

IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICITON

APPEAL NO.: HACDA 002 of 2021 S

BETWEEN: FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION
(FICAC)

APPELLANT

AND: PRIME FIJI LIMITED

RESPONDENT

Counsel: Mr. R. Aslam and S. Savumiramira for the Appellant
In absence of the Respondent

Date of Hearing: 24 March 2021

Date of Judgment: 24 November 2021

JUDGMENT

1. This is an appeal filed by the Fiji Independent Commission Against Corruption against a judgment delivered in Magistrate's Court Case No 927/2016. The Respondent was charged for the following counts in the Magistrate's Court;

Count 1

Statement of offence

Forgery: Section 156(1) of the Crimes Act

Particulars of offence

Prime Fiji Limited, a Limited Liability Company having its registered address at 17 Auckland Street, Viria West Vatuwaqa, Suva between 01st day of April 2016 and the 30th day of April 2016 partly at Suva in the Central Division made a false document namely the Performance Security of Westpac banking Corporation for the Performance Guarantee No. FRA/TIISP/15-67, Streetlight renewals amounting to FJ \$ 351,865.00 purported to have been issued by the Westpac Banking Corporation, with intent to dishonestly induce Fiji Road Authority in their capacity as public officials to accept it as genuine, and to dishonestly influence the exercise of their function.

Count 2

Statement of offence

Using forged document: Section 157(1) of the Crimes Act

Particulars of offence

Prime Fiji Limited, a limited Liability Company having its registered address at 17 Auckland Street, Viria West Vatuwaqa, Suva between 01st day of April 2016 and the 30th day of April 2016 partly at Suva in the Central Division used a false document which Prime Fiji Limited knew to be false, namely the Performance Security of Westpac Banking Corporation for the Performance Guarantee No FRA /TIISP/15-67, Streetlight Renewals amounting to FJ351,865.00 with intent to dishonestly induce Fiji Roads Authority officials in

their capacity as public officials to accept it as genuine, and to dishonestly influence the exercise of their function.

2. The Respondent company is a registered private limited company in Fiji which has not been wound up yet. However, according to the Appellant the registered office is apparently shut down. The Director of the company is an Australian citizen, named Shane Halliday. The trial in the Magistrate's Court was taken up in his absence while he was represented by Howard Lawyers. Shane Halliday gave evidence via Skype from Australia as the Managing Director of the Respondent Company, at the Magistrate's Court hearing.
3. According to the evidence adduced in the Magistrate's Court the Respondent Company won a bid for a contract advertised by the Fiji Roads Authority for renewal of streetlights. The successful bidder was supposed to provide a performance guarantee equivalent to 10% of the contract value, which was in this case 351,865.00 FJD. The Company Director submitted a performance guarantee, which is also referred to in the evidence as a bank guarantee, to the said amount and later it was transpired that the Westpac bank had not in fact provided that performance guarantee. The allegation was that the email forwarded by the Respondent company was a false document. The explanation of the Director who gave evidence via Skype at the trial before the Magistrate's Court was that a junior officer in his company inadvertently cut and pasted a previous performance guarantee. But he also admitted that the amount in the previous performance guarantee was altered by the junior officer.
4. On 20th February 2020 the learned Magistrate delivered the judgment acquitting the Respondent of both counts. Being aggrieved by the said judgment the Appellant filed a petition of appeal on 18th March 2020. Subsequently on 12th October 2020 the Appellant filed an amended petition with the following grounds of appeal;

- a) That the learned Magistrate erred in law by concluding that the document (forged) needed to be accepted by the Public official to fulfill the last element of the offence of Forgery namely if the said document is accepted, to dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty of functions.
- b) That the learned Magistrate erred in law and facts by failing to evaluate the evidence holistically in finding that the Prosecution failed to prove the last elements of forgery, namely if the said document is accepted to dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or functions.
- c) That the learned Magistrate erred in law by concluding that the document (forged) needed to be accepted by the Public Official to fulfill the last element of the offence of using forged documents namely if the said document is accepted to dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or functions.
- d) That the learned Magistrate erred in law and facts by failing to evaluate the evidence holistically in finding that the prosecution failed to prove the last elements of using forged document, namely if the said documents is accepted, to dishonestly obtain a gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or functions.
- e) That the learned Magistrate erred in law and facts by failing to convict the Respondent for the offence of attempt after finding that the Respondent had the intention to commit the offence and that the false document had been sent to the public officer making the action of the Respondent more than preparatory.

5. It appears that the Appellant had found it difficult to serve the Appeal documents on the Respondent as the Respondent's registered office is closed. Nevertheless, on 13 August 2020 His Lordship Justice Perera decided to proceed with this Appeal in absence of the Respondent having been satisfied of the attempts made by the Appellant to serve the documents on the Respondent through various means.
6. Subsequently this matter was transferred before me upon the establishment of the Anti-Corruption Division of the High Court. Since the High Court has already decided to proceed with the hearing upon being satisfied of the attempts to serve, the appeal was heard before me in absence of the Respondent. Further, it must be noted that the pronouncement of the judgment was delayed until now due to the closure of courts following Covid19 lockdowns.
7. Be that as it may, I will now consider the grounds of appeal filed by the Appellant. It appears that the first four grounds of appeal relate to one element which is commonly enshrined in the offences of "forgery" and "using forged document". The counsel for the Appellant informed court that they will not canvass the fifth ground of appeal. Since the Appellant has abandoned the final ground of appeal, I decide not to discuss it. However I will consider the first four grounds of appeal together as all those grounds are founded more or less on the same issue.
8. Section 156 reads as follows;
 - (1) A person commits an indictable offence (which is triable summarily) if the person makes a false document with the intention that the person or another person will use it-
 - (a) to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and

- (b) if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function.

Penalty - imprisonment for 10 years

- (2) in a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the capacity was a capacity as a public official.

9. The offence of using a forged document is defined in Section 157 of the Crimes Act as follows;

- (1) A person commits an indictable offence (which is triable summarily) if the person knows that a document is a false document and uses it with the intention of -

- (a) dishonestly inducing another person in the other person's capacity as a public official to accept it as genuine; and
- (b) if it is so accepted, dishonestly obtaining a gain, dishonestly causing a loss or dishonestly influencing the exercise of a public duty or function.

Penalty - imprisonment for 10 years

- (2) In a prosecution of an offence against subsection (1), it is not necessary to prove that the defendant knew that the capacity was a capacity as a public official.

10. I have perused the judgment delivered by the learned Magistrate. It appears that she has dissected Section 156 as follows based on the judgment in *Swamy v State* [2019] FJHC 1041;HAA2.2019 (30 October 2019);

- i. The Accused
- ii. Makes a false document,
- iii. With the intention to use it by himself or by another person,

- iv. To dishonestly induce a third person in the third person's capacity as a public official to accept the said false documents as genuine,
- v. If the said document is accepted, to dishonestly obtains[sic] gain, dishonestly cause a loss or dishonestly influence the exercise of a public duty or function.

11. Similarly, the learned Magistrate based her judgment on the following elements in respect of the second count of using a forged document contrary to Section 157(1) of the Crimes Act;

- i. The Accused,
- ii. With the knowledge that the document is a false document,
- iii. Uses the false document with the intention of,
- iv. Dishonestly induce another person in the other person's capacity as a public official to accept it as genuine,
- v. If the document is accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function.

12. The Appellant contends that the learned Magistrate is misconceived in distinguishing the physical elements and the fault elements of the offence of forgery as well as the offence of using a forged document. The argument of the Appellant is that proof of actual acceptance of the false document is not necessary to constitute these offences.

13. The Appellant submitted a number of case laws on the common law position with regard to forgery. I have considered all those authorities. Yet the Appellant was unable to refer this Court to any authority which directly deals with the fault elements and physical elements of the offence of forgery. However, the Appellant brought to the notice of this Court that the Australian

Commonwealth Criminal Code provides similar definitions for forgery and use of forged documents.

14. Division 144 of the Australian Commonwealth Criminal Code Act 1995 reads as follows;

- (1) A person commits an offence if:
 - (a) the person makes a false document with the intention that the person or another will use it:
 - (i) to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and
 - (ii) if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and
 - (b) the capacity is a capacity as a Commonwealth public official.

Penalty: Imprisonment for 10 years.

- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the capacity was a capacity as a Commonwealth public official.

15. It is very clear that Section 156 of the Crimes Act is identical to the said provision in the Commonwealth Criminal Code. The Appellant drew the attention of this Court to a "Guide for Criminal Practitioners" on the Commonwealth Criminal Code. Although this Court is not bound to follow the interpretations found in the said Guide, it sheds a lot of light to the issue of fault elements in the offence of forgery.

16. Also, section 19 of the Crimes Act which defines intention is identical to the Commonwealth Criminal Code, where it states;

- a) A person has intention with respect to conduct if he or she means to engage in that conduct.
- b) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- c) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

17. According to the explanations provided in the Commonwealth Criminal Code Guide for Practitioners, many offences require proof of an intention to achieve a specific objective. Offences relating to forgery are constituted if those activities are accompanied by an intention to obtain a gain, cause a loss or influence the exercise of public duty or function. They are not physical elements of the offences and therefore it is not required for those intended outcomes to occur.

18. Unfortunately, the learned Magistrate seems to have based her judgement on the decision in *Koiroko v State* [2018] FJHC 216; HAA37.2017 (22 March 2018) where the Court stated ;

“As discussed above, the Appellants’ contention is founded on the last element of these two offences, that is “dishonestly obtaining a gain”. The learned counsel for the Appellants submit [sic] that in order to disclose the “dishonestly obtaining a gain”, the summary of facts has to disclose that the two Appellants had used the money obtained from I-Taukei Land Trust Board for their own benefit. I do not find that this argument has any merits. It is sufficient to disclose that the two Appellants have received money from the I-Taukei Land Trust Board based on the forged document which they have forged and submitted.

19. The learned Magistrate has noted in her judgement that as per limb (b) of Section 156(1) of the Crimes Act the Prosecution needs to prove that the document was in fact accepted. She further noted that it is not necessary to prove that a gain, loss or dishonest influence of the exercise of public duty or function was achieved following the decision in Koroiko (supra).
20. The plain reading of Section 156(1) shows that the only physical element of the offence of forgery is “making the document” and the limbs (a) and (b) are only extensions of intention, which are the fault elements of the offence. The fault element in the offence of forgery is twofold;
 - a. Firstly, it must be proven that there was an intention that the person who made the document or another person will use it to dishonestly induce a third person in the third person’s capacity as a public official to accept it as genuine; and
 - b. Secondly, it must be proven that there was an intention to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function, if the document was so accepted.
21. Therefore, it is not necessary for the document to be accepted or to actually obtain a gain, cause a loss or influence the exercise of a public duty or function to prove the offence of forgery. It appears that the learned magistrate is misconceived as she believed that the phrase “if it is so accepted” requires that condition to actually occur and the document to be accepted to constitute the offence. As the Counsel for the Appellant quite rightly pointed out it would become impossible to prove the offence of forgery if limb (b) of Section 156 is considered a physical element and if it is always necessary to occur.

22. I will now consider whether the physical element of “making a false document” is proven in this case. The Appellant has not challenged the findings of the learned Magistrate in terms of this element. Yet I am of the opinion that it will be fair to consider whether the other elements of the offences are also proven in the interest of justice, since the Respondent is not taking part in the appeal proceedings.

23. I have considered the reasoning of the learned Magistrate and the evidence that she based her opinion on in respect of making a false document. I am satisfied that the learned Magistrate has correctly applied the law to the evidence of this case, to decide that the bank guarantee in issue is a false document and it was made by the Respondent.

24. I will now consider whether there was evidence to prove that the Respondent had the intention to use the false bank guarantee to dishonestly induce a third person in the third person’s capacity as a public official to accept the said document as genuine. The learned Magistrate has analyzed the definition of public official in the Crimes Act and has come to the conclusion that the recipient of the said false document via email falls within the definition of public official. Further the learned Magistrate has discussed the legal meaning of dishonesty at length in her judgment. I do not find any reason to interfere with her findings in respect of those.

25. The learned Magistrate in her judgment stated that;

*“PEx1 is the email from Shane Halliday. In it he writes “please find attached Bank Guarantee in the prescribed format in the required amounts... **This concludes the pre-contract signing documentation requirements, all items per the list issued have now been submitted...**” (emphasis mine)*

The wording of the email in its ordinary meaning and effect leaves no ambiguity in the mind of this Court that the email with the attached documents was

intended to be used to complete the requirements as per the pre-contract list of the Accused company with Fiji Roads Authority."

26. In view of the evidence adduced in the case I am satisfied that there is sufficient evidence to prove beyond reasonable doubt that the Respondent intended to use the bank guarantee to dishonestly induce the public official at the Fiji Roads Authority to accept the said document as genuine.

27. I will now consider whether there was evidence to establish that there was an intention to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function, if the document was so accepted. I have perused the judgment of the Magistrate's Court and the evidence adduced at the hearing. There is no argument that after the Fiji Roads Authority received the false document, in this case the email containing the false bank guarantee, a letter was sent to Westpac bank to verify the bank guarantee. The Following day Fiji Roads Authority had informed the Respondent company that the bank guarantee was not acceptable. The learned Magistrate was of the view that since the document was not accepted by the Fiji Roads Authority limb (b) of Section 156 was not established.

28. As I have discussed before it has to be reiterated that limb (b) of Section 156(1) is not a physical element of the offence of forgery. It is merely an intended outcome and that outcome need not eventuate to establish the offence. As such I am of the view that the learned Magistrate was misconceived when she expected the document to be accepted to constitute the offence.

29. There is undisputed evidence to prove that the Respondent intended to dishonestly influence the exercise of a public duty or function. The fact that the false bank guarantee was sent via email to the Fiji Roads Authority clearly demonstrates that the intended outcome was to dishonestly influence the exercise of a public duty, if the document was accepted. Merely because the

document was later rejected does not neutralize the liability of the Respondent in committing forgery. The fact that the Fiji Roads Authority did not accept the document or the fact that exercise of a public duty or function was not actually influenced as a consequence of the falsity of the document is immaterial as the offence is rooted in the intention and not in consequence. I am satisfied that the last element of forgery is also proven beyond reasonable doubt with the evidence adduced in this case.

30. The second count is using forged document contrary to Section 157 of the Crimes Act. The prerequisite of this offence is proof of knowledge that the document is false. When the first count of making false document is proved, it is well established that the Respondent knew the document was false. The learned Magistrate has discussed the evidence relating to the element of “knowledge” that the document was a false document. That’s the first fault element of the offence of using forged document. I have no reason to interfere with the finding of the learned Magistrate that the Respondent had knowledge that it was a false document, where she stated in her judgement;

“I find that in accordance to PEX 12 the Accused Company was aware that the bank was only releasing the smaller bond of \$ 223k and that the larger bond of \$351k was subject to the term deposit being opened prior to 29th April. Therefore I find that the Accused Company was aware that the document sent on 25.4.16 as an email attachment being PEx3 was a false document.”

31. The physical element in this offence is “using the false document”. There is ample evidence to establish that Respondent company forwarded the false document via email to the Fiji Roads Authority. This evidence was undisputed, and I hold that the physical element of the offence is proven beyond reasonable doubt.

32. Similar to section 156, the limbs (a) and (b) of Section 157(1) are fault elements. To prove the offence of using forged document under Section 157 of the Crimes Act, in addition to the above-mentioned matters, it must also be proven that the document was used;

- a) Firstly, with an intention of dishonestly inducing another person in the other person's capacity as a public official to accept it as genuine; and;
- b) Secondly, with an intention of dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function, if it is so accepted.

33. As it was earlier stated it is not necessary for the intended outcomes to occur. Therefore, it is incorrect to hold that acceptance of the documents must be proven for the offence of using forged documents to be established. Similarly, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function also need not eventuate as they are not physical elements of the offence.

34. I am of the opinion that the learned magistrate erred when she decided that actual acceptance of the false document was necessary for the second count to be proven. I have considered whether there is evidence adduced to prove the above discussed fault elements of the offence. There is ample evidence to show that Shane Halliday instructed his staff to forward the false document knowing very well that no such bank guarantee was provided by the bank to fulfill the pre-contract requirements of the Fiji Roads Authority. Undoubtedly the evidence suggests that the only intention of the Respondent company was for the Fiji roads Authority officials to accept the said document as genuine and to influence the exercise of a public duty or function if the false document was so accepted. I am satisfied that the evidence adduced in this case proves the two fault elements in limb (a) and (b) of Section 157(1) beyond reasonable doubt.

35. For the foregoing reasons I am of the view that the findings of the learned Magistrate in respect of the fault elements are misconceived. The appeal is allowed.

36. I decide to quash the order of the learned Magistrate and set aside the acquittal in respect of the two counts.

37. Accordingly, the Respondent is found guilty for both counts and I enter convictions in respect of the first count and the second count.

38. This case is referred back to the Magistrate's Court for sentencing and I order this judgement to be served on the Respondent before proceeding to pass the sentence on the Respondent.



24 November 2021

At Suva

Solicitors:

Fiji Independent Commission Against Corruption for the Appellant

In absence of the Respondent