

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: 397 OF 2013

BETWEEN: SUDESH MANI NAIDU

Appellant

AND:

STATE

Respondent

Counsels: Appellant in person
Mr. F. Lacanivalu for the Respondent

Date of Hearing : 28 November 2013

Date of Judgment : 6 December 2013

JUDGMENT

1. The appellant was charged before the Lautoka Magistrate under following count:

Statement of Offence

OBTAINING PROPERTY BY DECEPTION:- Contrary to Section 317(1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

SUDESH MANI NAIDU with others on the 2nd day of September 2010 at Lautoka, in the Western Division, by deception dishonestly obtained 1 Akita Freezer valued \$999.00 and 1 Akita Washing Machine valued \$399.00 all to the total value of \$1398.00 belonging to COURTS Fiji Limited with intent to permanently deprived the said COURTS Fiji Limited.

2. The appellant pleaded not guilty and after trial he was convicted and sentenced for 20 months imprisonment on 18th September 2013.
3. The facts of the case are the appellant obtained a Freezer and a washing Machine from COURTS Fiji Limited by giving cheques which are found to be forged ones.

4. This appeal was filed on 25th September 2013 within time.
5. The grounds of appeal are :
 - (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive.
 - (ii) That there is disparity to the appellant's sentence and some other similar offence that was sentenced by other courts in Fiji.
 - (iii) That he was handicapped and not represented during the trial.
 - (iv) That the items were fully recovered and thus the sentence ought to be more lenient as in cases where stolen items are not recovered.

Grounds (i) sentence harsh and excessive

6. The learned Magistrate had selected a starting point of 24 months following the tariff judgments ***State v Atil Sharma*** HAC 122 of 2010 and ***State v Sinha*** [2010] FJHC 589;HAC 15.2009L (10 December 2010).
7. Six months were added for the aggravating factor that the appellant betrayed the trust and the confidence of COURTS Fiji Limited. A period of 10 months was deducted for the mitigating factors arriving at the sentence of 20 months.
8. The learned Magistrate had followed relevant tariff judgments and arrived at a correct starting point. The period added for the aggravating and period deducted for mitigating circumstances are justifiable and reasonable. Therefore there is no merit in the first ground of appeal and it fails.

Ground (ii)

9. Although the appellant had stated that there is disparity with sentences given in some other similar offence by other Courts of Fiji he had failed to submit any such judgment. Therefore there is no merit in this ground and it fails.

Ground (iii)

10. The next ground is that the appellant was not represented in the trial. There is no absolute right of representation in Fiji. It is recognized in several judgments in Appellate courts.
11. The right for representation is not an absolute right. In ***Shankar v The State*** [2006] FJHC 14; CAV 0008U.2005S (19 October 2006) it was held that "*the right of counsel under Section 28 (1) of the Constitution is subject to that criterion of reasonableness. To construe section 28 (1) (d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section the right to counsel conferred thereby is qualified by considerations of reasonableness. The Constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment.*"

12. Further in **Ramalasou v State** [2010] FJHC 19;AAU 0085.2007 (28 May 2010) it was held by His Lordship Mr. John Byrne and His Lordship Mr. Daniel Goundar that:

“This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice.”

13. In **Drotini v The State** [2006] FJCA 26;AAU0001.2005S (24 March 2006) it was held that:

“It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.”

“The question for this Court is whether there was possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently.”

14. The appellant was explained his right of representation and given sufficient time. Therefore there is no merit in this ground and it fails.

Ground (iv)

15. The appellant had filed submissions in mitigation of the sentence. He was given a deduction of 10 months for the mitigation. The fact that the items were recovered is a ground for mitigation. The other grounds submitted by the appellant are that he is the sole bread winner, seeking forgiveness and promise not to reoffend. Time period of 10 months is justifiable for that mitigation. Thus there is no merit in this ground of appeal and it fails.
16. For the reasons given above the appeal against the sentence is dismissed.

Sudharshana De Silva

JUDGE

**At Lautoka
06th December 2013**

**Solicitors for the Appellant:
Solicitors for the Respondent:**

**In Person
Office of the Director of Public Prosecution**