IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0015 of 1997S
(High Court Criminal Case No. HAD0003/96 and HAD0004/96)

BETWEEN:

WILISONI DAKUNAIVEI TAMAIBEKA

First Appellant

AND:

AMINIASI KATONIVUALIKU

Second Appellant

AND:

THE STATE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Hon. Justice I F Sheppard, Justice of Appeal
The Hon. Justice D L Tompkins, Justice of Appeal

Hearing: Monday, 9th November 1998, Suva

Counsel: Mr. Isireli Fa for the First Appellant
Mr. Kitione Vuataki for the Second Appellant
Ms. Nazhat Shameem, Director of Public Prosecutions, for the Respondent

Judgment on First Appellant's appeal: Friday, 13 November 1998

Reasons for judgment on First Appellant's appeal and judgment on Second Appellant's appeal: Friday, 8 January 1999

JUDGMENT AND REASONS FOR JUDGMENT OF THE COURT

The first appellant was charged under an indictment containing ten counts of fraudulent conversion of property. The second appellant was charged in the same indictment with ten counts of abuse of office. Following a four week trial, the assessors, by a majority, found both appellants guilty on all counts. Townsley J entered that opinion as the verdict of the court. On 9 December 1997 each appellant was sentenced to one year's imprisonment on

17

each of the first five counts concurrently and two years imprisonment on each of the other five counts concurrently but consecutive to the first five. Each was therefore sentenced to an effective term of three years. Both appellants have appealed against conviction and sentence.

At the conclusion of the hearing of the appeals on 13 November last we announced our decision in relation to the outcome of the first appeal. We ordered that the appeal against conviction be allowed. The convictions of the first appellant on each of the ten counts were quashed and a direction was made that the first appellant be acquitted. We did not give reasons for our conclusions at the time that we announced our decision. The reasons are included in this judgment which deals with both of the appeals.

The Counts

The first count against the first appellant charged that he:

> *"...on or about the 5th day of September, 1989 at Suva in the Central Division, being one of the Directors of Wilisoni Tamaibeka Company Limited, a company incorporated pursuant to the Laws of Fiji, fraudulently applied the sum of $7,800.00 for a use or purpose other than the use of purposes of such company the said sum being the property of and paid to the said company by the Office of the Public Trustee of Fiji for the purpose of developing and subdividing into lots Leased State Land at Nabua and Narere."*

The remaining counts were in identical terms save for the dates and amounts. They were:

count 2	5 March 1990	$12,000
count 3	14 June 1990	$ 8,700
count 4	11 July 1990	$ 8,500
count 5	9 August 1990	$ 8,600
count 6	4 October 1990	$ 9,500
count 7	21 March 1991	$16,500
count 8	24 May 1991	$10,000
count 9	8 August 1991	$15,000

18

count 10 20 February 1992 $10,500

Count 11 in the indictment charged the second appellant that he:

> *'...on or about the 5th day of September, 1989 at Suva in the Central Division, being employed in the Public Service and performing the duties of the Public Trustee of Fiji, in abuse of the authority of his office, directed Acting Estate Officer, Anil Perm Chandler f/n Ramie to do an arbitrary act namely process Voucher No. 0880 and cause Cheque No.40157 to be drawn on the Public Trustee Account No. 02-104485-2101-8 in the sum of $7,800.00 in favour of payment to Wilisoni Tamaibeka Company Limited as an advance for development works allegedly carried out by the said company on Leased State Land at Nabua and Narere and without any inspection having been made by any office of the department to determine the extent of development work having been carried out by Wilisoni Tamaibeka Company Limited thus prejudicing interests of the beneficiaries of monies held in trust by the Public Trustee of Fiji.'*

The remaining counts were identical but for the date, the amounts and the persons directed to do the arbitrary act. The dates and amounts are identical to those in the ten counts against the first appellant. The persons directed to do an arbitrary act were persons employed in the office of the Public Trustee.

The Factual Background

In July 1983 the first appellant applied to the Public Trustee for a loan of $40,000 over a house property owned by him at Kinoya. He dealt with Mr. D. P. Singh who at that time was the Assistant Public Trustee. Following a valuation of the property at $33,800 an advance of $22,500 was made and later a further advance of $6,500. The first appellant defaulted. When the property was put up for tender, the first appellant's de-facto wife and daughter bought it for $45,521.69, the amount outstanding. This amount was to be paid by instalments. They defaulted on their payments. The events relating to the Kinoya property do not relate directly to the matters at issue on the appeal. They are relevant only as background.

19

Wilisoni Tamaibeka Company Limited ("the company") was incorporated on 12 November 1982. Its capital was $3 made up of two $1 shares held by the first appellant and one $1 share held by his wife.

On 29 November 1985 a receiving order was made against the first appellant. Bankruptcy proceedings were commenced, but he was not adjudicated a bankrupt then or later.

On 9 November 1987 the second appellant was appointed Administrator General and Public Trustee.

In 1988 the first appellant decided to undertake a property development through the company. On 18 October 1988 a two year development lease was granted to the company over land at Nabua. The first appellant discussed with Mr. Singh the possibility of the Public Trustee financing the development. The result was an application for a loan of $50,000 dated 19 December 1988. On the same day Mr Singh submitted that application together with a brief memorandum to the second appellant who endorsed on the memorandum his approval to the loan.

The loan approval, apparently on Mr. Singh's authority, was increased to $75,000 on certain conditions relating to the mortgage of the lease. The conditions included a first debenture over the company, a collateral mortgage over the Kinoya lease, and an undertaking that the company pay the selling price of the lots to the Public Trustee.

In 1989 the first appellant became aware that land at Narere was also available for development. The first appellant was advised by Mr. Singh that the Public Trustee would be able to assist. Mr. Singh retired as Assistant Public Trustee on 3 July 1989. Thereafter the dealings between the first appellant and the company were mainly with the second appellant.

20

On 15 May 1991 the company obtained a two year development lease over the Narere land. On 13 February 1992 there was completed a mortgage of the land in favour of the Public Trustee securing a loan of $150,000.

In reliance on these loan applications and securities the Public Trustee paid the following amounts to the company or the first appellant.

5 September 1989	$ 7,800
5 March 1990	$13,000
14 June 1990	$ 8,700*
11 July 1990	$ 8,500*
9 August 1990	$ 8,600*
21 March 1991	$16,500
25 May 1991	$10,000*
8 August 1991	$10,000
8 August 1991	$15,000
20 February 1992	$10,500*
4 October 1992	$ 9,500*

The payments marked with an asterisk were open cheques endorsed 'please pay cash' which endorsement was signed by the second appellant.

On 9 April 1991, the total of principal and interest then owing on the advances already made was $238,523.63. On 25 February 1994 a further payment of $17,000 was made direct to Rupeni Consultants for work done by them relating to engineering plans they had prepared for the company.

On 23 April 1994 Mr. Archibald commenced in the office of Public Trustee.

On 18 July 1994 the Principal Land Valuer reported that the term of one of the development leases had expired on 15 May 1993 and the other was to expire on 1 November 1994. No development work had been carried out on the sites. Neither the Nabua nor the Narere developments, nor the leases, had any market value.

21

The company did not at any time make any payment in reduction of the loans nor any payments for interest.

At the time of trial the total amount owing including interest was, according to Mr. Archibald in evidence, over $400,000. A schedule produced in evidence suggests the principal and interest totalled $464,227.89.

The First Appellant's Appeal Against Conviction

Mr. Fa for the first appellant raised two principal grounds in support of his submission that the convictions of the first appellant should be quashed.

Joint Trial and Joint Representation

He submitted that the Judge erred in failing to order that both appellants be tried separately and that the failure to order separate trials had prejudiced the first appellant. He also submitted that the two appellants should not have been represented by the one counsel.

In support of the first, he submitted that the attitude of the assessors towards the first appellant may have been adversely affected by the prosecution case against the second appellant, and more particularly by the Judge summing up the case concerning the second appellant before he summed up the case concerning the first appellant. He submitted that the Judge failed adequately to direct the assessors that they should not place any weight at all on the fact that the money originated from the office of the Public Trustee. He also submitted that the Judge erred in stating that the test for fraud for the first appellant was the same standard as that to be applied to the second appellant.

The general rule relating to severance of trials was thus described by the Court of Appeal in England in *R v Assim* [1966] 2 All ER 881, 887.

22

> ***"As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the Court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases."***

In the present case, the matters which constituted the offences charged against the first appellant and which constituted the offences charged against the second appellant are closely related. In particular they involve the same payments. We accept that the ingredients of the offences charged against the first appellant are markedly different from the ingredients of the offences charged against the second appellant. However, the background circumstances, the history of the loan application, the condition of the developments at the time the various payments were made, and the purpose of those payments, are all factors common to the charges against each. In our view, these factors are so related that the interests of justice were best served by the two trials being heard together.

There was a further difficulty that faced the first appellant on this ground. At no stage before or during the trial, was any application made by either appellant for severance. The application for severance should be made at the outset of the trial, although not necessarily before the plea is taken: *R v Grondkowski* [1946] 1 All ER 559. We accept that in circumstances that are likely to be exceptional, an application for severance could be made during a trial, if in the course of it, factors have emerged which would render severance necessary in the interests of justice. But it would only be in the most extraordinary circumstances that an appeal against conviction should be allowed on the grounds of a joint trial, where no application for severance was ever made. Such a course could only be justified where this court concluded that the interests of justice required setting aside the conviction because prejudice to the appellant arising from the joint trial rendered the conviction unsafe.

23

We are not satisfied that any prejudice occurred to either appellant as a result of the joint trial. The Judge in his summing up was very careful to treat the cases against each appellant as separate and distinct. He made it clear that the assessors should consider the case against each separately. There are no grounds for considering that the assessors did not abide by that direction.

Nor can we see any basis upon which the appeal could be allowed because both appellants were represented by the one counsel. The first appellant is an experienced man in business. He would be well able to make his own decision on who should represent him as counsel. The second appellant is a qualified and was a practising lawyer. He is even better equipped than most to appreciate the advantages and disadvantages of one counsel representing both appellants. There is no evidence from either appellant that they were in any way dissatisfied with the manner in which they were represented by their counsel. Nor do we see how there could be any grounds for dissatisfaction, nor any prejudice against either appellants We do not see any substance in the other matters raised by Mr Vuataki.

This ground of appeal against conviction cannot succeed.

The Trial Judge Erred In Failing To Direct An Acquittal

Mr. Fa put this submission in various ways. The essence of his submissions was that the evidence called by the prosecution failed to prove to the requisite standard that in respect of each of the counts, the appellant had fraudulently applied the sum of money to which the count related for a use or purpose other than that of the company.

The Judge in his summing up made it clear to the assessors that there was what he termed a serious defect in the State's case against the first appellant. He pointed out that this was not a general deficiency case. The assessors could not take the sum total of the monies in the ten counts and say that he could not have spent all that on subdivisional purposes, therefore he is guilty. He posed to the assessors the question "how do you know in relation to any one amount that it was not legitimately spent for subdivisional purposes?" He said that once the monies were in the possession of the company, for all the assessors knew, it

went into the company's bank account with other company money. He pointed to what was clearly a significant omission by the State in failing to produce and analyse the company's bank account. There was simply no evidence to show what became of the money nor any effort made to trace where it went. There was never obtained any statement of the assets of the company. There was no evidence, he said, setting out what was the undertaking of the company, although according to the first appellant's statement from the dock, the company's activities were principally but not entirely related to the two subdivisions. The Judge put it to the assessors that they might have their suspicions but they could not be sure. He also pointed out that there was no covenant binding the company to utilise the proceeds of the advances solely on the subdivisions. They did not know to what purposes the first appellant may have applied the money. He concluded by again reminding the assessors of what he called a big problem on the question of how they could be satisfied beyond reasonable doubt as to whether the first appellant misapplied company funds in each count.

Ms. Shameem submitted that on the evidence presented, particularly the first appellant's statement to the Police and unsworn statement from the dock, there was ample evidence to justify the conclusion that the proceeds of each cheque were not used for the purposes of the company, but were fraudulently converted to the use of the first appellant. She relied on the first appellant's statement to the Police that the money was to be applied for the work of the company on the two subdivisions. There was no suggestion in either statement that the company was involved in any other work. She referred to the first appellant's request that six of the ten cheques should be made payable to cash to avoid the appellant paying the proceeds into the company's bank account. She submitted that the statement by the first appellant that he had made a further payment of $7,000 to the surveyors during the time the advances were being made was unsupported by any documentation. She also referred to the first appellant's statement that he had used money given to the company by the tenants to pay the surveyors.

In support of her submissions that the assessors could regard the taking of the money as fraudulent, she pointed to the absence of any physical development on either site and that the surveyors later involved, Rupeni Consultants, were paid $17,000 direct from the Public Trustee for the preparation of the plans. She pointed out that the first appellant did not claim either in his police statement or his statement from the dock, that the company was

25

conducting any business other than the subdivisions. She referred to the capital of the company of $3, the absence of any assets in the company now, and certain inconsistencies between the first appellant's statement to the Police and his statement from the dock.

Conclusion on this ground

The Judge was correct to point out to the assessors that there were serious deficiencies in the case presented by the prosecution. Amongst these was the failure to produce to the court the bank accounts of the company and to trace payments into and out of the bank account. The first appellant had said that he asked for some of the cheques to be payable to cash, because he needed them to pay creditors, and if they were made out to the company's order and had to be paid into the company's bank account, the bank would take the proceeds in reduction of the company's overdraft. An examination of the bank statements would have revealed whether this concern was justified. In the absence of any evidence to the contrary, it is reasonable to assume that the four cheques that were made out to the order of the company must have been paid into the company's bank account. In the light of the first appellant's statement, it is at least possible that the proceeds from those cheques went to reduce the company's overdraft. If that be so, the first appellant could not have been rightly convicted of the counts to which those cheques related. There was no evidence called by the prosecution to rebut this reasonable possibility.

There is a further aspect. It is apparent that the principal creditors of the company relating to the subdivisions were the two surveyors Bernard McCarthy and Rupeni Consultants. $11,000 were paid to Bernard McCarthy on 23 December 1988 before payment of any of the cheques to which the charges relate. Presumably that was paid from the company's bank account, possibly in overdraft. The first appellant in his statement from the dock said that he made a further payment of $7,000 later, after the advances had commenced. The source from which that payment was likely to have come was the advances from the Public Trustee. In the case of Rupeni Consultants, they were paid $17,000 direct by the Public Trustee on 25 February 1994 well after the last advance. But there was no admissible evidence to prove what were the total amounts charged by Bernard McCarthy and by Rupeni Consultants, and what other payments, if any, had been made in reduction of the those charges. The significant defect in the prosecution's case is the failure to call any person from

either Bernard McCarthy or from Rupeni Consultants. Had there been evidence from these two sources that no payments were received from them that could possibly have been traced to any of the advances, the prosecution case would have been significantly strengthened. In the absence of evidence from them about the amounts owing to them. and the payments received, there cannot be reasonably excluded the possibility that at least some of the proceeds from the advances were paid to one or both of them.

There is an additional aspect. The prosecution was unable to prove with respect to any one count that the money to which that count related was fraudulently converted by the first appellant to his own use. This was because of the prosecution's failure to trace the proceeds of the advances. It follows that to justify a conviction in respect of all ten counts relating to all ten advances from the Public Trustee, the prosecution was required to prove beyond reasonable doubt that not even a part of one of those advances was paid to the company for its own purposes. It failed to so. Even if it is a reasonable inference that not all of the proceeds of all the advances went exclusively to the company for the purpose of the subdivision, or other company purposes, there cannot be any justification for finding the first appellant guilty on all ten counts.

There is yet a further aspect. The prosecution failed to call any detailed evidence relating to the company's accounts. It has not excluded the reasonable possibility that the company was indebted to the first appellant. When regard is had to the capital of the company, it is likely that some of the appellant's own resources have gone into the company for the purpose of the company's operations, either in relation to the subdivisions, or for other earlier activities. The prosecution therefore has not excluded the reasonable possibility that some of the proceeds of the advances went to the company, and then was legitimately paid by the company to the first appellant in reduction of any amount that may have been owing by the company to the first appellant.

For these reasons we conclude that the evidence called by the prosecution could not prove beyond reasonable doubt that the first appellant fraudulently applied for his own use, the proceeds from all the cheques to which the ten counts related.

27

The Course The Judge Should Have Followed

Section 299 of the Criminal Procedure Code (Cap 21) provides in part:

> *'299-(1) When the case on both sides is closed, the Judge shall sum up and shall then require each of the assessors to state his opinion orally and shall record such opinion.*
> *(2) The Judge shall then give judgment but in doing so shall not be bound to conform to the opinions of the assessors: provided that ... where the Judge's summing up of the evidence is on record, it shall not be necessary for any judgment other than a decision of the court ... to be given ... except that when the Judge does not agree with the majority opinion of the assessors, he shall give his reasons... in open court for differing with such majority opinion...'*

In the recent decision in the case of the *State v. Ram* Criminal Appeal no. AAU004 of 1995 and *Sami v. The State* Criminal Appeal no. AAU0005 of 1995, judgment 12 February 1998, (Sir Moti Tikaram P, Sir Ian Barker JA and Gordon Ward JA) this court considered the role of the Judge and the assessors in the trial. At page 21 of the unreported judgment the court said that it was clear that the Judge had the power to disagree with the assessors and he is not bound to conform to their opinion. It referred to earlier cases giving guidance on how that power should be exercised. In *Saukuru v. R* Criminal Appeal 45 of 1981, the court suggested that when the Judge adopts the strong line of overriding an opinion of the assessors, his reasons must be cogent and his own approach to the relevant law should be impeccable. In *Raduva and Heatley v. R* Criminal Appeal 109 of 1995, this court said:

> *'...where credibility is in issue we would like to say, from a not inconsiderable experience on the bench in criminal proceedings, that the status of being a Judge does not confer any advantage in the field of assessing truthfulness over any other man in the world. Indeed the contrary is sometimes suggested. That is why we have assessors and juries.'*

In the present case the opinion of the assessors finding the first appellant guilty on all counts was a majority opinion. It was contrary to the tenor of the Judge's summing up pointing to significant difficulties in the case presented by the prosecution. The failure of the prosecution to prove the essential elements of each count beyond reasonable doubt did not

28

depend on credibility. Rather it resulted from omissions in the prosecution case in the respects to which we have referred. In those circumstances the proper course for the Judge to have followed was to disagree with the majority opinion of the assessors, and decline to enter convictions. Then, in accordance with the proviso to s 299, he was required to give reasons announced in open court for differing with that majority opinion. He should have adopted that course because, for the reasons to which we have referred, most of which he identified in the summing up, the opinions of two of the assessors finding the first appellant guilty on every count was clearly unsafe and could well have resulted in a significant injustice to the first appellant.

It was for these reasons that the court gave judgment that the appeal against conviction be allowed. The convictions of the first appellant on each of the ten counts were quashed. In their place there was be a direction that the first appellant be acquitted on all counts.

The First Appellant's Appeal Against Sentence

In view of the conclusion we reached on the first appellant's appeal against conviction, the sentences passed on him could not stand. They were accordingly quashed. The appeal against severity of sentence lapsed.

The Second Appellant's Appeal Against Conviction

The second appellant was charged under s.111 of the Penal Code (Cap. 17) relevant parts of which provide.

> *"S.111. Any person who, being employed in the Public Service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour. If the act is done or directed to be done for purpose of gain he is guilty of a felony and is liable to imprisonment for two years...'*

29

Mr Vuataki for the second appellant advanced several grounds in support of his primary submission that the second appellant was wrongly convicted.

Employed In The Public Service

Mr. Vuataki submitted that the prosecution failed to prove that the second appellant was employed in the Public Service, where the evidence was that the appellant was employed under "contract." He submitted that the relationship of employer and employee exists only where the worker is employed under a contract of service and that that relationship is to be distinguished from a contract for services, that is a contract between an employer and independent contractor. Because the second appellant was employed under contract, he was an independent contractor, and therefore not employed in the Public Service.

We do not accept this submission for two reasons.

First, the phrase "employed in the Public Service" is defined in section 4 of the Penal Code as meaning any person holding any of the offices set out in the definition including:

> *(ii) any office to which a person is appointed or nominated under the provisions of any Act...'*

The second appellant was appointed Administrator General of Fiji. Section 4 of the Public Trustee Act (Cap 64) provides that "the Administrator General of Fiji shall be the Public Trustee". He was therefore appointed to that office under the provisions of an Act.

Secondly, the contract between the Secretary, Judicial Advisory Committee on behalf of the Military Government of Fiji, and the second appellant, dated 9 November 1987 makes it clear that the second appellant was employed by the Government. Clause 1 of the agreement provides:

> *"1. The Government will employ the officer and the officer will serve the Government for the period ... and upon and subject*

30

to the terms hereinafter mentioned."

That provision makes it perfectly plain the relationship between the Government and the second appellant was that of employer and employee. He was not an independent contractor.

Abuse of Authority and Arbitrary Acts

Mr Vuataki's primary submission on this ground was that the acts of the second appellant in directing the relevant employee to process the vouchers and cause the cheques to which the counts related to be drawn, were not arbitrary acts done in abuse of the authority of his office. More particularly he submitted that the prosecution had failed to prove, to the required standard, that the second appellant had the necessary criminal intent.

What the prosecution is required to prove on a charge under s 111 was considered by the Supreme Court of Fiji in *Naiveli v the State* Criminal Appeal No.CAV001 of 1994, judgment 23 November 1995. The court (Sir Timoci Tuivaga, President, Sir Robin Cook, and Sir Anthony Mason) said at page 3 of the unreported judgment:

> *"Central to the commission of an offence under s.111 is the doing or directing to be done of an arbitrary act, 'in abuse of the authority' of the accused's 'office.' What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power or authority of an officer of the Public Service, will constitute an abuse of office if it is done or given maliciously with the intention of causing loss or harm to another, or with intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office. No doubt other instances may be given. But it would be unwise for us to attempt any exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression 'abuse of the authority of his office.'*

Later at page 6 of the unreported judgment the Supreme Court said:

> *"..it is reasonably clear that the assessors would have understood that the question whether the petitioner honestly believed that he*

> ***was entitled to give the direction complained of was an issue which they were required to determine before coming to a verdict of guilty."***

In view of the guidance given in *Naiveli*, it may not be necessary to have regard to s 8 of the Penal Code which provides:

> *"8. A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.'*

Ms. Shameem pointed out that Division V of the Penal Code relates to "offences relating to property." Section 111 is not within Division V. Therefore, it may be contended that it was not intended that s 8 be applied in the case of an offence charged under s 111. But she accepted, in our view rightly, that, since the phrase "offences relating to property" is not defined in the Code, and since each of the counts alleged against the second appellant relates to money, which is a form of property, the better approach is that s 111 applies in the present case. But in our view, the section adds little to the proof requirements set out in *Naiveli,* to which we have referred.

In essence, what the prosecution was required to prove beyond reasonable doubt, in respect of each count in the indictment, was that the second appellant, in giving the direction to which the count referred, acted in bad faith, not honestly believing that he was entitled to give that direction.

It remains to consider whether there was evidence upon which the assessors could properly infer that the appellant had so acted. As is common in cases of this kind, the prosecution case relied on circumstantial evidence. There was no direct evidence to establish the second appellant's state of mind at the relevant times, other than his exonerating statements. But the prosecution submits that, when all the relevant evidence is considered, there is ample evidence upon which the assessors could properly infer that the appellant could not have honestly believed that he was entitled to act in the way he did.

32

The prosecution accepts that none of the acts to which the counts relate were done or directed to be done for the purpose of gain. There can be no suggestion that the appellant did any of these things with the intention of conferring some advantage or benefit on himself. There is no evidence to suggest that he benefited directly or indirectly in any way. Nor is it suggested by the prosecution that the second appellant had any motive to undertake these acts, quite apart from personal gain. Motive is immaterial so far as regards to criminal responsibility: s 9 (3) of the Penal Code. But absence of motive may be relevant in considering whether the facts relied upon by the prosecution justify the inference beyond reasonable doubt, that when carrying out each of the acts specified in the ten counts, the second appellant was acting in bad faith.

It was the case for the second appellant that, although, when approving the loan and giving the directions to which the counts relate, the second appellant may have been acting in breach of his duty as Public Trustee and negligently, the prosecution failed to prove that in each case he did not honestly believe that he was entitled to give the direction complained of.

In considering whether the necessary adverse inference could properly be drawn, it is convenient to consider, first, the approval of the loan, and secondly, the giving of the directions to make the payments. Although he was not charged with any offence relating to the approval of the loan, his state of mind at that stage could have a significant bearing on his state of mind when he did the acts referred to in the counts.

The second appellant's first involvement in the application for the approval of the loan was in response to a memorandum dated 19 December 1988 from Mr. Singh addressed to the second appellant concerning a loan application to the company. The memorandum reads:

> *'Attached is an application for loan together with other supporting documents. Mr. Tamaibeka has shown me that there are almost all purchasers of the lot, some will pay cash and others will draw from Fiji National Provident Fund. The application could be considered on –*
>
> *(1) first mortgage of land*

(2) first debenture of the company undertaking and assets

(3) collateral on present mortgage of crown lease owned by the wife and daughter

(4) pay or assign all selling price

(5) draw sale and purchase agreement with the prospective purchases

(6) purchases to apply to Fiji National Provident Fund immediately and this sum to be paid to this office

(7) valuation

After 1-7 certain advance could be considered'

On the foot of the memorandum the first appellant has written:

'I am agreeable to above. The Director of Land's consent to mortgage of both properties will have to be obtained.'

He has then written his initials and the date, 20/12/88, the same date as the memorandum.

The application that was apparently attached to that memorandum and approved by the second appellant was grossly defective. It was in a prepared form for an application to the Public Trustee for a loan. Almost all the particulars required to be given were left blank. The only information in the application was the name and address of the applicant, the amount of the loan ($50,000) and the proposed security with reference to the Nabua property. There was no information about the applicant's financial position, no further evidence about the title and in particular the nature of the leasehold interest of the property to be developed, or of the property to be mortgaged as collateral, and no further information about the borrowing history of the applicant.

The approval was in clear breach of the second appellant's obligations, not only because of the lack of information in the application, but also because the lease to be offered as the primary security was for only two years. Section 12(1)(b) of the Trustee Act (Cap 65) relating to investments by trustees which binds the Public Trustee, authorises the investment on first mortgage or charge of an estate in leasehold for an unexpired term of not less than 50 years from the time when the mortgage is made. Further, the second appellant was or should have been aware of the fact that, at the time of the loan application, the Kinova property referred to in paragraph 3 of the memorandum had been sold to the first appellant's de facto wife and daughter, and that the full purchase price remained owing. It therefore had no equity. In addition, in the absence of any evidence about the borrowing company in the loan application, he could have no reason to believe that the debenture over the company's assets would provide any security.

It was the prosecution's contention that no responsible Public Trustee, acting honestly, could conceivably have approved a loan that was so obviously in breach of his duties as a trustee. The second appellant in his statement from the dock said that he had not seen the loan application. The Judge was entitled to put to the assessors, as he did, that they may well disbelieve that statement when the memorandum from Mr. Singh, which the second appellant certainly saw, said that it had annexed to it the loan application. It would be even more remarkable if the second appellant were to approve the proposal in the memorandum without even seeing any of the supporting documents. It was submitted on behalf of the second appellant that in approving the loan he was relying on Mr. Singh. This was advanced not as some form of legal justification or excuse, but rather as an indication that he was not acting dishonestly in giving his approval.

The Judge put that part of the case to the assessors in this way after referring to the absence of a completed lease:

> *"But how fragile an interest, you may ask yourselves, is that to be advancing trust money on? That is the nub of the State's case, you could not get a more hazardous venture in other words. That is the way it is put by the prosecution. It never should have been countenanced in the first place by an honest trustee acting in good faith and without intent to defraud. In effect the prosecution say that's evidence that he was not honest*

> ***and that there was some intention on foot to defraud the beneficiaries. For some reason or another he was giving this money out to Tamaibeka without proper consideration. The prosecution do not have to prove a motive why. They merely point to it happening, and ask how come trust monies go out to Tamaibeka Company Limited so readily without proper examination of the proposition as a trustee should make personally?"***

We now come to the advances themselves. The first advance was made on 27 January 1989 shortly after the approval of the loan proposal. From that advance until that to which the first count relates on 5 September 1989, 10 advances were made. By that latter date, $62,650 in principal had been paid out. There was also interest of $3,659.19,

The first count advance of $7,800 brought the principal to $70,450. The next advance on 25 September 1989 of $5,800 brought the principal to $76,250, more than the amount of the loan approval. By 21 March 1991 when the payment of $16,500 was made the principal payments totalled $204,150. No further security was provided until February 1992, almost a year later, when the $150,000 mortgage over the Narere leasehold land was completed. At the time of the final payment to which the counts relate, the total principal advanced was $266,552.

It was the case for the prosecution that these advances must have been made dishonestly. This was because the second appellant knew or ought to have known that the security of mortgages over two year development leases was contrary to the Trustee Act, that no valuation of the leases had ever been obtained, that there was no basis for believing that the securities were adequate, that the advances must have been far more than the two-thirds of the value authorised by the Trustee Act, that issuing cheques for cash was contrary to proper practice, that no certificates had been obtained for expenditure on the developments that could have justified further payments, and that no physical work had been done in respect of either subdivision. In essence, therefore, the prosecution case was that the initial approval of the loan was dishonest and that the appellant's dishonesty was further confirmed by his authorising advances to be made under the circumstances to which we have referred, and, in respect of the later payments, in excess of the loan approvals. It followed that he was rightly convicted on all counts.

36

It was the case for the second appellant that he discovered the extent of the deficiency of the advance secured over the Kinoya house. Later, the first appellant said in his unsworn statement from the dock, he met with the first appellant and the Minister of Lands and he was told that the company would be developing Narere as well as Nabua. It was hoped that the profit from these developments would cover the whole of the debt owing to the Public Trustee, including that on the Kinoya property. He claims he queried the two-year period of the lease as inadequate, pointing out it should be 50 years. The Minister explained that it was the standard practice to grant two years so that the developer would not sit on the lease and, without any development, sell it. He referred to the Minister's undertaking to give 99 year leases to purchasers of lots in the subdivision. He added that the Minister requested him to advance further money to enable both subdivisions to proceed. The Minister was aware of the request for cheques to be in cash. The first appellant told him that if the cheques were deposited into the bank, it would take the proceeds to reduce the overdraft, and he needed cash to pay Rupeni and others who were withholding plans. Later, though he realised that further money was going to be needed to complete both subdivisions, he told the first appellant that no further advances would be made. However, in February 1994 when the first appellant explained that Rupeni had completed all requisitions for Narere and the plans were in the final stages, the second appellant authorised the final payment to Rupeni of $17,000 - that payment was not the subject of any charge.

In essence therefore the second appellant's defence was that he relied on Mr Singh in approving the loan proposal, that the initial payments were made in accordance with that proposal, that later he acted in accordance with the request from the Minister, that the advances were continued in the hope that it would enable the subdivisions to be completed, which in turn would enable all advances including that on the Kinoya house to be repaid, and that at all stages he honestly believed that he was entitled to act in the way that he did.

Mr. Vuataki submitted that in approving the loan proposal and making advances the second appellant was not in breach of his duties as a trustee. The requirement for a 50 year lease and for any advance to be not more than two-thirds of the valuation were simply discretionary in that, if a trustee did not comply with these requirements he was not necessarily in breach of his duty as a trustee. We do not accept those submissions. It is

37

perfectly clear from the relevant provisions in the Trustee Act that those are requirements beyond which a trustee may not go without acting in breach of his duty as a trustee.

Mr Vuataki submitted that the Judge erred in directing the assessors that the second appellant could not delegate the exercise of the discretion to approve the loan to Mr Singh, on the principle that a trustee cannot delegate his powers. He relied on s 4 (3) of the Public Trustee Act that provides that the Assistant Public Trustee shall have the same powers, rights and duties as the Public Trustee. Mr Vuataki may well be right in this submission, but if there were a misdirection in this respect, it was not material, because, as a matter of fact, in this case, the second appellant did approve the loan proposal when he endorsed his agreement on the foot of Mr Singh's memorandum of 19 December 1998.

Conclusion on this ground of appeal

As we have already stated, the crucial issue under this ground of appeal is whether there was evidence upon which the assessors could properly conclude that in making each of the advances specified in the counts against the second appellant, he did not honestly believe he was entitled to do so.

There can be no doubt that in approving the loan proposal in the first place, and in authorising each of the payments to which the counts relate, the second appellant acted in gross and serious dereliction of his duties as Public Trustee. The issue therefore becomes whether those breaches were so gross and so serious as to justify the conclusion that the appellant could not honestly have believed that he was entitled to do what he did. We have considered all the issues raised on this ground of appeal. It is our conclusion that there was evidence upon which the assessors and the Judge could properly have concluded that when the appellant gave the directions set out in each of the counts, he could not honestly have believed that he was entitled to give them.

Prejudicial To The Rights Of Another

To constitutes an offence under s.111 of the Penal Code an essential element for the prosecution to prove is that the act of the accused is "prejudicial to the rights of

another". In the present case the indictment alleges that the second appellant, in doing the act set out in each count relating to the drawing of the cheques, was "prejudicing interests of the beneficiaries of monies held in trust by the Public Trustee of Fiji."

Mr Vuataki submitted that the prosecution failed to establish that any losses that may have resulted from the transactions to which the counts related, prejudiced the rights of beneficiaries for whom the Public Trustee was holding money on trust. The Government of Fiji, he submitted, was the loser, not the beneficiaries of moneys held in trust by the Public Trustee. His submission requires consideration of the relevant statutory provisions and the evidence that was given concerning the manner in which the Public Trustee operates.

The Judge in his summing did not deal with the matter in any detail. He said:

> *"Another element is that the arbitrary acts that he directs must be prejudicial to the rights of another. The State says that it was prejudicial to the rights of beneficiaries to have the monies involved in the charges, spirited away out of the account. In effect it reduces the monies in that common fund pro tanto to that amount and thereby affects probably all beneficiaries under all trusts being administered by the Public Trustee. You heard evidence that all monies are placed in the common fund but separate ledger accounts are kept for each trust, much like a trust account that a solicitor has. He mixes all his client's money in a bank account that he keeps and he is obliged to keep separate ledgers recording the comings and goings of funds in respect of each client. The Public Trustee does it in relation to each trust. So that's who's prejudiced according to the information."*

We turn now to the Public Trustee Act. Section 13 provides that the Public Trustee may act as a custodian or an ordinary trustee. Subsection (2) provides the Public Trustee may act, either alone or jointly with any other person in any capacity to which he may be appointed in pursuance of the provisions of the Act. He shall have the same powers, duties and liabilities, and shall be entitled to the same rights and immunities and be subject to the same control and orders of the court as a private trustee acting in the same capacity.

Part VI of the Act deals with the liability of the Public Trustee and financial provisions. Section 27 is significant. It provides:

'27 - (1) The Consolidated Fund shall be liable to make good all sums required to discharge any liability which the Public Trustee, if he were a private trustee, would be personally liable to discharge except where the liability is one to which neither the Public Trustee nor any of his officers or agents has in any way contributed and which neither he nor any of his officers or agents could by the exercise of reasonable diligence have averted and in that case the Public Trustee shall not nor shall the Consolidated Fund be subject to any liability.
(2) All sums payable in pursuance of the provisions of this section out of the Consolidated Fund shall be charged on and issued out of that fund.'

Section 29 provides that all expenses incurred by the Public Trustee shall be charged against and be payable out of the relevant trust estate or property.

Mr. Vuataki relied particularly on section 30. It provides:

'30. Moneys in or payable into the Public Trustee's account by the Public Trustee or any officer, servant or person acting or presuming to act under the authority of this Act shall be deemed to be property of the Government of Fiji for the purpose of this Act and shall be recoverable in like money as money due to the Crown.'

The effect of these provisions is, first, that the Public Trustee has the same rights, duties and liabilities as a private trustee. Secondly, if the acts of the second appellant had given rise to a liability to which the second appellant or any of his officers such as Mr. Singh had in any way contributed and which he or his officers could by the exercise of reasonable diligence have averted, the Consolidated Fund was liable to make good all sums required to discharge that liability. This provision is consistent with section 30, providing that all monies in or payable to the Public Trustees Account shall be deemed to be the property of the Government of Fiji. If there has arisen a loss for which the Public Trustee is liable, that loss is made good by the Consolidated Fund, not suffered by the beneficiaries. In effect the Government guarantees the integrity of the assets held by the Public Trustee on

40

behalf of beneficiaries. The indemnity applies in this case, since there can be no doubt that the loss suffered was caused by the Public Trustee.

On this analysis of the statutory provisions, the Judge was in error when he said that monies "spirited away" out of the account were going to reduce the monies in the Common Fund pro tanto affecting all beneficiaries under all trusts being administered by the Public Trustee. Any funds "spirited away" giving rise to a liability from the Public Trustee will be made good by the Consolidated Fund. The interests ultimately prejudiced were those of the Government, not the beneficiaries.

The evidence given on this issue does not take the matter any further. Mr. Archibald described the Public Trustee's methods in these terms. After referring to the Public Trustee's general cheque account with the National Bank of Fiji, he said:

> *'That account is in fact the main Public Trustee Account, into which beneficiaries' monies, or should I say, trust monies are paid. Beneficiaries of trusts' monies so far as the trust properties are turned into or consist of money, are effectively in a common fund.*
>
> *The legislation in sec.290 of the Public Trustee Act requires all monies payable to the Public Trustee to be paid into an account which is known as the Public Trustee's Account.*
>
> *This Account, while it is deemed to be public funds, is administered solely by the Public Trustee under the Act. That is for the purposes of recovery and enforcement.*
>
> *The Public Trustee Account does not form part of the Government Consolidated Fund or Account. The provisions relevant to that are to be found in the Finance Act.*
>
> *There is no other power on the part of the Public Trustee to invest money except the general power to be found in the Trustee Act, and the incorporation of that provision into the Public Trustee Act.*
>
> *The practice was that the NBF paid the Public Trustee the equivalent of 4% per annum calculated on a daily basis, and paid at the end of each month. All monies held in the General Account to which I have referred, any surpluses*

available for investment were drawn directly on that account and paid to bank term deposits, or mortgage investments.

It is effectively something similar to a Solicitor's Trust Account. Separate ledger accounts are kept for the individual client, ie. estate or trust.'

Mr. Archibald did not say in that passage or elsewhere in his evidence that any loss resulting from the loan proposals would have affected the interests of the beneficiaries of trusts administered by the Public Trustee.

Proof of an act prejudicial to the rights of another is an essential element of the offence. In this case, the State chose to charge the first appellant with prejudicing the interests of beneficiaries. The onus was on the prosecution to prove this element of the charge. However, we are prepared to accept that, although ultimately the prejudice will be the Government's, it may well be that there was some interference with the rights of the beneficiaries, even if only to the extent that payment of capital or interest due by the Public Trustee might have been delayed pending a claim on the Consolidated Fund.

We do not see any purpose in considering that matter further. That is because, if the prosecution failed to prove this element of the offence, this is clearly a case for the exercise of the proviso to Rule 23(1) of the Court of Appeal Rules. This was not an issue raised by the defence at the trial. Had it been, the prosecution could have applied for an amendment to substitute the words "prejudicing the interests of the State" for the words "prejudicing the interests of the beneficiaries". There would have been no reason not to grant such an application. But in any event, we see no prejudice to the second appellant arising from the counts referring to prejudicing the interests of beneficiaries rather than prejudicing the interests of the State. No substantial miscarriage of justice could have occurred. We would not allow the appeal on this ground.

The Summing Up

42

Mr. Vuataki advanced as a separate ground of appeal that the summing up was, as he put it in his submissions, lopsided, biased, and high prejudicial. He sought a new trial on that ground.

At the commencement of the summing up, the Judge correctly directed the assessors on their role and standard of proof, on the need to consider each count in the indictment individually, the nature of evidence to which they could properly have regard, the drawing of inferences and the definitions of the offences charged against each appellant. But when the Judge came to deal with the factual matters, and in particular the case for the prosecution against the second appellant, there is force in Mr. Vuataki's submission that he did so in emotive language in the form of rhetorical questions that were consistently adverse to the second appellant.

We do not propose to repeat the summing up in detail. Whether it was lacking in fairness to a degree that requires a new trial is a matter that needs to be judged after considering the whole of it. But we shall refer to some of the matters relied on by Mr Vuataki by way of example.

In the course of the summing up the Judge said:

> *"[The second appellant] is a lawyer and ignorance of the law is no excuse. You ask yourself what trustee in good faith and without intent to defraud would indulge in the conduct he did, and you may, it is open to you to come to the conclusion that Mr. Kato was not in good faith at all, and after taking over from D B Singh he had some sort of thing going with Tamaibeka, whatever may it have been."*

In the absence of any evidence that would support an inference that the second appellant was in some way benefiting from the transaction, it was not only incorrect to tell the assessors that they could draw such an inference, it was also highly prejudicial.

In considering the effect of the summing up it is necessary to look at it overall to judge whether it was a fair and objective presentation of the case for the prosecution and the case for the defence. Looking at the summing up in this way it is our conclusion that it

lacked these characteristics. It states the case for the prosecution forcefully - indeed in much of it reads like the address for the prosecution. Where the Judge does make reference to the case for the defence, the references are accompanied with comments or rhetorical questions clearly intended to denigrate the defence. Comments such as

> "...you may think that argument is fanciful."
>
> "...what is the status of Mr. Kato for honesty and bonafide and absence of intent to defraud?"
>
> "Had it not been for the notation "I am agreeable to above" without any investigation at all by a lawyer of many years experience none of this sad business would have happened at all".
>
> "[Advancing trust monies] never should have been countenanced in the first place by an honest trustee, acting in good faith and without intent to defraud."
>
> "Why would he turn a blind eye to [Mr Singh's actions]?"
>
> "What do you make of that coming from the Public Trustee?"
>
> "How frank is he being with you in his statement from the dock?"
>
> "And is Mr Kato telling the full truth from the dock?"
>
> "Does an honest Public Trustee indulge in that conduct, or is it a gross abuse of office?"

and the like, including references to the second appellant "ladling out" the money to the first appellant, were all calculated to denigrate the case for the defence. Nowhere in the summing up does he tell the assessors in a clear way, without adverse comment, what was the case for the defence.

44

A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge.

In *R v. Fotu* [1995] 3 NZLR 129 the Court of Appeal in New Zealand was concerned with a challenge to a summing up on the grounds of lack of impartiality. At 138 Cooke P, delivering the judgment of the court, referred to the speech of Lord Hailsham of St. Marylebone L C in *R v Lawrence* [1982] AC 510, 519:

> *'A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.'*

Cooke P went on to observe that in *Fotu's* case "...the summing up contrasts in some respects with the orderly, objective, and balanced analysis there recommended."

Later he added:

> *"Considered as a whole the summing up leaves not the slightest doubt about what the judge was putting forward as the only just, proper and correct verdict, although he was careful to say frequently that it was a matter for the jury. A Judge is entitled to indicate his own views of the evidence, provided that as a whole the summing up is a fairly balanced and fair presentation of the case to the jury (Broadhurst v. R [1964] AC 441; R v Ryan [1973] 2 NZLR 611).*

45

> ***With great regret we are driven to conclude that this summing up clearly crossed the line into imbalance"***

The requirement fairly to put the defence to the jury, or here the assessors, has long been recognised. In *re Dinnick* (1909) 3 Cr App R 77, 79, Lord Alverstone LCJ referred to what he described as a paramount principle of the criminal law "that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury."

In *R v Clayton* (1948) 33 Cr App R 22 Lord Goddard CJ had this to say about that duty:

> *"The duty of a judge in any criminal trial...is adequately and properly performed...if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence..."*

In *R v Wilkes and Briant* [1965] VR 475, 479, Smith J in the Full Court of the Supreme Court of Victoria referred to the risk of an erroneous conviction unless extremely strict precautions are taken. He said:

> *"Important amongst the necessary safeguards is the established rule that it is the judge's duty to put the defence fairly to the jury. That rule cannot, save in quite special circumstances, be departed from, without serious risk of a miscarriage of justice."*

Finally, we refer to the comments of Richmond J in the Court of Appeal of New Zealand in *R v Ryan* [1973] 2 NZLR 611:

> *"There are cases where, in the particular circumstances, it has been held sufficient for a judge to leave the matter to the jury*

> ***simply on the basis of the evidence they have heard and the addresses of counsel... On the other hand there have been cases...in which the summing up was held inadequate because it emphasised matters adverse to the accused but failed adequately to convey to the jury the answers made by the accused... In some cases it may be sufficient for the judge to refer in the most general terms to the issue raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence."***

This was a complicated and protracted matter, as is apparent from the duration of the trial and the length of the summing up. It was certainly one where it was essential for the Judge to comply with the requirement of the rule to which we have referred. To put the case for the defence to the assessors fairly, it was necessary for him to describe that case in a fair and objective manner. Regrettably, we are forced to the conclusion that he failed to do so. At no stage in the lengthy summing up did he describe to the assessors, in a sufficiently detailed and impartial manner, just what was the defence and the evidence upon which it relied. In the course of the summing up he made brief references to submissions that had been made on behalf of the defence, but in most although not all cases, these references were followed by a derogatory comment, examples of which we have set out above. Similarly he referred in some detail to the statement the second appellant had given to the police and to the statement he had made from the dock. But again, in many instances he followed these by comments indicating that the second appellant's statement should not be accepted. At the end of that part of the summing up dealing with the second appellant, he made reference to the closing address of the counsel for the prosecution, but neither there nor elsewhere did he refer to the closing submissions of counsel for the second appellant. It is important that the Judge fairly puts the case for the defence to the assessors, without at the same time making it clear, as the Judge did here, that he rejected that case.

It is our view that in the present case the summing up lacks those essential qualities of objectivity evenhandedness and balance required to ensure a fair trial. In the light of that conclusion the conviction cannot stand. This is not a case for the exercise of the proviso to Rule 23(1) of the Court of Appeal Rules.

47

The result of the second appellant's appeals.

The appeal against conviction is allowed. The convictions on all counts are quashed. A new trial is ordered on all counts.

In view of this conclusion, the sentences passed on him cannot stand. They are quashed. The appeal against severity of sentence lapses.

.....

Sir Moti Tikaram

President

.....

Justice D.L.Tompkins

Justice of Appeal

.....

Justice I.F.Sheppard

Justice of Appeal

Solicitors:

Vuataki Esq. Lautoka for the 2ND appellant

Office of the ~~Attorney General~~ D.P.P., Suva for the respondents

C:/OFFICE/WPWIN/WPDOCS/USHA/AAU0015U.97S