IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 66 OF 2018

IN THE MATTER of an Appeal against the Sentence of the Magistrate's Court of Suva in Criminal Case No. 353 of 2018.

BETWEEN : **KARAN PRASAD**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Ms. Litiana Ratidara for the Appellant
Ms. Shirley Tivao for the Respondent

Date of Hearing : 10 April 2019

Judgment : 21 May 2019

JUDGMENT

[1] This is an Appeal made by the Appellant against the Sentence imposed against him by the Magistrate's Court of Suva, on 16 May 2018.

[2] In the Magistrate's Court, the Appellant was charged with the following offence:

Statement of Offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to Section 318 of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

KARAN PRASAD, on the 15th day of January 2018, at Vatuwaqa, in the Central Division, by deception, dishonestly obtained $750.00 cash from **RITESH CHAND** promising him that he would arrange a flat at 8, Batiki Street, Vatuwaqa, on 15th January 2018, but he failed to do so and used the money for his personal use.

[3] On 5 March 2018, the very same day the Charge was filed, the Appellant was ready to take his plea and he pleaded guilty to the Charge. The Summary of Facts was read over and explained to the Appellant the same day and he understood and admitted to the said Summary of Facts. Accordingly, the Appellant was found guilty on his own plea and convicted.

[4] On 16 May 2018, the Appellant was sentenced to 22 months imprisonment. The Learned Magistrate had ordered that that 10 months of the sentence would be suspended for 5 years. The Appellant was ordered to serve in custody the balance 12 months term of imprisonment.

[5] The Learned Magistrate had also ordered thus: "Considering the fact that this offence was committed distinctively from the offence in CF 352/18 and that you had committed the same offence repeatedly, I order the custodial imprisonment term in this case to run consecutive to the custodial imprisonment term in CF 352/18. This way, the total custodial term in both cases, in Court's view, shall fit the criminality of your offending."

[6] Aggrieved by this Order the Appellant filed a document titled 'A Notice and Application to Review of the Sentence Error', on 24 January 2019. This Court considers this Notice to be a Petition of Appeal. However, this Petition of Appeal, which was originally filed in person by the Appellant, was filed almost 7 months out of time. Since the Petition of Appeal was filed 7 months out of time the Learned State Counsel

submitted that the State would be objecting to the enlargement of time to hear this Appeal.

[7] Accordingly, the Appellant filed a Notice of Motion seeking an extension of time to file the Petition of Appeal. The Notice of Motion was supported by an Affidavit deposed to by the Appellant.

[8] As per the Affidavit filed, there are four proposed Grounds of Appeal against Sentence.

Grounds of Appeal

[9] The proposed Grounds of Appeal against Sentence are as follows:

1. That the Learned Magistrate erred in law and in fact when he failed to fully suspend the sentence after the Appellant had made full restitution to the complainant;

2. The Learned Magistrate erred in law and in fact when he wrongly calculated the discounts and ultimately coming to a wrong sentence term;

3. The Learned Magistrate erred in law and in fact in failing to fully suspend his sentence on account of his status as a first offender;

4. The Learned Magistrate erred in law when he failed to consider the totality principal ultimately ordering a consecutive sentence.

Principles Relating to Enlargement of Time for Filing of Appeals

[10] It has now been well established that there are several factors that a Court needs to take into consideration when dealing with such applications.

[11] In the case of **Charan v. Wati** [2014] FJSC 19, Fiji Supreme Court Special Leave to Appeal Civil Appeal No. CBV 0007/2014 (17 December 2014), His Lordship Chief Justice Anthony Gates has elaborated on the principles to be applied by the appellate courts when exercising its discretion in applications for leave to appeal out of time:

(i) The reasons for the failure to file within time;

(ii) The length of the delay;

(iii) Whether there is a ground of merit justifying the appellate court's consideration?

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the respondent be unfairly prejudiced?

[12] Although, the above relates to a Civil Appeal, the principles with regard to Criminal Appeals are synonymous.

[13] The Appellant has deposed that he was represented by the Legal Aid Commission during the proceedings in the Magistrate's Court. He states that after the Sentence was imposed on him in this matter (and the connected matter CF 352/18), he had applied to the Legal Aid Commission for assistance in the Appeal. Thereafter, in June 2018, he had been visited by his Counsel at the Suva Corrections for obtaining of instructions on the Appeal. His Counsel had then written a letter to the Registry seeking copies of the Sentence. A copy of the letter addressed to the Senior Court Officer, Magistrate's Court, Suva, dated 5 June 2018 has been attached to the Affidavit.

[14] The Appellant states that upon numerous follow ups, the copies of the Sentence was only released when his Counsel had liaised with the Senior Court Officer, Magistrate's Court, Suva. This he states was on 13 September 2018.

[15] The Appellant further deposes that due to the restrictions placed on Counsel visiting the Correction facilities, it became difficult for his Counsel to obtain proper instructions from him.

[16] Therefore, the Appellant had filed the Notice and Application to Review of the Sentence Error, in person, on 24 January 2019.

[17] Considering the above factors, this Court is of the opinion that the Appellant has explained the reasons for the failure to file his Appeal within time. Although, the length of delay of 7 months, maybe unreasonable, this Court is inclined to accept this application for enlargement of time to file the Appeal.

[18] Accordingly, this Court will decide on the merits of the Grounds of Appeal against Sentence.

The Law and Analysis

[19] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*
>
> *(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*
>
> *(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*
>
> *(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*
>
> *(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*
>
> *(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*
>
> *(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

[20] Section 247 of the Criminal Procedure Act stipulates that ***"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."*** *[Emphasis is mine].*

[21] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

> "*(2) The High Court may —*
>
> *(a) confirm, reverse or vary the decision of the Magistrates Court; or*
>
> *(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*
>
> *(c) order a new trial; or*
>
> *(d) order trial by a court of competent jurisdiction; or*
>
> *(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*
>
> *(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*
>
> *(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

<u>Appeal against Sentence</u>

[22] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"…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 relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v. The King** [1936] HCA 40; [1936] 55 CLR 499).”*

[23] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v. The King** [1936] HCA 40; [1936] 55 CLR 499; and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.”

[24] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[25] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

“[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the

*guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

……..

[45] 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."

The Grounds of Appeal against Sentence

Ground of Appeal No. 1 and 3

[26] I deem it appropriate to discuss the aforesaid Grounds of Appeal against Sentence together.

[27] The first Ground of Appeal is that the Learned Magistrate erred in law and in fact when he failed to fully suspend the sentence after the Appellant had made full restitution to the complainant. The third Ground of Appeal is that the Learned Magistrate erred in law and in fact in failing to fully suspend his sentence on account of his status as a first offender.

[28] Suspended Sentences are discretionary power given to the Sentencing Court.

Section 26 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") provides as follows:

(1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[29] In this case the Learned Magistrate has duly considered the provisions of Section 26 of the Sentencing and Penalties Act and given justifiable reasons as to why he was suspending only part of the total term of imprisonment. At paragraph 14 of the Sentence the Magistrate has stated as follows:

> **"***You are a first offender. The full amount obtained from the complainant have been restituted. These factors justify a lenient sentence on you. However, this is an offence committed with the engagement of a cynical plan over a short period of time and with the use of social media. Abuse of social media has become a serious concern in the present day society. Innocent victims targeted through social media has to be protected against such criminal activity. Therefore a determent punishment is necessary to send out a clear message to the would-be offenders. Moreover, it is to be considered at this stage that you had repeatedly committed this offence. In CF 352/18 too you had committed the same offence in respect of the same property in a similar manner. Thus your actions in this case warrants a deterrent punishment. Accordingly having considered both the principles of deterrence and rehabilitation, I find a part suspension of your sentence is both expedient and justifiable and shall serve both ends of justice."*

[30] For the aforesaid reasons, I find that the first and third Grounds of Appeal against Sentence are without merit.

Ground of Appeal No. 2

[31] This Ground of Appeal is that the Learned Magistrate erred in law and in fact when he wrongly calculated the discounts and ultimately coming to a wrong sentence term.

[32] I concede that there were certain typographical errors found in the Sentence delivered by the Learned Magistrate (at page 4 of the Sentence). However it is clear that the Learned Magistrate has rectified those errors prior to issuing the Sentence. The said errors did not cause any prejudice to the Appellant as the errors did not affect the ultimate Sentence of 22 months imprisonment imposed by the Learned Magistrate.

[33] For the aforesaid reasons, I find that this Ground of Appeal against Sentence is also without merit.

Ground of Appeal No. 4

[34] This Ground of Appeal is that the Learned Magistrate erred in law when he failed to consider the totality principal ultimately ordering a consecutive sentence.

[35] Section 17 of the Sentencing and Penalties Act states:

> *"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or similar character, the Court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the Court had imposed a separate term of imprisonment for each of them."*

[36] Section 22 (1) of the Sentencing and Penalties Act provides that:

> *"Subject to subsection (2), every term of imprisonment imposed on a person by a Court must, unless otherwise directed by the Court, be served concurrently with any uncompleted sentence or sentences of imprisonment."*

[37] The Learned Magistrate has duly considered the above provisions (at paragraph 16 of his Sentence) and determined that the custodial term of imprisonment in this case to run consecutive to the custodial term of imprisonment in CF 352/18. Imposing of concurrent or consecutive Sentences is the discretion of the Sentencing Court.

[38] For the aforesaid reasons, I find that this Ground of Appeal against Sentence is also without merit and should be rejected.

Conclusion

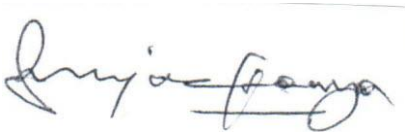
[39] For all the reasons aforesaid, I conclude that this Appeal should stand dismissed and the Sentence be affirmed.

FINAL ORDERS

[40] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The Sentence imposed by the Learned Magistrate Magistrate's Court of Suva is affirmed.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 21st Day of May 2019

Solicitors for the Appellant : Office of the Legal Aid Commission, Suva.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.