

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 125 OF 2017

BETWEEN: AVIYASHNI VANDHANA NAIDU

Appellant

A N D: STATE

Respondent

Counsel: Ms. V. Narara for Appellant
Mr A. Singh for Respondent

Hearing: 04th January 2018
Judgment: 06th April 2018

JUDGMENT

Introduction

1. The Appellant appeals against the conviction for the offence of Obtaining Financial Advantage by Deception and the sentence of two years and ten months, imposed against her by the Magistrate's Court in Lautoka on the following grounds *inter alia*;

Appeal against the Conviction

- i) *The Learned Trial Magistrate erred in law and in fact in convicting the Appellant without taking into consideration that the Prosecution had not produced the complainant's parents, sister or friend to corroborate the complainant's oral evidence,*
- ii) *The learned Magistrate erred in law in convicting the Appellant when he seemed to have shifted the burden of prove to the Appellant to prove her guilt.*

Appeal against the Sentence

- i) *The learned trial Magistrate erred in law and in fact when he picked the starting point at the higher end of the tariff,*

- ii) *The learned Magistrate erred in law and in fact none he reached the final sentence by doubling counting the aggravating factors,*
- iii) *The learned Magistrate erred in law and in fact none he miscalculated the remand period.*

2. The parties were directed to file their respective written submissions, which they filed as per the direction. On the 4th and 5th of January 2018, the learned Counsel for the Appellant and the Respondent made their oral arguments and submissions. During the course of the hearing of this Appeal, the learned Counsel for the Appellant informed the court that the Appellant wishes to abandon the second ground of appeal against the conviction and the third ground of appeal against the sentence.
3. Having carefully considered the record of the proceedings of the Magistrate's Court, the respective oral and written submissions of the parties, I now proceed to pronounce my judgment as follows.

Background

4. The Appellant was found guilty for obtaining a financial advantage of \$12,000 from the Complainant by deception. The Appellant had met the Complainant while both of them were traveling to Suva in a public bus. The Appellant had introduced herself as an employee of UNDP. She had offered the Complainant that she could arrange her work visa to go and work in New Zealand. Having believed the Appellant, the Complainant has given her \$12,000 on several occasions. However, the Appellant had never lodged any visa application of the Complainant to the High Commission of New Zealand. The Complainant had never returned the said money to the Complainant. The Complainant was a student at the USP at that time. The Complainant had raised this amount of \$12,000 from the money that she borrowed from her parents and a friend. According to the evidence given by the Complainant, she was still repaying the said money that she borrowed from them.

Appeal against the Conviction

5. I now draw my attention to the first ground of appeal against the conviction. The Appellant contends that the learned Magistrate has failed to take into consideration that

the evidence given by the Complainant was not corroborated with the evidence of the parents, sister or the friend of her by the prosecution.

6. The learned Counsel for the Appellant submitted that there is no independent evidence to corroborate that the Appellant had actually raised this sum of \$12,000 from the money that she borrowed from her parents and a friend. Neither the parents nor the friend was called to give evidence in that regard. Moreover, the Complainant had said in her evidence that she met the Complainant in order to give the initial sum of \$5000 with her sister. There is no independence evidence from her sister to corroborate that evidence of the Complainant.
7. Evidence of corroboration means that the evidence which supports some other evidence that an accused has committed the offence with which he is being charged. It is evidence which is relevant, admissible, and credible and independent and which implicates or link the accused person to the offence as charged. However, it is the general rule that there is no requirement that the evidence be corroborated. Evidence of one witness is enough to support a verdict whether in civil or criminal proceedings, if the court accepts it as credible and reliable. (vide Director of Public Prosecution v Kilbourne (1973) 1 All ER 440, Director of Public Prosecution v Hester (1973) A.C.296).
8. In this case, the sources of the money that was given to the Appellant by the Complainant were not disputed. During the cross examination, the Complainant was only questioned about the sources of the fund. The Complainant in her evidence has explained the sources of the funds where she testified that she borrowed money from her parents and a friend. There is no evidence or questions to suggest or dispute otherwise. The Appellant only contended in the Magistrate's Court that she never received such money from the Complainant. Hence, the main dispute was whether the Complainant actually gave the Appellant a sum of \$12,000.
9. In paragraphs 72 and 73 of his judgment, the learned Magistrate has specifically stated that he accept the evidence given by the Complainant as truth and reliable. The learned Magistrate found that:

“Therefore, I have observed the demeanour of PW1. I accept her evidence and that of the prosecution witness as truthful and reliable. The complainant was fluent in her evidence and accepts that she told the truth in court and was honest.

She was able to withstand cross examination and she answered questions without being evasive. At some point her emotions overwhelmed her. I reject the suggestion by the defence that she used \$12,000 all by herself. PW1’s demeanour was consistent with her honest.”

10. Accordingly, it is clear that the learned Magistrate has accepted the evidence given by the Complainant as honest, true and reliable evidence. Therefore, I do not find any requirement for the learned Magistrate to corroborate the evidence given by the Complainant from other independent evidence in respect of the sources of the fund.
11. In view of these reasons, I do not find any merits in this ground of appeal.

Appeal against the Sentence

12. The appeal against the sentence is founded on two contentions, that the learned Magistrate has picked the starting point at the higher end of the tariff limit and then has considered the same grounds as aggravating factors in reaching the final sentence.
13. The learned Magistrate has correctly identified the tariff for the offence of Obtaining a Financial Advantage by Deception as two years to five years with two years being reserved for minor offences with little and spontaneous deception. **(State v Sharma [2010] FJHC 623; HAC122.2010L (7 October 2010).** Having identified the applicable tariff limit, the learned Magistrate has selected four years as the starting point, which is at the higher middle range of the acceptable tariff limit. He then increased one year for the aggravating factors. He then reduced one year for the mitigating grounds and one year and two months for the time spent in remand custody, reaching the final sentence of two years and ten months. The final sentence of two years and ten months is within the acceptable tariff limit.

14. Goundar JA in Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013) has expounded that the Court must take into consideration the objective seriousness of the offence in order to determine the starting point. His Lordship has further held that, as a matter of good practice, the starting point should pick from the lower or middle range of the applicable tariff, where his Lordship held that:

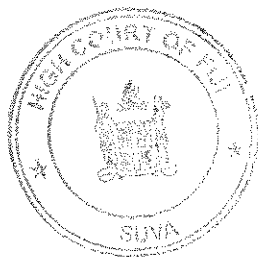
“The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.


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 stage. 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.”

15. In view of the above judicial precedents, the court as a matter of good practice usually pick the starting point from the lower or middle range of the tariff. However, there are no strict rules or principles stating that the court must select the starting point from the lower or the middle range of the tariff. Furthermore, the court has to take into consideration the objective seriousness or the objective circumstances of the offence in order to determine the starting point.
16. The learned Magistrate in paragraph nine of his sentence has discussed the objective seriousness and the circumstances of the offence, where he found that:

“I regard this offence as particularly nasty and cynically operated against an unsuspecting victim and depriving her of \$12,000 amid her dream of a better future in New Zealand.”

17. Having considered the objective seriousness of the offence, the learned Magistrate has selected four years as the starting point, which is well within the acceptable sentencing principles.
18. The learned Magistrate in paragraph seven of his sentence has considered the following grounds as the aggravating factors, that:
 - i) Breach of trust,
 - ii) Trauma and stress upon the victim,
 - iii) Non-recovery of \$12,000.
19. It is clear that that learned Magistrate has not considered any of these aggravating grounds in paragraph nine in order to determine the starting point. Therefore, I do not find that the learned Magistrate has considered the same grounds in order to select the starting point and also as the aggravating factors. Accordingly, I do not find any merits in the grounds of appeal against the sentence.
20. In conclusion, the appeal against the conviction and the sentence is disallowed and dismissed accordingly.
21. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Lautoka
06th April 2018

Solicitors
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent.