

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 32 OF 2017

BETWEEN: **ASHIQ ALI AZIMULLAH**

Appellant

A N D: **STATE**

Respondent

Counsel: Ms. N. Mishra for Appellant
Mr S. Sha for Respondent

Judgment: 28th December 2017

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrate's Court at Suva for one count of Obtaining a Financial Advantage, contrary to Section 326 (1) (a) (b) of the Crimes Act. He was first produced in the Magistrate's Court on the 18th of July 2016. Subsequent to several adjournments, the Appellant had pleaded guilty for this offence on the 10th of February 2017. The learned Magistrate then convicted and sentenced him for a period of two years imprisonment on the 13th of March 2017. Aggrieved with the said conviction and the sentence, the Appellant appeal against the conviction and the sentence on the following grounds, *inter alia*:

Appeal against the conviction.

- i) *The learned Magistrate erred in law and in fact when he convicted the Appellant for the offence of Obtaining Financial Advantage, when the summary of facts admitted failed to dislodge and prove the elements of the offence.*
- ii) *The learned Magistrate erred in law and in fact when he convicted the Appellant on a defective charge.*

Appeal against the sentence.

- i) *The learned Magistrate failed to take into consideration all mitigation factors submitted by the Appellant,*
 - ii) *The learned Magistrate erred in determining that the Appellant failed to qualify for a suspended sentence provided under Section 26 (1) of the Sentencing and Penalties Act 2009, when he gave no weight to the Appellant's remorse.*
2. On the 6th of September 2017, the learned counsel for the Appellant and the Respondent appeared in court. The court then directed the parties to file their written submissions as both the parties consented to conduct the hearing by way of written submissions, which they filed as per the direction. Subsequently, the learned counsel for the Appellant informed the court that the Appellant does not wish to proceed with the second ground of appeal against the conviction. Having perused the record of the proceedings in the Magistrate's Court and respective written submissions of the parties, I now proceed to pronounce the judgment as follows.

Ground I

3. The first ground of appeal is founded on the contention that the summary of facts as admitted by the appellant has not disclosed and proved the essential elements of the offence of Obtaining Financial Advantage.
4. Section 174 of the Criminal Procedure Act stipulates the procedure of recording the plea of the accused in the Magistrate's Court, where it states that:
 - i) *The Substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge,*
 - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*

5. Accordingly, the court shall first provide the appellant the substance of the charge, including the facts pertaining to all essential elements of the offence and give him an opportunity to inform the court either he admits or denies the truth of the charge. If the court satisfies that the appellant admitted the truth of the charge, the court shall then proceed to convict the appellant and sentence him accordingly.
6. Justice Gates (as his Lordship then was) in State v Isaia Saukova (2000) 1 FLR 135 has discussed the duty of the Magistrate in respect of recording the plea of guilt, where his Lordship held that:

"It is essential that a Magistrate be satisfied that an Accused is admitting facts which amount to all of the legal elements that go to prove the charge in question. Where the Accused is represented by counsel, the Magistrates task is easier. Where the Accused is unrepresented a more onerous burden is cast on the court. But the Magistrate should ensure that the Accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result".

7. Section 326 (1) of the Crimes Act states that:
 - i) *A person commits a summary offence if he or she—*
 - a) *engages in conduct; and*
 - b) *as a result of that conduct, obtains a financial advantage for himself or herself from another person; and*
 - c) *knows or believes that he or she is not eligible to receive that financial advantage.*
8. Accordingly, the main elements of the offence are that:
 - i) The Accused,
 - ii) Engaged in a conduct,
 - iii) as a result of that conduct, obtains a financial advantage for himself from another person,

- iv) Knows or believes that he is not eligible to receive that financial advantage.
9. According to the summary of facts, the complainant had paid \$250 to the Appellant upon undertaking given by the Appellant that he will repair the vehicle's window regulator of the complainant on the 1st of June 2016. The Appellant had issued a receipt to the complainant and informed that he will repair it on the next day. On the next day, the Appellant had failed to repair it and informed the complainant that he will do it later. After three weeks, the complainant had reported the matter to the Police as the Appellant failed to repair it.
10. I will now reproduce the summary of facts in verbatim as outlined in the Magistrate's Court, where it states that:

"On the 1st day of June 2016, at MH Super Fresh, Tamavua, one Shivnesh Kumar, (A1) 29 years, employee of Vodafone Fiji of 11 Maharaj Place, Namadi Heights, paid \$250 to one Ashiq Ali, (Accused) age 30 years, self-employed of Nakasi to repair his vehicle's window regulator.

Accused received the money and promised (A1) that he will repair the window regulator and will installed in his vehicle the next day. Accused also issued a receipt to A1.

The next day A1 waited and contacted the accused asked about the window regulator. Accused informed A1 that he will repair and install later.

A1 reported the matter after the accused failed to repair his vehicle's window regulator after three weeks.

The accused arrested and interviewed under caution".


11. In view of the summary of facts, there is no evidence that the Appellant knew or believed that he was not entitle to receive that money from the complainant. The learned counsel for the Respondent in his written submissions conceded this ground stating that there is no evidence for the prosecution to prove that the Appellant knew or believed that he was not entitled to receive such amount from the complainant.

12. It is clear that the summary of facts as outlined, has not disclosed all the elements of Obtaining a Financial Advantage. Accordingly, the appellant has not admitted the truth of the main elements of the offence as charged. Under such circumstances, the learned Magistrate has no jurisdiction to enter a conviction against the appellant pursuant to Section 174 (2) of the Criminal Procedure Act.
13. The learned counsel for the respondent in his supplementary submissions submitted that the State is not considering to proceed this charge against the appellant, if the court orders a retrial in the Magistrate's Court. By submitting such, the learned counsel for the respondent requested the court not to order a retrial. I accordingly do not order a retrial.
14. In view of the above conclusion, I do not wish to proceed to determine the two grounds of appeal raised by the Appellant against the sentence.
15. Accordingly, I set aside the conviction and the sentence entered against the appellant for the count of Obtaining a Financial Advantage.

The orders of the court are:

- i) The appeal is allowed,
 - ii) The conviction entered against the Appellant for the count of Obtaining a Financial Advantage is quashed, and the sentence is set aside.
16. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
28th December 2017

Solicitors
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent.