IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 54 OF 2014

BETWEEN: **KRISHNA SAMI GOUNDAR**

Appellant

AND: **STATE**

Respondent

Counsels: **Mr. I Khan for the Appellant**
Ms. S. Kiran for the Respondent

Date of Hearing: **23 January 2015**
Date of Judgment: **3 February 2015**

JUDGMENT

1. The appellant was charged before the Nadi Magistrate Court with one count of Obtaining Financial Advantage by Deception contrary to Section 318 of the Crimes Decree No. 44 of 2009.

2. He was convicted and sentence dated 26th September 2014 was pronounced in open Court on 30th October 2014. He was sentenced to 1 year and 8 months imprisonment with 1 year term suspended for 2 years.

3. This appeal against the sentence was filed on 17.11.2014 within time.

4. His grounds of appeal against the sentence are:

a) **THAT** the Learned Trial Magistrate erred in Law and in fact in convicting the Appellant when he failed to inform the Appellant of his right to consult a Lawyer before the plea to the charges against him.

b) **THAT** the Appellants guilty was not made voluntarily as he was pressurized by the Police that if he pleads guilty he will not be sent to prison.

c) **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into account the Appellant's restitution to the complainant.

d) **THAT** the Learned Trial Magistrate erred in law and in fact in sentencing the Appellant to imprisonment for 8 months as excessive and harsh in the circumstances.

e) **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into relevant consideration in passing sentence to the Appellant.

f) **THAT** the Learned Trial Magistrate erred in law and in fact in not giving a suspended sentence to the Appellant due to his mitigating circumstances.

g) **THAT** the Learned Trial Magistrate took irrelevant matters into consideration when sentencing the Appellant.

h) **THAT** the Appellant reserve his right to argue and/or add further Grounds of Appeal upon receipt of the Court Record in this matter.

5. Both parties have filed written submissions. I have carefully considered those.

1st Ground

6. The appellant alleges that he was not given his right to consult a lawyer before the plea to the charges against him.

7. The right for representation is not an absolute right.

8. In ***Shankar v The State*** [2006] FJHC 14; CAV 0008U.2005S (19 October 2006) it was held that

   "the right of counsel under Section 28 (1) of the Constitution is subject to that criterion of reasonableness. To construe Section 28 (1) (d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section the right to counsel conferred thereby is qualified by considerations of reasonableness. The Constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment."

9. Further in ***Ramalasou v State*** [2010] FJHC 19; AAU 0085.2007 (28 May 2010) it was held:

   "This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is

indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice."

10. In ***Drotini v The State*** [2006] FJCA 26;AAU0001.2005S (24 March 2006) it was held:

"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial Court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the Court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the Court should explain the procedure sufficiently for the accused to be able to conduct his defence."

"The question for this Court is whether there was possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently."

11. The appellant was explained his right of representation on 3.12.2013 when he came before the Magistrate for the 1st time. He elected to represent himself. He was given sufficient time before he pleaded guilty on 12.3.2014. Therefore there is no merit in this ground and it fails.

2nd Ground

12. The second ground is that the plea was equivocal.

13. In ***Caniqo v State*** [2013] FJCA 60; AAU 115.2011 (28 June 2013) Court of Appeal observed that:

"[20] *However an appellate Court will only consider an appeal against conviction following a plea of guilty if there is some evidence on the record of equivocation or if the plea was entered as a result of a misunderstanding of the law or in the absence of a free and informed decision."*

14. In ***Taunolo v The State*** [1993] FJHC 79; (1993) 39 FLR 264 (16 September 1993), the dicta in ***Ram Sami Naidu v R*** Cr. App. 34 of 1984 (unreported) at page 2 was adopted in relation to guilty pleas.

"...each case must be dealt with on its own particular facts and there must be an intentional and unequivocal admission of guilt by an accused adequately informed of the substance of the charge or complaint"

15. In **Tuisavusavu v State** [2009] FJCA 50; AAU 0064.2004S (3 April 2009) the Court of Appeal held:

*"[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a Court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate Court considering the issue of an allegedly equivocal plea.*

*[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate Court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);*

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

16. The appellant was not represented at the time of plea on 12.3.2014. The appellant had pleaded guilty on his own free will and admitted the summary of facts on next day 25.3.2014. He was found guilty as charged. Summary of facts admitted by the appellant is sufficient to establish elements of the charge. Thus there is no material in the record to suggest that the plea was equivocal. There is no merit in this ground and it fails.

3rd Ground

17. The third ground is that the learned trial Magistrate erred by not taking into account the appellant's restitution to the complainant.

18. In paragraph 12 of the sentence the learned Magistrate had considered the partial repayment made as a ground of mitigation in deducting 6 months from the sentence. Therefore, there is no merit in this ground.

4th, 5th, 6th and 7th Grounds

19. In ***Bae v State*** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) the Court of Appeal held that:

"It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself. (House v The King [1936] HCA 40; (1936) 55 CLR 499).

20. The final sentence was 1 year and 8 months imprisonment of which 1 year was suspended for 2 years.

21. The tariff for this offence is 2-5 years. The Learned Magistrate had followed the correct tariff judgments.

22. 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."

23. 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."

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

25. In ***Koroivuki v State*** [2013] FJXCA 15; AAU 0018.2010 (5th 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."

26. He had added 12 months for the following aggravating factor.

    (i) You breached the trust of the employer.

27. Then the learned Magistrate deducted 6 months for the mitigating factors.

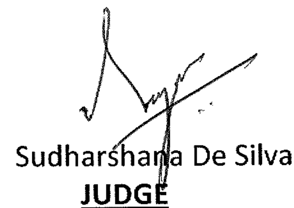
28. Further 10 months were deducted for the Guilty plea.

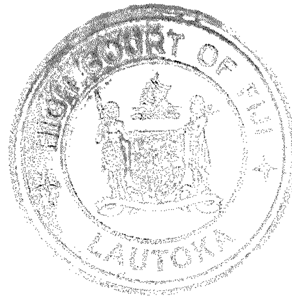
29. The final sentence was 1 year and 8 months.

30. The Magistrate had considered the suspension of the sentence and decided for a partial suspension after giving reasons.

31. This sentence is neither harsh nor excessive in the circumstances. There is no merit in the above grounds. The appellant had failed to satisfy this Court that the learned Magistrate either did not consider relevant factors or considered irrelevant matters.

32. For the reasons given above the appeal against the sentence is dismissed.





Sudharshana De Silva
JUDGE

At Lautoka
3rd February, 2015

Solicitors: **Iqbal Khan & Associates for the Appellant**
Office of the Director of Public Prosecutions for the Respondent