

IN THE HIGH COURT OF FIJIAT SUVA

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

NATHAN SIWAN NADAN CHETTY

Appellant

CASE NO: HAA 47 of 2018
[MC Suva Criminal Case No. 60 of 2014]

Vs.

STATE

Respondent

Counsel : Mr. A. Chand for Appellant
Mr. S. Shah for Respondent

Hearing on : 26 November 2018

Judgment on : 05 December 2018

JUDGMENT

1. The appellant was charged before the Magistrate Court of Suva for seven counts of obtaining financial advantage contrary to section 326 of the Crimes Decree (now Crimes Act). After trial, on 01/12/2015, the appellant was acquitted on counts 5, 6 and 7 but convicted of the lesser offence of dishonestly causing a loss on counts 1, 2, 3 and 4.

2. The appellant was sentenced on 28/06/2018 to 24 months imprisonment and the said sentence was suspended for 3 years.

3. Being aggrieved by the Learned Magistrate's decision to convict him, the appellant has filed this timely appeal raising a single ground of appeal against his conviction. The ground of appeal reads thus;
"That learned Magistrate erred in law and in fact when she convicted the Appellant when there was insufficient evidence on each of the four counts of Dishonestly Causing a Loss."
4. A brief account of the factual matrix in the case is found in paragraph 29 of the impugned judgment under the heading 'Analysis' where it is stated thus;
"During the hearing the Prosecution only tendered documents for Counts 1 to 4. The term financial advantage has a broader meaning in relation to fraud cases. In a Tasmanian case, Murphy [1987] Tas R 178 it has been held that the term "financial advantage" includes the obtaining of cash as well as other forms of intangible benefits. According to the evidence of the complainant (PW1) and his wife (PW2) the accused asked them for money stating that he was sick. They remitted money to the accused by way of TMO and a deposit into the accused Bank of Baroda account. The accused promised to repay the money once he received his bonus from the cane payment. Todate they have not received any money from the accused."
5. The Learned Magistrate's conclusion was that the evidence adduced in the case supports the offence of dishonestly causing a loss contrary to section 324 of the Crimes Decree 2009.
6. I note that the Learned Magistrate has outlined at paragraph 28 of the judgment the elements of the offence of obtaining financial advantage under section 326 of the Crimes Act, the offence which the appellant was charged with. The fourth element as stated by the Learned Magistrate is; *"Knows or believes that the other person is not eligible to receive that financial advantage"*. This is incorrect. The fourth element is about the knowledge of the accused that he or she is not eligible to receive the advantage.
7. The elements of the offence under section 326 of the Crimes Act could be identified thus;

- (a) The accused;
 - (b) Engaged in a conduct;
 - (c) As a result of that conduct, obtained a financial advantage for himself or herself from another person; and
 - (d) The accused knew or believed that he or she is not eligible to receive that financial advantage.
8. There is no discussion in the impugned judgment in relation to whether or not each element of the offence under section 326 of the Crimes Act has been proved beyond reasonable doubt on each count.
9. Section 142 of the Criminal Procedure Act which bears the short title, '*contents of judgment*' provides thus;
- 142 .— (1) Subject to sub-section (2), every such judgment shall, except as otherwise expressly provided by this Decree, be written by the judge or magistrate in English, and shall contain —
- (a) the point or points for determination;
 - (b) the decision and the reasons for the decision; and
 - (c) shall be dated and signed by the judge or magistrate in open court at the time of pronouncing it.
10. Therefore, it is fundamental for such judgment to include *inter alia*;
- a) An account of the relevant facts;
 - b) the elements of each offence the accused is charged with; and
 - c) the reasons for the decision on whether or not each charge has been proved.
11. I do note that there was no evidence to establish that the accused knew or believed that he is not eligible to receive that financial advantage and therefore it was open for the Learned Magistrate to consider whether a lesser offence has been proved beyond reasonable doubt.
12. However, I cannot approve the approach taken by the Learned Magistrate where she had failed to explain why she concluded that the offences the appellant was

charged with were not proved. On the face of it, the Learned Magistrate seems to have simply ignored the offence the appellant was charged with and had decided to consider a different (lesser) offence she considered appropriate.

13. Before proceeding to consider lesser or alternative offences as provided for by the Criminal Procedure Act, the court should first make a proper decision as to whether or not the charges filed by the prosecution against an accused is proved beyond reasonable doubt and should provide reasons for that decision.
14. In the instant case, sufficient reasons are not found in the impugned judgment even in relation to the decision to conclude that the offence of general dishonesty causing a loss under section 324 of the Crimes Act has been established in relation to counts 1 to 4.
15. The elements of the offence under section 324 of the Crimes Act which the appellant was ultimately convicted of in relation to counts 1 to 4 could be outlined as follows;
 - a) the accused;
 - b) did or omit to do an act;
 - c) with the intention of dishonestly causing a loss to another person.
16. It is pertinent to note that in order to establish the offence under the said section 324 of the Crimes Act, there must be evidence to prove that the accused had acted 'dishonestly'.
17. According to the prosecution this was a case where the appellant had failed to pay the complainant money he had obtained from the complainant with the promise of paying it back. The appellant had given evidence and had taken up the position that the money the complainant had paid to him was in fact money owed to him from the complainant.
18. The Learned State Counsel has quite correctly conceded that there was no evidence before the Magistrate Court to establish dishonesty on the part of the appellant.

19. In the circumstances, I find that the ground of appeal raised in this case is well founded and this appeal should be allowed. Accordingly, the conviction entered against the appellant on 01 December 2015 by the Magistrate Court of Suva in Case Number 60/2014 should be set aside.
20. Considering all the circumstances, I do not find it appropriate to order a re-trial.

Orders of the Court;

- i.) Appeal allowed;
- ii.) The convictions entered for the offence under section 324 of the Crimes Act in relation to counts 1, 2, 3 and 4 against the appellant, in Suva Magistrate Court Criminal Case No. 60 of 2014 and the resulting sentence set aside;
- iii.) The appellant is acquitted on counts 1, 2, 3 and 4 as charged in Suva Magistrate Court Criminal Case No. 60 of 2014; and
- iv.) The acquittals entered on counts 5, 6 and 7 affirmed.



Vinsent S. Perera
JUDGE

Solicitors;

Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the State.