

IN THE RESIDENT MAGISTRATE'S COURT
AT SUVA -CRIMINAL DIVISION

Criminal Case No. 1565 of 2013

BETWEEN : Director of Public Prosecutions
Prosecution

AND : Vijendra Goundar (a.k.a Sonu) and Another

For Prosecution : Mr.S.Shah and later Ms.J.Prasad (*ODPP*)

For the Accused persons : Ms. N. Mishra and later Ms. L.Ratidara (*LAC*)

Date of Judgment : 12th April 2022

Judgment

1. The accused person was jointly charged with another with twelve counts (Count 1-2 & 4 – 13) for Obtaining Financial Advantage by Deception contrary to Section 318 of the *Crimes Act 2009* and one count (Count 3) for Causing a Loss contrary to Section 324 (1) of the *Crimes Act 2009*¹.
2. The accused and his co-accuse had pled not guilty to the charges and as such the matter proceeded to hearing.
3. During the hearing prosecution called eleven (11) witnesses but did not tender any document.
4. Prosecution then closed their case.
5. Upon the close of Prosecution counsels for the accused and co-accused made an application seeking a finding of 'No Case to Answer'.
6. This court found that there was a case to answer for the accused however acquitted his co-accused on the basis of their being no case to answer.
7. As such the matter proceeded with the accused and upon seeking a position from the Accused pursuant to Section 179 of the *Criminal Procedure Act 2009*, the accused advised the court that both he would give evidence but would not call any witnesses.

¹ Copy of the Charge sheet is annexed herein as Annexure 'A'.

8. The accused gave evidence and tendered exhibits.

The Charge

9. The court restates verbatim the charging sections as follows:

Count 1-2 & 4 -13)

“318.A person commits a summary offence if he or she, by a deception, dishonestly obtains a financial advantage from another person.”

Count 3

“324 (1) A person commits a summary offence if he or she does anything with the intention of dishonestly causing a loss to another”

Summary of Evidence

Prosecution

10. The first prosecution witness (PW1) was Bal Govind. He stated in his evidence that the accused was his relative. In fact he stated that the accused offered to arrange for his work overseas with others. He identified the accused in court.
11. As such they gave money to the accused at the accused's residence on the premise that the accused would arrange for passports and the airfares for two his sons and his nephew (Mahend Lal, Govind Junior and Bal Govind). He gave money awaited an update from the accused, however no update was forthcoming. As a result he went and reported the matter to Police.
12. He had not received any refund.
13. When cross examined PW1 agreed that the accused had promised to organize the visa however he did not sign any formal agreement to that effect.
14. When re-examined he confirmed that he paid a total of \$6,000.00 to the accused.
15. The second Prosecution witness (PW2) was Vijendra Prakash whom stated that he knew the accused from the village. He identified the accused in court.

16. He also stated that accused was organizing his work visa to Australia, for which he paid the accused \$1000.00. He was informed to await an update from the accused however none was forthcoming.
17. In fact he did not receive an update until the Police contacted him regarding the same.
18. In cross examination he agreed that he had paid \$900.00 and that he was informed by the accused that he would have to wait for the first group to leave before he could follow in the next group.
19. He also stated that he had no reason to believe that the accused would mislead him as they had known each other since childhood.
20. In re-examination he confirmed that he had paid the accused the sum of \$900.00.
21. The third Prosecution Witness (PW3) was Kamla Wati. She identified the accused in court as the person she had given a total of \$6000.00 (in three installments) to, in order for him to arrange for work visas. The work visas were to be arranged for her sons.
22. She was informed to await an update from the accused however none was forthcoming. She also did not receive any money back from the accused.
23. In cross-examination she agreed that she had known the accused since birth and had trusted him. She also agreed that she was promised Visas by the accused.
24. The fourth Prosecution Witness (PW4) was Krishna Swamy. He stated that he had given the sum of \$2175.00 for his visa and passport (\$175.00 was for passport alone) to the accused. He identified the accused in court.
25. He was then informed by the accused to await the collection of his papers however none was forthcoming. In fact there was no reply, no visa and no refund from the accused.
26. In cross examination PW4 agreed that the accused received the entire sum of \$2175.00 however did not mention whom he worked for. He also agreed that the accused did not mislead him however he had not received any passport or a refund from the accused.
27. Heena Kumari was the fifth Prosecution witness (PW5). She was employed with the Suva City Council in the Business Licence Department. She stated that in 2011 the business operated under

Tagimaucia Travel and Shahil Construction however there were no records of business registration in their system.

28. She confirmed this in cross examination.

29. The sixth prosecution witness (PW6) was Veena Devi. She stated that the accused was her nephew and he was employed with Tagimaucia travel. She identified the accused in court.

30. The accused had arranged sometimes in 2011 for her to travel to New Zealand. As a result she organized a family meeting at her residence in Taveuni where the accused stated that he would arrange for work visas to Australia.

31. She recalls paying \$850.00 for passports and visas however none was forthcoming. Upon enquiry the accused had informed them that he was waiting on his co-accused to respond wherein he would inform them. PW6 further stated that she had never met the co-accused.

32. When cross examined she agreed to being refunded the sum of \$1700.00 and that the accused was working with his co-accused. She also agreed that the accused worked by himself at Tagimaucia Travel and that she gave the money to him.

33. The seventh Prosecution Witness (PW7) was Shabila Devi who stated that she gave \$850.00 to PW6 in order for the accused to arrange a Visa for her son. However, nothing eventuated and she received the sum of \$830.00 from the accused.

34. In cross examination she agreed that she paid the money to PW6 as she was making the arrangements. She also agreed that she did receive a refund of \$830.00.

35. Vijay Kumar was the eighth Prosecution witness (PW8). He stated that the accused (whom he identified in court) had informed him that he could arrange for work visas for his sons. As such he gave \$850.00.

36. He waited for a week and then asked for a refund. The accused refunded the entire sum of \$850.00.

37. In cross examination he agreed to being refunded the \$850.00.

38. The ninth prosecution witness (PW9) was Mohammed Nazim Aziz. He stated that he paid \$2000.00 to the accused on the promise of the accused arranging for a work visa. He identified the accused in court.
39. He further stated that he suspected that something had gone wrong when the first group of people had not left. He was then refunded \$500.00 however the balance had not been paid to him.
40. In cross examination he agreed that PW8 had introduced him to the accused and that he had given \$2000.00 to the accused at the residence of PW8. He did not expect the accused to mislead him.
41. Jasvil Prasad was the tenth prosecution witness (PW10). He stated that he gave \$2150.00 to the accused at the residence of PW8 on the promise of receiving a passport and work visa for Australia. He identified the accused in court.
42. PW10 further stated that the accused's promise was never fulfilled however a refund of \$500.00 was paid to him but the balance remains unpaid. He also received his passport.
43. In cross examination PW10 agreed that he had paid \$2150.00 but no receipt was given. He also agreed that he had received his passport.
44. The final prosecution witness (PW11) was Mehzabeen.Z.Ali whom employed with the Nasinu Town Council in the Business Licence Department. She stated that in 2011 there were no records in their system of any business operating under Shahil Construction registered under the accused.
45. In cross examination she agreed that there was no record of Shahil Constructions or Tagimaucia Travel.
46. That brought to an end prosecution case.

Defence Case

47. The accused in his evidence stated that he was approached by his co-accused to collaborate with on business venture. The business dynamics were based around his co-accused arranging for work visas whilst he would be responsible for air tickets.
48. As a result he received money from his relatives and people whom he knew or were referred to him by his family. These included PW1, PW2, PW3, PW4, PW7, PW9 and PW10.

49. All monies received for the purpose of obtaining a Visa were forwarded to his co-accused (Sova Matoga) who was operating under name Doves Fiji Travel.
50. The accused tendered² an email to show that her co-accused was arranging work visas and that there was some hint of interference.
51. He also stated that he would give money either in cash or deposited into the account of his co-accused. He tendered deposit slips³ as well a BSP Bank statement⁴ for his co-accused to show that he had deposited money into her account.
52. He maintained that he had always informed all the people whom had given him money for Visas that it was his co-accused who would arrange the Visas and not him.
53. When the visas were not forthcoming he tried to refund the people with whatever he could.
54. When cross examined he agreed that he was never in a position to obtain a Visa and had never seen anyone obtaining a Visa via his co-accused.
55. He further agreed that the people who gave him money were relatives or people he knew from Taveuni and trusted him. He also agreed that the people believed in his advice and gave money as a result. The accused also agreed that he could not process Visas, as it was his co-accused who did that.
56. That was the Defence case.

Closing Submissions

57. Both parties closing submissions have been considered by the court.

Legal Discussion

58. Bearing in mind the above factual matters this court directs itself on the following legal matters which it finds is relevant in this matter.
59. In order to prove the offences charged, Section 57 and 58 of the *Crimes Act 2009* directs on the following:

² Defence Exhibit No.1

³ Defence Exhibits No.2A, 2B and 2C

⁴ Defence Exhibit No.3

“Legal burden of proof—prosecution

57.—(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Act —

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof—prosecution

58.—(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Sub-section (1) does not apply if the law creating the offence specifies a different standard of proof.”

60. The above legal regime had so often been pronounced by the courts and one such example is that which was highlighted by *Aluthge J* in his summing in *State v Baleiwakaya* - Summing Up [2020] FJHC 32; HAC121.2019 (24 January 2020), where he stated:

“7.The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.”

61. The other is *Woolmington v DPP*⁵ where the court held that "*no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the accused, is part of the common law*".

62. Therefore the burden of proving both accused persons guilt beyond reasonable doubt lies with the prosecution. If the evidence creates any doubt, the benefit of the doubt should be given to both accused.

Analysis

No evidence – Count 2,3,5, 6 and 13

63. The complainants in Count 2, 3, 5, 6 and 13 did not give evidence.

64. As such there is no evidence led on those counts by Prosecution as is required by the above highlighted legal provisions.

⁵ [1935] AC 462

65. Given that no evidence has been led on the same, this court acquits the accused on Counts 2, 3, 5, 6 and 13.

Count 1, 4, 7, 8, 9, 10, 11 and 12

66. Arising out of the above listed counts, Prosecution needs to prove the following elements of the offence beyond reasonable doubt arising out of Section 318 of the *Crimes Act 2009*. Section 318 states as follows:

67. The elements therefore are as follows:

- i. The accused person;
- ii. By Deception, dishonestly
- iii. Obtained a financial advantage

68. The evidence led by Prosecution addressed in its entirety confirms the first and third element beyond reasonable doubt.

69. This is stated on the basis, that PW1, PW2, PW3, PW4, PW7, PW9 and PW10 identified the accused in court as the person whom they had given money to and none of the those witnesses received a full refund.

70. The court now moves on to explore the two terms, that is, Dishonest and Deception. When this two elements are established it is then easier to discuss the remaining elements.

71. In doing this the court has garnered from paragraphs 31 to 35 in the decision of *Aluthge J* in *Mani v State* [2020] FJHC 772; HAA7.2020 (16 September 2020).

72. We begin with the term ‘dishonest’. The *Crimes Act 2009* at Section 290 and section 348 define it thus:

“... 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.”

73. 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’ as follows;

“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.”

74. Moving on to the term ‘deception’.

75. Section 316 of the *Crimes Act 2009* 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 authorized to cause it to do.

76. In allowance for clarity the following passage from Blackstone’s Criminal Practice 2007 at page 402 is regurgitated as follows:

“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 isto 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, ...”

77. In *Tuilomaloma v State* [2019] FJHC 851; HAA009.2019 (30 August 2019) *Perera J* defined the element of ‘deception’ as follows:

“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.”

78. Considering the definitions of Deception and Dishonesty it is clear from the evidence of PW1, PW2, PW3, PW4, PW7, PW9 and PW10 that the accused held out the belief that he was able to arrange for work visas.

79. The evidence of all the above listed witnesses only point to the accused given out that information and no one else.

80. This added to the fact that the accused disseminated this information to those whom were either family members or people who knew him from Taveuni or were referred by family and as such it appears from the evidence led by Prosecution that they accepted his proposition without reservation.

81. As such it is this court's opinion from the evidence that PW1, PW2, PW3, PW4, PW7, PW9 and PW10 all believed that the accused was able to arrange for the Visas as it was their evidence that he gave them such a belief.
82. Such belief unfortunately was not met as such this court accepts therefore that Prosecution has proved the 2nd element beyond reasonable doubt.
83. The accused in his defence contends that he had no power to arrange for Visas and showed proof that the same was only in the power of his co-accused. He also showed proof that he had deposited money to that effect.
84. Unfortunately he agreed in cross examination that he knew he did not have this ability but took money instead. In addition, his defence cannot be accepted out of the fact that PW1, PW2, PW3, PW4, PW7, PW9 and PW10 all say it was the accused and the accused alone who gave them the belief that he would arrange for the Visa.
85. As such this court rejects the Accused's position.
86. Given the discussions at paragraphs 66 to 85 above-herein this court is of the opinion that Prosecution has been able to prove Count 1, 4, 7, 8, 9, 10, 11 and 12 beyond reasonable doubt.
87. In summary this are the court's findings:
- Count 1, 4, 7, 8, 9, 10, 11 and 12** – Accused is found guilty as charged.
- Count 2,3,5, 6 and 13** – Accused is found not guilty as charged and is acquitted on the same.
88. The court shall now accept mitigation in terms of **Count 1, 4, 7, 8, 9, 10, 11 and 12**.


.....
JEREMAIA .N.L SAVOU
RESIDENT MAGISTRATE

