**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 SURYANAYANARA MURTI**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Calanchini P**
**Prematilaka JA**
**Madigan JA**

**Counsel** : **Mr R P Singh with Mr A Nand for the Appellant**
**Ms Y Prasad for the Respondent**

**Date of Hearing** : **15 September 2015**

**Date of Judgment** : **2 October 2015**

# JUDGMENT

**Calanchini P**

[1] The Appellant was charged with one count of trafficking in persons contrary to section 112(3) (a) (b) of the Crimes Decree 2009 and with seven counts of obtaining property by deception contrary to section 317(1) of the Crimes Decree. Following a trial in the High Court at Suva before a judge sitting with three assessors the

Appellant was convicted on all counts. On 17 November 2010 the Appellant was sentenced for the offence of trafficking in persons and for each offence of obtaining property by deception to terms of imprisonment of six years to be served concurrently with a non-parole term of four years.

[2] In the statement of agreed facts (p.50 of the record) it was agreed that the Appellant, an Indian national, together with seven other Indian nationals (the complainants) travelled together from India to Nadi Fiji departing on 9 and arriving on 10 September 2010. It was also agreed that at the time of leaving India all seven complainants held valid Indian passports. The caution interview and charge statement of the Appellant were admitted into evidence by consent. The flight itineraries and boarding passes of all seven complainants and the Appellant were also admitted into evidence by consent.

[3] The case for the prosecution and the evidence adduced to establish it may be stated briefly. The Appellant told the seven complainants that he could arrange work for them on a farm in New Zealand. He had taken money from each of them. The amended information alleged that each complainant had paid NZ$4,300.00 to the Appellant in India. The Appellant showed the complainants documents indicating that they had been offered jobs. The Appellant made all the travel arrangements for the complainants and their tickets were handed to them at the airport in India. The Appellant had told the complainants that Nadi was in New Zealand and that they would take a domestic flight from Nadi to their destination. It was alleged that the Appellant had told the complainants that they should lie to the immigration officers at Nadi and say that they were on holiday. The Appellant had told the immigration officer that he was assisting the complainants with English translation and that he did not know them. The Appellant intended to leave the complainants in Fiji and return to India. The complainants were at risk of being exploited. The employment documents were false and there was no work arranged in New Zealand for the complainants.

[4] In his notice of appeal the Appellant raised nine grounds of appeal against conviction and eight grounds of appeal against sentence. Although received by the Court of Appeal registry on 14 January 2011 the appeal was considered at the leave hearing to

be timely since the notice itself was dated 22 November 2010 and on the basis that the subsequent delay was not the fault of the Appellant. The justice of appeal granted leave to appeal against conviction and sentence.

[5] The same grounds of appeal against conviction were set out in the Appellant's submissions filed on 12 May 2015 as follows:

> *"1. That the Learned Trial Judge erred in law by allowing the State to proceed with the eight charges of obtaining property by deception contrary to section 317(1) of the Crimes Decree No. 44 of 2009 as it was the State case that the deception occurred in Delhi, India, which is a different jurisdiction altogether.*
>
> *2. That the Learned Trial Judge failed to explain why 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 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 ailed 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 primary witnesses.*
>
> *7. That the Learned Trial Judge erred in law when he accepted the verbal and hearsay evidence of all seven 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 complainant's possession and there was nil evidence before the Court that was tendered that proved that the materials were given by the Appellant to the victims as alleged.*

9. *That the Learned Trial Judge failed to consider that there was no eye witness to corroborate the witness's evidence."*

[6] At the hearing of the appeal Counsel for the Appellant informed the Court that the Appellant was not pursuing his appeal against sentence. The appeal against sentence will be regarded as having been abandoned under Rule 39 of the Court of Appeal Rules and dismissed by this Court.

[7] The nine grounds of appeal against conviction may be considered under three broad headings. The first matter raised by the appeal concerns jurisdiction to try the Appellant in respect of the seven counts of obtaining property by deception (grounds 1-3). The second matter raised by the appeal concerns discrepancies and contradictions in the evidence given by prosecution witnesses and the manner in which the learned trial judge dealt with those issues in his summing up and in his judgment (grounds 4-6). The third issue raised by the appeal concerns whether the admissible evidence and the weight to be attached to it was sufficient to establish guilt beyond reasonable doubt.

[8] The issue of jurisdiction raised by the appeal relates to the convictions for obtaining property by deception. The offence is set out in section 317(1) of the Crimes Decree and states that:

> *"A person commits a summary offence if he or she, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property."*

[9] The issue is whether the Appellant can be tried for an offence against section 317(1) being a law of Fiji. That issue is expressly dealt with by section 7 (1)(b)(i) of the Crimes Decree which states so far as is relevant:

> *"___ a person does not commit an offence against the laws of Fiji unless*
>
> *(a)* ___
> *(b)* *the conduct constituting the alleged offence occurs wholly outside Fiji and a result of the conduct occurs:*
> *(i)* *wholly or partly in Fiji*
> *(ii)* ___ "

[10] Although the conduct (being the *"act"* or acts as defined – section 15 of the Decree) that constitutes the offence occurred in India and wholly outside Fiji, a person commits an offence under section 317(1) of the Decree if "*a*" result (and not "*the*" result) of the act or acts constituting the offence occurred wholly or partly in Fiji.

[11] There is no doubt that the initial conversation concerning employment in New Zealand and representations made to the complainants to that effect by the Appellant constituted the deception that led to the complainants handing over NZ$4,300.00 each to the Appellant. The deception and the obtaining of the money being the conduct constituting the offence occurred wholly outside Fiji. Even after the money had been obtained from the Complainants, the Appellant continued the deceptive conduct by purporting to arrange travel documents to New Zealand, by explaining that Nadi was in New Zealand and by boarding the flight with the complainants. All the time the complainants believing that they were flying to Nadi in New Zealand. A result of the conduct was only apparent and complete in the minds of the complainants when they landed at Nadi and realised that they were not in New Zealand but had in fact landed at Nadi in Fiji. A further result was that there was no arranged employment.

[12] On occasions the question of jurisdiction may involve questions of mixed fact and law. However in this case it was an agreed fact that the complainants had left India with the Appellant on 9 September 2010 and had arrived together at Nadi International Airport on 10 September 2010. In my judgment that agreed fact settled the jurisdictional issue. I am satisfied that the learned trial Judge did not misdirect the assessors or himself for that matter when he directed the assessors that the *"Fiji Courts have jurisdiction to try the case and you do not have to consider the jurisdiction issue."* The issues for the assessors to determine were related to the obtaining of property and deceptive conduct.

[13] In my view the Appellant has failed to demonstrate any error in relation the challenge based on jurisdiction and I would dismiss those grounds of appeal.

[14] The next challenge is set out in grounds four to six which relate to discrepancies and contradictions in evidence adduced by the Respondent. It must be stated these three

grounds of appeal are not well drafted with the result that it is difficult to determine the precise nature of the challenge.

[15] It is appropriate to consider each of these grounds separately. Ground 4 states:

> *"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."*

[16] I have some difficulty in determining what is the error that the learned trial Judge is alleged to have made in ground four. The only issue that appears to be raised by this ground is that the learned trial Judge should have identified discrepancies in the evidence given by the witnesses and given directions to the assessors on those discrepancies. The ground of appeal does not specify the alleged discrepancies nor as to how material those discrepancies were. The written submissions filed by the Appellant refer to some issues where the evidence given by a particular complainant was not exactly the same as the evidence given by one or more of the other complainants. However it is not clear whether the Appellant is complaining about the directions given to the assessors or about the reasons given by the learned Judge in his judgment when he indicated his agreement with the opinions of the assessors.

[17] Ground 5 states:

> *"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."*

This ground appears to allege that the trial Judge has in some way omitted to properly consider the evidence in his judgment. There are no particulars provided in relation to the complaint.

[18] Ground 6 states:

> *"That the Learned Trial Judge severely erred in law by allowing the substantial contradicted evidence adduced in Court by the seven primary witnesses."*

It can be assumed that this ground also seeks to challenge the reasoning of the Trial Judge in his judgment.

[19] Although the written judgment of the learned Trial Judge does not appear in the appeal record, it is reproduced in the written submissions filed by the Appellant. It is appropriate to first determine what is the duty of the Trial Judge upon the rendering by the assessors of unanimous opinions that the Appellant was guilty of all counts in the amended Information. The answer is found in section 237(3) of the Criminal Procedure Decree 2009. The effect of that provision is that when the judge agrees with either the unanimous or the majority opinion of the assessors and where the judge's summing up of the evidence is on record it shall not be necessary for any judgment (other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) to be written down or comply with the procedure or contain the material that would otherwise be required under the Decree. In other words, there is no obligation under section 237(3) for the trial Judge to give reasons for his decision to agree with the opinions of the assessors.

[20] However, the Supreme Court has stated on a number of occasions that the appeal courts would be greatly assisted if a trial judge indicates in the judgment the evidence upon which he relied or the reasons for his decision to agree with the opinions of the assessors (See: **Sheik Mohammed –v- The State** CAV 2 of 2013; 27 February 2014). It is apparent from his judgment that the trial Judge has considered the evidence summarized by him in his summing up and has also taken into account his own observations of the witnesses as they gave their evidence and were cross-examined. He has not relied solely on those observations. As the judge in criminal trials in Fiji is the ultimate arbiter of fact and law, those were matters that he was quite entitled to take into account.

[21] As for the alleged discrepancies and contradictions, it is apparent that any inconsistency or contradiction in the evidence given by the seven complainants can more readily be attributed to the frailties of human memory and to the fact that at no stage prior to meeting at the airport had the seven complainants all met with the Appellant at the same time and at the same place.

[22] The evidence adduced by the Respondent at the trial, if accepted by the assessors and the trial Judge was in my judgment sufficient to establish the elements of the offences beyond reasonable doubt. The Appellant denied all the allegations and was not able

to offer any explanation as to how it was that the reference number on his electronic ticket occurred as the second last within the sequence of reference numbers on the tickets of the seven complainants. The Appellant's ticket reference number was 5891602577952. The first ticket reference number was 5891602577946. The remaining seven tickets reference numbers followed in numerical order and the eighth ticket had the reference number 5891602577953. It was simply a matter for the assessors and the trial judge to determine whether they were satisfied beyond reasonable doubt as to the guilt of the Appellant after all the evidence had been led.

[23] In my judgment the learned trial Judge has summarised the material evidence of the complainants in a fair and balanced way in paragraphs 28 to 36. For the reasons already stated I do not consider that it was necessary for the trial Judge to make any specific reference to what may otherwise be referred to as either insignificant or irrelevant discrepancies and inconsistencies in either his summing up or his judgment.

[24] The third issue raised by the appeal is canvassed in grounds seven to nine of the grounds of appeal against conviction. Ground seven claims that the trial Judge erred in law when he accepted the verbal and hearsay evidence of the complainants concerning the offences without formal proof. At the outset it must be pointed out, having read the record of the evidence, that the evidence of the seven complainants was almost entirely direct evidence as to what they did, saw and heard. To the extent that there was any hearsay evidence in respect of conversations the evidence was admissible as an exception to the hearsay rule. There could be no objection to their having given their evidence verbally in the witness box and subjecting themselves to cross-examination. Any relevant formal proofs that could reasonably be expected to be adduced were either admitted into evidence by consent or during the course of the trial.

[25] Ground 8 is related to the assessment of the available evidence by the learned Judge both in his summing up and in his judgment. The weight to be attached to that evidence was a matter in the first instance for the assessors and then a matter for the trial Judge as the ultimate arbiter of fact. I have no hesitation in concluding that all the relevant evidence was summarised by the trial Judge and that on the evidence thus

summarised it was open to both the assessors and the Judge to conclude that the Appellant was guilty on all counts.

[26] Ground nine complains that the trial Judge has failed to consider that there was *"no eye witness"* to corroborate the evidence given by the complainants. The warning given by the learned Judge in his summing up at paragraphs 22 and 23 concerning corroboration and accomplices was quite proper. There was certainly no requirement in law to indicate that corroboration need be by way of *"an eye witness."*

[27] For all of the above reasons I have concluded that the grounds of appeal do not succeed and I would dismiss the appeal.

**Prematilaka JA**

[28] I have read in draft form the judgment of Calanchini P and agree that the appeal should be dismissed.

**Madigan JA**

[29] I have read in draft the judgment of the President of the Court. I agree with his judgment and would dismiss the appeal on all grounds for the reasons stated therein.

*Orders:*

*Appeal dismissed,*

**Hon. Mr Justice Calanchini**
**PRESIDENT, COURT OF APPEAL**

**Hon. Mr Justice Prematilaka**
**JUSTICE OF APPEAL**

**Hon. Mr Justice Madigan**
**JUSTICE OF APPEAL**