

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 014 of 2018

STATE

Appellant

v

WAISELE LIOLEVU
SEREANA LEWANUYA

Respondents.

Mr. J. Niudamu for the State
Miss Vulimainadave (L.A.C) for the Respondents.

Date of Hearing : 13 December 2018
Date of Judgment : 14 December 2018

JUDGMENT

- 1.] The two Respondents were charged in the Magistrates Court at Lautoka with one count of Personation and twenty-seven (27) counts of obtaining a financial advantage .
- 2.] On 25th December 2015 both accused entered pleas of guilty to all charges and on 10th January 2018, they agreed a set of facts put to them and were convicted.
- 3.] They were sentenced on the 26th January 2018, after the Magistrate had received a mitigation letter from each of them giving him their address and phone number.
- 4.] The Magistrate in sentencing each of them on each charge declined to enter a conviction and released them.
- 5.] The State appeals this outcome and would have this Court set aside the sentencing orders made below and sentence the Respondents afresh.

- 6.] The facts of the case are that both these Respondents were offered posts as United Nations agents by a Mr. Heathrow. They were to be working as agents of UNICEF offering villagers affected by Cyclone Winston the chance of having solar panels installed in the homes.
- 7.] The two Respondents travelled to Matacawalevu Village in the Yasawas where they presented their proposal to the Turanga-ni-koro. They said that they were representing UNICEF. The Turanga-ni-koro arranged a meeting of all his villagers and the Respondents told them they could obtain solar panels on the condition that they paid an upfront fee of \$40 per household. 27 villagers paid the \$40, never to see the Respondents nor the panels again. The Respondents returned to Viti Levu and were unable to contact or see Mr. Heathrow again, so they decided to return the money to the villagers. Alas, the matter had already been reported to the Police.
- 8.] Counsel for the Defense submits that the 27 obtaining charges are wrongly charged and that they should have been charges of obtaining a financial advantage by deception contrary to section 318 of the Crimes Act 2009. Unfortunately defense counsel has fallen in error because Counsel for the State has mistakenly referred to the charges wrongly in his written submission.
- 9.] The fact is that the charges are Obtaining Financial Advantage contrary to section 326 of the Act, which is of course a legitimate charge although section 318 would have been far more appropriate.
- 10.] The maximum penalty for an offence of Obtaining Financial Advantage is 10 years imprisonment .
- 11.] The Magistrate started his sentence by identifying the tariff sentences for Impersonation where he said that there was none and then proceeded to identify the Tariff for Obtaining Financial Advantage by Deception which was the wrong offence. He then purported to pass sentences under this erroneous foundation and having decided on what he perceived to be appropriate sentences (18 months for the impersonation and 12.6 months for the obtaining,) he finished by setting them aside, ordering no convictions ,and discharging both accused.
- 12.] His rationale for this he states is that *"were there no Mr Jackson Heathrow there would be no offence committed. You each deserve a second chance"*

- 13.] This is tantamount and as absurd as saying "were there no Hitler there would have been no second world war"
- 14.] The fact is there **was** a Mr. Heathrow and there **were** offences committed.
- 15.] It is no defense in law to say that you were an innocent dupe of a fraudster. Duress is a defense in law but not gullibility.
- 16.] These two respondents had strong mitigation for their offences but not so strong as to warrant discharge without conviction.
- 17.] In the light of the sentences being cast for the wrong offence and for the unwarranted discharge this Court will set aside the orders passed below and sentence afresh pursuant to section 256(2) of the Criminal Procedure Act 2009.
- 18.] The maximum penalty of Impersonation is 12 months imprisonment . For that offence I sentence each of the accused to a term of imprisonment of 4 months for the first count.
- 19.] The maximum penalty for obtaining financial advantage (s.326) is 10 years imprisonment and the tariff should be akin to a section 318 offence that is a tariff of 2 to 5 years with the upper range reserved for sophisticated and well planned operations.
- 20.] For each of these obtaining offences I take a starting point of two years imprisonment at the lower end of the tariff. For the aggravation of duping unsophisticated villagers who would never think to ask for proper identification, I add a further 12 months.
- 21.] The first respondent is 32 with a clear record. He has worked as a chef in one of Fiji's best hotels; in fact giving that up for the opportunity to "work for the U.N.". He is a member of a large family and is one of the main providers of their livelihood. He was led astray by "Mr. Heathrow" who made him promises of lucrative work in Australia once the solar panel project was complete. When he realized the enormity of the deception, he went with the other Respondent to try and repay the monies taken.. He is most remorseful. For these mitigating features I deduct two years leaving the interim sentence for the first Respondent to be 12 months.

22.] In cases where a former accused has been at liberty either after an acquittal or an unconditional discharge, he or she is in the reasonable expectation that his trials are over and the matter put behind him/her. To suddenly thereafter be put in peril of incarceration for his crimes must be a very stressful and traumatic state. To compensate for shattering that reasonable expectation I further reduce the sentence by 6 months. This means that the first respondent will serve a sentence of 6 months concurrently for each of the 27 counts of Obtaining Financial Advantage and these sentences will be served concurrently with the sentence for impersonation.

23.] The second respondent is 29 years of age. She too has strong mitigation in that she pleaded guilty, she tried to return the money, she is remorseful. She is in the final years of study to be a Primary School teacher. I adopt the same sentencing process adopted for the first respondent and sentence her to similar terms for the offences; that is 4 months for the Impersonation and 6 months for each of the Obtaining Offences. All sentences are to be served concurrently.

24.] Orders.

1. The appeal succeeds.
2. The sentences passed below are set aside and new sentences passed.
3. Both Respondents are sentenced to 4 months imprisonment for one offence of Personation.
4. Both respondents are sentenced to 6 month terms of imprisonment for 27 counts of Obtaining Financial Advantage.
5. All sentences are to be served concurrently.
6. The convictions are to be recorded.



P.K. Madigan
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P.K. Madigan
Judge
High Court Lautoka