IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 010 OF 2021

BETWEEN:	**AVINESH PRAKASH CHAND**	**APPELLANT**
A N D:	**STATE**	**RESPONDENT**

Counsel: Ms. D. Rao for Appellant
Ms. S. Latu for Respondent

Date of Hearing: 22nd March 2022

Date of Judgment: 03rd June 2022

JUDGMENT

1. The Appellant was charged in the Magistrate's Court sitting in Labasa with one count of Larceny by Servant, contrary to Section 274 (a) of the Penal Code, one count of Theft, contrary to Section 291 (1) of the Crimes Act, one count of Forgery, contrary to Section 341 (1) of the Crimes Act and one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act.

2. The matter proceeded to the hearing consequent to the plea of not guilty entered by the Appellant. The Prosecution presented the evidence of five witnesses. At the conclusion of the Prosecution's case, the learned Magistrate found there was no case to answer to the counts two and three as charged. Hence, counts two and three were dismissed, and the Appellant was acquitted of the same. The trial continued in respect of the first and fourth counts. The Appellant opted to exercise his right to remain silent and thus did not present any evidence for the Defence. The learned Magistrate, in her judgment dated 21st of January 2020, found the Appellant guilty of the offence of Obtaining Financial Advantage, contrary to Section 318 of the Crimes Act and convicted to the same. However, the learned Magistrate found the Appellant not guilty of Larceny by Servant, contrary to Section 274 (a) of the Penal Code. The Appellant was subsequently sentenced to 18 months imprisonment period with a non-parole period of 12 months on the 13th of April 2021.

3. Aggrieved with the said conviction, the Appellant filed a timely appeal on the following grounds:

   (i) That the Learned Trial Magistrate erred in convicting the Appellant when the facts adduced by the Prosecution did not constitute the offence for which he was charged.

   (ii) That the Learned Trial Magistrate erred in considering irrelevant matters in convicting the Appellant when he ought not to be convicted of such offence.

   (iii) That the Learned Trial Magistrate erred in convicting the Appellant for obtaining financial advantage by deception when there was no evidence as to:

      a) The Appellant retaining any monies belonging to the complainant when the evidence led by Prosecution was that the monies had merely not been deposited;

b) *That the Appellant had in his power and custody anything of value either belonging to or derived from monies obtained from the complainant;*

c) *The Appellant having any form of unexplained wealth or property during or after the period of question so as to lead the Learned Magistrate to draw inferences from circumstances before convicting him.*

iv) *That the Learned Trial Magistrate erred in convicting the Appellant for obtaining financial advantage by deceptions after having found him not guilty for Larceny by Servant, Theft and Forgery arising out of similar facts.*

4. The Court directed the parties to file their respective written submissions on the 16th of February 2022, which they filed as per the direction. The Court heard this appeal on the 22nd of March 2022 and ordered the parties to file further written submissions. Having carefully perused the record of the proceedings in the Magistrate's Court and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

5. Having carefully considered the grounds of appeal filed by the Appellant, I could summarize that they are founded on the allegation that there was no evidence to establish the main elements of the offence of Obtaining Financial Advantage by Deception; hence, the learned Magistrate's conviction cannot be supported by the evidence adduced in the trial. Thus, this is an appeal against the finding of facts by the trial Magistrates.

6. The main elements of the Obtaining Financial Advantage by Deception are that:

   a) the accused;
   b) dishonestly obtained;
   c) a financial advantage;
   d) by deception.

7. Goundar J in **Reddy v State [2022] FJHC 39; HAA013.2021 (4 February 2022)** has given a descriptive explanation of the main elements of Obtaining Financial Advantage by Deception, where Justice Goundar held that:

> *"Black's law dictionary (6th edition) provides the following definition to the word '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."***
>
> *The term 'dishonest' is defined under section 290 and section 348 of the Crimes Decree. Both sections provides the same definition which is in line with the dictum in R v Ghosh [1982] 3 WLR 110. However, section 290 limits the application of the definition provided in the said section to Part 16 of the Crimes Decree and the definition provided under section 348 is only for Division 7 of Part 17. The offence of obtaining financial advantage by deception is listed under Division 2 of Part 17 of the Crimes Decree.*
>
> *The definition provided in the Crimes Decree for the term 'dishonest' is 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."***
>
> *I am of the view that dishonesty under section 318 should also be determined in line with the above definition.*

In the case of Duncan v Independent Commission Against Corruption [2016] NSWCA 143 (22 June 2016) the court had explained the term 'financial advantage' as follows;

> ***"Financial advantage is not exhaustively defined in the Crimes Act and it is perhaps easier to identify than define. However, it does include retaining a financial advantage: s 192D(1)(c). In Coelho v Durbin (Supreme Court (NSW), Badgery-Parker J, 29 March 1993, unrep) Badgery-Parker J described as the essence of the concept of financial advantage that the person alleged to have obtained such an advantage has obtained a benefit which can be valued in terms of money."[Emphasis added]***

Section 316 of the Crimes Decree provides a definition for the word 'deception'. However, the said definition does not clearly explain 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, ..."***

The following definition is provided for the term 'deception' under section 316 of the Crimes Decree;

> ***"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 authorized to cause it to do.***

It is necessary for the prosecution to prove that the deception operated in the mind of the person who is alleged to have been deceived. I am of the view that deception under section 318 of the Crimes Decree should be a deception as to existing facts or law and not a deception as to the future. With regard to deception as to the future, Blackstone's Criminal Practice 2007 states thus;

> ***"For a deception to be an offence under the Theft Acts 1968 or 1978, it must be a deception as to existing facts, or as to law. A representation that something will happen in the future will not suffice. It therefore, will not do to argue that, when one person issues a worthless cheque to another, he has deceived the other into thinking that it will be honoured. For similar reasons, if a person falsely promises to perform a service for someone in the future, it cannot be argued that the person to whom the promise was made has been deceived into thinking that the service will be performed. There may indeed have been a criminal deception, but in either case, the deception must be expressed in terms of present fact."***

8. The Appellant was employed as a sales representative of the Newman Limited, a subsidiary of CJ Patel Group, in 2009 and 2010 in Labasa. He was tasked to sell recharge

cards, both electronic and manual. His responsibility was to submit the Cash Account Form with the cash and cheques collected from his sale to the Account Cashier at the end of every working day. The Cash Account Form had three copies; the white copy was given to the Account Cashier, the pink copy was sent to Suva, and the yellow copy remains in the book. (vide evidence PW2). According to the evidence given by Prosecution Witness (PW1), the General Manager Finance, Corporate and Risk of CJ Patel, the Company found some discrepancies in the payments as some of the Cash Account Forms did not reconcile with the bank account. PW1 tendered 18 documents of Cash Account Forms with accompanying documents and marked them in evidence as Prosecution Exhibits 1 to 18. However, only Exhibits 15 to 18 are relevant to the time between the 9th of February 2010 and the 10th of March 2010. The total amount of the money stated in these four Cash Account Forms is $7,862.51. Exhibit 15 is a yellow colour document, Exhibit 16 is a blue colour document, and Exhibits 17 and 18 are pink colours documents.

9. It is noteworthy to mention that these four Cash Account Forms belonged to Seajay Distributors and not to Newman Limited or even to CJ Patel. There was no evidence before the learned Magistrate explaining the relevancy of Seajay Distributor's Cash Account Form to this matter. As per the evidence presented in the trial, the Appellant had worked for Newman Limited, a subsidiary of CJ Patel Group and not for Seajay Distributors.

10. Be it as it may, the allegation levelled against the Appellant in count four is that he had obtained a financial advantage of $21, 713.46 from Newman Limited by deception. There was no evidence adduced by the Prosecution before the learned Magistrate to establish that the Appellant had obtained such an amount of money from Newman Limited by inducing the Newman Limited to handover him any goods or items worth $21, 713.46 with the intention of deceiving them by not returning the proceeds of the sale of those items.

11. According to PW5, the Appellant had not handed him over these four Cash Account Forms. Neither the Appellant had filled those Forms in front of him. However, PW5 said in his evidence that the Appellant had filled these Forms. He said that he could recognize the

handwriting of the Appellant. Furthermore, he claimed that his signature on these four-Forms was forged. The Archbold (Ed 2021 para 14-84-86, p 1879 states that:

> *"Proof of Knowledge*
>
> *Handwriting may be proved either by the admission of the author or by any person who saw the author write or sign the document in question. In addition it may be proved by any witness who will at least swear that he believes the writing to be that of the party (Eagleton v Kingston) (1803) 8 Ves. 438 at 475, per Eldon LC), and has either seen the person write, or corresponded regularly with him, or acted upon such correspondence: O'Brien (1912) 7 Cr. App. R. 29, CCA. A mere statement that the writing is like that of the party is not enough: Drew v Prior (1843) 5 M. & Gr. 264.*
>
> *Observation of the act of writing*
>
> *A single observation of the act of writing is sufficient; William v Worall (1838) 8 C. & P. 380; Warren v Anderson (1839) 8 Scott 384. The same applies to the writing of a surname only: Lewis v Sapio (1827) M. & M. 39.*
>
> *Regular correspondence*
>
> *Acquaintance with handwriting from the habit of regular correspondence is sufficient: Harrington v Fry (1824) Ry. & M. 90, or where acquaintance has been acquired in the course of business from a number of documents purporting to have been written by the party: Doe v Suckermore (1837) 5 A. & E. 703; Fitzwalter Peerage Claim (1843) 10 Cl. & F. 193.*

12. However, the learned Authors of Archbold (Ed 2021, para 14-87 pg. 1879) has further explained that:

"Many of the above cases derive from a period when communications and business documents were written by hand and literacy was infrequent. These authorities should be viewed with caution. It is submitted that identification of handwriting by a lay witness based upon a single or even a few previous observations of the act of writing is of such poor evidential quality that, save in exceptional circumstances, it should not be adduced. What is required is a familiarity with the party's handwriting."

13. Accordingly, PW5 had not seen the Appellant filling these Forms or never received these Forms from the Appellant. PW2's evidence did not expressly state whether he witnessed the Appellant fill these four Cash Account Forms. In the absence of such evidence, it is not safe to rely on PW5's evidence to establish that the Appellant filled those four Cash Account Forms.

14. Moreover, the Cash Account Form contained three copies, and only the pink copy was sent to the Suva office. The yellow copy remained in the book while the white copy was given to the Account Cashier. (vide Evidence of PW2). However, Exhibit 16 is blue in colour, and no evidence before the learned Magistrate to confirm whether the Cash Account Form had another copy in blue colour. Further, there was no evidence whether these four Forms were found in possession of the Appellant or were sent by the Appellant to the Suva Office.

15. Having considered the above-discussed reasons, I find there was no evidence adduced before the learned Magistrate to establish the main elements of the offence of Obtaining Financial Advantage by Deception; hence, the judgment of the learned Magistrate dated 21st January 2020 cannot be supported by the evidence adduced before the Magistrate's Court. I accordingly find the grounds of appeal filed by the Appellant have merits.

16. In conclusion, I make the following orders;

   i) The Appeal is allowed,

   ii) The Conviction dated 21st of January 2020 is quashed and the sentence dated 13th of April 2021 is set-aside.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva
03rd June 2022

Solicitors
Maqbool & Company for Appellant.
Office of the Director of Public Prosecutions for the Respondent.