

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 27 OF 2016

BETWEEN: ANIL KUMAR

APPELLANT

A N D: STATE

RESPONDENT

Counsel: Mr. Sharma for Appellant
Ms. Khan M. for Respondent

Judgment: 18th November 2016

JUDGMENT

1. The appellant was charged with another in the Magistrate's Court, Suva for 1 count of Conspiracy to Defraud – Influencing A Public Official.

Consolidated Charge
[Complaint by Public Officer]

First Count
Statement of Offence (a)

CONSPIRACY TO DEFRAUD – INFLUENCING A PUBLIC OFFICIAL: Contrary to section 329 (1) of the Crimes Decree Number 44 of 2009.

Particulars of Offence (b)
ANIL KUMAR and **ASAF ALI** between the 1st day of March 2015 to the 10th day of March 2015 at Suva in the Central Division

conspired with the intention of dishonestly influencing Fiji Immigration Officers in the exercise of their duties in the issuance of a passport.

2. On his own plea of guilty the Learned Magistrate after convicting him of the charge, on 08/08/2016 sentenced the appellant to 2 years and 5 months imprisonment with a non-parole period of 1 year and 6 months.
3. The appellant appealed against the above sentence on the following grounds:
 - a) The Learned Magistrate erred in law and in fact when she only deducted 1 year for the Appellant's mitigating factors and his previous good conduct as a first offender.
 - b) The Learned Magistrate erred in law and in fact when she failed to take into consideration all of the Appellant's Mitigation Submissions.
 - c) The Learned Magistrate erred in law and in fact when she failed to give appropriate or adequate discount for the Appellant's approximately 3 months 2 weeks remand in the Department of Immigration Safe House in Veiuto, Nasese, in Suva from 13th August 2015 to 26th November 2015.
 - d) The Learned Magistrate erred in law and in fact when she failed to give appropriate or adequate discount for the Appellant's approximately 5 months 16 days remand at the Suva Remand Centre from 27th November 2015 to 12th May 2016.
 - e) The Learned Magistrate erred in law and in fact when she failed to take into consideration the Case Authorities cited in the Appellant's Sentencing and Mitigation Submissions.
 - f) The Learned Magistrate erred in law and in fact in not suspending the sentence.

g) The Sentence is harsh and excessive in all circumstances of the matter.

Grounds a, b and e

4. Grounds a, b and e will be discussed together. It is submitted on behalf of the appellant that the Learned Magistrate only deducted 1 year for the 9 mitigating factors and if the period in custody was deducted only 3 months was given for all 9 mitigating factors.
5. On deducting the period in custody the appellant has already raised grounds 'c and d'. Therefore I will deal with grounds 'c and d' later in this judgment.
6. Following mitigating factors were identified by the Learned Magistrate, in her sentencing judgment.
 - (i) That you are 29 years old. You are an Indian citizen from Nawanshahr, Punjab in India.
 - (ii) You are married to Preeti and she is on a work permit in New Zealand.
 - (iii) You financially support your parents in Nawanshahr, Punjab, India.
 - (iv) On 30th August 2011 you came to Fiji on a Student Permit and studied for and obtained a Business Management Certificate from the New Zealand Perfect Training Centre in Nadi, Fiji. You returned to India on 27th December 2011.
 - (v) You then returned to Fiji on 23rd March 2012 on a Business Visa; obtained a Work Permit and invested funds into two business ventures. You had to pay a Business Bond of FJD\$3,428.00 to the Department of Immigration.

- (vi) You initially invested \$10,000.00 in Indiana Fashions and became a shareholder. Three months later the business closed.
 - (vii) In 2012, after Indiana Fashions closed, you became a shareholder of Dilbar Cuisine Fiji Limited. You invested FJD\$110, 000.00 in this business venture. You borrowed and remitted FJD\$45, 000.00 from India to Fiji for this business venture. When you return to India you will have to repay FJD\$45, 000.00 which is equivalent to 1, 350, 000 rupees.
 - (viii) You were remanded by the Immigration authorities from 13th August, 2015 to 20th November 2015 then transferred to the Suva Remand Centre. It was only when the Suva High Court heard your Writ of Habeas Corpus Application on 13th May 2016, that an officer from Director of Public Prosecutions office advised the court that you will be interviewed, charged and produced in the Suva Magistrate's Court later that day. You have been remanded in custody after been charged since 13th May 2016.
 - (ix) You beseech the Court for a non-custodial sentence and begged the Court to impose a suspend sentence.
7. In terms of section 24 of the Sentencing and Penalties Decree 2009, any period of time during which the offender was in custody prior to the trial of the matter or matters shall, unless the court otherwise orders, be regarded as the period of imprisonment already served. Therefore any period of custody before the trial should not be taken as a mitigating factor but it should be regarded as a period already served from the sentence.
8. Therefore the factor 9, that the Learned Magistrate has considered as a mitigating factor should not be considered as a mitigating factor but be regarded as a period already served and has to be deducted separately.
9. I will deal with that aspect later in the judgment when I consider grounds c and d.

10. Out of the other mitigating factors, no. 2, 3, 4, 5, 6, 7 are his personal circumstances and only a minimal discount can be given for those. Therefore the remaining mitigating factors to be taken into consideration for a sufficient discount is the age of the accused and the fact that he was of previous good character.
11. Hence, I find that sufficient discount was given by the Learned Magistrate when he gave 12 months for the mitigating factors. For the early guilty plea the Learned Magistrate has discounted separately.
12. Therefore I find that there is no merit in grounds a, b and e.

Ground c and d.

13. Section 24 of the Sentencing and Penalties Decree 2009 provides:

“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.”

14. In her sentencing judgment the Learned Magistrate in paragraph 26 has said:

“The State submitted that the detention period by Immigration should not be considered as the accused was not remanded by the Court. I do agree with the State. However, I note that the accused has been remanded by this Court for a period of almost 3 months. As per section 24 of the Sentencing and Penalties Decree 2009, I further deduct 3 months from the sentence.”

15. Section 24 does not speak about the remand period by court before trial, but refers to the period the offender was held in custody prior to trial. It is now admitted by State as well that the appellant was in custody before he was brought before the court for approximately 9 months. He has spent in remand custody after being produced in court for another 3 months.

Chronology of time that the appellant was in custody was filed by parties with agreement. State conceded at the hearing of the appeal that the ultimate sentence should reflect the period the appellant spent in immigration custody for the offence as well.

16. I find that the Learned Magistrate fell into error when she decided that only the period in remand should be considered, not the period of custody in Immigration Department.
17. Hence, I conclude that the 9 months period in immigration custody also should be considered as a period the appellant has already served and same should be discounted. The remand period of the appellant after being produced in court has already been deducted from the sentence.

Ground e

18. The contention of the appellant is that the Learned Magistrate accepted the tariff of 2 – 5 years as in **Hussein v. State** *Criminal Appeal HAA 066/2012 (16 March 2012)* and failed to consider the **State v. Mohammed Aswaq** Magistrate Court *Nadi Criminal Case No. 65 of 2016* and **State v. Anand Kumar Prasad and others** *Criminal case No. 24 of 2010* in Lautoka High Court.
19. **State v. Mohammed Aswaq** (supra) is a case that was decided by the Magistrate's Court, Nadi and it had only a persuasive value as far as the Magistrate's Court is concerned. However, the Learned Magistrate Nadi in 'Aswaq' case has taken into consideration the case of **Prasad v. State** (supra) when he decided on tariff. In case of Prasad (supra) the accused persons were charged for conspiracy to defraud under the Penal Code as the offences were committed by the accused persons in that case during the period between 01/04/2006 and 31/12/2007. Under the Penal Code the maximum

punishment prescribed was 7 years imprisonment. However, the appellant in the instant case was charged under the Crimes Decree 2009 and the maximum punishment prescribed is imprisonment for 10 years. The offence charged in this case was under section 329 (1) of the Crimes Decree 2009, an offence that falls under part 17 of the Crimes Decree.

20. The case of Hussein (supra), that the Learned Magistrate followed in this case, where the charge was under section 318 of the Crimes Decree 2009 also was under the category of 'Fraudulent conduct' under part 17 of the Crimes Decree 2009, where the maximum punishment prescribed also is 10 years imprisonment. Therefore the Learned Magistrate in this case was correct when she followed the tariff set in case of 'Hussain'. Hence, this ground of appeal has no merit.
21. Before I deal with grounds f and g, I must mention that although it was not urged by the appellant as a ground of appeal, at the hearing of this appeal the counsel for the appellant submitted that the Learned Magistrate fell into error in deciding on the aggravating factors.
22. The aggravating factors the Learned Magistrate identified were:
 - (i) The magnitude of the conspiracy whereby you were well aware that Nirmal Singh is from Malaysia and is not a Fijian citizen but is applying for a Fijian passport with another person's personal details: and
 - (ii) The victim of the offending was one of the boarder agencies of this country – Immigration Department. You have tarnished the reputation of this government department. These agencies have to be protected from persons willing to engage in fraudulent activities and entering into plans to facilitate such activity.

23. Counsel for appellant contended that 1st aggravating factor is an element of the offence. It is clear that the conspiracy is an element of the offence. However, the Learned Magistrate has taken into account the magnitude of the conspiracy. In that context this has to be considered with the 2nd aggravating factor mentioned above.
24. On the 2nd aggravating factor, I cannot accept that the reputation of the Government Department (Immigration Department) was tarnished by the actions of the applicant as it was discovered by the officers. However, when it comes to dishonestly influencing a public official in the exercise of their public duties, I find that court should take it very seriously when it comes to the Immigration officers as the border control matters are involved. Issuance of a Fiji passport to a non-Fijian on forged documents can be a serious threat to National security as well. Therefore it is a serious aggravating factor and the appellant who conspired to commit such offence should get deterrent punishment. He acted as a facilitator for the person namely Nirmal Singh who is a Malaysian Citizen to obtain a Fiji passport.
25. Hence, I find that the 2 year period that the Learned Magistrate added for the aggravating factors is justified.

Grounds f, g and h

26. The sentence imposed on the appellant by the Learned Magistrate is within the tariff and at the lower end of the tariff. Hence, it is not excessive at all. Although the appellant is a first offender when consider the seriousness of the offence and that this is a calculated, pre-planned offence it is not appropriate to suspend the sentence of imprisonment. Therefore the Learned Magistrate was correct in imposing a custodial sentence. Hence, grounds f and g should necessarily fail.

27. Finally, your sentence you have to serve after deduction of the 9 months custody period mentioned in paragraph 17 will be 1 year and 8 months.
28. Your non-parole period will be 9 months.
29. Appeal is allowed to the above extent.




Priyantha Fernando
Judge

At Suva

18th November 2016

Solicitors

Victoria Chambers for the Appellant

Office of the Director of Public Prosecutions for the Respondent