

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 63 of 2017**

**STATE**

**V**

**KAMLESH ARYA**

**Counsel** : Mr. Sam Savumiramira with Ms. Laite Bokini for the State  
Dr. Gregory Woods QC with Mr. Vijay Maharaj for the Accused

**Dates of Trial** : 15-18, 23-26, 29-30 April & 1-2, 6-10 and 13 May 2019

**Summing Up** : 15 May 2019

**Judgment** : 17 May 2019

**JUDGMENT**

[1] The accused, Kamlesh Arya, was charged by the Fiji Independent Commission Against Corruption (FICAC) with the following two offences:

**FIRST COUNT**

***Statement of Offence (a)***

**ABUSE OF OFFICE:** Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

***Particulars of the Offence (b)***

**KAMLESH ARYA**, between 1<sup>st</sup> January 2014 and 31<sup>st</sup> 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 amount to \$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.

## **SECOND COUNT**

### ***Statement of Offence (a)***

**GENERAL DISHONESTY – CAUSING A LOSS:** Contrary to Section 324(2) of the Crimes Decree 2009.

### ***Particulars of Offence (b)***

**KAMLESH ARYA**, between 1<sup>st</sup> January 2014 and 31<sup>st</sup> December 2014, at Suva, in the Central Division, whilst being employed as the Registrar of the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, dishonestly caused a risk of loss to Bhawani Dayal Memorial Primary School by authorizing the Free Education Grants as loans amounting to FJD\$116,500, and knowing that the loss will occur or substantial risk of the loss will occur to Bhawani Dayal Memorial Primary School.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 18 days.
- [3] At the conclusion of the case for the prosecution, this Court made a Ruling that the accused has no case to answer in respect of the First Count and he was accordingly acquitted of the First Count. The charge that is remaining against the accused is the Second Count. Therefore, whatever reference is made in this Judgment to offence or charge is a reference to the Second Count.
- [4] Prior to the commencement of the defence case, leave was sought by the prosecution to amend the Second Count, which application was permitted by this Court.
- [5] At the conclusion of the evidence and after the directions given in the Summing Up, the three Assessors unanimously found the accused guilty of the Second Count.
- [6] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my Summing Up to the Assessors and also the opinions of the Assessors.
- [7] During my Summing Up I explained to the Assessors the salient provisions of Section 324 (2) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [8] The Assessors were directed that in order to prove the Second Count, the prosecution must establish beyond reasonable doubt that;
  - (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) Dishonestly;
- (v) Caused a risk of loss to Bhawani Dayal Memorial Primary School (BDMPS), by authorizing the Free Education Grants (FEG), amounting to FJ\$116,500, as loans;
- (vi) Knowing that the loss will occur or a substantial risk of the loss will occur.

**[9]** Each of the above individual elements was further elaborated upon in my Summing Up, including the applicable legal test to determine “dishonesty” or the dishonest state of mind of an accused person.

**[10]** In support of their case, the prosecution led the evidence of the following 9 witnesses:

1. Dr. Brij Lal
2. Ravineet Ritesh Sami
3. Satyendra Singh
4. Makarita Voi Fuata
5. Moshin Shaheed Ali
6. Mosese Matanisiga
7. Tawake Gaunavou
8. Ruci Daulako
9. Talica Ratulevu

**[11]** By consent of both the prosecution and defence, Prosecution Exhibits **PE 1 to PE 49** was tendered to Court.

**[12]** The accused called the following witnesses in support of his case:

1. Prileshni Kanthi Devi
2. Vijay Chand
3. Bhuwan Dutt
4. Nereo Kanasalusalu

**[13]** The defence also tendered to Court Defence Exhibits **DE 1 to DE 15**.

**[14]** In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Agreed Facts*” without placing necessary evidence to prove them:

1. **THAT** the Accused in this matter is Mr. Kamlesh Arya (hereinafter referred to as the “the Accused”), 64 years old of Quarters 6, Gurukul Primary School, Saweni in Lautoka.
2. **THAT** the Accused was appointed to the position of “Registrar at the University of Fiji (hereinafter referred to as “University”) on the 11 December 2012 for a period of three (3) years which was renewed for another three (3) years in 2015.
3. **THAT** the Accused is responsible to the Vice Chancellor for the satisfactory performance of his duties.
4. **THAT** the Accused is also responsible for all the administration of the University, including the Finance and Facilities aspects of the University during the material time of the offence.
5. **THAT** the Accused was appointed to be the School Manager for a few Sabha schools including Bhawani Dayal Memorial Primary school (“**BDMPS**”), Bhawani Dayal Arya College (“**BDAC**”), Nadroga Arya College, DAV College, Ba Pundit Vishnu Deo, DAV Primary School and Arya Kanya Pathshal during the material time of the offence.
6. **THAT** the Accused was appointed to be the School Manager for the abovementioned schools based on merits through the Sabha Annual General Meeting and Executive Meeting as outlined in the Sabha Constitution.
7. **THAT** the Accused duties and responsibilities as the School Manager is to manage the school in terms of its infrastructure, be part of the management board, take decisions for development and be the liaison between the management and the Ministry of Education.
8. **THAT** the Accused was one of the Trustees for the Arya Pratinidhi Sabha of Fiji (hereinafter referred to as “**APS of Fiji**”). The other Trustees were Mr Arun Padarath, Mr Bhuwan Dutt, Mr Ravineet Ritesh Sami and Mr Shanti Saraj.
9. **THAT** between January to June 2014, Mr Sami was the National General Treasurer of APS of Fiji and was elected as a Trustee for APS in June 2014.
10. **THAT** Mr Sami was also the Executive Director Finance of the University of Fiji in 2014.
11. **THAT** Mr Sami was appointed as the General Treasurer of APS Westpac Internet Banking and simultaneously granted access to manage the cash flows of all accounts of Sabha.

### Procedure on the use of Free Education Grant from Ministry of Education

12. **THAT** the government through the Ministry of Education (hereinafter referred to as “MOE”) initiated the Free Education Grant (“FEG”) for both primary and secondary schools in 2014.
13. **THAT** the grants were calculated per student according to the roll provided by the school management. Each student was supposed to receive \$250 each Term to be utilised for the purpose outlined in the Financial Management Handbook (hereinafter referred to as “Handbook”).

### Term 1 FEG

14. **THAT** on the 6<sup>th</sup> January 2014, Bhawani Dayal Memorial Primary School had received \$83,076 into its Westpac Account No. 24564700 for the Term 1 allocation in 2014.
15. **THAT** on the 31<sup>st</sup> January 2014, \$27,500 was loaned to BDAC from BDMPS FEG via internet transfer. ***[In evidence it has transpired that in actual fact the \$27,500 was loaned to BDAC in the following manner: On 16 January 2014, \$20,000; on 31 January 2014, \$500; and on 4 February 2014, \$7000].***
16. **THAT** on the same date another \$30,000 was loaned to the University from BDMPS grant through internet transfer as well.
17. Thereafter, on the 26<sup>th</sup> February 2014, again another \$9,000 was loaned to Vunimono Arya School (“VAS”) via internet transfer from BDMPS grant. ***[In evidence it transpired that in actual fact \$9,000 was transferred by VAS to the credit of the BDMPS account on that day. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***
18. **THAT** on the 14<sup>th</sup> March 2014, another loan transfer of \$11,800 was done to the BDMPS grant to the APS Administration Account through internet transfer. ***[There is no record of such a transaction. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***

### Term 2 FEG

19. **THAT** on the 13<sup>th</sup> May 2014, BDMPS had received \$83,423 into its Westpac Account No. 24564700 for the Term 2 allocation in 2014.
20. **THAT** on the 15<sup>th</sup> May 2014, a loan transfer of \$25,000 was done to the BDMPS FEG to BDAC account via internet transfer.
21. **THAT** on the 3<sup>rd</sup> June 2014, another loan transfer of \$9,000 to VAS was done to the BDMPS grant via internet transfer.

22. **THAT** on the 15<sup>th</sup> July and again on the 15<sup>th</sup> August 2014, two loan transfers were conducted to the BDMPS grant to the University amounting to \$25,000 and \$10,000 respectively via internet transfer. ***[In evidence it transpired that in actual fact the \$10,000 was transferred by the University of Fiji to the credit of the BDMPS account, on 15 August 2014. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***
23. **THAT** the Accused was interviewed under caution at the FICAC Office in Lautoka on the 22/03/16, 08/11/16, 09/11/16 and the 11/11/16 in the English language by FICAC Commission Office (CO) Siteri Vuidreketi with Assistant Commission Officer (ACO) Mosese Matanisiga present as the Witnessing Officer before the interview was concluded on the 21/11/16 at the FICAC Office in Suva by the same mentioned officers.
24. **THAT** on the 22<sup>nd</sup> November 2016, the Accused was formally charged at the FICAC Office in Suva in the English language by the Senior Commission Officer (SCO) Alivereti Wakanivesi with CO Siraz Ali present as the Witnessing Officer before the Accused was produced in court on the same date.
- [15] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them, they must, therefore, treat the above facts as proved beyond reasonable doubt (Subject to the clarifications I have made, which are depicted in brackets above).
- [16] Based on the said agreed facts it has been admitted that the Accused in this case is Kamlesh Arya. There is also no dispute as to the specified time period during which it is alleged the offence was committed or as to the place of offence.
- [17] However, the prosecution must prove beyond reasonable doubt the remaining three elements of the offence: namely that the accused acted dishonestly, by authorizing the FEG, amounting to FJ\$116,500, as loans; and thereby that he caused a risk of loss to BDMPS; and that the accused knew that the loss will occur or a substantial risk of the loss will occur.
- [18] The prosecution case is that the accused, Kamlesh Arya, acted dishonestly, by authorizing the FEG, amounting to FJ\$116,500, as loans and thereby caused a risk of loss to BDMPS, and that he knew that the loss will occur or substantial risk of the loss will occur to BDMPS.
- [19] The accused denies that he acted dishonestly. He also denies that there was a risk of loss to BDMPS or that he had knowledge that the loss will occur or substantial risk of the loss will occur to BDMPS.

- [20] It has been agreed between the parties that the accused was appointed to be the School Manager for a few Sabha schools, including BDMPS, during the material time of the offence. It is also agreed that at the time the accused was functioning as the Registrar at the University of Fiji. It is further agreed that the accused was one of the Trustees for the APS. The other Trustees were Arun Padarath, Bhuwan Dutt, Ravineet Ritesh Sami and Shanti Saraj.
- [21] It is also agreed that between January to June 2014, Ravineet Sami was the National General Treasurer of APS and was elected as a Trustee for APS in June 2014. He was also functioning as the Executive Director Finance of the University of Fiji in 2014. As the General Treasurer of APS, he was appointed for Westpac Internet Banking facility and simultaneously granted access to manage the cash flows of all accounts of APS.
- [22] It has also been agreed between the parties as to how the loaned sum of FJ\$116,500 is made up. This is also clearly depicted in the relevant bank statements and also in document PE 49 (by way of graphs depicting the loans for Term 1 and 2 of 2014).
- [23] The sum of FJ\$116,500 is made up of 7 distinct transactions, which have taken place between 16 January 2014 and 15 July 2014. For the prosecution to succeed, they must prove that at the time each of these transactions or loans were authorized, the accused was acting dishonestly.
- [24] With regard to the authorization of the loans, the best evidence, in my opinion would be the evidence of prosecution witness Ravineet Ritesh Sami. This witness has been granted immunity by the FICAC.
- [25] It is agreed that between January to June 2014, Ravineet Sami was the National General Treasurer of APS. As the General Treasurer of APS, he was appointed or nominated by APS to carry out Internet Banking with Westpac and simultaneously granted access to manage the cash flows of all accounts of APS. He was the only person who had the authority to perform transfers via Internet Banking on behalf of the APS.
- [26] The statement made to FICAC by Ravineet Sami, dated 22 November 2016, has been tendered to Court as Prosecution Exhibit PE 47. Usually a statement made to the Police by a witness, during the course of investigations, is not admissible in evidence. However, in this case the statement of Ravineet Sami has been tendered to Court as a prosecution exhibit. Therefore, the contents of the statement, is now part of the evidence.
- [27] In the said statement, the witness refers to the relevant inter school loans of FJ\$116,500, which is the subject matter of this case, and also provides information as to who authorised the said loans in the following manner:

1. 16 January 2014, FJ\$20,000 loaned to BDAC – *“Upon the directive of the office bearers that were Mr Arya, Mr Padarath and Mr Bhuwan Dutt, I did these transfers.”*

2. *31 January 2014, FJ\$500 loaned to BDAC – “The Sabha officials, Mr Kamlesh Arya and Mr Arun Padarath approved this loan either through email or verbally.”*
3. *31 January 2014, FJ\$30,000 loaned to University of Fiji – “I made this Westpac Internet Transfer transactions and Mr Arya and Mr Padarath approved this loan.”*
4. *4 February 2014, FJ\$7,000 loaned to BDAC – “I made this Westpac Internet Transfer transactions and Mr Arya and Mr Padarath approved this loan.”*
5. *15 May 2014, FJ\$25,000 loaned to BDAC – “Being the School Manager of Bhawani Dayal Memorial Primary School and Bhawani Dayal College, Kamlesh Arya responded to these email (dated 15 May 2014) and approved to transfer the funds.”*
6. *3 June 2014, FJ\$9,000 loaned to VAS – “I made this transfer as the repayment of the loan which was taken earlier on 04.02.2016. I wish to refer to this record of email correspondence dated 06.05.2014 with the subject: Vunimono Arya Primary School MOE Allocation sent by Mr Nirendra Kumar, School Manager at that time of Vunimono Arya School to Mr Padarath, Mr Bhuwan Dutt and Mr Umesh Chand and later forwarded to me. Kamlesh Arya was also forwarded this chain of emails....”*
7. *15 July 2014, FJ\$25,000 loaned to University of Fiji – “I would like to show you this record of email correspondence dated 15/07/2014, addressed to Kamlesh Arya and others with the subject: Salary Clearance and Transfers, sent by me to Mr Arya, Mr Padarath and Bank. We advised the Bank to transfer the following funds to clear the University’s salaries, since there was a delay from Government in paying University’s grants.....”*

**[28]** It is evident from the above, that authorization for the transfers to be made was not given by the accused alone (except for the transaction dated 15 May 2014). This seems to have been a collective decision of the APS, and authorization had come collectively from the office bearers of the APS, which included Arun Padarath and Bhuwan Dutt as well.

**[29]** In his testimony before this Court the witness Ravineet Sami testified that it was the accused, as the School Manager of BDMPS, who was approving or authorising the loans, which are the subject matter of this case. However, this version is inconsistent



with the detailed statement given by him to FICAC on 22 November 2016, which is also part of the evidence in this case.

- [30] There is no doubt that the FEG could not be loaned out from one school or one institution to another. This is clearly depicted in Prosecution Exhibit PE 5 (Ministry of Education Standard Power Point slides regarding Financial Management in Schools) and Prosecution Exhibit PE 12 (Financial Management in Schools Manual, May 2014-the Handbook). It is also clear that the accused may well have known that the FEG could not be loaned out or donated (as per the email correspondence tendered as Prosecution Exhibit PE 14 (v)-MOE Grants and PE 14 (vi)-APS Updates/MOE Workshop Update).
- [31] However, a breach of a regulation or directive alone does not necessarily tantamount to dishonesty or to a criminal offence.
- [32] The defence position is that the new system of FEG was hurriedly implemented and referred to so called “teething problems” in its implementation. The defence also takes up the position that the inter loan system between the APS schools existed for many years. Even prosecution witness Ravineet Sami agreed that the inter loan system between the APS schools existed for more than 50 years.
- [33] The defence produced Exhibit DE 2, which contains Audited Financial Statements of certain APS Schools, to highlight this fact. Each of the audited statements has a notation to the effect: “Internal loans represent unsecured loans to and from Sabha and Schools managed by the Sabha and are receivable when the funds become available”.
- [34] The above is also consistent with the explanation provided by the accused during the course of his Caution Interview Statement. The Caution Interview Statement has been tendered to Court by consent of both parties, as Prosecution Exhibit PE 46. Separate typed portions of the Caution Interview Statement of the accused has been tendered to Court as Prosecution Exhibit PE 46A.
- [35] In this case the prosecution is relying on the admissions made by the accused in his Caution Interview Statement. The accused admits to making the statement and also submits that the answers given therein represents his explanation to the allegations against him.
- [36] I am of the opinion that the statement was made voluntarily by the accused, and that the answers provided by him are truthful and, as such, sufficient weight could be attached to the said answers given by the accused.
- [37] I wish to refer in particular to the following portions of the Caution Interview Statement made by the accused:

.....

**Q76 : For the time you were the School Manager for Bhawani Dayal Memorial Primary School and seeing that all these transactions took place in 2014 what can you tell being the School Manager and having these transactions take place in that particular year, anything you would like to tell us?**

A : All I can say is there is nothing fraudulent about it. The accounts don't show any deception at all. The Sabha has been in the education sector for 110 years now and during its operations, it involves certain....so that they could operate the schools that they own before even government intervention financially came into play to ensure that none of their schools ran into financial crisis that they ended up borrowing money for operations so they instituted what you call the inter school loan. The inter loan system was sort of a helping hand kind of thing that if I need today you give me, tomorrow you need I repay you, and if you need more than you can take from me if I had funds. So really all transactions which are under IB transfer are under that inter loan system which is an understanding between the Sabha and the bank that's all I can say. There is nothing unusual about it in the Sabha context. Government intervention in full stage came in 2014 so if government had in a position on it you know it should regard as transitional the management of the school transiting from an old scheme into a new scheme and through dialogue and discussions you bring the whole exercise to a mutual agreement and it has come now that they practicing something from an age, government said you can't do that you know you must come into the fold. In 2015, the system has returned all borrowings whoever they borrowed from in 2014 and now we are back to square one. We must start afresh we are now in line with governments policies and I don't believe there is any serious breach because its transitional anything that happens from the old to the new has come but when the new partner has questioned it and the old system brings it to par then the mechanism...that's all I can say. And all these things are done in the organizational interest not individual interest so these transfers in no way reflect that I have benefitted, no way because its direct bank to one account which belongs to the Sabha and back to the account that's all I can say.

.....

**Q110: I just wanted to ask for those schools does the policy allow the loaning of school funds?**

A : Like I said if my recollection is correct like I have stated before the Sabha had a inter school loaning system and you may find even in my previous caution interview and that became in existence well before even I

became the manager of the schools and if I may qualify the arrangement is to sustain the operations of the schools meaning that if a Sabha school had a cash flow situation then Sabha would transfer funds from a school where the money was available to another of its school to sustain it for a short period and then money would be returned to the lender when the grants and fee collections were received at the receiving school. And all these things have been and continued to reflect in the annual reports of the schools, financial reports.

.....

**Q345: For the loans which you approved to be taken out from the BDMPS grants. Were you fulfilling the intention of the Ministry or of the Sabha?**

A : Well like I said there is an educational partnership with the Ministry and the Sabha and as manager of the school one has to look at both scenarios and in collective enterprising. The system can't let one ship sink and the other sail. Therefore, as the manager of the schools apart from addressing the needs of the 2 schools, the needs of other schools in terms of cash situations were equally important and had to be addressed and Sabha's inter loan system avoided bank borrowings on short terms at higher interest rates. The provision for decades provided a win – win situation.

**[38]** From all of the above it is very clear that the accused did not have any dishonest intention at the time he authorized the inter school loans which are the subject matter of this case. In any event, as I have stated above, the authorization was not done by him alone but was a collective decision of the APS Executive Committee and/or the Trustees.

**[39]** For the same reasons aforesaid I am of the opinion that the prosecution has failed to prove the remaining two elements of the charge as well- That the accused caused a risk of loss to BDMPS; and that the accused knew that the loss will occur or a substantial risk of the loss will occur.

**[40]** In any event, the defence states that the entire sum of FJ\$116,500 was repaid to BDMPS. To establish this fact the defence tendered Exhibit DE 3, which is a document prepared by witness Prileshni Devi - Tabulated details of transfers from and repayments to Bhawani Dayal Primary School Account Number 24564700.

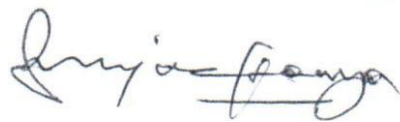
**[41]** I agree that as per the above statement the entire sum of FJ\$116,500 was not repaid in the year 2014. FJ\$40,000 was repaid in the year 2015; and the final repayment, in the sum of FJ\$35,700, was only made on 1 December 2016. However, the fact remains that no loss or substantial risk of loss was caused to BDMPS.

[42] For all the aforesaid reasons, I find that the unanimous opinion of the Assessors in finding the accused guilty is perverse and not justified.

[43] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove its case beyond reasonable doubt by adducing credible and reliable evidence satisfying all elements of the offence of General Dishonesty - Causing a Loss with which the accused is charged in Count 2.

[44] In the circumstances, I find the accused not guilty of the charge of General Dishonesty - Causing a Loss.

[45] Accordingly, I acquit the accused of the Second Count.



**Riyaz Hamza**

**JUDGE**

**HIGH COURT OF FIJI**



AT SUVA

Dated this 17<sup>th</sup> Day of May 2019

**Solicitors for the State : Office of the Fiji Independent Commission Against Corruption (FICAC), Suva.**

**Solicitors for the Accused: MC Lawyers, Barristers & Solicitors, Suva.**