

**IN THE COURT OF APPEAL
AT SUVA**

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0095 OF 2011

BETWEEN : **CHIRK KING YAM**

APPLICANT

AND : **THE STATE**

RESPONDENT

COUNSEL : **Mr. I. Khan for Applicant**
Ms. M. Fong for Respondent

Date of Hearing : **12 July 2013**

Date of Ruling : **26 July 2013**

RULING

- [1] The applicant was sentenced to 6 years' imprisonment after he pleaded guilty to 5 counts of fraud related offences in the High Court at Lautoka. The offences arose from theft of \$1.3 million dollars from Warwick Resort where the applicant was employed as the Financial Controller. This is an application for leave to appeal against sentence pursuant to section 21(c) of the Court of Appeal Act. The proposed grounds of appeal are:

1. That the learned trial judge erred in law and in fact when he passed a sentence which was wrong in principle and or manifestly harsh and excessive considering all the circumstances of the case including:
 - (i) The disparity of the sentence in principle to other like offending; and
 - (ii) The nature of the defense advanced and the absence of correct calculation of the time deducted for early plea; and
 - (iii) The proper analysis and reduction for mitigation.
2. That the learned trial judge erred in law and in fact when he passed sentence based upon wrong factual basis and on matters which had been improperly taken into account and/or took fresh matters into account which were not admitted to in the Information and in the Summary of Facts, thereby prejudicing the Appellant's right to have his sentence determined fairly.
3. That the learned trial judge failed to properly take into account the Appellant's guilty plea and therefore failed to discount the Appellant's sentence in accordance with law and such failure gave rise to the excessiveness and harshness of the sentence.
4. That the learned trial judge failed to give the Appellant an opportunity to be heard on the issue of non parole period and therefore prejudiced the right of the Appellant to respond to the manner of sentence meted by the trial court.

- [2] Sentencing is an exercise of judicial discretion. For an appellate court to disturb a sentence, the appellant must demonstrate that the sentencing court fell into error in exercising its sentencing discretion. In *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999), the Court of Appeal adopted the following principles at page 2:

If the trial 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 relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936) 55 CLR 499).

- [3] Since this was a breach of trust case by an employee, the learned judge quite properly directed his mind to the principles set out in the English case of *Barrick* 81Cr. App.R(S) 78. The learned judge also referred to the local case of *Anand Kumar Prasad and others* Criminal Case No. 24 of 2012, to determine the appropriate range of sentence. The applicant submits that the learned judge erred in referring to the case of *Prasad* because in that case, the offender was convicted after a trial, while in his case, he pleaded guilty. This submission is misconceived. Like the present case, *Prasad* was a systematic fraud case involving substantial amount of money committed by an employee, and therefore, was relevant in determining the range of sentence. As the Court said in *Kim Nam Bae* at page 4:

An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the High Court

and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence.

[4] It is clear from the sentencing remarks of the learned judge that he only referred to *Prasad* to identify the appropriate range of sentence. Otherwise, *Prasad* was of limited relevance and the applicant was sentenced on the facts relevant to his case.

[5] After concluding the tariff for systematic fraud by an employee was two to ten years' imprisonment, the learned judge picked 10 years as his starting point by incorporating the following aggravating factors:

- (i) It was a systematically, sophisticated fraud.
- (ii) It was executed over a long period of time.
- (iii) It was enormous breach of trust in his position as a valued member of management (Finance).
- (iv) It was a veiled assault on the tourist industry as a whole; it could have severely damaged a resort which is extremely popular with foreign tourists.

[6] The learned judge then reduced the sentence for the following mitigating factors at paragraph [18]:

The greatest mitigating feature in the accused's favour is his plea of guilty, although it is disputable whether it is a plea at first opportunity or not. Admittedly it was entered within days of the final draft of the information being issued, however Counsel for the State submits that although a draft, the offences charged were in effect the same as had been included on previous information, yet in

nicer form. Where the plea to be at first opportunity, a discount of 33% would be available to the accused and decreasing percentages would attach to more belated pleas. Although there is force to both sides of this “argument” it is a point which has to be balanced. The accused could have indicated a plea far earlier than he did, yet when the final draft of the information was produced he did one day later and after receiving legal advice, change his plea. In the circumstances, I allow the accused a 25% reduction for his plea of guilty which brings his sentence down to 90 months (7 ½ years). For his clear record, his remorse, the pathetic plight of his family, I deduct a further 18 months from the sentence, meaning that the total term of imprisonment he will serve will be a term of six years.

- [7] As can be seen from the above remarks, the learned judge fairly dealt with all the mitigating factors. I do not find any fault in the sentencing discretion of the learned judge in the manner he dealt with the guilty plea and other mitigating factors.

- [8] The arguable issues relate to grounds 2 and 4. The learned judge took into account as an aggravating factor the impact of the applicant’s crime on the tourism industry as a whole. The applicant submits that there was no factual basis for this aggravating factor as no evidence of impact was led by the State. Counsel for the State submits that the impact evidence may have been taken from the State’s submissions at the sentencing hearing. If that is so, then this may be a potential error because the applicant had not agreed to this fact.

- [9] The second arguable issue relates to the fixing of the non-parole period of 5 years. The applicant submits that since he was

unrepresented at the sentencing hearing, the learned judge should have given him an opportunity to be heard on the non-parole period. The applicant refers to section 18(2) of the Sentencing and Penalties Decree, which gives the sentencing judge discretion not to fix a non-parole period. The applicant says if he would have been given an opportunity to be heard, he would have persuaded the judge not to fix a non-parole period. Whether an unrepresented accused should be invited to make submissions before a non-parole period is fixed is an arguable point of law.

[10] Leave is granted to proceed with the appeal against sentence on grounds 2 and 4 only. Leave is refused on grounds 1 and 3.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Iqbal Khan & Associates for Applicant
Office of the Director of Public Prosecutions for Respondent.