IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL CASE NO.: HAA 6 OF 2020

(Nausori Magistrates Court Case No. 551/19)

BETWEEN: **NILESH MANI**

Appellant

AND: **STATE**

Respondent

Counsel: Mr. Jiten Reddy for Appellant
Ms. Sheenal Swatika for State

Date of Hearing 1 September 2020
Date of Judgment: 16 September 2020

JUDGMENT

1. This is an appeal filed by the Appellant challenging the conviction and the sentence.

2. The Appellant was charged with one count of Obtaining Financial Advantage by Deception.

3. On 2 September 2019, the Appellant was produced before the Magistrate's Court at Nausori. The Appellant was unrepresented. He was granted bail and the matter was adjourned for plea as the Magistrate at Court No. 2 was not sitting on that day. On 24 September 2019, full disclosures were served and the plea was taken. According to the Magistrates Court Record, the charge was read in Hindi; the Appellant understood the same and pleaded guilty to the charge on his own free will. The summary of facts was read on the same day. The Appellant understood the facts and agreed the same. He was convicted and, on 18 November 2019, sentenced to 27 months' imprisonment with a non-parole period of 20 months.

4. A petition of appeal was filed on 2 March 2020 against the sentence only on the following ground:

> That the sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case in view of the foregoing grounds:
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> a) That the Appellant was a 1st offender.
> b) That the Appellant had pleaded guilty on the first available opportunity saving Court's time and resources.
> c) That the Appellant had a good character generally.
> d) That the Appellant was remorseful for his actions.
> e) That there was no bad behaviour on the part of the Appellant like failing to stop or escaping from the scene of the accident.
> f) That the learned Magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances.
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> The appellant reserves the right to add, alter or amend his grounds of appeal pending receipt of Court Records.

5. In the written submission filed on 11 June 2020, the Appellant raised issues on the basis that the charge was defective and that he lacked opportunity to seek legal assistance, indicating that he is appealing the conviction also.

6. Section 247 of the Criminal Procedure Act stipulates that no appeal shall be allowed in the case of a person who has pleaded guilty, and has been convicted on such a plea by a Magistrate's Court, except as to the extent, appropriateness or legality of the sentence.

7. In the present case, the Appellant is convicted on a guilty plea and therefore Section 247 of the Criminal Procedure Act bars any appeal against the conviction.

8. However, it is well established in Fiji that an appeal against conviction entered on a plea of guilty can be entertained on limited grounds. The first ground was recognized as far back as 1975 by the Supreme Court in Deo v Reginam [1976] FJLawRp 1; [1976] 22 FLR 1 (23 January 1976). This decision concerned the insufficiency of the admission to prove the charge. It was made under the Criminal Procedure Code (now repealed). The Supreme Court in *Deo* observed:

> So far as the appeal against conviction is concerned, section 290(1) of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such a plea by a magistrates' court, except as to the extent or legality of the sentence. However it is well established that an appeal against conviction can be entertained on a plea of guilty if it appears that upon the admitted facts the appellant could not in law have been convicted of the offence charged (R v Forde [1923] 2 KB. 400 at 403); and it is on this proposition that the appeal against conviction is founded

9. The scope of the appealability of a conviction entered upon a guilty plea was further expanded by the Supreme Court in Rakorako v Reginam [1978] FJSC 123; Criminal Appeal No. 85 of 1978 (24 November 1978) where the Court observed:

Section 290(1) of the Criminal Procedure Code provides that:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a magistrates' court, except as to the extent or legality of the sentence."

That section presupposes that the offence to which an accused has pleaded guilty is one known to law, that the admitted facts substantiate the offence charged, and that the accused understood the charge and unequivocally admitted his guilt; and this Court can entertain an appeal against conviction after a plea of guilty only if the grounds relate to one or other of these elements (R. v. Mohammed Khalil and Anor. Labasa Cr. App. Nos. 10 and 11 of 1978; R. v. Gyan Deo Labasa Cr. App. No. 12 of 1975) (emphasis added)

10. The Court of Appeal in Nalave v State [2008] FJCA 56; AAU0004.2006: AAU005.2006 (24 October 2008) observed:

> [23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).
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> [24] In Maxwell v The Queen (1996) 184 CLR 501, the High Court of Australia at p. 511 said:
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> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.

11. The High Court in Taimalawai v The State [2001] FJHC 56; Haa0021j.2001b (7 August 2001) stated:

> [7] It is well settled law that an appeal against conviction arising from guilty plea lies in limited circumstances. For instance, an appeal may be entertained if the appellant claims the plea was a nullity, or the offence was not known in law, or where the proceedings were otherwise invalid (Sikeli Koro v The State, Criminal Appeal No. HAA 0048 of 2002L). Chand v State [2008] FJHC 9; HAC138.05 (18 January 2008)

12. The High Court of Fiji has been following the precedents set by the Supreme Court and the Court of Appeal despite that the lawgivers had not made any changes to the then existing law when they enacted the Criminal Procedure Decree (Act) in 2009.

13. However, a contrasting view (in obiter) was taken by the High Court in Raisokula v State [2018] FJHC 148; HAA24.2017 (2 March 2018) where Justice Perera observed:

> In my opinion, the proper course of action according to the existing law for a person convicted by a magistrate court on an equivocal plea to seek redress is to invoke the revisionary jurisdiction of the high court under section 260 of the Criminal Procedure Act. Given the provisions of section 262(5) of the said act which reads "[w]here an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed" it is manifestly clear that a person convicted on a plea of guilty by the magistrate court whose appeal against conviction cannot be allowed in terms of section 247 of the Criminal Procedure Act, can invoke the revisionary jurisdiction of the high court.

14. *Raisokula* was followed by Wimalasena J in Sami v State HAA 19 of 2019.

15. In the present case, despite the view expressed in *Raisokula*, there is no challenge by the Respondent to the jurisdiction of this Court to entertain this appeal. However in view of the conflicting views expressed by the courts on the issue of jurisdiction and the opinion expressed in *Raisokula* that there is a patent lack of jurisdiction for this court to entertain appeals against conviction entered by the magistrate court on a plea of guilty, it is my duty to explain my position before addressing the grounds of appeal against the conviction.

16. The provisions under Section 247 of the Criminal Procedure Act is identical to the provisions under the Criminal Procedure Code. The Supreme Court, which is the highest court of the land, when made its decisions in *Deo*, was well aware that there was a statutory bar to entertaining appeals against convictions entered upon a guilty plea. Nevertheless it followed the English decision in R v Forde [1923] 2 KB. 400 at 403 and entertained the appeal against conviction entered upon a guilty plea. That must be for ineffable good reasons.

17. As correctly stated in *Raisokula*, the revisionary jurisdiction of the High Court can only be exercised to correct the errors apparent on the face of the record and involves questions of legality, jurisdiction and/or procedural impropriety. Unlike the appeal, revision is not a statutory right. The High Court therefore can decide to examine or not examine a decision made by a lower court. The primary purpose of a revision is to make sure that justice has been administered properly and also to correct any errors apparent on the face of the record that could have led to improper justice. If the higher court finds that the legal procedures were followed to arrive at a decision, then no changes are made no matter how unreasonable the decision may appear.

18. Some errors involving legality, jurisdiction and/or procedural impropriety may be apparent on the face of the record. For example, when the accused has pleaded guilty to a charge which is defective or not known to law, such errors may be apparent on the face of the record and the exercise of revisionary jurisdiction would not be a problem.

19. The problem is that some errors that were discussed by the Supreme Court in *Rakorako* may not be apparent on the face of the record. As in the case of *Raisokula*, convictions recorded on guilty pleas are often challenged on the basis that the facts admitted by the accused do not establish the elements of the offence charged. In such a scenario, the errors may not be apparent on the face of the record and the High Court is required to go into the merits and examine the admissions presented in the form of summary of facts to satisfy itself whether all the elements of the offence charged have been established. For this

purpose, it may be necessary to examine the record of caution interview which is not often annexed as part and parcel of the record. There have been even instances where the appellate courts have allowed the appellant to adduce further/fresh evidence to substantiate his or her claim Chand v State [2012] FJSC 6; CAV0014.2010 (9 May 2012).

20. In Levy v State [2010] FJHC 32; Criminal Appeal 41 of 2009 (5 February 2010, the appellant claimed that the summary of facts presented at the magistrates court misled the court into believing that, he, during his cautioned interview, had admitted committing the offences when in fact that was not true. The appellant had been interviewed twice under caution for two alleged rapes. The summary of facts relied on recited the facts of each alleged rape and concluded by saying "*Accused person was arrested by police and later on interviewed under caution, he admitted committing the offence*"

21. Although the Court Record of the Magistrate's Court recorded receipt of this second statement, it was not included as an exhibit in the Court Record. Counsel for the appellant however was able to furnish a copy of that interview to the High Court. Upon perusal of which, it was found that the comparatively detailed first interview was totally exculpatory whilst the second interview was partially inculpatory and partially exculpatory. The appellant had admitted the sexual *actus reus* of the second offence, but nowhere is the question of consent addressed. In the light of the content of these statements, the court found that the summary of facts relied on by the learned Magistrate was misleading and the conviction was quashed.

22. As I have discussed in the following paragraphs, a similar situation is presented in the present appeal and therefore, the jurisdiction of this court to entertain this appeal is not in doubt in my mind. I proceed to decide the appeal as it is.

23. It is pertinent to discuss the grounds of appeal against the conviction along with the circumstances under which the alleged guilty plea was entered. The Appellant submits that

the charge against him is defective in that the alleged deception and dishonesty is not outlined in the charge and it did not fully particularize so as to say what the Appellant actually did in order to obtain financial advantage.

24. This objection concerning the charge has been raised for the first time as an issue in this appeal. Section 279 (1) of the Criminal Procedure Act provides:

> Subject to sub-section (2), no finding, sentence or order passed by a Magistrates Court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect of substance or form or for any variance between such information, complaint, summons or warrant and the evidence, unless it is found that —*(a)* such objection was raised before the Magistrates Court whose decision is appealed from; and *(b)* the Magistrates Court refused to adjourn the hearing of the case to a future day notwithstanding that it was shown to the Magistrates Court that by such variance the appellant had been deceived or misled.
>
> (2) If the appellant was not represented by a lawyer at the hearing before the Magistrates Court, the High Court may allow any such objection to be raised.

25. In DPP v Solomone Tui [1975] 21 FLR 4 in which Grant CJ considered the authorities and the similarly worded provision in section 100 of the English Magistrates Courts Act 1952 and accepted that:

> "Despite its apparent scope, it has been held that the provisions of this section cannot validate a fundamental error going to the root of the matter; such as the failure to include in the charge a necessary ingredient of the offence in question, duplicity of a charge, want of jurisdiction, or a charge which discloses no offence known to law".

26. The Appellant was unrepresented when he entered the plea. In view of Section 279 (2) and the decision of the Supreme Court in *Tui*, the Appellant should be allowed to raise his objection in this appeal.

Is the Charge Defective?

27. Section 58 of the Criminal Procedure Act provides:

> "Every charge or information shall contain–
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> *(a)* a statement of the specific offence or offences with which the accused person is charged; and
>
> *(b)* such particulars as are necessary for giving reasonable information as to the nature of the offence charged".

28. The Supreme Court in Saukelea v State [2019] FJSC 24; CAV0030.2018 (30 August 2019) observed:

> [36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017: [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6.

29. The information upon which the Appellant was convicted reads as follows:

> Statement of Offence
>
> **OBTAINING FINANCIAL ADVANTAGE BY DECEPTION**: Contrary to Section 318(1) of the Crimes Act 2009.
>
> Particulars of the Offence
>
> **NILESH MANI** on the 8th of July, 2019 at Nausori in the Central Division, by deception, dishonestly obtained $ 600.00 from **FILOMENA TAOI.**

30 The two issues concerning the charge to be addressed in this appeal are that:

a. whether the accused knew what charge or allegation he had to meet:

b. whether the accused was embarrassed or prejudiced in the way the defence case was to be conducted:

31. As was held by the Supreme Court in *Solomone Tui,* the failure to include an essential element in the charge is a fundamental error going to the root of the matter thus rendering the charge defective. The elements of the offence of Obtaining Financial Advantage by Deception are that:

1. The accused;
2. dishonestly obtained;
3. a financial advantage;
4. by Deception .

32. It is obvious that all the elements of the offence of Obtaining Financial Advantage by Deception are included in the charge.

33. In Shekar & Shankar v. State Criminal Appeal No. AAU0056 of 2004, the Court of Appeal made the following observations about the purpose of a charge:

> The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in the Act.

34. The question is whether particulars as are necessary for giving reasonable information as to the nature of the offence charged were given to the accused so that he was not embarrassed or prejudiced in his defence.

35. Since the Appellant pleaded guilty to the charge at the first instance, the question whether he was embarrassed or prejudiced in the way the defence case was to be conducted does

not arise. In such cases, the approach, in my opinion, should be different. When a conviction is impugned on the basis that there was a defect in the charge or deficiency of the particulars, the important questions to be asked by the appellate court should be whether all the elements of the offence charged have been established by the facts admitted by the accused and whether the accused had been afforded the right guaranteed under Section 14 (2) (e) of the Constitution, namely, to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence.

36. The case of Tavurunaqiwa v State [2009] FJHC 198; HAA022.2009 (10 September 2009) is relevant to the first question. In that case, after the accused pleaded guilty to the charge at the Magistrates Court, the court record stated, that the learned Magistrate advised the accused that rape is unlawful sexual intercourse with a woman without her consent. The accused advised the court that he was freely and voluntarily pleading guilty. Facts were then tendered by the prosecution. The facts admitted by the accused clearly established that the complainant did not consent to the sexual intercourse. Before recording the conviction, the learned Magistrate asked twice whether the complainant consented to sexual intercourse, to which the accused answered "no". The High Court in appeal affirmed the conviction entered by the Magistrate on the guilty plea.

37. The Court observed at [21]:

> It is clear that the appellant was not embarrassed or prejudiced by the omission of the essential ingredient of lack of consent in the particulars of the offence. Lack of consent from the complainant was established when the appellant admitted the facts tendered in support of the charge by the prosecution. I am satisfied no substantial miscarriage of justice has occurred.

38. The summary of facts admitted by the Appellant in the present case is as follows:

- Between the 1st day of April to 30th day of April 2019, one Filomena Taoi (A-1) 51yrs, executive Assistant at 117 Rokosawa road, Stage 4,

Cunningham gave $600 to Nilesh Mani (B-1) 38 yrs, self-employed of Vuci South road, Nausori for the deposit of Installation of Retractable Blinds.

- Accused went to A-1's house and take (sic) measurements and also told A-1 that the total cost would be $180.00 for this retractable blinds.
- On the same day B-1 told A-1 that task will be completed within a week.
- After numerous calls and messages sent to B-1 he did not respond to A-1.
- Matter was reported at Nausori Police Station on 01/8/19.
- On 16/8/19 B-1 was interviewed under caution and he admitted to the allegation and was formally charged on 31/8/19 for Obtaining Financial Advantage by Deception.
- B-1 in custody to appear at Nausori Magistrate's Court on 2/9/19.

39. It is apparent on the face of the record that the accused had admitted obtaining money (financial advantage) but not that he obtained money dishonestly and by deception although it is stated in the latter part of the summary of facts that 'the accused admitted the allegation'.

40. The term 'dishonest' is defined under Section 290 and section 348 of the Crimes Act. 'dishonest' is defined as follows; "... 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.

41. In Chute v State [2016] FJHC 1114; HAA015.2016 (8 December 2016) Perera J referred to Black's law dictionary (6th edition) to define '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.

42. Section 316 of the Crimes Act provides that "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 person is not authorised to cause it to do.

43. However, the said definition does not clearly define 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, ...

44. In Tuilomaloma v State [2019] FJHC 851; HAA009.2019 (30 August 2019) Perera J has given a vivid definition to the element of 'deception' which is worth reciting here.

> 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.
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> 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.
>
> 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 fulfil his promise subsequently, as long as **A** intended to fulfil 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.

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.

45. In the present case, there was no admission as to whether or not the Appellant actually intended to install retractable blinds when he made the promise. On the face of the facts agreed by the accused, there was no direct evidence as to the state of his mind at the time he made the promise nor was there any circumstantial evidence to draw a conclusion to that effect. The State Counsel in the written submission however, submits that the Appellant did not have the capacity to carry out the promise he had made and had no intention to fulfil the promise made in the first instance because he was running an upholstery business providing furniture with padding, springs and it did not include installation or production of retractable blinds.

46. Nowhere in the summary of facts admitted by the Appellant it is stated that he was running an upholstery business providing furniture with padding, springs and covers and his business did not include installation or production of retractable blinds. The State Counsel does not state from where she has managed to gather this information. These facts were never before the learned Magistrate for him to draw the inference the State Counsel has

drawn in respect of the element of deception. The Learned Magistrate, without acting upon the statement that the 'accused admitted to the allegation', should have examined the caution interview so that he could be satisfied that the accused had obtained money (financial advantage) dishonestly and by deception. A greater care should have been taken as the accused was unrepresented by a legal counsel.

47. Gates J (as he then was) in Anaia Nawaqa & Others v State HBM 14 of 2000L said:

> it is a sound and safe practice in Fiji, as was done here, for the prosecution to provide the Magistrate with copies of the accused's police interview statements where the accused is not represented. When deciding whether he could safely enter a conviction to the very serious charge of rape, and after examining each statement and the medical report, the Magistrate where appropriate could raise with each of the Appellants who had provided an exculpatory explanation, whether each still persisted with that line of defence" and later.
>
> "Magistrates will exercise their good judgment in choosing which elements of an offence need to be raised with an unrepresented accused.

48. It is unfortunate that the learned Magistrate did not do so in this case.

49. I find that the deficiency in the information has not been supplied by the summary of facts so that the learned Magistrate could satisfy himself that the Appellant was guilty of Obtaining Financial Advantage by Deception.

50. As to the second question, the full disclosures were served on the unrepresented accused on the day the plea was taken (On 24 September 2019). Right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence has not been afforded to the Appellant before the plea was taken.

51. I am satisfied that a substantial miscarriage of justice has occurred. The appeal against conviction should be allowed.

52. In view of the said decision, it is not necessary to examine the grounds against the sentence. The Appellant has already served 10 months in the correction facility. In the circumstances, an order for a retrial is not warranted.

53. Following Orders are made:

The Appeal is allowed.

The conviction is quashed and the sentence is set aside.

Aruna Aluthge

Judge

At Suva

16 September 2020

Solicitors: Jiten Reddy Lawyers for Appellant

Office of the Director of Public Prosecution for Respondent