IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAA NO. 42 OF 2016

BETWEEN : RAKESH GOUNDAR

Appellant

AND : THE STATE

Respondent

Counsel : Appellant in person
Ms Kiran for Respondent

Date of Judgment : 25th November, 2016

JUDGMENT

Introduction

1. This Petition of Appeal was filed by the Appellant against the sentence delivered by the Learned Magistrate of Lautoka on the 10th of February 2016 on the following grounds, *inter alia,*

   i) *The Learned Magistrate erred in law and by giving other deduction as the sentence was below 2 years which could be given a suspended sentence,*

   ii) *The sentence of 20 month is manifestly harsh and excessive in all circumstances of the case,*

   iii) *The learned Magistrates do not consider the time spent in remand,*

   iv) *The learned Magistrate erred in law in fact never took into consideration when sentencing the appellant the relevant matters but in fact took irrelevant matters into consideration.*

2. Pursuant to the service of the Petition of Appeal, the Appellant and the Respondent appeared in court on the 22nd of September 2016. The Appellant sought time to obtain assistance from the Legal Aid Commission. Subsequent to several adjournments, the Appellant informed the court that he wishes to appear in person. I then directed the Appellant and the Respondent to file their respective written submissions, which they filed as per the direction. The Appellant and the Respondent informed the court that they rely on the written submissions and do not wish to make any oral submissions.

3. Having carefully considered the respective written submissions filed by the parties, and the record of the proceedings of the Magistrates Court, I now proceed to pronounce my judgment as follows.

Background

4. The Appellant was charged in the Magistrate court for one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Decree. The Appellant was first produced before the Magistrates court on the 11th of July 2016. The Appellant sought time to obtain Legal Aid assistance, hence the matter was adjourned till 26th of July 2016. He was denied bail and remanded in custody. The Appellant pleaded guilty for the offence on the 9th of August 2016. The learned Magistrate then convicted and sentenced the Appellant for a period of 20 months imprisonment on the 23rd of August 2016. Aggrieved with the said sentence the Appellant has filed this appeal.

5. The Appellant in his written submission has only discussed two grounds of appeal, they are that;

   i) The sentence is manifestly harsh and excessive,

   ii) The learned Magistrate erred in failing to consider the time spent in remand custody prior to the sentence,

6. The Appellant has submitted that he was planning to make a full restitution to the complainant and that fact was not considered by the learned Magistrate in the sentencing. He contended that there are substantive mitigatory grounds in favour of him, which justify a suspended sentence. Having outlined above grounds, the Appellant then submitted his family and personal circumstances in his submissions.

7. The learned counsel for the Respondent in her detailed submissions, conceded that the final sentence of twenty months is below the acceptable tariff limit. Moreover, the learned counsel admitted that the learned Magistrate erred in his sentence by not taking into consideration the time spent by the Appellant in remand custody. However, the learned counsel submitted that considering whole the circumstances of this case, the sentence of twenty months of imprisonment neither harsh nor excessive.

8. The Appellant in his reply submissions, has brought up a new issue that the charge was defective. It is not a ground of appeal that was filed with the Petition of Appeal. Hence, I do not wish to consider that issue in this judgment.

The Laws

9. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"

10. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, it states;

'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 of the relevant considerations, then the appellate court may impose a different sentence.'

11. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that;

"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".

12. Gounder JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;
ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;
iii) Whether the sentencing judge mistook the facts;
iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

Ground One

13. I now draw my attention to the first ground of appeal that is founded on the contention that the learned Magistrate erred in his sentence by not suspending the sentence, which is below two years of imprisonment. Moreover, the Appellant contended that the learned Magistrate has failed to consider that the Appellant was intending to make a full reparation to the Complainant.

14. Section 26 (1) of the Sentencing and Penalties Decree states that;

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances"

15. Section 26 (2) (b) of the Sentencing and Penalties Decree defines the jurisdiction of the Magistrates court in respect of imposing suspended sentence, where it states that;

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(b) Does not exceed 2 years in the case of the Magistrate's Court.

16. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

17. The Court of Appeal of New Zealand in **R v Petersen (1994) (2) NZLR 533, at 539**, has discussed the appropriate factors that a court should consider in suspending a sentence in an elaborative manner. Eichelbaum CJ in **Petersen (supra)** held that;

"Thomas at pp 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrence the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately".

18. Eichelbaum CJ in **Petersen (supra),** went on and further held that;

"In concluding our consideration of the principles we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of common sense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response".

19. The learned Magistrate has not specified the grounds that he has taken into consideration in imposing a non-custodial sentence. However, he has stated that this case does not warrant a non-custodial case according to the circumstances surrounded in it. Hence, I am satisfied that the learned Magistrate has considered the circumstances of this case as a whole and concluded that this case does not warrant a non-custodial sentence.

20. Justice Shameem in **State v Simeti Cakau (HAA 125 of 2004S),** has discuss the applicable sentencing approach for offences involved with breach of trust, where her ladyship found that;

"That a custodial sentence is inevitable except in those exceptional cases where full restitution had been affected, not to buy the offender's way out of prison, but as a measure of true remorse"

21. In this instance case, there is no record in the proceedings of the Magistrates' court to confirm that the Appellant has made any restitution. He has only

mentioned in his submissions in mitigation that he was willing to pay back to the Complainant. That is obviously not sufficient to satisfy the court to consider the issue of restitution in his favour.

Ground II and IV

22. For the convenient of determination, I now proceed to determine second and fourth grounds of appeals together.

23. The Learned Magistrate has accurately considered the acceptable tariff limit as Two (2) to Five (5) years' imprisonment for the offence of Obtaining property by Deception. **(State v Atil Sharma (HAC 122 of 2010L) and The State v John Cunningham Miller (Criminal Appeal No 29 of 2013).** The learned Magistrate has then selected three (3) years as the starting point. He has not considered any aggravating factors. He has then reduced 6 months for the mitigating factors and further reduction of 10 months for the early plea of guilt, reaching the final sentence of 20 months of imprisonment.

24. The final sentence of twenty months of imprisonment is in fact below the acceptable tariff limit of two (2) to five (5) years as expounded in above mentioned judicial precedents.

25. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found 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"

26. In view of the observation made by Gounder JA in **Koroivuki (supra)** if the sentence falls below the acceptable tariff limit, the sentencing court is required to provide reasons. Having carefully perused through the sentence, I do not find that the learned Magistrate has given any reasons for imposing the sentence below the acceptable tariff limit. Hence, I find that the conclusion of the learned Magistrate in this sentence is not founded on correct principles and guidelines of sentencing.

Ground III

27. The third ground of appeal is founded on the contention that the learned Magistrate erred in his sentence by failing to deduct the time spent by the Appellant in remand custody prior to the sentencing.

28. The learned counsel for the Respondent submitted that the Appellant had spent 44 days in remand prior to the sentence.

29. Section 24 of the Sentencing and Penalties Decree states that;

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.

30. Hon Chief Justice Gates in **Sowane v State [2016] FJSC 8; CAV0038.2015 (21 April 2016)** has discussed the scope of the Section 24 of the Sentencing and Penalties Decree, where his Lordship held that;

"The burden is cast upon the court. The provision is mandatory. For the court shall regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a court otherwise orders."

31. His Lordship Chief Justice Gates in **Sowane (supra)** went on and further held that;

"Uniformity of approach to sentencing procedure is important. Whilst both methods may serve the spirit of the Decree, nonetheless a preferred procedure must be decided upon.

Our attention was drawn to a recent High Court case, when the same issue came up: State v. SBN HAC 083/2010 11th April 2016. The learned judge, following the usual sentencing procedure, had arrived at the appropriate sentence. His lordship then went

on to order the remaining period (after deduction of time spent on remand) that the offender must serve. The terms of the sentence were set out as follows:

'In the result, you are sentenced to an imprisonment term of 12 years with a non-parole period of 10 years. Considering the time spent in custody, the remaining period to be served is:

Head Sentence – 05 years, 11 months and 26 days

Non-parole period – 03 years, 11 months and 26 days."

This method has the advantages of simplicity and clarity, and makes order as to the actual minimum period to be served as part of the sentencing order of the court. The interpretation and calculation is not left to Corrections. We conclude this is the proper way to give effect to section 24.

32. In this instant case, the learned Magistrate has not taken into consideration the time spent by the Appellant in remand custody.

33. Having concluded that the final sentence of twenty (20) months of imprisonment is below the acceptable tariff limit and the learned Magistrate has failed to deduct the time spend by the Appellant in custody prior to the sentencing, I now proceed to consider if there is a reason for me to intervene into the sentence imposed by the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Decree.

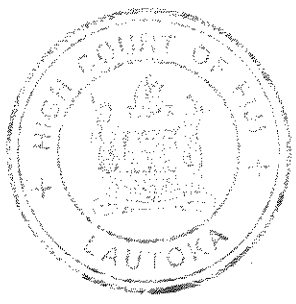
34. As expounded by the Fiji Court of Appeal in **Sharma (supra)** the court could still dismiss the appeal if the final sentence reached by the learned Magistrate falls within the permissible range, though his conclusion is founded on wrong principles and guidelines.

35. The Appellant has spent 44 days in remand custody prior to the sentencing. If the learned Magistrate in his sentence took into consideration the time spent by the Appellant in remand custody, still the sentence would not go below twenty months of imprisonment.

36. In view of these findings, I do not find any reason for me to intervene into the sentence imposed by the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Code.

37. In conclusion, I refuse this Petition of Appeal and dismiss it accordingly.

38. Thirty (30) days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe
Judge

At Lautoka
25th November, 2016

Solicitors : Office of Director of Public Prosecution