

IN THE HIGH COURT OF FIJI

AT SUVA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 33 OF 2016

IN THE MATTER of an Appeal against conviction
from the decision of the Magistrate's Court of
Fiji at Suva in Criminal Case No. 1197 of 2012.

BETWEEN :

PRATISHNA NARAYAN

APPELLANT

AND

STATE

RESPONDENT

Counsel : Mr. M. Yunus with Ms. J. Lal for the Appellant
Ms. J. Prasad for the Respondent

Date of Hearing : 21 August 2017

Judgment : 1 December 2017

JUDGMENT

[1] The Appellant was charged before the Magistrates Court at Suva in Criminal Case No. 1197 of 2012 with seven counts of Theft, contrary to Section 291(1) of the Crimes Act No. 44 of 2009 ("Crimes Act"), as follows:

FIRST COUNT

Statement of Offence

THEFT: Contrary to Section 291(1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan between the 11th day of November 2011 and the 14th day of November 2011 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$3800.00 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

SECOND COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 14th day of December 2011 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$3,114.60 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

THIRD COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 29th day of December 2011 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$5,916.60 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

FOURTH COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 3rd day of January 2011 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$4,180.55 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

FIFTH COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 4th day of January 2012 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$5,700.00 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

SIXTH COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 10th day of February 2012 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$1,925.00 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

SEVENTH COUNT

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Pratishna Narayan, on or about the 14th day of December 2011 at Suva in the Central Division, whilst being employed as a wholesale supervisor for Morris Hedstrom dishonestly appropriated \$5,925.00 in cash belonging to Morris Hedstrom with the intention of permanently depriving Morris Hedstrom of the said sum.

- [2] At the conclusion of the trial, on 21 July 2016, the Appellant was found guilty and convicted on all seven counts of Theft. On 4 August 2016, she was sentenced to a term of 30 months imprisonment for each count of Theft to be served concurrently, with a non-parole period of 20 months.
- [3] The Appellant tendered her proposed Petition of Appeal to the Registry of this Court on 15 September 2016, which was out of time by 27 days. As such, she made an application for enlargement of time. On 24 February 2017, His Lordship Justice Wengappuli, granted the application for enlargement of time for filing of the Petition of Appeal.
- [4] In her Petition of Appeal, the Appellant seeks only to challenge the validity of the conviction entered against her upon following grounds:
1. *"The Learned Magistrate erred in fact when he stated in paragraph 2 of his Judgment dated 21st July 2016 that prosecution witness 1 (Mr. Brij Lal) had paid the full amount of \$ 5775.00, in his cross examination however, the Court record of PW 1 confirm that he only admitted to paying \$ 3849.90 (in his cross-examination).*
 2. *The Learned Magistrate erred in law and fact when he based his Judgment on circumstantial evidence that was led by the prosecution. He placed great reliance on the invoices for the particular transactions concerned that were adduced rather than the source of funds who were the customers. The only direct evidence that was led by the prosecution was the evidence of PW1 and PW6 who were the*

customers of Morris Hedstrom and also the source of funds to confirm that they actually paid the invoice sum to Morris Hedstrom. The Magistrate did not give any consideration on the failure of the prosecution to adduce direct evidence of the other five customers whose invoices were relevant to the charges. If the customers related to the charges were called as witnesses, they would have confirmed how much money was given to Morris Hedstrom by them.

3. *The Learned Magistrate erred in law and in fact when he gave due consideration to altered invoices that was led by the prosecution witnesses in the evidence without any knowledge of who the alterations were made by.*
4. *The Learned Magistrate erred in fact when he found the Appellant counted the money which was received from the sales representative and acknowledges the money by signing the book ("red book"). There was no evidence led that indicated that the Appellant counted the money in front of the sales representative.*
5. *The Learned Magistrate erred in fact when he found that the Appellant had the capacity to reprint customer copies of the invoice. The Appellant further submits that she did not have access to the computer which had the capacity to reprint the customer copies of the invoice in order to amend the customer copies.*
6. *The Learned Magistrate erred in fact when he found that the Appellant had passed unauthorized credit notes for the relevant transactions or gave instructions to clerks for the passing of unauthorized credit notes without proper approval from management and warehouse when it was clearly brought out in examination in chief of the Appellant that she had the management's approval vide email for the passing of the credit notes. "*

[5] As can be seen from the above grounds of appeal, there is one ground of appeal on the law and facts (Ground 2), while the remaining five grounds of appeal are only on facts (although it is stated in Ground 3 that it is both on law and in fact).

[6] During the course of the trial, the prosecution led the evidence of 18 witnesses to prove the seven charges of Theft against the Appellant. At the close of the case for the prosecution, the defence was called for. The Appellant chose to give evidence and also called her husband (Sanjay Lal) to testify on her behalf.

[7] On 21 July 2016, the Learned Magistrate delivered his Judgment finding the Appellant guilty and convicting her on all seven counts of Theft. His Judgment is found at pages 226 to 247 of the copy record (appeal brief).

Ground One

[8] The Appellant states that the prosecution witness Mr. Brij Lal (PW1) testified in his evidence in chief that he had paid the full amount of \$5775.00. However, that in his cross examination he only admitted to paying \$3849.90.

[9] Mr. Brij Lal's evidence is found at pages 22 to 25 of the copy record. In his evidence in chief, he has clearly testified that he paid the full amount on the invoice no. 17467 (Prosecution Exhibit 1-PE 1). However, in cross examination when the said document was shown to him, he was asked the following questions (at page 24 of the copy record):

Q. Now if you look at the document again; it says \$3849.90 paid, right?

A. Yes

Q. Did you pay that?

A. Yes

[10] From the above testimony of Brij Lal, it is clear that he had paid the full amount of the invoice of \$5775.00. However, the amount that is depicted in the invoice at the time it was shown to him was \$3849.90. The witness never stated or admitted that he only paid \$3849.90. His testimony is that he paid the full amount of the said invoice, which was \$5775.00.

[11] Given the above, it is clear that the Learned Magistrate made a correct finding of fact. Therefore, the first ground of appeal is without merit.

Ground Two

[12] This ground is that the Learned Magistrate erred in law and fact when he based his Judgment on circumstantial evidence that was led by the prosecution.

[13] To deal with this ground of appeal, I refer to the short summary given by the Learned State Counsel in the written submission filed by her, to understand the context of the case:

“Morris Hedstrom, the complainant company, employed the Appellant as a Wholesale Supervisor. The Wholesale Department was responsible for receiving orders. These orders are then delivered and the sales representatives would then pick up the money due for the delivered items. The payments could happen after delivery or at time of delivery. The sales representative upon collection of the money would enter “paid” on the original invoice of the customer which would be evidence of payment by the customer. The money would be taken to the Wholesale Department and entered in the collections book (cash book). The details of the cash received, customer name, invoice number would be entered. The cash would be handed over to the Wholesale Department by the sales representative. The person receiving the money would then sign on the collections book that they have received the money. From there the Wholesale Department would prepare a cash summary and handover the money to the Credit Department.

During trial it was proved by the sales representatives that they were giving the full amount received for an invoice to the Appellant. The Appellant signed on the collections book after counting the money. However, when the cash summary was prepared by the Appellant the money given to the Credit Department was less. The wholesale staff preparing the cash summary was the Appellant herself and her two subordinates. The subordinates testified that they were given the money by the Appellant who told them to prepare the cash summary, they only entered the amount that was given to them by the Appellant. Therefore, the complainant company only banked the money given to the Credit Department which was obviously less than the amount given to the sales representative. To balance the accounts and hide the offence, the Appellant passed unauthorised credit notes for the missing money.”

[14] It is clear that the prosecution called only two customers namely, Mr. Brij Lal (PW1) and Mr. Navin Narayan (PW8), in support of their case. However, the testimony of two sales representatives namely Ravin Prasad (PW4) and Rohit Prasad (PW6) was led by the prosecution during the trial. The said two sales representatives testified as to the customers from whom they received the money from and also as to the amount they received. They also testified that the said amounts received by them was given to the Appellant. Their evidence was supported by the entries made in the collections book, whereby it is established that the Appellant received the said amounts.

[15] In this regard, I refer to paragraph 73 of the Learned Magistrate's Judgment. The Magistrate has stated that the crucial witnesses for the prosecution were the sales representatives (PW4 and PW6) and that the defence failed to raise any doubts in respect of the evidence. The said witnesses had clearly stated that the Appellant received the money, counted and signed the collections book and they were not involved in making any changes in the delivery copies. The Magistrate states that he accepted these two witnesses as credible witnesses.

[16] At paragraph 74 of the Judgment, the Learned Magistrate states that even though the defence submitted that the prosecution failed to call all the customers, in the end what matters in a criminal trial is the quality of the evidence and not the quantity. He observes that in this case the prosecution has produced cogent and credible evidence through their witnesses to prove their case.

[17] At paragraph 43 of his Judgment (page 237 of the copy record), the Learned Magistrate states that in this case there is no direct evidence to show the Appellant committed any of the offences. Accordingly, the prosecution is relying on circumstantial evidence to prove their case. However, I am of the opinion that this case is based on both direct evidence and circumstantial evidence.

[18] Therefore, considering the totality of the evidence in this case, I am of the opinion that in addition to direct evidence, there was strong circumstantial evidence against the Appellant available to the Learned Magistrate to base his Judgment upon and to find the Appellant guilty of the counts of Theft. For the aforesaid reasons the second ground of appeal is also without merit.

Ground Three

[19] This ground is that the Learned Magistrate erred in fact when he gave due consideration to altered invoices that was led by the prosecution witnesses in the evidence without any knowledge of who the alterations were made by.

[20] I find that the Learned Magistrate has dealt with the issue of altered invoices in his Judgment (at paras 58, 59 and 68). It is clear that he has considered that the Appellant had access to make the changes in the said invoices, based upon the evidence led by

the prosecution. For these reasons, I am of the opinion that the third ground of appeal is without basis.

Ground Four

[21] This ground of appeal is that the Learned Magistrate erred in fact when he found the Appellant counted the money which was received from the sales representative and acknowledges the money by signing the book (“red book”). There was no evidence led that indicated that the Appellant counted the money in front of the sales representative.

[22] The testimony of the sales representative Ravin Prasad (PW4), can be found at pages 42 to 59 of the copy record; and the testimony of sales representative Rohit Avinesh Prasad (PW6) can be found at pages 64 to 78 of the record.

[23] It can be clearly elicited from the evidence of the above two witnesses that the Appellant counted the money which was received from them in their presence. For the aforesaid reasons this ground of appeal is frivolous and therefore without merit.

Ground Five

[24] This ground of appeal is that the Learned Magistrate erred in fact when he found that the Appellant had the capacity to reprint customer copies of the invoice. The Appellant further submits that she did not have access to the computer which had the capacity to reprint the customer copies of the invoice in order to amend the customer copies.

[25] The prosecution led the testimony of Sarojini Devi (PW9), who was working as the Wholesale Clerk under the Appellant (reverse of page 92 - reverse of page 109 of the copy record); and of Viniana Salele (PW10), who was working as the Wholesale Assistant under the Appellant (pages 110 – 129 of the copy record).

[26] The above two prosecution witnesses have clearly testified that the Appellant had access to the computer which had the capacity to reprint the customer copies of the invoices. Therefore, this ground of appeal fails.

Ground Six

[27] This ground of appeal is that the Learned Magistrate erred in fact when he found that the Appellant had passed unauthorized credit notes for the relevant transactions or gave instructions to clerks for the passing of unauthorized credit notes without proper approval from management and warehouse when it was clearly brought out in examination in chief of the Appellant that she had the management's approval vide email for the passing of the credit notes.

[28] Mr. Asitha Sunndeniya (PW17), the Financial Controller of the Carpenters Group has testified that the credit notes passed by the Appellant were unauthorised. Mr. Sunndeniya's testimony is found from the reverse of pages 162 – 177 of the copy record.

[29] The Learned Magistrate has duly considered the issue of unauthorised credit notes in his Judgment (at paragraphs 32, 33, 61 and 62 of the Judgment). Therefore, this ground of appeal too is without merit.

Conclusion

[30] In the light of the above, the conviction in respect of all seven counts are affirmed and this appeal is dismissed.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



At Suva

This 1st Day of December 2017

Solicitor for the Appellant : Messrs Neel Shivam Lawyers, Suva.
Solicitor for the Respondent : Office of the Director of Public Prosecution, Suva.