THE STATE

v.

LAUZIK MUKESH CHAND

[HIGH COURT, 1998 (Pain J) 14 May]

Appellate Jurisdiction

Sentence- forgery and uttering in connection with immigration application – whether discharge without conviction appropriate – Penal Code, Section 44.

The State appealed against a discharge without conviction imposed on a first offender who forged and uttered false academic qualifications when applying for immigration. Allowing the appeal and imposing a sentence of imprisonment in lieu, the High Court explained the limitations on the circumstances in which Section 44 of the Penal Code could be used and emphasised the seriousness of the offences which had been committed.

Cases cited:

Aminio Lagoia Seuvou v Reginam (Criminal Appeal No.88 of 1980)
Attorney-General's References Nos. 30 and 31 of 1992 (1993) 14 Cr. App. R (S) 386
Attorney-General's Reference No.4 of 1989 (1989) 11 Cr. App. R (S) 517
Attorney-General's Reference No.5 of 1989 (1989) 11 Cr. App. R (S) 489
Attorney-General's Reference No.6 of 1994 (Christopher Lee) (1995) 16 Cr App R (S) 343
Attorney-General's Reference No.65 of 1995 (Vernon Ferric) 1996 2 Cr App. R (S)209
Attorney-General's Reference No.39 of 1996, (Wayne Thomas Searle) 1997 1 Cr App R (S) 355
Attorney-General's Reference No.16 of 1992 (1993) 14 Cr App R(S) 319
Duffy v R (1994) 15 Cr App R (S) 677
Police v McCabe [1985] I NZLR 361
Police v Roberts [1991] 1NZLR 205
R v Kavanagh - Court of Criminal Appeal (England) 16th May 1972
R v O'Toole – (1971) 55 Cr App R 206
The State v Alipate Tamoa Mocevakaca (Criminal Review No.1 of 1990)

Appeal against sentence imposed in the Magistrates' Court.

J Naigulevu for Appellant
M S Sahu Khan for Respondent

Pain J:

A This is an appeal by the State against a conditional discharge of the Respondent in the Magistrates' Court on charges of forgery, uttering forged documents and attempting to obtain property on forged documents.

FACTS

On 23rd November 1994 the Respondent lodged an application with the
B Australian Embassy in Suva for permanent residence in Australia. With that application he enclosed photocopies of what purported to be his B.A. Degree certificate and his Academic Record from the University of the South Pacific. On 7th July 1995 the Australian Embassy wrote to the Respondent requesting the original documents and also sent copies of the documents to the University for verification. It was then discovered that the documents were forgeries. On
C 1st August 1995 the Respondent wrote to the Australian Embassy advising that he had submitted a document which was not correct and he could not produce the original degree copy from the USP. On 14th February 1996 the University reported the matter to the Police. The Respondent was then in New Zealand. He had applied for permanent residence in New Zealand. By letter dated 20th November 1996 sent to him at an address in New Zealand, he was
D advised by The New Zealand Immigration Service that his application had been agreed in principle. The Respondent was arrested by the Police on his return to Fiji on 3rd December 1996. He was interviewed and completely denied the allegations.

On 12th December 1996, the accused was charged in the Magistrates' Court
E with 6 offences being 3 offences in respect of each forged document. These charges were forgery of the USP degree certificate, uttering the forged degree certificate to the Australian Embassy, attempting to obtain a migration visa on the forged degree certificate, forgery of the USP Academic record, uttering the forged academic record to the Australian Embassy and attempting to obtain a migration visa on the forged academic record.

F On 18th December 1996 the Respondent pleaded guilty to all six charges. He admitted the facts and the Court was advised that he was a first offender. Counsel then made submissions in mitigation. He advised that the Respondent was a professional accountant, aged 31 years and married with two children. Details were given of his record from 1985 to 1989 in Professional Examinations in Accountancy conducted by the New Zealand Society of
G Accountants. Certificates were produced of his provisional membership of the New Zealand Society of Accountants in 1991 and his admission as a chartered accountant of the Fiji Institute of Accountants in 1993. Counsel submitted that the Respondent had come to be influenced by a person and was told by virtue of his existing certificates he is entitled to a certificate from USP. Counsel described the offending as an act of desperation to emigrate to Australia. The Respondent had withdrawn the application and made application permanent residence in New Zealand which had been approved in

principle. He had employment in New Zealand. He had pleaded guilty to all charges and was sorry and remorseful. Counsel submitted that the offending had not affected anybody and a discharge without conviction was appropriate.

The learned Magistrate then adjourned the case to 3rd January 1997 for sentence. On that date he delivered a prepared decision in which he first set out the police summary of facts and the points raised by counsel in mitigation. The learned Magistrate said that in reaching his decision he was guided by the statements of Fatiaki J. in The State v Alipate Tanoa Mocevakaca (Criminal Review No.1 of 1990) and cited extracts from that decision. He then noted that the Respondent was a first offender, remorseful, had apologized, had qualified for permanent residence in New Zealand and had a good job offer. He also said that a conviction would almost certainly have a destructive effect on young man's future prospects in New Zealand. Finally, the learned Magistrate said that the facts of the case were peculiar. He took into account Fatiaki J's guidelines and Mr. Raza's mitigation that a conviction against the accused ought not to be entered. He discharged the accused without conviction on all counts on conditions that the accused not re-offend within 12 months and that he pay $100 court costs.

APPEAL

The State appeals upon three grounds namely:

1. The sentence was wrong in principle. Having regard to the serious nature of the offence and sentences imposed in other cases a discharge under Section 44 of the Penal Code was not appropriate.

2. The learned Magistrate took into account wrong considerations. The remarks of Fatiaki J. in The State v Mocevakaca (supra) were not applicable to this case.

3. The sentence was manifestly lenient for this particular offending.

Counsel for the Appellant elaborated upon these grounds. He emphasized the nature of the offending which he submitted amounted to serious fraud and deception. Such offending would normally attract a custodial sentence and several illustrative cases were cited. It was submitted that a discharge was wrong in principle and was manifestly lenient for such deliberate and serious fraud offending. Counsel also argued that unwarranted emphasis was given to the matters raised in mitigation. He also analysed the decision of Fatiaki J. in The State v Mocevakaca (supra) and submitted that it was inappropriate to the present case and had been wrongly taken into consideration by the learned Magistrate.

Counsel for the Respondent submitted that the appeal against sentence is misconceived. The Respondent was not convicted and not sentenced. He was

discharged without conviction. In terms of sections 308 and 309 of the Criminal Procedure Code there can be no appeal. Counsel also submitted that, as there was no challenge in the Magistrates' Court to the defence application for a discharge, it is now too late for the State to do so. Counsel also relied upon an Australian article: "Dismissal of Crown Appeals Despite Inadequacy of Sentence" by Fiori Rinaldi (1983 7 Crim L J 306). He quoted extensively from this article placing special emphasis on the references to a basic concept of fairness to be considered by the Court on an appeal for enhancement of a lenient sentence. He also referred to passages in the article indicating that an appellate court will not interfere with a lenient sentence given to a first offender. Finally, it was submitted that the learned Magistrate took into account appropriate matters and did not err in law in exercising his power to discharge the Respondent under Section 44 of the Penal Code.

PRELIMINARY ISSUES

There are three issues that need to be dealt with before the merits of the appeal are considered.

The first is the Respondent's submission that the State does not have a right of appeal under Sections 308 and 309 of the Criminal Procedure Code against the conditional discharge in this case. Reliance is first placed on Section 309(1) which states:

> "309(1) - No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a Magistrates' Court, except as to the extent or legality of the sentence"

This Section is, at least primarily, directed to an appeal by the defendant and not the State. Nevertheless, the Section only precludes an appeal where the defendant has pleaded guilty and has been convicted. In this case, following the plea of guilty a submission was made on behalf of the Respondent that he be discharged pursuant to Section 44 of the Penal Code. That Section can be applied with or without proceeding to conviction. In his decision the learned Magistrate said that this was a case where a conviction against the accused ought not to be entered. On this basis an appeal is not precluded by Section 309(1) of the Criminal Procedure Code because the express provision that the Defendant has been convicted does not apply. Moreover, if Section 309(1) does apply, it contains an exception for an appeal as to the extent or legality of the sentence. For the reasons I will shortly give I am satisfied that this is an appeal against sentence. It is the accepted practice in this Court that Section 309(1) allows an appeal against sentence following a plea of guilty.

The Respondent next relied upon the provisions of Section 309(2) of the Criminal Procedure Code which states:

> "309 (2) - Save with the leave of the High Court, no appeal shall be allowed in a case in which a Magistrates' Court has

> passed sentence of a fine not exceeding $10 only, notwithstanding that a sentence of imprisonment has been passed by such court in default of payment of such fine, if no substantive sentence of imprisonment has also been passed". (emphasis added)

It is submitted that no appeal lies because the sentence is not a fine of over $10. However, this is not what the Section says. The Section precludes an appeal where a fine not exceeding $10 has been imposed. It specifically relates to situation where a fine has been imposed and that fine does not exceed $10. A reading of the Section (particularly the parts underlined above) makes this quite clear. The Section does not apply in this case because the Magistrates Court has not passed a sentence of a fine not exceeding $10. The Respondent was discharged. No fine was imposed.

The Respondent next relied upon Section 309(3) of the Criminal Procedure Code which states:

> "309 (3) - No conviction or sentence, which would not otherwise be liable to appeal, shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace".

It is submitted that if an order to find security to keep the peace is not appealable then *a fortiori* a discharge is not appealable. However, this is again a specific statutory provision. It applies to a conviction or sentence that is not otherwise appealable and provides that it shall not be appealable merely on the ground that security to keep the peace is imposed. It has no application in the present case. For reasons I will shortly give, this sentence of a discharge is liable to appeal and the Respondent was not ordered to find security to keep the peace.

Finally, the Respondent relied upon Section 308(1) of the Criminal Procedure Code which states:

> "308(1) - Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a Magistrates' Court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order."

It is submitted that the appeal against sentence in this case is misconceived because a discharge under Section 44 of the Penal Code is not a sentence. I agree that technically a discharge under Section 44 is an order. The section says that the Court may make an order discharging the defendant. If it were technically necessary for the appeal to be against the order of discharge I would grant the Appellant leave to amend accordingly. However, that is not necessary. In my view the word "sentence" in Section 308(1) is used in the sense of being the definitive pronouncement by the Court in respect of a defendant who has pleaded guilty to or being found guilty of a criminal charge.

That final disposition of the case is not restricted to such common sentences as imprisonment or a fine. It extends to any other disposition of the case including, for example, an order for security for keeping the peace (Section 41 Penal Code) an order for discharge (Section 44 Penal Code) and an order to pay compensation (Section 160(2) Criminal Procedure Code). Such orders are generally recognized and accepted as the sentence imposed upon the defendant.

They are appealable as a sentence under Section 308(1) of the Criminal Procedure Code.

The second issue is the submission of Counsel for the Respondent that the State cannot appeal the Section 44 discharge because it was not challenged in the Magistrates' Court. The Respondent relies upon passages on pages 306, 330 and 331 of the article "Dismissal of Crown Appeals Despite Inadequacy of Sentence" (supra). In particular at page 330 it is said:

> "Should Crown Counsel neglect his duty at trial an appeal court might remind him at the hearing of the appeal that it is too late in the day to put submissions which were available but not drawn to the judge's attention at trial."

However the author points out that the role of Crown Counsel in Australia is quite different from that in other jurisdictions such as England where the Crown takes no interest at all in the sentencing stage of a trial. Fiji has traditionally followed English practice although there have been developments in both jurisdictions since the article was published in 1983. In this Court, State counsel are now invited to address on sentence. However, no such general practice has developed in the Magistrates' Courts.

Moreover, it is clear that the author of the article is referring to appeals heard in a Court of Criminal Appeal from cases prosecuted by Crown Counsel in courts presided over by judges. I consider that the principle now being advanced by the Respondent is not appropriate for appeals from the Magistrates' Court to this Court. It is contrary to practice and quite inappropriate to expect Police Prosecutors in Fiji to make detailed submissions on sentence in the Magistrates' Court. In this case the failure of the Police Prosecutor to challenge the submission by counsel for the defence that a discharge was appropriate is no bar to the State appeal against that sentence.

The third issue is whether the learned Magistrate was correct in applying the decision in The State v Mocevakaca (supra) to the facts and circumstances of this case. Having read the decision, I am satisfied that Fatiaki J. was not purporting to lay down general sentencing principles to be applied in all cases. The single issue in that case was whether a sentence of imprisonment was appropriate for the particular young first offender on a charge of rape. In this present case the learned Magistrate quoted passages from page 3 of the decision which are expressed in general terms. However, each relates to young first

offenders (a term used 5 times on page 3 of the decision) and the desirability of keeping them out of prison. Fatiaki J. noted that the defendant was a 19 year old secondary school pupil, the social welfare report spoke highly of him and recommended probation, the offence was committed on the spur of the moment, the families of the defendant and the victim had reconciled in the traditional way and the victim (who spoke at the review hearing) had forgiven the defendant. The learned Judge exercised his revisional powers by substituting a good behaviour bond for the sentence of imprisonment.

A

In my view the decision in The State v Mocevakaca does not set out general guidelines for sentencing. The remarks of the learned Judge were directed to a specific issue, namely, the desirability of keeping young first offenders out of jail. They should be considered within that context. They have little, if any, relevance to the sentencing of the 31 year old married man on forgery charges in the present case. The only real common ground is that they are both first offenders who pleaded guilty. In applying the remarks of Fatiaki J. as a guideline the learned Magistrate did err in principle.

B

C

DECISION

Section 308(1) of the Criminal Procedure Code gives the State (as a party) an equal right with the accused person to appeal against a sentence imposed in the Magistrates Court. The approach that has been adopted by this Court to sentence appeals by both parties is basically the same. A sentence will not be altered unless it is either manifestly excessive or manifestly lenient or is wrong in principle.

D

In England, Section 36 of the Criminal Justice Act 1988 provides that, if the Attorney-General considers that the sentencing of a person in the Crown Court has been unduly lenient, he may refer the case to the Court of Appeal for review of the sentence. The Court of Appeal has held that it is implicit in the section that this Court may only increase sentences which it concludes were unduly lenient". (Attorney-General's Reference No.4 of 1989 (1989) 11 Cr App R (S) 49). In the present context I consider that there is no significant difference in meaning between the adverbs "unduly" and "manifestly". The decisions of the Court of Appeal (England) provide a very helpful guide for the determination by this Court of State appeals against sentence under Section 308(1) of the Criminal Procedure Code. For example, the proper approach to such appeals was expressed by Lord Taylor C.J. in Attorney-General's References Nos. 30 and 31 of 1992 (1993) 14 Cr. App. R (S) 386 at page 389:

E

F

G

> "We take the view that the sentences passed by the learned Judge were manifestly too low. We bear in mind the principles which have been stated many times to be applied by this Court on an Attorney- General's reference. This Court will not interfere with a sentence merely because it is somewhat lenient, or because it is more lenient than the sentence this Court might

> have passed were it sitting at first instance. The Court will only interfere where the sentence is unduly lenient, that is to say outside the bracket of sentences which a judge could reasonably impose on the facts presented before him".

A similar test was earlier stated by Lord Lane C.J. in Attorney-General's Reference NO.4 of 1989 (1989) 11 Cr. App. R (S) 517 and he also said in Attorney-General's Reference No.5 of 1989 (1989) 11 Cr. App. R (S) 489:

> "Before this Court grants an application of this sort by the Attorney-General, it must be shown that there was some error in principle in the judge's sentence. It must be shown that in the absence of the sentence being altered by this Court public confidence would be damaged".

I have read the extracts from the 1983 Australian article "*Dismissal of Crown Appeals Despite Inadequacy of Sentence*" (supra) supplied by counsel for the Respondent. They are not particularly apposite to this jurisdiction or this particular appeal. The article deals with the interpretation and application by Courts of Criminal Appeal in Australia of State legislation providing for Crown appeals. This legislation appears to impose a requirement on the appellate Court, when it considers a sentence to be manifestly lenient, to nevertheless consider whether a different sentence ought to be imposed. It does not do so if the proper sentence would then result in an unfair punishment. The article gives 5 general categories under which the Australian Courts have refused to disturb lenient sentences on this basis of fairness.

These are:

1. Where there has been delay, particularly if the offender has complied with the term of a non-custodial sentence;
2. Where an unappealed sentence imposed on a co-offender is seen to create a penalty ceiling;
3. Infringement of the "totality" principle;
4. Where the inadequate sentence is seen to have a significant prospect of rehabilitating the offender;
5. Where imposition of the inadequate sentence was contributed to by lack of challenge by the Crown in the lower Court.

In considering this Article and the author's comments, it must be remembered that the decisions appear to be based on a statutory requirement that is not present in the appeal provisions contained in Part X of the Criminal Procedure Code.

Counsel for the Respondent made submissions in respect of categories 1,4 and 5. I have already said that the requirement in category 5 for the prosecution to challenge a particular sentence is inappropriate on State appeals from the Magistrates' Court to the High Court in this country. The particular matters

raised by counsel in respect of categories 1 and 4, so far as they are relevant to this appeal, will be dealt with in the course of this decision.

In considering the adequacy of the sentence in this case the Court must have particular regard to the nature of the offending, the mitigating factors, the principles for granting a discharge and the reasons of the learned Magistrate.

The legislature has clearly taken a stern view of this type of offending. The maximum sentences prescribed for offences of forgery, uttering forged documents and attempting to obtain property on forged documents are respectively 7 years, 7 years and 14 years imprisonment. The actual offences committed by the Respondent were particularly serious. They amounted to premeditated and deliberate fraud perpetrated for his own benefit. The crime of forgery may encompass a wide range of culpability. However the compilation of totally false documents purporting to be a copy of a university academic report for passes in courses that the Respondent had never taken at the University and a copy of a degree certificate that he had never obtained is very serious criminality. The Respondent compounded his criminality by having a Justice of the Peace certify the forged documents to be true copies of the originals. Furthermore, the further offending by uttering those fabricated documents to the Australian Embassy with the fraudulent intent of using them to support an application for a migration visa is particularly grave. The need for, and expectation of, complete honesty on the part of applicants is manifest. There is no merit in the submission that this was just a stupid and foolish act by the Respondent. It was a deliberate fraud upon the representatives of a foreign government.

The decisions submitted by counsel for the appellant indicate that a sentence of imprisonment is appropriate for cases involving serious fraud. For instance, in Aminio Lagoia Seuvou v Reginam (Criminal Appeal No.88 of 1980) this court confirmed a sentence of 9 months imprisonment on six counts of forgery and two counts of uttering. This related to a single transaction in which the offender, by altering figures in his bank passbook, made a rather clumsy attempt at defrauding the bank, by endeavouring to make an unauthorized withdrawal of $3000. The learned Chief Justice said:-

> "A deterrent sentence was clearly called for. Fraud as a crime is always viewed with much gravity by the courts. By its nature the crime implies cunning and deliberateness on the part of the offender. I have no doubt therefore that when Appellant engaged in it he fully appreciated the seriousness and iniquity of his criminal act."

Those comments are particularly applicable to this case.

Usually, offences of forgery and uttering are committed for financial gain. However, the absence of any immediate financial advantage does not affect the Respondent's culpability in this case. The Respondent perpetrated the

fraud in an effort to obtain permanent residence in Australia. That is viewed as something of considerable value in the community.

A I have already outlined the mitigating factors advanced on behalf of the Respondents. Those of particular significance are that the accused is a first offender who pleaded guilty to all charges. He was aged 31 and married with two children at the date of sentence. Since the commission of the offence he has been admitted to the Fiji Institute of Accountants as a Chartered Accountant. He never had a university degree, as he fraudulently represented. B However, he had passed 20 papers for the Professional Examination in Accountancy in New Zealand which entitled him to provisional membership of the New Zealand Society of Accountants. That may have been a sufficient equivalent for immigration purposes as the Respondent has since had an application for residence in New Zealand approved in principle. He has also obtained employment in New Zealand. A conviction would naturally affect C the prospects of him and his family obtaining final approval for permanent residence in New Zealand. The New Zealand Immigration Service has deferred a decision pending the outcome of this appeal.

These are strong mitigating factors but they must be balanced against the gravity of the offending. I have already mentioned the serious nature of this D particular offending and the sentences normally imposed for serious fraud.

In discharging the Respondent without conviction the learned Magistrate was required to exercise a discretion under Section 44 of the Penal Code. In terms of the section the Court must, having regard to the circumstances including the nature of the offence and the character of the offender be of the opinion E that "it is inexpedient to inflict punishment". A discharge is the most lenient sentence that can be imposed for an offence. Indeed it is recognized by the wording of the section as being no punishment at all. Even a conditional discharge only requires that the offender commits no offence during a stipulated period - something that should not be a burden as it is what a responsible citizen is expected to do. A discharge is sparingly given. The discretion should F be exercised with great care and only in "very exceptional circumstances" (Police v McCabe [1985] 1 NZLR 361). It is, for example, appropriate in such cases as where the offence is trivial or only technical (R v Kavanagh - Court of Criminal Appeal (England) 16thMay 1972), where the accused is morally blameless (R v O'Toole – (1971) 55 Cr App R 206) or where the accused has suffered in a manner that is wholly disproportionate to the offence G committed (R v Kavanagh (Supra) and Police v Roberts [1991] 1NZLR205).

In his reasons for sentence the learned Magistrate drew heavily upon the decision of Fatiaki J. in State v Mocevakaca (supra) and cited five separate extracts. He expressed the view that a conviction would almost certainly have a destructive effect on this young man's future prospects in New Zealand and concluded by saying:-

"This court will show mercy in deserving cases. The facts of

> this case are peculiar. In my view taking into account Fatiaki J's guideline above and Mr. Raza's mitigation, this case is one where a conviction against the accused ought not to be entered."

A

In my view the learned Magistrate erred in principle in respect of the following matters:

1. By taking into account and applying sentencing principles that were irrelevant to the case. I have already given reasons why the decision of Fatiaki J in The State v Mocevakaca (supra) does not give guidelines of sentencing applicable to this case;

B

2. By failing to take into account the gravity of the fraud offences committed by the Respondent. This was not mentioned by the learned Magistrate in his sentencing remarks;

C

3. By failing to give proper consideration to the principles to be taken into account and applied for a discharge under Section 44 of the Penal Code.

D

In all the circumstances of the case, a conditional discharge is manifestly lenient for the offences committed by the Respondent. This was deliberate and well executed forgery of two bogus university certificates and uttering of them to the Australian Immigration Office for the purpose of obtaining a permanent residential visa. Not only is the offending serious but there are strong reasons of public interest to impose a salutary penalty. Public confidence would be eroded if the Courts allowed such offending to go unpunished. An element of deterence is necessary for the Respondent and others who might be minded to be dishonest in their dealings with immigration authorities. This is not an exceptional case to warrant a discharge and such a marked departure from the normal range of sentence.

E

F

In saying this, I do not overlook the mitigating circumstances and effect upon the Respondent and his family. However, a conviction and appropriate sentence must be imposed in all the circumstances of this case. An interesting comparison in this regard is the case of Duffy v R (1994) 15 Cr App R (S) 677. The appellant pleaded guilty to a charge of using a false instrument contrary to Section 3 of the Forgery and Counterfeiting Act 1991. This related to a form of consent to nomination for local government elections in the name of another person. This was forwarded to the Returning Officer by the appellant knowing that the witness had not been present when the nominee signed the form and that the address of the nominee on the form was not correct. This was accepted by the Court of Criminal Appeal as being essentially a technical offence which allowed nothing to be achieved that could not have been achieved by a genuine attestation and the insertion of [the nominee's] correct address. The appellant was aged 61, and a first

G

offender with excellent previous character. His contribution to the community and in political work over many years had earned him a great deal of respect. The Court decided that in view of the technical nature of the fraud and the "enormous amount of personal mitigation" the appellant's conduct could and should have been reflected in a substantial financial penalty (In the event, as the appellant had served one month of a six months prison sentence imposed in the Crown Court he was discharged without further penalty). In the present case the Respondent also has strong personal mitigation but his offending is far more serious. The deliberate forgery and uttering of academic records for his own gain is certainly not a technical offence. The offences call for a conviction and imposition of an appropriate penalty.

There is no reason why the unduly lenient sentence should not be enhanced in this case. This may affect the Respondent's prospects of migrating to New Zealand but this is a decision for the Immigration Authority of that country. This case is singularly relevant to immigration issues. It would be anomalous and wrong for this Court to confirm an unduly lenient sentence for fraud offences on the Immigration Authority of one country merely to enhance the prospects of the offender's migration to another country. Further the discharge was not, as submitted by counsel for the Respondent, a rehabilitative or curative sentence that should not be interfered with. The Respondent had not shown a criminal proclivity that was considered to be amenable to appropriate treatment or guidance within the community. Nor is delay an influencing factor on this issue. The only condition of discharge was that the Respondent not re-offend which should not be any imposition. He has not been required to undertake any community based activity or sentence, although, even the substantial completion of such a sentence does not prevent the Court from increasing an unduly lenient sentence. (See Attorney-General's Reference No.6 of 1994 (Christopher Lee) (1995) 16 Cr App R (S) 343). Indeed there are many reported decisions of the English Court of Criminal Appeal in which partially completed non-custodial sentences have been increased to a sentence of imprisonment upon reference by the Attorney-General. Two recent illustrative cases are Attorney-General's Reference No.65 of 1995 (Vernon Ferric) 1996 2 Cr App R (S)209 (a probation order varied to 21 months imprisonment) and Attorney-General's Reference No.39 of 1996, (Wayne Thomas Searle) (1997) 1 Cr App R (S) 355 (a community service order varied to 12 months imprisonment). Finally, and for completeness, I record that this is not an appropriate case for the Court to exercise any discretion it may have not to enhance an unduly lenient sentence nor to apply proviso (a) to Section 319(1) of the Criminal Procedure Code (if it applies to sentence appeals). The imposition of such an unduly lenient sentence for this offence has occasioned a substantial miscarriage of justice. Even on the broad grounds of fairness relied upon by the Respondent it is not unfair to enhance the sentence imposed for these serious offences.

In my view this offending by the Respondent warranted a sentence of not less than 12 months imprisonment at first instance. However, the Respondent is entitled to appropriate reduction for being a first offender who has pleaded

guilty and for the other mitigating factors. There are also further facts and circumstances that must be recognized.

There has been considerable delay. At the commencement of this decision I detailed the history of the case from the commission of the offences on the 23rd November 1994 until sentencing on the 3rd January 1997. The appeal was filed on the 7th January 1997 but the Respondent did not become aware of it until April 1997. The appeal was heard on 27th February 1998 but earlier fixtures for 11th September 1997 and 30th January 1998 were adjourned on the Respondent' s applications. Although the Respondent was responsible for some of this delay, it was not deliberate on his part. The fact is that, in practical terms, he is now to be sentenced for the offences 3 years and 5 months after they were committed and 1 year and 4 months after he was discharged in the Magistrates' Court. Also, for a period of three months he had every reason to believe that his discharge was the final determination of the case.

Compounding the recent delay will have been the anguish endured by the Respondent regarding the withholding of his New Zealand immigration visa (which paradoxically would give him entry into Australia as well).

An allied consideration is the aspect of "double jeopardy" that is recognized in State appeals against sentence. This was expressed by Lord Taylor C.J. in Attorney-General's Reference No.16 of 1992 (1993) 14 Cr App R(S) 319 as:

> "A further consideration ..... which this Court has to have in mind, is this, that where the Court has to consider whether to alter the sentence or not, it must have in mind that to vary a sentence which has become used to accepting as his deserts, to something more severe, is in itself a form of punishment. Some allowance needs to be made for the fact that the reference causes suspense and anxiety a second time for the offender whilst he is waiting to know the outcome".

Giving due allowance for the considerable personal mitigation, the delay and the double jeopardy aspect the term of imprisonment that ought now to be imposed upon the Respondent for these offences is six months.

However, in view of all the circumstances of this case including the considerable delay, the fact that the Respondent has fulfilled the conditions of the discharge given in the Magistrates' Court and the additional anxiety and anguish suffered by the Respondent and his family it would be harsh and unfair to now impose immediate imprisonment. A suspension of the term is justified for the minimum period.

Accordingly, I make the following orders:

1. The appeal by the State against sentence is allowed.

2. The conditional discharge imposed on the Respondent in the Magistrates Court in respect of two charges of forgery, two charges of uttering forged documents and two charges of attempting to obtain a migration visa on forged documents are quashed.

3. In substitution, on each charge, the Respondent is convicted and sentenced to 6 months concurrent imprisonment but an order is made pursuant to Section 29 of the Penal Code that the sentences shall not take effect unless during a period of one year the Respondent commits in Fiji another offence punishable with imprisonment.

(Appeal allowed: convictions entered, sentences of imprisonment imposed.)