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

**CRIMINAL APPEAL NO.AAU 0004 of 2020**
**[In the High Court at Suva Case No. HAC 324 of 2016]**

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| **BETWEEN** | : | **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)** |
| | | ***Appellant*** |
| **AND** | : | **IFEREIMI VASU**<br>**PENIASI KURIVITU KUNATUBA** |
| | | ***Respondents*** |
| **Coram** | : | **Prematilaka, JA** |
| **Counsel** | : | **Mr. R. Aslam and Ms. Puleiwai for the Appellant**<br>**Mr. F. Vosarogo for the 01st Respondent**<br>**Ms. V. Ravono for the 02nd Respondent** |
| **Date of Hearing** | : | **09 February 2021** |
| **Date of Ruling** | : | **23 February 2021** |

# RULING

[1] The respondents had been charged in the High Court of Suva with one count each of Abuse of Office contrary to section 139 of the Crimes Act, 2009. The charges read as follows.

***FIRST COUNT***

***Statement of Offence (a)***

***ABUSE OF OFFICE**: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.*

***Particulars of the Offence (b)***

***IFEREIMI VASU***, *between 11th July 2013 and 27th December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.*

***SECOND COUNT***

***Statement of Offence (a)***

***ABUSE OF OFFICE****: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.*

***Particulars of the Offence (b)***

***PENIASI KURIVITU KUNATUBA,*** *between 31st October 2012 and 31st March 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Director Corporate Service and Acting Deputy Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ$ 60,345.65 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.*

[2] At the conclusion of the summing-up, on 11 December 2019 the assessors had unanimously opined that the respondents were not guilty. On 18 December 2019 the learned trial judge had agreed with the assessors and acquitted the respondents.

[3] On 16 January 2020 the appellant had preferred a timely notice of application for leave to appeal against conviction. Written submissions on behalf of the appellant had been tendered on 22 July 2020. Written submissions of the 01st and 02nd respondents had been filed on 09 October 2020 and 10 September 2020 respectively.

[4] Grounds of appeal urged on behalf of the appellant are as follows.

***Ground 1***

*The learned High Court Judge erred in law and was misconceived in identifying the correct elements of Abuse of Office offence under Section 139 of the Crimes Act of 2009.*

***Ground 2 – Issue of Fault Element***

*i. The Learned High Court Judge erred in law in his Ruling that the intention was the fault element of the abuse of office offence under Crimes of 2009, contrary to the law settled by previous binding case authorities.*

*ii. The Learned High Court Judge erred in law by wrongly applying Section 23 of the Crimes Act of 2009 to the offence of Abuse of office under Section 139.*

*iii. The Learned High Court Judge erred in law in his Summing Up by directing the Assessors that the intention of the Accused was the fault element of the offence.*

*iv. The Learned High Court Judge erred in law in his Judgment by applying his earlier Ruling that the intention of the Accused was the fault element of the offence of Abuse of office.*

***Ground 3***

*The Learned High Court Judge erred in law and facts by ruling on the applicable fault element on a clarification sought by the 1st Respondent after the prosecution had closed its case, thus depriving the prosecution of proving the relevant fault element applicable.*

***Ground 4 – The Judgment contradicting the legal direction given to the Assessors in the Summing Up***

*i. The Learned High Court Judge erred in law and fact in contradicting his own Legal Direction given to the Assessors by stating in his Judgment that those several other officers also should take equal share of the blame for these breaches and irregularities when he already directed the Assessors in his Summing Up that the Assessors must only focus on the evidence available against the Respondents without dwelling on purported breaches of other officers.*

*ii. The Learned High Court Judge erred in law and fact when he stated, contrary to the evidence available, in his Judgment that the Respondents alone cannot be held responsible for all the breaches and irregularities noted in the transactions when several other officers with predefined duties should take equal shared of the blame for those breaches and irregularities when he found the Respondents not guilty.*

***Ground 5 – Prejudicial to the rights of another***

*The Learned High Court Judge erred in law and fact by failing to consider evidence available, in its entirety, pertaining to the element of "prejudicial to the rights of another".*

***Ground 6 – Gain***

*i. The Learned High Court Judge erred in law when he disallowed admissible and relevant evidence that incriminated the Respondents being tendered by the prosecution which intended to prove the alleged gain stated in the information.*

*ii. The Learned High Court Judge erred in law and fact when by failing to analyse evidence available in its entirety pertaining to the element of "gain".*

***Ground 7 – Disclosures***

*i. The Learned High Court Judge erred in law when he disallowed the disclosures consisting of further evidence being filed and used by the prosecution during the Trial.*

[5] In terms of section 21(2)(a) of the Court of Appeal Act, the appellant could appeal against acquittal on a question of law alone but only with leave of court on a question of fact alone or a question of mixed law and fact under section 21(2)(b). The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

***01st and 02nd (i) grounds of appeal***

[6] 01 and 02 (i) grounds of appeal are similar while 02(ii) to (iv) grounds of appeal are consequential to them. The gist of the appellant's complaint emanates from the trial judge's determination in the Ruling dated 28 November 2019 given at the close of the

prosecution case that in terms of the provisions of the Crimes Act, 2009 the fault element of the offence of Abuse of Office under section 139 of the Act is intention.

[7] The appellant's main arguments could be summarized as follows.

(i) The legislature in promulgating section 139 of the Crimes Act, 2009 had adopted the offence of Abuse of Office from section 111 of the Penal Code, for both are almost similar except with regard to the enhanced sentence prescribed under the Crimes Act.

(ii) Therefore, the judicial decisions interpreting the fault element of section 111 of the Penal Code are still valid and applicable under section 139 of the Crimes Act, 2009, as reflecting the legislative intention.

(iii) Intention was never part of the offence of Abuse of Office under section 111 of the Penal Code (and not under section 139 of the Crimes Act, 2009) as demonstrated by the decisions delivered under the Penal Code in **Patel v Fiji Independent Commission Against Corruption** (FICAC) [2013] FJSC 7; CAV0007 of 2011 (26 August 2013) and **Devo v Fiji Independent Commission Against Corruption** [2017] FJSC 16; CAV0005 of 2017 (20 July 2017). Intention was not considered as part of the offence of Abuse of Office in **Fiji Independent Commission Against Corruption (FICAC) v. Ana Laqere and Others** [2017] FJHC 337; HAC 56.2014 (10 May 2017 decided under the Crimes Act, 2009.

(iv) There was never an ambiguity about the *mens rea* (or now fault element) of the offence of Abuse of Office under section 111 of the Penal Code and one of the first cases to decide the issue was **Naiveli v State** [1995] FJSC 2; CAV00014 of 1994s (23 November 1995) followed by subsequent decisions including ***Devo***.

(v) The trial judge was correct in stating that the fault element was inbuilt in the offence of Abuse of Office under section 139 of the Crimes Act,

2009 but erred in concluding that intention was the 'predominant' fault element based on section 23 of the Crimes Act, 2009 on the premise that the offence had not specified a fault element.

(vi) Guilty knowledge, ulterior motive, gain or harm intended to cause; or negligence, not limiting the fault element only to intention, could also be fault elements of the offence of Abuse of Office under section 139 of the Crimes Act, 2009 depending on the circumstances of the case.

[8] The respondents' arguments could be summarized as follows.

(i) Section 139 of the Crimes Act, 2029 is similarly worded to section 111 of now repealed the Penal Code except for the enhanced sentencing provisions. However, Crimes Act has also brought several new provisions not found in the Penal Code meant to give meaning and guidance in the interpretation of offences and sections 18-23 of the Crimes Act provide such guidelines to determine the fault element/s in any given offence.

(ii) Neither section 111 of the Penal Code nor 139 of the Crimes Act, 2009 specifies a fault element. It was wrong to assert that intention was never part of the offence of Abuse of Office and it was always intention that was the fault element of section 111 of the Penal Code.

(iii) ***Naiveli*** had accepted the fault element of the offence of Abuse of Office under section 111 of the Penal Code to be intention considering section 9 of the Penal Code. However, that would no longer is the case in the light of provisions in section s 15-23 of the Crimes Act, 2009 for the offence of Abuse of Office under 139 of the Crimes Act, 2009. Current statutory provisions would prevail over the case law decided under the repealed law.

(iv) The trial judge was right to rule that 'intention' is the fault element of offence of Abuse of Office under section 139 of the Penal Code.

(v) To state guilty knowledge, ulterior motive, gain or harm intended to cause or negligence as the fault element depending on the circumstances of the case is unhelpful and imprecise.

[9] It is not a correct proposition of law to say that the legislature in promulgating section 139 of the Crimes Act, 2009 had simply adopted the offence of Abuse of Office from section 111 of the Penal Code merely because the wordings in both are almost similar except the enhanced sentencing regime under the Crimes Act. The preamble to the Crimes Act is very clear that it sought to *inter alia* repeal the Penal Code and make provision in relation to the elements of criminal responsibility and to prescribe a range of criminal offences. Accordingly, repeal of the Penal Code is specifically stated in section 391(1) of the Crimes Act, 2009 subject to savings and transitional provisions in section 392 and 393 which are, of course, not relevant to the issue at hand. Thus, the offence of Abuse of Office under section 139 of the Crimes Act, 2009 is an offence created under the Crimes Act and not an adaptation of offence of Abuse of Office in section 111 of the Penal Code.

[10] However, the judicial decisions interpreting the fault element in section 111 of the Penal Code can still be relevant and of persuasive value in interpreting the fault element of section 139 of the Crimes Act, 2009 subject, of course, to the legislative provisions in relation to the elements of criminal responsibility introduced by the Crimes Act, 2009 which obviously take precedence over any judicial interpretations under the repealed Penal Code. Section 5 of the Crimes Act, 2009 provides a few other tools and rules of interpretation of provisions of and offences prescribed by the Crimes Act or any other Act which include calling in aid any judgment of a court in Fiji.

[11] In ***Patel*** and ***Devo*** the Supreme Court has not discussed at all the issue of the fault element in the offence of Abuse of Office section 111 of the Penal Code and therefore cannot be regarded as having laid down any principle on the fault element or lack of it. ***Ana Lagere and Others*** too had concentrated on the physical element of 'abuse of authority of office' and not the fault element of offence of Abuse of Office under section 139 of the Crimes Act, 2009.

[12] In ***Naiveli*** the Supreme Court decided that section 9 of the Penal Code had not excluded from consideration any mental element as an ingredient of an offence other than an intention to cause a particular result and declared in the context of section 111 of the Penal Code that the state of mind of the offender of the arbitrary act would determine whether he or she had done it in abuse of the office. The court had further held that if the said act is done or directed to be done maliciously (a) with the intention of causing loss or harm to another or (b) with the intention of conferring some advantage or benefit on the office, it will constitute an abuse of office with the proviso that these are just two instances of abuse of office and it would be unwise to attempt an exhaustive definition of what constitutes an abuse of office. While being mindful that ***Naiveli*** too had been decided under the Penal Code in the context of section 9, it is clear that the Supreme Court had accepted that there is a mental element in the offence of Abuse of Office under section 111 of the Penal Code but not prescribed what that fault element is except identifying malicious intention as one such mental element. Therefore, ***Naiveli*** cannot be regarded as a binding authority as to the fault element of the offence of Abuse of Office under section 139 of the Crimes Act, 2009.

[13] Therefore, to state that guilty knowledge, ulterior motive, gain or harm intended to cause or negligence in addition to intention were part of offence of Abuse of Office under section 111 of the Penal Code is incorrect. Similarly, to claim that intention was always the mental element of the offence of Abuse of Office under section 111 of the Penal Code is also an error. Similar arguments even in relation to the offence of Abuse of Office under section 139 of the Crimes Act cannot be sustained.

[14] Therefore, answers to the questions whether there is a fault element and if so what that fault element is in the offence of Abuse of Office under section 139 of the Penal Code, have to be found within the relevant provisions of the Crimes Act, 2009 as the previous judicial pronouncements have not settled that issue.

[15] Section 13 (1) of the Crimes Act, 2009 states that an offence consists of physical elements and fault elements. Fault element in some jurisdictions is called the mental element or *mens rea*. It is clear that any given offence could have more than one physical element and more than one fault element. According to section 13(2), the law

that creates a particular offence could provide that there is no fault element for one or more physical elements of that offence. Similarly, the law that creates an offence could also provide different fault elements for different physical elements [*vide* section 13(3)] of that offence. Therefore, unless the law creating an offence specifically provides otherwise as anticipated in sections 13(2), every such offence must be taken to consist of physical as well as fault elements. Thus, the mere absence of a specific reference to a fault element in an offence does not mean or presupposes the lack of a fault element/s in that offence unless the law creating that offence specifically rules out such a fault element.

*Strict liability*

[16] There is another class of offences recognized by the Crimes Act. The law creating a particular offence could provide that an offence is a strict liability offence in which event there are no fault elements for any of the physical elements of such a strict liability offence [*vide* section 24(1)(a)]. The law creating an offence may also provide that strict liability applies to a particular physical element of that offence [*vide* section 24(1) and (2)] in which event there are no fault elements for that physical element [*vide* section 24(2)(a)]. Thus, there can be two types of strict liability offences.

*Absolute liability*

[17] Section 25 deals with offences of absolute liability which are similar to the two types of strict liability offences under section 24 except that the defense of mistake of fact under section 35 is unavailable to the two types of absolute liability offences whereas mistake of fact as a defense is available in respect of strict liability offences.

[18] It appears that the offences referred to in section 13(2) could either become strict liability offences or absolute liability offences depending on how the law creating the offence may provide.

*Offences that do not specify fault elements*

[19] There are other offences where the law creating those offences neither rules out fault elements nor specifies fault elements and thus, are silent as to the required fault

elements. In other words, those offences have no fault elements inbuilt in the definition of the offences. However, it would be wrong to assume that those offences have no fault elements. It is to deal with such offences that Crimes Act, 2009 has promulgated section 23.

[20] Section 23 (1) and (2) declare

*'If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.'*

*[section 23(1)]*

*'If the law creating the offence does not specify a fault element for a physical element that consists of circumstance or a result, recklessness is the fault element for that physical element.'*

*[section 23(2)]*

[21] It is clear enough that the offence of Abuse of Office section 139 of the Crimes Act is neither a strict offence nor an absolute offence. Nor does it specify a fault element. Therefore, the offence of Abuse of Office is in the category of offences that do not specify fault elements and therefore, section 23 comes into operation. What the fault element of the offence of Abuse of Office is then depends on whether it falls into section 23(1) category or section 23 (2) category. This in turn depends on the nature of the physical element of the offence.

[22] The physical elements of an offence are (a) conduct or (b) a result of conduct or (c) a circumstance in which conduct, or a result of conduct occurs [ *vide* section 15(1)]. 'Conduct' means an act, or an omission to perform an act or a state of affairs and 'engage in conduct' means (a) do an act or (b) omit to perform an act [*vide* section 15(2)].

[23] If so, then the question is whether the physical element of the offence of Abuse of Office consists only of conduct or a result of conduct or circumstance. In other words it has to be determined whether the offence comes under sections 23(1) or 23(2). To find an answer, one has to go back to the definition of the offence of Abuse of Office in section 139.

[24] In the offence of Abuse of Office the offender does or directs to be done any arbitrary act in the circumstance where he or she is employed in the public service and the said act is done in a manner prejudicial to the rights of another in abuse of the authority of his or her authority. If the said act is done or directed to be done for gain and any gain is achieved there is a result too. Thus, the physical element of the offence of Abuse of Office consists not just the arbitrary act but of all other elements mentioned in section 139, the combination of which creates a circumstance where the arbitrary act occurs. In case the arbitrary act is done or directed to be done for gain and a gain materializes it becomes the result of the arbitrary act which occurs in the said circumstance.

[25] Therefore, the arbitrary act (conduct) alone does not constitute the physical element in the offence of Abuse of Office. The physical element consists of the totality of the elements in section 139 (circumstance) in which the arbitrary act (conduct) occurs or the result of that conduct (in the case of gain) occurs. If any of the physical elements in addition to an arbitrary act is not established then there is no offence of Abuse of Office. Hypothetically, if the physical element is regarded as consisting only of the arbitrary act then the prosecution needs to prove only that to establish the offence of Abuse of Office but that is obviously not the correct legal position. Prosecution has to prove all elements described in section 139 to establish the physical element and they constitute not just a conduct but a circumstance in which conduct or a result of conduct occurs.

[26] In **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal said of 'circumstance' as follows.

> '[30] The word circumstance is not defined in the Crimes Act, 2009. It has been defined in the Cambridge English Dictionary as *'a fact or event that makes a situation the way it is'* and as *'a fact or condition connected with or relevant to an event or action'* by the Oxford English Dictionary. Merriam-Webster Dictionary describes it as *'a condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant'*. Webster's New World Dictionary describes a circumstance as *'a fact or event accompanying another, either incidentally or as an essential condition or determining factor.'*

[27] In the circumstances, it is my considered view that the physical element of the offence of Abuse of Office set out in section 139 of the Crimes Act, 2009 consists not only of a conduct but a circumstance in which conduct occurs. If the arbitrary act is done or directed to be done for gain and in consequence a gain materializes then the physical element consists of a circumstance in which both a conduct and a result of a conduct occurs (vide section 15(1)]. Therefore, the offence of Abuse of Office comes under sections 23(2) of the Crimes Act and recklessness becomes the fault element for the physical element of the offence of Abuse of Office.

[28] Section 14 of the Crimes Act, 2009 states *inter alia* that in order for a person to be found guilty of committing an offence, the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [*vide* section 18(1) and (2)].

[29] Therefore, the prosecution in the case of the offence of Abuse of Office has to establish recklessness as the fault element on the part of the accused as defined in section 21 (1) of the Crimes Act, 2009. If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [*vide* section 21(4)]. Thus, in an offence of Abuse of Office the fault element would be established if the prosecution proves intention or knowledge or recklessness as defined in sections 19, 20 or 21 of the Crimes Act respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of Abuse of Office.

[30] Therefore, the trial judge had erred in stating in the impugned ruling dated 28 November 2019 that the state of mind of the accused or the fault element of the offence of Abuse of Office was inbuilt in the element 'in abuse of the authority of his office' with the predominant element being intention. However, he was right when he agreed with the defense that Section 139 of the Crimes Act does not specifically set out a fault element.

[31] The trial judge's decision that intention is the only fault element of the offence of Abuse of Office had arisen from his having concluded that the physical element of the said offence is only conduct as seen from paragraph 22 of the ruling.

> *[22]....There is no dispute that the section sets out the physical element of the offence to be one of conduct. Therefore, in terms of Section 23 of the Crimes Act where the law creating the offence does not specify a fault element for a physical element that consist only of conduct, intention is said to be the fault element for that physical element.*

[32] This error had occurred due to the trial judge having treated the offence of Abuse of Office as coming under section 23(1) instead of section 23(2) of the Crimes Act, 2009.

[33] To the extent of my determination that intention or knowledge or recklessness would constitute the fault element of offence of Abuse of Office, the learned trial judge had erred in his ruling dated 29 November 2019 that the fault element for the offence of Abuse of Office in terms of Section 139 of the Act is one of intention only. He had however correctly identified the physical elements of the said offence.

[34] I therefore, determine that this is a question of law alone and no leave is required to appeal to the Court of Appeal and the mater can proceed to the Court of Appeal for hearing of the appeal on 01 and 02 (i) grounds of appeal.

***02(ii) to (iv) grounds of appeal.***

[35] These grounds of appeal are consequential to the main issue involved in the 01 and 02(i) grounds of appeal discussed in detail above.

[36] The trial judge had not erred in applying section 23 of the Crimes Act, 2009 to the offence of Abuse of Office but where he erred was applying section 23(1) instead of section 23(2) of the Crimes Act, 2009.

[37] The impugned direction in the summing-up that the intention was the fault element of the offence of Abuse of Office was the direct result of the ruling earlier given on the fault element which I have held to be erroneous.

[38] Same goes with the judgment too. The trial judge had simply reiterated that the fault element of the offence of Abuse of Office was only intention based on his initial ruling.

[39] These grounds of appeal are interlocked with the 01 and 02(i) grounds of appeal and the errors complained of are the result of the initial ruling.

[40] Since these grounds of appeal also pose questions of law alone and no leave is required to appeal to the Court of Appeal and they can be taken up by the Court of Appeal at the hearing of the appeal.

***03rd ground of appeal***

[41] The appellant complains of the timing of the trial judge's ruling on the fault element of the offence of Abuse of Office. It argues that after over a month into the trial and after the prosecution case was closed the trial judge had determined the fault element to be only intention when the prosecution had from the time of the pre-trial conference indicated that it was not seeking to prove intention as the fault element but *'the state of mind of the accused and what motivated him to do the acts'* whatever they meant and therefore, the determination of the trial judge that intention was the fault element caused injustice to the prosecution and could not be rectified subsequently as the prosecution case had not been built-up or presented on that basis. The appellant further complains that the prosecution was not given an opportunity to prove by leading evidence what the trial judge had thought to be the fault element after the ruling namely intention.

[42] It is not possible to fully digest the events leading up to the trial judge having decided to rule on the fault element of the offence of Abuse of Office and it cannot be ascertained whether the prosecution had sought permission to adduce further evidence in the light of the ruling, whether that request had been denied by the trial judge or even if such an opportunity had been afforded whether it could have mitigated any prejudice already caused to the prosecution etc. without the complete appeal record. The defense appears to have made an application to the judge to rule on the fault element for them, presumably, to fashion their defense after the close of the

prosecution case. Why the defense waited until the close of the prosecution case to urge the trial judge to rule on the fault element of the offence of Abuse of Office was not clear. It appears that after the ruling the appellants had decided not to offer any evidence for the defense, presumably a strategic decision, prompted by the legal position on the fault element pronounced in the ruling. It also appears that there had not been consensus among the prosecution, defense and the trial judge as to what exactly would form the fault element of the offence of Abuse of Office.

[43] I am of the view, that though this is not a pure question of law it is important enough particularly in view of my determination on the main issue, to proceed to the Court of Appeal. I am inclined to allow leave to appeal.

***04th ground of appeal***

[44] The appellant complains that the trial judge having redirected at paragraph 7 that the assessors have only to decide whether from the available evidence the 01st and 02nd appellants are guilty or not guilty of the offences charged, had then held to the contrary in his judgment at paragraph 58 that the two appellants alone cannot be held responsible for all the breaches and irregularities in the procurement procedure as there were several officers who should take equal share for those breaches and irregularities. By making that statement I do not think that the trial judge has *per se* contradicted his redirection.

[45] While the appellant's grievance is not completely without a basis, I am not convinced that this ground of appeal has a reasonable prospect of success in overturning the outcome of the trial judge's decision to agree with the assessors in the light of a trial judge's duty when he agrees with the assessors.

[46] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court

was supported by the evidence and was not perverse so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)].

***05th and 06th ground of appeal***

[47] These grounds of appeal essentially involve questions of mixed law and fact and could be examined only upon a scrutiny of the entire trial proceedings which task is beyond the scope of this leave to appeal hearing without the benefit of such material.

[48] In the circumstances, I would not grant leave to appeal on the material available to me but the appellant is free to canvas those matters before the full court by way of a renewal application for leave to appeal, if it so desires.

***07th ground of appeal***

[49] The appellant complains that the trial judge had disallowed its application to file and serve late disclosures in the midst of the trial where the second witness for the prosecution was under cross-examination, on the basis that it would cause prejudice to the respondents. The appellant relies on **Tuisolia v Fiji Independent Commission Against Corruption** [2010] FJHC 100; HAM122 of 2009 (01 April 2010) in support of its contention.

[50] The respondents argue that the prosecution should have anticipated the necessity of material contained in the additional disclosures for its case as the case had been in progress for a long time. They also argue that had the trial judge permitted the appellant's application it would have prejudiced their rights to have the disclosures well in advance of the trial. The respondents do not dispute the general propositions of law expressed in ***Tuisolia*** but contend that it cannot be applied to the facts of the instant case.

[51] It appears that in ***Tuisolia*** the applicant had challenged the service of additional disclosures following the setting of a trial date (not while the trial was in progress as in the current case) and argued that it constituted rogue conduct on behalf of the prosecution. It is in that context having had the benefit of all the documents the prosecution served on the applicant Gounder J observed

> *'[36] In my view, the additional disclosures, albeit late, is entirely consistent with the duty of the prosecution to disclose evidence to ensure a fair trial for the applicant. Continuing disclosures is almost a norm in fraud cases. This is because fraud prosecution involves voluminous amount of documents. It is in the interests of justice that all material documents are made available to an accused to ensure a fair trial is held. The primary principle is that the applicant has the disclosures to prepare a defence. Looking at the conduct of the prosecution in view of their disclosure obligations to the applicant, the prosecution complied with rules of fairness and open justice by disclosing the additional evidence. The fact is that the applicant has the disclosures. These circumstances do not show any manipulation of court process on behalf of the prosecution.*

[52] In contrast, the additional documents the appellant sought to serve on the respondents while the second prosecution witness was under cross-examination are not before me. Neither do I have the benefit of examining the reasons for the rejection of the appellant's application by the trial judge nor why he had thought that such additional disclosures would prejudice the respondents. I am also not privy to the precise basis or reasons for the respondents' objection to the appellant's application other than their right to have the disclosures in advance.

[53] In the circumstances, I am not inclined to allow leave to appeal on this ground of appeal.

**Order**

1. The notice of appeal filed by the appellant against acquittal may proceed to the Full Court on the questions of law set out under 01st and 02nd grounds of appeal.
2. Leave to appeal against acquittal is allowed on the 03rd ground of appeal.
3. Leave to appeal against acquittal is refused on other grounds of appeal.


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**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**