IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0018 of 2016
[High Court Case No: HAC334 of 2013]

BETWEEN : **RUDRA MAHARAJ**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

Before	:	**Hon. Mr. Justice Daniel Goundar**
Counsel	:	**Mr. G. Driscoll for the Appellant – instructed by Iqbal Khan & Associates** **Ms. F. Puleiwai for FICAC**
Date of Hearing	:	**4 November 2016**
Date of Ruling	:	**11 November 2016**

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted on a charge of bribery contrary to section 12(1) (a) (ii) of the Prevention of Bribery Promulgation 2007. On 18 February 2016, he was sentenced to 4 years 11 months imprisonment with a non-parole period of 3 ½ years and $2000.00 fine. This is a timely application for leave to appeal against conviction and sentence pursuant to section 21 (1) of the Court of Appeal Act, Cap. 12. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr. App. No. CAV0010 of 2013; 20 November 2013). The test for leave to appeal against sentence is whether there is an

arguable error in the sentencing discretion (*Naisua v State* unreported Cr. App. No. CAV0010 of 2013; 20 November 2013).

[2] When the charge arose on 24 September 2012, the appellant was employed as an information officer – public relations at strategic framework for change coordination office at the Office of Prime Minister. At trial, it was not in dispute that the appellant was a public servant within the meaning of the Prevention of Bribery Promulgation No. 12 of 2007.

[3] The complainant was a businessman, Avin Prakash. Following a successful bid for the tenders with the Department of Energy to build Bio Fuel Sheds, the technical evaluation committee awarded the building contract to Mr Prakash's company, Fijiana Builders. Mr Prakash's evidence was that he accompanied his father to the Parliament House where they met the appellant on his request. In that meeting, the appellant solicited bribe from Mr Prakash. When Mr Prakash returned home, he decided to audio record the conversation between him and the appellant in the next meeting. They met again at the Parliament House but Mr Prakash was unable to record the conversation. On that same day in the afternoon, they met at the appellant's house. The conversation was audio recorded. The matter was reported to FICAC.

[4] The next meeting was on 24 September 2012 at the appellant's home. FICAC decided to carry out a covert surveillance of this meeting. At this meeting, the appellant accepted $2000.00 cash and two cheques in the total amount $10,000.00 from Mr Prakash. After accepting the bribe, the appellant escorted Mr Prakash and his father to their vehicle. At that point, a FICAC officer intervened and arrested the appellant. When the appellant saw the FICAC officer approaching, he discarded the money on the ground. At trial, the appellant elected not to give evidence or call any witnesses.

[5] Counsel for the appellant advances the following grounds:

Appeal against Conviction

1. That the learned Trial Judge erred in law and in fact in refusing to allow the Appellant from objecting to the recording of the Complainant's and the Appellant's conversation on the basis that no notice was given before the hearing and in the circumstances the appellant was obliged to withdraw his objection and as such there was a substantial miscarriage of justice. (full particulars will be provided upon receipt of the Court Record).

2. That the Learned Trial Judge erred in law and in fact in relying on and/or considering and/or taking into consideration inadmissible and/or prejudicial evidence in finding the Appellant guilty. (full particulars will be provided upon receipt of the Court Record).

3. That the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the Complainant and Prosecution witness PW2 as such there has been a substantial miscarriage of justice. (full particulars will be provided upon receipt of the Court Record).

4. That the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing himself and the assessors on the circumstantial evidence that was relied by the State. (full particulars will be provided upon receipt of the Court Record).

5. That the Learned Trial Judge's failure to adequately evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice. (full particulars will be provided upon receipt of the Court Record).

6. That the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice. (full particulars will be provided upon receipt of the Court Record).

7. That the Learned Trial Judge erred in law and in fact in not discharging the Assessors when the Prosecution Witness whilst giving evidence testified that the Appellant had earlier accepted $100,000.00 in respect of another company "Fortech" such prejudicial evidence caused a substantial miscarriage of justice despite the fact the Learned Trial Judge directed the Assessors to disregard such evidence. (Full particulars will be provided upon receipt of the Court Record).

Appeal against Sentence

8. That the appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

9. That the Learned Trial Judge erred in law in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

10. That the Learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment Contrary to Section 25 of The Constitution of Fiji (1998) (Section 11 (1) of the 2013 Constitution of Fiji).

11. That the Learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

[6] Counsel for FICAC submits that the grounds of appeal advanced by the appellant does not precisely specify the issues that are to be considered on appeal. I agree. As this Court said in *Vulaca v State* - Majority Judgment [2011] FJCA 39; AAU0038.2008 (29 August 2011) at [15]:

> Appellate courts have always stressed that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what they have to respond to. We hope that it will not again be necessary to point out a similar inadequacy in grounds of appeal.

[7] Unfortunately, the written submissions filed by Mr Khan on behalf of the appellant in support of the application for leave and bail are not helpful. Apart from reciting the grounds of appeal and citing passages of case law (relevance of which are questionable), the submissions fail to identify the actual complaints of the appellant. At the leave hearing, Mr Driscoll on behalf of Mr Khan applied for leave to file written response to FICAC's submissions. Leave was granted. Written response was filed on 9 November 2016. Written response provides some clarity to the issues presented by this appeal.

[8] The first complaint is that the trial judge threatened to keep the appellant's trial counsel for two weeks in court by using harsh tone if he proceeded with his application for voir dire to challenge the admissibility of the covert audio recording of the conversations between the appellant and the complainant. This complaint has no merit. It is clear that for whatever tactical reasons, the admissibility of the audio recording was not disputed by the appellant at the trial. The learned trial judge made it plain in his judgment that the audio recording of the conversations were admitted in evidence without objection (see, paragraph 13 of the judgment). By not disputing the admissibility at the trial, the issue was waived and the appellant is prevented from complaining on appeal. Grounds one and two are unarguable.

[9] The second complaint is that the learned trial judge did not adequately direct himself on the law regarding previous inconsistent statement. This complaint has no substance. The learned trial judge correctly directed himself on the previous inconsistent statement at paragraph 17 of his judgment. The alleged inconsistencies were in the form of omissions. The learned trial judge found the omissions did not go to the root of the matter and did not affect the credibility of the witness. Ground three is unarguable.

[10] Ground four alleges that the learned trial judge did not adequately direct on the law regarding circumstantial evidence. This ground is misconceived. The prosecution case was based upon direct evidence and not circumstantial evidence. In any event, the trial judge's direction on circumstantial evidence at paragraphs 84-89 of the summing-up is impeccable. This ground is unarguable.

[11] Ground five alleges that the learned trial did not independently evaluate the evidence before accepting the unanimous guilty opinion of the assessors. The learned trial judge did independently evaluate the evidence, although he was not required by the law to do so. In *Chandra v State* unreported Criminal Petition No. CAV 21 of 2015; 10 December 2015, Keith JA said at [36]-[37]:

> I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in *Sheik Mohammed v The State* [2013] FJSC 2 at [32]:
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> "An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."
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> But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) *and* (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[12] In my judgment, the learned trial judge complied with *Chandra's* decision to evaluate and give reasons for convicting the defendant as a matter of good practice even when accepting the unanimous or majority opinion of the assessors. Ground five is unarguable.

[13] The caution interview of the appellant contained exculpatory statements. The learned trial judge fairly directed his mind to those statements at paragraph 14 of his judgment. Ground six is unarguable.

[14] The learned trial judge gave clear direction to the assessors to disregard the prejudicial evidence regarding an uncharged act. The learned trial judge did not refer to the prejudicial evidence of the uncharged act in his judgment when convicting the appellant. Ground seven is unarguable.

[15] The remaining grounds relate to sentence. The maximum sentence for bribery under section 12(1) (a) (ii) of the Prevention of Bribery Promulgation 2007 is a fine of $500000 and 10 years' imprisonment. In sentencing the appellant, the learned trial judge adopted the UK Sentencing Guidelines because under the Bribery Act 2010 (UK) the maximum imprisonment for a similar offence is also 10 years' imprisonment. The learned trial judge said an appropriate tariff was 5-8 years' imprisonment. The learned trial judge then used 6 years as his starting point and then adjusted the sentence to reflect the aggravating and mitigating factors. The appellant was a public servant. He breached the trust of the public by taking a bribe. The amount involved was substantial by Fiji standards. The mitigating factors were the appellant's personal circumstances including his previous good character. The learned trial judge considered all these factors before arriving at the sentence of 4 years 11 months imprisonment. In my judgment, there is no arguable error in the sentencing discretion.

[16] For these reasons, I refuse leave to appeal against conviction and sentence.

[17] The test for bail pending appeal is more stringent. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. The Bail Act 2002 specifically requires the court to consider the following factors when considering bail pending an appeal:

(a) The likelihood of success in the appeal;

(b) The likely time before the appeal hearing;

(c) The proportion of the original sentence which will have been served by the appellant when the appeal is heard.

[18] The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015).

[19] It therefore follows that the two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (*Seniloli & Others v The State* unreported Cr App No. AAU0041/04S; 23 August 2004). So far the appellant has served nine months of his sentence. If all efforts are made to ensure the appeal is ready for hearing, the appeal could be heard next year.

[20] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). The appellant has filed an affidavit in support of his application for bail. None of the matters raised in the affidavit constitute exceptional circumstance especially when the appellant has failed to satisfy the threshold of a very high likelihood of success in appeal (*Silatolu v The State* unreported Cr App No. AAU0024 of 2003; 27 September 2004). For these reasons, the application for bail fails.

Result

[21] Leave to appeal against conviction and sentence is refused.
The application for bail pending appeal is refused.

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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Iqbal Khan & Associates for the Appellant
Fiji Independent Commission against Corruption for the Respondent