

SECOND COUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to section 318 of the Crimes Act 2009.

Particulars of Offence

ZINAZ NEHA BUKSH, on the 23rd day of December, 2013, at Suva in the Central Division, being the Director of Star Agencies Global Migration and Travel Services, by deception, dishonestly obtained \$2,000.00 (FJD) cash from one SABID ALI SHAH promising the said SABID ALI SHAH that she was in a position to arrange his work visa to Australia but failed to do so.

THIRD COUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to section 318 of the Crimes Act 2009.

Particulars of Offence

ZINAZ NEHA BUKSH, on the 23rd day of May, 2014, at Suva in the Central Division being the Director of Star Agencies Global Migration and Travel Services by deception, dishonestly obtained \$1,800.00 (FJD) cash from one SABID ALI SHAH promising the said SABID ALI SHAH that she was in a position to arrange his work visa to Australia but failed to do so.

FOURTH COUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to section 318 of the Crimes Act 2009.

Particulars of Offence

ZINAZ NEHA BUKSH, on the 8th day of August, 2014, at Suva in the Central Division, being the Director of Star Agencies Global Migration and Travel Services, by deception, dishonestly obtained \$1,700.00 (FJD) cash from one AMELIA LAVETI VIRIVIRILAU promising the said AMELIA LAVETI VIRIVIRILAU that she was in a position to arrange her work visa to Australia but failed to do so.

FIFTHCOUNT

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to section 318 of the Crimes Act 2009.

Particulars of Offence

ZINAZ NEHA BUKSH, on the 22nd day of October, 2014, at Suva in the Central Division, being the Director of Star Agencies Global Migration and Travel Services, by deception, dishonestly obtained \$800.00 (FJD) cash from one AMELIA LAVETI VIRIVIRILAU promising the said AMELIA LAVETI VIRIVIRILAU that she was in a position to arrange her work visa to Australia but failed to do so.

2. In seven pages, the learned Magistrate provided the reasons for his decision. On 6 February 2018, the learned Magistrate sentenced the appellant to 26 months imprisonment on each count, ordering the same to be made concurrent to each other. The final sentence was 26 months imprisonment, with a non-parole period of 20 months imprisonment, to take effect from 6 February 2018.
3. The facts in summary form were as follows. The appellant set up a travel visa consulting service on 29 October 2013. She called the business "Star Agencies". She registered the same with the Administrator – General and obtained a Business licence from the Suva City Council. Her business was basically for "tourist visa and providing visa consulting services". She operated her business from 90 Waimanu Road, the 1st floor. She partnered with one Elvin Sagar, who was held out to be working for Australia Immigration. According to the appellant, Mr. Sagar could provide a 1 year work permit, a job and accommodation in Australia. This appeared to be what she was telling her clients at "Star Agencies".
4. It was on the basis of the above understanding that Mr. Sabid Ali Shah (PW3) and Ms. Amelia Virivirilau (PW1) visited "Star Agencies", as mentioned in the particulars of the offences in count no. 1, 2, 3, 4 and 5. Unbeknown to PW3 and PW1, the set up by "Star Agencies", was nothing but a sham. PW3 and PW1 paid cash to the appellant as indicated in the above counts, but she failed to deliver as promised. In September 2014, the appellant closed "Star Agencies". She said, Mr. Sagar was not delivering as promised, and PW3 and PW1 had not received the services they were promised. The matter was then reported to the police.
5. The appellant was not happy with her conviction and sentence. She appealed to the High Court. She advanced the following grounds:

APPEAL AGAINST CONVICTION:

- (1) The learned trial Magistrate erred in law and in fact in convicting the Appellant for counts 1, 2, 3, 4 and 5 without taking into consideration the evidence adduced by the prosecution and the defence adequately and/or at all.
- (2) The learned trial Magistrate erred in law and in fact in convicting the Appellant for counts 1, 2, 3, 4 and 5 for the offence of obtaining Financial Advantage by Deception when the prosecution failed to prove all the elements of the offence beyond all reasonable doubt.

- (3) The learned trial Magistrate erred in law and in fact in convicting the Appellant for count 1, 2, 3, 4 and 5 for the offence of Obtaining Financial Advantage by Deception when the complainants paid money to the Appellant for consultation and application for their Visas.

APPEAL AGAINST SENTENCING

- (4) The learned sentencing Magistrate took irrelevant and unlawful aggravating factors for enhancing the sentence and failed to take relevant facts into account.
- (5) The learned sentencing Magistrate erred in law and in fact in not taking into consideration that the Appellant was 8 months pregnant and she was going through lot of pain and suffering. The learned Magistrate also failed to consider that Appellant will have difficulties in upbringing her child and child's welfare will be seriously affected in the Prison.
- (6) The learned sentencing Magistrate erred in law and in fact in not taking into consideration that Appellant started making payments to her clients' under Judgment Debtor Summons in the Magistrate Court Suva. The learned Magistrate failed to direct his mind to these circumstances.
- (7) The sentence is harsh and excessive in all the circumstances of the case..."
6. Although the appellant filed 7 grounds of appeal on conviction and sentence, most of them overlap with each other and are thus a repetition of the others. As for conviction, I will only deal with ground 2, as it covers all the three grounds advanced. For sentence, I will only cover ground 7, as it, in my view, covers all the grounds advanced for sentencing

Conviction Appeal Ground No. 2

The learned trial Magistrate erred in law and in fact in convicting the Appellant for counts 1, 2, 3, 4 and 5 for the offence of obtaining Financial Advantage by Deception when the prosecution failed to prove all the elements of the offence beyond all reasonable doubt.

7. Section 318 of the Crimes Act 2009 reads as follows:
"...A person commits a summary offence if he or she, by a deception, dishonestly obtains a financial advantage from another person. Penalty – imprisonment for 10 years..."

8. For the accused to be found guilty of the above offence, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) by a deception
- (iii) dishonestly
- (iv) obtains
- (v) a financial advantage
- (vi) from another person.

9. How does the Crimes Act 2009 define "deception"? Here we look to section 316 of the Crimes Act 2009, which reads as follows:

"...In this part - "deception" means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes -

- (a) a deception as to the intentions of the person using the deception or any other person; and**
- (b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the persons is not authorised to cause it to do..."**

10. On whether or not the above definition is clear cut, I agree with Mr. Justice V. Perera's observation in **Sisilia Chute v State**, Criminal Appeal Case No. HAA 015 of 2016, High Court, Suva, where His Lordship said:

"...section 316 of the Crimes Decree provides a definition for the word "deception". However, the said definition does not clearly explain what a "deception" is. In Blackstone's Criminal Practice 2007 at page 402 it is stated thus; The best known judicial definition of deception is that of Buckley J in Re London and Globe Finance Corporation Ltd [1903] 1 Ch 728 at p. 732:

To deceive is ... to induce a man to believe that a thing is true which is false.
This was quoted with approval in DPP v Ray [1974] AC 370 and is consistent with the normal dictionary meaning of the term,..."

11. So, the phrase "by a deception" as mentioned in paragraph 8 hereof means "to deceive", that is, "to induce a person to believe that a thing is true which is false". In the **"Oxford Advanced Learner's Dictionary"**, 6th edition, Oxford University Press, 2002, the word "deceive" means

“to make somebody believe something that is not true”; it is also to mislead. When you add the above definition to the definition provided in section 316 of the Crimes Act 2009, “to deceive” would mean “to intentionally or recklessly deceive somebody, by words or conduct, believe something that is not true in fact or law”.

12. In **Sisilia Chute v State** (supra), His Lordship Justice V. Perera, on the meaning of “deception” in section 318 of the Crimes Act 2009 said as follows:

“...It is necessary for the prosecution to prove that the deception operated in the mind of the person who is alleged to have been deceived. I am of the view that deception under section 318 of the Crimes Decree should be a deception as to existing facts or law and not a deception as to the future...” [paragraph 35]

I agree with His Lordship’s views.

13. In my view, when considering whether or not the accused deceived the complainant, within the term “deception” as described in section 318 of the Crimes Act 2009, the whole facts of the case must be examined. The accused’s business set up must be examined. Do they have the skills and experience to do what they were doing? Was the accused’s business genuine or was it a sham? Were the people behind the business genuine or fraudulent? The accused’s actions before the promise to provide a visa must be examined, including the accused’s actions and inaction after the promise was given. Yes, a future promise to provide a visa is not a representation of fact (**Ramesh Chand v State**, Criminal Appeal No. HAA 003 of 2004, High Court, Suva); but that promise in combination with the surrounding circumstances, including the accused’s subsequent actions and excuses for inaction, may provide the evidence to prove a deception on existing fact (**Mareca Duibana Bese v State**, Criminal Appeal No. HAA 060 of 2005, High Court, Suva). The word “deception” in section 318 of the Crimes Act 2009 must be examined in the above way.
14. Next, we consider the word “dishonestly” in paragraph 8 hereof. Section 290 and 348 of the Crimes Act 2009 defines “dishonest” in the same way. It reads:

“...dishonest means –

- (a) dishonest according to the standards of ordinary people; and
- (b) known by the defendant to be dishonest according to the standards of ordinary people...”

15. In Sisilia Chute v State (supra), in paragraph 28, Mr. Justice V. Perera, on the meaning of "dishonesty", said the following:

"...Black's law dictionary (6th edition) provides the following definition to the word "dishonesty". "Disposition to lie, cheat, deceive, or de-fraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray..."

I agree with His Lordship.

16. In the Oxford Advanced Learner's Dictionary (supra), the word "obtain" is taken to mean "to get something, especially by making an effort". The word "financial" is an adjective used before a noun and means "connected with money". The word "advantage" is a noun and means "a thing that helps you to be better or more successful than other people" or "a quality of something that makes it better or more useful". The phrase "from another person" means exactly what it says "from another person". The words described above are the plain ordinary meaning of the words used in paragraph 8 hereof to describe the elements of the offence created by section 318 of the Crimes Act 2009.

17. Did the learned Magistrate err in law and/or facts, when he decided as he did, in this case? In an attempt to answer the above question, I have read and considered the court record, the judgment and sentence delivered by the learned Magistrate. I have read and considered the evidence of the four prosecution's witnesses and the accused's evidence. I have also read and considered the parties' exhibits.

18. The facts of the case appear to show the following. The appellant (accused) was interested in setting up a business known as "Star Agencies". It was a travel agency specializing in arranging travel and work visas to Australia. It also promised work and accommodation in Australia. The appellant registered "Star Agencies" with the Administrator-General on 29 October 2013. On or about December 2013, the appellant entered into a partnership with one Mr. Alvin Sagar. The appellant said Mr. Sagar was working for Australia Immigration. According to the appellant, it was Mr. Sagar's role to arrange the work visa, job and accommodation for clients from Australia. The business then advertised the above through the mass media. The appellant hired staffs, and set up shop at 94 Waimanu Road Suva. The appellant and her staff

started receiving money from the complainants, as alleged in counts no. 1, 2, 3, 4 and 5 of the charge.

19. Unbeknown to the complainants, the above arrangements was a sham. According to the appellant, Mr. Sagar was unable to obtain the work visa, jobs and accommodations from Australia. Mr. Sagar was not produced at the hearing, either as a witness for the prosecution or the defence. What Mr. Sagar allegedly did came from no-one else but the appellant. Even if Mr. Sagar existed, and the appellant's evidence of the same is to be accepted, the appellant was in partnership with Mr. Sagar, and she cannot escape liability for Mr. Sagar's inactions. As a partner, she was liable for Mr. Sagar's alleged inactions. If Mr. Sagar's existence is not to be accepted by the trier of fact, that is, the learned Magistrate, then the appellant was liable for the whole fraudulent set up, that is, "Star Agencies" did not have the means to obtain what it was promising clients, and yet was receiving money from them. In my view, the appellant created "Star Agencies", and the same was nothing but a sham. The appellant, because of the above deception, dishonestly obtained money from the complainants, which is a "financial advantage from others". The fact that her promise to obtain a visa was a representation as to the future, her whole set up was a deception, and a means of obtaining a financial advantage from others.
20. In my view, the learned Magistrate did not err in fact or law, and he correctly convicted the appellant. I therefore dismiss her appeal against conviction.

Sentence Appeal Ground No. 7:

The Sentence is harsh and excessive in all the circumstances of the case.

21. The appellant has already served approximately 8 months 24 days for "obtaining by deception a financial advantage" of approximately \$6,450 from the two complainants in counts no. 1, 2, 3, 4 and 5 of the charge. In my view, that was sufficient punishment. She had already served her sentence.

Result

22. Given the above, the appellant's appeal against conviction is dismissed. Her appeal against sentence partially succeeds. She had served her sentence. She is to be released from custody forthwith.




Salesi Temo
JUDGE

Solicitor for Appellant : **Sherani and Company, Solicitors, Suva**
Solicitor for the Respondent : **Office of the Director of Public Prosecution, Suva**