

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 122 OF 2010L

STATE

VS

ATIL SHARMA

Mr. M. Korovou for the State
Accused in Person

Date of Hearing: 24 September & 7 October 2010
Date of Sentence: 07 October 2010

SENTENCE

- [1] This accused was convicted after trial in the Magistrates Court at Lautoka of one offence of obtaining financial advantage by deception, contrary to section 318 of the Crimes Decree 2009. The matter was then transferred to this Court for sentence pursuant to section 190(1) of the Criminal Procedure Decree 2009.

[2] The facts revealed at trial show that a Miss Bijay Wati put an advertisement for employment in the newspapers in April 2010. In response to the advertisement, she was contacted by a person to come to Lautoka on Friday the 29th April 2010 with a view to working as a housekeeper for \$150 per week. The caller said his name was Vimlesh Sharma and that he was the Director of a Garment factory. Ms Wati was at that time working for a doctor in Suva. She took leave and came to Lautoka that very day. She was met at the bus stand by "Vimlesh Sharma" and 2 other men. She was taken to an office where he asked her for \$500 because it was "company procedure". Ms Wati went to an ATM machine to get the money where "Vimlesh" asked for another \$500 because he had no money for the weekend. She gave him \$1000 and she was promised it would be returned to her after the weekend. It was getting dark and Ms Wati asked to be taken to her cousin's house in Lautoka. "Vimlesh" said you are to go to Cathay Hotel, the company will pay next week, but in the meantime she was to pay. The next morning they went shopping when Ms Wati spent \$60 for her own clothes and Vimlesh selected clothes worth \$630 paid for by Ms Wati on the promise that she would be repaid. During that weekend the victim expended a total of \$3640 which she gave to

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"Vimlesh" on the promise of a job and return of the money the following week. Unsurprisingly the victim then lost contact with "Vimlesh" whom she identified in Court as this accused.

- [3] A complaint was made to the Police and some officers from Rakiraki Police Station intercepted this accused after a high speed car chase and interviewed him under caution.
- [4] The cautioned interview, although unchallenged, was disregarded by the learned Magistrate at trial, because in exercising extreme fairness, the Magistrate had regard to the fact that the accused had made a passing reference to being forced to admit at an early stage of the trial.
- [5] The accused declined to cross-examine any of the prosecution witnesses and proffered no evidence in his own defence.
- [6] This accused is 42 years old, he is married with 2 teenage children and he tells me he owns a textile company called "Sharma's Trading". He has 41 previous convictions, including 35 for this same offence.

[7] The accused is obviously a "habitual offender" but I am unable to classify him as such unfortunately because this crime does not come within the categories set out in section 10 of the Sentencing and Penalties Decree 2009. Whether this is an intentional omission by the legislature or not, it is the Court's view that offences of fraud should be included in those categories, for the very protection of the community at large.

[8] Previously the maximum penalty for obtaining money by deception was five years, however the maximum penalty for this offence is now 10 years which shows the degree of seriousness that the legislature does have regard to the offence. Petty frauds committed against unsuspecting and unsophisticated victims are particularly nefarious and it is for the Courts to protect such victims. While it is not for the Court to protect gullible ^{persons} ~~persons~~, the impact on the victim must be considered. In these difficult times of unemployment, prospective employees will do anything they can to ingratiate themselves with persons who they perceive to be future employers, and it is quite understandable that this desperate lady would "lend" large sums of money to the accused.

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[9] The accused's long and dismal record, while I cannot regard it as that of a habitual offender, does him no credit. Persistent offending of the same nature suggests an addiction to deceit, and repeated incarceration has not done anything to reform him. He is however remorseful, or so he says, however that remorse has not extended to an offer to recompense the victim for the money he so cynically "milked" her of.

[10] The tariff under the Penal Code offence for obtaining money by deception was 18 months to three years (Arin v State [2009] HAA 55 of 2008, Ateca v State HAA 71 of 2002, Rukhmani v State HAA 056 of 2008).

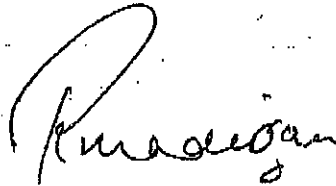
[11] Now that the penalty under the new Crimes Decree has doubled, then obviously this tariff needs to be revisited. The tariff for obtaining a pecuniary advantage by deception should now be between 2 years and 5 years with 2 years being reserved for minor offences with little and spontaneous deception. The top end of the range will obviously be reserved for fraud of the most serious kind where a premeditated and well planned cynical operation is put in place.

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[12] I regard this offence as particularly nasty and cynically operated against an unsophisticated and defenceless victim. I take as my starting point a term of 5 years. It is an aggravating feature that this deception was practiced on a sole female victim away from her friends and family and for that I add a further year. For the accused's very limited mitigation in that he claims to be remorseful (a claim that is unconvincing from the mouth of a proven deceiver) and for his time spent in custody, I deduct six months meaning that this accused will be imprisoned for a total term of 5 years and 6 months and he will serve a total of four years before being eligible for parole.

[13] The State in their otherwise very helpful submissions, suggest that this Court should now activate a suspended sentence of 18 months passed on the accused in the Sigatoka Court on the 13th October 2009. This I cannot do. Section 28 of the Sentencing and Penalties Decree 2009 only allows me to restore that sentence, or part of it, if the accused has been charged with and found guilty of the offence of breach of suspended sentence order. The Court is not aware of any proceedings, let alone any conviction for breach of suspension.

[14] He has 30 days to appeal to the Court of Appeal:



Paul K. Madigan

Judge

At Lautoka

07 October 2010