IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 40 OF 2015

BETWEEN : KRISHNA MURTHI

Appellant

AND : STATE

Respondent

Counsel : Ms. P. Chand for the Appellant
Mr. A. Singh for the Respondent

Date of Hearing : 30th March, 2016
Date of Ruling : 06th May, 2016

JUDGMENT

Introduction

1. The Appellant pleaded guilty to several counts of Obtaining Property by Deception contrary to Section 317 (1) and one count of Obtaining Financial Advantage by Deception contrary to Section 318 of the Crimes Decree No. 44 of 2009 at the Magistrates Court of Fiji at Nadi in five different cases and was convicted.

2. Upon conviction, Appellant was sentenced to total of 11 years and one month' imprisonment. Details of the the sentences in each case are as follows:

I. CF 387 of 2011- 23 months' imprisonment with non parole period of 18 months.

II. CF 933 of 2013- 35 months' imprisonment with non parole period of 30 months.

III. CF 276 of 2014 – 17 months' imprisonment with non parole period of 12 months.

IV. CF 278 of 2014 – 23 months' imprisonment with non parole period of 18 months.

V. CF 299 of 2014 – 35 months' imprisonment with non parole period of 30 months.

3. Being dissatisfied with his sentence, the Appellant filed this timely appeal on the following grounds:

Grounds of Appeal

4. The Appellant has set out the following grounds of Appeal:

a) That the learned Magistrate erred in law and in fact when he failed to deduct the time, the correct time Appellant spent in remand.

b) That the learned Magistrate erred in law and in principle when he failed to consider the principle of totality whilst sentencing the Appellant.

c) That the learned Magistrate erred in law and in principle when he sentenced the Petitioner to a term of imprisonment considering the fact that the:

1. Appellant is a first offender
2. Appellant has pleaded guilty at the earliest possible opportunity
3. Appellant is remorseful and seeks court's forgiveness.

d) That the learned Magistrate erred in law and in fact when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellant.

e) That the learned Magistrate erred in law and in principle when he failed to justify the imposition of consecutive sentence considering the circumstances of the Appellant.

Law

5. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"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 relevant consideration, then the Appellate Court may impose a different sentence. This error 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)".*

6. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae:***

> *"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.

Analysis

Ground (a) : That the learned Magistrate erred in law and in fact when he failed to deduct the time, the correct time Appellant spent in remand.

7. The Appellant was sentenced in 5 different cases by the same Magistrate on 22nd September, 2015. The learned Magistrate in all 5 different cases deducted 7 months from the sentence.

8. The Appellant was remanded in three cases (276 of 2014, 278 of 2014 and 299 of 2014) on 14th April, 2014. In 933 of 2013, he was remanded on 17th April, 2014 and in 387, he was remanded on 1st of May, 2014. Appellant pleaded guilty to all the charges on 1st of July, 2014 in all cases filed against him. His sentence was pending since then for nearly seven months and was granted bail on 24th October, 2014. Since his sureties were not acceptable to court, (being one surety is not his own pastor) and he could not furnish $ 1000 cash bail, he could not come out and was in remand till 6th of January, 2015. Although Appellant was granted bail on 24th October 2014, he had been in remand for nearly nine months, until he was actually released on the 6th of January, 2015.

9. The learned Magistrate, when he imposed the sentence, deducted only seven months and had not deducted the total period of nearly nine months that the Appellant had been in remand.

10. Section 24 of the Sentencing and Penalties Decree provides:

"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.

11. Learned Magistrate did not give any reason why the total period the Appellant spent in remand was not deducted from his sentence. Therefore, this ground has merit and succeeds.

Ground (b) : That the learned Magistrate erred in law and in principle when he failed to consider the principle of totality whilst sentencing the Appellant.

12. In **Vukitoga v State** [2013] FJCA 19; AAU0049.2008 (13 March 2013) the Court of Appeal discussed this principle comprehensively. Before applying it to the present case, it is appropriate to reproduce His Lordship's discussion on the relevant law since it is very much relevant to resolve the issue before me.

"The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. (para 10)

In Mill v The Queen [1988] HCA 70 the High Court of Australia in its judgment cited D.A.Thomas, Principles of Sentencing (2nded.1979) pp.56-57 as follows:

> *"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it*

looks wrong'; "when....cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences'."

The Court further cited Ruby, Sentencing (3rd ed.1987),pp.38-41.

"Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise by appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

The Court further stated that "The Totality principle has been recognised in Australia. In Knight (1981) 26 SASR 575 the Full Court of the Supreme Court (SA) (Walters, Zelling and Williams JJ) said, in a joint judgment (at 576):

"It seems to us that when regard is had to the totality of the sentences which the applicant is required to undergo, it cannot be said that in all the circumstances of the case, the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven criminal conduct or with his due deserts. To use the language of Lord Parker LCJ in Faulkner (1972)56 Cr App R 594 at 596, at the end of the day as one always must, one looks at the totality and asks whether it was too much'."(para 11)

In Fiji in Tuibua v The State [2008] FJCA 77 the Court approved of the principles set out in Mill v The Queen (supra). Further in Taito Rawaqa v The State [2009] FJCA 7 in a case where the Accused was charged similarly as in the present case the totality principle was discussed and at page 3 of the Judgment stated:

> *"That the totality principle is so well known now that it is necessary only to make a passing reference to it. It requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interests of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct." (para 12)*

13. The totality principle is a recognized principle of sentencing formulated to assist a sentencer when sentencing an offender for multiple offences. The Appellant was charged with several counts in five different cases. Learned Magistrate considered the maximum sentence, applicable tariff, starting point, aggravating and mitigating factors in each case separately. However, when he sentenced the Appellant he appears to have considered all the cases as a whole when he stated, in each case, the following:

> *"You have other cases as well today for the similar offences and the sentence are passed in those cases as well. Considering all the circumstances I am of the view that, this sentence to run consecutively to make the punishment effective".*

14. Some cases that were pending before another magistrate had been transferred citing 'in the interest of the accused and in the interest of justice' to the learned Magistrate who sentenced the Appellant. The Appellant pleaded guilty to the counts in all five cases at once and expected the learned Magistrate to approach his sentence holistically.

Therefore, the learned Magistrate should have paused for moment and considered the totality of the aggregate sentence in order to ensure that it is just and appropriate. Sentencing is never a mere matter of arithmetic. The court must always step back and take a last look at the total just to see if it looks wrong.

15. The Appellant had been convicted on several counts of Obtaining Property by Deception under Section 317(1) of the Crimes Decree 2009. The maximum penalty is ten years' imprisonment while the tariff is set between 2 and 5 years [***State v Miller*** (2014) FJHC 16; Crim. App. (31 January 2014)]. The Appellant was also convicted on one count of Obtaining Financial Advantage by Deception which carries the same maximum penalty and the tariff range. The total sentence of imprisonment spanning 11 years and one-month imposed on the Appellant exceeded the maximum penalty prescribed for the offence, let alone the top edge of the tariff, when the the sentences in each case were ordered to run consecutively.

16. Before moving on to consider whether each sentence is properly calculated in relation to the offence for which it is imposed, it is pertinent to consider whether, in accordance with the principles governing consecutive sentences, the learned Magistrate was justified in ordering the sentences to run consecutively as is raised by the Appellant in ground (e).

Ground (e)-That the learned Magistrate erred in law and in principle when he failed to justify the imposition of consecutive sentence considering the circumstances of the Appellant.

17. Section 22 of Sentencing and Penalties Decree 2009 does give the sentencing Judge or Magistrate a discretion to choose between concurrent and consecutive sentences. However, he or she must exercise the same in a judicial manner and this would require an enquiry into whether the circumstances warrant a consecutive sentence or a concurrent sentence. In this exercise, he or she is required to consider the factors relating to the application of totality principle before making orders for consecutive sentence.

18. In **Visawaqa v. The State** [2003] FJHC 138, 23rd September 2003; Pathik J said that:

> *"The power to order sentences to run consecutively is subject to two major limiting principles, which may be called the "one transaction rule" and the "totality principle" **(Thomas: Principles of Sentencing 2nd ED.p.53).** It does not mean that consecutive sentences cannot be imposed, so long as the overall sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of aggravating features **(Regina v. Johnson (Thomas), The Times 22.5.95).***

19. It is said in **Archbold [2012] p. 732,** that consecutive sentences should not be imposed for offences which arise out of same transaction or incident, whether or not they arise out of precisely the same facts, but much is left to the discretion of the court. (**R. v Lawrence,** 11 Cr. App. R (S) 580 CA) It is only in exceptional circumstances that a court will impose consecutive sentences if the offences arise from the same transactions. (**R v. Wheatley**, 5 Cr. App. R. (S) 181 CA).

20. It is clear that the offences for which sentences were imposed on the Appellant did not arise out of same transaction or incident. However, as described in paragraph 13 above, learned Magistrate adopted a holistic approach when he considered all the cases together and ordered the sentences in five distinct cases to run consecutively. Therefore, he should have applied the totality principle and reviewed the aggregate term and then decide, when the offences are looked at as a whole, whether it is desirable in the interests of justice to impose consecutive sentence and the total sentence imposed is fair, correct and not unduly harsh.

21. In **Vukitoga** *(supra),* the Court held that a concurrent sentence should be imposed and that if the Court intends to impose a consecutive sentence, then the Court must give a justifiable reason to do so. In this case, the learned Magistrate imposed a consecutive sentence without any reason noted.

22. In my opinion, Appellant's personal circumstances and the circumstances under which he had to plead guilty to the charges, some of which arose out of breach of contract situations, the sentence imposed by the learned Magistrate with consecutive effect is harsh and excessive in terms of Section 15(3) of the Sentencing and Penalties Decree. Therefore, the grounds (b) and (e) raised by the Appellant have merit and succeed.

Ground C- That the learned Magistrate erred in law and in principle when he sentenced the Petitioner to a term of imprisonment considering the fact that the:

1. **Appellant is a first offender**
2. **Appellant has pleaded guilty at the earliest possible opportunity**
3. **Appellant is remorseful and seeks court's forgiveness.**

23. Appellant was 42 years old and married with three children. He was the sole breadwinner looking after his elderly mother. The learned Magistrate considered the Appellant's personal circumstances, character and the fact that he is a first offender in mitigation. However, he rejected the migratory factor that the Appellant had been genuinely remorseful.

24. The Respondent argues that the Appellant did not plead guilty at the earliest possible opportunity and submits that this grounds filed by the Appellant is misconceived and do not have merit.

25. Before coming to my own finding on this ground, it is apposite to refer to circumstances under which the Appellant had to plead guilty to the charges leveled against him.

26. At the cautioned interview held in respect of all the cases, the Appellant admitted having obtained property and financial advantage at the expense of the respective traders.

27. When the Appellant was produced in Court on 27.03.2014, for Case No 933 of 2013, the learned Magistrate asked if he was prepared to take the plea, he said he was not ready and needed some time to study the disclosures since he was undefended.

28. In Case No. 276 of 2014, Appellant admitted in his cautioned interview, that he obtained the air conditioner unites on hire purchase agreement and tendered the receipt to show that he had made a part payment for property he purchased. On 3rd April 2014, he informed Court that he was to make the balance payment, but got delayed and assured that he will pay the balance and bring the receipt if he was given an opportunity. Having considered his undertaking, the Court granted him bail with the condition that '*accused to produce proof on full payment of the goods he claims to have purchased genuinely on the next review date'* and adjourned the matter till 11th April, 2014 for the plea. On the 11th April, 2014, the Appellant did not appear and tendered a medical sheet through his wife. The learned Magistrate was not convinced that Appellant was sick and, having revoked bail, issued a warrant. He appeared in Court two days thereafter on 14th April 2014 and informed that he went to the hospital and could not pay the balance payment. Being dissatisfied with the Appellant's explanation, Court remanded him on the basis that he was at breach of bail conditions. He was in remand since then in this case and all other cases until he pleaded guilty (which the learned Magistrate described 'on his own free will') on the 1st of July, 2014, and also further thereafter until he was actually released on bail on the 6th of January, 2015. When the Appellant pleaded guilty to the charges, he was not defended by a counsel. His sentence was deferred for a period of nearly 15 months on the basis that 'no payment was made' although the Magistrates Court sitting in criminal jurisdiction was not supposed to act as an agent for debt recovery. Proceedings of 15th July, 2014 in case No. 933 of 2013 reveal that the Appellant had even sought Legal Aid to get an early date for mitigation and filed his mitigation by then in all cases.

29. Having considered the factual scenario of this particular case and other four cases, I am of the view that the Appellant should have been treated as having pleaded guilty to the charges at the first available opportunity and, without offending sentencing principles, should have been sentenced compassionately.

30. The learned Magistrate failed to give the full discount the Appellant was entitled to for his early guilty plea and mention it separately. Appellant's early guilty plea should have been discounted for separately from other mitigating factors in each case, which as a practice, after adjusting for mitigating and aggravating circumstances, allowance should have been 1/3rd of the sentence. Therefore, ground C has merit and succeeds.

Ground (d): That the learned Magistrate erred in law and in fact when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellant.

31. Section 2 of the Sentencing and Penalties Decree 2009 defines non-parole period as *"any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole".*

32. Discretion has been granted to the sentencing judge in terms of Section 18 of the Sentencing and Penalties Decree when fixing a non-parole period but is silent as to how that period should be arrived at. In **Paula Tora v. The State** Criminal Appeal No. AAU 0063 of 2011 (27 February 2015) it was stated:

> *"[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4 (1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the*

one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act, 2006 on the balance of the head sentence after the non-parole term has been served."

33. In ***Maturino Raogo v. State*** Criminal Appeal CAV 003 of 2010 (19th August 2010) the Supreme Court had in considering the imposition of a minimum term under section 33 of the amended Penal Code expressed the view that a sentencing court which is minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.

> *"In certain states of Australia and New Zealand legislation has provided the basis on which minimum terms of imprisonment in relation to the head sentence for different offences should be imposed. In Fiji, in the absence of statutory provisions regarding any guidelines for fixing the limits of the non-parole period it would be best to leave it to the discretion of the sentencing judge who should also consider striking a balance between rehabilitation and deterrence when fixing a non-parole period.*
>
> ***It would be seen therefore that there is no basis for the imposition of the non-parole period in terms of the statutory provisions as it stands now in Fiji except to say that when fixing a non-parole period it would be six months less than the head sentence.*** *This would indicate that a period which is less than six months than the head sentence would be the maximum limit of the non-parole period. If the remission of one third is to be considered at the end of such a six months' period, it may go against the spirit of section 4 (1) of the Sentencing and Penalties Decree, 2009 in striking a balance between rehabilitation and deterrence. (emphasis mine)*

34. It would be seen that learned Magistrate slightly exceeded the limit when he imposed a non-parole period in each case. Furthermore, when he made the sentences to run consecutively, implementation of the non- parole period became problematic.

Conclusion

35. Having considered the law and legal principles, I have come to the conclusion that the overall sentence of eleven years and one month' imprisonment is harsh and excessive in all the circumstances of the cases in appeal. To achieve the purpose and to reach a just and reasonable outcome that matches the factual scenario of each case, the sentence imposed by the learned Magistrate in case No. 933 of 2013 is quashed. Having done that, I proceed to sentence the Appellant in that case afresh with the resultant sentence having concurrent effect to other connected cases.

36. In adjusting the sentence, the following phrase quoted from Ruby, Sentencing (3rd ed.1987),pp.38-41 cited in ***Mill v The Queen*** *[1988] HCA 70* by the High Court of Australia in its judgment was also considered.

> *"Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise by appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."*

37. Instead of imposing sentences afresh in each case individually, I select case No. 933 of 2013 in which Appellant was charged with eight counts of Obtaining Property by Deception and one Count of Obtaining Financial Advantage by Deception in the process of sentencing.

38. In that case, the learned Magistrate imposed 35 months' imprisonment for each count and ordered sentences to run concurrent to each other. The learned Magistrate also made the sentence he imposed in this case to run consecutively to sentences imposed in other four cases. Final sentence he imposed is eleven years and one month' imprisonment.

39. The manner in which the offences were committed is somewhat premeditated. These types of offences will necessarily have a negative impact on free trade and the economic development and must be discouraged. I pick four years as the starting point for each count of Obtaining Property by Deception. There are no aggravating factors. (the aggravating factors that the learned Magistrate considered in some cases are in fact part of the element of the offence) I deduct one year for all the mitigation factors that the learned magistrate considered and come to an interim sentence of three years' imprisonment. I give a further discount of one year for his early guilty plea. Now the sentence for each count of Obtaining Property by Deception is two years' imprisonment. All the eight sentences on Obtaining Property by Deception counts are to run concurrently.

40. For the Count of Obtaining Financial Advantage by Deception, I pick four years as the starting point. There are no aggravating factors. I deduct one year for all the mitigation factors that the learned Magistrate considered and come to an interim sentence of three years' imprisonment. I give a further discount of one year for his early guilty plea. Now the sentence for the count of Obtaining Financial Advantage by Deception is two years' imprisonment.

41. Although the causes of action arose out of the same transaction and in the same incident, when considered the number of offences the Appellant had committed, imposition of sentence with concurrent effect would be lenient and offend the sentencing principles. Therefore, I order that the sentences imposed on the counts of Obtaining Property by Deception are to run consecutively to the sentence imposed on the count of Obtaining Financial Advantage by Deception. Now the final sentence in 933/2013 is four years' imprisonment.

42. I do agree with the reasons given by the learned Magistrate when he ordered a custodial sentence. Hence I order that the Appellant serve four years' imprisonment effective from 22nd September 2015.

43. Having considered the totality principle and for the reasons I have given in this judgment, I order that the sentences imposed by the learned Magistrate in other four cases (387 of 2011- 23 months' imprisonment 276 of 2014 – 17 months' imprisonment, 278 of 2014 – 23 months' imprisonment, 299 of 2014 – 35 months' imprisonment) are to be served concurrently to the sentence imposed by me in this case in relation to case No. 933 of 2013.

44. Now the final sentence of the Appellant is four years' imprisonment with concurrent effect.

45. Appellant is eligible for parole only after he has served three years in prison.

46. Sentencing Orders of the learned Magistrate made on 22nd September, 2015 are varied accordingly and the appeal succeeds to that extent.

Aruna Aluthge
Judge

At Lautoka
6th May, 2016

Solicitors: **Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent