IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

STATE

Appellant

APPEAL CASE NO: HAA. 11 of 2024 **V**
[Suva Magistrate's Court Criminal. Case No. CF. 158 of 2021]

DRAVEEN MUDALIAR

Respondent

Counsel: Ms. M. Naidu for the State as Appellant

Mr. J. Cakau for the Respondent

Appeal Hearing: 4 October & 20 November 2024
Appeal Judgment: 13 December 2024

APPEAL JUDGMENT

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1. **Draveen Mudaliar**, the Respondent, was charged with the offence of *Operating an unregistered university* contrary to section 13(1) - (2) of the Higher Education Act 2008 laid out as follows in the Charge in Magistrate's Court case no. CF. 158 of 2021:

Statement of Offence

OPERATING AN UNREGISTERED UNIVERSITY: Contrary to section 13(1) - (2) of the Higher Education Act 2008.

Particulars of Offence

DRAVEEN MUDALIAR, between the 14th of December 2017 and 19th of September 2019, at Suva, in the Central Division, operated Integrated Information Services Limited, a degree awarding institute of technology, without being duly registered under the Higher Education Act 2008.

2. On 31 March 2021 the Respondent, being represented by defence counsel Mr. Filimoni Vosarogo, pleaded *not guilty* to the aforesaid charge, and tried accordingly on 7 December 2023.

3. After the prosecution closed its case, defence counsel Mr. Cakau then made a *submission of no case to answer* and the learned magistrate ruled accordingly on 12 February 2024 acquitting the Respondent Draveen Mudaliar under section 178 of the Criminal Procedure Act 2009.

4. Having being dissatisfied with the aforesaid acquittal, the Office of the Director of Public Prosecutions then lodged a timely petition of appeal primarily on the basis that *'the learned magistrate erred in law and fact when he held that there was no evidence led to satisfy the element of 'a degree awarding institute of technology' as per the definition stipulated by section 4 of the Higher Education Act 2008'*, and seek that the acquittal be quashed and the High Court make such other order in the matter as to it may seem just and remit the matter accordingly to the Magistrate's Court.

5. The appeal hearing was held on 4 October 2024 and 20 November 2024, and this is the Court's appeal judgment.

Power of High Court on appeal against acquittal on *no case to answer*

6. Section 256(2)(a)-(f) and (3) of the Criminal Procedure Act 2009 state:

256.-(2) The High Court may –

(a) confirm, reverse or vary the decision of the Magistrate's Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.

Law on *No case to answer* in Magistrates Court

7. Section 178 of the Criminal Procedure Act 2009 state:

178. If at the close of the evidence in support of the charge it appears to the court that a case is not made against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.

8. In Moidean v R [1976] FJ Law Rp 33; (1976) 22 FLR 206 (26 November 1976), the Fiji Court of Appeal held:

So far as the question of fact and evidence are concerned it may seem strange that occasion for such criticism should arise, as the learned magistrate had only to deal with a submission that there was no case to answer. At that stage the magistrate's task was to decide whether, or not a reasonable tribunal might convict, on the evidence so far laid before it—if so there would be a case to answer. We would repeat the very helpful practice note on this point, issued by the Queen's Bench Division in England

for the benefit of justices of the peace and reported in [1962] 1 All ER 448. It is equally useful to magistrates:

> *"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.* ***A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence: (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.*** *Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."*

9. In State v Aiyaz [2009] FJHC 186; HAC033.2008 (31 August 2009), Justice Daniel Goundar held at paragraphs 5 – 6:

> *[5] The test for no case to answer in the Magistrates' Court under section 210 is adopted from the Practice Direction, issued by the Queen's Bench Division in England and reported in [1962] 1 All ER 448 (Moidean v R (1976) 22 FLR 206). There are two limbs to the test under section 210 [Criminal Procedure Code Cap.21 (now repealed) (emphasis added)]:*

[i] Whether there is no evidence to prove an essential element of the charged offence;

[ii] Whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict.

[6] An accused can rely on either limb of the test under section 210 to make an application for no case to answer in the Magistrates' Court.

10. Since Moidean v R (supra) and State v Aiyaz (supra) including the repeal of the Criminal Procedure Code (s.210) and subsequent enactment of the Criminal Procedure Act 2009 (s.178), in Sharma v State [2024] FJHC 522; HAA80.2023 (16 August 2024), Justice Aruna Aluthge held at paragraphs 14 – 15:

14. Section 178 of the Criminal Procedure Act 2009 (CPA), which deals with no case to answer applications, provides as follows:

> *If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.*

*15. The test for no case to answer in the Magistrates' Court is adopted from the Practice Direction issued by the Queen's Bench Division in England and reported in [1962] 1 All E.R 448 [Moidean v R (1976) 22 FLR 206 (26 November 1976) (FCA)]. This test has been applied in Fiji in numerous cases [State v Aiyaz [2009] FJHC 186; HAC033.2008; The State v Lakhan Criminal Appeal No. HAA 025 of 2016 (25 April 2017)] . Accordingly, the test under Section 178 of the Criminal Procedure Act has two limbs. The **first** limb of the test is **whether there is no evidence to prove an essential element of the charged offence**. The **second** limb of the test is **whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict**. A no case-to-answer application can be upheld on either limb.*

See also State v Dirabici [2024] FJHC 90; HAA023.2023 (15 February 2024) per Rajasinghe, J on the two limb test for *no case to answer* in the Magistrates Court.

Appeal against acquittal on *no case to answer* in Magistrate's Court

11. In its petition of appeal the State as Appellant contend that *'the learned magistrate erred in law and fact when he held that there was no evidence led to satisfy the element of 'a degree awarding institute of technology' as per the definition stipulated under section 4 of the Higher Education Act 2008'*, and seek that the acquittal be quashed and the High Court make such other order in the matter as to it may seem just and remit the matter accordingly to the Magistrate's Court.

Elements of offence under section 13(1) – (2) of the Higher Education Act 2008

12. Section 13(1) – (2) of the Higher Education Act 2008 state:

> *13.-(1) Subject to section 54, no person shall establish or operate a university or degree-awarding institute of technology unless the institution is established and registered by virtue of this [Act].*
> *(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding $50,000 for an individual or $250,000 for a body corporate or to imprisonment for term not exceeding 12 years for an individual or a director of a body corporate, or to both such fine and imprisonment.*

13. The elements of the offence prescribed under section 13(1) – (2) cited above are:

[1] A person i.e. the accused;
[2] operated a ***degree-awarding institute of technology*** called Integrated Information Services Limited between 14 December 2017 to 19 September 2019;
[3] which institute was not registered by virtue of the Higher Education Act 2008; and
[4] the accused knew that the institute was not legally registered, given that this particular offence is neither a strict liability nor absolute liability offence.

14. Under section 4 of the Higher Education Act 2008 the term ***"degree-awarding institute of technology"*** *means an educational institution providing post-secondary education which specializes in technical education and training and awards qualifications up to degree level.*

15. The terms ***"operating"*** and ***"higher education institution"*** are defined under section 3(a) - (b) of Higher Education (Amendment) Act 2017 as follows:

3. Section 4 of the Principal Act is amended by-

(a) deleting the definition of "higher education institution" and substituting the following-

"higher education institution" *means an educational institution in or operating in Fiji that provides award-conferring post-secondary education or provides educational support services for students of other higher education institutions including overseas institutions, including but not limited to-*

(a) technical and vocational education and training centres;

(b) information technology centres;

(c) secretarial schools;

(d) language schools;

(e) hospitality training centres;

(f) educational agencies;

(g) caregiving training providers;

(h) performing arts and sports academies;

(i) religious educational institutions;

(j) colleges; and

(k) universities

(b) inserting the following new definition-

"operating" *for the purposes of this Act means conducting any form of activity in any medium to promote or in support of fee-paying or non-fee paying higher education and training that is sourced externally, or within Fiji or both.*

16. Section 8 of Higher Education (Amendment) Act 2017 state:

8. All references to "university or degree awarding institute of technology" in the Principal Act and any subsidiary laws made under it are deleted and substituted with

"higher education institution" ***except where it appears in section 13 of the Principal Act****.*

Magistrate's ruling in support of *no case to answer*

(a) *"degree-awarding institute of technology"* – Higher Education Act 2008, s.4

17. The learned magistrate acquitted the accused i.e. Respondent for ***no case to answer*** under section 178 of the Criminal Procedure Act 2009 primarily on the basis that the prosecution evidence only showed that the vocational training school operated by the accused only awarded diploma qualification and not degree level qualification. According to the learned magistrate the prosecution had failed to adduce evidence to prove an essential element of the charge (i.e. first limb of the *no case to answer* test), that is, the vocational training school operated by the accused actually offered degree level qualification in accordance with the definition of ***"degree-awarding institute of technology"*** under section 4 of the Higher Education Act 2008.

18. The learned magistrate had arrived at such decision by interpreting the term ***"degree-awarding institute of technology"*** to mean that the vocational training school operated by the accused i.e. Respondent **must offer degree level qualification** in order to conform with the meaning of the said term provided under section 4 of the Higher Education Act 2008. Since the said vocational training school only awarded diploma qualification as per the prosecution's evidence, it therefore did not qualify as a ***degree-awarding institute of technology***.

19. I do not concur with the learned magistrate's interpretation of the term ***"degree-awarding institute of technology"*** because the meaning of the said term provided under section 4 of the Higher Education Act 2008, in my view, does not make it mandatory or obligatory for the educational institution like that of the Respondent's vocational training school to actually offer degree level qualification, and the fact that the Respondent's school being a ***"higher education institution"*** offering only diploma level qualification is sufficient to conform with the meaning of and be held accordingly as a ***"degree-awarding institute of technology"***.

20. On that basis the Appellant State's ground of appeal succeeds.

21. As to the remaining elements of the relevant offence noted in paragraph 13 herein, there is evidence that the Respondent's school's registration was revoked in December 2017, and the Respondent knew of that de-registration including efforts to re-register the said school for purposes of complying with the Higher Education Act 2008.

Defective charge

22. Counsel for the Respondent Mr. Cakau further argued that the charge is defective because the *Statement of offence* reads ***Operating an unregistered university*** contrary to section 13(1) -(2) of the Higher Education Act 2008, while the *Particulars of the offence* notes Integrated Information Services Limited as a ***degree awarding institute of technology*** rather than *university.*

23. In Saukelea v State [2019] FJSC 24; CAV0030.2018 (30 August 2019), the Supreme Court held at paragraph 36:

> *[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: Koroivuki v The State CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: Skipper v Reginam Cr.App.No. 70 of 1978; [1979] FJCA 6 (29 March 1979).*

24. Having carefully perused the entire record of proceedings in the Magistrate's Court and relying on Saukelea v State (supra), I hold that despite the inaccuracy of drafting of the charge, (i) the accused being represented by competent counsel Mr. Filimoni Vosarogo knew what allegation she had to meet; and (ii) the accused and her counsel were not in any manner embarrassed or prejudiced in conducting their defence. Furthermore, the error in the charge did not mislead the accused i.e. Respondent or led to a miscarriage of justice.

25. On such basis the argument on defective charge submitted by the Respondent's counsel is hereby dismissed.

Conclusion

26. Based on all the reasons noted above, I allow the Appellant State's appeal to the effect that the order of **acquittal** by the learned magistrate is **quashed**, and duly substituted with an order of ***'a case to answer'***, thus the learned magistrate is to continue hearing the case i.e. CF. 158 of 2021 in accordance with section 179 of the Criminal Procedure Act 2009 and according to law.

27. Thirty (30) days to appeal to the Fiji Court of Appeal.

Orders of the Court:

(1) The State's appeal against acquittal is allowed to the effect that the order of **acquittal** by the learned magistrate is **quashed**, and duly substituted with an order of ***'a case to answer'***, thus the learned magistrate is to continue hearing the case i.e. CF. 158 of 2021 in accordance with section 179 of the Criminal Procedure Act 2009 and according to law.

HIGH COURT CRIMINAL SUVA

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Hon. Justice Pita Bulamainaivalu

PUISNE JUDGE

At Suva

13 December 2024

Solicitors
Office of the Director of Public Prosecutions for the Appellant
Vosarogo Lawyers for the Respondent