

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**  
**CRIMINAL APPEAL CASE NO.: HAA 32 OF 2014**

**BETWEEN:**                      **MAKERETA POLAUGA OFAKILEVUKA MALO**

*Appellant*

**AND:**                              **STATE**

*Respondent*

**Counsels :**                      **Mr. E. Koroi for the Appellant**  
   **Ms. S. Kiran for the Respondent**

**Date of Hearing:**              **29 October 2014**

**Date of Judgment:**        **30 October 2014**

**JUDGMENT**

1. The appellant was charged before the Nadi Magistrate Court with two counts of Obtaining Financial Advantage by Deception and one count of Obtaining Property by Deception. The particulars of the offence are as follows:

**FIRST COUNT**  
*Statement of Offence*

**OBTAINING FINANCIAL ADVANTAGE BY DECEPTION:** Contrary to Section 318 of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**MAKERETA POLAUGA OFAKILEVUKA MALO** on the 12/04/12 to 15/06/12 at Nadi in the Western Division by deception dishonestly obtained financial advantage of \$1,280.00 from ATECA NARISIA.

**SECOND COUNT**  
*Statement of Offence*

**OBTAINING FINANCIAL ADVANTAGE BY DECEPTION:** Contrary to Section 318 of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**MAKERETA POLAUGA OFAKILEVUKA MALO** on the 01/03/12 to 04/07/12 at Nadi in the Western Division by deception dishonestly obtained financial advantage of \$1,095.00 from **MIRIAMA MATI**.

**THIRD COUNT**  
*Statement of Offence*

**OBTAINING PROPERTY BY DECEPTION:** Contrary to Section 317 (1) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**MAKERETA POLAUGA OFAKILEVUKA MALO** on the 07<sup>th</sup> day of June, 2012, at Nadi in the Western Division by deception dishonestly obtain property namely Samsung Digital Camera valued \$359.00, Akita 22 LCD Flat Screen valued \$599.00 and LG DVD player valued \$139.00, all to the total value of \$1,097 the property of **MIRIAMA MATI**.

2. She had pleaded guilty and admitted the summary of facts. The agreed summary of facts are as follows.

On the 15/08/12 at Namaka Police Station one Ateca Narisia (Witness-1) 31 years bar attendant of Legalega, Nadi and one Miriama Mati (Witness-2) 23 years house maid of Malawai, Nadi reported that one Makereta Polauga Ofakilevuka Malo (Acc) 25 years unemployed of Vatumami, Rakiraki by deception obtain money from them after promising them to arrange for their working visa and migration to the United Kingdom between April to July 2012. Also on the above date (Witness-2) reported that (Acc) also obtain property by deception from Courts Omega Namaka Branch after using her courts account number 080000118501 and fled with the high purchase property to Rakiraki without her concern.

Between the months of April to July 2012 (Acc) check in at the Kontiki Private Hotel Votualevu Nadi and was staying there for few months, that's when she met with both (witness) who were both employed at the hotel. They start knowing each other when (Acc) mention to them that she's legally married to one Royal British Air Force captain and she's here in Fiji arranging for some Fijian to be recruited in the British Army and Overseas employers. Both witness said that they are interested in employment

opportunity overseas so they gave their Passport, CV and documents to (Acc). (Acc) upon receiving the documents gave her BSP Bank account number : 8420392 to both witness and promise that she's going to process their application and visa in Suva and for them to deposit the money for their visa application and other document fees.

(Witness-1) deposited a total of \$1,280.00 into (Acc) account on different dates and bank branch and (Witness2-) deposited a total of \$1,095.00 into (Acc) account on different dates and bank branch. (Acc) always contact both (witness) when she's in Suva and demanded the cash to be deposited into his account as it's urgent for the British High Commission for the final processing of their Visa. (Acc) after few days back at the Hotel and met both (witness) assure ring them that they would be flying out to England on August, 2012. Both (witness) also gave cash personally to (Acc) on several occasion at different places in Nadi.

(Acc) on 07/06/12 at Courts Omega Namaka personally produce (Witness-2)'s identity documents and mention that (Witness-2) was her cousin and working for Kontiki Hotel. She inform the staff of Courts Omega that (Witness-2) has given concern for her to apply for the purchasing of a Samsung Digital Camera value at \$399.00, Akita 22 LCD flat screen value at \$599.00 and LG DVD Player value at \$139.00 on account number: 080000118501 and she would pay for the deposit. (Acc) after processing the property didn't inform (Witness-2) and she took the items, fled with the items to Rakiraki.

Investigation into the above matter was carried out where by DC 3426 Inosi Ravouvou was appointed as Investigating Officer. Upon information received (Acc) was arrested from Rakiraki all the above property, items was recovered from (Acc) house at Vatumami. She was interviewed under caution and she admitted the facts and allegation stating that it was her intention to by deception to obtain money from both (Witness) and lied to them, she also mention that she has used up all the money on her personal expense. (Refer to question no. 88, 94, 95, 108, 122 and 127) of the interview notes. (Acc) was charge for two counts of obtaining financial advantage by deception and one count of obtaining property by deception. (Acc) has 5 previous convictions of the similar offence. (Acc) is appearing in police custody for court.

3. She was convicted and sentenced on 17.3.2014 for 2 years and 1 month imprisonment for each count to run concurrently with 15 months as non-parole period.
4. This appeal against the sentence was filed on 31.3.2014 within time.
5. Her grounds of appeal against the sentence are:
  - (i) I believe that the sentence is both harsh and excessive and a lesser sentence would be appropriate given the following grounds:

- (1) Partial restitution has been done; of the total amount of \$2,295.00, I restituted the complainant \$1,200.00.
- (2) Willingness to retribute in full; I was willing to repay/return the full amount to the complainant and the complainant had preferred restitution.
- (3) Was not willing to drag the matter in engaging the Court's time and pleaded guilty.

6. Both parties have filed written submissions.

7. In the written submissions of the appellant following ground of appeal are given.

That the learned Magistrate erred in not considering the restitution mitigation made by the appellant where she had indicated to the Court that she was willing to make good the whole amount she had obtained by deception.

That the learned Magistrate erred in not considering a lesser imprisonment term under 2 years had the full restitution been considered along with other mitigating factors adduced by the appellant and which would have qualified her for a suspended sentence.

The learned Magistrate erred in predetermining the appellant's sentence to be more than and above the 2 years qualification for a suspended sentence provided under Section 26 (1) & (2) of the Sentencing and Penalties Decree 2009.

The learned Magistrate erred in imposing a long non parole period of 15 months given the ignored full restitution and other mitigating factors.

In a nutshell, the learned Magistrate erred in fact and in law in imposing a harsh and excessive sentence.

8. The learned Magistrate had correctly identified the maximum punishment for the sentence as 5 years.

9. Then he had followed the new tariff set by Hon. Mr. Justice Paul Madigan in *State v Sharma* [2010] FJHC 623; HAC 122.2010L (7 October 2010) The tariff is 2-5 years.

10. 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."*

11. 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."*

12. The learned Magistrate had selected a starting point of three years. Considering the objective seriousness of the offence, the starting point selected by the learned Magistrate is correct.

13. In Koroivuki v State [2013] FJXCA 15; AAU 0018.2010 (5<sup>th</sup> March 2013) the Supreme Court held:

*"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls outside either below or higher than the tariff, then the sentencing Court should provide reasons why the sentence is outside the range."*

14. He had added 2 years for the following aggravating factors.

- (i) You breached the trust of the complainant and took advantage of their vulnerability
- (ii) These are well planned offences.

15. Then the learned Magistrate deducted 2 years for the following mitigating factors:

- (i) 26 years and married
- (ii) Remorseful and begged for forgiveness
- (iii) Cooperated with police
- (iv) Partial restitution and willingness to pay the balance.

16. Then three months were deducted for the time period in remand.

17. Further 8 months were deducted for the late Guilty plea.

18. The final sentence was 2 years and one month.

19. 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 15 months.

20. According to Section 18 (4) of the Sentencing and Penalties Decree *“Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.”*

21. The learned Magistrate had complied with the above provision in setting a non-parole period.

#### **First & Second Grounds in Written Submissions**

22. The first ground of appeal is that no time was given by the learned Magistrate for the appellant to make a full restitution. Careful perusal of the copy record reveals that the appellant had first informed the Court her willingness for restitution on 5.11.2012. She had paid \$1,300.00 on 19.11.2012. Then on 14.2.2013, the appellant moved time till 18.3.2013 for the payment. The appellant was absent on 18.3.2013 and no further steps were taken to pay the balance till 14.11.2013 when the plea was taken. The submissions on mitigation were not filed till 6.2.2014.

23. The learned Magistrate had considered Partial restitution and willingness to pay the balance as a migrating factor in deducting 24 months from the sentence.

24. In State v Semiti Cakau HAA 125 of 2004S Hon. Madam Justice Nazhat Shameem had observed that:

*"There are ample authorities supporting the proposition for custodial sentences on fraud and breach of trust offences. Custodial sentences are usually imposed in spite of the offender's good character. People of previously good character are often given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust that makes a custodial sentence inevitable except in the most exceptional cases where full restitution has been made. Non custodial sentences in those circumstances are not to be seen as offenders buying their way out of prison but as true remorse."*

25. In State v Singh [2007] FJCA 35; AAU 0033.2006 & AAU 0039.2006 (25 June 2006) the Court of Appeal discussed the issue of late restitution.

*"We cannot understand how the learned Judge could have found that repayment after such a long failure to do so and then only after the Judge gave him the option to pay or go to jail could be considered any measure as true remorse. It appears to us to be a clear case of something Shameem J expressly excluded, namely a payment made by the appellant to buy his way out of prison."*

*The Judge's decision to allow the appellant time to pay was wrong and the manner in which it was stated was wrong. It could only have led the appellant to feel that an implicit bargain had been struck; i.e. fail to pay you will go to prison, pay and you will not.*

*Such implicit bargains were disapproved of by Salmon LJ in the case of Collins v R [1969] 53 Cr App R 385. That case had been adjourned and the accused bailed to allow him to assist the police locate stolen property; a course Salmon LJ described as not appropriate. He referred to the earlier case of West v R [1959] 43 Cr App R 109 in which Parker LCJ had pointed out that the court of appeal had disapproved of situations such as occurred in the case before us.*

*West's case was one of fraudulent conversion. The sentencing court had allowed an adjournment after the sentencing Judge had referred to the accused's ability to repay the sum taken and continued "I cannot order you to repay but I will postpone sentence if you are willing to promise me to come up for judgment in six months. Are you willing?" Parker LCJ commented:*

*"That is just what this court has said ought not to be done. ... it is highly undesirable to postpone sentence and at the same time to turn the court into money-collecting agency."*

26. Considering above legal authorities, there is no justification for the late restitution.

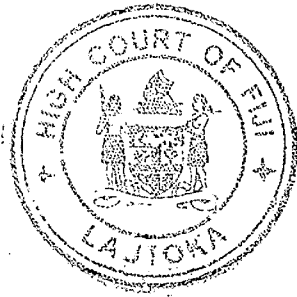
27. There is no merit in these grounds of appeal and those fail.

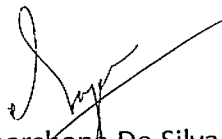
### Third Ground in the Written Submissions

28. The learned Magistrate had considered the correct tariff, correct aggravating and mitigating factors and given appropriate deductions for the Guilty plea and the time period in remand. The final sentence is within the tariff.
29. There is no merit in this ground that the sentence was predetermined.

### Fourth Ground in the Written Submissions

30. The non-parole period of 15 months is in compliance with the Section 18 (3) of the Sentencing and Penalties Decree. Considering the previous record of the appellant, that period is justified. There is no merit in this ground and it fails.
31. Appellant had failed to establish any merit in any of the grounds of appeal given above.
32. For the reasons given above the appeal against the sentence is dismissed.



  
Sudharshana De Silva  
JUDGE

At Lautoka  
30<sup>th</sup> October 2014

Solicitors : Koroi Law for the Appellant  
Office of the Director of Public Prosecutions for Respondent