

IN THE HIGH COURT OF THE FIJI ISLANDS

APPELLATE JURISDICTION

AT SUVA

CRIMINAL APPEAL CASE NO: HAA 110 OF 2008

BETWEEN

MOHAMMED RIZWAN

AND

THE STATE

Appellant in Person

Ms P. Madanavosa for State [Respondent]

Date of Hearing & Ruling: 6 February 2009.

RULING

1. Mohammed Rizwan this is your appeal against sentence.
2. You were charged as follows:
 - i) in Navua Magistrate Criminal case No: 254 of 2008 one count of Obtaining Goods By False Pretence: contrary to section 309(a) of the Penal Code Cap 17. The particular were that you on 25 July 2008 at Navua in the Central Division, with intent to defraud obtained from Anjula Devi, 5 ducks valued

at \$150.00, by virtue of a forged document, namely, Bank of Baroda Savings Deposit Slip.

ii) In Navua Magistrates Court Case No: 252 of 2008, one count of Obtaining Goods By False Pretence: contrary to section 309(a) of the Penal Code Cap 17. The particular were that you on 11 August 2008 at Navua in the Central Division, with intent to defraud obtained from Mahesh Chand, 4 billy goats valued at \$360.00 and 2 roosters valued at \$72.00, all to the total value of \$572.00, by virtue of a forged document, namely, Bank of Baroda Savings Deposit Slip.

3. From the Court Files the following is established. You pleaded guilty to both charges referred to above on 30 September 2008. You were convicted.
4. On the same day you were sentenced by the trial Magistrate to 12 months imprisonment for both counts of offences charged. In addition the trial Magistrate ordered: 'The 12 months prison term is to be served concurrently, but consecutively to the current sentence he is serving.'

Appeal Grounds

5. The appellant submitted by letter dated 12 January 2009, that the sentence is harsh and excessive. In the absence of legal counsel for the appellant, the court have reviewed the grounds set out in that letter and summarised the relevant grounds of appeal as:
 - i) Insufficient discount were given to his guilty at the first opportunity after being charged;
 - ii) Error of law by trial Magistrate in ordering the sentence to be served consecutive to prior sentences appellant serving;
 - iii) Error of law by trial Magistrate in taking into consideration previous convictions in determining sentence

6. The court has not received any submission from the State.

Appeal Determination

7. It is now settled law that a sentence may be overturned on appeal, only if it is established that it was unlawful, wrong in principle or manifestly excessive: Kuldip Singh v The State [1998] FJCA 55; AAU 004 of 1997.

8. In determining what may be 'wrong in principle or manifestly excessive' sentence, the court hearing the appeal will be considering if the sentence under review is outside the broad range of penalties appropriate for such an offence. It would be incorrect for the appeal court, to simply hold the view that it would not have passed the said sentence if it was the sentencing court and therefore it would change it.

9. In Gumbs (1927) 19 Cr App R 74, Lord Chief Justice Hewart stated:

' this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle.'

10. In the light of the above, I now review the specific complaints of the appellant. As regards the inadequate discounting of the sentence because of his guilty plea, I find no merit in this claim because on the facts it is clear that 6 months imprisonment was discounted for the guilty plea.

11. On whether the correct sentence tariff was used in choosing the starting point of 12 months imprisonment, from the sentence ruling the trial magistrate held that the tariff for such cases is 18 months to 3 years imprisonment. This is the correct sentence tariff for the offence of Obtaining Goods Under False Pretence: see Mohammed Rizwan v The State [2006] FJHC; HAA 24-34 of 2006 and State v Chand [2004] FJHC 53; HAA 001 of 2004. This complaint has no merit and is dismissed.

12. An aspect of the sentence ruling that was improper, was the fact that in determining sentence in this case, the trial Magistrate said 'The accused has admitted his list of previous convictions for similar type offences. I only

take into account the offences committed in the last 10 years.... A deterrent sentence is called for as he has not learnt his lesson despite several stints in prison.' Clearly the previous conviction of the appellant was used to determine sentence when it should not have been used. In Jonetani Sereka v The State [2008] FJHC 88; HAA 9027 of 2008 Goundar J held that: 'Previous convictions should not be used as an aggravating factor to increase sentence. The relevance of previous convictions of an offender to the sentencing process is that the offender is not entitled to any credit for good character that a first offender generally is entitled to.'

13. I agree with the above observations of Goundar J. I find that the trial magistrate erred in taking the appellant's previous conviction into consideration in determining the sentence against the appellant in this case. However, she did not specify in her sentence ruling, by how many months she had increased the sentence for that consideration.

14. In considering the facts here, I find the 12 months imprisonment sentence about right and should not be overturned.

15. As regards the ordering of the sentence to be served consecutive to the current sentence served by the appellant, the trial Magistrate gave no reasons for such an order. In Viliame Tuibua v The State [2008] FJCA 77; AAU 0116 of 2007 the Court of Appeal held that:

'When a sentence imposes a sentence of imprisonment on an offender who is already subject to an existing sentence for other offences, and orders the new sentence to run consecutively to the existing sentence, the sentence should consider the propriety of the aggregate sentence taken as a whole'

16. From the case files in the Magistrates Court, it is established that the appellant was sentenced on 22 September 2008, in Magistrate Criminal Case No: 471/08 to 3 years imprisonment to be served concurrently with his 3 years imprisonment sentence in Nausori Magistrate Court Criminal Case No; 134/08. A week later on 30 September 2008, the appellant was sentenced to the 12 months imprisonment in the two cases from he now appeals.

17. The proper approach should have been to consolidate all the 4 cases before one Magistrate for sentencing. This would obviate the suspicion that attends the facts of these cases, namely, that the separation was done to achieve the consecutive order for sentence. If that were so, than the sentences would indeed have been improper.
18. I now consider the totality of the sentences against the appellant in the 4 cases I have referred to. I find that given the nature of the criminal offending and the close proximity of the offending that took place, it should be considered as a single transaction for sentencing purposes and all the sentences should be concurrent and not consecutive.
19. I conclude that the sentences passed in the two cases in this appeal be served concurrently. This will mean that the total sentence for the two case would be 12 months imprisonment effective from 30 September 2008.

ORDERS

20. I make the following orders:

- a) The appeal against sentence partially succeeds;
- b) The sentences passed in the Magistrate Court are to be served concurrently effective from 30 September 2008.

Isikeli Mataitoga

JUDGE

At Suva

6 February 2009.