

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No 10 of 2013

BETWEEN:

EMA MATEIVITI YAVALANAVANUA

- V -

STATE

Appellant in Person
Ms S. Puamau for the State

Dates of Hearing : 9, 12, 17 July 2013
Date of Judgment : 24 July 2013

JUDGMENT

[1] On the 3rd August 2012 in the Magistrates Court at Nadi, this appellant was convicted on her own plea of two counts of obtaining financial advantage by deception. On the 7th September 2012 she was sentenced to a term of 20 months imprisonment for the two counts. The Magistrate

failed to state whether these two terms were to be served concurrently or consecutively. He imposed a minimum term of 14 months imprisonment.

- [2] The appellant now appeals this sentence on the grounds that it was harsh and excessive and that it is inconsistent with the objectives of sentencing set out on S.4(1) of the Sentencing & Penalties Decree 2009. She also relies on grounds that the Magistrate was biased against her and that he did not consider everything she placed before him in mitigation. She also prays that she was not given credit for the time she had spent in remand awaiting sentence.
- [3] At the hearing before me and in her extensive written submissions, the appellant abandoned all grounds of appeal save and except the time spent in remand ground. She claims that she had been in remand awaiting sentence for this case since 1st June 2010 and that for that reason she should not have to serve the 20 months sentence imposed by the Nadi Magistrate.
- [4] The facts of the case against the appellant were that, between 24 – 26 May 2010 the appellant approached a Mr. Smith who was staying near where she and her partner were living. She asked Mr. Smith whether he needed a Fijian passport which he initially refused. However on her insisting, he agreed and paid a deposit to her of \$2,700 on the 24th May 2010. She obtained a further sum of \$3,857 from him. Mr. Smith never saw a passport nor had his \$6,557 refunded to him.
- [5] The Magistrate, in casting his sentence and in reviewing appropriate authorities took a starting point for each of these offences of 20 months imprisonment. He then discarded the accused's submission that she had been in remand for 2 years awaiting sentence. He increased the sentence by 15 months to reflect the aggravating features being planning

of the deception, no remorse and a purported deception on a government department (Passport Office). For mitigating features which he found to be single mother, remorse and first offender he reduced the sentence by 7 months and for the early guilty plea another 8 months bringing the sentence down to 20 months which is the sentence he passed. He also ordered the appellant to pay \$6,557 restitution to the complainant.

[6] At the hearing of this appeal I twice told the appellant that I had the power to increase sentences as well as reduce them and she told me that she understood that but wished to proceed in any event.

[7] The learned Magistrate has correctly referred to the tariffs for obtaining by deception but fell into error by arriving at a sentence that was below the tariff. By so doing he is pulling the tariff down which is unhelpful. As this Court said in **Atil Sharma** (HAC 122 of 2010) the tariff should be between 2 and 5 years with 2 years being reserved for minor offences with little and spontaneous deception.

[8] The appellant's claim that she had been in remand for more than 2 years awaiting sentence for this matter did not find favour with the Magistrate nor does it find favour with this Court. The appellant was facing other cases in the Nasinu and Suva Magistrates Court and having earlier absconded was refused bail in respect of these matters. The learned Magistrate who sentenced her in the Suva Case (1278/10) actually took into account 22 months of her remand period and applied that to the sentence. She also received credit in her other cases for time in remand to the extent that she has had more credit for her time in remand than she was entitled to. Her ground of appeal on this basis must fail.

[9] The Magistrate gave the appellant credit for being a first offender which in fact was not correct. At the time of sentence, she had convictions for

at least 3 other matters similar (1278/10 Suva, 1347/09 and 650/10 Nasinu).

In the light of the sentence being in error, I now set aside the sentence passed below and would sentence afresh (pursuant to S.256 (2) of the Criminal Procedure Decree).

[10] The accepted tariff is between 2 years and 5 years for the offence of obtaining by deception. The amount obtained here is not very large but it was a cynical deception practiced against somebody who was presumably a tourist and I take a starting point therefore of 30 months. To this I add the same 15 months to reflect planning of the deception and an attempt to defraud a government department. From this total of 45 months I deduct 3 months to reflect her mitigation of personal hardship with a young daughter. I deduct a full third from this for her plea of guilty at first opportunity meaning that the sentence she will serve will be one of 28 months.

[11] The appeal is dismissed and the sentence below is set aside. A new sentence of 28 months is imposed which is the sentence for each of the two charges to be served concurrently. I order that she serve a minimum period of imprisonment of 24 months. I also retain the Magistrate's compensation order and I order that she pay \$6,557 to the complainant.

P. Madigan

Judge

At Lautoka

24 July 2013