

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

CRIMINAL APPEAL NO. AAU 0028 OF 2023
[Suva High Court HAA 23 of 2020]

BETWEEN : **SHAINAAZ MOHAMMED**
ATISH KUMAR

Appellants

AND : **THE STATE**

Respondent

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Mr A. Sen for the Appellants**
Ms J. Prasad for the Respondent

Date of Hearing : **28th June, 2023**

Date of Decision : **7th August, 2023**

DECISION

[1] By Notice of Motion supported by Affidavit the 1st Appellant abovenamed sought an order that he be given leave to file notice and grounds of appeal out of time against the

judgment of the High Court dated 29th January, 2021. The Appellants had been charged on five counts in the Magistrate's Court.

- [2] By that judgment, the High Court quashed the acquittals on four of the five counts (Counts 1, 3, 4 and 5) entered by the Magistrate's Court in respect of the 1st Appellant while affirming the acquittal on count 2. The acquittal in respect of the 2nd Appellant on count 5 was quashed.

Respondent's objection (of a preliminary nature) to the Appellants' present application

- [3] Ms. Prasad (for the Respondent) based on Section 3 (4) of the Court of Appeal Act submitted that, the Appellants' intended grounds of appeal do not satisfy the requirements envisaged in that section and therefore the Appellants were not entitled to maintain the present application.
- [4] Mr Sen (for the Appellants') on the other hand, drawing attention to the proposed grounds of appeal contended that all those grounds raised questions of law
- [5] On **Counts 1, 3, 4 and 5**, (Mr) Sen contended that although the 1st Appellant was charged (on amended charges) under Section 376 (a) of the Penal Code (Cap.17) for corrupt practice, he was employed only as a receptionist with New Zealand Immigration Services. He was not a visa officer and he was handed over the passports only for dispatching.
- [6] Consequently, (Mr) Sen argued whether the Appellant could have been regarded as an agent of "*the the state*" under Section 375(2) of the Penal Code for him to have been charged under Section 376 (a).

Determination

- [7] Having regard to the established rule of interpretation that provisions of a statute must be considered together, I am convinced that, the aforesaid issue raises a question of law, in

as much as if that was not done it could amount to an error of law that injures viz: *error juris nocet*

- [8] I also paid regard to inter alia the decisions of this Court in **Bijma Wati v Gaya Prasad** [ABU 33 of 2016, 14 September, 2017 and **Food for Less (Fiji) Limited –v- Elizabeth Chand** [ABU] 0043 of 2016, 1 June 2018 as to the interpretation of what constitutes a question of law.

On Count 5

- [9] Here, both appellants had been charged for conspiracy to commit a misdemeanor contrary to Section 386 of the Penal Code.
- [10] On that, (Mr) Sen submitted, the particulars of conspiracy were neither pleaded nor any cogent evidence adduced before the Magistrate’s Court although the High Court quashed the acquittal entered by the Magistrate against the 2nd Appellant. Consequently, (Mr) Sen argued, that was a sufficient question to raise as a question of law.

Determination

- [11] I agree with (Mr) Sen’s submission.
- [12] For the aforesaid reasons I reject the objection raised by Ms Prasad.

Consideration and Discussion on whether the Appellants ought to be granted leave to appeal out of time

- [13] Criteria to be considered in granting leave to appeal out of time are well established in the jurisprudence of Fiji.

- [14] While the appellants have conceded that there has been a delay, they have urged “*the covid pandemic situation*” that prevailed during the time in issue besides other reasons. (affidavit of the Appellant dated 31st March, 2023)
- [15] Given the specific time frames during the relevant periods, although I was not convinced as to the reasons for the delay, I was obliged to see whether there are arguable matters with reasonable prospect of success in appeal if leave was to be granted (vide: **NLTB v Khan** [2013] FJSC 1.
- [16] Without having to be repetitive, I re-cap what I have stated earlier in determining whether the proposed grounds of appeal urged constitute questions of law.
- [17] I hold the view that the said questions *per se* are questions that must be left to the full court to go into and determine.
- [18] In so far as Counts 1, 3, 4 and 5 are concerned when the learned High Court Judge quashed the acquittals entered by the Magistrate’s Court in respect of the 1st Accused-Appellant, it is clear from His Lordship’s judgment that, the provisions of Section 378 had not received his attention, although some money transaction had taken place involving both Appellants stood established on the evidence on Record. That, it could be argued, was a matter for the New Zealand Embassy.

“378. Where in any proceedings against a person for an offence under this Chapter it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of the State or any Government department or a town council... or other public body having power to impose rates, or entrusted with the expenditure of any Government funds or grants, by or from a person or agent of a person holding or seeking to obtain a contract from the State or any Government department or town council...or other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in this Chapter, unless the contrary is proved.

- [19] The words “...*person in the employment of the State or any Government department...*” and “.... *Person or agent of a person holdinga contract from the state or any Government department ...*” are noteworthy. The said phrases are prefaced by the words “*where in any proceedings against a person for an offence under this Chapter...*” (viz: corrupt practices).
- [20] It is not in dispute that the 1st Appellant is an employee of the New Zealand Embassy.
- [21] Accordingly, Section 376 (a) and 375 (2) could be argued as needing to be read with Section 378 of the Penal Code. That, the learned High Court Judge had not addressed his mind to.
- [22] If it needed to be addressed and eventually if the answer was to be in the affirmative then, there was a strong prospect of success in the 1st Appellant’s appeal
- [23] Those are matters that cry to be determined by the full Court.
- [24] Yet another incidental factor that impacted on my thinking was, the learned judge having affirmed the acquittal in regard to count 2, as to how he could have reversed the Magistrate’s determination on Counts 1, 3, 4 and 5, for in my view, the elements pleaded on the said counts were intrinsically interwoven.
- [25] On Count 5, when the learned High Court Judge quashed the acquittal in respect of the 2nd Appellant, while it was consistent with His Lordship’s determination on the said count being based on ‘*conspiracy*’, thus bringing the said count within the rationale laid down in the House of Lords decision in DPP v Shannon (1975 AC 717), nevertheless it needed to be regarded subject to Section 378 for the same to have been sustained.
- [26] Even, given the *voir dire* hearing on the admissibility of evidence at the caution interviews of the two appellants which the Magistrate had held as admissible evidence, the crunch

factor to be considered was the bearing Section 378 had, which factor the learned High Court Judge did not address.

[27] Additional factors that weighed with me were that there are concurrent decisions in this case, the first being by the Magistrate's Court and the second being by the High Court and consequently enabling the full Court to ascertain and determine whether there were serious misdirections and/or non-directions on the part of the Magistrate for the High Court to have reversed the decision of the Magistrate.

Conclusion

[28] For the aforesaid reasons I grant leave to appeal on all the grounds urged on the proposed grounds of appeal.

Orders of Court:

- 1) *Leave to appeal on all the grounds urged in the proposed grounds of appeal is allowed.*
- 2) *Registrar is directed to have this appeal listed for a call over date to fix a date for hearing by the full court.*
- 3) *In as much as the interpretation and interplay of specific provisions of the Penal Code have been brought in to consideration, I make no order as to Costs.*



Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Sen Lawyers for the Appellant
Office of the Director of Public Prosecutions for the Respondent