

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT SUVA

Criminal File No: MACD 41/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : SHALENDRA KUMAR

Accused

Appearances

For Prosecution : Ms. Fatefehi (**FICAC**)

For the Accused : Mr. Vosarogo & Mr. Cakau (**Vosarogo Lawyers**)

Date of Judgment : 11th August 2023

JUDGMENT

1. The accused person is charged as follows:

Count One

Statement of Offence [a]

OBTAINING FINANCIAL ADVANTAGE: Contrary to Section 326 (1) of the **Crimes Act 2009**.

Particulars of Offence [b]

SHALENDRA KUMAR between 1st January 2010 and 31st May 2010 at Suva in the Central Division whilst being the Director of Professional Stationeries engaged in a conduct namely caused payments amounting to FJ34,236.77 to be made to Professional Stationeries and as a result of that conduct obtained a financial advantage amounting to \$34,236.77 from the Public Works Department and knowing that he was not eligible to receive the said financial advantage.

Count Two

Statement of Offence [a]

ATTEMPT TO PERVERT THE COURSE OF JUSTICE: Contrary to Section 190 (e) of the **Crimes Act 2009**.

Particulars of Offence [b]

SHALENDRA KUMAR sometimes on and about the 1st day of October 2018 at Suva in the Central Division whilst being the Director of Professional Stationery Supplies attempted to pervert the course of justice by influencing one Mosese Vuetimaiwai a former RICOH employee to make a false statutory declaration to refute his FICAC Statement in the case against the said Shalendra Kumar.

Count Three

Statement of Offence [a]

ATTEMPT TO PERVERT THE COURSE OF JUSTICE: Contrary to Section 190 (e) of the *Crimes Act 2009*.

Particulars of Offence [b]

SHALENDRA KUMAR sometimes on and about the 1stFebruary 2014 and 31st December 2015 at Toorak, Suva in the Central Division attempted to pervert the course of justice by creating false back dated Professional Stationery delivery dockets in order to be used as evidence in the case against the said Shalendra Kumar.

2. The accused had pled not guilty to the charges and as such the matter proceeded to trial.
3. During the hearing prosecution called six (6) witnesses and tendered multiple exhibits.
4. Prosecution then closed their case.
5. Upon the close of Prosecution case there was a concession by learned counsel for the Accused that there was a case to answer
6. As such upon seeking a position from the Accused pursuant to Section 179 of the *Criminal Procedure Act 2009*, the accused gave evidence but chose not to call any witnesses in support.
7. The Accused closed his case thereafter.

COUNT 1

8. The court restates verbatim the charging sections as follows:

"Count 1

"326.-(1) A person commits a summary offence if he or she-

(a) engages in conduct; and

(b) as a result of that conduct, obtains a financial advantage for himself or herself from another person; and

(c) knows or believes that he or she is not eligible to receive that financial advantage."

Legal Discussion

9. In order to prove the offences charged, Section 57 and 58 of the **Crimes Act 2009** directs on the following:

"Legal burden of proof–prosecution

57.–(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Act –

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof–prosecution

58.–(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Sub-section (1) does not apply if the law creating the offence specifies a different standard of proof."

10. The above legal regime had so often been pronounced by the courts and one such example is that which was highlighted by *Aluthge J* in his summing in **State v Baleiwakaya** – Summing Up [2020] FJHC 32; HAC121.2019 (24 January 2020), where he stated:

"7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room."

11. The other is ***Woolmington v DPP***¹ where the court held that "no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the accused, is part of the common law".

12. Therefore the burden of proving the accused person's guilt beyond reasonable doubt lies with the prosecution. If the

¹ [1935] AC 462

evidence creates any doubt, the benefit of the doubt should be given to the accused.

The Elements of the Offence

13. Prosecution needs to prove the following elements of the offence beyond reasonable doubt arising out of Section 326 (1) of the **Crimes Act 2009** and this is self-evident from the charge itself, that is:
 - i. The accused;
 - ii. Engages in conduct;
 - iii. As a result of that conduct, obtains a financial advantage for himself; and
 - iv. Knows or believes that he is not eligible to receive that financial advantage."
14. In this matter the accused has agreed to fourteen (14) transactions as per the agreed facts. The total of all the transactions amounts to FJ\$34,236.77, which were deposited into the account of Professional Stationery from the Public Works Department on the premise that stationeries would be supplied. The agreed facts also affirms that the accused's identity is Shalendra Kumar.
15. All fourteen transactions were tendered as exhibits, with one transaction containing multiple documents. This documents also formed the Agreed documents.
16. In **State v Vasu** - Summing Up [2019] FJHC 1180; HAC324.2016 (11 December 2019), where *Hamza J* stated as follows:

"[91] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as **agreed facts** without placing necessary evidence to prove them. Therefore, you must treat all those facts as proved beyond reasonable doubt."

17. Considering the sentiments in Vasu (supra), as a result of the agreed facts the following elements of the offence are proved beyond reasonable doubt:

- i. The accused (paragraph 1 of the Agreed Facts);
- ii. Engages in conduct (paragraphs 7 to 40 of the Agreed Facts);
- iii. As a result of that conduct, obtains a financial advantage for himself (paragraphs 41 to 53 of the Further Agreed Facts and paragraphs 2, 3 and 4 of the Agreed Facts). In fact the deposits were made into the Westpac Bank account for Professional Stationery Services which was a registered business and not a limited liability company. This meant effectively that the accused was personally responsible for the business.

18. This leaves the final element of the offence, that is, 'Knows or believes that he is not eligible to receive that financial advantage'.

19. The final element under the current legal regime as propounded under the *Crimes Act 2009* is the fault element.

20. This is stated on the basis of the use of the words 'Knows or believes'.

21. Prosecution by way of the particulars of offence has chosen 'knowledge' as the fault element. This is evidenced by the following wordings from the particulars of offence that is, "**knowing** (emphasis mine) that he was not eligible to receive the said financial advantage."

22. Section 20 of the **Crimes Act 2009** defines knowledge in the following manner:

"

Knowledge

20. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

23. In *Fiji Independent Commission Against Corruption (FICAC) v Bakani* [2014] FJHC 572; HAC026.2009 (6 August 2014), *Bandara J* (as he then was) discussed the term as follows:

“

20. Lord Denning MR, in *CiaMaritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd. The Eurysthenes* [1976] 3 All ER 243 at 251, [\[1977\] QB 49](#) at 68):

*"And when I speak of **knowledge**, I mean not only positive **knowledge**, but also the sort of **knowledge** expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry - so that he should not know it for certain - then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to **knowledge** of it."*

The Roskill LJ commented on actual **knowledge** as:

*"I add the word "believed" to cover the man who deliberately turns a blind eye to what he believes to be true in order to avoid obtaining certain **knowledge** of the truth."*

21. In the case of *Agip(Africa) Ltd v. Jackson* [1992] 4 All ER 385, [1990] Ch 265, Millet J analyzed '**knowledge**' in following terms;

*"**Knowledge** may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analyzed by Peter Gibson J in [*SocieteGenerale pour Favoriser le Developpement du Commerce et de I'Industrie en France SA* (1982) [1992] 4 All ER 161 at 235, [\[1993\] 1 WLR 509](#) at 576-577as comprising. "(i) actual **knowledge**; (ii) willfully shutting one's eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) **knowledge** of circumstances which would indicate the facts to an honest and reasonable man; and (v) **knowledge** of circumstances which would put an honest and reasonable man on inquiry." According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual **knowledge**, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) and (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not?*

22. The 'issue' of '**knowledge**' is best explained in the above citations. If the existing circumstances show either affirmatively or can be inferred through circumstances that the accused had actual **knowledge** of the facts or he willfully shut his eyes to the obvious truth or did not make queries, either

willingly or recklessly, as expected from a honest and reasonable man, it is the obvious conclusion that he had the '**knowledge**' of the existed situation. If somebody continues to exist, within a given scenario, as if like he does not have any '**knowledge**' of what is happening around him, whilst everybody else can see the reality, he is undoubtedly having some '**improper motive**' to do so. The simple question is as to why he maintained a stoic silence?

"

24. The excerpt from Bakani's case (supra) was aptly summarized in *Fiji Independent Commission Against Corruption (FICAC) v Lagere* - Summing Up [2017] FJHC 336; HAC56.2014 (1 May 2017) as follows:

"

Knowledge

32. I now take your attention to the third element, which the accused knew or believed that the loss will occur or that there is a substantial risk of the loss occurring. Knowing or believing is **knowledge**. **Knowledge** can either be direct **knowledge** or inferred **knowledge**.

33. In determining the **knowledge**, it is sufficient to have the necessary awareness or the understanding of the act and its consequences. However, in some instances, **knowledge** includes "willfully shutting one's eye's to the truth". If a person deliberately or intentionally refrains from making an inquiry about the act or the consequence of it, that also falls with the meaning of "**Knowledge**"

25. Noting the legislative definition and that of case law as above cited, has Prosecution proved beyond reasonable doubt that the accused had the knowledge that he was not entitled to receive the \$34, 236.77.

26. Prosecution premised this on four things.

27. Firstly was the fact that the accused supplied three (3) quotations from his business and two other businesses as per evidence of Laisa Halafi [PW1], Sala Biukoto [PW3] and Tavenisa Tavaga [PW4]). PW3 stated that whilst she was employed for the accused's business that is Professional Stationery Services they would issue quotations for other companies because they had them with them.

28. One of the businesses referred to by PW3 was Office 2000 wherein Leena Ana Marie [PW2] and Mosese Vuetimaiwai [PW5] confirmed to the court that all the quotations under the banner of Office 2000 for the fourteen (14) transactions were not made by Office 2000.
29. Secondly, was the fact that the vat portion for transaction 3, 6, 10 and 11 were invoiced twice as per the evidence of Sen Jeet (PW6).
30. Thirdly, whilst the accused's business as per further agreed fact paragraphs 41 to 53 was paid the sum of FJ34,236.77, the evidence of PW1 and PW4 suggests that there was no stationery delivered for Transaction 1,2,3,5,6,7,8,9,10,11,12 and 13 whilst Transaction 4 and 14 were only supplied partially.
31. PW1 and PW4 also stated that sometimes in 2014 they had gone to the office of the accused and were made to sign the delivery dockets for thirteen (13) of the fourteen (14) transactions when the stationery were ordered, paid and should have been supplied between 1st January 2010 and 31st May 2010.
32. Fourthly, the accused had been complicit with the PW1 and PW4 in all the transactions because PW1 and PW4 with others as per their evidence would receive cash following the payment of a transaction.
33. Even though all the witnesses were cross examined in terms of the final element, this court is of the view that none of them were discredited as such.
34. PW1 and PW4 however were accomplices in this matter. This is a fact they do not deny.
35. Consequently, the court directs it's mind on accomplice evidence and the need for a **care warning** as described in **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)

especially the reliability of the evidence of PW1 and PW4 when the evidence maybe described as tainted.

36. In fact it is prudent for this court to remind itself as to the danger of convicting upon the evidence of PW1 and PW4 unless confirmed by evidence from some other source, i.e. corroboration.

37. PW1 is currently serving a prison sentence whilst PW4 was granted immunity to become a state witness. PW1 stated that she agreed to become a witness for the state out of a personal conviction, however PW4 was granted immunity in order to be a state witness.

38. In the court's view there is nothing to be gained by PW1 by giving evidence for the state however PW4 has gained her freedom from prosecution as a result. It is the evidence of PW4 that should be corroborated wherein to this court the evidence of PW1 does exactly that. PW1 corroborates the version of events of PW4 and as a result the court has accepted their evidence.

39. Consequently, following from the above discussions the fourth and final element of the offence is proved beyond reasonable doubt.

40. Prosecution has proved Count 1 beyond reasonable doubt.

COUNT 2 AND 3

41. The court restates verbatim the charging sections as follows:

"Count 2 & 3

190. A person commits a summary offence if he or she -

(e) in any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice.

42. The elements of the offence for Count 2 and Count 3 as charged are as follows:
- a. The accused;
 - b. In any way;
 - c. Attempts to pervert the course of justice.
43. This court agrees with Prosecution's submission that the attempt must be more than preparatory as highlighted at Section 44 (2) of the *Crimes Act 2009*.

Count 2

44. This court has considered the evidence of Mosese Vuetimaiwai [PW5] as it relates to this count and makes a finding that he was not a forthright witness in terms of the specific evidence he gave in relation to count 2.
45. He was evasive when questioned and would be selective in his answers when asked questions that went to the heart of the allegation in count 2.
46. As a result this court rejects the portion of his evidence which relates to Count 2, which means that Prosecution has not been able to prove Count 2 beyond reasonable doubt.

Count 3

47. As per PW1 and PW4's evidence in terms of Count 1, that there was payment for stationery ordered for fourteen (14) transactions but majority were not supplied or the ones which were supplied were done so partially.
48. PW1 and PW4 stated that sometimes in 2014 they had gone to the office of the accused and were made to sign the delivery dockets by the accused for thirteen (13) of the fourteen (14)

transactions when the stationery were ordered, paid and should have been supplied between 1st January 2010 and 31st May 2010.

49. As the issue of the accomplice has already been considered above herein and whilst considering the directions on accomplice evidence as well as paragraphs 47 and 48 above herein, this court is of the firm view that prosecution has proved count 3 beyond reasonable doubt as a result.

Defence Case

50. The accused was not required to prove his innocence but given that the court is satisfied that Prosecution has proved all the elements of the offence for Count 1 and Count 3, he was only required to prove his defence on a balance of probabilities.

51. The accused needed to prove that it was more probable than not that his version of events could be accepted and therefore be considered a valid defence.

52. His defence in terms of count 1 was that he had supplied all stationery ordered, which his business was paid to do. He however denies colluding with PW1 and PW4.

53. He did allude to the court that the PWD stock card would have shown that the items were supplied however he only made oral suggestions of its existence without actually attempting to produce a copy or call as a witness the person employed by PWD who was responsible for the stock card.

54. In terms of count 3 the accused denied the allegation outright, however gave no other plausible explanation of his denial.

55. Considering what the accused had raised in his defence, it is the court's considered view that the weight of prosecution's evidence should have been rebutted by the accused on a balance of probabilities.

56. Given the court's deliberations at paragraphs 50 to 54 above-herein, the defence raised by the accused is dismissed for failing to meet the required standard.

Conclusion

57. This court has accepted that Prosecution has proved its case beyond reasonable doubt in terms of Count 1 and Count 3 and has dismissed the defence raised on the basis that it was not proved on the balance of probabilities. In terms of Count 2 the court is not satisfied beyond reasonable doubt that prosecution has proved its case.

58. Therefore being satisfied as a result of the above finding, this court makes the following pronouncement:

- i. Count 1 (Obtaining Financial Advantage) - Guilty;
- ii. Count 2 (Attempt to pervert the course of justice) - Not Guilty;
- iii. Count 3 (Attempt to pervert the course of justice) - Guilty.

59. As a consequence of the above pronouncement the court shall now accept mitigation from the accused or his counsel and sentencing submissions from prosecution in terms of Count 1 and Count 3.

60. In terms of Count 2 the accused is acquitted of the charge.


JEREMAI N.L. SAVOCA
Resident Magistrate

