

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**  
**CRIMINAL APPEAL CASE NO.: 9 OF 2014**

**BETWEEN:** **DHIRENDRA NANDAN**

*Appellant*

**AND:** **STATE**

*Respondent*

**Counsels :** **Appellant in person**  
**Ms. S. Kiran for the Respondent**

**Date of Hearing :** **6 May 2014**  
**Date of Judgment :** **13 May 2014**

**JUDGMENT**

1. The appellant was charged before the Lautoka Magistrate Court with one count of obtaining money by false pretence contrary to Section 209 (a) of the Penal Code.
2. He had pleaded not guilty and was convicted after trial on 17.8.2012. He was sentenced on 3.2.2014 for 2 years and 8 months imprisonment with 18 months as non-parole period.
3. This appeal against the sentence was filed on 10.2.2014 within time.
4. His grounds of appeal against the sentence are:
  - (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive in all circumstances of the case.

- (ii) That the learned sentencing Magistrate failed to allow adequate discount for mitigating factors, specifically that the appellant paid \$1,600.00 back to the complainant, is a first offender in the relevant offence.
  - (iii) That there is disparity in the appellant's sentence and some other similar offence that was sentenced by other courts in Fiji.
  - (iv) That the learned sentencing Magistrate took irrelevant and unlawful aggravating factors for enhancing the sentence.
5. Both parties have filed written submissions.
6. The learned Magistrate had correctly identified the maximum punishment for the sentence as 5 years.
7. Then he had followed *Vinod Prasad v State* Cr. App. No.HAA 029 of 2002 and *Ramesh Chand v State* Crim. App. 012.2003S where a tariff of 18 months to 3 years was adopted.
8. The tariff under the Penal Code offence of obtaining money by deception was 18 months to 3 years. (*Arun v State* [2009] HAA 55 of 2008, *Ateca v State* HAA 71 of 2002, *Rukhmani v State* HAA 056 of 2008) as held by Hon. Mr. Justice Paul Madigan in *State v Sharma* [2010] FJHC 623; HAC 122.2010L (7 October 2010).
9. The learned Magistrate had selected a starting point of two years. He had added 2 years for the following aggravating factors.
- (i) You personally gained financially
  - (ii) The offence was well planned and executed
  - (iii) You caused monetary loss to the complainant
  - (iv) You breached the trust of the complainant
  - (v) Balance sum of monies taken from the complainant has not been repaid as promised.
10. Then the learned Magistrate deducted 12 months for the following mitigating factors:
- (i) 32 years
  - (ii) Sole bread winner
  - (iii) First offender
  - (iv) Ask for forgiveness

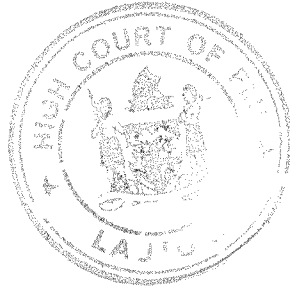
- (v) Remorseful
- (vi) Willing to pay full restitution in 4 months.

11. However, the learned Magistrate had also noted that although he had paid \$1,000.00 on 19.10.2012, you have failed to appear on the next day 14.12.2012 where another payment of \$ 1,000.00 was due. Then you were on a bench warrant till 1.10.2013 where you were arrested and produced in court. On 14.10.2013 you have paid another \$600.00 to the complainant.
12. The learned Magistrate had stated that he cannot find the part payment of restitution as reflection of true remorse. He found it being used to buy your way out of prison as held in *State v Simeiti Cakau* HAA 125 of 2004S. He had stated that he will not accept your part payment of restitution as mitigation nor should you be granted any discount in sentence.
13. The time period in remand 1.10.2013 to 3.2.2014 was deducted from the sentence. The final sentence was 2 years and 8 months with a non-parole period of 18 months.
14. When a person is sentenced for more than 2 years, the Magistrate could not suspend such sentence according to 26 (2) of the Sentencing and Penalties Decree. Further according to Section 18 (1) a non-parole period should be fixed. The learned Magistrate had correctly fixed a non-parole period of 18 months.
15. The starting point selected by the learned Magistrate is within the sentence tariff. He had added 2 years for the aggravating factors. Considering the planned nature of the offence, lack of true remorse that period is justified. Substantial deduction of 12 months was given for the mitigating factors. That is appropriate.
16. The convict was in remand from 3.8.2012 until 3.2.2014 for a period of 6 months. However the learned Magistrate had only considered a period from 1.10.2013 where the convict was produced before him.
17. According to Section 24 of the Sentencing and Penalties Decree:

*"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

18. This background warrants this court to exercise its powers in terms of Section 256 (2) (a) of the Criminal Procedure Decree to vary the sentence ordered by the learned Magistrate. The full period convict spent in remand is deducted from the sentence. The final sentence is 2 years and 6 months with a non-parole period of 18 months from 3.2.2014.

19. Appeal is allowed. Sentence is varied.



  
Sudharshana De Silva  
**JUDGE**

**AT LAUTOKA**  
**13<sup>th</sup> May 2014**

**Solicitors: Appellant in Person**  
**Office of the Director of Public Prosecution for the Respondent**