

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 30 OF 2017

BETWEEN: **JAGDISH NARAYAN**

Appellant

A N D: **STATE**

Respondent

Counsel: Mr. K. Singh for Appellant
 Ms. M. Khan for Respondent

Judgment: 19th January 2018

JUDGMENT

1. The Appellant had been charged in the Magistrate's Court of Suva for two counts of Obtaining Goods by Deception, contrary to Section 317 (1) of the Crimes Act. The appellant was first produced in the Magistrate's Court on the 23rd of September 2016. Subsequent to several adjournments, the Appellant had pleaded guilty for these two counts on the 14th of December 2017. The learned Magistrate has then convicted the appellant and sentenced him for a period of sixteen (16) months imprisonment for each counts, and suspended the both sentences for a period of two (2) years. Aggrieved with the said conviction and sentence, the Appellant appeal to this court on the following ground that:

"That the learned trial magistrate erred in law and in fact in not granting a non-conviction request sought by the accused as he had pleaded guilty on the 1st available opportunity and there being full

restitution and that a conviction recorded would cause hardship on the Appellant”.

2. The Appellant and the Respondent first appeared in the High Court on the 17th of August 2017. Subsequently, the counsel for the Appellant and the Respondent were directed to file their respective written submissions, which they filed as per the directions. The appeal was set down for hearing on the 7th of December 2017, where the learned counsel for the Appellant and the Respondent informed the court that they wish to rely on the respective written submissions which they have already filed.
3. Having carefully considered the record of the proceedings in the Magistrate’s Court and the respective written submissions of the parties, I now proceed to pronounce my judgment as follows.
4. The main contention of the Appellant in this appeal is that the learned Magistrate erred in law and in fact in not granting a non-conviction for the appellant.
5. Section 15 (1) of the Sentencing and Penalties Act has given the Sentencing Court a discretion to discharge the accused without recording a conviction.
6. The factors that need to be taken into consideration by the court in exercising its discretion whether to record a conviction or not, have been stipulated under Section 16 (1) of the Sentencing and Penalties Act, where it states that:

“In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case,

including-

- i) The nature of the offence,*
- ii) The character and past history of the offender; and*
- iii) The impact of a conviction on the offender’s economic or social well-being, and on his or her employment prospects.*

7. Hon Chief Justice Gates in **State v Batiratu [2012] FJHC 864; HAR001.2012 (13 February 2012)** has expounded the following guidelines if the court contemplates of discharging the accused without a conviction. Hon Chief Justice Gates held that:

“The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:

- a) The offender is morally blameless.*
- b) Whether only a technical breach in the law has occurred.*
- c) Whether the offence is of a trivial or minor nature.*
- d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*
- e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.*
- f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.*

8. According to the summary of fact, which the Appellant had admitted in the Magistrate’s Court, the Appellant had given two cheques from his bank account to the MH Supermarket, knowing that the account had no sufficient funds to honour those two cheques. In view of the admitted summary of facts, this is a case of breach of trust. Offences of this nature are obviously involved with dishonesty and moral culpability. They are not mere technical breaches of the law.

9. 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”.


10. 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”.

11. In view of the above sentencing remarks regarding the offences involved with breach of trust offender, it is clear that the courts in Fiji consider the offences of this nature as serious offences and attract custodial sentences unless there are exceptional circumstances exist. Therefore, I do not find the circumstances of this case falls with the **Batiratu** guidelines for non-convictions.
12. The learned Magistrate has properly exercised her sentencing discretion in refusing to enter a non-conviction in the paragraph fifteen (15) of her sentence.
13. In view of these reasons, I do not find the learned Magistrate had erred in law or in fact in refusing to enter a non-conviction against the Appellant.
14. Accordingly I find this ground of appeal has no merit and fails accordingly.
15. In conclusion, I refuse and dismiss this appeal.

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




R.D.R.T. Rajasinghe
Judge

At Suva
19th January 2018

Solicitors
Office of KS Law for the Appellant
Office of the Director of Public Prosecutions for the Respondent.