IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

ASATA TUILOMALOMA

Appellant

CASE NO: HAA. 009 of 2019
[MC Nausori, Crim. Case No. 107 of 2019]

Vs.

STATE

Respondent

Counsel : Ms. S. Kunatuba for the Appellant
Mr. Y. Prasad & Ms. S. Swastika for the Respondent

Hearing on : 26 July 2019

Judgment on : 30 August 2019

JUDGMENT

Introduction

1. The above named appellant was charged with one count of obtaining financial advantage by deception contrary to section 318(1) of the Crimes Act 2009. The appellant was convicted upon her guilty plea on 25/03/19 and on 26/03/19 was sentenced to an imprisonment for a term of 32 months with a non-parole term of 24 months.

2. Thereafter, the appellant through her counsel filed a petition of appeal on 23/04/19 advancing the following grounds of appeal;

Conviction: Grounds of Appeal

1. ***THAT*** *the Learned magistrate erred in law and facts when he convicted the appellant for the offence of Obtaining Financial Advantage by Deception when the summary of facts outlined and tendered by the prosecution failed to prove all elements of the offence.*
2. ***THAT*** *the Learned Magistrate erred in facts and law when he accepted the summary of facts which contradicted the particulars of the charge resulting in the miscarriage of justice*
3. ***THAT*** *the Learned Magistrate erred in law and facts when he allowed the plea of guilty when there was no evidence presented in Court that the accused received the money alleged in the statement of facts thus perpetuating a miscarriage of justice.*

Sentence: Grounds of Appeal

1. ***THAT*** *learned Magistrate erred in law and facts when he took irrelevant factors for enhancing the sentence and failed to take relevant facts into account.*
2. ***THAT*** *learned Magistrate erred in law and facts when he stated that this was a well planned and sophisticated act and took that as an aggravating factor.*
3. ***THAT*** *THE LEARNED Magistrate issued a sentence that is manifestly harsh, excessive and wrong in principle under all the circumstances of the case.*

3. Section 247 of the Criminal Procedure Act 2009 ("Criminal Procedure Act") reads thus;

> *Limitation of appeal on plea of guilty and in petty cases*
>
> 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.

4. Section 247 of the Criminal Procedure Act clearly provides that no appeal shall be allowed on conviction on a plea of guilty. A person convicted by a magistrate court on an equivocal plea can challenge that conviction but under the revisionary jurisdiction of the High Court. [See ***Raisokula v State*** [2018] FJHC 148; HAA24.2017 (2 March 2018)]

5. Accordingly, the appellant in this case cannot challenge her conviction under the appellate jurisdiction. However, I note that the issues raised under the first and the second grounds of appeal suggests that the plea of guilty entered by the appellant was equivocal. Therefore I consider it appropriate to assess the said grounds in order to decide whether I should invoke the revisionary jurisdiction of this court to set aside the conviction in this case.

6. The allegation raised in the first ground of appeal is that the summary of facts does not establish the charge against the appellant and on the second ground of appeal it is alleged that the summary of facts contradicts the particulars of the offence.

7. The appellant's charge reads thus;

> ***Statement of Offence***
>
> **OBTAINING FINANCIAL ADVANTAGE BY DECEPTION*:*** Contrary to section 318 (1) of the Crimes Decree 2009.
>
> ***Particulars of Offence (b)***
>
> **ASATA TUILOMALOMA,** between 22nd day of October, 2018 to 19th day of January, 2019 at Nausori in the Central Division by deception dishonestly obtained **$5,270.00** cash from **LILIETA SALU BATAI** promising to arrange for her visa to Australia but failed to do so.

8. In order to prove the offence under section 318 of the Crimes Act, the prosecution should prove the following elements;
    a) the accused;
    b) dishonestly obtained;
    c) a financial advantage;
    d) by deception.

9. I have dealt with the above elements in the case of ***Chute v State*** [2016] FJHC 1114; HAA015.2016 (8 December 2016)**.** The State Counsel invited the court to further elaborate on the fourth element above.

10. The fourth element requires the prosecution to prove that the accused deceived another. To deceive is to induce another person to believe that a thing is true where in fact it is false. The accused or the deceiver should know that the thing is false and yet induce the other to believe that the thing is true.

11. In order to establish the above offence under section 318 of the Crimes Act it is necessary that the advantage is obtained by deception, that is, the other person is deceived at the time the advantage is obtained. A mere breach of a future promise therefore does not constitute deception in relation to the offence of *obtaining financial advantage by deception* under section 318 of the Crimes Act.

12. For an example let us take a scenario where person '**A**' and person '**B**' entering into an agreement for **B** to pay $20 to **A**, for **A** to wash **B**'s car on a particular future date. Accordingly, **A** obtains $20 from **B** based on the promise that he will wash **B**'s car. Now let us assume that **A** has failed to wash **B**'s car on the relevant agreed date.

13. The mere failure of **A** to wash **B**'s car as promised after obtaining the $20 does not establish the offence under section 318 of the Crimes Act. '**A**' may have had the intention to wash the car on the relevant date when he promised **B** and obtained the $20 but then failed to perform that task due to some unforeseen reason or because **A** subsequently changed his mind. Even if **A** changes his mind and simply refuses to fulfill his promise subsequently, as long as **A** intended to fulfill that promise when he obtained the $20, **A** does not obtain the $20 by deception. In this situation the remedy for **B** is to recourse to civil proceedings to recover the $20.

14. The situation will be different if **A** in fact did not intend to wash the car at all, but merely made **B** believe that he would wash the car on the relevant future date for the purpose of obtaining $20 from **B**. If that is the case, **A** commits the offence of *obtaining financial advantage by deception* contrary to section 318 of the Crimes Act. Needless to say, there won't be direct evidence of the state of mind of **A** as to whether or not **A** actually intended to wash the car. However, it would be possible to find sufficient circumstantial evidence to draw the irresistible conclusion that **A** deceived

B by inducing the belief that **A** will wash the car when in fact **A** did not have the intention to do so. For an example, if **A** made **B** believe that he will wash the car on the third day from the day **A** obtained the $20, but by the time the said undertaking was given **A** had already bought a ticket to go abroad the next day for one month, it could be clearly inferred that **A** did not have the intention of washing **B**'s car when he obtained the money, but simply induced **B** to believe that **A** will do that only to get the $20.

15. Now I turn to the instant case. The summary of facts in the instant case are as follows;

- *Between 22/10/18 – 19/01/19, at Millenium Subdivision, Nausori, LILIETA SALU BATAI (A-1), 54 years, Domestic Duties of Koroiboto Settlement, Nausori was at home when her husband ISEI SIGARARA (A-2), gave her $1,000.00 cash to deposit it into her bank account at Bred Bank.*
- *(A-1) did not banked the said cash and she was keeping it with her at home.*
- *At that time, ASATA TUILOMALOMA (B-1), 39 years, Justice of Peace, of Tacirua was staying at TAITO NAWAI (A-3), 86 years, unemployed of Millennium Subdivision house very close to (A-1)'s place.*
- *Whilst (B-1) was staying there, she went around and told (A-1) with others that she is arranging visa to Australia if anyone wanted to go.*
- *(A-1) then agreed and she gave all her passports and documents to (B-1) for arranging her visa.*
- *On 22/10/18, she paid (170.00 cash to (B-1) as she was told to pay to assist in her visa documents.*
- *On 4/1/19, she paid $400.00 cash, on 5/1/19, she paid $300.00 cash, 6/1/19 she paid $400.00 cash, on 7/1/19 she paid $3000.00 cash, on 9/1/19, she paid $50.00 cash, on 16/1/19, she paid $250.00 cash, on 18/1/19 she paid $400.00 cash and on 19/1/19 she paid $300.00 cash all to the total amount of $5,270.*
- *All the cash that (A-1) gave to (B-1) was witnessed by ILAITIA BAKANI (A-4), 24 years, Businessman of Lot 11, New Millenium Subdivision, RATU DIKE TUIKOROCAU (A-5), 29 years, farmer of Koronovia. TEMALESI SIGARARA (A-6), 24 years, USP student of Koroiboto Settlement and VARISILA RABAKEWA (A-7), 31 years, domestic duties of Koroiniboto Settlement.*

- *(A-1) kept on paying cash as requested by (B-1) for her visa arrangement.*
- *(B-1) did not issue any receipt as she told (A-1) that once the ticket is ready and she will hand it together with the receipts.*
- *(B-1) promised (A-1) that she will fly out on 27/01/19 but nothing eventuated and it was also confirmed from the Interpol that there was no visa lodgment done.*
- *(A-1) then reported the matter at Nausori Police Station.*
- *On 22/02/19, (B-1) was arrested as she voluntarily came to the station after she was being called to come.*
- *(B-1) was formally charged for Obtaining Financial Advantage by Deception: Contrary to Section 318 of the Crimes Act of 2009.*
- *(B-1) will appear in custody today, 25/02/19.*

16. The relevant case record indicates that the appellant had understood and then agreed to the summary of facts. According to the summary of facts, the appellant had admitted that she was a Justice of Peace who was unemployed at the time but had made representations to the complainant that she is able to arrange Australian Visa. It is further admitted that the complainant agreed for the appellant to arrange the visa and the appellant had obtained money from the complainant from 22/10/18 to 19/01/19 and no visa lodgment was done. Further the appellant had admitted informing the complainant that the appellant will hand over the receipts for the payments once the ticket is ready. It is clear from the summary of facts that the appellant did not have the authority to act as an agent to facilitate the obtaining of Australian Visa for the complainant.

17. Therefore, according to the summary of facts, it is clear that the appellant induced the complainant to believe that the appellant had the authority or the capability of obtaining Australian Visa for the complainant where in fact the appellant did not have such authority or capability and that the appellant obtained the payments amounting to $5270 based on that deception. Therefore, the fourth element above is clearly established based on the summary of facts. This $5270 the appellant obtained from the complainant is clearly a financial advantage. Thus the third element above

is established.

18. Black's law dictionary (6th edition) defined the the word 'dishonesty' as follows;

> *"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."*

19. Based on the facts of the instant case, where the appellant had made representations that she is able to facilitate the obtaining of visa, whereas she knew very well that she does not have such authority or capability, it is also clear that the appellant's conduct was dishonest according to the standard of ordinary people. On the face of it, the facts relevant to the element involving deception appear to be relevant in relation to this second element which involves dishonesty. In order to establish this element, dishonesty, the evidence should indicate that the accused consciously deceived the other person.

20. All in all, the summary of facts admitted by the appellant clearly establishes the offence of *obtaining financial advantage by deception* contrary to section 318 of the Crimes Act beyond reasonable doubt. Therefore the issue raised on the first ground of appeal is devoid of merit.

21. On the second ground of appeal the appellant asserts that the summary of facts contradicted the particulars of offence. It is manifestly clear that this claim is misconceived. The summary of facts is in line with the particulars of offence.

22. Third ground of appeal where the counsel for the appellant submits that the Learned Magistrate erred in law by allowing the plea of guilty when no evidence was presented to establish that the appellant received the money as stated in the summary of facts is frivolous. Evidence is presented upon a plea of guilty by way of summary of facts which is subsequently admitted by the relevant accused who pleaded guilty. The appellant in the instant case had clearly informed the Learned Magistrate that she admits the summary of facts according to the transcript provided. The appellant had not challenged any of the facts included in the said

summary and therefore there was no requirement to adduce any further evidence, that is, to hold a *newton hearing*.

23. The counsel for the appellant assailed the procedure adopted by the Learned Magistrate in dealing with the guilty plea citing the decision in the case of ***Samutitoga v State*** [2017] FJHC 704; HAA25.2017 (25 September 2017). In ***Samutitoga*** (supra) His Lordship Justice Rajasinghe has succinctly explained the process that should be followed in recording a conviction following a plea of guilty. However, the counsel for the appellant failed to demonstrate from the relevant court record and the transcript that the Learned Magistrate failed to follow the procedure outlined in ***Samutitoga*** (supra).

24. Having said that, I wish to emphasise on the need for a magistrate to satisfy himself or herself that the summary of facts tendered in relation to the plea of guilty contains sufficient evidence that establishes all the elements of the offence the accused had pleaded guilty to. Often it is noted that the magistrates fail to make a minute in the court record to this effect and the instant case is not an exception. In my view, not only that a magistrate should satisfy himself/herself that the offence the accused has pleaded guilty to is established by the facts contained in the summary of facts filed before entering a conviction, the magistrate should also record in the case record that the said step was carried out before a conviction is entered. Suffice it to say, the mere fact that such entry is not made will not make the conviction bad in law.

25. In the circumstances, based on the material available before this court, I am satisfied that the plea of guilty entered by the appellant is unequivocal and there is no reason to invoke the revisionary jurisdiction of this court to disturb the conviction entered by the Learned Magistrate.

Appeal against the sentence

26. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> "*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 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) 55 CLR 499).*"

27. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;
    a) acted upon a wrong principle;
    b) allowed extraneous or irrelevant matters to guide or affect him;
    c) mistook the facts; or
    d) did not take into account some relevant consideration.

28. The allegation that the Learned Magistrate had taken into account irrelevant factors to enhance the sentence which is raised in the first ground of appeal against the sentence is again premised on the frivolous assertion that evidence should have been adduced in addition to the summary of facts to establish the elements of the offence. The appellant's argument is that the Learned Magistrate erred by taking into account certain aggravating factors that could be deduced from the summary of facts because there was no other evidence led to establish those factors. Therefore the first ground should fail.

29. However, the appellant also submits in passing that the Learned Magistrate erred by taking into account the aggravating factors in selecting the starting point. On the face of it, this amounts to a breach of a sentencing principle as it may lead to double counting.

30. I would therefore consider it appropriate to examine how the Learned Magistrate arrived at the sentence of 32 months imprisonment.

31. The Learned Magistrate has identified the applicable tariff as an imprisonment term between 02 years and 05 years relying on the judgment in the case of ***State v Miller*** [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014). It is pertinent to note that the maximum penalty for the offence under section 318 of the Crimes Act is a term of imprisonment for 10 years. The appropriateness of the court imposing on itself a sealing of 05 years imprisonment which is half of the maximum penalty the legislature has stipulated for this offence, that is, whether casting such a tariff would amount to a disregarding of the clear intention of the legislature is an issue that should be looked into, but in an appropriate case. In this case therefore, I would hold that the Learned Magistrate on his part had properly identified the applicable tariff.

32. I note that, having referred to ***Koroivuku v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) where the court held that the starting point should be selected from the lower or middle range of the tariff and that no reference should be made to the mitigating and the aggravating factors in selecting the starting point; the Learned Magistrate has first outlined the aggravating factors at paragraphs 11 and 12 of the impugned sentencing decision and selected 45 months imprisonment as the starting point specifically stating that the said starting point is selected after considering the objective seriousness of the offence and the said aggravating factors that were identified. However, the Learned Magistrate thereafter does not increase the said term he picked as the starting point in view of the same or any other aggravating factor.

33. Therefore it is clear that there was no double counting and the said approach of the Learned Magistrate does not in itself warrant the sentence to be disturbed. However, I am unable to endorse this hybrid method applied by the Learned Magistrate which seems to be a blend of the two tier method of sentencing and the instinctive synthesis method of sentencing. The Learned Magistrate should have stick to the two tier method he had indicated that he is applying which is transparent and capable of properly guiding the sentencer to reach a sentence proportionate to the gravity of the actual offending in each case.

34. On the second ground of appeal, the appellant alleges that the Learned Magistrate had erred by concluding that it was a well-planned and a sophisticated act and then considering the said deduction as an aggravating factor. Given that money was obtained in installments over a period of about 03 months and the misrepresentation made by the appellant to the complainant inducing the belief that the appellant could facilitate the obtaining of an Australian Visa for the complainant, I do not have any compelling reason to disagree with the aforementioned conclusion of the Learned Magistrate.

35. On the other hand, given that the lower end of the applicable tariff is 02 years imprisonment, the term added in view of the aggravating factors identified by the Learned Magistrate is in fact appear to be a period of 21 months. I do not find the said term as excessive given the aggravating factors in the case.

36. Therefore, the second ground of appeal against the sentence should fail.

37. Having picked 45 months in view of the objective seriousness of the offending and the aggravating factors, the Learned Magistrate deducted a term of 05 months in view of the factors that are outlined in paragraph 15 of the impugned decision. However, the only factor that I would accept as a mitigating factor is the fact that the appellant was a first offender. The other factors referred to in the said paragraph relating to the appellant's personal circumstances and the appellant's promise not to reoffend cannot be considered as mitigating factors. Therefore the deduction of 05 months in view of the fact that the appellant was a first offender was a substantial discount.

38. The Learned Magistrate had thereafter deducted 08 months in view of the guilty plea to arrive at the final term of 32 months imprisonment. The appellant's guilty plea was not entered at the first instance. The appellant had been granted a discount of 20%.

39. Accordingly, the Learned Magistrate has not erred in granting the discount in view

of the mitigating factors including the guilty plea which was correctly considered separately. The final sentence reached by the Learned Magistrate is well within the identified applicable tariff.

40. All in all, I am unable to find any reason to disturb the sentence imposed by the Learned Magistrate in the instant case and accordingly, the third ground of appeal which claims that the sentence is manifestly harsh, excessive and wrong in principle should also fail.

41. In the circumstances I would dismiss the appeal against the conviction for want of jurisdiction and would dismiss the appeal against the sentence as the relevant grounds of appeal lacks merit. For the purpose of completion, I would state that I have considered the issues raised in grounds of appeal against conviction to ascertain whether this court should invoke the revisionary jurisdiction to set aside the conviction and have concluded that the plea of guilty was not equivocal and therefore this case does not warrant such course of action to be taken.

Orders;

a) The appeal against the conviction and the sentence dismissed;
b) The conviction and the sentence imposed in MC Nausori, Crim. Case No. 107 of 2019 is hereby affirmed.

Vinsent S. Perera
JUDGE

Solicitors;
Law Solution, Suva for the Appellant
Office of the Director of Public Prosecutions for the State