IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 74 OF 2017

BETWEEN : ASISH AMIT NAND

Appellant

AND : STATE

Respondent

Counsel : Mr. Iqbal Khan for Appellant

: Ms. S. Kiran for Respondent

Date of Hearing : 23rd October, 2017

Date of Ruling : 03rd November, 2017

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrates Court at Nadi with one count of Obtaining Financial Advantage by Deception contrary to Section 318 of the Crimes Act 2009. The amount involved was FJD 360.

2. The Appellant pleaded guilty to the charge on his own free will and agreed the summary of facts filed by the State. On the 3rd July, 2017, he was sentenced to 24 months' imprisonment with immediate effect and the balance imprisonment of 12 months was suspended for three years.

3. Being aggrieved by the said sentence, the Appellant filed a petition of Appeal within appealable time on the grounds stated therein.

4. Both Counsel filed written submissions and, in addition to that, they made oral submissions.

The Law

5. In ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015), the court considered the approach that should be taken in exercising appellate jurisdiction when a sentence imposed by a court below is challenged. The Court observed:

> *"In **Kim Nam Bae v The State** (AAU 15 of 1998; 26 February 1999) this Court observed:*
>
> > *"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 principles, 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 relevant consideration, then the Appellate Court may impose a different sentence. This error 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)."*
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> *"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"

Facts

6. The Appellant agreed following facts in the Magistrates Court:

In November 2010 PW 2 rang Air Pacific Limited to do booking and obtain itinerary to buy his airline ticket for his trip to Australia and New Zealand. PW 2's call went to Air Pacific call center which was operated by Mind Pearl Reservation and was served by the Appellant. The Appellant took his email address and phone number for this and sent him itinerary on his email.

On 05th April, 2011 the Appellant called PW 2 on his mobile phone advising him that he is selling six tickets to any Air Pacific destinations for FJD$399.00 each requesting him to deposit $60.00 in his bank account for each itinerary (total of $360.00 for six tickets).

The Appellant also mentioned that he is an Air Pacific Staff and is working at Nadi Airport and that he wants the cash to be deposited in Westpac account and he will issue an itinerary through which he can get the ticket issued at Nausori Airport.

PW 2 became suspicious and rang Shiu Ritesh Chandra PW1, Finance Officer of Air Pacific Limited, Nadi Airport who is his friend asking if they were running any promotion. PW 1 confirmed to PW 2 that there was no such promotion and also they do not have any staff by the name of the Appellant. PW 2 informed PW 1 that a friend called him and was trying to sell him airline tickets and he felt suspicious about it.

Since this was very strange which prompted PW 1to find out from where these tickets were coming from. PW 2 rang and informed the Appellant that he will pay cash and since he is in Nadi Airport, his cousin PW 1 who also works at Nadi Airport will pay him cash for the itinerary.

PW 1 made call to Appellant's mobile and mentioned to him that he would like to meet in person and discuss about the payment and ticket. The Appellant then told him that he will not be able to meet in person as he is working in the terminal and it will require an ID for him to visit him. The Appellant then gave him his Westpac account number 980224911 to deposit $360.00 and he will email the itinerary.

On 06th April PW1 sought approval from his company's legal department and deposited $360.00 cash of Air Pacific Limited into the account of Appellant at Westpac Namaka Branch and placed the transaction on hold hoping to get one sale transaction completed and subsequently get more information on this case.

PW 1 and PW 2 rang the Appellant and advised him that the money had been deposited. The Appellant then told them that the itinerary will be emailed to PW 2 in the same afternoon. Next day when PW 2 did not receive the itinerary he rang the Appellant who told him that the money deposited is on hold.

The Appellant also informed PW 2 that he does not want to deal with him as he had placed the money on hold in his account. $360.00 was released to the account of the Appellant and he was informed about it but he did not email him any itinerary.

Timaima Vatu PW 3 of Westpac Bank, Namaka confirms that $360.00 was deposited on the name of (PW 2) at Namaka Branch to the account of the Appellant on 6/4/11. She also confirms that on the same day the Appellant's account was checked at ANZ Samabula ATM as there is a charge of 0.60 cents on the Appellant's account without any withdrawal on this day. (PW 2) also has some of the recordings of some of the telephone conversations with the Appellant.

On 14/05/11 the Appellant was traced and caution interviewed and he stated that he used to work for Air Pacific call center operated by Mind Pearl and he knows PW 2 over the phone as once he had served him with itinerary. Also that he received $360.00 in his account as commission from PW 2 which he paid commission as he wanted 6 tickets for Nadi- Sydney for $599.00 each which was a promotional fare. He also stated that he had withdrawn $360.00 and he was working for Pacific Business Solution. He stated that he handed this money to his

then manager Marica Moimoi PW 5, Reservation Consultant residing at Cunningham, Suva as PW 2 came to her and the matter was settled.

PW 5 confirmed receiving the cash from the Appellant and left it in the office. She stated that she called PW 2 to come and collect the cash but he said that he is reporting the matter to police. According to PW 5 she left the cash in the office and the company closed and she does not know where the cash and her other properties are.

Grounds of Appeal

7. The Appellant filed following grounds of appeal.

I. *That the Learned trial Magistrate erred in law and fact in ordering a sentence of 24 months imprisonment which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.*

II. *That the Learned trial Magistrate erred in law and fact in considering legal authorities which were not applicable/relevant to the charges before the Court and/or could have been distinguished to the facts before the Court and hence misdirected himself in taking into consideration the said legal authorities.*

III. *That the Learned trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.*

IV. *That the Learned trial Magistrate erred in law and in fact in not taking into adequate consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.*

Analysis

8. In his appeal ground 1, the Appellant has taken up the position that the learned Magistrate had fallen into error when he was sentenced to 24 months' imprisonment which was harsh and excessive in the circumstances of the case.

9. The maximum sentence for the offence under Section 318 of the Crimes Act is 10 years' imprisonment.

10. Under the old Penal Code, the maximum sentence for the offence was a term of 5 years and the tariff was between 18 months to 3 years. In ***State v Miller*** [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014), Madigan J set the new tariff for the offence under the Crimes Act, proportionate to the higher maximum sentence. His Lordship observed:

> *"As this Court stated in Atil Sharma HAC122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception....."*
>
> *From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naive or in any other way socially disadvantaged"*

11. The learned Magistrate imposed a sentence of 24 months' imprisonment and 12 months of which was suspended for a period of 3 years. As a result, the Appellant is required to serve only 12 months in prison. There can be no doubt that 12 months' custodial sentence imposed on the Appellant is below the tariff range and quite lenient when considered the sophisticated nature of his offending and also the breach of trust situation.

12. Starting point of 3 years has been picked from the middle range of the tariff and is in agreement with the guideline set out in ***Korivuki v The State*** [2013] FJHC 15 (5 March 2013). The learned Magistrate aggravated the sentence by one year on account of preplanning/sophistication of the offending which in my view is correct. Appellant's false pretense as an employee of Air Pacific cannot be considered as an aggravating factor because it was already subsumed in the

elements of the offence. However, an increase of one year is not excessive for the aggravating factor highlighted by the learned Magistrate.

13. Learned Magistrate discounted two years for the guilty plea and Appellant's personal circumstances although the guilty plea was tendered belatedly as a matter of bargaining for leniency and not as an indication of contrition.

14. In ***Daunabuna v State*** Criminal Appeal No. AAU0120/07 (4 December 2009), the Court of Appeal adopted a passage from R v Winchester (1992) 58 A Crim R 345 at 350 by Hunt CJ:

> *"A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some cases be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: Shannon (1979) 21 SASR 442 at 452; Ellis (1986 6 NSWLR 603 at 604. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in a trial. Obviously enough, the extent to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected): Beaven (unreported, Court of Criminal Appeal, NSW, Hunt, Badgery-Parker and Abadee JJ, 22 August 1991), at p.12.*

15. The Counsel for Appellant has quoted the following phrase from Author D. Thomas's book, "Principles of Sentencing', Second Edition P 212, to justify his demand for leniency on account of personal circumstances of the Appellant:

> *"Family hardship may be a ground for mitigation of the sentence where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment".*

16. According to this dictum, leniency for family hardship is warranted only when the degree of hardship is exceptional. The Appellant's counsel submitted following personal circumstances before the learned Magistrate:

> *Accused is 34 years of age; he is married with 2 children ages 7 and 8 years and earns $ 210 per week as a Digitalization Clerical Officer at Registrar of Titles.*

17. None of these circumstances can be considered exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. Generally, personal circumstances, such as family hardship, have no or very little migratory value. See: ***Raj v State*** [2014] FJHC 12(20 August 2014). Therefore, 2 years in my opinion is a sufficient deduction.

18. The learned Magistrate has followed the correct sentencing approach in coming to his final sentence. He has applied two tiered process that should be adopted by sentencing judges in Fiji. The Supreme Court in ***Qurai –v- The State*** (CAV 24 of 2014; 20 August 2015) at paragraph 49 briefly described the methodology that is currently used in the courts in Fiji:

> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

19. The Appellant contends that the learned Magistrate applied legal authorities which are not applicable or relevant to the charges. However, the Counsel has failed to point out any legal authority wrongly applied by the learned Magistrate.

20. The Counsel for Appellant has also failed to highlight the so called irrelevant matters the learned Magistrate took into consideration and relevant matters he failed to take into consideration when sentencing the Appellant.

21. The Counsel for Appellant argues that the learned Magistrate misdirected himself as to the application of Section 4(2) (j) of the Sentencing and Penalties Act 2009 when he failed to suspend the whole sentence.

22. In the mitigation submission filed before the learned Magistrate, Appellant's counsel sought a non-custodial sentence on the basis that Appellant is remorseful; that he is the sole breadwinner of the family, assisting his sickly children, both suffering from heart problems; and that full restitution was done.

23. In light of this submission, the learned Magistrate, at paragraphs 11, 12, 13, 14 and 15, of his Ruling considered whether a suspended sentence was warranted in the circumstances of the case. He directed his mind to the principles enunciated by Gounder J in ***Balaggan v State*** [2012] FJHC 1032; HAA031.2011 (24 April 2012) where His Lordship stated:

> *"Neither under the common law, nor under the Sentencing and Penalties Decree, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is – whether the punishment fits the crime committed by the offender"*

24. The learned Magistrate, having considered the '***Balaggan*** guidelines' and general principles of sentencing set out in Section 4 of the Sentencing and Penalties Act, appears to have thought it futile to apply the notion of rehabilitation as the primary purpose of sentence in view of Appellant's previous convictions of similar nature. He also had doubts about genuineness of both restitution and guilty plea, both came late. In crafting his final sentence the learned Magistrate struck a right balance between rehabilitation and deterrence, both general and special, when he imposed a partly suspended sentence.

25. In ***State v Mahendra Prasad*** [2003] FJHC 320; HAC0009T.2002S (30 October 2003) it was stated;

> *"Where there is an earnest and sincere wish to effect reparation to the victim and there is prompt an expression of remorse, a suspended sentence is not wrong in principle.*

26. At paragraph 15 and 16 of the Ruling, the learned Magistrate observed:

> *"The non- custodial sentence is not wrong in principle if there is full restitution. The accused paid the total amount at the registry. However, making payment only will not make any accused person entitled for the non-custodial sentence. The very purpose of imposing non-custodial sentence is to give another chance to an accused to reform himself. The accused is already on a non- custodial sentence for above two convictions which are within the 10 years period. It seems therefore, the purpose of non-custodial sentence is lost as the accused committed this sophisticated offence within three years. If the accused was really remorseful, he could have paid the total amount immediately in 2012 when he was charged and taken progressive approach. However, he pleaded not guilty and dragged the matter for long. .... "*
>
> *..."I am of the view that, the court should strike a balance between the conflicting interests of the personal mitigation of the accused and need for punishment and the deterrence both special and general"*

27. The Appellant first appeared in the Magistrates Court on 2nd July, 2012 and pleaded not guilty to the charge. He withdrew his 'not guilty' plea and pleaded guilty to the charge after nearly 4 years on 8th August, 2016. It was on that day he deposited money in court. Therefore, learned Magistrate's suspicion as to genuineness of Appellant's remorse is well founded.

28. The Appellant has also submitted his familial circumstances.

29. Appellant's wife has filed a Statutory Declaration in this Court wherein she has stated that her two children had undergone open heart surgeries at CWM Hospital and that she herself had recently undergone tonsillitis operation at the same hospital. To support this claim, four documents issued by the hospital have been annexed to the affidavit filed.

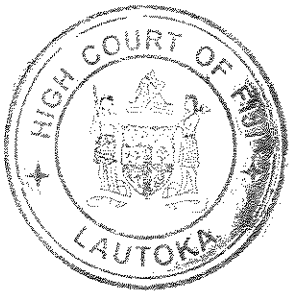
30. According to 'Discharge Summaries', Appellant's children had been discharged from hospital long time ago in 2009 and 2011. They are currently being looked after by the mother. The medical reports filed do not suggest a serious medical condition although Appellant's son Abhinev is still under medication.

31. Appellant's wife has been discharged from CWM hospital on 2nd June, 2017. It appears that her medical condition is not that serious so as to have an unfavorable impact on her children's wellbeing.

32. According to 'AAN 3', the Appellant had entered into a three year contract with the Ministry of Justice for the position of Clerical Officer. It is highly unlikely that he can secure this position in light of the conviction recorded in this case on his own volition.

33. Therefore, I would not consider these situations to be exceptional circumstances that could have been considered by the learned Magistrate to wholly suspend the sentence of the Appellant.

34. For the above reasons, the appeal against sentence is dismissed. The sentence imposed by the learned Magistrate at Nadi is affirmed.



Aruna Aluthge

Judge

AT LAUTOKA

3rd November, 2017

Counsel: Iqbal Khan Associates for Appellant

Office of the Director of Public Prosecution for Respondent