IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 30 OF 2017

BETWEEN: MESAKE BERANALIVA

APPELLANT

AND:

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)

RESPONDENT

Counsel : Mr. K. Tunidau for Appellant
: Ms. F. Puleiwai for Respondent

Date of Hearing : 30th October, 2017
Date of Ruling : 1st December, 2017

JUDGMENT

BACKGROUND

1. On the 09th January 2017, Mesake Beranaliva (hereinafter referred to as "the Appellant") was convicted on two counts of Bribery contrary to Section 4(2)(a) under the Prevention of Bribery Promulgation (as known then) now Prevention of Bribery Act 2007 in the Magistrates Court at Nadi. The particulars of the counts are as follows:

Count 1
Particulars of Offence

MESAKE BERANALIVA between 30th May 2013 and 31st May 2013 at Namaka in the Western Division whilst being a public servant namely an Estate Officer employed in

iTaukei Land Trust Board without lawful authority or reasonable excuse solicited and accepted an advantage namely FJ$300 from Navinesh Naicker on account of having performed an act in his capacity as a public servant, namely showing the boundary pegs on a land by the name of Tagiruku at Nawaka to be leased by the iTaukei Land Trust Board to the said Navinesh Naicker.

Count 2
Particulars of Offence

***MESAKE BERANALIVA** between 31st May 2013 and 06th June 2013 at Namaka in the Western Division whilst being a public servant namely an Estate Officer employed in iTaukei Land Trust Board without lawful authority or reasonable excuse solicited and accepted an advantage namely FJ$600 from Navinesh Naicker on account of having performed an act in his capacity as a public servant, namely issuing the offer letter for a land by the name of Tagiruku at Nawaka to be leased to Navinesh Naicker by iTaukei Land Trust Board.*

2. At the trial, prosecution called seven witnesses and tendered five documents. At the end of the prosecution case, the Appellant's counsel made a No Case to Answer submission under Section 178 of the Criminal Procedure Act whereupon the Court ruled that there is a case made out against the Appellant which is sufficient to calls for his defence.

3. Thereafter on the 3rd March 2017, the Appellant was sentenced to 18 months' imprisonment and a fine of $1,000.00 for each count to be served concurrently and in default of fine, an imprisonment of 100 days to be served consecutive to the main sentence.

4. On the 29th March 2017, the Notice and Grounds of Appeal were filed in the Lautoka High Court registry and served on the FICAC (hereinafter referred to as 'the Respondent").

5. Both Counsel filed helpful written submission as directed by Court and wanted the Court to rule on written submissions.

Grounds of Appeal

6. The Appellant is appealing his conviction and sentence on following three main grounds:

I. The trial Magistrate erred in fact and in law when she said at paragraph 23 of the Judgment that it was the Appellant's idea to meet the complainant at Chillie's restaurant.

II. The trial Magistrate erred in fact and in law on her assessment of the evidence at paragraph 24 of the judgment.

III. The sentence in its totality was harsh and excessive.

7. Under each main ground of appeal stated above, there are sub-paragraphs stated. I intend to address all issues raised in appeal.

The Law

8. The law relating to appeals to High Court is set out in Section 246 of the Criminal Procedure Act. The Section reads:

> *246 (1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence....*

The facts

9. Following facts were accepted by the learned Magistrate:

> *Complainant (PW.2), Navinesh Naicker, is a businessman from Navoli, Ba. On 30th May 2013, he went to iTaukei Land Trust Board (ILTB) office at Namaka to check his lease application for the native land he was intending to take a lease of. He was directed to Estate Officer Mesake (the Appellant) who told the complainant to come the following day and bring $300 for marking the land. On the following day, complainant went to the ILTB office where he was accompanied by the Appellant and another ILTB officer to see the land. Complainant was shown the land and the pegs and came back to the office. Upon arrival at the office, Appellant called the complainant into his cabin and asked for $300 for the job done (marking). The complainant paid $ 300, but did not get a receipt. Appellant having promised to give a receipt later asked the complainant to bring another $600 for the offer letter. When informed about this, complainant's uncle advised him that offer letters are issued free of charge. Complainant double*

checked this advice with a Pastor. Complainant then reported the matter to the Prime Minister's office and then to FICAC office at Lautoka. Whilst at the FICAC office, complainant received a call again from Appellant and was told to wait for him at Chillie's Restaurant in Namaka. FICAC officers who received the complaint photocopied dollar notes worth $600 and gave them back to the complainant. Appellant came to the Chillie's Restaurant around 3.00 p.m. with the offer letter. At the Chillie's restaurant, Appellant, having done some corrections on the offer letter gave it to the complainant initialing on the correction. Then the Complainant gave $ 600 to the Appellant. No receipt was issued. FICAC officers approached the Appellant as he was walking out of the restaurant. Marked dollar notes were found in Appellant's shirt pocket. Appellant was arrested and the dollar notes were taken into FICAC officer's custody.

ANALYSIS

Appeal Against Conviction

Ground 1

10. The Appellant contends that the trial Magistrate erred in fact and in law when she said at paragraph 23 of the judgment that it was the Appellant's idea to meet the complainant at Chillie's Restaurant.

11. This contention appears to be based on two premises. Firstly, Appellant states that the evidence of Isireli Tagicaki (PW1) that the Appellant was being set-up by FICAC to meet the complainant at Chillie's Restaurant and for the complainant to give $600.00 to the Appellant is contradictory to complainant (PW2)'s evidence. Secondly, Appellant says that the chronology of events between the Appellant and the complainant as explained by the Appellant in his evidence-in-chief and in particular the fact that the complainant insisted that they meet at Chillie's restaurant had not been taken into account by the learned Magistrate.

12. PW 1 clearly stated in his evidence-in-chief that the covert operation was planned after receiving the complaint from PW2 on the same day (6th June). As per instructions received from his superiors, PW1's team had gone to the place where the alleged exchange was intended to take place. The information as to the place where the exchange was to take place had been provided to FICAC officers by PW2.

Q. And then what happened from there Mr. Tagicaki?

A. The men were organized and we had proceeded to the place where the alleged exchange was intended to take place.

Q. Where the alleged exchange was to happen?

A. During the afternoon, we had received a complaint from the complainant I had organized a team of men and then we proceeded to Namaka at the Chillie's Restaurant.

13. It is clear that it is only after the FICAC received information as to the place where the exchange was to take place from the complainant that officers had gone to the Chillie's Restaurant and had set up a covert operation.

14. PW.1 confirmed his position under cross examination.

Q. What operation did you set up at Chillie's Restaurant?

A. There was an official complaint lodged the reason why we had set out to conduct a covert operation Ma'am.

15. PW1's evidence is further reinforced by complainant (PW.2)'s evidence that the covert operation had been planned at Chillie's Restaurant as per the information provided by PW.2. PW2's evidence was that he received a telephone call whilst at the FICAC office from the Appellant advising him to come to the Chillie's Restaurant.

Q: you said you then went to pay Mesake the $600. Where did you pay Mesake?

A: He told me to come to the the Chillie's Restaurant which is beside the TLTB office in Namaka. He told me to sit there at the site I will be coming there. When we were sitting in the Chillie's Restaurant in Namaka he gave me the offer letter at Chillie's Restaurant in Namaka and there was some errors there so he made some changes there and put his initials there and he gave it me then I paid $ 600 to Mesake.

16. Under cross examination, PW2 clearly denies the proposition that it was his idea to meet the Appellant at Chillie's Restaurant.

Q: So instead of you going with him with the $600 for first part payment of this offer letter you set him up with FICAC at the meeting place at Chillie's Restaurant right?

A: No, he told me to come there at the Chillie's Restaurant before in the morning he told me to come to the office.

.....

Q: Recording devise they gave it to you in Lautoka before coming to Namaka?

A: When the time he told me he told me you don't come to the office come down to the Chillies Restaurant.

Q: Right so that's what FICAC told you?

A: No he told me because he was off that time.

17. In his evidence under re-examination, PW2 confirmed his position that it was Appellant's idea to meet PW2 at the Chillie's Restaurant.

Q: can you clarify and confirm who called you on the 6th of June 2013 to meet at Chillies Restaurant?

A: Masake.

18. The Appellant's evidence was that on 6th June, 2013, PW2 called just before 12 noon that he would be late and would be at the ILTB office at 2 p.m. This the Appellant agreed to. The Appellant then said that just before 2 pm., PW2 called him again and insisted that they meet at Chillie's Restaurant to have lunch with him but he turned down the offer as he had already had his lunch but he agreed to have tea and at the same time hand deliver PW2 his contractual letter.

19. According to Appellant's evidence, the time and the venue of the meeting had been decided not by Appellant but by PW2. Appellant had merely agreed to have tea with PW2 at Chillie's Restaurant.

20. The learned Magistrate rejected this evidence. In my opinion, Her Worship had ample reasons to reject the version of the Appellant. The Appellant is a public officer and supposed to provide his services in his office at ILTB and not at a Restaurant. PW2 as a recipient of the service cannot dictate terms to a public servant as to the place and time where the official work should be conducted and

legitimate payments done. There is no dispute that Appellant had gone to the restaurant with the offer letter and the money was paid after the letter was handed over to the complainant. No official receipt had been given. The money was put in his shirt pocket. He never advised PW2 to pay the money to cashier at the counter.

21. Appellant had turned down the offer for lunch not because the acceptance of such an offer was unbecoming of his office but because he had already had lunch. He did not refuse to have tea at a restaurant with a customer during official working hours. Furthermore, there is no evidence that Appellant in fact had tea at Chillie's when he met with PW2 for nearly 15 minutes. He just had a chat, made a correction on the letter where he signed (apparently to give the impression that he is the authorized officer to sign the letter), collected $ 600, put it in his shirt pocket and went away handing the offer letter.

22. It is clear that it is on this evidential basis that the learned Magistrate at paragraph 23 of her Judgment rejected the evidence of the Appellant whilst drawing her attention to evidence of both Appellant and PW2. The whole paragraph 23 outlines the analysis done by the learned Magistrate regarding the Appellant's evidence and evidence of PW2 under cross examination. Paragraph 23 of the Judgment states:

> *"In his evidence he (Appellant) stated that the idea of Chillie's restaurant was not his idea and it was PW2 who suggested going to the Chillie's restaurant. He further stated he was insisted to go there. The reason he went to the Chillie's restaurant was because PW2 insisted to go there. As an estate officer with authority he just went because of his customer's request. The court cannot rely on this part of evidence. He brought the offer letter with him to the restaurant and explained the payments and corrected the errors. ..*
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> *Further he collects the $500.00 from PW2 as the first installment and put it into his pocket and told him to follow him to the office. This is the accused person's version. He explained why he did all these things because customer service. But PW2 in his cross examination denied and stated that it was the Accused's idea to meet at the Chillie's restaurant. PW2 denied that accused told him to follow. But accused told PW2 to bring $600.00 before the offer letter and there is no explanation for this request before the offer letter and how he calculated the amount $600.00. First Mesake told PW2 to come to his office but later he changed it to Chillie's restaurant after PW2 informed him that he was unable to come in the morning. I cannot find any reason in the defence evidence why this accused*

was in such a hurry to give this offer letter to PW2 and to collect payments before the offer letter".

23. The learned Magistrate at paragraph 23 of her judgment analysed the evidence of the Appellant and rejected it. Her Worship has given reasons for her finding. The learned Magistrate's finding that it was Appellant's idea to meet the complainant at Chillie's restaurant is founded on facts proved in evidence. She was not mistaken. There is no error in fact or law. Therefore, this ground should be dismissed.

Ground 2

24. The Appellant contends that the trial Magistrate erred in fact and in law in her assessment of the evidence at paragraph 24 of the judgment upon the following grounds:

i. The trial Magistrate failed to properly consider the Appellant's duty as an estate officer in relation to the lease offer letter of the complainant;
ii. The trial Magistrate failed to consider that the schedule of costs in the lease offer was standard costs and it was open to the appellant to divulge the same to the complainant when asked;
iii. The trial Magistrate failed to consider that an offeree had the choice of installment payment, part payment or full payment of the schedule of costs in the lease offer within the stipulated time in the lease offer.
iv. The trial Magistrate failed to consider and give proper weight to the fact that on 5th June, 2013, the appellant had advised the complainant about his lease offer, the schedule costs on the offer, and the choice of payment the complainant can do and to call into the iTLTB office, Namaka to execute his lease offer on 6 June, 2013 at 12 midday.

25. The learned Magistrate at Paragraph 24 stated the following:

"The accused took money at the Chillie's restaurant and it was not his office. He went to the Chillie's restaurant to take $600.00. He failed to issue a receipt for $300.00 and for $600.00 to the PW2 he took $600.00 from PW2 and he put it in his shirt pocket and he left the table where they were sitting. He walked towards

the entrance without noticing PW2 was following. These facts explained properly that this accused took this advantage from PW2 for the offer letter. I cannot find that the accused has any lawful authority or reasonable excuse to collect money for the marking of boundaries and for the issuing of offer letter from PW2 in the defence case".

26. In my opinion, the learned Magistrate's assessment of evidence at paragraph 24 of the judgment is correct. Her Worship's finding is available on evidence led in trial. There is no error of fact or law.

27. Soloveni Masi (PW3), who was the Manager at the ILTB, gave evidence as to the standard procedure adopted by ILTB when it comes to alienation of native lands on lease. The learned Magistrate at paragraph 8 of the Judgment summarizes PW3's evidence and outlines the procedure in comparison to what was expected of the Appellant as an Estate Officer.

28. PW3 in his evidence spoke about an Estate Officer's duty and what should have been done when it comes to lease payments and whether the procedure followed by the Appellant was correct. He clearly stated that all legitimate payments should be made to the cashier at the ILTB office so that a receipt can be issued. Only exception to this payment system is permitted where the land is located in a rural area. Still a receipt had to be issued for each payment. He said Namaka where the land is located does not come under this 'rural area' category.

29. Offer letters are generally sent to the offeree by post once the offer is approved by a senior Estate Officer. In the schedule to the offer letter, fees and other required costs are specified and the offeree is advised to come and make scheduled payments within 6 weeks of the offer letter. PW3 said that schedule of costs to the lease payment can only be divulged to the offeree once the offer letter is given and not before.

30. It appears that the Appellant had taken a special interest in the matter and divulged the scheduled costs to the offeree even before the offer letter was issued and the offer was accepted by the offeree. According to evidence of the Appellant, he had informed PW2 over the phone about the schedule of payment even before the offer letter was issued to him. There was no formal acceptance of the offer by the complainant until 6th June 2013, thus there was no reason why he should divulge all those information well in advance. Although it was open for him to divulge that information as to scheduled costs in the lease offer which are standard costs, Appellant's premature disclosure of the costs to the complainant strengthened prosecution's argument that he had solicited money from PW.2.

31. At the trial, it was strenuously argued by the defence counsel that the payment was done as part payment or first installment of the offer. However this argument was not supported in evidence. According to PW3's evidence, complainant had the choice of installment payment, part payment or full payment of the scheduled costs in the lease offer within the stipulated time in the lease letter. However, time enlargements and installment payments are possible only where an approval has first been given to that effect by the Manager or the Senior Estate Officer. There was no evidence before the trial Magistrate to satisfy herself that such an approval was sought by PW2 or that the Appellant had obtained an approval from his superior officers to obtain payments on installment basis. Appellant had no authority by the time he accepted money to negotiate terms in relation to time enlargements or installment payments with the complainant.

32. PW 2 clearly said that the sum of $ 600 was solicited by the Appellant to issue the offer letter. That is why he was concerned and inquired about the fee for offer letter from his uncle and got it double checked by a Pastor; that is why he had complained to the Prime Minister's office and then to the FICAC.

33. In face of vigorous cross examination in this regard, the PW2 vehemently denied that the sum of $ 600 was solicited and obtained by the Appellant as the first installment in the schedule of payments. He clearly stated (at page 31 of verbatim transcript of trial) that he was not aware that, in the offer letter, there is a schedule of payments which totals up $ 6559. It should also be noted that, according to Appellant's evidence, he had obtained only $ 500 and not $ 600 as the first installment. He had apparently made an attempt to match the stamp fee (legitimate standard cost) in the schedule of payments with what he had solicited. However, Counsel for defence never put Appellant's version (that he obtained only $ 500) to PW2 when he subjected the complainant to cross examination.

34. This ground lacks merit and therefore fails.

35. The learned Magistrate did carefully analyse and evaluate the Appellant's evidence which all the prosecution witnesses had rebutted in their evidence and there is no evidence that FICAC officers and the complainant had set up the meeting between the complainant and the Appellant. The FICAC officers only observed the meeting within Chillie's restaurant but the arrangement was done by the Appellant when he told the complainant to collect his offer letter. The Appellant's evidence is not supported by any other evidence except his own

word against the prosecution witnesses, which is not sufficient to state that the trial Magistrate failed to properly evaluate and assess the Appellant's evidence.

36. The Appellant contends that the trial Magistrate failed to consider that the Chillie's Restaurant meeting was the preferred venue of meeting by the complainant at 2 pm on 6th June, 2013, in collusion with FICAC investigators.

37. I have already addressed this issue. There is no evidence to suggest that the Chillie's Restaurant was the preferred venue of the complainant except the evidence of the Appellant which was not supported by any independent evidence. PW3 clearly stated that official functions such as issuing of offer letters and payments should be done at the ILTB office and not at the restaurant.

38. The Appellant further argues that the trial Magistrate failed to consider and give weight to the fact that at Chillie's restaurant:

    (a) The Appellant gave the complainant his lease offer where the Appellant further reiterated the mode of payment available to the complainant on the schedule of costs with the lease offer;

    (b) The Complainant gave the Appellant $600.00 as his first installment on the schedule of costs;

    (c) The Appellant was on his way out of the restaurant followed by the complainant to go back to his office when arrested by FICAC officers.

39. The trial Magistrate did consider the above evidence. I have already discussed these issues. PW2 stated that the $600 was given for the lease offer letter. The trial Magistrate had the opportunity to listen to the audio recording which captured the conversation between the Appellant and PW2. PW3 also confirmed that the proper procedure was not followed especially when the Appellant was receiving money at the restaurant when the money should have been paid at the ILTB office. The trial Magistrate did consider the evidence that came out and proper weight was given to it, thus leading to the Appellant's conviction. Therefore, this ground fails.

40. The Appellants contends that the trial Magistrate was wrong in saying that the payment of $600.00 was to be made at the ILTB office where a receipt will be issued and not at Chillie's restaurant when the arrangement for the meeting at

the Chillie's restaurant was that of the complainant in collusion with FICAC investigators.

41. The trial Magistrate is not wrong when she said in paragraph 24 that the payment was supposed to be made at the ILTB office where a receipt will be issued and not at Chillie's restaurant since that is the proper procedure which was also confirmed by PW3. The Appellant should not have received the money at the restaurant (if he claims that he was going to issue the receipt later) for rightly he should have taken PW2 to the ILTB office and asked him to pay the money to the cashier before the letter of offer was issued. There is no evidence that the arrangement for the meeting at the Chillie's restaurant was made by the complainant in collusion with FICAC investigators.

42. The Appellant argues that the trial Magistrate failed to consider that the arrest of the Appellant at Chillie's restaurant by FICAC officers was premature on the following grounds:

(a) The FICAC did not allow the Appellant to proceed to his office to issue a receipt for the $600 received;
(b) The FICAC officers were at that stage not fully aware of what a lease offer, its schedule of costs and the choices available to the offeree on payments of the offer entails;
(c) Whether the complainant ill-advised the FICAC officers about the nature of the transaction that was to take place between him and the Appellant.

43. The restaurant was not a place to issue official letters and make legitimate payments. The arrest was not premature since the Appellant had taken the money and placed it in his shirt pocket. PW2 stated that Appellant walked out of the restaurant whilst complainant was still sitting at the restaurant. This evidence was confirmed by FICAC officers.

44. The arrest was done on the complaint made by PW2. PW2 made a complaint on the basis that $ 600 was solicited by the Appellant to issue the offer letter. The covert operation was set up accordingly. There was reasonable suspicion that the Appellant had committed an offence under the Prevention of Bribery Act 2007 of soliciting an advantage of $600 in return for the lease offer letter to be given.

45. The Appellant further contends that the trial Magistrate was wrong in imputing blame on the Appellant with regard to $300.00 allegedly paid by the complainant to the Appellant contrary to the evidence led in the case.

46. There is more than sufficient evidence led in trial to convict the Appellant on Count 1 of Bribery which is soliciting and accepting $300. Through evidence of the complainant and the circumstantial evidence that was led, the trial Magistrate was convinced beyond reasonable doubt that the Appellant did commit bribery as per Count 1.

47. The Appellant further contends that the trial Magistrate failed to properly weigh the totality of the evidence and in particular the admissions by the complainant in cross-examination with regard to the $600.00 paid.

48. The trial Magistrate did weigh the evidence properly. In its totality, there is no such admission by the Complainant in his cross-examination as claimed by the Appellant. PW2 has clearly rejected the proposition of the Defence Counsel that the $600 was solicited and paid as the first installment of the offer. (*vide* answer to the last question at page 31 of the verbatim transcript). There are no material contradictions or any inconsistency in the PW2's evidence and his evidence was not discredited by the defence.

49. There is no merit in the grounds of appeal raised by the Appellant against conviction.

APPEAL AGAINST SENTENCE

Ground 3

50. In ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015), the Court of Appeal laid down the approach to be taken by an appellate court when a sentencing discretion by a court below is challenged. The Court observed:

"In Kim Nam Bae v The State (AAU 15 of 1998; 26 February 1999) this Court observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principles, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if*

he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House –v- The King [1936] HCA 40; (1936) 55 CLR 499)."

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust"

51. The Appellant argues that the sentence imposed by the learned Magistrate in its totality was harsh and excessive.

52. The learned Magistrate has taken into consideration the Sentencing and Penalties Act and guideline judgments in crafting her sentence. She has correctly identified the tariff set by Madigan J in ***State v Blake*** [2014] FJHC 375 (29 May 2014) as being between 9 months and 3 years.

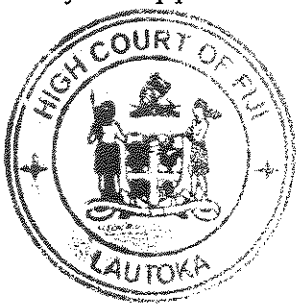
53. The starting point of 12 months is in the lower range of the tariff. The sentence was increased by 6 months to reflect aggravating factors correctly identified by the learned Magistrate. There was no mitigating circumstance and therefore she arrived at a sentence of 18 months imprisonment which is within tariff for each count to be served concurrently. The fine of $ 1000 and, default sentence of 100 days' imprisonment to be served consecutive to the head sentence is reasonable and fitting to the circumstances of the offences.

54. The learned Magistrate considered whether the sentence should be suspended because it fell below 2 years. She has given reasons why a custodial sentence is warranted in this case.

55. In this Appeal, the Appellant has failed to satisfy this court that the trial Magistrate has erred in principle or that she has allowed irrelevant matters to guide her when sentencing the Appellant or that she has fallen into error whilst exercising her sentencing discretion. Therefore, this ground should fail.

56. For reasons given, appeal against conviction and sentence is dismissed. The Judgment and Sentence of the learned Magistrate at Nadi are affirmed.

57. 30 days to appeal to the Court of Appeal.



Aruna Aluthge
Judge

AT LAUTOKA
1st of December, 2017

Solicitors: **Kevueli Tunidau Lawyers for Appellant**

Fiji Independent Commission against Corruption for Respondent