

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA37 of 2016
[Magistrates' Court Case No. 1562 of 2015]

BETWEEN : **AMIT AVINESH CHAND** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Hon. Mr Justice Daniel Goundar

Counsel : Mr Z Mohammad for the Appellant
Ms S Lodhia for the Respondent

Date of Hearing : 9 February 2017

Date of Judgment : 20 February 2017

JUDGMENT

[1] This is a timely appeal against sentence only. The appellant was convicted on his own pleas of guilty to charges of obtaining goods by deception and fraudulent falsification of accounts. He was sentenced to 2 years' imprisonment for obtaining goods by deception and 18 months' imprisonment for fraudulent falsification of accounts, to be served concurrently. The total effective sentence was 2 years' imprisonment with a non-parole period of 18 months.

[2] The facts were that the appellant was employed as an IT Programmer by the complainant, Carpenters Finance Fiji Limited (Carpenters Finance). He had a credit facility known as the money link account with Carpenters Finance. The facility allowed him to purchase goods on credit and then pay off his account on a later date. As an employee of Carpenters Finance, the appellant had access to his account kept by

Carpenters Finance. Between 16 March 2012 and 2 February 2014, the appellant dishonestly obtained items such as electronics, recharged cards, sports equipment and grocery to the total value of \$74,336.02 from various subsidiaries of Carpenters Fiji Group Limited. During the same period, the appellant accessed his money link account and falsified his account by raising false payments to clear his debts. On 23 February 2014, the fraud was detected after a random audit of the money link accounts was carried out by Carpenters Finance. When the fraud was detected, the appellant returned some of the goods that he had dishonestly obtained.

[3] The grounds of appeal are:

- (i) That the Sentence is manifestly harsh and excessive in all the circumstances of the case.
- (ii) That the Learned Magistrate erred in law and in fact in starting with a three years term for the 1st Count and 27 months for the 2nd Count, by pegging the same to cases in which the above terms were the final sentence.
- (iii) That the Learned Magistrate erred in law and in fact adding a additional term of 18 months to Count 1 thereby falling into an error namely that the Count 1 is inherently a breach of trust offence.
- (iv) That the Learned Magistrate erred in law and in fact in failing to impose a term which would have allowed him to suspend the sentence for both Counts 1 and 2.

[4] Appellate courts review sentences for errors in the exercise of the sentencing discretion. Errors in the exercise of the sentencing discretion may arise if the sentencing court acts upon a wrong principle, considers irrelevant matters, mistakes the facts or fails to consider relevant matters (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). Unfortunately, in the present case, the grounds of appeal have not clearly spelt out the alleged errors in the exercise of the sentencing discretion. Counsel for the appellant submits that the main complaint is that the learned Magistrate erred in not suspending the sentence.

[5] The maximum sentence prescribed for obtaining property by deception is 10 years imprisonment. The maximum sentence for fraudulent falsification of accounts is 7 years imprisonment. In his sentencing remarks, the learned Magistrate referred to the case of *State v Miller* unreported Cr App No 29 of 2013; 31 January 2014, in which Madigan J said the tariff for these offences is between 2 to 5 years imprisonment and

that the high end of the tariff should be reserved for well planned and sophisticated deception. The learned Magistrate also referred to cases under the repealed Penal Code that had established a tariff of 18 months to 4 years for fraud offences committed by employees.

- [6] The learned Magistrate used the two-tiered approach to sentencing. After identifying the range, he used a starting point to adjust the sentence to reflect the mitigating and aggravating factors, before arriving at the final sentence. For obtaining goods by deception, 3 years was used as a starting point. For fraudulent falsification of accounts, 27 months was used as a starting point. The appellant's complaint regarding the terms used as the starting point has no merit.
- [7] The starting point approach in sentencing is well recognised in Fiji and in jurisdictions like England, Canada, Australia and New Zealand. The starting point approach supports the principles of equality and uniformity in sentencing (*Koroivuki v State* unreported Cr App No AAU0018 of 2010; 5 March 2015). Both, the offender and the community have the right to expect that others who are similarly situated and have committed similar offences, will receive similar punishments by the courts.
- [8] It is well settled that the starting point sentencing approach does not limit a judge's discretion in a particular case, but guides that discretion. In *Koroicakau v State* unreported Cr App No CAV0006 of 2005S; 4 May 2006, the Supreme Court rejected the petitioner's argument regarding the length of term the sentencing judge used for the starting point, saying the argument misunderstands the sentencing process. The Supreme Court said at [13]:

When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.

- [9] The aggravating factors considered by the learned Magistrate were the serious breach of trust, the planning and sophistication involved in the deception, and the total value of

the goods obtained was high. The sentence was enhanced by 1 ½ years to reflect these factors.

[10] The sentence was discounted to reflect the following mitigating factors:

Early guilty plea – 1 year

Previous good character – 1 year

Partial restitution – 6 months

[11] After discounting the sentence to reflect the above mitigating factors, the learned Magistrate arrived at the final term of 2 years' imprisonment for obtaining goods by deception and 18 months' imprisonment for fraudulent falsification of accounts. Since the offences were part of one transaction, the sentences were made to run concurrently, making a total effective sentence of 2 years' imprisonment with a non-parole period of 18 months. The learned Magistrate then directed his mind to suspension of sentence. At first, the learned Magistrate remarked that the sentence exceeded 2 years and therefore it could not be suspended. It is unclear why the learned Magistrate thought the sentence exceeded 2 years, when in fact it did not, but immediately after making that comment, the learned Magistrate remarked that suspension was inappropriate because of the seriousness of the case and the high amount involved.

[12] The courts view breach of trust by an employee as a serious offence. The primary purposes of sentence for offences involving dishonesty by an employee are denunciation and deterrence, both special and general. A sentence of imprisonment is inevitable and suspension of sentence is appropriate only if there are special circumstances. As the Court of Appeal said in *Deo v State* unreported Cr App No AAU0025.2005S; 11 November 2005 at [27]:

Frauds by an employee which involve a breach of trust strike at the very foundations of modern commerce and public administration. It has long been the rule that such cases must merit a sentence of imprisonment. Where the sentence imposed is of such a length that the court has power to consider suspending it, the sentencing judge must consider that option. However, that decision should only be made where there are special circumstances meriting

such a sentence and, in all cases, the sentencing court should not be too quick to find such circumstances.

- [13] Counsel for the appellant submits that the special circumstances that justified suspension of sentence were that the appellant was a young and a first time offender, that he showed genuine remorse by cooperating with the authorities and by entering early guilty pleas and the fact that partial restitution was made.
- [14] At the time of the offending, the appellant was 35 years old. Clearly, he was not a young offender. He was a person with mental maturity to deceive his employer over a period of two years. He used his knowledge and position as the IT Programmer to conceal his fraud for nearly two years. The use of technology to falsify the employer's accounts and conceal the fraud was calculated and sophisticated. The appellant was a senior employee having worked for Carpenters Finance for a decade. The defrauded amount was significant and the breach of trust was gross. These were serious aggravating factors that the learned Magistrate correctly took into consideration.
- [15] The appellant did not plead guilty at the first reasonable opportunity. The appellant first appeared in the Magistrates' Court on 12 October 2015. After numerous adjournments, he pleaded guilty on 25 July 2016. The appellant is fortunate that the learned Magistrate considered his guilty pleas as early guilty pleas.
- [16] Previous good character is not a compelling mitigating factor in breach of trust cases (*State v Cakau* unreported Cr. App. No. HAA 125 of 2004S; 10 November 2004), but in the present case, the learned Magistrate was generous to consider the appellant's previous good character as a mitigating factor.
- [17] The appellant disputed the total amount of restitution that was made to Carpenters Finance but the learned Magistrate accepted the complainant's valuation, which was \$21,149.85. The appellant was unable to support his valuation with evidence.
- [18] Appropriate discounts were given to all the relevant mitigating factors. There were no special circumstances to suspend the sentence. The sentence is on the lower end of the tariff for offences involving dishonest employees. Clearly, the learned Magistrate also

considered rehabilitation as a purpose of sentence when imposing the lower end of the tariff sentence. No error in the exercise of the sentencing discretion has been shown. The appeal must fail.

[19] For these reasons, the appeal is dismissed. The appellant may appeal against this judgment on any question of law alone pursuant to section 22(1) of the Court of Appeal Act, Cap.12 within 30 days from the date of this judgment.



Solicitors:
Fazilat Shah Legal for the Appellant
Office of the Director of Public Prosecutions for the State

A handwritten signature in black ink, appearing to read "Daniel Goundar", written over a horizontal line.

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Hon. Mr Justice Daniel Goundar