

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE: HAA 56 OF 2016

BETWEEN : EDWIN MANESH MASLA

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant in Person
Mr S. Babitu for the Respondent

Date of Judgment : 4th of January, 2017

JUDGMENT

Background

1. The Appellant was charged in the Magistrates Court of Nadi for two counts of Obtaining a Financial Advantage by Deception, contrary to Section 318 of Crimes Decree. The Appellant pleaded guilty for both of the counts on the 15th of October 2013. Subsequently, the learned Magistrate sentenced the Appellant for a period of twenty four (24) months of imprisonment with non-parole period of

eighteen (18) months. Aggrieved with the said sentence, the Appellant filed this Petition of Appeal on the following grounds *inter alia*;

- i) *The learned Magistrate erred in law by giving other deduction as the sentence was 2 years which could be given a suspended sentence,*
- ii) *The learned Magistrate erred in law by fixing a non-parole period as Section 18 (4) of Sentencing and Penalties Decree 2009, the Sentencing Court is required to fix a period of less than at least six months than the term of sentence,*
- iii) *The sentence of 24 months is manifestly harsh and excessive in all circumstances of the case.*

2. Pursuant to the service of the Petition of Appeal, the matter was set down for hearing on the 8th of November 2016. The Appellant and the Respondent informed the court that they would conduct the hearing by way of written submissions. I accordingly directed them to file their respective written submissions, which they filed. Having carefully perused the respective written submissions filed by the parties and the copy record of the proceedings of the Magistrates Court, I now proceed to pronounce the judgment as follows.

Ground III

3. For the convenience of determination, I first draw my attention to the third ground of appeal, which is founded on the ground that the sentence of twenty four (24) months imprisonment is manifestly harsh and excessive.

4. The learned Magistrate has correctly identified the tariff for the offence of Obtaining a Financial Advantage by Deception as two years to five years with two years being reserved for minor offences with little and spontaneous deception. (State v Sharma [2010] FJHC 623; HAC122.2010L (7 October 2010)). Having identified the applicable tariff limit, the learned Magistrate has selected three years as the starting point, which is at the middle range of the acceptable tariff limit. He then increased one year for the aggravating factors. He then reduced two years for the mitigating grounds, reaching the final sentence of two years.
5. The final sentence of two years is within the acceptable tariff limit.
6. Gounder JA in Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015) has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

“It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

- i) Whether the sentencing judge acted upon a wrong principle;*
- ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
- iii) Whether the sentencing judge mistook the facts;*

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

7. Having considered the above discussed reasons and the judicial precedent, it is my opinion that the learned Magistrate has properly and accurately exercised his sentencing discretion according to the applicable sentencing guidelines. Therefore, I find that the final sentence of two years is neither excessive nor harsh. Accordingly, the third ground of appeal has no merit.

Ground II

8. The second ground of appeal is founded on the contention that the learned Magistrate erred in law by fixing the non-parole period of eighteen months.
9. Section 18 of the Sentencing and Penalties Decree deals with the imposition of non-parole period, where it states;
 - i) *Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole,*

ii) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1),

iii) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole,

iv) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

10. According to Section 18 (4) of the Sentencing and Penalties Decree, the non-parole period must be at least six months less than the term of the final sentence. In this matter the non-parole period is eighteen months, which is exactly a six months less than the main sentence of twenty four (24) months. Therefore, I do not find any merit in the second ground of appeal.

Ground I

11. The third ground of appeal is founded on the contention that the learned Magistrate failed to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Decree.

12. Section 26 (1) of the Sentencing and Penalties Decree states that;

“On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances”

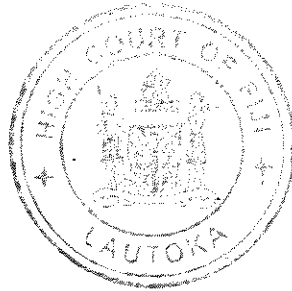
13. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.
14. The Appellant was charged for offences involved with breach of trust. Justice Shameem in State v. Raymond Roberts (HAA 0053 of 2003 S) has discussed the applicable sentencing approach for the offences involved with breach of trust, where her ladyship found that

“The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim”

15. Furthermore, in State v Simeti Cakau ((HAA 125 of 2004S)), Justice Shameem has further elaborated the applicable sentencing approach for offences involved with breach of trust, where her ladyship found that

“That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender’s way out of prison, but as a measure of true remorse”

16. The learned Magistrate has taken into consideration that the Appellant has made no attempt for restitution and the seriousness of the offence. Having considered those grounds, the learned Magistrate has appropriately exercised his discretion in imposing a custodial sentence. Therefore, I do not find any merit in the first ground of appeal.
17. In conclusion, I dismiss and disallow this Petition of Appeal.
18. Thirty (30) days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

4th of January, 2017

Solicitors : Office of the Director of Public Prosecutions,