

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. 122 of 2017

EPELI SAULEIROGO

V

THE STATE

Counsel : Appellant in person
Mr. A. Datt for the State

Date of Hearing : 23rd January and 13 February 2018
Date of Judgment : 21st February 2018

JUDGMENT

- 1.] The Appellant (“the accused”) was convicted in the Magistrates Court in Ba of one count of obtaining financial advantage by deception, contrary to s. 213 of the Crimes Act 2009. He entered a plea of guilty on the 6th September 2017, some 4 years and 2 months after his first appearance on the charge. He was sentenced on the 13th September, 2017 to a term of imprisonment of 2 years with a minimum term to be served of 18 months.

- 2.] The appellant seeks to appeal that sentence of the following grounds:
 - (1) that the learned Magistrate failed to take into account that the accused had harvested 20 tonnes of the complainant’s cane.
 - (2) the learned Magistrate failed to take into account restitution of \$53 paid to the complainant.

- (3) The Magistrate failed to allow discount on plea of guilty
- (4) The sentence is harsh and excessive in all the circumstances.

- 3.] The brief facts of the case are that on 29 May 2013 at about 11 am at Sugar Cane Growers, Rarawai, Ba the complainant, a 65 year old cane farmer entered into an agreement with the accused that the accused would cut his cane in the season. The accused took \$200 from the farmer. Thereafter, the accused avoided the farmer and refused to cut the cane as agreed. The matter was reported to the Police, the accused located, interviewed under caution and charged.
- 4.] Subsequent to the plea the mitigation advanced by the unrepresented accused according to the record was:
 - (i) plea of guilty and remorse
 - (ii) a payment of \$53 into the court registry as restitution to the complainant.
- 5.] The maximum penalty for the offence is a term of imprisonment of 10 years and the sentencing tariff is between 2 and 5 years with the lower end of the band for unsophisticated opportunistic fraud and the higher for premeditated more sophisticated frauds. (See **Sharma** [2010] FJHC 623, HAC 122.2010 Lbs.)
- 6.] In his sentence the learned Magistrate took a starting point at the bottom end of the tariff, a point of 24 months. He increased it by 12 months for aggravating features which he claimed to be a breach of trust. He reduced the sentence by 4 months for what he said was mitigation and discounted a further 8 months

for the plea of guilty, arriving at a final sentence of 24 months or 2 years, with a minimum term of 18 months.

- 7.] The Magistrate finally ordered that the \$53 be paid to the complainant.
- 8.] In opposing the appeal, counsel for the State has filed well researched written submissions which have been very helpful.

Ground One

- 9.] The Appellant claims that he harvested 20 tonnes of the complainant's cane and that was never taken into account by the Magistrate.
- 10.] The Magistrate can only take into account matters that are placed before him, and it was never claimed by the accused in the Court below that he did in fact cut cane for the farmer. Claims to the contrary are not reflected in the Court Record.
- 11.] This ground of appeal does not succeed.

Ground 2

- 12.] The appellant submits that the Magistrate did not take into account the \$53 paid into Court by way of compensation.
- 13.] The Magistrate was well aware of the \$53 because he says in his sentence; "Court Registry is directed to contact the complainant immediately and retribute the said sum of \$53 to him without delay"

14.] Payment of monies by way of restitution is not a shield to criminal process in cases of theft or fraud.

15.] In **Jocelyn Deo**, HAA 0008 of 2005) Shameem J. said:

“The issue is not just restitution, the issue is true and sincere remorse, an early guilty plea ad confession, and restitution to the victim as evidence of such remorse and apology”.

16.] Having been charged with obtaining \$200, \$53 is not showing remorse. It is a mystery as to why that sum in particular was paid and this Court is not helped by the very exiguous notes of the Magistrate first handling this case. On a couple of days when the accused was not on bench warrant, the then Magistrate just wrote \$53, and nothing more. Sparse notes written in Court below do not help.

17.] Restitution before a case comes to Court may well be of some benefit to an accused in mitigation but restitution during the Court process sends a message of solicitation to a lenient sentence.

18.] It is axiomatic that restitution will only operate as a mitigating factor and not a defence to the charge.

19.] In the absence of any evidence on the record, this ground of appeal too must fail.

Ground 3

20.] The Appellant submits that he was deprived of the 1/3 discount for a plea of guilty.

21.] It has been sentencing practice in Fiji to afford a one third discount to all those who enter a plea of guilty before trial. The Court of Appeal said in Poate Rainima CA AAU0022 of 2012)

It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be first valid and to be applied in all future proceedings at first instance".

22.] It must be stressed that the operative phrase in this pronouncement is "earliest opportunity".

23.] A plea made four years after first call is not "earliest opportunity". He was very fortunate to receive a discount of the 8 months that he did.

24.] This ground of appeal fails.

The Magistrate has sentenced the accused quite properly, although leniently without error of law, and the frivolous appeal is dismissed.



Paul K. Madigan

Judge.

At Lautoka High Court

21st February 2018