

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT NASINU

Criminal File No. MACD 02 /2021 NAS

BETWEEN : Fiji Independent Commission Against Corruption
Prosecution

AND : Mul Deo & Ors
Accused

For the State : Mr. Nand

For the Accused : Ms. J.Manueli & Mr. Liganivai (LAC)

SENTENCE

1. The accused was charged for the following offence:

“ Statement of Offence (a)

DISHONESTY-OBTAINING A GAIN: Contrary to Section 323 of the Crimes Act 2009.

Particulars of Offence (b)

MUL DEO and Anor. on or about 27th April 2016, at Nakasi in the Eastern Division, acquired a drivers license for the said MUL DEO without following due process of the Land Transport Authority with the intention of dishonestly obtaining the said drivers license.”

2. The accused in the presence of his counsel had indicated his willingness to take his plea. When the charge was read to the accused, he indicated that he understood the same. The accused then pled guilty to the offence willingly and also admitted the summary of facts.
3. The Court being satisfied that the accused's guilty plea was voluntary and unequivocal herein convicts the accused.

Previous Convictions and Documents Tendered

4. Prosecution informed the court that the accused was a first offender and in addition they tendered the transcript of the accused's caution interview.

Summary of Facts

5. The summary of facts tendered by Prosecution highlights that the accused paid the sum of \$350.00 to an Avinesh Shashi Kumar (co-accused who has been dealt with) at Farm Road Opposite the LDS Church on the 27th of April 2016.

6. This is after he had approached Avinesh Shashi Kumar earlier in the day seeking assistance in obtaining a Group 6 license.
7. He then received a drivers licence following payment authorising him to drive a specific type of class of motor vehicles classified under 'Group 6' in addition to his earlier authorisation to drive motor vehicle classified under 'Group 2'.
8. In terms of classification, a Group 6 type driver's license authorises a driver to drive a motor vehicle which can carry weight of 3.5 tonnes and above. They are loosely termed as 'Heavy Goods Vehicle Drivers Licence'.
9. As a result of the said classification any applicant has to go through vigorous testing prior to a driver's license under group 6 being issued. In this case, the accused bypassed all of these by paying \$350.00 to Avinesh Shashi Kumar.
10. In his caution interview, the accused admitted this.

Mitigation

11. In mitigation counsel for the accused submitted the following:

Personal Circumstances

Accused is 39 years of age, is married, has four (4) children, is self-employed earning \$200/week.

Circumstances of the Offending

He was not aware that it was an offence to do what he did, in light of the representations made to him from Avinesh Shashi Kumar.

Mitigating Factors

He is a first offender, has entered a guilty plea prior to trial saving the court's time, has cooperated with FICAC, he is remorseful, is the sole-breadwinner and had spent one night in remand. He has also had his Class 6 Drivers license cancelled.

Prosecutions Sentencing Submission

12. The gist of Prosecution's submission leans towards a sentence that is proportionate to the offending.

13. However, they also seek a sentence which shall act as deterrence.

Maximum Punishment and Tariff

14. The offence of *DISHONESTY –Obtaining a Gain* has a maximum sentence of five (5) years imprisonment.

15. There is currently no tariff established for this offending however this court has considered the decision in *Sagar v State (Fiji Independent Commission Against Corruption)* [2020] FJHC 445; HAA025.2020 (17 June 2020) as a helpful guideline.

16. In that case, an eighteen (18) month custodial imprisonment term was overturned and replaced with a term of three (3) month custodial imprisonment term and the suspension of the remaining fifteen (15) months, on the basis that the learned Magistrate whom had sentenced the Appellant had not properly exercised his judicial discretion whilst sentencing.

Sentence

17. In reaching the appropriate sentence the court is mindful of Section 4(1) of the *Sentencing and Penalties Act 2009* which it regurgitates herein below as follows:

“Sentencing Guidelines

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*
- (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....”*

18. In *Laisiasa Koroivuki v the State* (Criminal Appeal AAU 0018 of 2010) his Lordship Justice Goundar discussed the guiding principles for determining the starting point in sentencing and observed:

"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 time. 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".

19. Considering the gravity of offending and the accused’s culpability, this Court garnering from the decision in *Sagar v State (supra)* selects eighteen (18) months as the starting point for the sentence.

20. This court does not add any aggravating features of the offence as they are absolved in the offence itself.

21. The court notes mitigation presented as highlighted above-herein wherein it deducts three (3) months bringing the interim sentence to fifteen (15) months.

22. The Supreme Court specifically his Lordship Marsoof JA in *Qurai v State* [2015] FJSC 15; CAV24.2014 (20 August 2015) set out the appropriate discounts that courts of first instance must have regard to when sentencing accused persons whom have pled guilty. This court regurgitates verbatim the same as follows:

“[56] This Court takes cognisance, as it is bound to in terms of section 4(2)(b) of the Sentencing Decree, the existence in Fiji of a sentencing practice of allowing a discount of one-third of the sentence for an early guilty plea...”

23. As a result this court deducts one third (1/3) from the remaining fifteen (15) months interim sentence, because of the early plea of guilty.

24. The final sentence following the one third deduction stands at ten (10) months.

25. As the final period of imprisonment falls below two (2) years, the court as per Section 26 of the *Sentencing and Penalties Act 2009* has the discretion to order a suspended sentence.

26. In considering whether or not to suspend the sentence the court garners direction from Goundar, J’s sentencing remarks in *Muskaan Balagan v State* [2012] HAA 31/11S 24 April 2012 at [20] as follows:

‘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 purposes 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 punishment fits the crime committed by the offender?’

27. Further in *Sagar v State (supra)* Aluthge J stated at paragraph 20 :

“20. The term of imprisonment imposed by the Learned Magistrate is less than two years. Therefore, the Learned Magistrate had discretion to suspend the sentence if he was satisfied that, in the circumstances of the case, it was appropriate for him to do so.”

28. The co-accused Ashwin Shashi Kumar was given a fully suspended sentence by my predecessor in title on the basis of being a young and first offender.

29. The same cannot be stated for the accused.

30. Given the above discussions, the court is of the opinion that a fully suspended sentence sends the 'incorrect message' to the members of the public that legal requirements can be bypassed without any consequences.

31. There must be some form of deterrence when sentencing as such this court shall not fully suspend the sentence.

32. Be that as it may considering the principle of proportionality in sentencing as a result of the mitigating factors, it would not be out of place if part of the sentence would be suspended.

33. Therefore considering Section 15(1)(d) and Section 26 (1) and (5) of the ***Sentencing and Penalties Act 2009***, a partly suspended period of imprisonment shall be imposed as follows:

- i. The accused shall serve three (3) months of his ten (10) month sentence in custody whilst the balance of seven (7) months shall be suspended for a period of two (2) years.
- ii. The three (3) month custodial period of imprisonment shall be served immediately.

34. The clerk will explain this sentence to the accused person.

35. 28 days to appeal.


JEREMAIA N.L SAVOU
Resident Magistrate
13th January 2022

