

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 73 OF 2018
CRIMINAL MISC. NO. HAM 195 OF 2018

BETWEEN : **SANJESH PRAKASH RAM**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. Z. S. Mohammed for the Appellant.
: Mr. J. B. Niudamu for the Respondent.

Date of Hearing : 13 December, 2018
Date of Judgment : 18 December, 2018

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrates Court at Nadi for one count of general dishonesty - causing a loss contrary to section 324(1) of the Crimes Act 2009. It was alleged that the appellant on the 22nd day of May, 2014 dishonestly caused a loss of cash of \$20,000.00 the property of Ajesh Ram.

2. The appellant pleaded guilty to the charge after it was read, explained and understood by him in the Magistrates Court.
3. The appellant also admitted the summary of facts after it was read to him. The learned Magistrate after being satisfied that the guilty plea was unequivocal convicted the appellant as charged.

SUMMARY OF FACTS

4. The brief summary of facts was as follows:

The appellant was running a business namely Ram's Engineering and Fabrication Works located at the Namaka Industrial area (next to Namaka Public School). In the month of April 2014, he met Ajesh Ram, Businessman of Nadi Back Road, the complainant in this matter. After a few months the appellant told the complainant that he was selling his freehold land for \$20,000.00.

Before buying the land the complainant went to Nasau, Nadi and visited the site. The appellant showed the victim a ¼ acre of freehold land as belonging to him. After inspecting the land the complainant was interested in buying the same both agreed to get the paper work done by a solicitor. The complainant had to pay \$20,000.00 to the appellant including the solicitor's fees of \$350.00 once the sale and purchase agreement was made.

At the solicitor's office, the appellant brought a lady by the name of Bhagrati with her son namely Hari Prasad. At the lawyer's office it was revealed that the appellant had already made a sale and purchase agreement with Bhagrati for the same piece of land. At that time the

land belonged to Bhagrati. The complainant informed the lawyer's clerk that he was buying the land from the appellant.

At the lawyer's office on 27th May, 2014, the appellant signed a Statutory Declaration after sometime the sale and purchase agreement which was made between the appellant and Bhagrati was revoked or cancelled. On 22nd May, 2014, at about 5pm at the lawyer's office the complainant gave \$20,000.00 cash to the appellant before the lawyer's clerk.

A new sale and purchase agreement was made between Bhagrati and the complainant. Later, in the month of July 2017 the complainant engaged a solicitor to check his land title and found out that the application for the transfer was rejected and that the appellant had already transferred the land to his name.

5. After hearing mitigation on 11 October, 2018 the appellant was sentenced to 20 months imprisonment out of which 12 months was custodial term and the balance of 8 months was suspended for 2 years.
6. The appellant being dissatisfied with the sentence filed a timely appeal against sentence as follows:
 - (i) *That the sentence is manifestly harsh and excessive in all the circumstances of the case.*
 - (ii) *That the learned Magistrate erred in law and in fact in starting with 30 months as the starting tariff, and only reducing 6 months from mitigation factors considering that he is a first offender.*
 - (ii) *That the learned Magistrate erred in law and in fact adding an additional term of 6 months to Count 1 thereby falling into an error namely that the charge is inherently a breach of trust offence.*

- (iv) *That the learned Magistrate erred in law and in fact in failing to impose a full suspended sentence being that the sentence is under two years and full restitution was made to the complainant which was accepted in open Court before plea.*
7. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

LAW

8. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.
9. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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. AAU0015 at [2]*. 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.”*

10. From the grounds of appeal and the submissions made it is obvious that the appellant's contention is that the sentence was wrong in principle which has resulted in a harsh and excessive sentence. The appellant seeks a wholly suspended sentence.
11. All the grounds of appeal can be dealt with together.
12. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:
 - “(a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
 - (b) to protect the community from offenders;*
 - (c) to deter offenders or other persons from committing offences of the same or similar nature;*
 - (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
 - (e) to signify that the court and the community denounce the commission of such offences; or*
 - (f) any combination of these purposes.”*
13. Section 4(2) states the different factors which a court must take into account when sentencing an offender. Section 15(3) inter-alia states that sentences of imprisonment should be regarded as the sanction of last resort.
14. The maximum sentence for the offence of general dishonesty - causing loss is 5 years imprisonment. The general tariff for fraud related offence

is 18 months to 3 years imprisonment (*see State v Maciu Jimi, criminal case no. HAC 019 of 2011 (12 May, 2011)*).

15. In this case the learned Magistrate took a starting point of 30 months imprisonment to which she added 6 months as aggravating factors arriving at an interim sentence of 36 months. For mitigation and guilty plea the sentence was reduced by 16 months to 20 months imprisonment.
16. Counsel submits that the complainant was paid the sum of \$20,000.00 on 12 February, 2018 hence there was full restitution by the appellant in this regard the appellant's sentence should be wholly suspended. This court accepts that restitution is an important mitigating factor in favour of the appellant but restitution has to be made genuinely in a spirit of remorse. Genuine remorse can reduce the harshness in final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
17. In this case the learned Magistrate had accepted restitution but doubted it was genuine, the fraud had taken place on 22nd May, 2014 and the restitution was made on 12th February, 2018. At paragraph 24 of the sentence the learned Magistrate stated:

"... The transaction took place on 22nd May, 2014. Since then to 12th February, 2018 i.e. over 3 years, you personally benefitted by using the hard earned money of the complainant and until the complainant found out that you have not registered the land title under his name..."

18. Counsel for the appellant further states that at latter part of paragraph 24 the learned Magistrate had taken into account an irrelevant fact that the appellant had failed to offer any interest payment for using the sum

of \$20,000.00 for over 3 years and 9 months. On this basis the sentence should be reduced.

19. This submission is misconceived when the learned Magistrate made the above comment she was discussing the fact whether the restitution was genuine or not and at paragraph 24 of the sentence she went at length to explain why the restitution was not an expression of genuine remorse by the appellant.
20. In any event the above comments of the learned Magistrate came after she had already arrived at 20 months imprisonment at paragraph 13 of the sentence so the issue of non-payment of interest was immaterial to the issue of final sentence.

HIGH STARTING POINT

21. The appellant argues that the learned Magistrate erred in selecting 30 months imprisonment as a starting point which resulted in an excessive punishment. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in *Laisiasa Koroivuki v The State, criminal appeal No. AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:

"[26] 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.

[27] 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.

22. Considering the tariff of 1 ½ years to 3 years imprisonment for fraud related offences, the starting point of 30 months appears to be on the higher side of the scale, however, the final sentence does come within the tariff which is an appropriate punishment considering the circumstances of the offending. This case was a well-planned, premeditated, breach of trust fraud on an unsuspecting victim where the culpability of the appellant is very obvious.

23. The Court of Appeal in *Sachindra Nand Sharma vs. The State, Criminal Appeal No. AAU 48 of 2011* at paragraph 45 had stated that an Appellate Court does not use the same methodology of sentencing as the Sentencing Court. It must be established that the sentencing discretion had miscarried by reviewing the reasons for the sentence or by determining the facts the sentence was unreasonable or unjust:

“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.”

24. The final sentence correctly reflects the criminality involved which is just and reasonable in the circumstances of the offending. The amount involved is also substantial.

25. In *Suresh Lal v State, Criminal Appeal Case No. HAA 020 of 2013* at paragraph 17 it was stated:

“It is trite law that the ‘starting point’ of a sentence to be within the range of tariff of a particular offence. If the sentencing court deviates from this principle, it should only be in exceptional circumstances. Reasons for such a deviation must be provided as it would be clear to the public, prosecution and the accused as to why the court took a different approach in a given scenario. It is an objective approach towards the offence and the offending background when selecting a ‘starting point’... Identification of the correct tariff and the selection of a proper ‘starting point’ play a pivotal role in the sentencing process.”

26. The *Koroivuki principle* suggests that as a matter of good practice the starting point should be picked from the lower or middle range of the tariff. However, in my view this may not always be possible since each case is dependent upon its own facts.

27. In this case the starting point of 30 months imprisonment selected by the learned Magistrate was within the tariff of the offence of fraud. This court in fairness to the appellant also looks at the aggravating factors

which has been added to enhance the starting point and whether the starting point and the subsequent addition of 6 months for aggravation amounts to double counting of aggravating factors causing a substantial miscarriage of justice.

28. The starting point although on a high scale was within the tariff of the offending and the addition of six months does not bring the interim sentence outside the tariff range. The appellant is lucky that the learned Magistrate enhanced the sentence for aggravation by 6 months only considering the serious nature of the offending, the manner in which it was carried out and the breach of trust.
29. The summary of facts does not give a good picture of the appellant in particular he had approached the complainant knowing the fact that he was not the owner of the property, accepting payment when he was not entitled to receive the money in the first place, keeping the money for his personal use for a least 4 years and not transferring the land to the complainant after he became the owner.
30. The facts of the offending reek of deliberate deception and misrepresentation and breach of trust of the highest order. No substantial miscarriage of justice can therefore be attributed to the starting point and the aggravation used in the sentence.
31. A sentence is not based on a mathematical calculation the task of a Sentencing Court is not to add and subtract from an objectively determined starting point but to balance the various factors and make a value judgment as to what is the appropriate sentence in all the circumstances of the case.

32. The learned Magistrate in this case had complied with the purposes of sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2) of the Sentencing and Penalties Act. The learned Magistrate did not err in the exercise of her sentence discretion.

PARTIAL SUSPENSION OF SENTENCE

33. The appellant further submits that the sentence should be wholly suspended since he has paid back the sum of \$20,000.00, he was 47 years old at the time of the offending, first offender and had pleaded guilty.
34. The discretion to suspend a term of imprisonment must be exercised judicially after identifying special reasons for doing so.
35. In order to suspend the sentence of the appellant this court has to consider whether the punishment is justified taking into account the seriousness of the offence committed by the appellant. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

“Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender’s sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for

rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?”

36. This court accepts that there are some factors in favour of the appellant such as he was a first offender, a person of generally good character who committed an isolated offence, pleaded guilty, amount of money obtained was paid to the victim, and he had cooperated with police. On the other hand, the appellant has committed a serious offence after much planning, premeditation and breach of trust, no genuine remorse was expressed when the restitution was made after about 4 years of the offending which requires the imposition of a penalty to deter others and to send a signal to the community and like-minded people that the court will not tolerate such behaviour.

GENUINE REMORSE

37. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not the same thing. An early guilty plea could form part of that process but the sentencing court then has the responsibility to assess the early guilty plea along with other factors before arriving at a conclusion.
38. The Supreme Court of Fiji in *Gordon Aitcheson v State, criminal petition no. CAV0012.2018 (2 November 2018)* made a very pertinent observation about genuine remorse at paragraphs 19 and 20 as follows:

*“[19] Accepting the inevitable, namely conviction, will not count as remorse: **Netani Domanibitu** CAV0004 of 2018 24th August 2018. Nor would negotiations for reduction of the charge be suitable evidence of the same (see Court of Appeal AAU129 of 2013).*

[20] The sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of the mitigation. That assessment is very much a role for the trial judge, which I do not believe this court should usurp. The judge before whom the plea is tendered, the summary of facts is read, and the mitigation is urged in the presence of the Accused, is in a much stronger position to assess remorse and whether it is sincere and acceptable.”

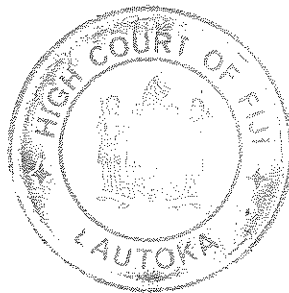
39. It should also be noted that when a person pleads guilty it cannot automatically be taken as demonstrating a genuine remorse. In this case the learned Magistrate had not accepted remorse as a mitigating factor particularly when restitution was effected after 4 years of the offending.
40. After carefully weighing the factors in favour of the appellant and the serious nature of the offence committed, I am compelled to state that special and general deterrence factor has been taken into account in imposing a custodial sentence of 12 months imprisonment. In rehabilitating the appellant his balance term of imprisonment was partially suspended by 8 months.
41. In view of the above, there is no error made by the learned Magistrate in the exercise of her discretion not to suspend the sentence of the appellant wholly. The learned Magistrate correctly took deterrence factor by not wholly suspending the term of imprisonment considering the seriousness of the offending.
42. There is no injustice caused to the appellant by the exercise of the learned Magistrate’s discretion not to wholly suspend the sentence.

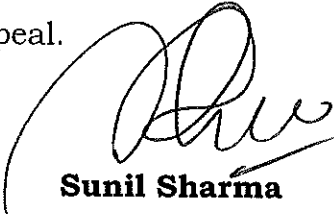
CONCLUSION

43. Taking into consideration, the above reasons there is no error made by the learned Magistrate in the exercise of her sentence discretion. The final sentence is within tariff and the discretion to partially suspend the sentence was correctly exercised which will assist in the rehabilitation of the appellant. The sentence is appropriate punishment considering the circumstances and the nature of the offending arising out of a well-planned, breach of trust fraud involving a substantial amount of money. As a matured businessman the appellant should have known that the consequences of his unlawful act would be serious.
44. The grounds of appeal against sentence are dismissed due to lack of merits.

ORDERS

1. The appeal against sentence is dismissed.
2. The sentence of the Magistrates Court is affirmed.
3. 30 days to appeal to Court of Appeal.




Sunil Sharma
Judge

At Lautoka
18 December, 2018

Solicitors

Messrs Zoyab Shafi Mohammed Legal for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.