

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 06 OF 2023

IN THE MATTER of an Appeal from the Decision
of the Magistrate's Court of Ba, in Criminal Case
No. 189 of 2019.

BETWEEN : JAGDISH KUMAR

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr. Anil J. Singh with Ms. Saminah Khan for the Appellant
Ms. Saini Naibe for the Respondent

Date of Hearing : 21 July 2023

Judgment : 29 August 2023

JUDGMENT

- [1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Ba.
- [2] On 20 April 2019, the Appellant was charged in the Magistrate's Court of Ba, with one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act No. 44 of 2009 (Crimes Act). The charge read as follows:

CHARGE

Statement of Offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to Section 318 of the Crimes Act of 2009.

Particulars of Offence (b)

JAGDISH KUMAR, on the 28th day of February 2019, at Yalalevu, Ba, in the Western Division, by deception dishonestly obtained \$2,200.00 from **ASPANA MEERAIYA**.

- [3] On 23 July 2019, the Appellant took his plea and pleaded not guilty to the charge.
- [4] The matter then proceeded to trial. The trial commenced on 27 April 2022. The prosecution led the evidence of 6 witnesses, including the complainant, Aspana Meeraiya.
- [5] At the end of the case for the prosecution, the defence made an application that the Appellant had no case to answer. However, by his Ruling dated 7 July 2022, the Learned Magistrate held that the Appellant had a case to answer and called for his defence.
- [6] On 16 September 2022, the Appellant had given evidence. The defence also led the evidence of Shanta Kiran, wife of the Appellant, in support of the defence case.
- [7] The case for the State is that the Appellant had sought \$2,200.00 from the complainant, which he said was to be paid to the Police, so as to obtain the burial order for the burial of her father, who had passed away on 20 February 2019. Later they had found that the burial notice was free of charge. The Appellant is said to have been working as a Law Clerk for 40 years.
- [8] On 23 December 2022, the Appellant was found guilty of the charge and convicted. On 23 February 2023, the Appellant had been imposed a sentence of 23 months imprisonment. He was ordered to serve 11 months and 15 days imprisonment immediately (less the 17 days he had already served in custody). The balance period of 11 months and 15 days imprisonment was suspended for a period of 4 years, to take effect upon being discharged from prison.

- [9] Aggrieved by the said Order, on 9 March 2023, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.
- [10] With the Leave of Court, on 16 May 2023, the Appellant filed Amended Grounds of Appeal.
- [11] This matter was taken up for hearing before me on 21 July 2023. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [12] As per the Amended Grounds of Appeal filed by the Appellant the Grounds of Appeal are as follows:

Grounds of Appeal against Conviction

- 1.1 The Learned Magistrate erroneously reversed the onus from the prosecution onto the Accused, in that, in order to entertain the act that the Appellant had done work for the complainant and was entitled to remuneration, the Magistrate in total disregard of the criminal law stated that if the money was owing, then the Accused had to prove the same by reporting to police or by a civil suit to recover what was owed to him. The Learned Magistrate should have or ought to have known that in a criminal case such as this, the burden does not shift on the Accused throughout the trial, an Accused does not have to prove anything, in a criminal trial.
- 1.2 The Learned Magistrate further erroneously put the onus on the Accused and wrongly used the Record of Interview tendered by the Accused to state that the Accused was evasive and that he should have had knowledge when the prosecution evidence was that the burial order was issued on the 28th of February 2019 and the funeral was on the following day. However, in order to bolster the complainant's evidence that the funeral had taken place without having any independent evidence before him from the funeral director, the cemetery records and the death certificate which would have clearly stated when the burial took place, the Magistrate was unjustified in his conclusion and wrongly convicted the Accused.

- 1.3 The Learned Magistrate erroneously rejected the evidence of the defence witness that is, the wife of the Accused, when he should have known or ought to have known that the wife or husband of an Accused person remained a competent witness for the prosecution or the defence and as she was not cross-examined her evidence was unchallenged and there was no legal basis for its rejection.
- 1.4 The Learned Magistrate erroneously failed or refused to consider a defence of "*Defence of Claim of Right*" which was submitted to him (Page 104 of the Records) thereby causing a grave miscarriage of justice as he was required to negate that defence before he could find all the elements of the offence proven.
- 1.5 The Learned Magistrate failed to consider or refused to consider a defence of "*Good Character*" (Page 105 of the Record) when he was duly bound to consider, even if he did not accept it.
- 1.6 The Learned Magistrate fell into error as the prosecution had failed to prove through any documentary evidence, as to when the burial took place, as this was a crucial issue where the truth lies.
- 1.7 The Learned Magistrate erroneously reversed the onus on the Appellant by stating that the entitlement to the money should have been litigated and/or reported to police when there was clear evidence that the Appellant had been promised payment on a Friday but was arrested the day before and thereafter criminal proceedings were on foot.
- 1.8 The Learned Magistrate fell into error when he failed to acknowledge that the alleged deception was not operating in the mind of the person being allegedly deceived when he mistook the deception to be the burial order fee which was incredible and therefore impossible to be operating in the mind of the person being deceived, as it was the evidence of the prosecution from the complainant that the money was for the police in issuing the burial order after the actual burial.
- 1.9 The Learned Magistrate failed to consider the there was a probability that the complainant was required to pay for the legal services in obtaining the burial order

and for carrying out work in preparation for the burial and the associated religious duties, thereby causing a grave miscarriage of justice.

- 1.10 The Learned Magistrate misused the Record of Interview which was tendered by the defence to erroneously bolster the prosecution case and further he failed to give the Appellant the benefit of the doubt, as his evidence and that of his witness was not discredited in cross-examination, thereby causing a miscarriage of justice.

Grounds of Appeal against Sentence

- 1.11 The Learned Magistrate failed to consider the impeccable evidence given by two character witnesses nor did he explain why that evidence did not carry weight as the charge itself was on the lower range of criminality (\$2,200.00) and committed by a 63 year old person without previous conviction when he ought to have known that prison is a last resort and that tariff is only a guidepost and not mandated compulsory sentence.
- 1.12 The Learned Magistrate erred in his sentencing exercise as he took irrelevant matters into consideration particularly, he regarded restitution as a calculated attempt to avoid a custodial sentence when he ought to have regarded restitution as an act to compensate the complainant and demonstrating the acceptance of the Learned Magistrate's findings and alleviating any pain on the complainant.
- 1.13 The Learned Magistrate erred in his sentencing as he took an erroneous and narrow view of the purpose and benefit to the community by restitution and that a custodial sentence is a last resort and reserved for the worse cases.
- 1.14 The sentence was manifestly harsh and excessive having regard to all the facts of the case.
- [13] As can be observed there are ten Grounds of Appeal against conviction; and four Grounds of Appeal against sentence.

The Law and Analysis

[14] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.”

[15] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

“(2) The High Court may —

- (a) confirm, reverse or vary the decision of the Magistrates Court; or*
- (b) remit the matter with the opinion of the High Court to the Magistrates Court; or*
- (c) order a new trial; or*
- (d) order trial by a court of competent jurisdiction; or*
- (e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*
- (f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*
- (3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”*

The Grounds of Appeal against Conviction

Grounds 1.1, 1.2 and 1.7

- [16] These Grounds of Appeal against conviction are that the Learned Magistrate erroneously reversed the onus from the prosecution to the Appellant as stated in the said Grounds of Appeal.
- [17] I find that the above three Grounds of Appeal against conviction are inter-related. As such, they will be addressed together.
- [18] Section 318 of the Crimes Act provides: *A person commits a summary offence if he or she, by a deception, dishonestly, obtains, a financial advantage, from another person.*
- [19] The Learned Magistrate’s Judgment is found at pages 44 to 59 of the Magistrate’s Court Record. I find that the Learned Magistrate has correctly outlined the elements of the offence of Obtaining a Financial Advantage by Deception [At page 46 of the Magistrate’s Court Record and elaborated on the said elements from pages 52-54]. He has also duly summarized all the evidence led in the trial [From pages 46-52 of the Magistrate’s Court

Record]. He has then analysed the evidence in relation to the said elements of the offence [From pages 52-59 of the Magistrate's Court Record]. Accordingly, the Learned Magistrate has found the Appellant guilty of the charge and convicted him.

[20] In his Judgment the Learned Magistrate has clearly stated that by law an Accused person is always presumed innocent until proven guilty. He has also stated that it is the burden on the prosecution to prove the Accused's (the Appellant's) guilt beyond reasonable doubt. He has further stated that this burden never shifts to the Appellant and remains with the prosecution throughout the trial. The Learned Magistrate has made due reference to Sections 57 and 58 of the Crimes Act where these principles have been reiterated.

[21] Whilst analyzing the evidence in the case in relation to the elements of the offence of Obtaining a Financial Advantage by Deception, the Learned Magistrate has correctly stated that the identity of the accused is not disputed. The complainant, Aspana Meeraiya (PW 1), her brother Sunil Vikash Nadan (PW 2) had known the Appellant as they live in the same community. The Learned Magistrate has gone on to state that the Appellant did not deny in his caution interview that he lives in the same community with the two witnesses and had assisted them with regard to their father's funeral and post funeral rites.

[22] The Learned Magistrate has stated that a sum of \$2,200.00 had been given to the Appellant for obtaining of a burial notice in the presence of PW 1, PW 2 and PW 3 (Arunesh Kumar). However, obtaining of a burial order was free of charge.

[23] With regard to the credibility of the said three witnesses, the Learned Magistrate has stated that PW 1, PW 2 and PW 3 were cross-examined and that they did not waiver and maintained their position. In his view they were not discredited and were firm. He had found that the said witnesses had no compelling reasons for lying or fabricating the evidence against the Appellant.

[24] The Counsel for the Appellant submits that the Learned Magistrate had reversed the onus from the prosecution to the Appellant and made reference to paragraph 29 of the

Learned Magistrate's Judgment to substantiate this position. Paragraph 29 reads as follows:

"Furthermore, if PW 1 and PW 2 actually owed money to the accused, he could have reported the matter to Police or take out the civil suit to recover what was owed to him. Accused works for a private legal firm and is aware of the procedures involved hence prompt action should have been taken in that regard as indication that he had a bona fide claim against PW 1 and PW 2. His excuse that he was about to lodge a claim when arrested by the Police is untenable and unbelievable because as of present date he has not filed any civil action whatsoever, or filed a Police report against PW 1 and PW 2. To me this counter-claim or allegation by the accused against PW 1 and PW 2 as basis of his defence is unreliable and not credible. I therefore refuse to believe and accept the defence case".

- [25] It is manifest from the above paragraph that the Learned Magistrate is setting out his reasons as to why he does not believe or accept the Appellant's evidence or the defence version in this case. In no way is the Learned Magistrate stating that he is shifting the burden of proof to the Appellant to establish the charge against him by the prosecution.
- [26] For the aforesaid reasons, I find that the said three Grounds of Appeal against the conviction are without merit and should be rejected.

Ground 1.3

- [27] This Ground of Appeal against conviction is that the Learned Magistrate erroneously rejected the evidence of the wife of the Appellant when he should have known or ought to have known that the wife or husband of an accused person remained a competent witness for the prosecution or the defence and that there was no legal basis to reject her evidence.
- [28] In his Judgment, the Learned Magistrate clearly sets out that the evidence of the Appellant's wife (DW 2) does not assist the Appellant's case due to the fact that she was not present at the time the money had been given and received by the Appellant at the residence of PW 1 and PW 2 and also at the time when the burial order was handed over to the PW 2.

[29] Furthermore, the Learned Magistrate has gone on to state that on the basis of how he has assessed the Appellant's evidence (DW 1) in the case, he finds that the DW 2, being the Appellant's wife, would have been briefed by the Appellant on what to say. She had personal interest in the case and that is to ensure that the Appellant was absolved from criminal liability. Her evidence did not discredit the evidence of the prosecution witnesses (PW 1, PW 2 and PW 3). As such, the Learned Magistrate states that he has given little weight to her evidence.

[30] I am of the opinion that the Learned Magistrate has given justifiable reasons as to why he was not accepting the evidence of the Appellant's wife. Accordingly, I find that the said Ground of Appeal against the conviction is also without merit.

Ground 1.4

[31] This Ground of Appeal against conviction is that the Learned Magistrate erroneously failed or refused to consider a defence of "*Claim of Right*" which was submitted to him and thereby that grave miscarriage of justice has been caused to the Appellant.

[32] It must be stated at the very outset that the said defence has been submitted during the course of the written submissions filed by the Learned Counsel for the Appellant at the conclusion of the trial. The said written submissions can be found from pages 93-108 of the Magistrate's Court Record.

[33] It is the opinion of this Court that although the Learned Magistrate may not have specifically made reference to the said defence during the course of his Judgment, he has dealt with the issues involved at paragraphs 28 and 29 of his Judgment.

[34] Therefore, this Ground of Appeal against the conviction is without merit.

Ground 1.5

[35] This Ground of Appeal against conviction is that the Learned Magistrate failed or refused to consider a defence of "*Good Character*" when he was duly bound to consider the said defence, even if he did not accept it.

[36] It must be emphasized that the said defence has also been submitted only during the course of the written submissions filed by the Learned Counsel for the Appellant at the conclusion of the trial [From pages 105-106 of the Magistrate's Court Record].

[37] The Learned Magistrate has duly considered the previous good character of the Appellant during the sentencing process and has given the Appellant a reasonable discount for the fact that he was a first offender.

[38] Therefore, I am of the opinion that this Ground of Appeal against the conviction is without merit.

Ground 1.6

[39] This Ground of Appeal against conviction is that the Learned Magistrate fell into error as the prosecution had failed to prove through any documentary evidence as to when the burial of the complainant's father took place, as this was a crucial issue where the truth lies.

[40] The Appellant has been charged for Obtaining Financial Advantage by Deception on or about the 28 February 2019. What the prosecution has to prove in this case is that on or about the 28 February 2019, the Appellant dishonestly obtained the sum of \$2,200.00 from the complainant by way of a deception.

[41] It is my opinion, that in this case the prosecution has established beyond reasonable doubt all the elements of the offence of Obtaining a Financial Advantage by Deception. It was not necessary for the prosecution to establish by documentary evidence as to when the burial of the complainant's father took place.

[42] For the said reasons, I am of the opinion that this Ground of Appeal against the conviction is without merit.

Ground 1.8

[43] This Ground of Appeal against conviction is that the Learned Magistrate fell into error when he failed to acknowledge that the alleged deception was not operating in the mind of the person being allegedly deceived.

[44] During the course of his Judgment, the Learned Magistrate has duly given his mind to the issue of deception and the evidence led by the prosecution to establish that the Appellant had made false representation to the PW 1 and PW 2 and thereby deceived them into paying him the sum of \$2,200.00.

[45] Therefore, I am of the opinion that this Ground of Appeal against the conviction is also without merit.

Ground 1.9

[46] This Ground of Appeal against conviction is that the Learned Magistrate failed to consider that there was a probability that the complainant was required to pay for the legal services in obtaining the burial order and for carrying out work in preparation for the burial and the associated religious duties, thereby causing a grave miscarriage of justice.

[47] It is obvious from the evidence of the prosecution witnesses that the obtaining of a burial order was free of charge. There was no requirement to make any payment or fee to the Police or to any other agency for the obtaining of the said burial order.

[48] Therefore, this Ground of Appeal against the conviction is also without merit.

Ground 1.10

[49] This Ground of Appeal against conviction is that the Learned Magistrate misused the record of interview which was tendered by the defence to erroneously bolster the prosecution case and further he failed to give the Appellant the benefit of the doubt thereby causing a miscarriage of justice.

[50] When examining the Judgment of the Learned Magistrate I find that he has properly assessed the totality of the evidence led at the trial and come to the conclusion that the prosecution has proved its case against the Appellant beyond reasonable doubt. As stated before, the Learned Magistrate has duly provided reasons as to why he does not believe or accept the Appellant's evidence or the defence version in this case.

[51] Therefore, I am of the opinion that this Ground of Appeal against the conviction is also without merit and should be rejected.

The Grounds of Appeal against Sentence

[52] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*“...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 principle, 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).”*

[53] These principles were endorsed by the Fiji Supreme Court in *Naisua v. The State* [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *House v. The King* [1936] HCA 40; [1936] 55 CLR 499; and adopted in *Kim Nam Bae v The State* Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.”*

[54] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant consideration.

[55] In *Sharma v. State* [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (R-v- Lee Oosthuizen [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in Naikелеkelevesi -v- The State (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in Qurai -v- The State (CAV 24 of 2014; 20 August 2015) at paragraph 48:

"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then 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."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide

effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] 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.”

- [56] The Grounds of Appeal against sentence are that the sentence is manifestly harsh and excessive in all the circumstances of the case, that the Learned Magistrate failed to consider the impeccable evidence given by two character witnesses on his behalf and that the Learned Magistrate failed to consider the fact that the Appellant was willing to pay restitution in this matter.
- [57] The Learned Magistrate’s Sentence is found at pages 75 to 79 of the Magistrate’s Court Record. As per Section 318 of the Crimes Act the maximum penalty for the offence of Obtaining a Financial Advantage by Deception is 10 years imprisonment. In this case, the Learned Magistrate has taken the tariff for the offence as 2 to 5 years imprisonment, based on **State v. Sharma** [2010] FJHC 623; HAC122.2010L (7 October 2010); which was upheld by the Court of Appeal in **Sharma v. State** [2013] FJCA 75; AAU98.2010 (17 June 2013).
- [58] In considering the sentence to be imposed on the Appellant, the Learned Magistrate has made reference to the statement made by His Lordship Justice Madigan in **State v. Sharma (supra)** as follows: “.....The tariff for obtaining a pecuniary advantage by deception should now be between 2 years and 5 years, with 2 years been reserved for minor offences with little and spontaneous deception. The top end of the range will

obviously be reserved for fraud of the most serious kind where premeditated and well planned, cynical operations is put in place.”

[59] Accordingly, considering the circumstances of the offending in this case, the Learned Magistrate has taken a starting point of 2 years imprisonment. He has duly considered the aggravating factors (breach of trust and prevalence of this type of offence in the community) and mitigating factors (primarily the fact that the Appellant was a first offender) and sentenced the Appellant to 23 months imprisonment. It is clear from the above that the Learned Magistrate has considered the lower end of the tariff in determining the sentence to be imposed on the Appellant. As such, it cannot be said that the sentence imposed by the Learned Magistrate is harsh and excessive.

[60] The Learned Magistrate has made reference to the testimony of the two character witnesses namely, W. Rosa and T. Waqavono, and stated that he has given due consideration to the said testimony.

[61] With regard to restitution, the Learned Magistrate has stated at paragraph 10 of the sentence as follows: *“Although you have restituted the amount taken after trial, it is not in my view a sincere and genuine gesture of remorse on your part. It appears to be a calculated attempt to avoid a custodial sentence”*.

[62] Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate’s Court.

[63] From a reading of the above Section it is manifest that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or only part of the sentence.

[64] I am of the opinion that the Learned Magistrate has duly provided his reasons as to why he was suspending only part of the sentence imposed on the Appellant and not the whole sentence. At paragraphs 11 and 12 of the sentence, the Learned Magistrate states as follows: *"11. The purpose of sentencing in this case is deterrence. Therefore, this sentence should be a lesson for you and a warning to other similar minded people. 12. Nonetheless bearing in mind the circumstances of offending, your background and belated restitution, I am of the view that a part custodial and part suspended term would be apt. This will account for your rehabilitation."*

[65] Considering the aforesaid, I am of the opinion that the Grounds of Appeal against sentence are without merit.

Conclusion

[66] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[67] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Ba in Criminal Case No. 189 of 2019 is affirmed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the Appellant : Anil J. Singh Lawyers, Barristers and Solicitors, Nadi.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Lautoka.