

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

CRIMINAL APPEAL NO. HAA 29 OF 2017

IN THE MATTER of an Appeal from the decision
of the Magistrate's Court Nausori, in Criminal
Case No. 531 of 2013.

BETWEEN : JONA ROBANAKADAVU

APPELLANT

AND : STATE

RESPONDENT

Counsel : Ms. Samanunu Vaniqi for the Appellant
Mr. Yogesh Prasad for the Respondent

Date of Hearing : 18 September 2017

Judgment : 27 March 2018

JUDGMENT

[1] The Appellant was charged before the Magistrate's Court of Nausori, in Criminal Case No. 531 of 2013, for General Dishonesty Causing a Loss, contrary to Section 324 (1) of the Crimes Act No. 44 of 2009 ("Crimes Act").

- [2] The full details of the charge against the Appellant was as follows:

CHARGE

Statement of Offence

GENERAL DISHONESTY – CAUSING A LOSS : Contrary to Section 324 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

JONA ROBANAKADAVU on the 22nd day of November, 2012 at Nausori in the Central Division obtained from MIKAELE VUNITURAGA the sum of \$11,000 but failed to pay back the said amount within the agreed period of two weeks, therefore dishonestly caused a loss to the said MIKAELE VUNITURAGA.

- [3] On 6 February 2017, the Appellant pleaded guilty to the charge. On the same day, the Summary of Facts were read out and explained to the Appellant who admitted to the same. It is recorded in the proceedings of 6 February 2017 that the Appellant had been represented by Counsel on the said day.
- [4] The Learned Magistrate convicted the Appellant of the charge. It is borne out from the proceedings that the Learned Magistrate had duly satisfied herself that the guilty plea was made voluntarily and unequivocally by the Appellant prior to convicting him.
- [5] On 15 May 2017, the Appellant was sentenced to a term of 17 months imprisonment, with a no-parole period of 11 months. It was ordered that the sentence is to be served concurrently to the sentence imposed by the Magistrate's Court of Nausori, Criminal Case No. CF 499 of 2015.
- [6] Aggrieved by this Order, the Appellant submitted an Appeal against his conviction and sentence. Since the Appeal was been filed out of time, the Appellant filed a Notice of Motion for Leave to Appeal Out of Time, which was received at the Registry of the

High Court on 6 July 2017. The said Notice of Motion was supported by an Affidavit of the Appellant.

- [7] When the matter was called before me on 26 July 2017, it was submitted by Learned Counsel for the Respondent that the State makes no contention to the issue of enlargement of time to hear this appeal.
- [8] The Appellant filed the Appeal against his conviction and sentence on the following grounds:
- (i) That the Learned Magistrate erred in law when she allowed a guilty plea to be entered by the defence counsel on behalf of the Appellant in his absence.
 - (ii) That the Learned Magistrate erred in law and fact when she proceeded to sentence the Appellant without confirming his plea upon his appearance on the date of sentencing.
 - (iii) That the Learned Magistrate erred in law and fact when she failed to suspend the Appellant's sentence.
 - (iv) That the sentence is harsh and excessive given all the circumstances of the case.
- [9] It has been submitted by Counsel for the Appellant, that after perusing the Court Record, the Appellant will not be arguing Grounds 1 and 2 (above) regarding conviction. The Appellant will only be arguing against the sentence imposed on him.
- [10] Both Counsel for the Appellant and the State filed written submissions, and also referred to case authorities, which I have had the benefit of perusing.
- [11] It is worth mentioning that the Appellant appealed against the sentence imposed on him in Magistrate's Court Nausori, Criminal Case No. CF 499 of 2015. His Lordship Justice Vincent Perera set aside the conviction and sentence and discharged the Appellant from those proceedings. [See *Robanakadavu v. State* [2017] FJHC 483; HAA 16 of 2017 (3 July 2017)].

Law and Analysis

[12] 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)."*

[13] 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."*

[14] 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.

[15] However, in this case, the Learned State Counsel has submitted, that both the conviction and sentence against the Appellant be quashed. The basis for this contention is that from the facts of the case, there was an implied contract entered between the Appellant, as a borrower, and the complainant, as a lender. Subsequently, there was a breach of this implied contract by the Appellant. The correct remedy for this breach was a civil action, instead of a criminal action. Civil Courts have the powers to enforce judgment debtor summons against defaulters.

[16] The State submits that the issue of borrowing money and making arrangements to pay is purely civil in nature and police intervention is not the appropriate forum to recover debts between a willing lender and borrower. The issue of not repaying the debt within the time frame stipulated does not amount to general dishonesty causing a loss. It amounts to contractual breach, whether implied or expressed, and the correct forum to recover the said money is through civil proceedings.

[17] I consider it appropriate to examine the above submission of the Respondent as a preliminary issue before dealing with the grounds of appeal raised by the Appellant. In this Appeal, although the Appellant is only challenging the sentence imposed by the Learned Magistrate, this Court, in its revisionary jurisdiction, can set aside the conviction if it is satisfied that the conviction is bad in law.

[18] Section 262 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") sets out the powers of the High Court on revision. The Section is re-produced below for ease of reference:

"262. — (1) In the case of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 256 and 257; and

(b) in the case of any order other than an order of acquittal, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

(3) The High Court shall not impose a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been imposed by the court which imposed the original sentence.

(4) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

[19] In the case of **State v. Ratuvou** [2002] FJHC 140; HAA 60J of 2002S (2 August 2002); Her Ladyship Madam Justice Shameem held: *"...This matter is before the High Court on an appeal against sentence. However the Court can, in its revisionary jurisdiction, quash convictions based on invalid charges."*

[20] The Appellant was convicted for General Dishonesty Causing a Loss, contrary to Section 324 (1) of the Crimes Act. The Section reads as follows:

"A person commits a summary offence if he or she does anything with the intention of dishonestly causing a loss to another person."

[21] Therefore, in order for the prosecution to prove the charge of General Dishonesty Causing a Loss, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 22 November 2012);
- (iii) At Nasouri, in the Central Division;
- (v) Obtained from Mikaele Vunituraga the sum of \$11,000, but failed to pay back the said amount within the agreed period of two weeks (the relevant conduct);
- (vi) With intention;
- (vii) Of dishonestly causing loss to the said Mikaele Vunituraga.

[22] The term 'intention' has been defined at Section 19 of the Crimes Act to mean:

"(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events."

[23] Therefore, it must be proved by the prosecution that at the time of taking of the sum of \$11,000 the Appellant intended to dishonestly cause loss to the complainant, Mikaele Vunituraga.

[24] The Summary of Facts filed in this case reads as follows:

"On the 6th day of February, 2013, Mikaele Vunituraga [A-1] 36 years, self-employed of Lot 9 Dilkusha Road, Nausori reported that one Jona Robanakadavu [B-1] 45 years, self-employed of Naduru Road failed to return the \$11,000.00 that he had borrowed.

On the 22nd day of November 2012, [A-1] lent [B-1] \$11,000.00 as [B-1] constantly asked for [A-1] to help him out with a loan. [A-1] lent the money to [B-1] because [B-1] had promised to return the whole sum in 2 weeks' time. After the completion of the 2 weeks, [A-1] approached [B-1] and

asked for the money owed to him but [B-1] stated that he needed more time. [A-1] agreed and gave [B-1] another week for the payment to be done. After the additional week [A-1] asked [B-1] to return the money, [B-1] made excuses of being unable to pay. [A-1] checked with [B-1] on many occasions and after [B-1] defaulted on many occasions, [A-1] reported the matter at the Nausori Police Station.

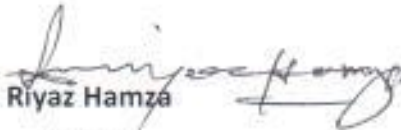
[B-1] was then located, arrested and interviewed under caution in which he admitted to taking the money in question (s) 25 to 30 and further stated that he is unable to pay back the amount because he could not afford to in question 38. [B-1] was then charged for General Dishonesty causing loss contrary to Section 324(2) of the Crimes Decree (Act) No. 44 of 2009. [B-1] was then bailed for the Nausori Magistrates Court on 25 September 2013. Full some has been paid to [A-1]."

- [25] It is clear from the above Summary of Facts that the complainant had 'lent' the sum of \$11,000.00 to the Appellant; and that the Appellant had 'borrowed' the said sum of money from the complainant. The use of the terms 'lent' and 'burrowed' clearly indicates that this was purely a loan transaction or a transaction of a civil nature. The Appellant is said to have promised to return the whole sum in 2 weeks' time, but had failed to do so. Merely because the Appellant could not pay back the loan within the stipulated time period it does not mean that he intended to dishonestly cause loss to the complainant.
- [26] Therefore, I agree with the views of the Learned State Counsel in this matter.
- [27] Considering all the facts and circumstances of this case, I am of the opinion that the charge against the Appellant is invalid and as such the conviction is bad in law.
- [28] In the circumstances, I exercise the revisionary jurisdiction of this Court under Section 262(1) of the Criminal Procedure Act to set aside the conviction and sentence imposed by the Learned Magistrate in Magistrate's Court of Nausori and order that the Appellant be discharged from these proceedings forthwith.

Conclusion

[29] In the light of the above, this Appeal is allowed.

[30] The conviction and the sentence entered in the Magistrate's Court of Nausori Criminal Case No. 531 of 2013 is set aside; and the Appellant is discharged.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitors for the Appellant

: Vaniqi Lawyers, Suva.

Solicitors for the Respondent

: Office of the Director of Public Prosecutions, Nausori.