

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No.: HAA 54 of 2016

SETAREKI NIUBASAGA

vs.

STATE

Counsel : Appellant in person
Mr. J. Niudamu for the State

Dates of Hearing : 25 October and 2 November, 2016;
17 & 27 January, 2017

Date of Judgment : 6 February, 2017

JUDGMENT

- 1] On the 3rd August 2016 the appellant was convicted on his own plea in the Magistrates Court at Rakiraki of one charge of obtaining a financial advantage by deception contrary to section 318 of the Crimes Decree 44 of 2009. On the 5th August 2016 he was sentenced to a term of 1 year, 11 months and 11 days imprisonment with a minimum term to be served of one year.
- 2] He now seeks to appeal both his conviction and sentence.

- 3] Against conviction he prays that his plea was involuntary, his counsel having promised that he would have a suspended sentence if he entered a plea of guilty.
- 4] Against sentence he prays:
 - (i) the Magistrate erred in increasing the sentence for aggravating features already subsumed in the offence;
 - (ii) The Magistrate failed to afford sufficient credit for his plea of guilty;
 - (iii) The Magistrate placed too much emphasis on previous convictions, some of which were spent.
- 5] The facts of the case were that the appellant in May 2016 was the organizer of a Rugby tournament with the winning team to receive prize money. Each team contributed cash to make up the prize. At the conclusion of the tournament the appellant gave the winning team a cheque drawn in the sum of \$800. This cheque was dishonoured due to lack of funds.
- 6] In an interview under caution the appellant admitted to having spent the subscription money collected from the teams on tuition fees for his wife in Australia.

Appeal Against Conviction

- 7] The record of proceedings in the Magistrates Court shows that the Appellant, represented, entered a plea of guilty to the charge on the 3rd August 2016. When asked if that plea was made of his own free will, he replied in the affirmative.
- 8] He subsequently admitted a set of relevant facts. There is nothing in the

court record to indicate that the plea and agreement to the facts were misunderstood or obtained by pressure or threat.

- 9] It is pertinent to note that section 247 of the Criminal Procedure Decree 2009 reads:

“247. No appeal shall be allowed in the case of an accused person who has pleaded guilty and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence”.

- 10] Despite this limitation, it has long been accepted that the section is not an absolute bar to successful appeals. It could be that the facts in evidence do not support the offence admitted to, or that the plea was shown to be equivocal.

- 11] In the case of **Navale** AAU 004.2006 (24th October '08) the Court of Appeal discussed claims that a plea was equivocal as a ground of appeal. It was said:

“It has long been established that an appellate Court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record. A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty. A valid plea of guilty is one that is entered in the exercise of a free choice.”

12] The High Court of Australia said in Maxwell v R (1996) 184CLR 501:

“the plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. The circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage.”

13] In the instant case there is nothing in evidence before the Court apart from the appellant’s written submission that he was persuaded to plead guilty by his Counsel on the promise of a suspended sentence. There is no evidence on the record that the plea was not genuine.

14] Absent evidence to the contrary, the Court must assume that a practitioner would not tell a client what his sentence would be. He would merely advise his client what the likely range of sentence would be, given sentences previously passed for the offence.

15] The appellant urges the court to take into account the “flagrant incompetence” of counsel and his (appellant’s) lack of understanding of the consequences of the plea.

16] There is no evidence before this court that counsel was in any way incompetent or even reckless.

17] It is not the first time that this appellant has been before a court for an offence of dishonesty and to say that he does not understand the effect of a plea is unbelievable.

18] The appeal against conviction has no merit and it is dismissed.

Appeal against Sentence

- 19] In casting his sentence the Magistrate specifically referred to the plea of guilty and to his personal mitigation.
- 20] He stated that the aggravating features were:
- (a) Breach of trust as the organizer of the prize winning tournament;
 - (b) the benefit derived from the offence.
- 21] There is merit in the Appellant's submission that the second aggravating feature is not an aggravating feature at all. Obtaining financial advantage by deception of course leads to a benefit for the perpetrator. "Benefit derived" is financial advantage and it is unfair to penalize an accused twice for this element.
- 22] There has of course been a gross breach of trust in that each team had entrusted him with their contribution to the prize fund.
- 23] The appellant's first ground of appeal on sentence succeeds in part.
- 24] In his second ground the appellant submits that not enough credit was allowed for his plea of guilty.
- 25] The appellate Courts have never until now specified a scale of discount to make for pleas of guilty, but it has been repeatedly said that the "high water mark" of discount would be one third. That discount is afforded to an accused who pleads guilty at the first opportunity and is clearly remorseful in that plea. Depending on the time of pleas not made at first

opportunity, the discount falls away to no credit whatsoever to a plea made when the matter comes to trial.

- 26] In **Solomone Qurai** CAV24 of 2014 (20 August 2015) the Supreme Court stated that a one third discount could be given for a willing plea made at first opportunity and that this discount was to be the last step in the sentencing process.
- 27] This is exactly what the Magistrate did; affording a one third discount to the appellant of 8 months.
- 28] This ground of appeal must fail.
- 29] The third ground of appeal against sentence advanced by the Appellant is that too much emphasis was placed on his previous convictions which are too old to be considered.
- 30] The Magistrate said this in his sentence:

“You are not a first offender and it appears that you have previous convictions for similar type of offending. You seem to be the type of person who has a propensity to deceive others for personal benefit. To that end no leniency will be extended to you by this Court. Further I don’t see any exceptional circumstances to suspend your sentence, your sentence will be suspended.”

- 31] The appellant has 20 previous convictions for this same offence, 2 of which are “alive”. The Magistrate has not indicated that he has taken the spent offences into account but the two convictions recorded in the

Lautoka Magistrates Court are sufficient to justify the Magistrate's ruling in the paragraph quoted above.

32] This ground too must fail.

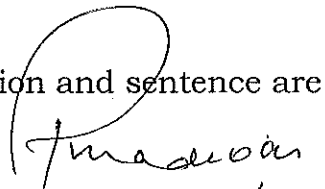
33] This Court set the tariff for this offence in the case of **Atil Sharma** HAC 122.2010 Ltk, where it was said:

“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 pre-meditated and well planned cynical operation is put in place.”

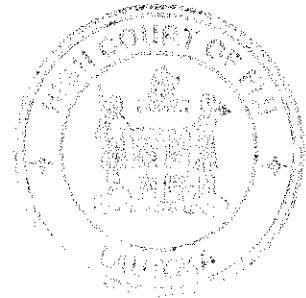
34] The Magistrate had taken a starting point of 2 years and had increased it by 12 months for the aggravating features. He then reduced that by 4 months for mitigating features and finally gave a full third discount (8 months) for the plea of guilty.

35] The resultant sentence passed on the appellant was lenient and despite the one erroneously attributed aggravating factor, it is condign punishment for the offence committed and this Court will not interfere.

36] The appeals against conviction and sentence are dismissed.



P. Madigan
JUDGE



At Lautoka
6th February 2017