IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 18 OF 2015

BETWEEN: **APIMELEKI RAMATU MATAKA**

Appellant

AND: **STATE**

Respondent

Counsel: **Ms J. Lagilagi for the Appellant**
Mr. A. Singh for the Respondent

Date of Judgment: **27th July 2015**

JUDGMENT

Introduction

1. The Appellant was charged with 13 counts for Obtaining Financial Advantage by Deception: Contrary to Section 318 of the Crimes Decree No. 44 of 2009.

2. The Appellant in the earliest possible opportunity pleaded guilty to all the 13 counts.

3. The Appellant chose to represent himself, admitted the Summary of Facts. The learned Magistrate convicted him as charged.

4. The Appellant not being satisfied filed, Petition of Appeal on the 28th of April, 2015, against sentence hence being within the 28 days of the appealable period.

Grounds of Appeal

5. On the 7th day of July, 2015, in its submission, the Appellant by way of his Counsel raised two grounds of Appeal.

Ground 1 – That the sentence imposed by the sentencing Magistrate is harsh and excessive.

6. The maximum penalty for this offence under the Crimes Decree No. 44 of 2009 is 10 years imprisonment.

Under the old Penal Code the maximum sentence for the offence was a term of five years and the tariff was between 18 months to 3 years. Given the penalty has now doubled under the Crimes Decree, the new tariff was set by Hon. Mr. Justice Paul Madigan in ***State v Sharma*** [2010] FJHC 623; HAC 122.2010L (7 October 2010). The tariff now is 2-5 years.

7. The final sentence passed by the learned Magistrate is within the required tariff as set by the guideline judgment in respect of offence of **Obtaining Financial Advantage by Deception.**

8. In ***State v Miller*** [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014) it was held:

> *"There are two deception offences in the Crimes Decree; obtaining property by deception (Section 317) and obtaining a financial advantage by deception (Section 318).....*
>
> *"....The penalty for both offences is the same, that is ten years. Under the old Penal Code the maximum for the offence was a term of 5 years and the tariff was between 18 months to three years. As this Court stated in **Atil Sharma** HAC 122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception....*
>
> *....From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naïve or in any other way socially disadvantaged..."*

9. In ***State v Sharma*** [2010] FJHC 623; HAC 122.2010L (7 October 2010) it was held by Hon. Mr. Justice Paul K. Madigan that:

> *"The tariff under the Penal Code offence for obtaining money by deception was 18 months to three years (**Arun v State** [2009] HAA 55 of 2008, **Ateca v State** HAA 71 of 2002, **Rukhmani v State** HAA 056 of 2008). Now that the penalty under the new Crimes Decree has doubled, then obviously this tariff needs to be revisited. The tariff for obtaining a pecuniary advantage by deception should now be between 2 years and 5 years with 2 years being*

reserved for minor offences with little and spontaneous deception. The top end of the range will obviously be reserved for fraud of the most serious kind where a premeditated and well planned cynical operation is put in place."

10. Considering the objective seriousness of the offence, the learned Magistrate had selected a starting point of two years, bottom line of the tariff band set for the offence. He, in his reasoning, had taken into consideration the fact that there is little deception. I find that the starting point selected by the learned Magistrate is correct.

11. In ***Koroivuki v State*** *[2013] FJCA 15; AAU 0018.2010* (5th March 2013) the Supreme Court held:

> *"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 outside either below or higher than the tariff, then the sentencing Court should provide reasons why the sentence is outside the range."*

12. The learned Magistrate had added 16 months to the starting point on the basis that the Appellant had tarnished the image of the Police when he made a representation to the complainants that he knew someone in the Police Department who would assist them in getting their Police clearance promptly. The learned Magistrate had apparently come to such a conclusion drawing an inference that the Appellant would resort to some sort of corrupt practice by bribing the Police. However, the statement that Appellant knew someone in Police who would assist in getting the work done promptly, does not lead to the only inference that the Appellant was attempting to bribe the police or engage in corrupt practice. I find that addition of 16 months to the starting point has been done on a wrong premise. However, after adjusting for the mitigating and aggravating factors, the final term has been set within the tariff and at the minimum sentence reserved for minor spontaneous cases with little deception. The learned Magistrate has not violated any sentencing principle when he imposed two years.

13. **Ground 2: That the Learned sentencing Magistrate erred in not taking into consideration his mitigation factor that he was not in a position to pay.**

The learned Magistrate in his sentencing remarks has highlighted that further time was granted to the Appellant to make full restitution. The Appellant had indicated to the Magistrate that he had joined another hotel and was earning FJD 500 fortnightly. He had asked for one month to pay the total amount to all the complainants. Considering the financial difficulty of the Appellant, the learned Magistrate had given nearly six months to make full restitution. The Appellant had failed to pay a single penny during that period. The learned Magistrate had in fact considered the financial difficulty of the Appellant and given ample time to make restitution. In view of the failure to comply with the undertaking given to Court, the Appellant had shown that he was not entitled to any mitigation on that account.

14. The Appellant has also submitted that the learned Magistrate had wrongly considered the previous record of the Appellant which included previous convictions of more than 10 years old. I find that the previous record had not made any impact on the final outcome. Even though the learned Magistrate had in his sentencing remarks mentioned about the Appellant's previous record, he had not considered it as an aggravating factor. The Appellant had not received any discount on that account as he had already been given the fullest concession possible within tariff which is two years.

15. The learned Magistrate has imposed the sentence subject to non-parole period of 18 months. The Appellant has indicated to this Court that he will find means and is prepared to make full restitution if given a chance. In view of his willingness to restitute, I reduce the non-parole period to 12 months in the event of full restitution. The Appellant is now eligible to parole after 12 months if he can provide proof of full repayment to Complainants.

Conclusion

16. The sentence of the learned Magistrate is affirmed subject to variation of non-parole period, conditional upon full restitution.

HIGH COURT OF FIJI LAUTOKA

Aruna Aluthge
JUDGE

AT LAUTOKA
On 27th July 2015

Solicitors: **Office of the Director of Public Prosecution for State**
Office of the Legal Aid Commission for Accused