IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE: HAA 15 OF 2016

BETWEEN : ABDUL AZLIM HAKIK

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr Zoheb Mohammed for the Appellant
Mr Josaia Niudamu for the Respondent

Date of Judgment : 1st August 2016

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the sentence delivered by the Learned Magistrate of Lautoka on the 10th of February 2016 on the following grounds, *inter alia,*

   I. *The learned Magistrate erred in imposing a custodial sentence when the petitioner had made full reparation,*

   II. *The learned Magistrate erred in stating that this offence was committed whilst your petitioner was on bail for three counts of obtaining property by deception as per the*

criminal cases of CF 150/12 and 152/12 when your petitioner was never charged with breach of bail condition,

III. *The learned Magistrate erred in stating that the Petitioner's action are suggestive that your petitioner has a repetitive trend to commit similar offences. In doing so, the learned Magistrate seems to be suggesting that your petitioner is a habitual offender,*

IV. *The learned Magistrate erred in failing to declare your petitioner as a first offender despite taking into account that your petitioner had a previous conviction which was more than 10 years,*

V. *The learned Magistrate erred in failing to suspend the sentence imposed when he had earlier suspended two other cases that is CF 150/12 and 152/12 with similar offences,*

2. Pursuant to the service of the Petition of Appeal, the Appellant and the Respondent appeared in court on the 22nd of April 2016. The learned Counsel for the Appellant and the Respondent informed the court that they wish to conduct the hearing by way of written submissions. Accordingly, both the parties were directed to file their respective written submissions and they did so as per the directions. Having carefully considered the respective written submissions of both the parties and the record of the proceedings of the Magistrates' court, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant was charged in the Magistrates' court for one count of Obtaining Property by Deception, contrary to Section 317(1) of the Crimes Decree. The

Appellant was first produced before the Magistrates' court on the 27th of January 2014. Subsequent to several adjournments, the Appellant has pleaded guilty for this offence on the 31st of August 2015 on his own free will. Once again the matter had been subjected to adjournment on several occasions in order to finalise the submission in mitigation and for the Appellant to make full reparation. According to the record of the proceedings of the Magistrates' court, the Appellant has made full reparation to the complainant on the 18th of November 2015. The Appellant has then been sentenced for a period of twenty one (21) months of imprisonment on the 10th of February 2016. Aggrieved with the said sentence, the Appellant has filed this Petition of Appeal.

The Law,

4. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"

5. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, it states;

'It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or

irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.'

6. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that;

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".

7. Gounder JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013;

20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;

ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;

iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

Ground II,

8. For the convenience of determination, I first draw my attention to the second ground of appeal, which is founded on the contention that the learned Magistrate erred in stating that the Appellant committed this offence whilst he was on bail for two other criminal actions, CF 150 of 2012 and CF 152 of 2012.

9. The learned Magistrate in paragraph twelve of the Sentence has stated that;

" it is to be noted that you have committed this offence whilst you were on bail for three counts of Obtaining Property by Deception as per criminal cases CF 152/12 and 152/12"

10. The Appellant had been charged with one count of Obtaining Property by Deception, contrary to Section 317 (2) (a) of the Crimes Decree for the criminal action CF 150 of 2012. He has committed this offence between 15th of March 2011 and 5th of October 2011.

11. In respect of the second criminal action, CF 152 of 2012, the Appellant had been charged with two counts of Obtaining Property by Deception, contrary to Section 317 (2) (a) of the Crimes Decree. The Appellant committed these two offences on the 10th and 24th of September 2011 respectively. He had been first produced before the Magistrates' court for these two Criminal Actions on the 16th of April 2012 and had been granted bail on the same day.

12. The offence charged for this substantive matter was committed by the Appellant on the 20th of January 2014. Accordingly, it is apparent that he has committed this offence while on bail for the two Criminal Actions CF 150 of 2012 and CF 152 of 2012. Hence, I find that the remark made by the learned Magistrate in paragraph twelve of his Sentence based on correct factual grounds. Moreover, it must be noted that the learned Magistrate has not considered this ground in determining the length of the sentence. He has only considered it in determining whether it is appropriate to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Decree. The legal principles pertaining to the suspension of sentence will be discussed in detail later in this Judgment.

13. In view of the reasons discussed above, I do not find any merits on the second ground of appeal. It accordingly fails.

Ground III

14. The third ground of appeal highlights that the learned Magistrate erred in stating that the Appellant has a repetitive trend to commit similar offences. The learned counsel for the Appellant submits that the said comment of the learned Magistrate suggests that the Appellant is a habitual offender.

15. Section 11 (1) of the Sentencing and Penalties Decree in dealing with the issue of habitual offenders, states that;

"A judge may determine that an offender is a habitual offender for the purposes of this part"

16. Thus Section 11 specifies that it is only a judge who can determine an offender as a habitual offender. However, pursuant to Section 10 of the Sentencing and Penalties Decree, a judge can determine an offender as a habitual offender in respect of the following offences only. They are;

i) Sexual Offences,

ii) Offences involving violence,

iii) Offences involving robbery and housebreaking,

iv) Serious drug offence,

v) Arson offences,

17. Justice Madigan in **Harry v State [2014] FJHC 25; HAA05.2014 (10 February 2014)** has discussed the application of Sections 10 and 11 of the Sentencing and Penalties Decree, where his Lordship found that;

"A Magistrate does not have the power to declare an accused to be a habitual offender. By the terms of section 11 of the Sentencing and Penalties Decree 2009 that power is reserved for a Judge, The Court of Appeal and the Supreme Court. Nor does section 10 of that Decree specify theft to be an offence which qualifies as a basis for the declaration. The classification can only be extended to those with previous for sexual offences, violence, robbery, drugs or arson"

18. Thus, in the context of reasons discussed above a Magistrate has no jurisdiction to determine an offender as a habitual offender pursuant to Section 10 and 11 of the Sentencing and Penalties Decree.

19. I now turn onto to discuss whether the learned Magistrate has actually declared the Appellant as a habitual offender in the Sentence.

20. In paragraph twelve of the sentence, in which the learned Magistrate has stated this:

" Thus in such circumstances your actions are suggestive that you have a repetitive trend to commit similar offences having no regards to the law and as such should be dealt with a deterrent punishment".

21. It appears that the learned Magistrate has considered the repetitive nature of the offending of the Appellant in order in determining whether it is appropriate to suspend the sentence or not. The learned Magistrate has not declared the Appellant as a habitual offender. The repetitive nature of the offending has also not been taken into consideration in determining the length of the sentence. Hence, I find the third ground of appeal is devoid of any merit and thus it fails accordingly.

Ground IV

22. The fourth ground of appeal is founded on the contention that the learned Magistrate failed to consider the Appellant as a first offender and grant sufficient discount for it.

23. The learned Magistrate in considering the mitigating factors, has considered that the Appellant was not a first offender. He has found the previous conviction of the Appellant was recorded in the year of 2002 and has perhaps erroneously or mistakenly considered the last recorded previous conviction less than ten years of this offence. Accordingly, it appears that the leaned Magistrate has not given the Appellant any discount for his previous good character.

24. In contrast, the learned Magistrate in paragraph ten of his sentence has concluded that the Appellant has a clear criminal record as his previous conviction was recorded fourteen years ago.

25. Be that as it may, I now draw my attention to consider whether the failure of the learned Magistrate to consider the Appellant as a first offender and give him

appropriate discount has affected the correctness of the final conclusion of the Sentence and thus warrants an intervention of this court.

26. Section 4 (2) (i) of the Sentencing and Penalties Decree states that;

"In sentencing offenders a court must have regard to-

i) the offender's previous character,"

27. The previous good character of the Appellant attracts favourable discount in sentencing. However, it does not apply *vice versa*. The adverse previous character cannot be considered in increasing the sentence, unless such behavior constitutes the elements of the offence charged.

28. Section 5 of the Sentencing and Penalties Decree has stipulated the factors in which the court could consider when determining the character of an offender, where it states that;

"In determining the character of an offender a court may consider (amongst other matters) -

a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender,

b) the general reputation of the offender, and

c) any significant contribution made by the offender to the community, or any part of it,

29. According to Section 4 (2) (i) and 5 of the Sentencing and Penalties Decree, not only the previous convictions but also previous findings of guilt of an offender can be considered in order to determine the character of the offender. The sentencing court is allowed to consider the numbers of the previous convictions, their seriousness, the date of those previous convictions, their relevancy and their nature in order to determine the character of the offender. According to Section 5 (a) of the Decree, the sentencing court could consider the record of previous convictions irrespective of the date of such convictions. The time gap between the previous conviction and the present offence facilitates the court to properly determine the character of the offender.

30. In **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013),** Gounder JA in delivering the judgment in the Fiji Court of Appeal has discussed the manner in which the sentencing court could consider the time between the previous conviction and the present offence, his Lordship held that;

"The lapse of time between the old conviction and the new offence is a significant factor in assessing the character of an offender. As this Court said in Tirai (supra) at paragraph 8

> ***"There are situations where, notwithstanding a previous conviction, it is appropriate to treat the offender as being rehabilitated and of good character. This will be especially so if there has been a considerable lapse of time since the last conviction [R v. Smith (1983) 5 Cr. App.R(s) 61]."***

In my judgment the lack of correlation between the two offences and the considerable lapse of time were relevant in assessing the good character of the appellant. The lack of

consideration of these factors led the trial judge to erroneously disregard the previous good character of the appellant".

31. The conviction of the Appellant was last recorded in 2002 which is fourteen years prior to committing of this offence. However, previously recorded convictions are not the only factor of consideration in determining the character of the offender. Section 5 of the Sentencing and Penalties Decree has allowed the court to consider other factors, including the general reputation of the offender and his contributions to the community.

32. As discussed above, the Appellant has committed this offence while he was on bail for two other criminal actions, involving three counts of similar offences. He had been convicted for those three counts on the same day that he was convicted for this offence, although those offences were actually committed in 2011.

33. Lord Justice Kennedy in **Regina v Micheal James Twisse (2001) Crim LR 151)** has held that the sentencing court should not ignore the obvious, if it established that the offender had been engaged in similar offending prior to the offence that he was charged in the action. Lord Justice Kennedy held that under such circumstances, the sentencing court could give an appropriate sentence for the offence that he is charged for. However, the court should not consider him as an isolated offender. Lord Justice Kennedy in **Twisee (supra)** held that;

"What, however, is important is that, if the indictment is not drawn as we have suggested and the defendant does not ask for offences to be taken into consideration, Judges when sentencing should refrain from drawing inferences as to extent of the defendant's criminal activity, even if such inferences are inescapable having regard, for

example, to admissions made or equipment found. In other words, a defendant charged with one offence of supply cannot receive a more substantial sentence because it is clear to the court that he has been trading for 9 months: but the court is not require to blind to the obvious. If he claims that the occasion in question was an isolated transaction, that submission can be rejected. He can be given the appropriate sentence for that one offence without the credit he would receive if he really were an isolated offender."

34. **Michael James Twisse (supra)** is distinguishable from this case. Unlike in **Twisse (supra),** when the Appellant committed this offence, he had already been charged for his three previous offending. Therefore, as mentioned before, it is an obvious fact that the Appellant committed this offence while he was on bail for two other similar criminal actions. The sentencing court should not ignore such behaviors of an offender in sentencing.

35. The Supreme Court of Fiji in **Waqasaqa v The State [2006] FJSC 6; CAV0009U.2005S (8 June 2006)** held that;

"In a case like the present, where the later offence is committed while the prisoner was on bail awaiting trial for the earlier offence, a substantial concurrency of sentences for the two separate escapades would only encourage the prisoner on bail to make (criminal) hay while the sun shines"

36. In **Waqasaqa (supra)** the Supreme Court of Fiji has considered the imposing of concurrent sentence for an offence committed by an offender while on bail for another offence. The above observation made by the Supreme Court of Fiji has now been embodied under Section 22 (2) (e) of the Sentencing and Penalties Decree.

37. In view of the above observations made by the Supreme Court of Fiji in **Waqasaqa (supra),** and the Court of Appeal of UK in **Twisse (supra),** it is my opinion that an offender found guilty for committing an offence, while on bail for another offence, should not be allowed to find refuge for his adverse behavioural reputation under the guise of no recorded previous convictions. The questionable behaviour of the offender is not whether he has actually committed the perviously charged offence, but his criminal conduct in committing an offence while on bail.

38. Such behavior of an offender can be considered under Section 5 (b) of the Sentencing and Penalties Decree in order to determine the general reputation of the offender. Hence, I find that the Appellant by committing this offence while on bail has tarnished his reputation. Accordingly, it is my opinion that the Appellant is not entitled for any discount for his previous good character.

39. I now draw my attention to the mitigatory value of the previous good character of an offender in respect of offences involved with breach of trust.

40. Justice Shameem in **The State v Simeti Cakau (HAA 125 of 2004S)** has discussed the mitigatory value of the good character of offenders in respect of offences involved with breach of trust, where her ladyship Justice Shameem expounded that;

"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"

41. The offender in **Simeti Cakau (supra)** was a clerical officer in the Republic of Fiji Military Force. Justice Shameem held that in order to hold such a position, a good previous character is one of the essential prerequisites. Likewise, an unblemished character is a *sine quo non* to engage in business transaction based on trust and confidence. Hence, the previous good character of the Appellant in this particular case has a minimal mitigatory value.

42. Accordingly, I find that the conclusion of the learned Magistrate not to consider the Appellant as a first offender and not to accord him any discount for his previous good character is founded on correct principles in Sentencing. Hence, it does not warrant an intervention of this court.

Ground I,

43. I now turn onto ground one of appeal, which is founded on the contention that the learned Magistrate erred in law in imposing a custodial sentence when the Appellant made a full reparation.

44. Justice Shameem in **State v. Raymond Roberts (HAA 0053 of 2003 S)** has discussed the applicable sentencing approach for the offences involved with breach of trust, where her ladyship found that

"The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad

breach of trust , the money stolen is high in value and the accused shows no remorse or attempt at reparation. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim"

45. Furthermore, in **State v Simeti Cakau (supra),** Justice Shameem has further elaborated the applicable sentencing approach for offences involved with breach of trust, where her ladyship found that;

"That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender's way out of prison, but as a measure of true remorse"

46. According to the above discussed sentencing approach as expounded by her ladyship Justice Shameem, a suspended sentence may not be wrong in principle, if the accused is a first offender, pleads guilty and had made full reparation, demonstrating genuine remorse. The sentencing court must satisfy that the reparation made by the offender is not an attempt to escape from a custodial sentence. Hence, the actual consideration is not the reparation, but the true and sincere remorse in it.

47. This offence was committed on the 20th of January 2014. He was first produced before the Magistrates court on the 27th of January 2014. He pleaded guilty on the 30th of August 2015 and finally made the full reparation on the 18th of November 2015, that was nearly two years after the offence was committed.

48. Having found that the plea of guilt and the reparation were not made at the earliest, the learned Magistrate has considered the full reparation and the guilty plea as mitigating factors in favour of the Appellant in paragraph seven of the Sentence. However, the learned Magistrate has not found these two factors as an appropriate ground to suspend the sentence.

49. Therefore, I find that the approach adopted by the learned Magistrate in determining the mitigatory value of the full reparation is correctly founded in line with the applicable sentencing guideline principles. Hence, I find that this ground has no merit and it fails accordingly.

Ground V

50. I now draw my attention to ground five of appeal, founded on the contention that the learned Magistrate erred in law in falling to suspend the sentence. The Appellant submits that the sentence ought to have been suspended as the sentence of other two criminal actions with similar offences was suspended.

51. The Appellant pleaded guilty for the offences in the two criminal actions of CF 150 of 2012, CF 152 of 2012 on the same day in which he pleaded guilty for this offence. Having dealt both those actions together in one sentence, the learned Magistrate has sentenced the Appellant for Twenty Four (24) months of imprisonment and has suspended it for a period of five years.

52. It is prudent to approach this ground of appeal in two phases. The first is to determine whether the learned Magistrate has correctly concluded that there was no appropriate circumstances to suspend the sentence. The second phase is to

determine whether the final sentence imposed by the learned Magistrate is in line with the totality principles in sentencing.

53. Section 26 (1) of the Sentencing and Penalties Decree states that;

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances"

54. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

55. The Court of Appeal of New Zealand in **R v Petersen (1994) (2) NZLR 533, at 539**, has discussed the appropriate facts that a court should consider in suspending a sentence in an elaborative manner. Eichelbaum CJ in **Petersen (supra)** held that;

"Thomas at pp 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a

deterrence the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately".

56. Eichelbaum CJ in **Petersen (supra),** went on and further held that;

"In concluding our consideration of the principles we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response".

57. According to the comprehensive observation made by Eichelbaum CJ in **Petersen (supra),** the sentencing court could consider the following factors, though they are not exhaustive, in determining whether it is appropriate to impose a suspended sentence, *inter alia;*

i) The age of the offender,

ii) Previous good record, or a long period free of criminal activity,

iii) The need of rehabilitation,

iv) The likely response of the offender to the sentence,

v) Whether the suspended sentence act as a strong deterrent to the offender,

vi) The gravity of the offence, such as diminished culpability arising through lack of pre-meditation or the presence of provocation.

vii) Whether the offender cooperated with the authority,

58. The learned Magistrate in paragraph twelve of his Sentence has considered the previous behaviors of the appellant, his possible reactive response to the suspended sentence based on his repetitive nature of offending and also the principle of deterrence. Having considered these facts, the learned Magistrate has concluded that the circumstances of this case does not warrant a suspended sentence. I find that the conclusion of the learned Magistrate is founded on correct approach and principles.

59. I now turn onto discuss whether the sentence imposed by the learned Magistrate is just and in conformity with the totality principle.

60. Having considered the observation made by the High Court of Australia in Mill v The Queen [1988] HCA 70, the Fiji Court of Appeal in **Vukitoga v State [2013]**

FJCA 19; AAU0049.2008 (13 March 2013) has discussed the totality principle, where it was held that;

"The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences.

In Mill v The Queen [1988] HCA 70 the High Court of Australia in its judgment cited D.A.Thomas, Principles of Sentencing (2nded.1979) pp.56-57 as follows:

> ***"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; "when....cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."***

61. Accordingly, the sentencing court is required to consider whether the aggregate sentence imposed in sentencing an offender for series of offences is just and appropriate.

62. The Learned Magistrate has accurately considered the acceptable tariff limit as Two (2) to Five (5) years' imprisonment for the offence of Obtaining property by Deception. **(State v Atil Sharma (HAC 122 of 2010L) and The State v John Cunningham Miller (Criminal Appeal No 29 of 2013).** The learned Magistrate has then selected twenty six (26) months as the starting point, which is close to the lower end of the tariff limit. He then has added further eight months for the aggravating factors. Six months had been reduced to mitigating factors and seven months for the guilty plea, reaching the final sentence of twenty one (21) months' of imprisonment. The learned Magistrate has not imposed any parole period. The final sentence of twenty one (21) months imprisonment is in fact below the acceptable tariff limit of two (2) to five (5) years as expounded in above mentioned judicial precedents.

63. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found that;

"The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating

factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range"

64. In view of the observation made by Gounder JA in **Koroivuki (supra)** if the sentence falls below the acceptable tariff limit, the sentencing court is required to provide reasons. Having carefully perused through the sentence, I do not find that the learned Magistrate has given any reasons for imposing the sentence below the acceptable tariff limit. Hence, I find that the conclusion of the learned Magistrate in this sentence is not founded on correct principles and guidelines of sentencing.

65. It is in that context, I find there is a reason for me to intervene into the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Decree. I accordingly set aside the sentence of the learned Magistrate and consider an appropriate sentence in order to reflect the seriousness and the appropriate culpability of the Appellant in this offence.

66. Offences involving breach of trust attract custodial sentence unless an exceptional circumstance requires otherwise. Such acts are socially abhorrent. Trust and confidence is one of the essential prerequisites for the proper and progressive functioning of the social web, which includes personal human relationships, business and administrative relationships of people, etc. Hence, I find that the purpose of sentencing of offenders commit crimes of this nature must be founded on the principles of deterrence and the protection of community. I am mindful of the principle of rehabilitation. However as I

mentioned above, the need to deter the offenders or other persons from committing offences of this nature outweighs the purpose of rehabilitation.

67. The Appellant is a businessman and the director of Relax Transport. He has purchased two steel chains giving a cheque for the value of $560 from an account of Relax Transport. Being the director of the said business entity, the Appellant when presenting the said cheque must have been aware that the said account was dormant. Hence, it appears that the act was a pre-meditated with intentional deception. Hence, the level of responsibility and the degree of culpability of the Appellant in this offending could not be considered as low and minimal.

68. There is no specific information in the summary of fact in respect of the impact caused on the victim. However, the court is allowed to take notice of the impact of this offence on the society as a whole **(Koroivuki (supra)**. As I mentioned above, the offences of this nature can adversely affect the proper and positive function of the society. The Appellant has breached the trust reposed in him by the victim as a trusted business customer. The monetary value involved in this case is not substantially high.

69. In view of the reasons discussed above, it is appropriate to start the sentence from the middle range of the tariff. Hence, I select forty (40) months as the starting point. In view of the Summary of Facts, I do not find any further aggravating circumstances.

70. Plea of guilt of the Appellant was not at earliest. However, he is entitled for a sufficient discount for it. I accordingly reduce 8 months for the early guilty plea.

71. In view of the reasons discussed under Ground IV, the Appellant is not entitled for any discount for his previous good character. The Appellant made a full reparation. However, that was nearly after two years of the offending. Furthermore, I take into consideration the personal circumstances of the Appellant considered by the learned Magistrate in paragraph seven of his Sentence. In view of these factors, I reduce further 8 months, to reach the final sentence of two (2) years.

72. As I discussed above, I do not find any appropriate circumstances to suspend the sentence. Accordingly, I do not suspend this sentence pursuant to Section 26 of the Sentencing and Penalties Decree.

73. Having considered the personal circumstances of the Appellant and the possibility of rehabilitation, it is my opinion that sixteen (16) months of non-parole period would sufficiently serve the purpose of deterrence and rehabilitation. I accordingly hold that the Appellant is not eligible for parole for a period of sixteen months.

74. Accordingly, the final sentence for this offence for Obtaining Property by Deception is two years' of imprisonment period with non-parole period of Sixteen months.

75. According to the record of the proceedings of the Magistrates court, it appears that you had been granted bail on the same day that you were produced before the Magistrates court. Hence, I do not act under Section 24 of the Sentencing and Penalties Decree.

76. In conclusion, I make following orders,

i) The Appeal filed by the Appellant is dismissed.

ii) The Sentence imposed by the learned Magistrate on the 10th of February 2016, is set aside,

iii) The Appellant is sentenced for a period of two (2) years of imprisonment for the offence of Obtaining Property by Deception, contrary to Section 317 (1) of the Crimes Decree with non-parole period of sixteen (16) months pursuant to Section 18 (1) of the Sentencing and Penalties Decree,

iv) The sentence to be effective from the 10th of February 2016,

77. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka

1st August, 2016

Solicitors : **Office of the Director of Public Prosecutions**

Messrs Fazilat Shah Legal