

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 16 OF 2014

BETWEEN: AVIKASHNI DEVI SUDHAKAR

Appellant

AND: STATE

Respondent

Counsels : Mr. A. R. Singh for the Appellant
Ms. L. Latu for the Respondent

Date of Hearing : 8 September 2014

Date of Judgment : 22 September 2014

JUDGMENT

1. The appellant was charged before the Ba Magistrate Court in four cases as follows:

CF 235/12:

1st Count Theft contrary to Section 291

2nd Count Forgery contrary to Section 156 (1)

3rd Count Uttering Forged Documents contrary to Section 157 (1) (b)

CF 505/12

1st Count Obtaining Financial Advantage by Deception contrary to Section 318

2nd Count Obtaining Property by Deception contrary to Section 317 (1)

3rd Count Obtaining Property by Deception contrary to Section 317 (1)

4th Count Obtaining Property by Deception contrary to Section 317 (1)

5th Count Obtaining Property by Deception contrary to Section 317 (1)

6th Count Obtaining Property by Deception contrary to Section 317 (1)

7th Count Obtaining Property by Deception contrary to Section 317 (1)

CF 405/12

1st Count Obtaining Financial Advantage by Deception contrary to Section 318

2nd Count Obtaining Property by Deception contrary to Section 317 (1)

CF 406/12
1st Count Theft

2. The facts of these cases are as follows:

Criminal Case No. : 505/12

For count 1, sometimes in April, 2012 you offered to help the Complainant's (A1) sister (A2) with her divorce papers after telling him you held a big post at Lautoka Court. He paid you a total of \$220.00 even though you quoted \$350.00. You never issued any receipt.

For count 2, on 31 May, 2012 you told him that the Court needs his sister's jewelries to be declared. The next day she brought you her jewelries valued at \$900.00 in Ba town.

For count 3, on 31 May 2012 after she brought you her jewelries she also asked her mother (A3) 49 years of Clopcott Street, Yalalevu, Ba for her jewelries valued at \$1,000.00 after you promised her you'll return it within 21 days.

For count 4, on 31 May, 2012 she also asked her sister (A4) 30 years, Domestic Duties for her jewelries valued at \$650.00 after you promised her you'll return it within 21 days.

For count 5, on 3 June 2012 you asked A1 that the Court needed more jewelries to be declared in Court where he went and told his sister (A2) to give him her jewelries. On 4 June, 2012 A2 asked her aunty Lalita Devi (A5), 45 years, Domestic Duties of Clopcott Street, Yalalevu, Ba for her jewelries valued at \$850.00 after you promised her you'll return it within 21 days.

For count 6, on 4 June, 2014 when (A2) brought you her assorted jewelries she also asked her sister-in-law Evelyn Reshmi (A6), 38 years, Domestic Duties for her jewelries valued at \$2,400.00 after you promised her you'll return it in 21 days.

For count 7, on 12 July, 2012 you told (A1) that the Court needs (A2's) mangal sutra to be declared in Court to carry weight which she give you valued at \$2,000.00 in Ba Town after you promised you'll return it within 21 days.

On 29 June, 2012 (A1) rang your husband to pay off his balance of \$50.00 where he was informed that you were in Police custody after which he reported the matter to the Police and you were arrested.

There was no recovery in all counts.

Criminal Case No.: 405/12

For Count 1, sometimes in January, 2012 you after rumors had spread that you worked for Lautoka Court was asked by the Complainant if you could assist her recover some jewelries from her sister-in-law who is separated from her husband namely Riaz Ali. You demanded to be paid \$500.00 as fees which she paid. You then told her that the sister-in-law also reported to her that she was also keeping some of her jewelries. You then told the Complainant to give you the jewelries for you to declare in Court that it did in fact belong to her after which you were given her necklace valued at \$2,000.00 and ring valued at \$1,000.00. You promised her you'll return it within 21 days but you didn't. Matter was then reported to the Police. You were arrested and caution interviewed where you admitted the offences.

There was no recovery.

Criminal Case No.: 235/12

For count 1, you and the Complainant are married. He is running a business called Finest Copier Sales and Services, Ba. On 26 December, 2012 at about 2pm he discovered that his ANZ blank cheque leaf No. 00006 was missing from his cheque book. He then went to the Bank and informed staff that the leaf was stolen. On 28 June, 2012 you went to ANZ, Nausori and tried to cash the said cheque. You were then asked by the bank teller, one Ilaisa Tuva to sign on the cheque which you did. Upon verification of the signature the cheque was identified as the stolen one. Matter was reported to Nausori Police Station and you were arrested.

There was no recovery.

Criminal Case No. : 406/12

The complainant and you are married. Between 1 June 2012 and 2 July, 2012 you took his laptop to Suva for servicing and never returned it. He then found a receipt at your residence in the name of Henry's Pawn Shop and Second Hand Dealers stating that the said laptop was pawned there for \$400.00 on 6 July, 2012. The matter was reported to Police and you were arrested and interviewed under caution where you admitted to the offence.

There was full recovery.

3. Appellant pleaded guilty and had admitted the summary of facts of all the charges. She was convicted of all the above charges. She was sentenced on 31.3.2014 with the following sentence.

CF 505/12- Counts 1-7, 2 years imprisonment

CF 405/12- Both counts, 2 years imprisonment, concurrent to CF 505/12

CF 235/12 - 1st Count, 12 months imprisonment, 2nd & 3rd Counts 6 months imprisonment, concurrent to CF 505/12
CF 406/12-Count 1- 12 months imprisonment, concurrent to CF 505/12

4. However, the learned Magistrate had then stated that the sentences for count 2 & 3 above in CF 235/12 should be consecutive to sentence of CF 505/12. He had stated that final sentence is 2 years and 6 months and you will be eligible for parole after 20 months.
5. This appeal against the sentence was filed on 28.4.2014 within time.
6. His grounds of appeal against the sentence are:
 - (i) That the learned Magistrate erred in law and in fact when he failed to take into account the 8 months the accused had already spent in remand while passing the sentence
 - (ii) That the learned Magistrate erred in law and in fact when he failed to give any appropriate discount for the mitigating factors of the appellant
 - (iii) That the learned trial Magistrate erred in law and in fact in failing and/or neglecting to take into account the personal circumstances of the accused that lead to the commission of the offence
 - (iv) That the sentence passed by the learned trial Magistrate is not consistent with the sentences passed in cases of similar nature and therefore wrong in principle
 - (v) That the overall sentence was harsh and excessive considering the circumstances of the case
7. Both parties have filed written submissions.
8. The learned Magistrate had correctly identified the maximum punishment for Obtaining Financial Advantage by Deception, Obtaining Property by Deception, Theft, Forgery and Uttering Forged Documents as 10 years.
9. Then he had followed guide line judgments and found the tariff for Obtaining Goods by Deception as 18 months to 4 years and Obtaining Money by Deception as 18 months to 3 years. He had followed a sentence given by RM Thusara Rajasinghe in State v Rama [2010] FJMC; Criminal case 1183 of 2009 (13/12/2010)
10. However, Hon. Mr. Justice Paul K. Madigan had set new tariffs for these offences and those are binding on the learned Magistrate.
11. In State v Miller [2014] FJHC 16; Criminal appeal 29.2013 (31 January 2014) it was held:

“There are two deception offences in the Crimes Decree; obtaining property by deception (section 317) and obtaining a financial advantage by deception (section 318). The main section is 317 because there are numerous sub clauses of explanation, and the section

encompasses obtaining of choses-in-action as well as of tangible property. Obviously the section provides for the taking of monies and so it would have been a far more relevant offence in a situation such as in the present case. Obtaining a financial advantage (section 318) is more appropriate to situations such as securing scholarships by deception, securing a credit line by deception for example. It is not wrong for the charge to read financial advantage in this case, but it is not strictly correct. When an employee steals money from a bank account it is theft of a chose-in-action and it is obtaining property by deception contrary to 317(7) or sometimes 317(8) if the money is transferred to another.

The penalty for both offences is the same, that is ten years. Under the old Penal Code the maximum for the offence was a term of 5 years and the tariff was between 18 months to three years. As this Court stated in Atil Sharma HAC122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception.

From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naive or in any other way socially disadvantaged."

12. In State v Sharma [2010] FJHC 623; HAC 122.2010L (7 October 2010) it was held by Hon. Mr. Justice Paul K. Madigan that:

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

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."

13. Therefore the present tariff for the offences of Obtaining Financial Advantage by Deception and Obtaining Money by Deception is 2-5 years.

14. The learned Magistrate had followed correct tariff for the offence of Theft.

15. The learned Magistrate had followed State v Voj [2010] FJMC 147 Criminal Case 844.2009 (8.2.2010) for the tariff for the offences of Forgery and Uttering False Documents.

*"According to Goundar J in **State v Chaudary** [2008] FJHC 69.2007, 70.2007 & 71.2007 (on 19th February 2008), average sentence for a first offender with "Forgery" charge is one year imprisonment and in **Hu Jung Yun v. The State** [2005] HAA024 of 2005, three year sentence had been imposed."*

16. The tariff for fraud cases ranged from eighteen months to 4 years with 4 years imprisonment reserved for the worst type of offending, as observed by Her Ladyship Ms. Nizhat Shammen in **Hu Jun Jun v The State** [2005] FJHC 93; HAA 0024J.2005S (26 April 2005) In **State v Kesi** [2009] FJHC 145; HAC 024.2009 (22 July 2009) His Lordship Mr. Daniel Gounder identified the tariff for fraud offences as 18 months to 3 years imprisonment.

17. However, in **State v Prasad** [2011] FJHC 218; CRC 024.2010 (19th April 2011) His Lordship Mr. Justice Paul K. Madigan stated as follows:

"Forgery of cheques and of an authority to transfer is punishable by a maximum penalty of fourteen years. The tariff for forgery has always been seen as between eighteen months to three years imprisonment depending on the circumstances of the case. It is the Court's view that this tariff having been in place for many years seriously needs to be revisited. In these lean economic times forgery, especially by those in positions of trust, is becoming far too prevalent and the forgery is usually the conduit to obtaining money or property by means of the uttering of the forged document."

"There is no reason now why the range for forgery should not be between 3 years and 6 years, with factors to be considered to be-

High gain-actual or intended

Whether the accused a professional or nonprofessional

Sophisticated offending with high degree of planning

Target individuals rather than institutions

Vulnerable victim."

18. Therefore the correct tariff for the Forgery and Uttering False Documents now is 3 - 6 years imprisonment.

19. The learned Magistrate had selected a starting point of two years for all deception charges. He had added 1 year for the aggravating factors. He had deducted 6 months for being a first offender and another 6 months for the other mitigation. And the final sentence was 2 years.

20. For the theft charges he had started with 12 months and added 6 months for the aggravating factors. Six months were deducted being a first offender and another 6 months for the mitigating factors. The final sentence was 1 year imprisonment. The learned Magistrate had erred in his calculation of the final sentence.

21. Learned Magistrate had stated; *'I chose 6 months each as net sentence for the offences of Forgery and Uttering Forged Document.*
22. The convict was in remand for a period of 8 months. However, the learned Magistrate had not considered this period in any of his sentences separately.
23. 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."*
24. The learned Magistrate had erred in law and fact in respect of the following.
- (i) Not selecting a correct sentencing tariff for deception and forgery charges
 - (ii) Not giving a separate deduction for the guilty plea
 - (iii) Not deducting the time period in remand
 - (iv) There is an error in calculation of the sentence of the theft charges
25. This background warrants this Court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate and pass other sentences which reflects the gravity of the offence within the acceptable range of tariff.
26. I take a starting point of 2 years for the each deception charge and add 1 year for the aggravating factors. Six months are deducted for the mitigating factors including personal circumstances and being a first offender. Further 6 months are deducted for the guilty plea. When eight months in remand is deducted the final sentence will be 16 months.
27. I take a starting point of 3 years for the forgery charge and uttering a forged document charge. I add 1 year for the aggravating factors. I deduct 6 months for the personal circumstances. Another 8 months are deducted for the guilty plea. When time period in remand was deducted the final sentence will be 26 months.
28. For each charge of Theft, I sentenced the appellant for a period of 8 months.
29. Considering the totality principle, I order all the sentences to run concurrently.
30. Considering the nature of the offences and the vulnerable nature of the victims. This is not a fit case to suspend the sentence.

31. Appellant is not eligible for parole till serving 20 months of imprisonment from 31st March 2014.

32. Appeal is allowed. Sentence is varied.




Sudharshana De Silva
JUDGE

AT LAUTOKA
22nd September 2014

Solicitors: Aman Ravindra Singh Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent