IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

SOVA MATOGA

Appellant

CASE NO: HAA. 05 of 2019
[MC Suva, Crim. Case No. 1368 of 2018]

Vs.

STATE

Respondent

Counsel	**:**	Mr. A. Chand for the Appellant Ms. M. Khan for the Respondent
Hearing on	**:**	29 August 2019
Judgment on	**:**	04 October 2019

JUDGMENT

1. The appellant was charged before the Magistrate Court at Suva for one count of *false or misleading documents* contrary to section 335 of the Crimes Act 2009 ("Crimes Act") and one count of *obtaining financial advantage by deception* contrary to section 318 of the Crimes Act. The appellant pleaded guilty to the said charges on 21/11/18 and was convicted accordingly. She was sentenced to an imprisonment term of 02 years and 02 months on 08/03/19 where the time remaining to be served was 02 years and 02 months in view of the time the appellant had spent in custody.

2. Being aggrieved by the sentence imposed by the Learned Magistrate, the appellant had taken steps to file a timely appeal on the following grounds of appeal;

   i. ***THAT*** *Learned Magistrate erred in law and fact by considering the wrong tariff for Count 1.*
   ii. ***THE*** *Learned Magistrate erred in law and fact by considering a harsh starting point for Count 1.*
   iii. ***THAT*** *Learned Magistrate erred in law and fact by considering a harsh starting point for Count 2.*
   iv. ***THE*** *Learned Magistrate failed to consider the restitution reflected in the written mitigation submissions made by the Appellant.*

3. The charges the appellant was convicted of read thus;

FIRST COUNT

Statement of Offence (a)

False or Misleading Documents: contrary to Section 335 (a) (b) (c) of the Crimes Act Number 44 of 2009.

Particulars of Offence (b)

SOVA MATOGA on the 15th day of March, 2018 at Suva in the Central Division, you produces a Taxi Permit no: T2719 bearing the name of ROPATE & SOVA M. MAIWIRIWIRI to ABDUL RIAZ does so knowing that the documents is false.

SECOND COUNT

Statement of Offence (a)

Obtaining Financial Advantage by Deception: contrary to Section 318 of the Crimes Act Number 44 of 2009.

Particulars of Offence (b)

SOVA MATOGA, between 15th day of March, 2018 to 16th March, 2018 at Suva in the Central Division, by deception dishonestly obtained cash of $2000.00 from **ABDUL RIAZ** where you promised to sell the Taxi Permit No: T2719 but you fail to do so.

4. The summary of facts the appellant had admitted before the Learned Magistrate

are as follows;

- *Arrested and charged one **Sova Matoga** (B-1), 34 years, Office Admin at AOG church of Lot 1, Vunidakua Settlement, Cunningham was charged for one count of **False or Misleading Documents** contrary to Section 335 (a)(b)(c) of the Crimes Act No. 44 of 2009 ad two counts of **Obtaining Financial Advantage by Deception** contrary to Section 318 of the Crimes Act No. 44 of 2009.*
- *On 15/03/18, one **Abdul Riaz** (A-1), 36 years, Self Employed of Lot 1 Navunidakua Settlement, Cunningham, Stage 4 personally gave (B-1), cash of $200.00 as per receipt no: 1045221 for a deposit of the Taxi Permit No: T2719 bearing the owner's name as Ropate & Sova. M. Maiwiriwiri, which was uploaded on Facebook, for $12,000.00, where an agreement was made between (A-1) and (B-1).*
- *Again on the 16/03/18, (A-1) made another payment of $1800.00 to (B-1) as per receipts no: 1045241, total of $2000.*
- *After the payment, (A-1) failed to transfer the permit as arranged. (A-1) reported the matter at LTA Office, Valelevu and found that Taxi permit no: T2719 is owned by Ropate Maiwiriwiri and not (B-1).*
- *(A-1) reported the matter to the police where investigation was conducted. Investigation was conducted at LTA office, where **Rosa Naiveli** (A-2), 34 years, Acting Team Leader PSV – LTA of Lot 1 Koroba St, Nakasi confirmed that the Permit No: T2719 is owned by Ropate Maiwiriwiri.*
- *(B-1) was contacted which she voluntarily called in and was re-arrested by **WDC 3607 Laisa** (A-3), and interviewed under caution on the Video Recording Macine, where she admitted to all allegation against her.*
- *(B-1) was formally charged by **WDC 4195 Varisila** (A-4) for the above offences.*

5. Even though the appellant has brought this appeal to assail the sentence imposed by the Learned Magistrate, the respondent invited this court to first examine whether the convictions on the two counts are correct in law. If the convictions on the two counts are found to be bad in law, that would require this court to exercise the revisionary jurisdiction and to set aside the convictions. If that is the case, the

appeal against the sentence would become an academic exercise. Therefore, I have decided to consider the submissions made by the counsel for the respondent in relation to the convictions before I examine the grounds of appeal against the sentence.

6. In relation to the first count the respondent submits that the summary of facts does not establish the relevant offence.

7. The appellant was charged under section 335 of the Crimes Act on the first count. The said section reads thus;

> *False or misleading documents*
>
> 335. A person commits a summary offence if he or she—
>
> *(a)* produces a document to another person; and
> *(b)* does so knowing that the document is false or misleading; and
> *(c)* the document is produced in compliance or purported compliance with any law.

8. In order for the offence under section 335 above to be constituted, the document in question should be produced to the other person in compliance with or purported compliance with any law. What I can understand from the summary of facts is that, the appellant had uploaded on Facebook (an image of) a document purporting to be a taxi permit issued to her and another person, indicating that she is selling it for $12000 whereas the relevant taxi permit had in fact been issued under the other person's name only. Following that the complainant who is referred to as A-1 in the summary of facts appear to have agreed to buy the said permit and had made two payments to the appellant to the total value of $2000.

9. It is clear that the uploading of the aforementioned image on Facebook was not done by the appellant in compliance with any law. There is no evidence in the summary of facts to establish that the document in question was produced in compliance or purported compliance with any law. The position taken by the

respondent in relation to the first count where it is submitted that the summary of facts does not satisfy all the elements of the first count is therefore correct. Therefore, the plea of guilty entered by the appellant on the first count cannot be regarded as an unequivocal guilty plea. The court record bears no evidence that the Learned Magistrate has considered whether the elements of the first count (or the second count) are established by the summary of facts. If the Learned Magistrate did that, in all probability she may not have convicted the appellant on the first count.

10. In relation to the second count, the respondent submits that the said count is defective for the reason that the particulars of the offence does not properly outline the elements of the offence. The offence relating to the second count is *obtaining financial advantage by deception*. The particulars of the said count do refer to all the relevant elements including 'deception' but it is further mentioned in the said particulars that the appellant failed to fulfil her promise. The counsel for the respondent, relying on the case of ***Chute v State*** [2016] FJHC 1114; HAA015.2016 (8 December 2016) submits that mere breach of a promise would not constitute deception.

11. However, the respondent also points out that the summary of facts does contain evidence to establish deception on the part of the appellant. That is, according to the summary of facts the complainant was led to believe that the appellant was a joint owner of the relevant taxi permit where she was not, in order to obtain the money from the said complainant.

12. The second count correctly refers to the section under which the appellant is charged, which is section 318 of the Crimes Act. The short title of the offence is correctly mentioned in the 'statement of offence'. The summary of facts admitted by the appellant satisfies the elements of the relevant offence. Given these circumstances, I am satisfied that the plea of guilty entered by the appellant for the second count is unequivocal. The mere fact that the particulars of offence refer to a breach of promise as stated above, does not make the conviction on the second

count bad in law.

13. Given the above discussion, the conviction on the first count cannot stand. Therefore, I would exercise the revisionary jurisdiction of this court under section 262(1) of the Criminal Procedure Act to set aside the conviction on the first count. This means that the sentence for the first count will automatically be rendered nugatory. Therefore, it is no longer necessary to deal with the grounds of appeal relating to the sentence on the first count; ground one and groung two. The fourth ground of appeal has been abandoned and therefore the only remaining ground to be dealt with is the third ground of appeal.

14. Before I deal with the said ground of appeal against the sentence in relation to the second count, I wish to highlight that a magistrate's failure to consider whether the relevant offence is established by the summary of facts before entering a conviction upon a plea of guilty to a charge is a very serious lapse on the part of that magistrate.

15. A conviction should not be automatically entered when an accused pleads guilty to a particular charge. The magistrate should be satisfied that the guilty plea was entered voluntarily and that it is unequivocal, before recording a conviction. To ascertain whether the guilty plea is unequivocal, it is mandatory for the magistrate to consider whether there is evidence in the summary of facts admitted by the accused, to satisfy all the elements of the relevant offence. As I said in the case of ***Tuilomaloma v State*** [[2019] FJHC 851; HAA009.2019 (30 August 2019)] the magistrate should, in addition to satisfying himself/ herself that the elements of the relevant offence are made out through the facts included in the summary of facts, also make a clear endorsement in the court record that the said task was carried out.

16. The steps to be followed by a magistrate when an accused enters a plea of guilty to a charge should be as follows;

a) Question the accused in order to satisfy himself/ herself whether the accused pleaded guilty on his/ her own freewill;
b) If the magistrate is satisfied that the accused had pleaded guilty on his/ her own freewill, then request the prosecution to file and read the summary of facts. Where necessary the summary of facts should also be explained to the accused in his/ her preferred language through the interpreter;
c) Inquire from the accused whether he/ she understood the summary of facts and whether he/ she admits same;
d) If the accused confirms that he/ she understood the summary of facts and admits same, then should consider whether all the elements of the offence concerned are established through the summary of facts.

   If the accused is unrepresented, the magistrate should also go through the cautioned interview of the accused to see whether there are any exculpatory explanations and if so, should raise same with the accused to ascertain whether he/ she maintains the same line of defence [see ***Nawaqa v State*** [2001] FJLawRp 25; [2001] 1 FLR 123 (15 March 2001)];
e) If the summary of facts establishes the elements and therefore the relevant offence, then the magistrate should proceed to record a conviction for the relevant charge.

17. The relevant court record should reflect that the above steps were taken.

18. I note that in the instant case, though the appellant was legally represented at the initial stages, at the stage where she pleaded guilty to the two counts and was convicted, she was unrepresented. The court record does not include the cautioned interview of the appellant nor does it have a minute to the effect that the Learned Magistrate had gone through the cautioned interview to see whether there are any exculpatory explanations. It appears that this is another lapse on the part of the magistrate. However, because the appellant was legally represented in the appeal before me and because the counsel for the appellant did not raise any issue

pertaining to the equivocality of the appellant's plea, I consider it appropriate in this case to disregard this lapse in this case.

19. Now I turn to examine the third ground of appeal. On this ground, the appellant submits that the Learned Magistrate erred by selecting a harsh starting point when sentencing the appellant for the second count.

20. The accepted tariff for the offence of *obtaining financial advantage by deception* is an imprisonment term between 02 years to 05 years. The Learned Magistrate appear to have correctly identified the said range as the applicable tariff.

21. The Learned Magistrate selected 04 years as the starting point. She added 01 year in view of the single aggravating factor that was identified and deducted 09 months in view of the factors that were identified (apart from the guilty plea) as mitigating factors and then deducted a further term of 01 year and 05 months in view of the guilty plea to reach the final sentence of 02 years and 10 months.

22. The Learned Magistrate has not provided any justification for selecting 04 years which is 02 years more than the lower end of the tariff, as the starting point. The starting point for a sentence cannot be picked arbitrarily. There should be some form of a justification when a sentencer selects a term higher than the lower end of the tariff as the starting point.

23. In order to reach a just and proportionate final sentence that would correctly reflect the seriousness of the offence committed by an accused in applying the two-tier approach, the sentencer should let the relevant process guide him/ her to arrive at the final sentence and should not simply use the two-tier method merely to justify a particular figure predetermined by the sentencer to be the final sentence. It is a misconception to expect the final sentence to always fall within the sentencing tariff. Especially when it comes to sentencing an accused upon conviction based on an early guilty plea, the final sentence would not fall within the tariff but below the tariff unless there are very strong aggravating factors in the case, given the discount

usually granted for an early guilty plea.

24. Since the sentencing tariff is 02 years to 05 years, if an offender commits the offence of *obtaining financial advantage by deception* and if there are no aggravating factors or mitigating factors, that offender should receive a sentence of 02 years imprisonment. Therefore, the selecting of 04 years as the starting point when the lower end of the tariff is 02 years would indicate that the Learned Magistrate in this case has taken into account certain aggravating circumstances (not specified) to add 02 years to the said lower end. The Learned Magistrate had again added another year in view of one aggravating factor which is specified in the impugned decision. Accordingly, the result is that a total of 03 years have been added in view of the aggravating circumstances of the instant case.

25. The aggravating factor identified by the Learned Magistrate is as follows;

> "*The manner in which the defendant enticed the victim by trying to sell an item (Taxi Permit) which she does not own*."

26. It is not difficult to understand that this fact which was considered as an aggravating factor by the Learned Magistrate in fact constitutes 'deception' which is an element of the offence. However, there may be cases where the scheme employed by the accused to deceive the victim is so complex that the said complexity of the scheme which also signifies meticulous planning would justify to be considered as an aggravated factor.

27. What the appellant did in this case to deceive the victim was to post an image of a (forged) Taxi Permit with the false information that she is a joint permit holder. The appellant had not only made a false document but also used social media for her crime. These factors taken together with the fact that a total amount of $2000 was obtained through this deception, would justify a 03 year term to be added to the lower end of the relevant tariff. As far as the mitigating factors outlined by the Learned Magistrate are concerned, apart from remorse, all the other factors are

personal circumstances and the separate discount given for the guilty plea also invariably reflects remorse. Therefore, on the face of it, the reducing of 09 months of the sentence purportedly on the said (mitigating) factors, has been done based on irrelevant factors.

28. In the circumstances, even though I would not approve the Learned Magistrate's approach in selecting the relatively high starting point of 04 years without any justification, I am not convinced that the final term of 02 years and 10 months the Learned Magistrate reached is harsh or excessive given the nature and the circumstances of the offending.

29. The third ground of appeal should therefore fail.

30. However, I note that the Learned Magistrate has failed to fix a non-parole period in terms of the provisions of section 18(1) of the Sentencing and Penalties Act. Given that the sentence imposed in the instant case was above 02 years the Learned Magistrate must fix a non-parole period in view of the aforesaid section 18(1) or should provide reasons if a decision is made to decline the fixing of a non-parole period in terms of section 18(2) of the Sentencing and Penalties Act.

31. Given the construction of section 18(2) of the Sentencing and Penalties Act, the effect of not fixing a non-parole term would be that the offender has to serve the full remaining term of the sentence. [See ***State v Bulavou*** [2019] FJHC 878; HAC28.2018 (29 August 2019)]

32. In terms of the provisions of section 27(2) of the Prisons and Corrections Act, a prisoner is entitled for remission of one-third of the sentence for any term of imprisonment exceeding one month. The 'effective sentence'[1] derived based on remission is taken into account when discharging a prisoner in terms of section 48 of the Prisons and Corrections Act. However, according to the provisions of section

[1] Section 2 of the Prisons and Corrections Act defines the 'effective sentence' as the term of imprisonment that a prisoner is to serve, after taking into account remission as provided by section 28 of the Act.

48(1) of the Prisons and Corrections Act, a prisoner cannot be discharged based only on remission.

33. Even though the Sentencing and Penalties Act does not include any provisions relating to remission and therefore a sentencer is not required to take into account the provisions in the Prisons and Corrections Act relating to remission when sentencing an accused, the possibility of reconciling the provisions relating to remission in the Prisons and Corrections Act and the provisions relating to non-parole in the Sentencing and Penalties Act has been discussed in several judgments.

34. This debate on remission and non-parole surfaced with the practice adopted by the Prisons and Corrections Service to calculate remission based on the difference between the head sentence and the non-parole term. This practice led to the perception being formed that the fixing of a non-parole period is unfavorable to an accused and the non-parole period is simply an obstacle for the early discharge of the accused based on remission. The fact that the parole system is not operational due to the delay in constituting the parole board serve to reinforce the misgivings about the fixing of non-parole terms. Due to the fact that the non-parole system is not operational, at the moment the only effect of the non-parole term fixed by the sentencing courts in fact is that it prevents a prisoner from being discharged based on remission after serving the 'effective sentence' if the said non-parole term is more than two-thirds of the head sentence. Then the question is, what is the effect of declining to fix a non-parole term?

35. In terms of section 18(1) of the Sentencing and Penalties Act a sentencing court must fix a non-parole term when sentencing an accused to be imprisoned for life or for a term of 2 years or more. Let's take the extreme case where an accused is sentenced to life (not mandatory life) in a rape case in terms of section 207(1) of the Crimes Act. When a prisoner is sentenced to life, it is not possible to calculate remission and therefore the 'effective sentence'. Therefore, if a non-parole period is not fixed when sentencing an accused to be imprisoned for life, that accused is not entitled to an early discharge (based on remission). In other words, declining to fix a non-

parole period is clearly unfavourable to an accused who is sentenced to life imprisonment. That being the case, declining to fix a non-parole period cannot be construed as being favourable only to the accused persons who are sentenced to a fixed term of two years or more, but not the category who are sentenced for life. This argument complements the arguments in ***Bulavou*** (supra) in support of the position that declining to fix a non-parole term is unfavourable to the accused where the implication of doing so is that the accused should serve the full remaining head sentence and that it does not imply that the accused is entitled to an early release based on remission.

36. On one hand the non-parole period fixed by the court does indicate that the court does not want the relevant accused to be released or discharged before the accused serves that (non-parole) period which can therefore be construed as a minimum term.

37. On the other hand, fixing of a term as a period the accused is not entitled to be released on parole also signifies that the court considered it appropriate for the relevant accused to be considered for being released on parole after serving the relevant (non-parole) period. In my view, the parole board assumes jurisdiction over a prisoner to determine whether to release that prisoner on parole, when the court fixes a non-parole period in terms of section 18(1) of the Sentencing and Penalties Act and upon the prisoner serving that period. Thus, the fixing of a non-parole period is in fact favourable to the accused.

38. In my view, the best way to mitigate the complications that would arise out of the conflict between the provisions pertaining to remission and the provisions relating to non-parole is for the sentencing court to;

    a) fix two-thirds of the head sentence (or a lesser period) as the non-parole period if the court does not consider it inappropriate for the accused to receive the full benefit of remission;
    b) fix a period longer than two-thirds of the head sentence as the non-parole

period or decline to fix a non-parole period (in extreme cases) based on the nature/ gravity of the offence or the past history of the accused.

39. If the non-parole period is two-thirds of the head sentence (or less than that), the 'effective sentence' and the non-parole period of a prisoner who stays out of trouble inside the prison would be the same and in the absence of the parole board, that prisoner could be discharged upon the completion of the 'effective sentence'. In cases where the offence committed is relatively serious or the accused has several previous convictions, the court may consider fixing a period longer than two-thirds of the head sentence as the non-parole period; and in extreme cases decline to fix a non-parole period so that the relevant accused is required to serve the full (remaining) head sentence.

40. Section 19(1) of the Sentencing and Penalties Act reads thus;

> *19. – (1) The failure of the sentencing court to fix a non-parole period under section 18 does not invalidate the sentence but any court hearing an appeal against the sentence may fix a non-parole period in accordance with section 18.*

41. Accordingly, since the Learned Magistrate has failed to fix a non-parole term, I would fix the non-parole period at 22 months in view of the provisions of section 19(1) above. I have considered the nature and the circumstances of the offending, the aggravating and mitigating factors and the personal circumstances of the appellant in fixing the said non-parole term. Since the appellant is said to have been in custody for 08 months prior to the date of the sentence as noted by the Learned Magistrate, the non-parole term remaining to be served from the date of the sentence (i.e. 08/03/19) is 14 months.

Orders of the Court;

i.) By virtue of the provisions of section 262(1) of the Criminal Procedure Act, the conviction and the ensuing sentence imposed on the first count is set aside;

ii.) Appeal is dismissed;

iii.) The conviction entered in Suva Magistrate Court Criminal Case No. 1368 of 2018 on the second count and the ensuing sentence is affirmed;

iv.) A non-parole term of 22 months is fixed by virtue of the provisions of section 19(1) of the Sentencing and Penalties Act and the remaining non-parole term as at 08/03/19 is 14 months.

Vinsent S. Perera
JUDGE

Solicitors;

Legal Aid Commission for the Accused
Office of the Director of Public Prosecutions for the State