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

CRIMINAL APPEAL AAU 70 OF 2015
AAU 82 OF 2015
AAU 137 OF 2015
(High Court HAC 349 of 2013)

BETWEEN	:	**FIROZ JAN MOHAMMED** **NAVITALAI TAMANITOAKULA** **ILIESA TURAGACATI** ***Appellants***
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION** ***Respondent***
Coram	:	**Calanchini P**
Counsel	:	**Mr A K Narayan for the First Appellant** **Mr F Vosarogo for the Second Appellant** **Mr M Yunus for the Third Appellant** **Mr R Aslam with Ms S Fatafehi for the Respondent**
Date of Hearing	:	**7 March 2017**
Date of Ruling	:	**5 May 2017**

RULING

[1] The three Appellants together with one other were charged with offences that related to allegations of corruption. The first Appellant (Firoz Jan Mohammed) was charged with

(1) bribery of public officials contrary to section 134(1) of the Crimes Act 2009 (the Act), (2) obtaining a financial advantage contrary to section 326(2) of the Act and (3) perverting the course of justice contrary to section 190(e) of the Act.

[2] The second Appellant (Navitalai Tamanitoakula) was charged with one count of causing a loss contrary to section 324(2) of the Act. The third Appellant (Iliesa Turagacati) was charged with receiving a bribe contrary to section 135(1) of the Act and causing a loss contrary to section 324(2) of the Act.

[3] The Appellants and the fourth accused pleaded not guilty to the charges. Following a trial in the High Court before a Judge sitting with four assessors lasting some 28 days the assessors returned unanimous opinions of guilty on all charges against the three Appellants and the fourth accused. In a reasoned judgment delivered on 22 June 2015 the learned trial Judge indicated his agreement with the opinions of the assessors and proceeded to convict the Appellants and the fourth accused as charged. On 24 June 2015 the learned Judge sentenced the Appellants and the fourth accused. Firoz Jan Mohammed was sentenced to 7 years imprisonment with a non-parole term of 5 years on count 1, 8 years imprisonment with a non-parole term of 5 years on count 2 to be served concurrently with the sentence for count 1 and 12 months imprisonment on count 3 to be served concurrently with the sentences for counts 1 and 2. The effect was a total sentence of 8 years imprisonment with a non-parole term of 5 years.

[4] Tamanitoakula was sentenced to 4 years imprisonment with a non-parole term of 2½ years. Turagacati was sentenced to 6 years imprisonment with a non-parole term of 4 years on count 1 and to 5 years imprisonment with a non-parole term of 4 years on count 2 to be served concurrently with the sentence on count 1 for a total sentence of 6 years imprisonment with a non-parole term of 4 years. The fourth accused was sentenced to 2 years imprisonment suspended for 2 years.

[5] The first Appellant filed a timely notice of appeal against conviction and sentence on 25 June 2015. On the same day Firoz Jan Mohammed also filed an application for bail

pending appeal. On 22 July 2015 Tamanitoakula filed a timely notice of appeal against conviction and sentence. Although Turagacati filed a notice of appeal against conviction in October 2015, the appeal was treated as a timely appeal since the notice of appeal was dated 24 July 2015. The basis of that concession is that as an unrepresented incarcerated appellant at the time, Turagacati had no control over the movement of his notice of appeal after he had signed and dated the document.

[6] To the extent that the grounds of appeal against conviction raised by the Appellants involve questions of fact alone or questions of mixed law and fact the Appellants must obtain leave from the Court of Appeal. In the case of any appeal against sentence an appellant also requires the leave of the Court of Appeal (sections 21(1)(b) and 1(c) of the Court of Appeal Act Cap 12). The power of the Court of Appeal to grant leave may be exercised by a judge of the Court pursuant to section 35(1) of the Court of Appeal Act. Leave is not required in respect of grounds of appeal that involve questions of law alone (section 21(1)(a) of the Court of Appeal Act).

[7] The test to be applied in an application for leave to appeal against conviction is whether the appeal raises an arguable point that requires the consideration of the Court of Appeal. The test for leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** CAV 10 of 2013; 20 November 2013).

Leave to appeal conviction by Firoz Jan Mohammed

[8] As the Appellants have filed separate notices of appeal against their respective convictions it is necessary to consider each Appellant's application for leave to appeal against conviction and sentence in turn. The first Appellant (Firoz Jan Mohammed) relies upon 24 grounds of appeal against conviction and 22 grounds of appeal against sentence. These grounds of appeal are an unfortunate example of what has been described by this Court as the "*scatter gun*" approach to drafting a notice of appeal. It is, in my view, an abuse of process to allege as grounds of appeal that a trial Judge has erred on 24 arguable grounds in the conduct of the trial or in the summing up, let alone 22

arguable errors in the exercise of the sentencing discretion. During the course of his oral submissions Counsel for the first Appellant conceded that there was considerable repetition and or overlap in the grounds of appeal against conviction. It was also apparent that most of the grounds against sentence were misconceived or repetitive. In **Silatolu –v- The State** (AAU 24 of 2003; 10 March 2006) this Court observed at paragraph 6 in relation to a similar situation that:

> *"The amended grounds of appeal initially listed 27 grounds and many subsidiary grounds against conviction. Shortly before the hearing four were withdrawn. The remaining grounds overlap and are frequently repetitive. It would not be an unfair description to suggest counsel has used a "scatter gun approach" _ _ _ the court is seldom assisted by lengthy grounds which fail to distinguish those with merit from those which manifestly have none."*

[9] It is not necessary to set out in full each of the 24 grounds of appeal upon which the first Appellant relies in respect of his appeal against conviction. Specific reference will be made to a particular ground when necessary, otherwise, where possible, the grounds will be grouped and considered accordingly.

[10] However, before considering the first Appellant's grounds of appeal, a large number of which seek to challenge the propriety of the directions set out in the summing up, it is appropriate to recall the observations of the Privy Council in **Prasad –v- The Queen** (Privy Council Appeal No.32 of 1979 from the Court of Appeal, Fiji, delivered on 17 November 1980):

> *"[In Fiji] there is no jury, the trial is before a judge and assessors _ _ _. The judge sums up to them; each then states his individual opinion as to the guilt of the accused; although permitted to consult with one another they are not obliged to do so; and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they may be unanimous, if he thinks that their opinions are wrong. The field of comment upon evidence that is proper to a judge in summing up to a jury in a trial in which they are collectively the exclusive decider of fact is not necessarily the same as in summing up to assessors whose function it is to help the judge in making up his own mind as the sole ultimate determiner of fact."*

[11] It follows that any omission in the directions given to the assessors by the learned judge in the summing up or even any error in the summing up may be either clarified or rectified in either the reasoned judgment that the trial judge is required to pronounce if he disagrees with the opinions of the assessors (under section 237 of the Criminal Procedure Act 2009) or in the reasoned judgment that the trial judge should pronounce when he concurs with the opinions of the assessors (**Mohammed –v- The State** CAV 2 of 2013; 27 February 2014).

[12] In the present appeal, the learned trial Judge delivered a reasoned judgment on 22 June 2015 setting out cogent reasons in support of his decision to agree with the opinions of the assessors and his conclusion that the first Appellant Firoz Jan Mohammed was guilty on all three counts and then proceeding to convict him on those counts. As a result the grounds of appeal that raise issues concerning the summing up require consideration not only of the summing up as a whole but also of the judgment and its cogent reasons.

[13] Grounds 1 – 3 seek to challenge the adequacy of the summing up taking into account the length of the trial. These three grounds are expressed in general terms. Reference has not been made in either the grounds themselves or in the written submissions to any specific omission in respect of either the evidence or the closing addresses. The grounds do not comply with Rule 35(4) of the Court of Appeal Rules (the Rules) which requires the notice of appeal to "*precisely specify*" the grounds upon which the appeal is brought. The reason for this requirement was long ago stated by the Court of Appeal in **Fielding v R** (1938) 26 Cr. App. R 211:

> *"It has been said many times in this Court 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 case they have to meet."*

[14] Furthermore the grounds of appeal may also be described as prolix when they are numerous and equally lacking particulars. As a result leave to appeal on grounds 1 – 3 is refused.

[15] Ground 4 complains that the opinions of the assessors and the judgment of the learned Judge are unsafe and unsatisfactory. The bases upon which this Court may allow an appeal against conviction are set in section 23(1) of the Court of Appeal Act. The opinions of the assessors are not subject to appeal. An appeal in respect of a conviction may be allowed on the grounds specified in respect of the verdict or the judgment, both of which are the domain of the trial judge. Leave to appeal on ground 4 is refused.

[16] Ground 5 is not particularized and is too vague for the Court of Appeal to identify the nature of the complaint. Leave to appeal on ground 5 is also refused.

[17] To the extent that ground 6 raises a specific complaint it is said to be particularized in the submissions to grounds 10 and 11. Otherwise this ground is also vague and not sufficiently particularized to determine its merit. Leave to appeal on ground 6 is also refused.

[18] Ground 7 is described as an error of law alone and is said to be related to the directions given on the standard of proof. Although leave is not required in respect of a ground of appeal that involves a question of law alone under section 21(1)(a), it is necessary to determine whether the ground does raise a question of law alone or whether leave is required. In submissions before the Court Counsel for the Appellant stated that the issue was the use of the words "*not just some fanciful doubt.*"

[19] It is not necessary, in my judgment, for the Court of Appeal to consider whether it was proper for the learned Judge to include those words when directing on the standard of proof. The reason is that in his judgment the learned judge has applied the test of beyond reasonable doubt in relation to all the elements of the three counts upon which he then

proceeded to accept the guilty opinions of the assessors and convict the Appellant. At no stage in his judgment has the learned judge referred to the expression *"some fanciful doubt."* The correct standard has been applied and to the extent that the summing up may have raised a question of law alone, that issue has been clarified in the judgment. The appeal on ground 7 is dismissed under section 35(2) of the Act as being vexatious.

[20] Ground 8 complains that the directions given in paragraph 8 of the summing up are defective in the sense that the learned Judge has not identified which witnesses had given evidence that was inconsistent with prior out of court statements and the nature of those inconsistencies. In my view the issue raised by his ground does involve questions of law and fact. The directions to be given in any particular case will depend on the nature of the inconsistency and the extent to which the evidence implicates the accused. There is no reference in the judgment to inconsistent prior statements. The ground is arguable and leave is granted on ground 8.

[21] Ground 9 complains that the directions given by the learned Judge in paragraph 13 of his summing up on circumstantial evidence were inadequate. There is no specific complaint as to what should have been included or how the judge has erred in the directions that he did give. As a result this ground does not comply with Rule 35(4) of the Rules. It fails to identify the error of law. However in view of the observations of this Court in **Vulaca - v- The State** ([2011] FJCA 39; AAU 38 of 2008; 29 August 2011) it is necessary for the trial judge to remind the assessors and himself that with circumstantial evidence it is necessary to ask whether the only reasonable inference to be drawn from the evidence is the guilt of the accused. The Judge is required to ask himself whether there can be any other explanation for the evidence, which is also consistent with the accused's innocence.

[22] It is also not clear to what extent, if any, that the trial judge relied on the circumstantial evidence or to what extent he was able to rely on direct evidence. The Court of Appeal may need to consider the observation of the Supreme Court in its decision in Mohammed **Haroon Khan –v- The State** (CAV 9 of 2013; 17 April 2014).

[23] It is appropriate that ground 9 be considered by the Court of Appeal either as a question of law alone or as a question of mixed fact and law. To the extent that it may be necessary, leave to appeal on ground 9 is granted.

[24] The issues raised by grounds 10 and 11 are arguable and leave is granted.

[25] Grounds 12 and 13 involve questions of mixed law and fact. In his judgment the learned trial Judge has correctly stated and applied the standards of proof in relation to the available statutory defence. Leave is refused on grounds 12 and 13.

[26] It may be that ground 14 is a ground involving questions of mixed law and fact. However in view of the observations of this Court in **Nadiri –v- The State** (AAU 80 of 2011; 2 October 2015) the ground is not arguable and leave to appeal is refused.

[27] Grounds 15 and 16 can be considered together. The first issue relates to the adequacy of the directions in paragraph 36 given by the learned Judge on the element of conduct in the count relating to obtaining a financial advantage. In my view it is sufficient for the trial Judge to identify the elements of the offence and to indicate that each must be established beyond reasonable doubt. Beyond that requirement the prosecution must rely on the evidence to prove each element.

[28] The Appellant has not identified what evidence should have been included in the trial Judge's summing up. An appeal ground should not be based on speculation. Since both grounds 15 and 16 involve questions of mixed law and fact the grounds do not raise an arguable issue and leave to appeal is refused.

[29] Ground 17 is concerned with the comments made by the learned Judge about the witness Mr Tora. In his judgment the learned Judge has summarized the evidence given by Mr Tora and has clearly stated why he believed the evidence of Mr Tora and did not accept the evidence of the "*defence expert*" Mr Goodger. This ground is not arguable and leave to appeal is refused.

[30] In relation to ground 18 the learned Judge has provided reasons why he accepted the evidence adduced by the prosecution and did not accept the evidence of the Appellants in relation to the reasonable excuse defence. This ground is not arguable and leave is refused.

[31] In relation to ground 19, whether a direction should have been given concerning any incriminatory material affecting the Appellant in the caution interview of the second and third Appellants depends upon the existence of incriminatory material. Ground 19 involves questions of mixed law and fact. The issue can only be resolved after the record has been prepared and as a result leave should be given on ground 19. There is no reference to the caution interviews in the judgment.

[32] Grounds 20 – 24 can be considered together. The grounds do not particularise the error nor specify the element of the offence of perverting the course of justice upon which the learned judge failed to give directions. In any event when section 190(e) of the Crimes Act 2009 is compared with the directions given in paragraph 70 of the summing up it is clear that the learned Judge has directed sufficiently on both the physical and fault elements of the offence. The learned judge has identified the evidence upon which he relied in support of his finding of guilt and in support of his decision to convict the Appellant.

[33] The learned Judge has indicated that he accepted the evidence of Azeem Ali who stated that he had been forced by the Appellant to make a false declaration. It is that finding that establishes the allegation in count 8 that the physical element of perverting the course of justice was to influence Ali to make a false declaration.

[34] The other issues raised by the Appellant in written submissions were not part of the defence case at the trial and nor did trial Counsel seek further or clarifying directions from the trial Judge. If necessary, leave to appeal is refused on grounds 20 – 24.

Leave to appeal sentence by Firoz Jan Mohammed

[35] Although there are some 22 grounds of appeal against sentence set out in the notice of appeal, Counsel for the Appellant appeared to accept that the issues raised by those grounds could be considered under two main headings.

[36] The first issue was concerned with the determination of the tariff and the starting point for the offence of bribery of public officials under section 134(1) of the Crimes Act. However this is not a ground that has been particularized in the notice of appeal and as a result it must be assumed that the Appellant relies on ground one. This ground is stated in general terms as being that *"in all the circumstances of the case the sentence imposed upon the appellant was wrong in principle and manifestly excessive."* This ground has not been particularized in the notice of appeal nor has it been specifically addressed in the written submissions.

[37] The second heading relates to the analysis by the Judge of the aggravating and mitigating factors in the sentencing decision.

[38] The issue relating to fixing a tariff for the purposes of sentencing for the conviction of bribery under section 134(1) of the Crimes Act was not canvassed in the Appellant's written submissions. Counsel for the Appellant submitted at the hearing that the tariff selected by the learned trial judge was excessive. As the judge noted the maximum sentence upon conviction for this offence is 10 years imprisonment. In the absence of any relevant assistance from decisions in Fiji the learned Judge considered the approach to sentencing in the United Kingdom for a similar offence with a similar maximum penalty. As a result the learned judge considered that a tariff of 5 to 8 years was appropriate in a case where there was high culpability. The learned judge considered that the Appellant's culpability was high and adopted the tariff of 5 to 8 years with a starting point of 7 years. The judge added one year for involving others to effect the bribing of the government official as an aggravating factor. The Judge rejected the financial evidence adduced by the Appellant and the letters of character reference which he

regarded as lacking independence. He allowed one year for good character on the basis that the Appellant had a hitherto clean criminal record.

[39] I have concluded that the Court of Appeal is unlikely to conclude that the learned Judge has erred in the exercise of his discretion when he selected a tariff of 5 to 8 years for this offence and when he fixed the starting point of 7 years in the case of the Appellant.

[40] However whether the discretion has miscarried in relation to the aggravating and mitigating factors resulting in a sentence that was excessive is arguable and leave is granted in relating to this issue.

Application for bail pending appeal by Firoz Jan Mohammed

[41] The remaining issue for this Appellant is the application for bail pending appeal. The principles upon which such an application is considered are both well settled and well known (see **Zhong –v- The State** AAU 44 of 2013; 15 July 2014).

[42] In accordance with decided authority, I am not satisfied that any ground of appeal that remains to be considered by the Court of Appeal has a very high likelihood of success sufficient to constitute exceptional circumstances.

[43] Furthermore I am not satisfied that the Appellant has demonstrated that there are any other matters raised by him in support of his application which constitute exceptional circumstances. As a result the application for bail pending appeal is refused.

[44] In summary the Appellant Firoz Jan Mohammed's appeal against conviction on grounds 8 to 11 and 19 may proceed as grounds involving questions of mixed law and fact or on grounds involving questions of law alone. Leave to appeal against conviction is refused on grounds 1 – 6, 12 – 18, 20 – 24. The appeal is dismissed on ground 7 under section 35(2) of the Act. Leave to appeal against sentence is granted. The application for bail pending appeal is refused.

Leave to appeal conviction by Navitalai Tamanitoakula

[45] In his notice of appeal the second Appellant (Navitalai Tamanitoakula) relies upon 9 grounds of appeal against conviction. Again, grounds 1 – 3 seek to challenge the adequacy of the summing up so far as it relates to the second Appellant. Neither in these grounds of appeal nor in the written submissions does the second Appellant refer to any specific complaint. The grounds are expressed in general terms and it is not the task of the Court of Appeal to speculate the precise nature of the complaint. The grounds do not comply with Rule 35(4) of the Court of Appeal Rules. As a result leave to appeal on grounds 1 – 3 is refused.

[46] Grounds 4 to 8 raise objections to the directions in paragraphs 57 and 58 of the summing up. All four grounds relate to the comments by the trial Judge in these paragraphs about the second Appellant's decision not to give or call evidence at the trial. However the issue for the Court of Appeal will not be whether the directions to the assessors in those paragraphs were proper in themselves but rather whether the directions when read with the reasoned judgment establish whether the learned trial Judge has adopted the correct approach to the burden of proof and the decision by this Appellant not to adduce evidence. As the High Court of Australia observed in **Azzopardi –v- R** (2001) 205 CLR 50 at page 64:

> *"It is therefore clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make – weight in considering whether the prosecution has proved the accusation beyond reasonable doubt."*

[47] In paragraph 14 of his judgment the learned trial Judge concludes with the observation that:

> *"I find the prosecution have proved his guilt beyond reasonable doubt and there is no evidence before the Court that would deter me from that finding."*

[48] When these comments are considered with the impugned comments in paragraphs 57 and 58 of the summing up it is arguable that the learned Judge may have misdirected himself resulting in a miscarriage of justice. Leave is granted on grounds 4 – 7.

[49] Grounds 8 and 9 challenge the fairness of the summing up on the basis that it was lacking balance and was one-sided. However the objections have not been particularised and it must be recalled that the second Appellant did not adduce evidence. Leave is refused on grounds 8 and 9.

Leave to appeal sentence by Tamanitoakula

[50] Grounds 10 – 12 relate to the sentence appeal. The second Appellant was charged with one offence under section 324 of the Crimes Act 2009. The maximum penalty upon conviction is imprisonment for 5 years. The particulars of the offence indicate that the loss amounted to approximately $2.46m. He was sentenced to a term of imprisonment of 4 years with a non-parole term of 2½ years. To obtain leave to appeal against sentence the second Appellant is required to establish an arguable error in the exercise of the sentencing discretion. Considering the amount involved and the degree of culpability the learned trial Judge selected 5 years as the starting point. In doing so the learned Judge has considered matters that were proper and relevant. There is no error. In allowing a reduction of one year for character again there is no error on the part of the Judge. The issue of parity does not assist the second Appellant in this case. Leave to appeal sentence is refused.

Leave to appeal conviction by Iliesa Turagacati

[51] Ground 1 challenges the directions given to the assessors by the learned trial Judge in paragraph 9 of the summing-up concerning the written offers of immunity given to four prosecution witnesses in return for their giving truthful evidence if called upon in the trial against the accused. Copies of the immunity letters are included in the Respondent's submissions. The directions were proper and fair. None of the witnesses granted immunity testified in a substantive sense against the third Appellant. The ground is of even less merit when the trial is before a judge sitting with assessors. Leave is refused.

[52] Ground 2 appears to raise more than one issue. The first issue relates to the direction given on the elements of causing a loss under section 324 of the Crimes Act 2009. The second issue is that the particulars of the offence were inconsistent with the evidence. The third issue is that there was no evidence of causing a loss or dishonest conduct. This ground fails to take into account the correct direction given on the elements in the summing up. It also fails to consider paragraph 13 of the judgment dealing with count 4 against this Appellant. Leave is refused.

[53] Ground 3 challenges the summing up on the basis that it was unbalanced resulting in an unreasonable conviction. There are no particulars provided and the ground is too vague for the Court of Appeal to consider. Leave is refused.

[54] Counsel informed the Court that ground 4 was not being pursued and is marked as withdrawn.

[55] Ground 5 challenges the directions to the assessors on the evidence that established the loss under count 4. However the third Appellant's submissions take no account of paragraph 13 of the Judgment. The learned Judge sets out the evidence upon which the decision to convict is based. Leave is refused.

[56] Ground 6 challenges the directions given to the assessors by the learned Judge in paragraph 8 of the summing up concerning the approach to previous (out of court) inconsistent statements of witnesses. The directions given are somewhat confusing as to how exactly the trier of fact (ie. the Judge) should assess the evidence given on oath in the light of previous (out of court) inconsistent statements. Although the learned Judge in his judgment has adopted the correct approach to this issue there is no reference to inconsistent out of court statements in the judgment. Whether further consideration should have been given to such statements will require an examination of the record. For that reason leave is granted to appeal on this ground.

Orders:

1. *Firoz Jan Mohammed*
   - *Leave to appeal against conviction is granted for grounds 8 – 11 and 19.*
   - *Leave to appeal against conviction is refused on grounds 1 – 6, 12 – 18, 20 – 24.*
   - *Appeal is dismissed on ground 7 under section 35(2) of the Court of Appeal Act.*
   - *Leave to appeal against sentence is granted.*
   - *Application for bail pending appeal is refused.*

2. *Navitalai Tamanitoakula*
   - *Leave to appeal against conviction is granted on grounds 4 – 7.*
   - *Leave to appeal against conviction is refused on grounds 1 – 3 and grounds 8 – 9.*
   - *Leave to appeal against sentence is refused.*

3. *Iliesa Turagacati*
   - *Leave to appeal against conviction is granted on ground 6.*
   - *Leave to appeal against conviction is refused on grounds 1 – 3 and 5.*
   - *Ground 4 is marked withdrawn.*

W. Calanchini

Hon Mr Justice Calanchini
President, Court of Appeal