IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 66 OF 2019

BETWEEN	:	**RAVINESH SINGH** **APPELLANT**
AND	:	**THE STATE** **RESPONDENT**
Counsel	:	Mr. M. Naivalu for the Appellant. Mr. A. Singh for the Respondent.
Dates of Hearing	:	19, 23 December, 2019 and 31 January, 2020
Date of Judgment	:	14 February, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Lautoka with four counts of obtaining property by deception contrary to section 317 (1) of the Crimes Act.

2. When the matter was for hearing in the Magistrate's Court on 23rd August, 2019 the appellant through his counsel informed the court that he was changing his plea from not guilty to guilty.

3. The appellant thereafter admitted the summary of facts after it was read to him. The brief summary of facts was as follows:

4. Between 6th June, 2014 to 24th June, 2014 the appellant obtained items worth $299.00, $245.00, $3666.00 and $1,500.00 respectively from New Zealand Trading Corporation. The appellant issued cheques which were of no value when the cheques were dishonoured by the Bank the matter was reported to the police. The appellant was arrested, he admitted committing the offences and was subsequently charged.

5. On 27th September 2019 after hearing mitigation, the appellant was given an aggregate sentence of 7 years imprisonment with a non- parole period of 5 years (for all the four counts).

6. The appellant being aggrieved by the sentence filed a timely appeal against sentence as follows:

APPEAL AGAINST SENTENCE

a. That the learned Magistrate erred in law and/or in fact when he chose to begin his sentencing outside the applicable sentencing tariff.

b. That as such the learned Magistrate erred in law and/or in fact when according to *Koroivuki v State [2013] FJCA 15; AAU0018.2010, (5th March 2013)* he did not give his reasons for doing so.

c. That the learned Magistrate erred in law and/or in fact when he chose to end his sentencing outside the applicable sentencing tariff.

d. That learned Magistrate according to *Koroivuki v State [2013] FJCA 15; AAU0018.2010, (5th March 2013)* he did not give his reasons for doing so.

e. That the learned Magistrate erred in law and/or in fact when he failed to consider section 4 (2) (h) of the Sentencing and Penalties Act in your Petitioner effecting full restitution.

f. That the learned Magistrate erred in law and/or in fact when he reduced an aggregate 12 years to 7 years concurrent without explaining how he arrived at the latter figure in particular the imprisonment term for each count.

g. That the Petitioner appeals against sentence with respect being manifestly harsh and excessive and wrong in principle in all the circumstances of the case in that the honorable court was amenable to the options available to it pursuant to section 4 of the Sentencing & Penalties Act 2009 including a suspended sentence.

h. That the learned trial Magistrate with respect failed to take relevant matters into consideration and not taking into consideration relevant legal authorities and circumstances when sentencing your Petitioner.

7. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

LAW

8. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:

"(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes."

9. Section 4(2) states the different factors which a court must take into account when sentencing an offender. The maximum sentence for the offence of obtaining property by deception is 10 years imprisonment, the current tariff for this offence is from 2 years to 5 years imprisonment *(see State –vs.- John Cunningham Miller, criminal appeal No: HAA 29 OF 2013).*

10. **HIGH STARTING POINT**

The appellant argues that the learned Magistrate erred in selecting 12 years as an aggregate starting point for all the four counts which resulted in an excessive sentence. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in *Laisiasa Koroivuki v The State, criminal Appeal No: AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:

"[26] 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.

[27] 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.

11. This court agrees that the learned Magistrate erred in selecting a high starting point which has resulted in an excessive sentence.

12. In this case the learned Magistrate took a starting point of 12 years imprisonment being 3 years for each count. This resulted in a sentence which was way over the tariff, also it is noted that no reason has been given by the learned Magistrate why he had gone beyond the tariff.

13. For the above reasons, this court is satisfied that the sentence is a consequence of an error which should not be allowed to continue. The appeal against sentence in respect of this ground of appeal is allowed.

RESTITUTION

14. Counsel for the appellant during the hearing further argued and urged this court to consider the fact that the appellant on 22nd August, 2019 had made full restitution to the victim when he paid the sum of $5,710.00. Counsel submits that the appellant's sentence should have been substantially reduced resulting in a wholly suspended sentence.

15. This court accepts that restitution can be a mitigating factor in favour of the appellant, however, restitution has to be genuinely carried out in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence *(see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016).*

16. This court does not agree that the appellant had shown any genuine remorse when he paid the amount of restitution the allegations are dated to June, 2014, he did not plead guilty until the date of the hearing which was after 5 years in 2019. In my view the restitution made was not a sign of genuine remorse but a strategy to keep out of jail which is unacceptable.

17. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not the same thing. An early guilty plea could form part of that process but the sentencing court then has the responsibility to assess the early guilty plea along with other factors before arriving at a conclusion.

18. The Supreme Court of Fiji in *Gordon Aitcheson v State, criminal petition no. CAV0012.2018 (2 November 2018)* made a very pertinent observation about genuine remorse at paragraphs 19 and 20 as follows:

"[19] Accepting the inevitable, namely conviction, will not count as remorse: Netani Domonibitu CAV0004 of 2018 24th August 2018. Nor would negotiations for reduction of the charge be suitable evidence of the same (see Court of Appeal AAU129 of 2013).

[20] The sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of the mitigation. That

assessment is very much a role for the trial judge, which I do not believe this court should usurp. The judge before whom the plea is tendered, the summary of facts is read, and the mitigation is urged in the presence of the Accused, is in a much stronger position to assess remorse and whether it is sincere and acceptable."

19. It should also be noted that when a person pleads guilty it cannot automatically be taken as demonstrating a genuine remorse. In this case the learned Magistrate had incorrectly accepted restitution as true remorse when restitution was effected after 5 years of the offending a day before the hearing. This ground of appeal does not succeed.

20. Having allowed the appeal against sentence and in accordance with section 253 (3) of the Criminal Procedure Act I quash the sentence of the Magistrate's Court and sentence the appellant afresh.

21. Section 17 of the Sentencing and Penalties Act states:

"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."

22. I am satisfied that the four offences for which the appellant stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the four offences.

23. After assessing the objective seriousness of the offences committed I take 2 years imprisonment (lower range of the tariff) as the starting point of the aggregate sentence.

24. **AGGRAVATING FACTORS**

The following aggravating factors are obvious:

a. There is a high degree of planning involved;
b. The appellant was bold and undeterred;
c. Deliberate and improper use of an instrument of exchange namely cheques.

25. Considering the aggravating factors I increase the sentence by 2 years the interim sentence is now 4 years imprisonment.

26. **MITIGATION**

a. The appellant was 30 years at the time of the offending;
b. Sole bread winner of the family;
c. Taxi Driver and First Offender;
d. Seeks forgiveness of the victim;
e. Seeks leniency of the court.
f. Promises not to reoffend, willing to reform himself.

27. For the mitigation I reduce the interim aggregate sentence by 1 year. The appellant does not receive any reduction for guilty plea or restitution or remorse since he pleaded guilty on the day of the hearing after more than two years from 31st January, 2017 (when he pleaded not guilty) to 23rd August, 2019. The restitution was made one day before the hearing which does not indicate any genuine remorse but a last minute exercise to avoid an imprisonment term.

28. The appellant was granted bail on the day he appeared in court so there is no remand period. The final aggregate sentence for four counts of obtaining property by deception is 3 years imprisonment.

29. This sentence falls within the ambit of section 26 of the Sentencing and Penalties Act since it does not exceed 3 years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has discretion to suspend the term of imprisonment either wholly or partly if the court considers it to be appropriate to do so in the circumstances of the case.

30. The discretion to suspend the term of imprisonment must be exercised judicially after identifying special reasons for doing so.

31. In order to suspend the sentence of the appellant this court has to consider whether the punishment is justified taking into account the offence committed by the appellant. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

"Neither under the common law, nor under the Sentencing and Penalties [Act], 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?"

32. This court accepts that there are some factors in favour of the appellant such as he is first offender, was 30 years of age at the time of the offending and a person of generally good character. On the other hand, the appellant has committed a serious offence with much planning on a commercial enterprise on four occasions and his culpability is obvious.

33. After carefully weighing the factors in favour of the appellant and the serious nature of the offences committed, I am compelled to state that there is a need for special and general deterrence. I am satisfied that the term of imprisonment of 3 years imprisonment is an appropriate sentence to be served and I therefore refuse to suspend the term of imprisonment.

34. To assist in rehabilitation, I impose a non-parole period of 2 years imprisonment to be served before the appellant is eligible for parole.

35. I am satisfied that the term of 3 years imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.

ORDERS

1. The appeal against sentence is allowed.

2. The sentence of the Magistrate's Court is set aside.

3. The appellant is sentenced to 3 years imprisonment with effect from 27th September, 2019 with a non-parole period of 2 years to be served before he is eligible for parole.

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka

14th February, 2020

Solicitors

Messrs Law Naivalu for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.