

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 331 of 2016

[CRIMINAL JURISDICTION]

FICAC

V

- 1. ABDUL SHEKEB**
- 2. JOSEFA RABOILIKU MARAWA**

Counsel : Ms. F. Puleiwai & Ms. J. Pene for FICAC
Mr. I. Khan for 1st Accused
Mr. J. Bale for 2nd Accused

Hearing on : 11 – 16 April 2018

Ruling on : 16 April 2018

RULING ON NO CASE TO ANSWER

1. The accused are charged with the following offences;

FIRST COUNT

Statement of Offence

Bribery: Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered an advantage namely a Toyota Harrier vehicle registration no.

HV 915 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

SECOND COUNT

Statement of Offence

Bribery: Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

JOSEFA RABOILIKU MARAWA, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority of reasonable excuse, accepted an advantage namely a Toyota Harrier vehicle registration no. HV 915 from one **ABDUL SHEKEB**, Director and owner of Ariana Used Cars and Spare Parts, an account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

THIRD COUNT

Statement of Offence

Bribery: Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, on or about the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered a loan of FJ\$4,000.00 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

FOURTH COUNT

Statement of Offence

Bribery: Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

JOSEFA RABOILIKU MARAWA, on or about the 19th day of July 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority or reasonable excuse, accepted a loan of FJ\$4,000.00 from one **ABDUL SHEKEB**, Director and owner of Ariana Used Cars and Spare Parts, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

ALTERNATIVE CHARGE TO FIRST COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the course of having dealings with the Fiji Revenue and Customs Authority, offered an advantage namely a Toyota Harrier vehicle with registration number HV 915 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

ALTERNATIVE CHARGE TO THIRD COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, between the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the course of having dealings with the Fiji Revenue and Customs Authority, offered a loan of FJ\$4,000.00 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

2. The first accused is charged with the offence of bribery under section 4(1)(a) of the Prevention of Bribery Promulgation No. 12 of 2007 ("Bribery Promulgation")

on counts one and three. There is an alternative count under Section 8(2) of the Bribery Promulgation for each of those counts. The second accused is charged with the offence of bribery under section 4(2)(a) of the Bribery Promulgation on counts two and four.

3. The elements of the offence under section 4(1)(a) relevant to this case are;
 - a) the accused;
 - b) offered an advantage;
 - c) to a public servant;
 - d) on account of that public servant's performing any act in his capacity as a public servant.

4. The elements of the offence under section 4(2)(a) relevant to this case are;
 - a) the accused;
 - b) being a public servant;
 - c) accepted an advantage;
 - d) on account of his performing any act in his capacity as a public servant.

5. The elements of the offence under section 8(2) are;
 - a) the accused;
 - b) while having dealings of any kind with any public body;
 - c) offered an advantage;
 - d) to any public servant employed by that public body.

6. In respect of each offence, if the prosecution establishes the elements beyond reasonable doubt, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused.

7. In this case there is no dispute on the identity of the accused and that the second accused was a public servant at the time material to this case.

8. In relation to the substantive charges under section 4(1) and section 4(2) of the Bribery Promulgation, both accused dispute the elements in relation to offering/receiving an advantage. However, I find that there is some relevant and admissible evidence touching the relevant elements.
9. Both accused also dispute the fourth element of the aforementioned offences.
10. The prosecution is relying on the case of *AG v Chung Fat Ming* [1978] HKLR 480 and submits that in order to establish the fourth element of the offences under section 4(1) and section 4(2) of the Bribery Promulgation, 'the act the subject of the charge need not be a specific quid pro quo but can be a general sweetener'.
11. In the opening address and during the hearing on the application made by the defence on no case to answer, the prosecutor made statements to the effect that it is sufficient to prove that the receiver was a public servant in order to establish the fourth element in offences under section 4(1) and section 4(2) of the Bribery Promulgation. It was apparent that the prosecutor wants the words "on account of" simply ignored.
12. In *Chung Fat Ming* (supra), McMullin J had said thus in relation to the "keeping sweet" situation the prosecution is heavily relying on;

“(c), where the circumstances are too neutral to disclose anything more than a solicitation by an official, or a gift or promise to an official, where a nexus of common interest exists between the parties, known to both and arising from any possible performance of an act within the scope of that official's public duty. This latter case is the "keeping sweet" situation at its most tacit and ambiguous and perhaps at its most typical. Where the advantage offered or received has no obvious or in-built explanation such as to render it innocent it is open to the prosecutor to assume that it is corrupt and to lay his charge accordingly. Once he has done so section 25 operates to confirm his assumption and to put the accused to the risk of conviction unless he chooses to give an explanation.”
13. Section 25 referred to by McMullin J in the above passage is now repealed. This raises the question whether what McMullin J said about the "keeping sweet situation" in *Chung Fat Ming* (supra) is still valid. It is pertinent to note that section

26 of the Hong Kong Prevention of Bribery Ordinance was also repealed and in the Bribery Promulgation of Fiji which is almost identical to the Hong Kong Prevention of Bribery Ordinance, sections 25 and 26 are not promulgated.

14. I also note that McMullin J had indicated his reservations regarding the 'Leonard Test' the prosecution urges this court to apply in the following terms;

"I say that because as it seems to me this test is clear and workable only if one interprets "the kind of public servant" as meaning not merely that the official in question holds a certain office but also that he is, or is thought to be, in a position by virtue of that office to favour or disfavour the interest of the particular solicitee and that this is something which is apparent to both parties."


15. The 'Leonard Test' as proposed by Leonard J in the case of *KONG Kam-piu & Another v The Queen* [1973] HKLR 120 is as follows;

"As I see it the question which one must ask oneself when considering the corruptness of a gift given to or solicited by a public servant in order to induce him to abstain from a proposed course of action is 'Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?' If the answer is 'Of course not' as it is in this case then the gift has been solicited or given to him in his capacity as a public servant and is a corrupt one."

16. All in all, I am not convinced that the 'Leonard Test' should be applied in cases under section 4 of the Bribery Promulgation especially in the manner it is proposed by the prosecution.
17. In my view, in order to draw the irresistible inference that a particular advantage was offered or received on account of performing or abstaining from performing an act in the capacity as a public servant, one should consider all the circumstances involving the offering or receiving of the advantage including the nature of the advantage and the relationship between the public servant and the person who offered the advantage. Even though it is not necessary for the 'act' in question to be a specific act and it is sufficient for it to be any general duty of the public servant in question, it is still necessary to have evidence to prove beyond reasonable doubt that the advantage was given 'on account' of that 'act'.

18. However, given the evidence adduced by the prosecution in this case, I am satisfied that there is some evidence touching this element in each charge under section 4(1) and section 4(2) of the Bribery Promulgation.
19. In the circumstances, I find that there is a case for each accused to answer.
20. I would therefore proceed to explain the accused their rights interms of section 231(2) of the Criminal Procedure Act.




Vincent S. Perera
JUDGE

Solicitors;

Office of the Fiji Independent Commission Against Corruption (FICAC) for the prosecution.

Iqbal Khan & Associates for the 1st accused.

Faktaufon & Bale Lawyers for the 2nd accused.