

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 3 of 2011
(High Court HAC 195 of 2010)

BETWEEN : **KADALI SURYANAYANA MURTI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Chandra RJA**

Counsel : **Mr R. P. Singh for the Appellant**
Ms S. Puamau for the Respondent

Date of Hearing : **17 June 2013**

Date of Ruling : **5 August 2013**

RULING

1. The Appellant was charged on one count of Trafficking in Person contrary to section 112(3) (a) and (b) of the Crimes Decree No.44 of 2009 and seven counts of Obtaining Property by Deception contrary to section 317(1) of the Crimes Decree No.44 of 2009.
2. Seven Indian nationals had been promised by the Appellant, himself an Indian national, that he could arrange work for them in a farm in New Zealand. He had taken money from them as fees and had made the travel arrangements for them. He had booked them to travel to Fiji and when they had inquired from him as to where Nadi was, he had convinced them that Nadi was in New Zealand and that they would be taking a domestic flight from Nadi. He had told the victims to lie to the immigration officers at Nadi that they were on holiday. The Appellant had told the immigration officer that he was assisting the victims with English translation and that he did not know them. He had

wanted to leave the victims in Fiji and return to India. The victims were at the risk of being exploited.

3. After trial before assessors the appellant was convicted and sentenced to six years imprisonment with a non-parole period of 4 years.
4. In his notice of appeal the Appellant has appealed against his conviction and sentence on the following grounds:

Against Conviction

1. THAT the Learned Trial Judge erred in law by allowing the State to proceed with the eight (8) charges of obtaining Property by Deception contrary to section 317(1) of the Crimes Decree, No. 44 of 2009 as it was the States' case that the deception occurred in Delhi, India, which is a different jurisdiction altogether.
2. THAT the Learned Trial Judge failed to explain where it derived the right to charge a citizen of another country in this country's Court of Law for a crime that was alleged to have been committed in another jurisdiction.
3. THAT the Learned Trial Judge failed to address the Assessors and Counsel on the law that vested in him the power to hear the eight (8) charges of Obtaining Property by Deception contrary to section 317(1) of the Crimes Decree, No. 44 of 2009.
4. THAT the Learned Trial Judge erred in law by allowing the transcript of evidence that had a number of discrepancies in all evidence of the witnesses.
5. THAT the Learned Trial Judge was obliged to interfere with the inference and determine whether those matters are such as to throw a real doubt upon the credibility of each witness but he failed to do so.

6. THAT the Learned Trial Judge severely erred in law by allowing the substantial contradicted evidence adduced in court by the seven (7) primary witnesses.
7. THAT the Learned Trial Judge erred in law when he accepted the verbal and hearsay evidence of all seven (7) complainants for any such transaction that was said and alleged to have taken place without formal proof.
8. THAT the Learned Trial Judge failed to consider that all material evidence was in fact found on the complainants' possession and there was nil evidence before the court that was tendered that proved that the materials were given by me to the victims as alleged.
9. THAT the Learned Trial Judge failed to consider that there was no eye witness to corroborate the witnesses' evidence.

Against Sentence

1. THAT the Learned Trial Judge did not thoroughly consider section 4(2) of the Sentencing and Penalties Decree 2009 before sentencing.
2. THAT the Learned Trial Judge failed to consider that this was in fact the first ever Human Trafficking case and there is no prior case to consult and fix an estimate sentence.
3. THAT there was no current sentencing guideline in respect of count one of the Information.
4. THAT there was no term of any applicable guideline judgment.
5. THAT the nature and gravity of these offences were minimal.
6. THAT the Offenders' culpability and degree of responsibility for the offence was minimal.

7. THAT the impact of the offence on the victims in this case was minimal as well in comparison with other Human Trafficking cases.
8. THAT the Learned Trial Judge failed to consider that the degree of exploitation on the victims is minimal.

Consideration of grounds of appeal against conviction

5. Grounds 1, 2 and 3 relate to the question of jurisdiction. The issue taken up is as to whether the High Court of Fiji had jurisdiction to hear this matter. The arrangements with the victims and the exchange of money had taken place in Delhi, India. The victims had been promised employment in New Zealand and were brought to Fiji on the pretext that Nadi was in New Zealand. The transaction therefore involves the jurisdictions of India and Fiji and if the victims ended up in New Zealand, perhaps New Zealand too.
6. The conduct of the Appellant involved the movement of persons from one country to another on the promise of getting employment in another country for which the victims had to pay substantial sums of money. When the victims and the perpetrator of the crime were detected by the Immigration Officers in Fiji, the perpetrator's scheme of deception was made known as the victims up to that point of time had believed the Appellant about the promise of employment. The money changed hands in India and therefore the initial act of deception was completed there and the victims were being conveyed to their supposed employment which did not materialize. The manner in which the Appellant had behaved on reaching Fiji gave away his scheme of deception. The question therefore arises as to which country would have jurisdiction to try the perpetrator of the crime.
7. The charges leveled against the Appellant were in terms of section 112(3)(a) and (b) of the Crimes Decree No.44 of 2009 and seven counts in terms of section 317(1) of the Crimes Decree.

8. Section 112(3)(a) and (b) provide :

“(1) A person (the first person) commits an indictable offence of trafficking in persons if -

(a) The first person organizes or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) In organizing or facilitating that entry or proposed entry, or that receipt, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after entry or receipt.”

9. The Respondent relies on Section 7(1)(a)(b)(c) of the Crimes Decree No.44 of 2009 to justify this position which provide:

“Unless any of the provisions of section 8 apply to an offence under this Decree or any other Act or Decree, a person does not commit an offence against the laws of Fiji unless-

(a) The conduct constituting the alleged offence occurs –

(i) Wholly or partly in Fiji; or

(ii) Wholly or partly on board a Fijian aircraft or a Fijian ship; or

(b) The conduct constituting the alleged offence occurs wholly outside Fiji and a result of the conduct occurs –

(i) Wholly or partly in Fiji; or

(ii) Wholly or partly on board a Fijian aircraft or a Fijian ship; or

(c) All of the following conditions are satisfied –

(i) The alleged offence is an ancillary offence;

(ii) The conduct constituting the alleged offence occurs wholly outside Fiji; and

(iii) The conduct constituting the primary offence to which the ancillary offence relates or a result of that conduct occurs (or is intended by the person to occur) wholly or partly in Fiji, or wholly or partly on board a Fijian aircraft or a Fijian ship”.

The Respondent also relies on S. 4 of the Crimes Decree, No.44 of 2009 which defines a “Fijian Aircraft” as

(a)An aircraft registered, or required to be registered under the law of Fiji relating to civil aviation;

(b)An aircraft (other than a defence aircraft) that is owned by, or in the possession of control of a government entity; or

(c)A defence aircraft.”

The Respondent has submitted that although the offending occurred in Delhi, India since the victims and the Appellant travelled to Fiji on Air Pacific that Fiji Court have jurisdiction to hear the matter.

10. The learned trial Judge in his summing up to the Assessors stated :

“[17] The prosecution case is that the deception occurred in Delhi, India but the result of the deception occurred in Fiji, that is, the complainants ended up in Fiji, a country they had not intended to come. I direct you that as a matter of law, Fiji’s courts have jurisdiction to try the case and you do not have to consider the jurisdiction issue.”

11. The Appellant has challenged the jurisdiction of the Court to hear the case. The High Court had decided that it had jurisdiction to hear the case which involved a consideration of the provisions of the Crimes Decree set out above and which have been taken up in the submissions of the Respondent. Since the question of jurisdiction considered in this case involves a consideration of the facts as well since the initial deception in India was related to the result that occurred in Fiji, it would amount to a mixed question of law and fact.

12. The Appellant has relied on the minority view in **Treacy v The Director of Public Prosecutions** (1971) A.C.537 which involved a case of theft where a letter was posted from the Isle of Wight and received in Germany which was the basis of the charge. The minority view favoured the view that the offence was committed in Germany while the majority view was that the offence was committed in the Isle of Wight. The present case is distinguishable from Treacy's case as the facts are quite different.
13. The question regarding jurisdiction in cases of human trafficking being a very important one and further since this was the first case where this issue has arisen in Fiji, it is a matter that should be dealt with by the Full Court of the Court of Appeal and leave is granted.
14. The grounds of appeal 4 to 9 are on questions relating to adequacy of the direction of the learned trial judge regarding evidence. These are arguable and would be best dealt with by the full court of the Court of Appeal along with the question of jurisdiction.
15. Grounds 10 to 17 are in respect of the sentence meted out to the Appellant. Ground 10 as regards the sentence being harsh and excessive, grounds 11 to 13 as regards there being no precedents for trafficking in persons cases in Fiji and grounds 14 to 17 being in relation to mitigating factors.
16. These grounds regarding sentence are arguable especially in view of the fact that there are no precedents in Fiji for such cases and leave is granted on these grounds.
17. As the non-parole period of the sentence is four years with effect from 17 November 2010 this appeal should be listed before the Full Court of the Court of Appeal as early as possible.

Orders of Court

- (1) Leave to appeal against conviction and sentence is allowed.
- (2) The appeal to be listed before the full court of the Court of Appeal as early as possible.

Suresh Chandra
Resident Justice of Appeal