processes which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay,"*

8. In his ruling, Wimalasena J considered the delay and its impact on conducting a fair trial relating to the period between the 27th of March 2013 and the 2nd of July 2020. His Lordship then found that the delay had not affected the conduct of a fair trial and rejected the application for a stay of the proceedings. This Court has no jurisdiction to determine the correctness of Wimalasena J's ruling. Therefore, the issue of delay is limited insofar as it relates to the delay caused after Wimalasena J's ruling.

9. Appraising the above-outlined judicial precedents relating to the law on "stay proceedings," the Applicant has not provided any material facts or evidence to establish that this alleged delay had affected his right to a fair trial in the Magistrate's Court. Hence, I find no merit in this ground of appeal.

Evidence of Accomplice Witness.

10. The Appellant argues that the third Prosecution witness was an accomplice witness. According to the third Prosecution witness's testimony, the Appellant requested her to go to Fiji Post to collect the money from TMO. She worked at Foneology, and the Appellant was an acquaintance, as he was a customer. The third witness went to Fiji Post and received money from either the first Accused or the third Accused. She later handed over that money to the Appellant or the first Accused.

11. The Supreme Court of Fiji, in **Singh v The State [2006] FJSC 18; CAV0007U.2005S** (19 October 2006), outlined the accomplice warning, where Fatiaki CJ observed:

> *[27] The common law requires trial judges to warn of the dangers of convicting on evidence that is potentially unreliable. Generally the law endeavours to avoid inflexible rules and leaves it to judges to sum up in the manner best suited to the facts of the particular case. In general, judges should be free to tailor a summing up to the exigencies of the case: Carr v R [1988] HCA 47; (1988) 165 CLR 314 at 318 – 319.*
>
> *[28] There are, however, categories of cases that require departure from that general rule. One of these categories is "where the evidence suffers from some intrinsic lack of reliability going beyond the mere credibility of a witness": Carr at 319.*
>
> *[29] An accomplice, or a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the prosecution, is*

accepted as falling within this description: Jenkins v R. [2004] HCA 57; (2004) 211 ALR 116 at 121 –122. The law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated. The reason for this rule was explained by the High Court of Australia in Jenkins at 123 [30] as follows:

"The rule exists for a reason. That reason is related to the potential unreliability of accomplices, an unreliability thought to be so well known in the experience of courts that judges are required, not merely to point it out to jurors, but to tell them that it would be dangerous to convict upon the evidence of an accomplice unless it is corroborated. The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimize the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by reference to a need to a need to look for corroboration."

[30] The High Court went on to say at 124 [32]:

"Although the common law rule about accomplice warnings is a rule of law, and although (subject to the proviso) in the ordinary case the requirement for a warning does not depend upon a request being made by trial counsel, the rule is not so mechanical as to call for a warning in any case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case. The application of the rule must be related to its purpose, and will require a consideration of the issues as they have emerged from the way in which the case has been conducted".

12. The Learned Magistrate in paragraphs 58 and 59 of the Judgment has appropriately considered the care warning when examining the evidence of an accomplice. He has adequately acknowledged the risk of convicting based solely on an accomplice's evidence unless it is corroborated by additional proof.

13. The Appellant failed to provide any reasons demonstrating that the conclusion of the Learned Magistrate was unreasonable or inconsistent with the evidence presented before him. Given the reasons outlined, I find that this ground has no merit.

Point of Sale System

14. In his submissions, the Appellant argued that the Prosecution failed to properly investigate and present evidence regarding the crash of one system, referred to as the "point of sale system," used in Fiji Post.

15. Lord Hope in **R v Brown (1998) A.C. 367, p377) h**eld that the Prosecution is not obliged to lead evidence that may undermine the Crown case, but fairness requires the disclosure of material in its possession that may undermine the Crown case to the Defence. The investigation process will also require an inquiry into material that may affect the credibility of potential Crown witnesses. Here again, the Prosecution is not obliged to lead evidence from witnesses who are likely to be perceived by the Judge or Jury as incredible or unreliable.

16. According to the record of the proceedings in the Magistrate's Court, the Appellant was granted his right to defend as stipulated under Section 14 (2) (d) of the Constitution, which states that;

> *"to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the*

services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right;"

17. The Appellant had initially obtained the assistance of the Legal Aid Commission but later decided to defend himself in person. Thus, the Appellant chose not to have legal assistance from a lawyer. Therefore, he is now estopped from claiming that he was prejudiced in conducting the hearing due to a lack of legal assistance. If the Appellant felt that he needed more disclosures, he would have requested the Prosecution under Section 290 of the Criminal Procedure Act to disclose information about the so-called "point of sale system" if the Prosecution was in possession of such materials.

18. In light of the reasons discussed above, I find no merit in this ground as well.

Appeal against the Sentence

19. The Appellant appealed against the Sentence on the following grounds:

GROUND 2

That the Learned Magistrate erred in law and in fact when he did not give proper weight to the personal circumstance of the Appellant who was a first offender, was not represented by Counsel, was of previous good behavior who had chosen to exercise his constitutional right to remain silent throughout his trial but had pleaded guilty in the first instance to his first count saving the Court's time and resources.

GROUND 3

That the Learned Magistrate erred in law and in fact when he did not give proper weight to the Appellant's long silence as not arrogance in giving his a non-parole sentence considering the Appellant's long trial of 11 years.

GROUND 4

The Learned Magistrate erred in law and in fact when he did not give proper weight to the objectives of the Sentencing and Penalties Decree 209 when sentencing the Appellant.

GROUND 5

The Learned Magistrate erred in law and in fact when he did not give proper weight in considering other methods of punishment available at law to assist the Appellant's rehabilitation who was a first offender and unrepresented making his sentence manifestly harsh, excessive and wrong in principle.

20. In an appeal against the sentence, the Appellate Court will examine whether the sentencing Magistrate erred in exercising his or her discretion. In doing so, the Appellate Court will consider the following factors:

i) Whether the sentencing Magistrate acted upon a wrong principle;
ii) Whether the sentencing Magistrate allowed extraneous or irrelevant matters to guide or affect him;
iii) Whether the sentencing Magistrate mistook the facts;
iv) Whether the sentencing Magistrate failed to take into account some relevant considerations.

21. Shameem J in **State v. Raymond Roberts (HAA 0053 of 2003 S)** discussed the applicable sentencing approach for the offences involving breach of trust, where Her Ladyship found that:

> *"The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust , the money stolen is high in value and the accused shows no remorse or attempt at reparation.*

However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim"

22. Furthermore, in **State v Simeti Cakau (HAA 125 of 2004S)**, Shameem J has further elaborated on the applicable sentencing approach for offences involving a breach of trust, where Her Ladyship found that:

"That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender's way out of prison, but as a measure of true remorse"

23. According to the sentencing approach discussed above, a suspended sentence may not be wrong in principle if the Accused is a first offender, pleads guilty, and has made full reparation, demonstrating genuine remorse. The sentencing Court must ensure that the reparation made by the offender is not merely an attempt to evade a custodial sentence. Thus, the primary consideration is not the reparation itself, but the offender's true and sincere remorse.

24. The offences in this matter involve a breach of trust. The Appellant did not plead guilty to these offences, nor did he make any reparation to demonstrate his true and sincere remorse. Based on the sentencing approaches outlined above, it was not open to the Learned Magistrate to impose a suspended sentence or any other alternative punishment as stated under the Sentencing and Penalties Act, even though the Appellant was a first offender. The Learned Magistrate rightfully decided not to impose any non-parole period, considering the delay in concluding the matter. Accordingly, I find no merit in any of the grounds raised by the Appellant against the Sentence.

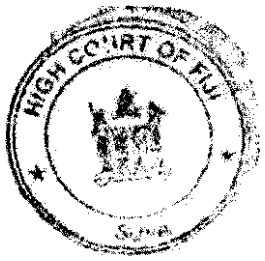
25. In conclusion, I make the following order:

a) Appeal against conviction is refused,

b) Appeal against sentence is refused,

c) Appeal is dismissed.

26. Thirty (30) days to appeal to the Fiji Court of Appeal.



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Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

14th May 2025

Solicitors.

Komai Law for Appellant.

Office of the Fiji Independent Commission Against Corruption for Respondent.