

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
246 of the Criminal Procedure Decree
2009.

SISILIA CHUTE

Appellant

CASE NO: HAA. 015 of 2016
[MC Suva, Crim. Case No. 1138 of 2012]

Vs.

STATE

Respondent

Counsel : Mr. N. Vere for the Appellant
Ms. M. Khan for Respondent

Date of Hearing : 13th September 2016

Date of Judgment : 08th December 2016

JUDGMENT

1. The appellant was charged with four counts under section 318 of the Crimes Decree 2009 ("Crimes Decree") before the Magistrates Court. After trial, on 29th March 2016, the learned Magistrate acquitted the appellant on count one and convicted her of the other three counts. The charges were as follows;

FIRST COUNT

Statement of offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: *Contrary to Section 318 of the Crimes Decree No. 44 of 2009.*

Particulars of offence

SISILIA CHUTE on the 5th day of May, 2010 at Suva in the Central Division by a deception, dishonestly obtained a financial advantage of \$14,000 cash from Rodney Michael Davies.

SECOND COUNT

Statement of offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: *Contrary to Section 318 of the Crimes Decree No. 44 of 2009.*

Particulars of offence

SISILIA CHUTE on the 16th day of July 2010 at Suva in the Central Division by a deception, dishonestly obtained a financial advantage of \$15,000.00 cash from Rodney Michael Davies.

THIRD COUNT

Statement of offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: *Contrary to Section 318 of the Crimes Decree No. 44 of 2009.*

Particulars of offence

SISILIA CHUTE on the 19th day of July 2010 at Suva in the Central Division by a deception, dishonestly obtained a financial advantage of \$15,000.00 cash from Rodney Michael Davies.

FOURTH COUNT

Statement of offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: *Contrary to Section 318 of the Crimes Decree No. 44 of 2009.*

Particulars of offence

SISILIA CHUTE on the 9th day of September 2010 at Suva in the Central Division by a deception, dishonestly obtained a financial advantage of \$10,000.00 cash from Rodney Michael Davies.

2. The learned magistrate sentenced the appellant for 2 years imprisonment and suspended the sentence for 3 years on 28th April 2016.

3. The appellant challenges the conviction on the following grounds;
 1. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that the charge were defective in that, it did not clearly outlined in writing the deception and dishonesty to obtain a financial advantage alleged against the appellant.*
 2. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that the appellant had told the police in her caution interview (Q67 to Q69 and Q71) that there were Sales and Purchase Agreement signed by Mr. David Deo and the complainant relating to the sale of one of the two freehold land in Wailoku and that the police had failed to obtain these documents as exhibits.*
 3. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that the appellant had told the police in her caution interview (Q74 and Q75) that there were Sales and Agreement signed by Mr. Nilesh Kumar and the complainant relating to the sale of one of the two freehold land in Wailoku and that the police had failed to obtain these documents as exhibits.*
 4. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that if the police should have produced the two Sales and Purchase Agreements as exhibits. The documents would have clearly spelt out as whose duty was to prepare and file documents relating to the transfer of the two freehold lands. However, it is the solicitors nominated in the two Sales and Purchase Agreement who should do it.*
 5. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration the requirement of Section 59(d) of the Indemnity, Guarantee and Bailment Act, Cap.232.*
 6. *That the learned trial magistrate erred in law and in fact in convicting the appellant*

for Count 2, 3 and 4 without taking into consideration that the complainant was a foreigner and has to comply with Section 7(1) and (2) of the Land Sales Act, Cap.137 by first getting the approval of the Minister of Land to buy either of the two freehold lands in Wailoku. The Sales and Purchase Agreements would have spelt out as whose duty to do this and the police failed to address this important issue in their investigation.

7. *That the learned trial magistrate erred in law and in fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that the police had not cross-checked what the appellant claimed in her caution interview and the failure of the police to do so is a breach of her constitutional right to a fair trial. The failure of the police should have created reasonable doubt in the mind of the learned trial magistrate.*

8. *That the learned trial magistrate erred in law and fact in convicting the appellant for Count 2, 3 and 4 without taking into consideration that the police had not produced in court Mr. David Deo and Mr. Nilesk Kumar the owners of the two freehold lands in Wailoku as prosecution witnesses.*

4. During the hearing, the counsel for the appellant submitted that this appeal is based on two core issues and that is; the defect in the charges and that the prosecution has not proved the elements, deception and dishonesty beyond reasonable doubt. At this point I wish to note that it would have assisted this court in dealing with this matter if the counsel for the appellant was precise in framing the appeal grounds and in making his submissions.

Preliminary objection that the appeal is out of time

5. The petition of appeal in this case had been filed on 25th May 2016. That is, within 28 days from the date of the sentence. As a preliminary objection, the respondent submits that this appeal is 30 days out of time. Counsel for the respondent argues that this appeal should have been filed within 28 days from the date of the judgment because the appeal is only against the conviction. According to the respondent, the appeal would have been within time if the appeal was against both conviction and sentence.

6. The respondent seems to be relying on the provisions of section 248(1) of the Criminal Procedure Decree 2009 (“Criminal Procedure Decree”) which provides that;

“Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant’s lawyer, and within 28 days of the date of the decision appealed against...”.

7. In this regard, it is relevant to examine the provisions of sections 246(1) and 246(3) of the Criminal Procedure Decree. The said sections reads thus;

“246(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence.”

...

“(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.”

8. Section 246(3) attributed to above, imposes a duty on a magistrate to inform an unrepresented accused of the right of appeal at the time when the sentence is passed. The said section does not refer to ‘judgment’.

9. Section 256(7) of the Criminal Procedure Decree provides thus;

“An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.”

10. It is trite law that a court becomes *functus* only after the sentence is passed after a conviction is entered as the court retains discretion up until that point to set aside the conviction. A final determination of the guilt of an accused is made when a court acquits an accused or when the sentence is passed following conviction.
11. In the light of the above, a convicted person does not have a right of appeal to appeal against his/her conviction until the sentence is passed. Therefore, it would be proper to calculate the appealable period from the date of the sentence even if the appeal is against the conviction only.
12. In the circumstances, I am not inclined to hold that this appeal is out of time for the reason that it is not filed within 28 days from the date of the judgment. I dismiss the respondent's preliminary objection and hold that this appeal is filed within time.

Brief facts

13. According to the evidence led before the learned Magistrate, the complainant had engaged the appellant who was a real estate agent to purchase certain properties in Fiji. The first count where the appellant was acquitted is based on an agreement in relation to the purchase of a native land and counts 2 to 4 are based on an agreement in relation to the purchase of a free hold land. With regard to the land relevant to the 2nd, 3rd and 4th counts the complainant had paid \$40,000 in three installments. It appears that the counts 2, 3 and 4 are based on each of these installments paid. The complainant complains that the appellant did not transfer the property to him or refund the money he paid.

Ground one

14. On ground one, the appellant takes up the position that the charges against the appellant are defective in that the alleged deception and dishonesty is not outlined in each charge. I note that the particulars of each charge cover all the elements of the relevant offence. Therefore, I am not convinced that the charges

are defective. In fact the appellant's complaint seems to be that the particulars given in each charge are not sufficient.

15. This objection concerning the charges is raised for the first time as a ground of appeal in this case. The appellant who was represented by a lawyer had not raised this as an objection before the learned magistrate.

16. Section 279 of the Criminal Procedure Decree provides thus;

"279. – (1) Subject to sub-section (2), no finding, sentence or order passed by a Magistrates Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect of substance or form or for any variance between such information, complaint, summons or warrant and the evidence, unless it is found that

–

(a) such objection was raised before the Magistrates Court whose decision is appealed from; and

(b) the Magistrates Court refused to adjourn the hearing of the case to a future day notwithstanding that it was shown to the Magistrates Court that by such variance the appellant had been deceived or misled."

17. In terms of section 56(i)(a) of the Criminal Procedure Decree, where proceedings are instituted by a police officer, the formal charge signed and presented to the magistrate court is deemed to be the complaint for the purposes of the Criminal Procedure Decree.

18. Therefore, in terms of the provisions of section 279(1) of the Criminal Procedure Decree, an objection based on the allegation that the charges are defective, cannot be raised as a ground of appeal unless that objection was first raised before the Magistrate Court and the Magistrate Court had refused to adjourn the hearing of the case to a future day.

19. Ground one is devoid of merit.

Grounds 2, 3, 4, 5 and 6

20. On the above grounds, the appellant submits that the learned Magistrate had erred in law and in fact in failing to inquire about the sales and purchase agreements in relation to the purchase of the properties as the police had failed to obtain the said documents. This submission is grossly misconceived. The courts in Fiji follow the adversarial system and therefore a Magistrate should only consider the evidence adduced before him to decide whether or not the elements of the offences have been proved beyond reasonable doubt.
21. The appellant also submits on the 5th ground that the learned Magistrate had erred by not considering the provisions of section 59(d) of the *Indemnity, Guarantee and Bailment Act* which provides a limitation in respect of actions brought upon agreements. This case was not brought under an agreement but under the Criminal Procedure Decree. The aforementioned section is not relevant to this criminal action brought against the appellant alleging that the appellant had committed offences under the Crimes Decree.
22. Therefore, I find that there is no merit in the above grounds.

Ground 7

23. On ground 7, the appellant argues that, the fact that the police had not cross-checked the claim made by the appellant in her cautioned interview creates a reasonable doubt in this case.
24. The appellant also submits that the said failure of the police constitutes a breach of the appellant's constitutional rights. In my view, an issue in relation to a breach of a constitutional right cannot be dealt with under the appellate jurisdiction provided in the Criminal Procedure Decree. Therefore, in this case, I will not decide whether or not a constitutional right of the appellant has been breached.

25. It is pertinent to note that the prosecution had tendered the cautioned interview of the appellant as a prosecution exhibit (Prosecution Exhibit 2). Upon perusal of the cautioned interview, I note that the said cautioned interview contains mixed statements. That is, it contains statements that are partly inculpatory and partly exculpatory.
26. Before I deal with the cautioned interview any further, I consider it appropriate to examine the elements of the offence of obtaining financial advantage by deception.
27. In order to prove the offence under section 318 of the Crimes Decree, the prosecution should prove the following elements;
- a) the accused;
 - b) dishonestly obtained;
 - c) a financial advantage;
 - d) by deception.
28. Black's law dictionary (6th edition) provides the following definition to the word 'dishonesty';
- "Disposition to lie, cheat, deceive, or de-fraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray."*
29. The term 'dishonest' is defined under section 290 and section 348 of the Crimes Decree. Both sections provides the same definition which is in line with the dictum in *R v Ghosh* [1982] 3 WLR 110. However, section 290 limits the application of the definition provided in the said section to Part 16 of the Crimes Decree and the definition provided under section 348 is only for Division 7 of Part 17. The offence of obtaining financial advantage by deception is listed under Division 2 of Part 17 of the Crimes Decree.

30. The definition provided in the Crimes Decree for the term 'dishonest' is as follows;

"... dishonest means –

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people."

31. I am of the view that dishonesty under section 318 should also be determined in line with the above definition.

32. In the case of *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 (22 June 2016) the court had explained the term 'financial advantage' as follows;

"Financial advantage is not exhaustively defined in the Crimes Act and it is perhaps easier to identify than define. However, it does include retaining a financial advantage: s 192D(1)(c). In Coelho v Durbin (Supreme Court (NSW), Badgery-Parker J, 29 March 1993, unrep) Badgery-Parker J described as the essence of the concept of financial advantage that the person alleged to have obtained such an advantage has obtained a benefit which can be valued in terms of money."[Emphasis added]

33. Section 316 of the Crimes Decree provides a definition for the word 'deception'. However, the said definition does not clearly explain what a 'deception' is. In Blackstone's Criminal Practice 2007 at page 402 it is stated thus;

"The best known judicial definition of deception is that of Buckley J in Re London and Globe Finance Corporation Ltd [1903] 1 Ch 728 at p.732:

To deceive isto induce a man to believe that a thing is true which is false.

This was quoted with approval in DPP v Ray [1974] AC 370 and is consistent with the normal dictionary meaning of the term, ..."

34. The following definition is provided for the term 'deception' under section 316 of the Crimes Decree;

"deception" means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes –

(a) a deception as to the intentions of the person using the deception or any other person; and

(b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to do.

35. It is necessary for the prosecution to prove that the deception operated in the mind of the person who is alleged to have been deceived. I am of the view that deception under section 318 of the Crimes Decree should be a deception as to existing facts or law and not a deception as to the future. With regard to deception as to the future, Blackstone's Criminal Practice 2007 states thus;

"For a deception to be an offence under the Theft Acts 1968 or 1978, it must be a deception as to existing facts, or as to law. A representation that something will happen in the future will not suffice. It therefore, will not do to argue that, when one person issues a worthless cheque to another, he has deceived the other into thinking that it will be honoured. For similar reasons, if a person falsely promises to perform a service for someone in the future, it cannot be argued that the person to whom the promise was made has been deceived into thinking that the service will be performed. There may indeed have been a criminal deception, but in either case, the deception must be expressed in terms of present fact."

36. During the hearing, counsel for the respondent submitted that dishonesty can be inferred considering the fact that the appellant failed to perform according to the agreement and the fact that the appellant failed to refund the money after several inquiries. She was unable to point out to any other evidence which demonstrates that the complainant was deceived and that the financial advantage was dishonestly obtained.
37. The impugned judgment does not clearly indicate the evidence considered by the learned Magistrate to conclude that the prosecution has proved that there was deception and that a financial advantage was obtained dishonestly in respect of

2nd, 3rd and 4th counts. According to paragraph 20 of the impugned judgment it appears that the learned Magistrate had inferred deception and dishonesty from the fact that the land in question was not transferred to the complainant and from the fact that the money paid to the appellant was not reimbursed.

38. However, it is pertinent to note that the cautioned interview of the appellant tendered in evidence by the prosecution contains an explanation with regard to the failure of the appellant to transfer the land as per the agreement and the failure to refund the money to the complainant.
39. When a cautioned interview containing mixed statements is adduced in evidence, the court is required to consider the incriminating statements and the exculpatory statements in determining where the truth lies. (*Sharp [1988] 1 W.L.R. 7; R v Aziz [1996] 1A.C. 41*)
40. Therefore, the learned Magistrate was required to take into consideration both incriminating and exculpatory statements in order to decide what exactly happened in this case. There was no dispute that the cautioned interview statement tendered as PE2 was made by the appellant though she had refused to sign the document.
41. In the cautioned interview, the appellant has stated that the owner of the property relevant to the 2nd, 3rd and 4th counts changed his mind because the complainant could not organise the money over a period of one year and decided to sell the property to someone else. She has also stated that part of the money she received from the complainant was used in relation to the intended purpose and the remaining money was taken by the receiver as her business was closed. She says that she did not obtain money from the complainant by deception and that she had paid a holding deposit to the owners of the property. If the aforementioned explanation of the appellant is true, then there was no deception and no dishonest obtaining of a financial advantage.
42. If the prosecution expects the court to disbelieve the exculpatory statements in a

cautioned interview that contains mixed statements, the prosecution should rebut that exculpatory version of the accused through other evidence unless it can be shown from the cautioned interview itself that the said version of the accused is not true.

43. As mentioned above, no evidence was adduced in this case to establish deception and dishonesty apart from the inference the prosecution expected the court to draw from the fact that the appellant did not act according to the agreement and from the fact that the appellant failed to refund the money paid by the complainant having failed to act according to the agreement. However, there is an explanation found in the cautioned interview tendered by the prosecution as part of the prosecution case for the appellant's failure to act according to the agreement and for not making a refund. This explanation is not rebutted by the prosecution through other evidence.
44. I find that there is merit in the appellant's submission that the learned Magistrate had erred in law by failing to properly consider the cautioned interview of the appellant which was tendered as a prosecution exhibit. In fact, the learned Magistrate has failed to properly consider and assess the evidence in his judgment in relation to the elements of each offence in this case. It was erroneous for the learned Magistrate to consider that the elements of the offence of obtaining financial advantage by deception is established based on the evidence to the effect that the appellant promised to sell a freehold land and the complainant did not receive the land or the money he paid.
45. I also find that there is merit in the submission made by the counsel for the appellant during the hearing that the elements concerning deception and dishonesty have not been proved beyond reasonable doubt.
46. Though the above (07th) ground of appeal does not clearly outline the aforementioned errors, I am of the view that the appeal should be allowed on this ground based on the above findings.

Ground 8

47. The issue raised on this ground is based on the failure of the prosecution to call the owners of the two properties as prosecution witnesses.
48. As I have discussed above, a defence had been sufficiently raised in the evidence presented by the prosecution itself pertaining to the elements, deception and dishonestly obtaining a financial advantage. In the cautioned interview the appellant claims that she did not deceive the complainant and she had in fact paid holding deposits to the landowners. She had stated that *"If I had been cheating I wouldn't have paid a single cent to anyone"*. Whether or not to call a particular witness as a prosecution witness is a matter for the prosecution to decide. However, if the prosecution wanted the court not to accept the aforementioned version of the appellant, they should have called the landowners as prosecution witnesses to establish that the appellant had no intention to act according to the agreement entered into with the complainant when she obtained the money from the complainant.
49. I find that the 08th ground has merit on the issue of paucity of evidence adduced by the prosecution. In my view, this ground complements the 07th ground of appeal.

Conclusion

50. I am of the view that this appeal should be allowed considering the findings on the seventh and eighth grounds of appeal. Accordingly, the conviction entered against the appellant on 29th March 2016 by the Magistrate Court of Suva in Case Number 1138/2012 should be set aside.
51. The evidence presented in this case seems to suggest that, if at all, this is a case where the deception was as to the future and not on the existing facts. The appellant appear to have breached the terms of an agreement between her and the complainant. As I have indicated above in relation to grounds 07 and 08, I am not satisfied that there was evidence in this case to prove the elements of the offence

under section 318 of the Crimes Decree, beyond reasonable doubt. Considering all the circumstances, I do not find it appropriate to order a re-trial.

Orders of the Court;

- i.) Appeal allowed;
- ii.) The conviction entered on counts 2, 3 and 4 against the appellant, in Suva Magistrate Court Criminal Case No. 1138 of 2012 and the resulting sentence set aside; and
- iii.) The appellant is acquitted on counts 2, 3 and 4 as charged in Suva Magistrate Court Criminal Case No. 1138 of 2012.



Vinsent S. Perera

JUDGE

Solicitor for the Appellant : Naipote Vere & Associates, Nakasi, Suva
Solicitor for the State : Office of the Director of Public Prosecution, Suva.