

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

CRIMINAL APPEAL NO. HAA 009 OF 2022

IN THE MATTER of an Appeal from the Decision of the Resident Magistrate, Magistrate's Court of Tavua, in Criminal Case No. 101 of 2014.

BETWEEN : **RAJNESH CHAND**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. Samisoni Lutumailagi with Ms. Divya Nair for the Appellant
Ms. Saini Naibe with Mr. Setefano Komaibaba for the Respondent

Dates of Hearing : 20 July 2022

Judgment : 19 August 2022

JUDGMENT

- [1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Tavua.
- [2] In the Magistrate's Court of Tavua, the Appellant was charged with one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act No. 44 of 2009 (Crimes Act), as follows:

AMENDED CHARGE
REPRESENTATIVE COUNT
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)

RAJNESH CHAND, between 22nd of February 2013 to 22nd February 2014, at Tavua, in the Western Division, by deception dishonestly obtained \$5800.00, with the intention of permanently depriving **LALIT CHAND**.

- [3] The Appellant was first produced in the Magistrate's Court at Tavua, on 1 July 2014. The original Charge filed against him had 10 separate counts of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act. On 29 September 2014, the Appellant took his plea and pleaded not guilty to all counts.
- [4] Nearly 6 years later, on 11 February 2020, the Amended Charge had been filed against the Appellant. On the same day, his plea had been taken. The Appellant pleaded not guilty to the charge and the matter had proceeded to trial.
- [5] On 1 February 2022, the Appellant had been found guilty of the charge and convicted. On 10 March 2022, the Appellant had been imposed a sentence of 24 months imprisonment. He was ordered to serve 9 months imprisonment immediately. The balance period of 15 months imprisonment was suspended for 2 years.
- [6] Aggrieved by the said Order, on 5 April 2022, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.
- [7] This matter was taken up for hearing before me on 20 July 2022. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [8] The Appellant had also filed a Notice of Motion seeking bail pending appeal (Criminal Miscellaneous Case No. HAM 69 of 2022). The said Notice of Motion was supported by

an Affidavit in Support filed by the Appellant. This Court decided that it would be best that the merits of this appeal be first gone into prior to making a determination on the Notice of Motion seeking bail pending appeal.

[9] As per the Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

Grounds of Appeal against Conviction

1. That the Learned Magistrate erred in law and in fact in convicting the Appellant in the absence of evidence of deception at all material times.
2. That the Learned Magistrate erred in law and in fact in convicting the Appellant of an amount not pleaded in the particulars of offence.
3. That the Learned Magistrate erred in law and in fact in convicting the Appellant on discredited evidence.
4. That the Learned Magistrate erred in law and in fact in convicting the Appellant in the face of the complainant's evidence that he willingly gave the alleged sum and not due to any representation on the part of the Plaintiff (Appellant).
5. That the Learned Magistrate erred in law and in fact in convicting the Appellant in the face of the complainant's discredited evidence that he gave a larger sum which allegation the Learned Magistrate rejected outright.

Grounds of Appeal against Sentence

1. The sentence is manifestly harsh and excessive in all the circumstances of the case.
2. The Learned Magistrate erred in law and in fact by splitting the term of sentence into custodial and a suspension when the law allowed for suspension of the whole sentence.

[10] As can be observed there are five Grounds of Appeal against conviction; and two Grounds of Appeal against sentence.

The Law and Analysis

[11] 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 reproduced 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.”

[12] 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.”*

The Grounds of Appeal against Conviction

- [13]** The Grounds of Appeal against conviction are that the Learned Magistrate erred in law and in fact in convicting the Appellant on the following grounds:
- in the absence of evidence of deception at all material times;
 - of an amount not pleaded in the particulars of offence;
 - on discredited evidence;
 - in the face of the complainant’s evidence that he willingly gave the alleged sum and not due to any representation on the part of the Appellant; and
 - in the face of the complainant’s discredited evidence that he gave a larger sum which allegation the Learned Magistrate rejected outright.
- [14]** I find that all the above Grounds of Appeal against conviction are inter-related. As such, they will be addressed together.
- [15]** Section 318 of the Crimes Act provides: *A person commits a summary offence if he or she, by a deception, dishonestly, obtains, a financial advantage, from another person.*

- [16] The Learned Magistrate's judgment is found at pages 40 to 66 of the Magistrate's Court Record. I find that the Learned Magistrate has correctly outlined the elements of the offence of Obtaining a Financial Advantage by Deception [From pages 55-56 of the Magistrate's Court Record]. He has also duly summarized all the evidence led in the trial [From pages 42-53 of the Magistrate's Court Record]. He has then analysed the evidence in relation to the said elements of the offence. Accordingly, the Learned Magistrate has found the Appellant guilty of the charge and convicted him.
- [17] Although not specifically taken up as a Ground of Appeal, the Learned Counsel who appeared on behalf of the Appellant has stated that the charge is defective. Firstly, that there is no mention in the charge as to the person from whom the money was dishonestly taken by deception. I cannot agree with this submission. It is clearly stated in the Amended Charge that the Appellant had dishonestly obtained the money by deception from Lalit Chand, who is the complainant in the case.
- [18] Secondly, that reference has been made in the Amended Charge to the words "with the intention of permanently depriving Lalit Chand", which has no application in relation to Section 318 of the Crimes Act. It is conceded that Section 318 makes no mention of the said words and as such it is not required by the prosecution to establish that the Appellant had the intention of permanently depriving the complainant of the property (namely the money).
- [19] However, the fact that the charge was defective, was never taken up during the proceedings in the Magistrate's Court. This issue has not even been raised as a Ground of Appeal filed by the Appellant. In any event, no prejudice has been caused to the Appellant by the said words or terms been written in the Amended Charge. The Learned Magistrate too has quite correctly not made any reference to the said words in outlining the elements of the offence.
- [20] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in this matter.
- [21] For the aforesaid reasons, I find that the Grounds of Appeal against the Conviction is without merit.

The Grounds of Appeal against Sentence

[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 Naikелеkelevesi –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."

- [26] The two Grounds of Appeal against sentence are that the sentence is manifestly harsh and excessive in all the circumstances of the case and that the Learned Magistrate erred in law and in fact by splitting the term of sentence into custodial and a suspension when the law allowed for suspension of the whole sentence.
- [27] As per Section 318 of the Crimes Act the maximum penalty for the offence of Obtaining a Financial Advantage by Deception is 10 years imprisonment. In this case, the Learned Magistrate has taken the tariff for the offence as 2 to 5 years imprisonment, based on *State v. Sharma* [2010] FJHC 623; HAC122.2010L (7 October 2010); which was upheld on appeal in *Sharma v. State* [2013] FJCA 75; AAU98.2010 (17 June 2013).
- [28] The Learned Magistrate's sentence is found at pages 67 to 71 of the Magistrate's Court Record. In considering the sentence to be imposed on the Appellant, the Learned Magistrate has stated [At paragraphs 11-13 of the sentence]: *"That the lower end of the tariff is recommended for minor offences with little or spontaneous deception. The higher end of the tariff is recommended for serious, well planned and cynical operations. Objectively, I am of the view your case falls more to the lower end of the tariff."*
- [29] It is clear from the above that the Learned Magistrate has considered the lower end of the tariff in determining the sentence to be imposed on the Appellant. He has duly considered the aggravating factors and mitigating factors in the case and sentenced the Appellant to 24 months imprisonment. As such, it cannot be said that the sentence imposed by the Learned Magistrate is harsh and excessive.

[30] The Appellant also states that the Learned Magistrate erred in law and in fact by splitting the term of the sentence into custodial and a suspended sentence. 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.

[31] From a reading of the above Section it is manifest that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or only part of the sentence.

[32] I am of the opinion that the Learned Magistrate has duly provided his reasons as to why he was suspending only part of the sentence imposed on the Appellant and not the whole sentence. At paragraph 31 of the sentence, the Learned Magistrate states as follows: *"This is your first offence and there has been no indication that you have misbehaved or re-offended since. However, the absence of remorse from you is significant for me. I am inclined to suspend your 2 years imprisonment but only in part and this will adequately reflect the first primary objective of your sentence which is to punish you to an extent and manner which is just."*

[33] Considering the aforesaid, I am of the opinion that these two Grounds of Appeal against sentence are without merit.

Conclusion

[34] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

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

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Tavua in Criminal Case No. 101 of 2014 is affirmed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

This 19th Day of August 2022

**Solicitors for the Appellant :
Solicitors for the Respondent:**

**Fazilat Shah Legal Barristers and Solicitors, Lautoka.
Office of the Director of Public Prosecutions, Lautoka.**