

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 58 OF 2020

BETWEEN : **SACHINDA NAND SAMI**
APPELLANT

AND : **STATE**
RESPONDENT

Counsel : *The Appellant appeared in Person*
: *Ms. P.K. Lata for the Respondent.*

Date of Hearing : *27th of January, 2021*
Date of Judgement : *12th of February, 2021*

JUDGMENT

Background

1. The Appellant (will be referred to as the accused sometimes) was charged with 6 counts of '*Obtaining Financial Advantage by Deception*' contrary to Section 318 of the Crimes Act of 2009, in the Magistrates' Court of Nadi.
2. In the presence of the accused and his counsel, Mr. Gade, on the 10th of July 2017, the charges were read over to the accused in English as accused has selected English as his preferred language and the accused has pleaded guilty to the said charges. Thereafter, summary of facts too were read over and admitted by the accused in the presence of his counsel on the same day.
3. The learned Magistrate of Nadi, by Sentence dated 01st of July 2020, has convicted the accused of the alleged offences and sentence him to 22 months and 21 days of imprisonment for the 3rd Count and 20 months of imprisonment for each of the other 5 counts to run concurrently with the said 3rd count.

4. Being dissatisfied of the said sentence, the accused (The Appellant) has submitted this appeal on the 25th of July 2020, within the allocated time.

Grounds of Appeal

5. The following grounds (in verbatim) were submitted by the appellant in challenging the said conviction and the sentence;
 - A) *That the learned Magistrate erred in law and in fact to convict the appellant for the offence of Obtaining Financial Deception when Summary of Facts outlined and tendered by the prosecution failed to prove all elements of the offences.*
 - B) *That the learned sentencing Magistrate erred in law by the post charge delay in sentencing the appellant when the plea of guilty was entered in 2017 and this omission to reduce on discount a portion of sentence to reflect the post charge delay in sentencing amounted to an injustice and procedural irregularities in the circumstances of the case.*
 - C) *That the learned Magistrate erred in law and in accepting the guilty plea in all the counts as it was an agreement for Road Show Broadcast on the 7th and 8th 2017 which was a future promise to happen.*
 - D) *That the learned Magistrate in this matter taking into consideration irrelevant matters than relevant matters. In this matter she mistook the facts.*
 - E) *That the learned Magistrate erred in law and in fact into not allowing appellant to retribute the complainant's in this matter.*
 - F) *That the learned Magistrate erred in law in not imposing a suspended sentence to the appellant to a term of imprisonment not exceeding two years as laid down by Saturday sentencing law in conformity with the provisions of Section Part vi suspended sentence of imprisonment if the period is sentenced in the proceeding for more than one offence-*
 - (i) *Does not exceed 3 years in the case of High Court or*
 - (ii) *Does not exceed 2 years in the case of the Magistrate Court*
 - G) *On other hand that the appellant was delayed for sentencing in this matter waiting from 2017 up to 2020 3 years breach of Constitution of Republic of Fiji for right of a accused person section 14 (1) & (2) (G) to have the trial begin and conclude without unreasonable delay. Also every person charged with an offence and every part to a civil dispute has the right to have the case determined within a reasonable time.*

H) *In this matter the attempt of the appellants to obtain proper and a fair trial has been a miscarriage of law to the appellant.*

6. The maximum prescribed punishment for the offence of '*Obtaining Financial Advantage by Deception*' contrary to Section 318 of the Crimes Act of 2009, is 10 years of imprisonment and the accepted tariff for this offence is between 2-5 years of imprisonment. (As for the case of **Kamalesh Lata Arun v State** [2009] HAA 52-55/08L, 23 October 2009)
7. Considering the fact that this is a premeditated crime and the culpability of the accused, the learned Magistrate has commenced the base sentence at 36 months of imprisonment.
8. The fact that there being 6 victims is considered as an aggravating factor adding 6 more months to the said sentence. In consideration of the submitted mitigating factors, 3 months were deducted. In consideration of the early guilty plea, the maximum possible 1/3 discount is given and on that basis another 1 year and 1 month was deducted.
9. The final sentence was 26 months of imprisonment and in calculating the period to be served, another 3 months and 09 days were deducted from it, considering it already served as the appellant has been in remand for that period. Therefore, the period to be served by the appellant was 22 months and 21 days of imprisonment.

Analysis

10. Out of the submitted grounds A and C is submitted challenging the conviction. Having gone through the Summary of Facts, I am satisfied and convinced that all the essential ingredients for the offence of Obtaining Financial Advantage by Deception is established by it. The appellant fails to point out the unproved element/s which he alleges. When Ground C is considered, firstly it is not very clear, what the appellant means by it. Assuming he means that since it was an event to be taken place in the future and therefore a guilty plea should not have been accepted, I do not find any merit in the said contention. In any event, the accused was charged after the expiration of the time period of the promised Road Show. The appellant was charged as there was no road show and also stalls were not given to the complainants as promised by the appellant. The complainants would not have given him any money if not for deceiving them by promising to give them stalls, by the appellant. Therefore, I do not find any merit in those contentions.

11. Alleged grounds B and G deals with the delay in sentencing after the plea. He has pleaded guilty on the 10th of July 2017. Thereafter he was granted bail and was released on bail on the 27th of July 2017. Since 16th of October 2017, the appellant has failed to appear in court on many occasions. The appellant in his submissions stated that he was in remand. It is apparent that he was arrested in regards to some other offence and remanded. In any event, he has not been remanded for this matter after granting of bail. Therefore such remand periods need not be discounted in this case. Later, though he submitted that his remand period is not properly calculated, that has never been a ground of appeal. I do agree that there is a considerable delay from his plea to the sentence. However, the appellant fails to elicit any prejudice caused to him by such delay.
12. Ground D alleged that the learned Magistrate has considered irrelevant matters and failed to take into consideration, some relevant matters. The appellant fails to point out such matters as alleged.
13. Ground E alleges that the learned Magistrate failed to give him an opportunity to retribute the complainants. Since plea, due to the delay in sentencing, the appellant had almost 3 years and if he wanted, he would have paid the complainants in restitution. The law does not provide any such opportunity or requirement. However, if such payment was made in restitution, the learned Magistrate should have taken it into consideration in sentencing.
14. Ground F, though somewhat unclear, appears the non-suspension of the prison term. Firstly it should be noted that the final term imposed by the learned Magistrate was 26 months of imprisonment and the only deduction from that is on the basis of, already served. Therefore, as rightly submitted by the appellant, the Magistrate could not suspend such term, as the sentence is for more than two years. The Ground H also lacks any merit as the submitted materials fails to disclose any miscarriage of justice.
15. It would be pertinent to note that in the case of **Kim Nam Bae v State** [AAU0015 of 1998S(26 February 1999)] the Court of Appeal has held that;

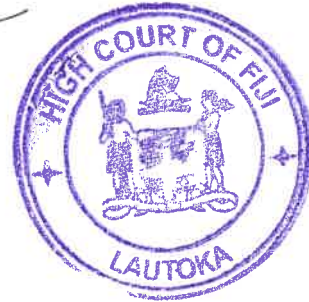
“It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts on a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, 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)”.

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.

16. When considering the submissions made by the appellant, I do not find any substance in the alleged grounds and in any event does not comply with the above criteria.
17. Therefore, I am of the view that the learned Magistrate was correct in convicting but in fact been too lenient on him as he was sentenced at the bottom of the tariff for 6 offences to run concurrently together with a long term he is serving for some other offence. Since the learned Magistrate has sentenced within the accepted tariff, I will not disturb it as for the principles laid down by the case of **Kim Nam Bae v State** (Supra).
18. In result, I disallow the appeal, and affirm the conviction and the sentence entered by the learned Magistrate.


Chamath S. Morais
Judge



At Lautoka
12th February 2021

Solicitors: *Appellant appeared in person.*
 Director of Public Prosecutions, Suva for the Respondent.