

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 298/ 2011

BETWEEN:

STATE

AND:

**FRANZ PHILIP DEVOL alias FRANZ ANTON
HAPSBURG alias FRANZ VON HAPSBURG**

**COUNSELS: Ms. Nancy Tikoisuva for the State
: Mr. David Toganivalu for the Accused**

Date of Sentencing Hearing : 23/11/2012

Date of Sentencing : 06/12/2012

SENTENCE

01. The Director of Public Prosecution had preferred the following charges against the accused above named.

FIRST COUNT
Statement of Offence

MAKING FALSE DECLARATION: Contrary to section 64(1) (a) and 65(3) of Immigration Act, 2003.

Particulars of Offence

FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON HAPSBURG on the 13th of March 2009 in Nadi in the Western Division, for the purpose of obtaining for himself a visitor's permit, with intent to deceive immigration officers at the Nadi International Airport, declared that he was **FRANZ PHILLIP DEVOL**, holder of Honduran passport No: C468197, knowing full well that he was not the legal holder of the said passport.

SECOND COUNT
Statement of Offence

DISHONESTLY CAUSING A LOSS: Contrary to section 324(2) of the Crimes Decree 2009.

Particulars of Offence

FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON HAPSBURG in between the 1st of August 2010 and 16th of September 2010, at Suva in the

Central Division, intentionally and dishonestly caused STEPHEN MALLERICH to lose USD\$ 7,500 by pretending that such monies would assist in the release of the said **FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON HAPSBURG**'s inheritance of \$16,000,000.00 due to him as a descendant of the House of Hapsburg, knowing full well that such loss would occur.

THIRD COUNT
Statement of Offence

OBTAINING FINANCIAL ADVANTAGE BY DECEPTION: Contrary to section 318 of the Crimes Decree 2009.

Particulars of Offence

FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON HAPSBURG in between the 8th September 2010 and the 28th of October 2010, at Suva in the Central Division, by pretending to be an heir of the House of Hapsburg, dishonestly obtained FJ\$12,830.00 in cash from **STEPHEN MALLERICH**.

02. On 12th November, 2012 the accused indicated that he wished to change his plea in respect of charges 1, 2 and 3. Accordingly charges were read and explained, the accused pleaded guilty to 1st 2nd and 3rd charges. Accepting the Plea to be unequivocal this court found him guilty and convicted him under Sections 64(1) (a) and 65(3) of Immigration Act, 2003 and under sections 324(2) and 318 of Crimes Decree No: 44 of 2009.

03. State Counsel submitted following summary of facts of which the accused admitted.

FACTS FOR COUNT 1:

04. On 13th March 2009, the accused arrived in Fiji on Republic of Honduras passport No: C468197. He came in on Visitors' Visa No: S2400309, and received a permit on arrival valid for 30 days. This permit was then further extended to 16th August 2009. Immigration Department was alerted on or around 30th November 2010 that the Accused was still in Fiji with an expired Visa.

During the course of the investigation, it was revealed that when the Accused entered Fiji on 13th March, 2009, he filled the following details on the Arrival card which was handed over to the immigration Officer at the Nadi International Airport in order to obtain a Visa and entry into Fiji.

Address in Fiji: Southern Cross Hotel, Suva c/o Alan Devon, Suva.

Expected Date of Departure: 12th April 2009.

Reason for Visit: others (did not specify reason for visit)

Passport No: C468197

Date of Birth: 29th July, 1938

Permanent Address: Calle 8 LA, Cieba, Honduras.

Further Immigration records revealed that the Accused had entered Fiji on previous occasion on Casterican Passport No: 165734F under the name Franz Anton Von-Hapsburg between 10th March 1999 and 21st March, 2000. When the Accused entered Fiji on Costerican Passport, he had listed his date of birth as being 23rd August 1938.

The Accused, on 13th March, 2009, for the purpose of obtaining for himself a Visa and

entry into Fiji, with intent to deceive the Immigration officer at Nadi International Airport declared on his arrival card that he was Franz De Vol, with Honduran Passport No: C468197 and with date of birth as 29th July 1938, knowing full well that it is false and misleading.

FACTS FOR COUNT 2.

05. Between the 1st of August 2010 and 16th September 2010, the accused intentionally and dishonestly caused a loss of US\$7500.00 to Stephen Mallerich by pretending that such money would assist in release of the accused's inheritance of \$ 16,000,000.00 knowing such loss would occur.

The Accused convinced Stephen Mallerich that he was a man of substantial wealth who was able to fund Mr. Mallerich's proposed projects in Fiji. The accused then approached Mr. Mallerich and asked for US\$5000.00 in order to obtain release of the accused mother's funds from the Estate in China and with the offer to fund Mr. Mallerich's H2O Water Park Plans and other substantial returns by 29th September 2010. On 10th September 2010 Mr. Mallerich then wired the said USD\$5000.00 to the Accused's preferred bank Account.

On 7th September 2010, the accused asked for another USD\$2500.00 which Mr. Mallerich wired from his Capital One Bank Account on 16th September 2010 to the accused's preferred Bank account. The Accused caused the payment knowing such loss would occur or a substantial risk of loss would occur.

Despite numerous pleas, emails, telephone calls and visits to Suva to meet the accused to receive his monies and promised returns back, Stephen Mallerich did not receive anything back from the Accused. To date, no such money has been returned causing a loss to Mr. Mallerich.

FACTS FOR COUNT 3

06. Between the 8th September 2010 and 28th October 2010, the accused further obtained FJD\$12,947.50 from Mr. Mallerich, which was wired to the Accused through western Union in Fiji, by deceptively representing to Mr. Mallerich that he required the said funds to open 3 bank accounts to pay for his Fiji Immigration debts and to pay for his attorney. The Accused represented to Mallerich that he needed the money in order to make various payments whilst waiting for his dollars to be freed up from his Estate in the House of Hapsburg, a wealthy family which was held in China and that Mr. Mallerich would receive his funds back.

Despite numerous pleas, calls, emails and visits to Suva to meet the Accused regarding his representations to them, Stephen Mallerich did not receive anything back from the Accused.

The details of the Western Union Money Transfer are as follows:

No.	Date	Sender/Sending Agent, Location and Operator I.D.	Beneficiary/Receiving Destination	Financial Agency/Reference #	Amount Wired/Wire Fee (FJD)
1.	8 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 557-564-9903	\$300/\$7.50
2.	8 Sept	Stephen	Franz Devol/Western	Western Union/	\$700/\$10

	2010	Mallerich/City Forex Fiji Pty/Operator 104	Union, Suva	282-164-1238	
3.	12 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 475-174-5600	\$800/\$10
4.	13 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 924-155-9627	\$590/\$10
5.	19 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 280-699-7468	\$2000/\$15
6.	22 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 673-085-4206	\$200/\$5
7.	30 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union	Western Union/ 850-592-3098	\$3000/\$20
8.	3 Oct 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union	Western Union/ 141-747-3712	\$2000/\$15
9.	13 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 679-756-0365	\$1000/\$10
10.	19 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 913-226-7376	\$490/\$7.50
11.	22 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union, Suva	Western Union/ 800-746-2034	\$500/\$7.50
12.	30 Sept 2010	Stephen Mallerich/City Forex Fiji Pty/Operator 104	Franz Devol/Western Union	Western Union/ 345-070-3268	\$1250/\$15

TARIFF

07. The maximum term of imprisonment for the counts mentioned above is as follows:

1. Count 1. A fine not exceeding \$2000 or to imprisonment of 2 years.

2. Count 2. 5 years imprisonment.
3. Count 3. 10 years imprisonment.

TARIFF FOR COUNT 1

08. The state submits there are very limited sentencing guidelines for Count No 1. But there are offences similar to count 1 available under the Penal Code.

09. In **Cagi v The State [2005] FJHC 264; HAA0083J.2005S** (2nd September 2005) the Appellant Cagi faced an activation of a suspended sentence in a Robbery with Violence case, when he pleads guilty and was convicted of the offence of Making False Declaration to Obtain a Passport under Penal Code Cap 17.

The maximum sentence provided under the Penal Code for the above offence was 2 years or a fine or with both. In this case the High Court on Appeal against the sentence dismissed and confirmed the sentence of 12 month imprisonment. A starting point of 18 months imprisonment was considered and reduced for the early guilty plea.

10. In **Balaggan v State [2012]** (24th April 2012) on a charge of giving False Information to a Public Officer under the Crimes Decree 2009, the High Court on appeal reduced the sentence from 2 years to 18 months imprisonment.

11. In **Hafiz v Reginam [1977]FJHC 27;Criminal Appeal 020 of 1977** (27th May 1977 the Supreme Court in quashing the conviction against the Appellant on charges Making a False Declaration for the purpose of procuring a passport under the Penal Code, noted that the Appellant had been sentenced to \$150 in fine only.

TARIFF FOR COUNT 2

12. The State also states that the tariff for this offence is quite limited as it is a new offence under the Crime Decree; however, there were offences under the Penal Code that are similar and could be considered as a matter of guidelines.

13. In **State v Jimi [2011] FJHC 327; HAC 019 of 2011** (12th May 2011) Justice Goundar sentenced the Accused to 9 months imprisonment suspended for 2 years. The High Court in this case, stated that for fraud related offences, the tariff is 18 months to 3 years imprisonment.

14. In **Raymond Roberts HAA0053 of 2003S** Madam Shameem J noted as in fraud cases:

"The principles that emerge from these cases that custodial sentence are inevitable where the accused pleads not guilty and makes no attempts at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation. However where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim."

TARIFF FOR COUNT 3

15. In **State v Sharma [2010]** FJHC 623; HAC 122 of 2010L (7th October 2010), Hon. Justice Madigan considered the same provision under Penal Code and stated as follows:

"The tariff under the Penal Code offence for obtaining money by deception was 18 months to 3 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 Crimes Decree 2009 has doubled, then obviously this tariff needs to be revised. 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.

16. In **Thoman v State [2011] 471**; HAA 022 of 2011(17th August 2011), on Appeal on the sentence of 18 months imprisonment for taking \$30.00 the High Court reduced the sentence to 14 months imprisonment.

17. In this case the accused under the pre-text of investment obtained USD7500 and FJ\$12,830.00 from the complainant which he never returned. He had not taken any endeavour to repay the said amount. Up to now accused had not disclosed his real identity. The accused had been in custody since November, 2011.

18. The accused had pleaded guilty to the charges mentioned above before commencement of the trial. He is 74 years old married has four children. He co-operated with police and gave his caution interview statement.

19. I have carefully considered these submissions in light of the provisions of the Sentencing and Penalties Decree No: 42 of 2009 especially those of the sections set out below in order to determine the appropriate sentence.

20. Section 15(3) of the Sentencing Decree provides that:

"as a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4, and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in the General Sentencing Provisions of the decree".

21. The objectives of sentencing, as found in section 4(1) of the Decree, are as follows:

- (a) To punish offenders to an extent and a manner, which is just in all the circumstances;
- (b) To protect the community from offenders;
- (c) To deter offenders or other persons from committing offences of the same or similar nature;
- (d) To establish conditions so that rehabilitation of offenders may be promoted or facilitated;

- (e) To signify that the court and the community denounce the commission of such offences; or
- (f) Any combination of these purposes.

22. Section 4(2) of the Decree further provides that in sentencing offenders, a Court must have regarded to:

- (a) The maximum penalty prescribed for the offence;
- (b) Current sentencing practice and the terms of any applicable and guideline Judgments;
- (c) The nature and gravity of the particular offence;
- (d) The defender's culpability and degree of responsibility for the offence;
- (e) The impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
- (f) Whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

23. **Now I consider the aggravating factors:**

1. The accused had obtained money from the complainant on the pre-text of investment.
2. The money has not been returned to the complainant.
3. The accused had not disclosed his true identity up to now.
4. The accused visited Fiji on a fake passport and continued to stay in Fiji despite his Visa expiring.
5. The accused had travelled to Fiji under several passports and under several names.

24. **Now I consider the mitigating circumstances:**

1. The accused pleaded guilty before commencement of the trial and saved considerable time for the court.
2. Accused is 74 years old and suffers from skin cancer.
3. He is a first offender and no previous criminal record available.
4. He had been in custody since 23rd of November 2010 and completed two years in remand custody.
5. He is remorseful of his action and sorry for the loss caused to the complainant.
6. Co-operated with police and gave a caution interview statement.

25. Considering all aggravated and mitigating circumstances I sentence you as follows:

- For the 1st count I take 18 months imprisonment as the starting point. I add 06 months for aggravating factors to reach the period of imprisonment at 24 months. I deduct 12 months for the mitigating factors.
- For the 2nd count I take 20 months imprisonment as the starting point. I add 04 months for aggravating factors to reach the period of imprisonment at 24 months. I deduct 06 months for the mitigating factors.
- For the 3rd count I take 30 months imprisonment as the starting point. I add 06 months for aggravating factors to reach the period of imprisonment at 36 months. I deduct 12 months for the mitigating factors.

26. I order that you serve the sentence concurrently to each other. In summary you are sentenced to 24 months imprisonment.

27. The accused has been in custody since 23/11/2010. He has spent 24 months in custody before the trial. Now he is 74 years old and suffers from skin cancer.

28. Considering the old age and ill health of the accused I set off the 24 months which already spent in custody against the sentence imposed in this case.

29. 30 days to appeal.

P. Kumararatnam
JUDGE

At Suva
06.12.2012