

IN THE COURT OF APPEAL
[On Appeal from the High Court]

Criminal Appeal No. AAU0117 of 2014
[High Court Case No. HAC 195 of 2012]

BETWEEN : **MANOJ KHERA**
Appellant

AND : **THE STATE**
Respondent

Coram : Chandra JA
Fernando JA
Goundar JA

Counsel : Mr. I. Khan for the Appellant
Mr. M. Delaney for the Respondent

Date of Hearing : 25 May 2015

Date of Judgment : 18 January 2016

JUDGMENT

Chandra JA:

I have had the advantage of reading in draft form the judgment of Goundar JA and I agree with His Lordship's conclusions and reasons.

Fernando JA:

I have had the advantage of reading in draft form the judgment of Goundar JA and I agree with His Lordship's conclusions and reasons.

Goundar JA:

- [1] Following a trial in the High Court at Suva, the appellant was convicted on four counts of false pretences and one count of money laundering. He was sentenced to 2 years' imprisonment on each count of false pretences and 4 years' imprisonment on the one count of money laundering, to be served concurrently. The total sentence was 4 years' imprisonment with a non-parole period of 3 years effective from 3 October 2014.

- [2] At trial, the appellant was represented by counsel. On appeal, he engaged a different counsel. A timely application for leave to appeal against conviction and sentence was filed. An application for bail pending appeal was also filed.
- [3] On 29 December 2014, Calanchini P heard the applications for leave and bail. A written ruling was delivered on 27 February 2015. Leave was granted on one ground against conviction and on one ground against sentence. Bail was refused.
- [4] Thereafter, the appellant did not make any further application until 14 April 2014 when he wrote in person and complained about the delay in hearing of his appeal. The complaint was considered by the Resident Justice of Appeal and a direction was given to list the appeal for hearing on 14 May 2015.
- [5] On 1 May 2015, the Registry issued a Notice of Hearing to the parties. On the same day, counsel for the appellant filed a document titled 'Amended Notice of Appeal'. The Amended Notice of Appeal included fresh grounds; six against conviction and three against sentence. Counsel for the appellant informed this Court that he was unaware that this appeal had been listed for hearing on 14 May 2015 when he filed the Amended Notice of Appeal.
- [6] On 8 May 2015, counsel for the State wrote to the Registry indicating that the State may seek an adjournment due to the late filing of the Amended Notice of Appeal. By this date the appellant had not filed any submissions for the State to respond.
- [7] A day before the hearing, the appellant filed his written submissions. When counsel for the State appeared on 14 May 2015, he drew the Court's attention to Rule 37 of the Court of Appeal Rules and submitted that the appellant's Amended Notice of Appeal may be in breach of the Rule.

[8] Rule 37 states:

“A notice of appeal may be amended –

(a) By or with the leave of the Court of Appeal, at any time;

(b) Without such leave, by supplementary notice filed with the Registrar in quadruplicate and served, not less than 14 days before the opening day of the sitting of the Court of Appeal at which the appeal is listed to be heard, upon each of the parties upon whom the notice to be amended was served.”

[9] The opening day of the sitting of the Court was 5 May 2015. The Amended Notice of appeal was filed on 1 May 2015, that is, four days before the opening day of the sitting. Clearly, the appellant was required to obtain leave under Rule 37(1)(a) to amend his Notice of Appeal. Without leave, the amendment is a nullity. When this was relayed to counsel for the appellant, he withdrew his Amended Notice of Appeal and elected to proceed with the hearing of the appeal on the grounds on which leave was initially granted by Calanchini P. While the appellant was allowed to withdraw his Amended Notice Appeal, the hearing could not proceed because the State had not been given a reasonable opportunity to respond to the appellant’s late submissions. The Court allowed the State to file written submissions by 21 May 2015, and the hearing was set for 25 May 2015.

[10] The Court has received helpful submissions from both parties. The grounds of appeal are:

1. *That the Learned Trial Judge erred in law and in fact in admitting evidence of lay witnesses as opinion evidence particularly evidence of the purported signatures on vital documents which were fundamental to the prosecution case.*
2. *That the Sentence is wrong in principle, harsh and excessive in the circumstances of the case.*

Evidence led at trial

[11] When the allegations arose, the appellant was the owner of a registered private company named Shivam Import & Export Limited. The company was engaged in jewellery business and was registered for Value Added Tax (VAT) Return claim with Fiji Revenue and Customs Authority (FIRCA). VAT is borne by the consumers, and in this case, the customers who bought jewellery from the appellant's company. The tax, which at the time was 10% of the value of good, is added to the purchase price. So when the consumers buy the goods inclusive of VAT, the tax is collected by the company on behalf of the government and remitted to FIRCA by filing a VAT Return. When making a Return, the company is required to disclose the VAT charged by the company upon sale and the VAT that the company was charged when they purchased goods and services in the course of running the business.

[12] The prosecution case was that the appellant made four VAT Return claims in January, February, March and April 2004, respectively. The prosecution alleged that on each claim the appellant submitted false invoices on the VAT that his company was charged when the goods and services were purchased in the course of running the business. The purpose for providing false information was to inflate the VAT that the company was charged to an amount that was more than the actual VAT that the appellant's company charged the customers. This method resulted in refunds payable to the appellant as follows:

January 2004	-	\$9,611.82
February 2004	-	\$8,200.00
March 2004	-	\$11,800.00
April 2004	-	\$15,000.00
Total	-	\$44,611.82

[13] The refunds were paid into the appellant's personal bank account which he opened in 2003. An international ATM card was then used to withdraw the funds between 6 May and 8 July 2004. The account was closed in 2005. Evidence was led that the appellant was the only authorised person to operate or access this bank account. The money laundering

charge was based on the fact that the appellant directly engaged in proceeds of crime when he withdrew the funds from his bank account knowing that the money was derived from unlawful activities.

- [14] The appellant's case was that he had no knowledge of the Returns and the documents that were submitted to FIRCA on behalf of his company. He said in his caution interview that his cousin who was also his accountant filed the false Returns because of a personal grudge. He said the signature contained in the declaration section of the Returns was forged. He said his personal bank account was under the control of his cousin and that he did not withdraw the money as alleged.

Handwriting opinion evidence

- [15] The gist of the appellant's ground of appeal against conviction is that his trial miscarried when the trial judge permitted the prosecution to lead opinion evidence on the appellant's disputed signature from a witness, Laisa Bainimarama who was not a handwriting expert.
- [16] The general rule is that a witness is not permitted to express an opinion on a relevant matter unless the witness by his qualification or experience is an expert in the field or subject matter calling for an expert opinion.
- [17] Comparison of handwritings requires expertise. Assessors or judges for that matter do not possess that expertise. Hence, they are assisted by experts when they have to decide on a disputed handwriting. In other words, a court may rely on an expert's opinion to determine a relevant fact in issue.
- [18] However, it is not necessary to prove handwriting by an expert witness. A witness who is familiar with a person's handwriting through a regular correspondence or through having

frequently seen the person's handwriting is competent to testify as to the handwriting (Pitre v The King [1933] Can. S.C.R. 69 at 72).

- [19] The exception to the general rule is part of the English common law. The exception was explained by Lord Coleridge in Rex. O'Brien (1911) 7 Cr. App. R. 29 at 31:

"To prove handwriting, it is necessary that a witness should have either seen the person write, or corresponded regularly with him, or acted upon such a correspondence. Then the witness may swear to his belief as to the handwriting, but without one of these foundations for his belief the question is inadmissible."

- [20] Ms Bainimarama was employed by FIRCA as an auditor. She had worked for FIRCA for fourteen years and was familiar with the VAT system as it existed in 2004. In 2004, she carried out an audit of the VAT Returns filed by the appellant's company. In the course of that audit, she went through all the Returns and documents submitted for a refund. She was familiar with the documents which were referred to her in her examination-in-chief. Counsel for the State while leading evidence from a Return filed in January 2004, asked her whether she could identify the signature that appeared in the declaration section of the form. The witness said she identified the signature to be of the appellant. The basis for her opinion was that during the audit she had looked at other lodged documents and the signature appeared similar. Counsel for the State did not pursue this line of evidence in relation to other three Returns.

- [21] Before this evidence was led, counsel for the appellant took an objection that the State counsel was leading the evidence on the specimen signature kept by FIRCA. No objection was taken that the witness was not qualified to express an opinion that the signature on the Return form belonged to the appellant. However, in cross-examination the witness admitted she was not a handwriting expert.

[22] Clearly, Ms Bainimarama was not an expert in the field of handwriting. She did not say that she was familiar with the appellant's signature. There was no evidence that she had ever seen the appellant signing. The correspondences that she used to arrive at her opinion were disputed documents. There was no evidence that she was in a regular correspondence with the appellant to recognise his signature. In my judgment, there was no foundation laid by the prosecution to justify receipt of her opinion that the signature was of the appellant.

[23] Counsel for the appellant relies on the case of **Shameem Mohammed v Reginam** 29 FLR 154 to argue that a substantial miscarriage of justice has occurred when the prosecution led inadmissible opinion evidence on a fact in issue. In that case, the accused was tried on two charges of false pretences. The charges were based on cheques presented to a company in order to obtain goods. The prosecution alleged that the person who presented the cheques was not entitled to them. The trial judge admitted specimen handwriting of the accused so that the assessors could compare the striking similarities in handwritings contained on the cheques. On appeal, this Court said at 158:

*"Once it was admitted the learned Chief Justice invited the assessors to make an unassisted comparison with the proved writing of the person who presented the cheques, instead of telling them that they should not do so. This wrong direction requires that the appeal should be allowed unless it is a case for the application of the proviso to section 23(1) of the Court of Appeal Act (Cap. 12 – 1978) on the ground that we consider that no substantial miscarriage of justice has occurred. That involves the question whether the assessors would on the evidence properly admissible and properly directed without doubt have been of the same opinion: see *Stirland v Director of Public Prosecutions* (1944) AC 315 and *Dharmasena v The King* (1951) AC 1."*

[24] Unlike in **Shameem's** case, the assessors in the present case were not asked to make a comparison of signature using the appellant's specimen signature. The issue in the present appeal is whether the inadmissible opinion evidence on a disputed signature has caused substantial miscarriage of justice. The question for this Court is whether the assessors would on the evidence properly admissible and properly directed without doubt have been of the same opinion (**Shameem**, supra).

- [25] The prosecution case was solely based upon circumstantial evidence. The trial judge's direction on circumstantial evidence in paragraph 36 of the Summing Up is impeccable. The trial judge did not refer to the impugned opinion on handwriting in his Summing Up. The appellant did not dispute that he was owner of the company that were paid VAT refunds by FIRCA as alleged by the prosecution. He also did not dispute that the refunds were paid into his personal bank account and that the alleged withdrawals were made from the account. His defence was that someone else had used his identity to commit the fraud. The assessors and the trial judge did not find that defence plausible. In my judgment, the assessors and the trial judge on the evidence properly admissible and properly directed without doubt have been of the same opinion.
- [26] For these reasons, I feel satisfied that there has not been a substantial miscarriage of justice. I would apply the proviso under section 23(1) of the Court of Appeal Act, Cap.12 and dismiss the appeal against conviction.

Sentence appeal

- [27] At the leave hearing, only one issue was taken against sentence. The appellant contended that he had paid restitution, but the trial judge did not take this fact into account when sentencing him. It was only on this issue Calanchini P granted the appellant leave to appeal against sentence (see, para [21] of the ruling).
- [28] Payment of restitution is an important consideration in sentencing. Sentencing courts must consider this factor under section 4(2) (h) of the Sentencing and Penalties Decree 2009. This section states:

“In sentencing offender a court must have regard to-

any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her

willingness to comply with any order for restitution that a court may consider under this Decree; any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree."

- [29] In fraud cases, payment of restitution before any charge is laid may indicate that the offender is genuinely remorseful to justify a suspended sentence, while a late payment of restitution after a charge is laid may indicate that the offender is trying to buy his way out of prison. Sentencing courts have endorsed the principle. In State v Cakau unreported Cr. App. No. HAA 125 of 2004S; 10 November 2004, the offender who was a military officer stole \$23,817.56 from the Fiji Military Forces after falsifying the accounts. He pleaded guilty to the charges and was given a suspended sentence in the Magistrates' Court. On appeal by the State, the High Court quashed the suspended sentence and imposed a custodial sentence of 18 months' imprisonment. In that case, Shameem J said at p.5:

"There is ample authority supporting the imposition of custodial sentences for serious fraud and breach of trust offences. Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust, that renders serious fraud offences the worst type of offending in property-related cases. It is for this reason, that a custodial sentence is inevitable except in those exceptional cases where full restitution has been effected, not to buy the offender's way out of prison, but as a measure of true remorse."

- [30] Similarly, in State v Deo unreported Cr. App. No. HAA008 of 2005S; 23 March 2005 Shameem J said at p 4:

"The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology."

- [31] At the hearing of the appeal, the State took the view that any payment to FIRCA if made by the appellant was not restitution, but was payment of his debts which he was compelled

by the law to pay FIRCA. I accept this submission. In his written mitigation submissions, counsel for the appellant alluded to the fact that the appellant was making payments towards the administrative penalties imposed under the VAT Decree. There was no evidence that the appellant had voluntarily paid restitution to FIRCA as a sign of remorse to receive credit as a mitigating factor.

- [32] In his submissions, counsel for the appellant raised additional new complaints against sentence, for which leave was not sought either from a single justice of appeal or the Full Court. I find none of the appellant's complaints warrant an intervention by this Court. This was a systematic fraud on tax office. When the tax office is defrauded, the public is defrauded. Anyone who commits fraud on tax office should expect condign punishment. In the present case, the sentence of 4 years' imprisonment is within the tariff for fraud cases in general.
- [33] The conviction for money laundering meant that the appellant was exposed to a maximum sentence of 20 years' imprisonment. The appellant used his bank account to disguise the true nature of money he obtained by false pretence from FIRCA and then systematically withdrew it to avoid detection or tracing.
- [34] The appellant's previous good character and his personal circumstances were of little value as mitigating factors. In fact, the appellant was not a person with previous good character. On 16 March 2001, he was discharged without conviction on the condition not to reoffend within 8 months for forgery, uttering a forged document and obtaining goods on a forged document. The appellant re-offended within three years. Any prospect of rehabilitation was slim as the appellant had made no use of the leniency shown to him by the court for the earlier offences.
- [35] The trial judge was correct to conclude that the appellant had expressed no remorse. The court record also supported the conclusion that the appellant had made efforts to either

avoid or delay the trial. There was no evidence to suggest that the prosecution was responsible for any delay. In any event, the delay was not exceptional to suspend the sentence. There is no error in the sentencing discretion of the trial judge.

[36] For these reasons, I would affirm conviction and sentence, and dismiss the appeal.

Order of the Court:

Appeal dismissed.



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Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

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Hon. Justice Shavindra Fernando
JUSTICE OF APPEAL

.....
Hon. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Messrs. Iqbal Khan & Associates for the Appellant
Office of the Director of Public Prosecutions for the State