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

CRIMINAL APPEAL NO. HAA 45 OF 2022

IN THE MATTER of an Appeal from the Magistrate's Court at Sigatoka, in Criminal Case No. 135 of 2018.

BETWEEN : **SHAHEEM ALI**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Ms. Rishika Chand for the Appellant
Mr. Unal Lal for the Respondent

Dates of Hearing : 17 April 2023 and 20 July 2023

Judgment : 1 September 2023

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Sigatoka.

[2] On 1 March 2018, the Appellant was charged in the Magistrate's Court of Sigatoka, with one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act No. 44 of 2009 (Crimes Act). The charge read as follows:

CHARGE

Statement of Offence (a)

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to Section 318 of the Crimes Act of 2009.

Particulars of Offence (b)

SHAHEEM ALI, between the 1st day of October 2017 to 28th day of December 2017, at Sigatoka, in the Western Division, by deception, dishonestly obtained from **PREM CHAND** $8,570.00 cash, this being a financial advantage from the said **PREM CHAND**.

[3] On 24 April 2019, the Appellant took his plea and pleaded not guilty to the charge.

[4] The matter had been listed for trial on 29 August 2022 and 30 August 2022. However, on the 29 August 2022, the Appellant had not been present. A medical certificate had been tendered on his behalf, and the defence had sought for a vacation of the trial. However, the Learned Magistrate had proceeded to hear the matter in the absence of the Appellant.

[5] The case for the State is that the complainant (who was a Taxi Driver) had given $8,570.00 to the Appellant, in three instalments, for the purpose of purchasing a motor vehicle from the Appellant. However, the Appellant had failed to provide a motor vehicle or to refund the said sum of money to the complainant.

[6] On 31 October 2022, the Appellant was found guilty of the charge and convicted. On the same day, the Appellant had been sentenced, in absentia, to 18 months imprisonment to be served once he is arrested.

[7] Aggrieved by the said Order, on 28 November 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.

[8] This matter was taken up for hearing before me on 17 April 2023 and 20 July 2023. 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.

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

Grounds of Appeal against Conviction

1. That the Learned Magistrate erred in law in proceeding with the Trial in Absentia despite medical certificate being provided to the Court.
2. That the Learned Magistrate erred in law and in fact in finding the Prosecution's evidence was credible.
3. The Learned Magistrate erred in law and in fact in finding that he was satisfied that the charges against the Appellant was proven beyond reasonable doubt when the evidence before the Court did not support such a finding.
4. The Learned Magistrate erred in law and in fact in finding the Appellant guilty when all the elements of the charge were not proven beyond reasonable doubt by the Prosecution.
5. The Learned Magistrate erred in law and in fact in convicting the Appellant without taking into consideration that the Police had not cross-checked what the Appellant claimed in his caution interview and the failure of the Police to do so is a breach of his constitutional right to a fair trial.
6. The Learned Magistrate erred in law and in fact in finding the Appellant guilty in all the circumstances of the case.
7. The Appellant reserves his right to add, alter or amend his grounds of appeal upon receipt of the Court Record.

Grounds of Appeal against Sentence

1. The Learned Magistrate's sentence is manifestly harsh and excessive in all the circumstances of the case as the Appellant was a first offender and had a good character generally.
2. The Learned Magistrate's disparity in sentence compared to other similar cases some of which are more serious in nature and or fault.

3. The Learned Magistrate erred in law in imposing immediate sentence when a suspended sentence would have been more appropriate in all circumstances.

4. The Appellant reserves his right to add, alter or amend his grounds of appeal upon receipt of the Court Records.

[10] Although the Appellant had reserved his right to add, alter or amend his Grounds of Appeal against both conviction and sentence, upon receipt of the Court Records, no such amendment was made. As such, there are six Grounds of Appeal against conviction; and three 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 re-produced 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

Ground 1

[13] This Ground of Appeal is that the Learned Magistrate erred in law in proceeding with the Trial in Absentia despite a medical certificate being provided to the Court.

[14] It is manifest from the Magistrate's Court Record that, on 31 January 2022, the Learned Magistrate had fixed the matter for trial on 29 August 2022 and 30 August 2022. On this day the Appellant had been present in Court and had also been represented by his Counsel from the Legal Aid Commission. It is also recorded that both parties agree to have all 3 matters (in respect of the Appellant) for hearing simultaneously. This is in reference to 2 other similar matters that the Appellant has been charged with in the Magistrate's Court of Sigatoka-Case Numbers 136 of 2018 and 249 of 2018.

[15] On 29 August 2022, the Appellant had not been present in Court. However, his Counsel had been present and had tendered a medical certificate on his behalf and had sought for a vacation of the trial. However, the Learned Magistrate having considered all factors had decided to proceed with the trial in the absence of the Appellant.

[16] Section 170 of the Criminal Procedure Act is titled "*Adjournment*". Section 170 (1) and (2) states as follows:

> *170. — (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.*
>
> *(2) For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.*

[17] Section 171 of the Criminal Procedure Act (which is titled *Non-appearance of parties after adjournment*) provides as follows:

> *171. — (1) If at the time or place to which the hearing or further hearing is adjourned —*
>
> *(a) the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and*
>
> *(b) if the complainant does not appear the court may dismiss the charge with or without costs.*
>
> *(2) If the accused person who has not appeared is charged with an indictable offence, or if the court refrains from convicting the accused person in his or her absence, the court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the court.*

[18] The Learned Magistrate's reasoning to proceed with the trial in the absence of the Appellant is depicted in the following paragraphs of his Judgment:

"On 29th August 2022, Counsel for the Accused applied for adjournment as the Accused was not well in light of his medical report that the Accused forwarded for submission to the Court. Defence did not submit a prescribed medical form under the Criminal Procedure Act. However, they submitted a medical certificate from a Medical Officer in Nadi. The said certificate was dated 28th August, 2022 and stated that the Accused suffered from "History of Chest Pain – Likely". I take notice that the said certificate does not contain an actual condition but a "likely" history of chest pain. Further, the certificate states that the Accused being unfit for work that day only, that is 28th August 2022, for MSK, which is the medical abbreviation for Muscoloskeletal. MSK is plainly understood as helping people to normal fitness after illness or injury. He was to be reviewed on 29th August 2022 only. He was not deemed medically unfit for Court for 29th August 2022 and there was no other argument raised to support his absence that day. Prosecution also submitted that the Accused was examined in Nadi whereas he was supposed to be residing in Natadola Settlement, Sigatoka. Defence could not assist the Court to this point.

After assessing the application for adjournment by Defence, against Section 170 of the Criminal Procedure Act and the relevant case authorities demanding that I exercise my discretion judiciously, I refused the application for adjournment and ruled that we proceed to Trial in Absentia....."

[19] I find that the Learned Magistrate has given valid reasons for continuing with the trial in the absence of the Appellant. He has also made due reference to Section 14(2) (h) (i) of the 2013 Constitution, which provides for criminal trials in absentia or trials in the absence of the Accused.

[20] Proceeding with a trial in absentia, is at the sole discretion of the Learned Magistrate. In my view, the Learned Magistrate has duly exercised his discretion in the instant case.

[21] It must also be emphasized that the Appellant had absented himself from Court even on the 30 August 2022 (the second day of the trial) and even on the day on which the

judgment and sentence had been pronounced (31 October 2022). Absolutely no reasons has been provided for his absence on the said two days.

[22] For all the aforesaid reasons, I am of the view that the first Ground of Appeal against conviction is without merit.

Grounds 2-6

[23] The said Grounds of Appeal are primarily in relation to the elements of the offence, the credibility of the prosecution witnesses/evidence and the fact that the prosecution had failed to prove the case against the Appellant beyond reasonable doubt. I find that the above Grounds of Appeal against conviction are inter-related. As such, they will be addressed together.

[24] 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.*

[25] The Learned Magistrate in his judgment has correctly outlined the elements of the offence of Obtaining a Financial Advantage by Deception. He has also duly summarized all the evidence led in the trial (the evidence of the complainant and the other three witnesses called by the prosecution in support of their case). He has then analysed the evidence in relation to the said elements of the offence. Accordingly, the Learned Magistrate has come to the finding that the prosecution has proved the case against the Appellant beyond reasonable doubt and found the Appellant guilty of the charge and convicted him.

[26] I am of the view that these Grounds of Appeal against conviction are without merit.

[27] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in this matter.

The Grounds of Appeal against Sentence

[28] 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)."*

[29] 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."

[30] 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.

[31] 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 **Naikelekelevesi –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."

[32] The Grounds of Appeal against sentence are that the sentence is manifestly harsh and excessive in all the circumstances of the case; that there was a disparity in sentencing compared to other similar cases, some of which are more serious in nature and or culpability; and that the Learned Magistrate erred in law in imposing an immediate sentence of imprisonment when a suspended sentence would have been more appropriate in all circumstances.

[33] The Learned Magistrate's sentence is found at pages 20 to 21 of the Magistrate's Court Record. 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 by the Court of Appeal in ***Sharma v. State*** [2013] FJCA 75; AAU98.2010 (17 June 2013).

[34] To determine the starting point within the said tariff, the Learned Magistrate has referred to the Court of Appeal judgment of ***Laisiasa Koroivuki v. State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); where the following guiding principles were formulated:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[35] In considering the sentence to be imposed on the Appellant, the Learned Magistrate has stated that he finds that the level of deception in the case was low and as such had taken a starting point of 2 years imprisonment.

[36] The Learned Magistrate has not increased the sentence to be imposed on the Appellant for aggravating circumstances. In fact, he has not made reference to any aggravating circumstances.

[37] The Learned Magistrate has considered the fact that the Appellant was a first offender and has duly granted him a discount of 6 months imprisonment. Thereby the final sentence imposed on the Appellant was 18 months imprisonment.

[38] For the aforesaid reasons, it cannot be said that the sentence imposed by the Learned Magistrate in this case is harsh and excessive.

[39] 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.*

[40] 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.

[41] I am of the opinion that the Learned Magistrate has duly provided his reasons as to why he was not inclined to suspend any part of the sentence imposed on the Appellant. The Learned Magistrate has stated as follows: *"I choose not to suspend this sentence as I do not see any chance of rehabilitation as you took the Court and the witnesses the full mile for the Court to determine your guilt."*

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

Conclusion

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

FINAL ORDERS

[44] 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 Sigatoka in Criminal Case No. 135 of 2018 is affirmed.

HIGH COURT OF FIJI LAUTOKA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA
This 1st Day of September 2023

Solicitors for the Appellant : Nexus Legal, Barristers and Solicitors, Nadi.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Lautoka.