IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 05 OF 2012

BETWEEN: FIJI INDEPENDENT COMMISSION ARAINST CORRUPTION

Appellant

AND: APOLOSI PIO SEKITOGA

Respondent

Counsels : Ms. Tema Waqabaca for the Appellant
Mr. Robinson for the Respondent

Date of Hearing: 15 August 2014
Date of Judgment: 18 August 2014

JUDGMENT

1. The respondent was charged before the Sigatoka Magistrate under the following counts:

COUNT 1
Statement of Offence

FALSE PRETENCES: Contrary to Section 309 (a) of the Penal Code, Cap 17.

Particulars of Offence

APOLOSI PIO SEKITOGA on or about 02 January 2008, at Sigatoka in the Western Division, with intent to defraud, by false pretence caused $2,450.00 to be paid to Roadworks Safety & Civil Products Ltd. for the benefit of the said Roadworks Safety & Civil Products Ltd. from the Department of Water & Sewerage for 100 numbers of 25mm Brass Ferrule Corks knowing that those 100 Ferrule Corks were not delivered by

Roadworks Safety & Civil Products Ltd. to Department of Water & Sewerage at Sigatoka Water Supply on the Local Purchase Order No. 740492 dated 30.11.07.

COUNT 2
Statement of Offence

ABUSE OF OFFICE : Contrary to Section 111 of the Penal Code, Cap 17.

Particulars of Offence

APOLOSI PIO SEKITOGA on the 08th February 2008, at Sigatoka in the Western Division, being employed in the public service as a Water Supervisor in the Department of Water & Sewerage at Sigatoka did an arbitrary act, prejudicial to the rights of the Department of Water & Sewerage, by acknowledging the receipt of 100 numbers of 25mm Brass Ferrule Corks by the Department of Water & Sewerage on 08.02.2008, whereas, 100 numbers of 25mm Brass Ferrule Corks were not received by the Department of Water & Sewerage on such date and in doing so abused the authority of his office.

2. The respondent pleaded not guilty and after trial he was acquitted on 11th April 2012.

3. The appellant filed a petition of appeal on 4th May 2012 within time.

4. The appeal was dismissed on 19th July 2012 by Hon. Mr. Justice S. Thurairaja on the basis that appellant has not complied with Section 246 (2) of the Criminal Procedure Decree.

5. Appellant successfully appealed to the Fiji Court of Appeal. By Judgment dated 5th December 2013 the Court of Appeal ordered as follows:

   "Appeal allowed. Dismissal of FICAC's appeal by the High Court is set aside. FICAC's appeal to the High Court is re-instated. The case is remitted to the High Court for hearing of FICAC's appeal against the respondent's acquittal on merits. The case is listed for mention in the High Court at Lautoka on 11 December 2012, 9.30 a.m. to fix a hearing date."

6. The grounds of Appeal against the acquittal are:

   (i) The learned Magistrate erred in fact and law in failing to properly consider and evaluate the evidence relevant to the elements of the charges before him, when he found the Respondent not guilty.

   (ii) The learned Magistrate erred in fact and law in acquitting the Respondent on the basis that the prosecution witnesses failed in their duties.

(iii) The learned Magistrate erred in fact and law in acquitting the Respondent who did not mount a defence in defence case, having found that all elements of the offence were met at the stage of No Case to Answer.

7. Both parties have filed written submissions.

1st Ground

8. In this case seven witnesses have given evidence. The learned Magistrate in his judgment had stated that:

"The Court noted all the evidence and the documents that were tendered in this case."

9. The learned Magistrate had then evaluated the evidence of the prosecution witness No.1. The learned Magistrate evaluation of evidence of all the witnesses and his findings in respect of each element of each charge is in five paragraphs produced below:

> *"The accused gave sworn evidence.*
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> *The Court noted all the evidence and the documents that were tendered in this case. PW-1 to the best of her ability outlined the procedure in making payments to the supplier once the goods were supplied. In re-examination she told the Court that "cheque is to be released after all stock is delivered. Lautoka consults us before cheque is released." It is noted by the Court that the green copy of the LPO is to be retained by the indenting officer until goods have been received or services performed and then certified to be complete and then forwarded to the Head Office. The green copy of the LPO was not certified by anyone; even the accused who was the Supervisor did not certify the green copy of LPO. He did not certify that the payment was to be made and neither did he certify that the goods were received.*
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> *As to the evidence of PW-1 Lanieta Marama and PW-4 Ranjani Lata the Court does not believe them as they did not properly perform their duties as clerical officers. They were required to follow the procedures, which they failed to and they have as a consequence in their evidence blamed the accused after they allowed the payment to be made to Roadworks Safety & Civil Products Ltd. Set procedures for the delivery and certification by department was not followed. The accused did not mislead the officers and neither did he falsely allege that goods were received when they were not.*
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> *It was PW-1 Lanieta Marama and PW-4 Ranjani Lata's duty as Chief Clerk and clerical officers to see that all goods were delivered and the green copy of the LPO was certified by the receiver or the Supervisor before the cheque was prepared. The Court does not believe PW-4 Ranjani Lata when she says she*

called the accused and he told her to release the cheque. PW-1 Lanieta Marama who was the chief clerk in her evidence told the Court that the cashier, which is PW-4 Ranjani Lata was trying to call her but called the Supervisor, the accused. The procedures which these Accounts Officials have stated are now being stated to save themselves, which is after they failed to perform their duties. The first question is how the cheque prepared without confirmation that all goods have been delivered. The second is what was the Sigatoka Office Chief Clerk doing that she failed to pick up that all the goods were not delivered and her office forwarded the green copy for the processing of the cheque.

From the evidence of the prosecution witnesses, mainly PW-1 Lanieta Marama and PW-4 Ranjani Lata the Court finds that they failed in their duties and are blaming the accused, the Water Supervisor.

The Court also finds from the evidence before it that accused did not make false pretences or abuse the authority of his office. The Court is not satisfied beyond reasonable doubt as to the guilt of the accused for both the counts."

10. From careful perusal of above, it is clear that the learned Magistrate failed in his duty to evaluate the evidence of other prosecution witnesses in light of the evidence given by the accused. The learned Magistrate had failed to consider each element of each charge is established or not.

11. In ***Chandar Pal v Reginam*** 20 FLR1 at page 4 it is held by His Lordship Acting Chief Justice Grant that:

"As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts and rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind the throughout the provisions of section 154 (1) of the Criminal Procedure Code."

12. In ***State v Singh*** [1996] FJHC 145; HAA 0023J.1995S (5 September 1996) Hon. Mr. Justice D. Pathik held that:

"This case depended essentially on the credibility of witnesses and findings of fact connected therewith. The learned Magistrate made no such findings. As a result the appellate court has received no guidance as he gave no indication of what impression the witnesses have created on his mind because he is the one who saw and heard witnesses. This Court cannot make its own evaluation of the printed evidence."

".....To conclude, for the above reasons the learned Magistrate has not performed his function in accordance with the requirements of the law; he has abruptly ended his Ruling without any evaluation and analysis of the evidence before him nor did he give any proper reasons for coming to his decision resulting in the Respondents' acquittal."

13. There is merit in the first ground of appeal and it succeeds.

2nd Ground

14. It was not suggested to prosecution witness No.4 that the respondent did not tell her that the items in question were delivered and she could release the cheque. Her position was that the respondent told her so. The learned Magistrate had decided that PW 4 had not followed the correct procedure.

15. What happens when evidence given by a reliable witness on a material point is not challenged in cross examination? What is the effect of such silence on the part of the counsel? It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted. Whenever the evidence given by witness on material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness.

16. In ***Attorney General of Hong Kong v Wong Muk-ping*** [1987] 2 All ER 488 at 493 Privy Council held:

"...any tribunal of fact confronted with a conflict of testimony had to evaluate the credibility of evidence in deciding whether the party who bore the burden of proof had discharged it. It was the commonplace of judicial experience that a witness who made a poor impression in the witness box might be found at the end of the day, when his evidence is considered in the light of the other evidence, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable might at the end of the day have to be rejected. Such experience suggested that it was dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case incapable of throwing light on its reliability."

17. In **R v. Sweet-Escott** 55 Cr. App. R 316 Hon. Mr. Justice Lawton held:

"That, since the purpose of cross –examination as to credit is to show that the witness ought not be believed on oath, the matters about which he is questioned must relate to the witness's likely standing after cross-examination before the tribunal which is trying him or hearing his evidence."

18. There is nothing in the judgment of the learned Magistrate to suggest that he evaluated the evidence of the witnesses No. 1 and 4 with the totality of the other evidence available. The learned Magistrate had failed to consider the position of the respondent or his conduct at all.

19. Therefore there is merit in ground two as well and it succeeds.

Ground 3

20. On 16th January 2012 the learned Magistrate had decided that there is case to answer by the respondent. Although there is no ruling found in the case record it has to be assumed that he followed the correct legal test at that stage as laid down in the Case of **R v. Galbraith** 73 Cr. App. R. 124, that is there any evidence (relevant and admissible) on each element of the offence, and is the evidence is such that a reasonable tribunal could convict the respondent at its highest.

21. On careful perusal of the final Judgment it is clear that the learned Magistrate had not considered the evidence of the respondent at all.

22. Therefore there is merit in the 3rd ground as well.

Conclusion

23. This background warrants this Court to exercise its powers in terms of Section 256 (2) (a) and (c) of the Criminal Procedure Decree to quash the acquittal. Although there is a delay considering the allegation against the respondent and public interest Court is of the view that this is fit case to order a re-trial. The case is remitted to the Sigatoka Magistrate Court for hearing de novo. The case is listed for mention in the Sigatoka Magistrate Court on 25th August 2014 at 9.30 a.m. to fix a hearing date without delay.

24. Appeal is allowed.

Sudharshana De Silva
JUDGE

At Lautoka
18th August 2014

Solicitors : **Legal Counsel for FICAC for the Appellant**
Robinson K Prasad Lawyers for the Respondent