

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

CRIMINAL APPEAL NO. AAU 068 of 2019
[In the High Court at Suva Case No. HAC 063 of 2017]

BETWEEN : **FIJI INDEPENDENT COMMISSION AGAINST CORUPTION**

Appellant

AND : **KAMLESH ARYA**

Respondent

Coram : **Mataitoga, P**
Andrée Wiltens, JA
Rajasinghe, JA

Counsel : **Ms. L. Bokini-Ratu with Ms. L. Mausio for the Appellant**
Mr. I.S. Lloyd KC with Dr T.V. Hickie for the Respondent

Date of Hearing : **09 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

A. **Introduction**

[1] In November 2016, the Fiji Independent Commission Against Corruption (“FICAC”) charged Mr Kamlesh Arya with (i) Abuse of Office, contrary to section 139 of the Crimes Act 2009 (“the Act”), and (ii) General Dishonesty - Causing a Loss. contrary to Section 324(2) of the Act.

- [2] The matter went to a trial in April to May 2019, and at the conclusion of the prosecution case, by ruling of 6 May 2019, Justice Hamza (“the judge”) determined there was a case to answer only in respect of the second charge. The first charge was accordingly dismissed – it is this decision that is the subject of appeal.
- [3] The second allegation continued to be heard with defence evidence being led, and ultimately the judge (disagreeing with the opinions of the assessors) found Mr Arya not guilty and acquitted him.
- [4] On 3 October 2022, FICAC sought leave to appeal the no case to answer ruling on 13 grounds. By decision of 30 December 2022, Justice Prematilaka, granted leave to appeal on 3 of those grounds.

B. Charge

- [5] Charge 1 reads as follows:

“Kamlesh Arya, between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, did arbitrary acts for gain in abuse of the authority of his office, namely authorized loans amounting to FJD\$116,500 from the Free Education Grant provided by the Ministry of Education to the said Bhawani Dayal Memorial Primary School, which was prejudicial to the rights of the said Ministry of Education and Bhawani Dayal Memorial Primary School.”

C. Agreed Facts

- [6] There were a number of agreed facts, which assist to understand the prosecution allegation:
- Mr Arya was appointed Registrar at the University of Fiji on 11 December 2011 for a 3-year term, which was renewed for a further 3 years in 2015. He was responsible for

- all the administration of the University, including Finance and Facilities, as well as for the satisfactory performance of his duties to the Vice Chancellor.
- At the material times, Mr Arya was appointed School Manager for several Sabha schools, including Bhawani Dayal Memorial Primary School (“BDMPS”). His appointment was through the Sabha Annual General Meeting and Executive Meeting, as per the Sabha Constitution, and the appointment was made on merit. His duties and responsibility were to manage the school in terms of its infrastructure, take decisions for development and to be the liaison between management and the Ministry of Education.
 - In 2014, the Government, through the Ministry of Education, initiated the Free Education Grant (“FEG”) scheme for Primary and Secondary schools. The grants were calculated per enrolled student, with schools allocated \$250 per enrolled student per term to be utilized by the school for the educational purposes outlined in a Financial Management Handbook.
 - In 2014, the BDMPS received \$83,076 as the Term One allocation from the Ministry of Education pursuant to the FEG scheme; and it similarly received a further \$83,423 for Term Two.
 - On 31 January 2014, BDMPS loaned \$30,000 of the FEG funds to the University of Fiji. On 15 July 2014, BDMPS loaned the University a further \$25,000 of the FEG funds; and on 15 August 2014, it loaned a further \$10,000 of the FEG funds to the University.
 - On 31 January 2014, BDMPS loaned \$27,500 of the FEG funds to another Sabha School, Bhawani Dayal Arya College (“BDAC”). On 13 May 2014, BDMPS loaned a further \$25,000 of the FEG funds to BDAC.
 - On 14 March 2014, BDMPS loaned \$9,000 of the FEG funds to another Sabha School, Vunimono Arya School (“VAS”). On 9 June 2014, BDMPS loaned a further \$9,000 of the FEG funds to VAS.

- All the loans were effected by means of internet transfers authorized by Mr Arya as the School Manager.

[7] It can be readily seen that there were few areas of factual dispute between the prosecution allegations and the defence case.

[8] Effectively, the prosecution case was that Mr Arya had contrary to his obligations abused his position in the public service as School Manager to grant loans to the University and two other Sabha schools out of funds given to BDMPS by the Government for other specified purposes.

[9] A strand of evidence not agreed, but established by evidence, was that Sabha not only ran BDMPS, BDAC and VAS, but also the University.

D. No Case to Answer

[10] The judge had not only seen and heard all the witnesses, but had also received written and oral submissions relating to the no case to answer contention. There is no complaint regarding the judge's approach in terms of the legal test to be applied for a no case to answer submission to be granted, as per *State v Waisale Tuivuya*¹ and *FICAC v Rajendra Kumar*². Nor is there complaint relating to the elements of the charge that the judge identified as having to be proved, namely:

“(i) The accused;

(ii) during the specified time period, in this case between 1 January 2014 and 31 December 2014;

(iii) at Suva, in the Central Division;

(iv) whilst being employed in the public service;

(v) did arbitrary acts;

¹ [2003] FJHC 186

² HAC 001 of 2009

- (vi) *for gain;*
- (vii) *in abuse of the authority of his office;*
- (viii) *which was prejudicial to the rights of the Ministry of Education and Bhawani Dayal Memorial Primary School.”*

[11] The judge accepted that the University of Fiji was established pursuant to section 4(1) of the University of Fiji Act 2011, and that section 11 of that legislation required the appointment of the Registrar by the University Council. On that basis, he considered that Mr Arya came within the definitions of the legislation and was employed in the public service as the University Registrar. Indeed, that was not disputed.

[12] The prosecution had contended that Mr Arya was effectively wearing “two hats” at the same time, and that accordingly so long as he was shown to have been employed in the public service as the Registrar of the University, he was also able to be so categorized in relation to acts done in his role as School Manager.

[13] In support of the “two hats” submission, prosecuting counsel sought to rely on the authority of *Keni Dakuidreketi v Fiji Independent Commission Against Corruption*³. Mr Dakuidreketi was a Director of the Native Land Trust Board (“NTLB”), a public office; and held the position of Chair of Vanua Development Corporation Ltd (“VDCL”), supposedly a private company. It was held that Mr Dakuidreketi, as VDCL Chair, was appointed by NTLB due to being a Director of NTLB, was a public officer due to the close relationship between the entities, and the reality of the situation was that VDCL was public in every sense but name. The Court held that his two roles were inextricably linked.

[14] The prosecution also cited the case of *Qarase v State*⁴, which involved a similar situation of a person holding several inter-related roles.

³ [2018] FJSC 4

⁴ Criminal Appeal No. AAU 66 of 2012

[15] However, in his ruling, the judge distinguished both cases on their facts, as there was no evidence of an inextricable link between Mr Arya's roles as Chancellor and School Manager. He rejected the "two hats" approach submitted by the prosecution.

[16] The judge further recorded that the prosecution had run the case on the basis that the alleged arbitrary acts done in abuse of the authority of Mr Arya's office (the granting of the loans to the University and other Sabha schools) were carried out in Mr Arya's capacity as the School Manager of BDMPS. Accordingly, to achieve a finding of guilt, the judge determined that the prosecution was required to prove that, as School Manager, Mr Arya was employed in the Public Service.

[17] He correctly focused on section 4(1) of the Act, which sets out:

"person employed in the public service" means any person holding any of the following offices or performing the duties of that office....., namely –

(a) the President or Vice-President;

(b) any office to which a person is appointed or nominated under the provisions of any Act or by election or by promulgation or decree;

(c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of paragraphs (a) or (b);..."

[18] The prosecution sought to establish Mr Arya's employment in the public service as School Manager in a somewhat circuitous manner. It was submitted, relying on subsection 4(1)(c) of the Act that the Permanent Secretary of the Ministry of Education ("PS") was employed in the public service, and further that he had the power of removing a School Manager pursuant to section 12 of the Education Act 1966.

[19] Section 12 of the Education Act 1966 vests the management of registered schools in "...a properly constituted controlling authority", which is required to appoint a manager and

submit the name/title to the PS. Subsection 12(2) provides that the PS may register or refuse to register the name submitted as manager; with subsection 12(3) setting out the power of the PS, in 3 specified situations, to prohibit any person from managing or assisting in the management of a school. Further, subsection 12(4) provides that a person who manages or assists in the management of a school when not registered or prohibited shall be guilty of an offence.

[20] The prosecution submitted that the power of the PS to prohibit, as described above, was synonymous with the power of removal from office, and accordingly, also the power of appointment. On that basis, the prosecution contended that Mr Arya was employed in the public service as the School Manager, pursuant to section 4(1)(c) of the Act.

[21] The judge did not accept this interpretation.

[22] In the course of argument, Mr Lloyd, counsel for Mr Arya had submitted, that the definition of a person employed in the public service in section 4(1)(b) of the Act should be read *ejusdem generis* with the remainder of the section, where the assumption is that the roles and offices in question are paid, not performed out of charity. The relevance of the submission revolved around the uncontested evidence that Mr Arya's appointment as School Manager was honorary – i.e. he was not paid.

[23] This argument appeared to find favour with the trial judge, although it was not the main reason for his decision.

[24] In conclusion, the judge found that it had not been proved that Mr Arya was employed in the public service in his capacity as the School Manager. It followed that there was no case to answer as an essential ingredient of the charge had not been proved, and Mr Arya was accordingly acquitted.

E. Appeal

[25] We record that Ms Bokini-Ratu was content to rely on her written submissions and to respond to questions from the Court. Her submissions appear to raise few new matters, and are little more than a rehearsal of the submissions made to the judge.

[26] The first ground alleged an error on the part of the judge in determining that it had not been proved that Mr Arya was a person employed in the public service. We note that the judge did not so find – he found it not established that Mr Arya was employed in the public service as School Manager.

[27] It was submitted the prosecution had run the case on the basis that Mr Arya was employed in the public service by virtue of holding two positions simultaneously, that he was effectively wearing “two hats” when advancing the loans. It was submitted to be significant that had Mr Arya not also been Registrar he would not have known to lend funds to the University, which funds it was submitted were required to meet expenses such as salaries, including that of Mr Arya. Accordingly, Ms Bokini-Ratu submitted, there was evidence that Mr Arya’s two roles were inseparable, and therefore the judge’s conclusion was an error.

[28] Although not referred to by either counsel, Mr Arya would similarly have known the financial positions of BDAC and VAS. However, the similarity ends there, as there is no suggestion that Mr Arya was being paid by the schools. We note also that there is no evidence that any of the funds loaned to the University were used to pay Mr Arya’s salary as Registrar. No matter how one regards it, it is difficult to see how the element of “for gain” has been proved.

[29] The case of *Qarase*⁵ had been cited in support of the “two hats” argument. Before this Court, it was submitted that where an individual holds two posts in which the public has an interest in the performance of the duties of the said positions, the individual is a person

⁵ *supra*

employed in the public service. On this basis, Ms Bokini-Ratu submitted the learned trial judge had erred in not examining the nature of the duties and level of public trust placed in Mr Arya as School Manager. However, this submission relies on the common law interpretation of “public office”, where the nature of the duties and level of public trust are of greater importance than the manner of appointment.

[30] The second ground of appeal is that the judge wrongly considered the principle of *ejusdem generis* when deciding that the position of School manager did not fall within the definition in section 4 of the Act. This interpretation was submitted to be too narrow, and that “whether paid or not” is not the appropriate test to determine whether a person is employed in the public service. A passage in *Dakuidreketi*⁶ was cited in support, where the Court quoted from an UK authority, namely *R v Bowden*⁷:

“A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.”

[31] On the basis of this interpretation, it was submitted that a person in the public service is a person holding any type of office of trust or confidence concerning the public and is answerable to the State for any misbehaviour relating to the duties of the office, whether paid or unpaid.

[32] The third ground of appeal advanced is that the judge erred in law by misconstruing section 4 of the Act and section 12(3) of the Education Act in finding Mr Arya to not have been employed in the public service as School Manager.

[33] In support of this submission, Ms Bokini-Ratu contended that BDMPS’s “controlling authority” did not have the final say in the appointment of the School Manager, that being the privilege of the PS by dint of his analogous powers of registration/prohibition.

⁶ *supra*
⁷ [1996] 1 Cr App R 104

[34] In reply, Mr Lloyd pointed to the considerable overlap between the grounds advanced. He pointed to what the appellant effectively sought, namely a contrary finding to that of the judge, that Mr Arya authorized the loans to the University in abuse of the authority of his public service post as School Manager. He urged this Court to not do that.

[35] He submitted that Mr Arya was not employed in the public service in relation to his post as School Manager, accepting that he was so employed in relation to being the Registrar of the University. However, the acts complained of, the authorizing of loans to the University, BDAC and VAS, he submitted were done by Mr Arya in his role as School Manager, which was wholly unrelated to his role at the Registrar of the University. For Mr Arya to be found guilty, Mr Lloyd submitted the prosecution was required to prove Mr Arya's status in respect his functions as School Manager, irrespective of his accepted status as Registrar of the University, citing a passage in *Qarase*⁸

“...the act complained of should be done under the colour of his office where use is made of such office by the accused.”

[36] Mr Lloyd accepted that a person may be employed in the public service in two separate capacities. However, he submitted that was not the case here. He sought to distinguish both the *Qarase* and *Dakuidreketi* cases due to their quite different factual scenarios, as the judge had done.

[37] Mr Lloyd did not accept that the judge had determined the no case issue by interpreting the provisions of section 4 of the Act *ejusdem generis*. It was his submission the no case decision turned on the finding that School Managers are not appointed or removed by any Act or by any public servant, and accordingly neither section 4(1)(b) or 4(1)(c) had application.

[38] Mr Lloyd sought also to distinguish between those employed in the public service and public officials, highlighting the concepts are quite different and should not be used

⁸ *supra*

interchangeably. He maintained that for Mr Arya to be a person employed in the public service pursuant to section 4 of the Act, he would have had to be (i) appointed by particular legislation, or (ii) appointed by, or capable of being removed by, another public official. He submitted that Mr Arya's appointment by the "controlling authority" of BDMPS came within neither of those provisions.

F. Discussion

[39] Section 23(1)(b) of the Court of Appeal Act 1949 provides:

"(b) on any such appeal against acquittal shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

[40] I accept that Mr Arya was employed in the public service by dint of his appointment as Registrar of the University. However, it is Mr Arya's acts as School Manager that are the subject of the allegations against him. Accordingly, it is his status as School Manager that is all important.

[41] I cannot accept, either using the "two hats" analysis, or the attempt to shoe-horn Mr Arya's appointment as School Manager utilising section 12 of the Education Act 1966 to fit inside section 4 (1)(c) of the Act, as legitimate to establish Mr Arya's required status of being employed in the public service. The common law relating to "public office" is quite a different matter and has no application in this case. Equally, the submissions that Mr Arya was in breach of a fiduciary obligation is not an ingredient of the charge, and is accordingly of no assistance in determining this appeal.

[42] The analysis of *Qarase* and *Dakuidreketi* by the prosecution is flawed. Those cases are unique to their facts, and do not assist. Equally the position taken by the prosecution that

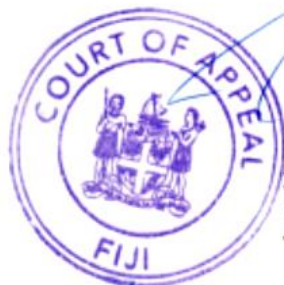
the judge had relied on the canon of *eiusdem generis* as the or an basis for reaching his decision is incorrect.


[43] The judge was correct in finding that the prosecution had failed to prove one of the essential elements of the charge. Accordingly, the appeal must fail.

[44] Lastly, in relation to whether there was a miscarriage of justice, I note that the alleged offending occurred in 2014. He was charged in November 2016. The 5-week trial took place between 15 April and 17 May 2019. The no case to answer ruling was delivered on 6 May 2019. Leave to appeal was sought on 3 October 2022, on some 13 grounds. Leave was granted in respect of only 3 of those grounds on 30 December 2022. This appeal was heard on 9 May 2025. The delay inherent in this summary is self-evident, as well as the personal costs to Mr Arya, financial and otherwise. Mr Arya's exoneration has had to wait an interminable time. I trust he can finally now put this whole episode behind him.

Order of the Court:

1. The appeal is dismissed.






The Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT COURT OF APPEAL



The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL



The Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

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Vijay Maharaj Lawyers for the Respondent