IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAM 42 OF 2015

BETWEEN : **APOLOSI QALOMAI**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : **Appellant in person**
Mr. Niudamu for the Respondent

Date of Hearing : 12th of May 2015
Date of Judgment : 29th of June 2015

JUDGMENT

1. The Appellant was convicted and sentenced upon his plea of guilty for a period of two years' imprisonment for four counts of Obtaining Financial Advantage by Deception contrary to Section 318 of the Crimes Decree on 20th of February 2015. Being aggrieved by the said conviction and the sentence, the Appellant files this appeal on the following grounds *inter alia;*

   i. *That the learned Magistrate had erred in law and in fact when he had disregarded and failed to consider the full restitution to all four complainants by the accused.*

   ii. *The learned Magistrate failed to consider that the complainants had appeared before the court and reconciled with the accused after the restitution,*

iii. *The sentence is harsh and excessive and wrong in principle. The sentence be substituted with a suspended sentence pursuant to Section 26 (1) of the Sentencing and Penalties Decree,*

iv. *The learned Magistrate failed to identify facts in this case as the building projects have subsequently completed.*

2. The Respondent appeared in court on 30th of March 2015. Both parties were then directed to file their respective submissions, which they filed accordingly. Having carefully considered the grounds of appeal, and respective submissions of the parties, I now proceed to pronounce the judgment of this appeal as follows.

First Ground of Appeal

3. It appears that the learned Magistrate has considered the full restitution in his sentence. He has given a four months discount for the restitution. Wherefore, I find that the first ground of appeal has no merit.

Second Ground of Appeal

4. In view of Section 154 of the Criminal Procedure Decree, the court is allowed to consider reconciliation only for the offences of common assault, assault occasioning actual bodily harm, criminal trespass and damaging property. Accordingly, the offence of obtaining financial advantage by deception is not a reconcilable offence. Apart from that, there is no record in the Magistrates' court proceedings that the four complainants had appeared before the learned Magistrate and reconciled with the accused. As such, I do not find any merit in the second ground of appeal.

Third Ground of Appeal

5. The Appellant contended that the sentence is harsh and excessive and founded on wrong guiding principles.

6. Having carefully considered the sentence of the learned Magistrate, I find that he has identified the accurate punishment for obtaining financial advantage by deception pursuant to Section 317(1) of the Crimes Decree. Having done such, the learned Magistrate has proceeded to consider the acceptable tariff. In doing so, he has relied on the decision of **State v Atil Sharma (Criminal Case No HAC 122 of 2010L),** where Justice Madigan has discussed the sentencing principles for the offence of obtaining financial advantage by deception under the previous Penal Code and the present Crimes Decree and expounded a new tariff limit. His Lordship found in **Atil Sharma (supra)** that;

"the tariff under the Penal Code office for obtaining money for 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".

7. The Learned Magistrate has correctly considered the acceptable tariff range for this offence as between 2 to 5 years. The learned Magistrate, having considered Sections 4(1), 4 (2) and 15 (3) of the Sentencing and Penalties Decree, has then selected 2 years as the starting point. It appears that the

Learned Magistrate has erroneously considered the Appellant's previous record of the similar nature to select the starting point.

8. The Fiji Court of Appeal in **Koroivuki v State (2013) FJCA15, AAU0018.2010 (5th March 2013)** has illustrated the applicable principle for selecting a starting point, where it was held that;

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 either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

9. There is no reference of objective seriousness of the offence. Instead the learned Magistrate has considered the previous record of similar nature in selecting the starting point, which is wrong in principle. However, the learned Magistrate has selected the lowest point of the acceptable tariff for the offence of obtaining financial advantage by deception, though he considered erroneous grounds. Wherefore, I do not find that prejudice has caused in selecting 2 years as the starting point.

10. The Learned Magistrate has then added 18 months for the aggravating factors and reduced 14 months for the early plea of guilty. He has then reduced further 4 months for the full restitution. There is no mitigation submissions filed by the Appellant in the case record of the magistrate court. Accordingly, it appears that the learned Magistrate has accurately and correctly considered the aggravating and mitigating factors in order to reach a period of 2 years of imprisonment.

11. The Appellant further urged that the learned Magistrate should have imposed him a suspended sentence instead of a custodial sentence. I now turn onto this issue.

12. Justice Shameem in **State v Semiti Cakau (HAA 125/2004S)** has discussed the sentencing approach for the offences of this nature in an inclusive manner, where his ladyship 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 makes a custodial sentence inevitable except in the most exceptional cases where full restitution had 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".

13. According to the sentencing remarks of the learned Magistrate and the record of the previous convictions of the Appellant, I find that the Appellant has been adversely recorded with ten previous convictions and four of them within the period of last 10 years. All of those four previous convictions within the period of last 10 years are for fraud and breach of trust offence. I accordingly, do not find any compelling reasons for suspending the Appellant's sentence.

14. Moreover, the learned Magistrate has correctly considered the non-parole period for the Appellant pursuant to Section 18 (3) and (4) of the Sentencing and Penalties Decree. Section 18 (3) of the Sentencing and Penalties Decree has given a discretionary power to set a period during the offender is not eligible to be released on parole if he is sentenced for a term between 2 years

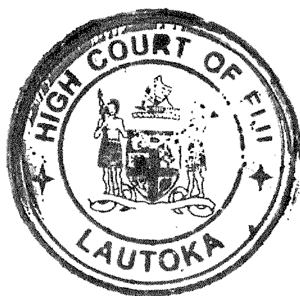
and 1 years. Moreover, Section 18 (4) has stated that the fixed period of non-parole must be at least 6 months less than of the sentence. In this instant case, the Appellant was sentenced for a period of 2 years imprisonment and not eligible for parole for a period of 15 months, which is correctly within the scope of Section 18 (3) and (4) of the Sentencing and Penalties Decree. Hence, I do not find any merits in the third ground of the appeal.

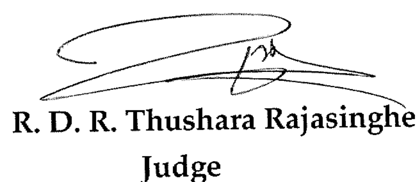
Fourth Ground of Appeal

15. It appears that the Appellant was properly read over and explained the summery of facts in the Magistrate court. He has admitted them before he was convicted and sentenced by the learned Magistrate. I accordingly find the fourth ground of appeal has no merit.

16. In view of the reasons discussed above, I refuse and dismiss this Appeal. I accordingly, uphold the conviction and the sentence imposed by the learned Magistrate on 20th of February 2015.

17. 30 days to appeal to the Fiji Court of Appeal.





R. D. R. Thushara Rajasinghe
Judge

At Lautoka
29th of June 2015

Solicitors : Office of the Director of Public Prosecutions
Appellant in Person