

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
246(1) of the Criminal Procedure Act
2009.

JONE ROBANA KADAVU

Appellant

CASE NO: HAA. 16 of 2017
[MC Nausori, Crim. Case No. 499 of 2015]

Vs.

STATE

Respondent

Counsel : Ms. S. Vaniqi for Appellant
Ms. M. Khan for Respondent

Date of Hearing : 19th June, 2017

Date of Judgment : 03rd July, 2017

JUDGMENT

1. The appellant was convicted upon his guilty plea and sentenced on 13th March 2017 for the offence of obtaining financial advantage by deception contrary to section 318 of the Crimes Decree No. 44 of 2009 (now Crimes Act). The charge reads thus;

Statement of Offence

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

Particulars of Offence

JONE ROBANA KADAVU *on the 16th day of January, 2015 at Nausori in the Central Division, dishonestly obtained a financial advantage of \$1,500.00 by deception from Savinesh Nadan to provide a Market Base and Plate but he failed to do so.*

2. The appellant was sentenced for a term of 2 years imprisonment with a non-parole period of 1¹/₂ years. Being aggrieved by the sentence imposed by the Learned Magistrate, the appellant had taken steps to file this timely appeal against the said sentence.
3. The Learned State Counsel, through the written submissions filed and during the hearing of the appeal pointed out that the relevant summary of facts filed before the Learned Magistrate does not establish the offence the appellant was convicted for. In fact, the submission of the Learned State Counsel is that the State cannot support the conviction in this case.
4. I consider it appropriate to examine the above submission of the respondent as a preliminary issue before dealing with the grounds of appeal raised by the appellant. Though the appellant only assails the sentence imposed by the Learned Magistrate in this appeal, this court in its revisionary jurisdiction can set aside the conviction if it is satisfied that the conviction is bad in law. (See *State v Ratuvou* [2002] FJHC 140; HAA0060J.2002S)
5. The appellant was convicted for the offence of obtaining financial advantage by deception under to section 318 of the Crimes Act. The elements of the said offence are as follows;
 - a) the accused;
 - b) dishonestly obtained;
 - c) a financial advantage;
 - d) by deception.
6. The respondent submits that there was no evidence before the Learned Magistrate on the fourth element above which involves 'deception'. As discussed in the case of *Chute v State* [2016] FJHC 1114; HAA015.2016 (8 December 2016), in order to prove the element that involves deception in a charge under section 318 of the Crimes Act, the prosecution should prove beyond reasonable doubt that the financial advantage was passed to the accused because of the deception as to the existing facts or law orchestrated by the accused that operated in the mind of the

person who took steps to pass the financial advantage.

7. This particular element in question cannot be established based on the mere evidence that the complainant gave money to the accused because he or she was deceived into thinking that a particular service will be performed by the accused in the future and the accused failed to perform that service.

8. The summary of facts filed in this case reads as follows;

“On the 16th day of January, 2015 Jona Robanakadavu [B-1] 52 years, Director of East West Taxi and Tour Company Limited residing at Nausori town obtained cash of \$1,500.00 from Savinesh Nadan [A-1] 23years, Manager of Nadali to provide a Market base and Permit but he failed to do so.

[B-1] is the director of the above company and runs his business from the above mentioned place. On the above date and place [A-1] came to see [B-1] in regard to the market base. After that [A-1] paid the above sum and [B-1] issued the receipt number 0816 [refer to folio D-1]. After that [A-1] was informed by other staffs that they will call LTA officers for interview but till to date nothing has been done. Whenever [A-1] went to check for the base approval and he was told that the base permit will be given later. [A-1] got frustrated and reported the matter for investigation.

Later on 16/06/15 [B-1] was formally charged for the offence of Obtaining a Financial Advantage by Deception contrary to section 318 of the Crimes Decree No. 44 of 2009.

[B-1] admitted receiving the money from [A-1] ref to question numbers 31, 32. [B-1] in custody for Nausori Magistrate’s Court” [Emphasis is mine]

9. The above summary of facts does not at least suggest that the accused did not have the capacity to perform the particular service and never intended to perform that service when he obtained the money and that the accused obtained the money by deceiving the complainant that he had the capacity to perform that service.

10. In the event the accused did not have the capacity to provide the service in question and if the complainant also knew that, then the complainant cannot be said to have been deceived on the existing facts or law. However, it should be noted that if this transaction involved the influencing of a public official and the complainant also knew that; such evidence may constitute a different offence where the complainant may also be criminally responsible.
11. All in all, the summary of facts in this case does not reflect that the appellant obtained the money by deception. Conversely, the summary of facts indicates that the relevant complaint was lodged because the complainant was frustrated over the appellant's failure to perform the particular service which the appellant had promised to perform. Though the appellant had clearly admitted that he received the money from the complainant, there is no admission to the effect that the appellant had deceived the complainant.
12. I also note that the following facts had been submitted as mitigating factors in the 'mitigation and sentencing' submission filed on behalf of the appellant before the magistrate's court;
 - “(b) It was Mr. Robanakadavu's intention to clear all his debts in due time but unfortunately, his business counterparts have not been honouring their payment agreements;*
 - (c) The failure to uphold all financial agreements as initially intended has affected all business relationships with all business stakeholders;*
 - (d) Apart from this particular complainant, there are others who have also decided to resolve their affected business relationship by way of court proceedings;*
 - (e) Despite all the business hiccups, Mr. Robanakadavu is intending to pay all those who have filed writs against him;*
 - (f) Clearing of all their arrears may not happen all at once but all payments will be distributed according to the revenue he earns from his business;*
 - (g) Mr. Robanakadavu honestly has no intention to be unjustly enriched at the expense of the other complainants but all these claims arose from an inadequacy in his initial business plan which he now manages to slowly revive, resolve and make good”*

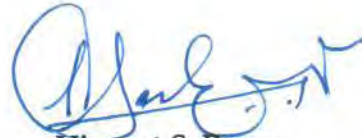
13. The above facts submitted in mitigation clearly repudiate dishonesty and deception on the part of the appellant. Given the content in the summary of facts and the above submissions made in mitigation, it is clear that the guilty plea that was entered by the appellant before the Learned Magistrate is ambiguous.
14. On 'ambiguous pleas', Blackstone's Criminal Practice 2016 states thus;
"If an accused purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggest he may have a defence (e.g., 'Guilty, but it was an accident' or 'Guilty, but I was going to give it back'), then the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty."
15. In this case, the Learned Magistrate should not have convicted the appellant given the facts placed before her which clearly suggested that the plea was ambiguous.
16. Before a conviction is entered upon a plea of guilty, it is necessary for the court to satisfy itself that the summary of facts admitted by the accused covers all the elements of the relevant offence and that the plea is unambiguous; whether the accused is legally represented or not. A Court should not proceed to sentence an accused on a plea that is imperfect, unfinished or otherwise ambiguous. (See Blackstone's Criminal Practice 2016, D12.100)
17. In the light of the above, the conviction entered by the Learned Magistrate in the case at hand should be set aside. Therefore, I will not deal with the grounds of appeal in this case.
18. This case was handled by the police prosecution before the magistrate's court. Having considered the evidence gathered by the police during the investigation, the Learned State Counsel had submitted before this court that there is no evidence that the appellant had committed the offence he is charged with.
19. I am inclined to treat the aforementioned submission of the State Counsel as a withdrawal of the complaint under section 169(1) of the Criminal Procedure Act.

20. In the circumstances, I would exercise the jurisdiction of this court under section 262(1) of the Criminal Procedure Act to set aside the conviction entered by the Learned Magistrate in Magistrate Court of Nausori Crim. Case No. 499 of 2015 and order that the appellant be discharged forthwith.

Orders of the court;

- i) The conviction and the sentence entered in Magistrate Court of Nausori Crim. Case No. 499 of 2015 on 13/03/17 is set aside; and
- ii) The appellant is discharged.




Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Vaniqi Lawyers, Suva.
Solicitors for the State : Office of the Director of Public Prosecutions, Suva.