IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 26 OF 2018

BETWEEN:	**MELISA SERA**	**APPELLANT**
A N D:	**STATE**	**RESPONDENT**

Counsel: Ms. T. Kean and Ms. N. Mishra for the Appellant
Ms. S. Serukai for the Respondent

Date of Hearing: 23rd August 2018

Date of Judgment: 18th October 2018

JUDGMENT

Introduction

1. The Appellant had been charged in the Magistrate's Court at Nausori for two counts of Obtaining Money by False Pretence, contrary to Section 309 (a) of the Penal Code. She was first produced in the Magistrate's Court on the 13th of October 2008. Subsequent to several adjournments, the Appellant had pleaded guilty to both counts on the 26th of March 2009. However, the Appellant had withdrawn her plea of guilty on the 30th of April 2009 and entered a plea of not guilty. The matter then proceeded to the hearing. The hearing had commenced on the 7th of August 2012. Subsequent to the hearing, the learned Magistrate in her judgment dated 10th of July 2017, found the Appellant guilty to both

counts as charged. Accordingly, the learned Magistrate has convicted and sentenced the Appellant to a period of 25 months imprisonment with a non-parole period of 19 months for each of the two counts. The learned Magistrate has further ordered that both sentences to be served concurrently. Aggrieved with the said sentence, the Appellant filed this appeal on the following grounds that:

> *"That the learned Magistrate erred in law and in principle when he sentenced the appellant to a term of imprisonment without considering the fact that the Appellant was willing and was in the capacity to restitute the Complainant."*

2. The Appellant and the Respondent were given directions to file their respective written submissions on the 3rd of July 2018 and they filed the same as per the directions. Subsequently, the learned Counsel for the Appellant and the Respondent made their oral submissions and arguments on the 6th of August 2018. Having carefully considered the record of the proceedings in the Magistrate's Court, the respective written and oral submissions of the counsel, I now proceed to pronounce my judgment as follows.

The law

3. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** found 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 the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence."*

4. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."*

Analysis

5. The ground of appeal is based upon on the contention that the leaned Magistrate had failed to take into consideration the fact that the Appellant was willing/was in the capacity to restitute the Complainant.

6. Section 4 (2) (h) of the Sentencing and Penalties Act states that:

> *In sentencing offenders a court must have regard to*
>
> *"any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree."*

7. Accordingly, the sentencing court has to take into consideration the action taken by the offender to make restitution or his willingness to comply with any order for restitution in sentencing an offender.

8. The Fiji Court of Appeal in **Khera v State [2016] FJCA 1; AAU0117.2014 (18 January 2016)** has discussed the effect of restitution in respect of offences involved with fraud and breach of trust, where Goundar JA held that:

> *"In fraud cases, payment of restitution before any charge is laid may indicate that the offender is genuinely remorseful to justify a suspended sentence, while a late payment of restitution after a charge is laid may indicate that the offender is trying to buy his way out of prison. Sentencing courts have endorsed the principle. In **State v Cakau** unreported Cr. App. No. HAA 125 of 2004S: 10 November 2004, the offender who was a military officer stole $23,817.56 from the Fiji Military Forces after falsifying the accounts. He pleaded guilty to the charges and was given a suspended sentence in the Magistrates' Court. On appeal by the State, the High Court quashed the suspended sentence and imposed a custodial sentence of 18 months' imprisonment. In that case, Shameem J said at p.5:*
>
> *"There is ample authority supporting the imposition of custodial sentences for serious fraud and breach of trust offences. Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust, that renders serious fraud offences the worst type of offending in property-related cases. It is for this reason, that a custodial sentence is inevitable except in those exceptional cases where full restitution has been effected, not to buy the offender's way out of prison, but as a measure of true remorse."*

*Similarly, in **State v Deo** unreported Cr. App. No. HAA008 of 2005S; 23 March 2005 Shameem J said at p 4:*

"The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology."

9. Accordingly, the main issue is not the restitution, but whether it was a true and sincere expression of remorse in accepting the liability of the crime.

10. The counsel for the Appellant in the Magistrate's Court had indicated to the learned Magistrate on the 23rd of February 2015, that the Appellant was willing to take a progressive approach to the charges. However, according to the record of the proceedings in the Magistrate's Court pertaining to 14th of September 2015, the counsel for the Appellant had informed the learned Magistrate that if the prosecution amends the charges, then the Appellant will take a progressive approach. This is not a genuine expression of remorse or apology for committing the offence. The Appellant had actually sought a plea bargaining in order to get a lesser sentence.

11. According to the record of the proceedings in the Magistrate's Court, the Appellant had pleaded guilty to the both counts on the 26th of March 2009. However, she had later withdrawn her plea of guilty and proceeded to the hearing. This matter had been pending in the Magistrate's Court for nearly nine years. The Appellant had not made any effort to make restitution during this period.

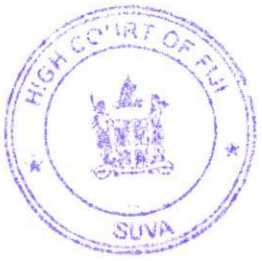
12. In view of these facts, I do not find that a mere willingness of making restitution after the conclusion of the hearing does not constitute as a genuine and voluntary expression of remorse and acceptance of the liability of the crime.

13. The learned Magistrate in paragraph 16 of the sentence has correctly found that the Appellant's willingness to repay the money is not a genuine effort and it is only to buy a way out from a prison term.

14. In view of these reasons, I find that the above conclusion of the learned Magistrate is based upon the correct sentencing approaches adopted by the courts in Fiji in respect of the offences involved with fraud and breach of trust. Therefore, I do not find any merit in the grounds of appeal.

15. In conclusion, I refuse this appeal and dismiss the same.

16. Thirty (30) days to appeal to the Fiji Court of Appeal.



R.D.R.T. Rajasinghe
Judge

At Suva
18th October 2018

Solicitors
Office of the Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecution for the Respondent.