

IN THE HIGH COURT OF FIJI
AT SUVA
ANTI CORRUPTION DIVISION

APPEAL CASE NO. HACDA 005 OF 2021S

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

APPELLANT

vs

SHANNON SHAHIL CHAND

RESPONDENT

Counsels:

Ms. Fatafehi	-	for Prosecution/ FICAC
Mr. Kohli A:	-	for Respondent

Date of Judgment: 10.03.22

JUDGMENT

1. In this matter the Respondent, **Shanon Shahil Chand**, was charged in the Magistrates Court of Suva, on the 04th of July 2016, as follows:

FIRST COUNT

Statement of Offence

ABUSE OF OFFICE – Section 139 of the Crimes Act No. 44 of 2009

Particulars of Offence

SHANNON SHAHIL CHAND between the 1st day of January and 31st day of December 2015 at Suva in the Central Division whilst being a person employed in the public service as a Technician at the Information Technology Unit of the Judicial Department, in abuse of that authority, did an arbitrary act for gain, namely that he used the Vodafone subsidy given to the High Court of Fiji under the Vodafone Newark Services Contract which should be used for official purposes to acquire Samsung Mobile phones for the purpose of his personal gain which are acts prejudicial to the rights of the Judicial Department.

SECOND COUNT

Statement of Offence

GENERAL DISHONESTY – OBTAINING A GAIN – Section 323 of the Crimes Act No. 44 of 2009

Particulars of Offence

SHANNON SHAHIL CHAND between the 1st day of January 2014 and 31st day of December 2015 at Suva in the Central Division with the intention of dishonestly obtaining a gain acquired Samsung mobile phones for his personal gain and benefit from the Vodafone subsidy given to the High Court of Fiji under the Vodafone Network Services Contract.

2. After trial, on 10th of May 2019, the Learned Magistrate of Suva had convicted the Respondent on the first count charged and acquitted the Respondent on the second count filed in Court. Thereafter, on the 01st of July 2019 the Learned Magistrate had sentenced the Respondent to eighteen (18) months imprisonment on the first count and suspended this sentence for 2 years.
3. Being dissatisfied with both, the acquittal of the Respondent on the second count of General Dishonesty – Obtaining a gain and the lenient sentence imposed on the Respondent on the first count of Abuse of Office, the Appellant had filed a timely appeal to the High Court against the said acquittal and the sentence passed by the Learned Chief Magistrate of Suva.
4. Further, being dissatisfied with the conviction pronounced by the Learned Chief Magistrate against the Respondent on the first count, the Respondent has filed a cross appeal against that conviction.
5. In this appeal in this Court, both counsel for the Appellant and Respondent made their submissions in this Court and have filed their written responses. In adjudicating this appeal by the Appellant and the cross appeal by the Respondent, this Court intends to analyze and make the final determination of Court in this same Judgement.

SUMMARY OF EVIDENCE

- The Respondent, Shannon Shahil Chand was employed by the Judicial Department of Fiji from 2012 to 2014 and he was employed as a contracted Technical Assistant for the IT Department.
- In purchasing items for the Judicial Department request would be prepared by the Officer involved, in this case the Respondent and it would be minuted and sent to the Chief Administrative Officer, where she assesses it and makes recommendation to the Chief Registrar. From there, if it is approved, the request would be forwarded to the Manager Finance and if it is refused the request will go back to the relevant department.
- The Respondent had been the officer responsible for acquiring phones for the Judicial Department. Further, whenever phones were damaged or not working properly, they had been given to the Respondent to have them repaired.

- Vodafone Fiji Ltd had been the then network provider for the Judicial Department and they have had a Network Service Agreement with the Judicial Department. As part of this agreement, depending on the amount spent by the Judicial Department, Vodafone had set aside a certain amount as a subsidy, where the Judicial Department could acquire mobile devices under the subsidy without paying for them. If the value of the mobile devices were more, then the Judicial Department could pay the difference and acquire the required phone.
- There had been a procedure that had to be followed to use the subsidy and there had been a contact person for the Judicial Department for ordering the required items under the subsidy. During the transactions in issue, the contact person for the Judicial Department had been the Respondent.
- The following phones had been acquired under subsidy:
 - (a) On 22nd April 2014 – Samsung Note 3 serial number 3590930584377 acquired under subsidy valued at \$1,699.
 - (b) On 9th December 2014 – Samsung Note 4 Serial Number 355844060186972 valued at \$1,999 acquired partially under subsidy \$998 and cash paid of \$1001- receipt number 525214.
- Further, all purchases made by the Judicial Department had been through local purchase orders – LPOs and all mobile devices purchased had been the property of the Judicial Department. These devices had been issued to certain staff members to use as part of their work and to be returned when they depart from the Judicial Department.
- The Business Accounts Manager Vodafone Fiji Ltd had confirmed that he dealt with purchases from the Judicial Department and the Respondent was the contact person for the Judicial Department. Further, this Business Accounts Manager had dealt with the purchases of phones by the Judicial Department on the provided subsidy. In this regard, a Samsung Note 3 had been acquired on the 22nd of April 2014 for \$ 1699 of the subsidy. This device had been personally delivered to the Hon. Chief Justice. Further, this witness had prepared documents relating to the purchase of a Samsung Note 4 on 9th December 2014 with the remainder of the subsidy.
- This device had costed \$1,999, where it had been practically paid with the remainder of the subsidy available for the Judicial Department of \$998 and partly paid by cash of \$1,001. This device had been obtained in this manner by the Respondent, who was the authorized contact person for the Judicial Department, and he had placed the stamp in the Chief Registrar’s accounts office.
- Further, another witness had testified at the trial that in 2015 he purchased a Samsung Note 4 from the Respondent for \$1,400.

APPEAL

Ground 1

“That the Learned Magistrate erred in Law and Fact by finding that the element of “intention of dishonestly obtaining a gain” was not satisfied despite the direct and circumstantial evidence adduced by the Prosecution for Count 2”

Ground 2

“That the Learned Magistrate erred in Law and in fact when he imposed a manifestly lenient sentence considering the current tariff available for the offence of Abuse of office.”

Ground 3

“THAT the learned Magistrate erred in Law and in fact by imposing a suspended sentence taking into account the seriousness of the offence and the breach of trust involved.”

6. Now, I will analyze the weight and validity of these grounds of appeal individually and make the determination of the Court.

Ground 1

“That the Learned Magistrate erred in Law and Fact by finding that the element of “intention of dishonestly obtaining a gain” was not satisfied despite the direct and circumstantial evidence adduced by the Prosecution for Count 2”

Submissions of the Applicant

7. The Appellant contends that **Section 19** of the **Crimes Act of 2009** defines “Intention”, as follows:

“Intention

19 (1) A person has intention with respect to conduct if he or she means to engage in that conduct;

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist;

(3) 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”

8. Further, Appellant submits that **Section 348** of the **Crimes Act of 2009** defines dishonesty as:

(a) Dishonesty according to the standard of ordinary people; and

(b) Known by the defendant to be dishonest according to the standards of ordinary people.

9. Appellant is of the view that the application of these definitions were amply demonstrated by the **United Kingdom Queens Bench** in the case of **R v Ghosh [1982] QB 1053** by **Lord Lane**, as below:

“In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the

*ordinary standards of reasonable and honest people what was done was **dishonest**. If it was not **dishonest** by those standards, that is the end of the matter, and the prosecution fails. If it was **dishonest** by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards **dishonest**. In most cases, where the actions are obviously **dishonest** by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is **dishonest** for a defendant to act in a way which he knows ordinary people consider to be **dishonest**, even if he asserts or genuinely believes that he is morally justified in acting as he did.”*

10. On the above analysis, Appellant contends that the Learned Chief Magistrate erred in law when he stated the below mentioned in page 14 of his judgement dated 10/05/2019:

“From the evidence that has been led the Court finds that the state has failed to establish this charge. He did an arbitrary act, which was to utilize the \$998 subsidy. However, he paid the balance to acquire a phone for himself. That does not meet the elements for this second count. His intention in this instance was to acquire a phone for himself at a discount.”

11. Appellant is of the view that during the trial, Prosecution led more than sufficient evidence through the below witnesses to establish the elements of the Second Count:

- i) PW1 – Shanon Toutou – Chief Administrative Officer of the Judicial Department
- ii) PW2 – Ronald Prasad - Chief Operating Officer of Vodafone.
- iii) PW4 – Amitesh Chand – Business Accounts Manager at Vodafone.

12. On this premise, it is the submission of the Appellant that the intention of the Respondent to obtain the mobile devices was dishonest when he willfully “turned a blind eye” in consulting his immediate supervisor or seeking their approval to obtain the phone. Further, it is the Appellant’s view that the Respondent deliberately used the Vodafone subsidy without following the due procedures.

Submissions of the Respondent

13. It is submitted for the Respondent that in the case of **Chute v State [2016] FJHC 114**, the word “dishonesty” has been defined with reference to the **Black’s Law Dictionary (6th edition)**, as below:

“Disposition to lie, cheat, deceive or defraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud or betray.”

14. On the above premise, Respondent submits that the prosecution failed to adduce evidence during the trial to prove that the Accused lied, cheated, deceived, defrauded and displayed untrustworthiness and lack of integrity. It is further submitted that the Prosecution failed to adduce evidence, as per the definition provided in Black’s, to demonstrate lack of honesty,

probity or integrity in principle, lacked fairness and straightforwardness, had a disposition to defraud, deceive or betray.

15. It is the position of the Respondent that he took advice from PW4 Amitesh Chand, the Business Accounts Manager at Vodafone, and acquired the Samsung Note 4 in accordance with acquisition procedure outlined by PW1 Shanon Toutou, the Chief Administrative Officer of the Judicial Department. It is further submitted that the Respondent was handed the Samsung Note 4 by PW4 at the Judicial Department and the Respondent paid at the same time.
16. Therefore, the Respondent submits that his actions were not dishonest according to the standards of ordinary people. Further, it was not known to him to be dishonest according to the standards of ordinary people. He claims that from the evidence led at the trial it was unknown to PW1, PW3 and PW6 that actions within the Judicial Department, as he did, would amount to dishonesty. Further, since PW1, PW3 and PW6, though in a position to correct and question the Respondent's actions if they were improper and dishonest, which they did not, the Respondent did not know his own actions were dishonest.
17. On the above premise, the Respondent informs this Court that at the time of his actions he was honest and reasonable but had mistaken belief that he could acquire various Samsung mobile phone devices, including Samsung Note 4. IT is the contention of the Respondent that during all material times he was unaware of the Vodafone subsidy granted to the Judicial Department.

Analysis and Finding of Court

18. In grappling with this first ground of appeal in this matter, I see the necessity to consider whether I need to apply a subjective test in determining the dishonesty of the Respondent in considering the submissions of the Respondent that he had a mistaken belief that he could acquire various Samsung devices from the subsidy given to the Judicial Department or whether I should apply an objective test in determining the dishonesty of the Respondent on the basis of the preview of a reasonable man. In this regard, I seek guidance from the decision of the **Court of Appeal of the United Kingdom** in the case of **R v McIvor [1982]**¹, where it was stated as below:

*“It seems elementary, first, that where the charge is conspiracy to defraud the prosecution must prove actual **dishonesty** in the minds of the defendants in relation to the agreement concerned, and, second, that where the charge is an offence contrary to s 15 of the Theft Act 1968 the prosecution must prove that the defendant knew or was reckless regarding the representation concerned.Theft is in a different category from conspiracy to defraud, so that **dishonesty** can be established independently of the knowledge or belief of the defendant, subject to the special cases provided for in s 2 of the Act. Nevertheless, where a defendant has given evidence of his state of mind at the time of the alleged offence, the jury should be told to give that evidence such weight as they consider right, and they may also be directed that they should apply their own standards to the meaning of **dishonesty**.”*

¹ [1982] 1 All ER 491

19. The present matter does not fall in the category of conspiracy to defraud but in the second category where Prosecution should have established with other evidence that the Respondent knew or was reckless regarding the matter in issue. Therefore, Prosecution could have established dishonesty of the Respondent independently of his knowledge or his belief. However, in reaching that conclusion I have to consider the evidence led at the trial and give due weight to ascertain whether the conduct of the Respondent according to the ordinary standards of reasonable and honest people was **dishonest**.

20. Therefore, as highlighted by both the Appellant and the Respondent in this matter, the below pronouncement made by the **Court of Appeal Criminal Division** of the **United Kingdom** in the case of **R v Ghosh [1982]**² becomes relevant:

*“In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was **dishonest**.”*

21. According to the summary of facts stipulated above, which were extracted at the Magistrate’s Court trial, as per **PW2 Ronald Prasad**, chief Operating Officer of Vodafone Fiji Ltd, during the time in issue they had been the network provider for the Judicial Department and they have had a Network Service Agreement with the Judicial Department and as part of this agreement, depending on the amount spent by the Judicial Department, Vodafone had set aside a certain amount as a subsidy, where the Judicial Department could acquire mobile devices under the subsidy without paying for them. If the value of the mobile devices were more, then the Judicial Department could pay the difference and acquire the required phones.

22. There had been a procedure that had to be followed to use the subsidy and there had been a contact person for the Judicial Department for ordering the required items under the subsidy. During the transactions in issue the contact person for the Judicial Department had been the Respondent. According to **PW1 Shannon Toutou**, she had been the chief administrative officer of the Judicial Department at the time in question. She had confirmed that the Accused was responsible for mobile phone purchases for the Department and for such purchases it had to be tendered by a minute to the immediate supervisor of the need and submitted to her for assessment, before forwarding to the Chief Registrar for approval. However, she had informed Court that she was unaware of the Vodafone subsidy until the FICAC investigation and though her official number 9981658 was on the form **P6** that was used to acquire the Note 4 phone with the subsidy, she did not assess form P6 or receive the Samsung Note 4 phone in December 2014.

23. According to **PW2**, the following phones had been acquired under the subsidy provided to the Judicial Department by Vodafone:

- i) On 22nd April 2014 – Samsung Note 3 serial number 3590930584377 acquired under subsidy valued at \$1,699.
- ii) On 9th December 2014 – Samsung Note 4 Serial Number 355844060186972 valued at \$1,999 acquired partially under subsidy of \$998 and cash paid of \$1001- receipt number 525214.

² [1982] 2 All ER 689

24. As per **PW4 Amitesh Chand**, the Business Accounts Manager of Vodafone Fiji Ltd, he had dealt with purchases from the Judicial Department and the Respondent had been the contact person for the Judicial Department. Further, this Business Accounts Manager had dealt with the purchase of phones by the Judicial Department on the provided subsidy. In this regard, a Samsung Note 3 had been acquired on the 22nd of April 2014 for \$ 1699 of the subsidy. This device had been personally delivered to the Hon. Chief Justice. Further, this witness had prepared documents relating to the purchase of a Samsung Note 4 on 9th December 2014 with the remainder of the subsidy.
25. This Samsung Note 4 had costed \$1,999, where it had been practically paid with the remainder of the subsidy available for the Judicial Department of \$998 and partly paid in cash of \$1,001. This device had been obtained in this manner by the Respondent. Further, **PW5 Benjamin Rao** had testified at the trial that in 2015 he purchased a Samsung Note 4 from the Respondent for \$1,400.
26. The Respondent had testified in the Magistrate's Court and stated that for the Samsung Note 4, he did follow the proper procedure, but it never required him to inform his superiors because he was paying for the phone and his supervisor wouldn't have given him the balance cash. According to the evidence of the Respondent, the required stamp for approval was in the custody of **PW1's Secretary Sangeeta** who affixed the stamp when he acquired the Samsung Note 4 partly through subsidy and by paying the remainder in cash.
27. From the above evidence extracted at the Magistrate's Court trial, as highlighted by the Learned Chief Magistrate, the elements that had to be established to prove Count 2 are as follows:
- i) The Accused (Respondent);
 - ii) With the intention of dishonestly obtaining a gain
 - iii) Acquired a Samsung Note 4 Mobile phone for his personal gain and benefit from the Vodafone subsidy given to the Judicial Department under the Vodafone Network Service Agreement.
28. However, considering the evidence and above elements to be proved beyond reasonable doubt, the Learned Magistrate had reached the below conclusion:
- "He did an arbitrary act, which was to utilize the \$998 subsidy. However, he paid the balance to acquire a phone for himself. That does not meet the elements for this second count. His intention in this instance was to acquire a phone for himself at a discount."*
29. Considering the above statement of the Learned Magistrate with the elements of the offence that had to be proved, he has felt that the intention of the Respondent was to acquire a phone for himself at a discount. In this regard, on his view, what appears to have lacked is the dishonest intention of the Respondent, though the Respondent utilized a part of the subsidy given to the Judicial Department to acquire a phone for himself.
30. As per the evidence lead at trial, it was established that the Respondent was the contact person for the Judicial Department and there was a procedure that was to be followed in purchasing items for the Judicial Department and this subsidy was given to the Judicial Department by Vodafone and not to the Respondent personally. Therefore, though the

Respondent paid part of the purchase price for the Samsung Note 4 phone, he utilized the subsidy given to the Judicial Department without informing his superiors ignoring the procedure to be followed. As such, he had used the benefit given to the Judicial Department for his personal benefit.

31. In ascertaining the dishonesty of the Respondent by this conduct, I refer to the pronouncement of the **Court of Appeal of the United Kingdom** in the case of **R v McIvor**³, as below:

*“Theft is in a different category from conspiracy to defraud, so that **dishonesty** can be established independently of the knowledge or belief of the defendant.”*

In this regard, what was needed to be established by the prosecution is that the defendant knew or was reckless regarding his conduct to use the remainder of the subsidy for his personal benefit.

32. In this matter the Respondent knew that the subsidy was provided by Vodafone to the Judicial Department and not for himself personally and, as a matter of practice, there was a procedure to be followed to utilize this subsidy. Nevertheless, the Respondent ignore this, either due to recklessness or with the knowledge that subsidy of \$998 belonged to the Judicial Department and not for himself.
33. Therefore, I find that for this second count all the required elements had been established at the trial by the Prosecution and the Learned Magistrate erred in law and fact in coming to his conclusion and acquitting the Accused. Therefore, acting under **Section 256 (2) (e)** of the **Criminal Procedure Act of 2009**, I quash the acquittal of the Respondent by the Learned Magistrate for the second count and convict the Accused (Respondent) for the second count, as was charged at the Magistrate Court for **GENERAL DISHONESTY – OBTAINING A GAIN**, as per **Section 323** of the **Crimes Act No. 44 of 2009**.

Ground 2

“That the Learned Magistrate erred in Law and in fact when he imposed a manifestly lenient sentence considering the current tariff available for the offence of Abuse of office.”

Submissions of the Applicant

34. The Appellant informs this Court that the maximum penalty for the offence of Abuse of Office under Section 139 of the Crimes Act of 2009 is ten (10) years when the abuse is done not for the purpose of gain, whereas, when the abuse is done for the purpose of gain it carries a maximum penalty of seventeen (17) years.

³ Supra, note 1

25. It is submitted by the Appellant that in the latest case authority of **FICAC v Laqere and Ors. [2017]**⁴ the court has established new tariff for Abuse of Office offence under section 139 of the Crimes Act of 2009. **His Lordship Rajasinghe J** in setting the new tariff made the following statements in paragraphs 25 – 26:

“I would like to adopt the same approach in setting an appropriate tariff allowing the sentencing Court to determine the appropriate starting point based on the level of culpability and the prejudice harm caused. Accordingly I find a tariff of one (1) year to twelve (12) years would alternately serve the above purpose. The sentencing court could consider the following rages of starting point based on the level of culpability and harm caused.

	High level of Culpability	Medium Level of Culpability	Lesser level of Culpability
High level of Harm/Prejudice with Gain	8 - 12	6 - 10	4 - 8
Medium level of Harm/Prejudice either with medium level of gain or without gain	8 - 10	4 - 8	2 - 6
Lesser level of harm/Prejudice either with less gain or without gain	4 - 8	2- 6	1 - 4

26. It was further submitted that the main objectives of sentencing under Sentencing and Penalties Act of 2009, where Section 4(1) sets out important reasons, as follows:

- 4 (1) The only purpose for which sentencing may be imposed by Court are:
- c. to deter the offenders or other persons from committing offences of the same or similar nature;
 - e. to signify that the Court and the community denounce the commission of such offences.

- (2) In sentencing offenders, a Court must have regard to:
- a. the maximum penalty prescribed for the offence;
 - c. nature and gravity of the particular offence;
 - d. the offender’s culpability and degree of responsibility for the offence.

27. It is the position of the Appellant that the Chief Magistrate erred in law and facts when he gave the Accused a very lenient sentence (suspended terms) by failing to uphold the intention of having section 139 and the guiding principles of the Sentencing and Penalties Act of 2009. Therefore, it is prayed that this Court should impose a custodial sentence on the Respondent to commensurate the gravity of the offence committed.

⁴ Crim. Case HAC 56 of 2014

Submissions of the Respondent

28. The Respondent contends that the Learned Magistrate was correct in suspending the sentence given on the particular nature of offending and the character of the Accused.
29. In further highlighting the observations made by Court in the case of **FICAC v Laqere and Others [2017]**⁵, the Respondent submits to this Court the factors Court should consider in determining the level of culpability, as follows:
- a) The level of contribution or the influence made by the accused in the commission of the offence;
 - b) The level of authority, trust and the responsibility reposed in the position held by the accused;
 - c) Has the accused influence or reassured others to involve in the offence;
 - d) Nature and the manner in which the offence was committed or planned;
 - e) Number of victims;
 - f) Whether the accused involved in the offence through force, coercion, exploitation or intimidation;
 - g) Not motivated by personal gain; and
 - h) Opportunist “one-off” offence with little or no planning.

Also, the Court further advised that in the above decision, Court also observed, as below:

“The level of harm/prejudice can be determined by considering the level of gain and the impact on the victim.”

30. In claiming that the Learned Magistrate was right in the sentence imposed on the Respondent, it is claimed that the following grounds were submitted by the Respondent to the Learned Magistrate for consideration:
- (a) The Accused had low level of influence in the commission of the offence of Abuse of Office as he was guided by the conduct of his superiors;
 - (b) The accused had low level of authority, trust and responsibility in the position he held as an IT Technician for the Judicial Department as he was required to report to his immediate supervisors and further seek stamped approvals for any local purchase orders on mobile devices;
 - (c) The accused did not influence or pressure others to become involved in the offence of Abuse of office;
 - (d) The Accused did not plan the offence of Abuse of Office and was in fact at the time only seeking to purchase a mobile device on discount;
 - (e) There is no victim per se however, if a victim were to be identified it would be the Judicial Department;
 - (f) The accused did not use force, coercion, exploitation or intimidation to commit the offence of Abuse of Office;
 - (g) The Accused was motivated to obtain a Samsung Note 4 at a discount and he did so for the price of \$1,9999 discounted to \$1,001;

⁵ Ibid.

(h) The accused committed the offense of Abuse of office as a one-off and did not at the time of committing the said offence know he was committing an offence.

31. On the above highlighted material, the Respondent submits that the sentence imposed by the Learned Magistrate was not erroneous in law and fact.

Analysis and Finding of Court

32. In relation to the second ground of appeal claimed by the Appellant, I am of the view that the sentence imposed by the Learned Chief Magistrate fell within the tariff pronounced in the case of **FICAC v Laqere and Ors. [2017]**. In this regard, the term imposed by the Learned Magistrate is consistent with the tariff pronounce in the above judgement, where the Court is of the view that the harm caused is of a lesser level and the resultant culpability of the Accused is less.

33. In this regard, the Learned Chief Magistrate has sufficiently analyzed the elements of the offence with reference to existing precedence and reached the final conclusion for the suitable sentence identified by the Court.

34. Therefore, I am of the view that it is not appropriate for this Court to alter the sentence imposed by the Learned Magistrate against the Respondent for the first Count, as charged, especially since it fell within the tariff stipulated for this offence and the rehabilitation potential together with the degree of harm has been well considered by the Learned Chief Magistrate.

Ground 3

“THAT the learned Magistrate erred in Law and in fact by imposing a suspended sentence taking into account the seriousness of the offence and the breach of trust involved.”

Submissions of the Applicant

35. Applicant is of the view that it is well settled law that the offences of abuse of office by public servants warrant immediate custodial sentence. In *Naiveli v State* [1994] FJCA 29 (12 August 1994) the court stated that:

“We note that such offences strike at the very roots of the administration of law and order and justice in this country. Such an offence can be committed only by a person who is in a position of authority and trust. If it became a pattern that because of their high position they would not serve a term of imprisonment it would only be to the detriment of the whole country.”

That the Court further states that:

We wish to make it clear however that the people in high office who abuse their power may well in the future be required to serve an immediate prison sentence. This comment should serve as notice to any such people that the courts are not prepared to regard such offences lightly and that they will not suspend sentences just because the consequences of such a person are severe.”

36. Appellant claims that in this instant, the Accused is charged with Abuse of Office and he not only worked at the Judiciary as the Technician, he is also a public servant entrusted with such duty and conduct to uphold whilst working at the Judiciary. However the Accused took advantage of this post and the rules and regulations in place and started acquiring phones for his personal use from Vodafone Fiji Ltd using the Vodafone subsidy that was given to the High Court of Fiji to be utilized for official purposes only.

In *State v Prasad* (2003) FJHC 320, HAC 009 2002s (30 October 2003) the Honourable Justice Gates stated that:

“The public interest lies in the deterrence of dishonesty practices by employees. Usually in such cases the gravity of the breach of trust needs to be marked by an immediate term of imprisonment no matter how sad the Accused’s story or how compelling the mitigation in favor.” (Emphasis added).

37. Therefore, the Appellant states that the sentence imposed on the Accused is inadequate and there should be an immediate custodial sentence imposed on him.

Submissions of the Respondent

38. It is position of the Respondent that the Learned Magistrate had the powers and was right in suspending the sentence for the following reasons:
- (a) The crime committed was more of technical in nature and not deliberate. There was no dishonesty involved.
 - (b) There was no planning involved;
 - (c) It was one off crime that was committed due to wrong advice by Amitesh;
 - (d) The crime is usually out of character of the Accused.
 - (e) The amount involved is only \$998.00.
 - (f) No loss has been suffered by the victim.
 - (g) The accused had been sufficiently punished.

Analysis and Finding of Court

39. With regard to this ground of appeal of the Appellant, I recognise that under **Section 26 (1)** of the **Sentencing and Penalties Act of 2009** the Court adjudicating the matter is given the authority to suspend a sentence, if the Court is satisfied under the circumstances.
40. In this matter, the Learned Chief Magistrate has very comprehensively considered the aggravating and mitigating factors before pronouncing the suspension of the sentence.
41. In this light, I find no reasonable ground to interfere with the suspension of the sentence by the Learned Magistrate.

CROSS APPEAL OF THE RESPONDENT

42. In this matter the Respondent had filed this Cross – Appeal on the following grounds:

GROUND OF APPEAL

1. That the learned Trial Magistrate erred in law and in fact in coming to a finding that the Respondent had done an arbitrary act in the absence of evidence to support the same.
2. That the Learned Trial Magistrate had erred in law and in fact in coming to a finding that the Respondent had done an arbitrary Act prejudicial to the rights of High Court in the absence of evidence in support the same.
3. That the Learned Trial Magistrate had erred in law and in fact in coming to a finding that the Respondent had acted in abuse of his authority for his gain in the absence of evidence to support the same.
4. That the Learned Trial Magistrate had erred in law and in fact in finding that the Respondent's gain was at the expense of the State in the absence of evidence to support the same.
5. That the Learned Trial Magistrate had erred in law and in fact in coming to a finding that the Respondent had admitted using Vodafone Subsidy in the absence of evidence to support the same.
6. That the Learned Trial Magistrate erred in law and in fact in finding that the Respondent had done an arbitrary act.
7. The Respondent reserves the right to add further grounds of appeal upon receipt of Court records.

Analysis and Finding of Court

43. In considering the above grounds of cross-appeal, it is perceptible that all those grounds are centered on the conviction reached by the Learned Magistrate in relation to the first count against the Respondent for abuse of office.
44. I am of the view that the Learned Magistrate had thoroughly analyzed the evidence lead at the trial with reference to the judicial precedents available in our jurisdiction in relation to the first count and has obtained guidance from the pronouncements of the Superior Courts of our country in this subject matter.
45. In relation to grounds 1, 2 and 6 the Learned Magistrate has comprehensively analyzed the meaning of "an arbitrary act" and reached his conclusion that the Respondent had done an arbitrary act. Therefore, the cross-appeal on these grounds is without merit.
46. With regard to cross-appeal grounds 3 and 4, the learned Magistrate had thoroughly considered the evidence lead by the Prosecution in deciding that the Respondent had acted in the abuse of his authority in using part of the subsidy given to the Judicial Department by Vodafone. Therefore, these two grounds of cross-appeal are unsubstantiated for further consideration in appeal by this Court.

47. As per cross-appeal ground 5, the Learned Magistrate had considered the evidence given by the Respondent at the Magistrates Court trial in deciding on the admissions made by the Respondent. As a consequence, this ground of cross-appeal is dismissed *in limine*.

ORDERS OF COURT

1. In considering the conviction of the Respondent for the Appeal Ground 1 under **Section 323** of the **Crimes Act of 2009** and acting under **Section 256 (2) (e) of the Criminal Procedure Act of 2009**, **Mr. Shanon Shahil Chand**, I impose a sentence of 12 months imprisonment against you, which shall commence forthwith.
 2. In relation to the Appeal Grounds 2 & 3, the pronouncement made by the Learned Magistrate shall remain.
48. You have 30 days to appeal to the Court of Appeal of Fiji.



A handwritten signature in black ink, appearing to read "Thushara Kumarage".

Hon. Justice Dr. Thushara Kumarage

cc: *Office of Fiji Independent Commission Against Corruption*
Office of Kohli & Singh Lawyers