

**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION [FICAC]
v JOSATEKI TOGA (HAC0002 of 2010L)**

HIGH COURT — CRIMINAL JURISDICTION

5

THURAIRAJA J

24, 30 April, 1 May 2012

10 **Criminal law — trial — bribery — abuse of office — accepting advantage — unanimous opinion of assessors — conviction — Criminal Procedure Decree ss 203(1), 237 — Penal Code s 111 — Prevention of Bribery Promulgation s 4(2)(c).**

The accused was charged with two counts of bribery, one count of abuse of office and two counts of alternate charges of accepting an advantage. The assessors found the
15 accused guilty on the abuse office charge, and not guilty on all other counts.

Held –

There was no entrapment on the accused. The evidence shows that the accused had accepted the bribe for his own benefit. The accused is guilty on the first, second and third
20 counts.

Accused convicted.

Cases referred to

Joseph v R [1948] AC 215; *Ram Dulare & others v R* (1955) 5 FLR 1; *Sakiusa Rokonabete v The State* Criminal Appeal No AAU0048/05; *Setevano v The State* (1999) FJA 3, considered.

25

E. Leweni & T. Wagabaca instructed by *Office of the Fiji Independence Commission Against Corruption* for FICAC.

K. Vuataki instructed by *Vuataki Law* for the Accused.

Thurairaja J.

30

Judgment of the Court:

[1] The trial commenced on 24th April and concluded on 30th April 2012. The Assessors unanimously found the Accused not guilty on 1st, 2nd, 4th and 5th Counts and unanimously found the Accused guilty on the 3rd count.

35

[2] I adjourned overnight to consider my judgment.

[3] Section 203 (1) of the Criminal Procedure Decree makes provision for the assessors.

‘Trials before the High Court shall be by a judge sitting with assessors as provided in this part.’

40

[4] Section 237 states as follows:

“(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

45

(2) Notwithstanding the provisions of s 142 (1) and subject to sub-section (2) where the judge’s summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment (other than the decision of the court which shall not be necessary for any judgment (other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) –

50

(a) *To be written down; or*

(b) *To follow any of the procedure laid down in s 141; or*

(c) To contain or include any of the matters prescribed by s 142.

(3) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –

5

(a) Written down; and

(b) Pronounced in open court'

As per the above section the trial judge should make the final decision. In other words ultimate responsibilities all lies with the trial judge to decide after evaluating all the evidence before Court.

10 [5] In *Joseph v R* [1948] AC 215:

'The learned Chief Justice does not appear to have brought his own mind to bear on the question of the guilt or innocence of the accused. He left the appreciation of evidence to the assessors, and accepted their conclusion as the verdict of a jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion. The appellant was entitled to be tried by the judge and he has not been so tried and, in the circumstances, the only course open to the Board was to advise His Majesty to allow the appeal and quash the conviction and sentence.'

15

[6] In *Ram Dulare & others v R* [1955] 5 FLR 1:

'It is clear that the legislature has given a trial judge the widest powers to accept or reject the opinions of sitting with him. These powers are discretionary. From the terms of the judgment, the learned trial judge made it quite clear why he came to his decision in this case and why it was that he unable to accept the opinion of the assessors.'

20

In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a jury in a trial. In the case of the *Joseph v R* [1948] AC 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial judge. The responsibility of arriving at a decision and of giving judgment in a trial by the Supreme Court sitting with assessors is that of the trial judge and the trial judge alone and in the terms of the Criminal Procedure Code, s 308, he is not bound to follow the opinion of the assessors.'

25

30 [7] In *The State v Sakiusa Rokonabete* Criminal Appeal No AAU0048/05, the Court of Appeal observed:

'In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions bases on their views of the facts.'

35

[8] In *Setevano v The State* [1999] FJA 3 at 5, the Court of Appeal stressed that the reasons of the presiding trial judge:

'must be **cogent** and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.'

40

[9] I direct myself in accordance with the law and the evidence which I discussed in my summing up to the assessors.

45 [10] The Deputy Commissioner of Fiji Independent Commission Against Corruption had preferred the following charges against the Accused Josateki Toga.

(i) 2 Counts of charges of bribery punishable under s 4 (2) (a) of the Prevention of Bribery Promulgation No 12 of 2007.

(ii) One count of abuse of office punishable under s 111 of Penal Code, Cap 17.

50

(iii) Two counts of alternate charges of accepting punishable under s 3 of the Prevention of Bribery Promulgation.

[11] Elements of these offences were extensively discussed in my Summing Up to the assessors.

[12] The Prosecution called 6 witnesses to prove the case for the Prosecution when the defence was called, the Accused opted to give evidence for himself.

5 [13] Before the trial proper commenced a voir dire inquiry held to discuss the admissibility of the Statement of the Accused made at the Caution Interview. After hearing all evidence the Court held that the Statement was inadmissible because the statement was obtained under oppression.

10 [14] The Accused is a government officer with experience in the office and life. Being an employee in a sensitive government institution such as Immigration Department shouldn't have gone down to a level of leaking official information to a 3rd party at a private place. In this case the Accused had obtained the information from their system, rubber stamped, signed and gave it to a third
15 person Mr Mellerich at a private restaurant namely McDonalds, Nadi. It is noted with concern that the Accused had lowered very much below his status by going to a place of which a layman wanted. The Accused could have clearly declined everything and told Mr Mellerich to come through proper channel. The Accused did not submit in his evidence that he was entrapped by any means.

20 [15] After carefully considering all evidence, submissions made by the Counsels I find that there is no entrapment on the Accused person. It is revealed by the evidence that the Accused had accepted the bribe for his own benefit.

[16] Considering the available evidence, which were fully analyzed and discussed in the Summing Up, I am satisfied that the Prosecution proved the 1st,
25 2nd and 3rd charges beyond reasonable doubt.

[17] Since the Prosecution proved the case beyond reasonable doubt against the Accused person, I reject the verdict of the assessors delivered in connection with 1st and 2nd counts. Any how the verdict of the assessors in connection with the 3rd charge is accepted.

30 [18] Considering all, I find the Accused Josateki Toga guilty to the 1st, 2nd and 3rd Counts as charged. Accordingly, I convict the Accused Josateki Toga under s 4 (2) (c) of the Prevention of Bribery Promulgation No 12 of 2007 and Section of the Penal Code Cap 17.

35

Accused convicted.

40

45

50