

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 331 of 2016

[CRIMINAL JURISDICTION]

FICAC

V

- 1. ABDUL SHEKEB**
- 2. JOSEFA RABOILIKU MARAWA**

Counsel : Ms. F. Puleiwai with Ms. J. Pene for FICAC
Mr. I. Khan for 1st Accused
Mr. J. Bale for 2nd Accused

Hearing on : 11 – 19 April 2018

Summing up on : 20 April 2018

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether an accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. As I have told you in my opening

address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
8. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
9. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as

directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

12. As a matter of law you should remember that the burden of proof lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
13. In order to prove that an accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.
15. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
16. Let us now look at the Information. The Deputy Commissioner of the Fiji Independent Commission Against Corruption has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

Bribery: Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered an advantage namely a Toyota Harrier vehicle registration no. HV 915 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

SECOND COUNT

Statement of Offence

Bribery: Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

JOSEFA RABOILIKU MARAWA, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority or reasonable excuse, accepted an advantage namely a Toyota Harrier vehicle registration no. HV 915 from one **ABDUL SHEKEB**, Director and owner of Ariana Used Cars and Spare Parts, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

THIRD COUNT

Statement of Offence

Bribery: Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, on or about the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered a loan of FJ\$4,000.00 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his

capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

FOURTH COUNT

Statement of Offence

Bribery: Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

JOSEFA RABOILIKU MARAWA, on or about the 19th day of July 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority or reasonable excuse, accepted a loan of FJ\$4,000.00 from one **ABDUL SHEKEB**, Director and owner of Ariana Used Cars and Spare Parts, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

ALTERNATIVE CHARGE TO FIRST COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the course of having dealings with the Fiji Revenue and Customs Authority, offered an advantage namely a Toyota Harrier vehicle with registration number HV 915 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

ALTERNATIVE CHARGE TO THIRD COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.

Particulars of Offence

ABDUL SHEKEB, on or about the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the

course of having dealings with the Fiji Revenue and Customs Authority, offered a loan of FJ\$4,000.00 to one **JOSEFA RABOILIKU MARAWA**, a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

17. The first accused is charged with the offence of bribery under section 4(1)(a) of the Prevention of Bribery Promulgation No. 12 of 2007 ("Bribery Promulgation") on counts one and three. There is an alternative count under Section 8(2) of the Bribery Promulgation for each of those counts.
18. The second accused is charged with the offence of bribery under section 4(2)(a) of the Bribery Promulgation on counts two and four.
19. Therefore, as you can see, both accused in this case are charged with multiple counts. You should bear in mind to consider each count separately. You must not assume that an accused is guilty of the other count just because you find him guilty of one count. Further, you should also remember to consider the evidence against each accused separately. In the event you find one accused guilty of a particular count, you must not simply assume that the other accused must be guilty as well. It is necessary that you consider whether the prosecution has proved each count beyond reasonable doubt against the relevant accused separately.
20. With regard to the alternative counts against the first accused, you should remember that an alternative count should only be considered if you find the first accused not guilty of the relevant substantive count. Thus, you should only deal with the alternative count to the first count if you find the first accused not guilty of the first count. Same applies regarding the third count.
21. Now let me give you a brief account of the evidence led in this case.
22. First prosecution witness Ms. Claudette Whippy said that;

- a) *She was in charge of the investigation branch of the Fiji Revenue and Customs Authority (FRCA) in 2015. Her department receives referrals from other arms of FRCA. She said the second accused was the National Manager Border Control in February 2015. She said some cases involving seizure reports are solved at the National Manager Border level and some cases are referred to her branch. She said the second accused could deal with duty liability issues involving \$500.00 or more without referring to her section.*
- b) *She received five complaints involving Ariana Used Cars and Spare Parts ("Ariana") and all those five cases were to do with mileages being tempered with. She said that no other cases were reported after February 2015.*
- c) *In July 2015 she received a direction to investigate a case against the second accused regarding a vehicle and money that was given as a loan to the second accused by Ariana. She said a search was conducted at Ariana premises and certain documents were seized. In 2015 the second accused looked after the Border Control and Ariana was importing vehicles and spare parts. She did not receive any cases involving Ariana after the 5 cases and as far as she knows Ariana was still importing.*
- d) *She said FRCA has a 'no gift policy' which is stated in PE14. She said she did not find during her investigation that the second accused had informed the HR office regarding the vehicle and the loan the second accused had received.*
- e) *During cross examination on behalf of the first accused she agreed that the vehicles relevant to the five cases against Ariana were released after the first accused paid fines.*
- f) *During cross examination on behalf of the second accused she agreed that the five seizure reports involving Ariana were reported to her department by the second accused. She agreed that though the second accused had the power to resolve or discharge any seizure report that is brought before his office, the second accused chose to send those five cases to her department for investigation. She agreed that the 'no gift policy' does not apply for goods purchased by an employee of FRCA.*

23. Second Prosecution Witness was Sheikh Shareem. He said;

- a) *He worked at Ariana as a Salesman from February 2015 to November 2015. He said if a customer wants to buy a vehicle through a bank loan he would request that customer to provide necessary documents; hand over the documents to the finance company and wait for the loan approval. After they receive the approval they would take steps to have the vehicle registered under the customer's name and his company would pay for all legal documents and all the LTA fees. After they receive the vehicle back from the LTA, the customer is required to submit further documents to the finance company in order for the finance company to issue the release letter. The vehicle would be released to the customer after they receive that release letter from the finance company. Thereafter they would submit the invoice and the delivery note to the finance company in order to receive the payment.*
- b) *He said the first accused was the director and the owner of the company when he joined. He could recall the second accused coming to the yard in April 2015 to inspect one of the two vehicles that came from Dubai. The first accused had told him that one of the vehicles were ordered for the second accused. After the inspection the second accused wanted to purchase a vehicle and spoke to the first accused. The first accused asked him to explain all the requirements to the second accused.*

- c) He said the second accused forwarded the necessary documents to the first accused. He said that he prepared the quotations tendered as PE11 and PE10 on the instructions of the first accused. The amount quoted in the first quotation PE11 dated 02/04/15 was \$34,000. Referring to the quotation book tendered as PE 11(I) he pointed out that the quotation before PE 11 is dated 03/04/15 and the quotation after PE 11 is dated 02/04/15.
- d) He said the amount on the second quotation PE10 dated 28/05/15 is \$30,000. Referring to the quotation book tendered as PE 10(I) he said the quotation after PE10 is dated 30/05/15 and the quotation before PE 10 is dated 27/05/15. He said the registration number as shown in PE 6 is HV 915 and the vehicle was checked on 07/04/15.
- e) He said from the date he started working in that company until 07/04/15 it was the first time a vehicle was registered without the loan being approved. He said the handwriting in the receipt tendered as PE 8 dated 08/04/15 is of the first accused. He pointed out that in the receipt book tendered as PE 8(I) the receipt before PE 10 is dated 17/07/15 and the receipt after PE 8 is dated 15/07/15.
- f) He said PE 09 which is the invoice number 0429 dated 08/04/15 is written by first accused. The invoice number 0428 is dated 17/07/15 and invoice number 0430 is dated 20/07/15. He said the first accused instructed the vehicle to be registered under the second accused's name. He said the directors do not deal with the issues regarding vehicles coming from the wharf.
- g) During cross examination he agreed that a different rule is applied in respect of customers who are of good character and good jobs. He agreed that when customers like police officers, customs officers, bank officers and military officers come to them, he would call the financial company on the phone in order to get an indication that the loan will be approved for such person. He also agreed that in some cases vehicles are released on the payment of a deposit by such customers.
- h) He agreed that before the vehicle was taken for registration he enquired from BSP Finance and it was confirmed that a loan of \$30,000 will be approved for the second accused. He agreed that the first accused told him that he received a deposit of \$4,000 from the second accused. He agreed that the first accused released the vehicle after the enquiries made by him about the approval of the loan for \$30,000. He agreed that the second accused was not the only customer whose vehicle was released on the payment of a deposit.
- i) He agreed that some car dealers take a \$500 deposit and release vehicles and some do not take a deposit at all before releasing vehicles due to the competition. He agreed that vehicles were released on payment of a deposit without loans being approved in the three instances suggested by the defence counsel.
- j) He agreed that there was nothing unusual when the second accused paid the deposit and took the vehicle and it was a normal transaction between a buyer and a seller. He agreed that he did not give the vehicle to the second accused for free. He said the difference of the amount quoted in PE11 and PE10 is because the price was reduced due to a fault in the vehicle. He agreed that the postal address given by the second accused in PE4 is the address of Customs Department, Suva and two to three customs officers came with the second accused to inspect the vehicle.
- k) During re-examination he said BSP did not say that the loan was approved. He said when he spoke to loan officer Mr. Sudeshwar Ram he was told that the loan can be approved and they have to check the documents properly. Thereafter he spoke to the first accused who told him to call Sudeshwar Ram again. When he

called again Sudeshwar Ram said the loan can be approved upon the second accused signing the documents.

- 1) He said he did not see the second accused pay the deposit to the first accused. He said the release of the vehicles to the three customers named by the defence counsel was done after releasing the vehicle to the second accused. He said one of the customers was a spouse of an army officer, another customer was about to retire from the police whom he knew and the third customer was a loan officer in the Credit Corporation.
24. The third witness for the prosecution was Sudeshwar Ram. He said;
- a) He was working as a senior credit officer at BSP during the time material to this case. He said, after an application is made for a vehicle loan and once it is approved the approval letter is sent to the car dealer in order for the car dealer to proceed with the registration of the vehicle. Thereafter the registration documents are provided by the car dealer to the bank and the bank would issue the release letter. The bank would then request for the original invoice and other documents in order to release the payment to the car dealer. He said the process takes about 5 days. He said sometimes a deposit is paid to the car dealer and sometimes it is paid directly to the bank.
 - b) He recalled receiving a loan application for the second accused from Ariana on 09/04/15. The documents were sent via email. Since the documents were incomplete he followed up with the second accused four to five times on his mobile in the month of April 2015. On certain occasions the second accused did not answer the mobile and on other occasions he was informed by the second accused that he was busy. After trying for more than four to five times he stopped following up as he assumed that the application would not be going through.
 - c) He said he filled the application form for the second accused on 17/07/15. He said he asked the second accused to pay \$4,000 as deposit for the car loan. The second accused told him that the deposit was paid to the car dealer. He said as \$4,000 was paid to the car dealer the second accused was not required to pay \$4,000 to the bank. He identified PE 5 as the application he filled on 17/07/15. He said he inspected the vehicle at the second accused's residence. Normally the vehicles would be inspected at the car yard and the vehicles would be unregistered. But in this case it was inspected at the second accused's residence and the vehicle was registered. He said he was surprised.
 - d) He said when he received the documents in April from the first accused he mentioned that he cannot proceed with the application until all requirements are met. He said he did not indicate to the first accused that the second accused's loan will be approved.
 - e) During cross examination on behalf of the first accused he agreed that sometimes he would give an indication that a person would be able to obtain a particular amount as a vehicle loan subject to providing documents. He also agreed that in this case he was in the process of assessing the loan application when FRCA came to his office and stated that the second accused is under investigation. He stopped processing the loan on that basis.
 - f) During cross examination on behalf of the second accused he said, when he followed up with the second accused, he did not get a response from the second accused saying that the second accused is no longer interested in applying for the loan. He agreed that the second accused had to deal with an issue concerning the data bureau

before the application was processed. He agreed that the second accused dealt with the said data bureau issue within one or two days and came back to him with the clearance.

- g) During re-examination he said, until there is approval from their credit department they are not able to confirm to the car dealer or to the customer that the loan has been approved. He said the bank will not process any loan application pending any cases or criminal charges against a customer. He said the second accused took the original documents from the bank saying that he wants to seek finance from elsewhere if his bank is not approving the loan.*

25. At the end of the prosecution case you heard me explain several options to the two accused. The first accused chose to give evidence on oath. The second accused also chose to give evidence on oath.

26. The first accused said in his evidence that;

- a) He commenced the business called Ariana Used Cars & Spare Parts in September 2014. He said after a customer agrees to buy a vehicle and pays a 10% deposit they would send all necessary documents to the bank through email or sometimes a bank officer would come to pick the documents in order to process a bank loan. He said they would release vehicles to those customers they trust and if they know that the loan will be approved. He said before the loan is approved they release vehicles upon the payment of a deposit.*
- b) He said that in this case he gave the vehicle to the second accused upon payment of a deposit. Upon receiving the deposit he enquired with the bank through his salesman whether the loan will be approved and thereafter he took steps to register the vehicle and to have it released to the second accused.*
- c) He said the second accused came to inspect the vehicle with two to three other officers before purchasing it. He said the second accused paid \$4,000 as deposit on 02/04/15 and it was deposited in his bank on the same day. He said the amount of \$34,000 in the first quotation was reduced to \$30,000 because there was a defect in the vehicle. He said he did not ask for any favours from the second accused when he had problems with the customs authority regarding his vehicles. The vehicles that were seized were eventually released and the second accused did not release those vehicles.*
- d) He said the second accused requested the \$4,000 the second accused previously paid as deposit in order for the second accused to deposit in the bank for the loan process. He said he did not give his money as a loan to the second accused. He said he did not give the vehicle to the second accused as a gift and it was a sale.*
- e) He tendered a bank statement for the period from 01/04/15 to 30/04/15 as 1DE 1. He pointed out that there is a deposit of \$4,000 made on 02/04/15 in the company bank account and he said that it was the amount he received from the second accused. He said he did not issue a receipt to the second accused on 02/04/15 because at that time they did not have a receipt book. The deposit of \$4,000 was recorded in the quotation that was issued on the same day. Later when the second accused requested for a receipt he issued PE 8. He forgot the date the deposit was made when he issued PE 8. When he asked the second accused he was told that it*

was on 08/04/15. Therefore he wrote that date. He said PE 8 was issued on a holiday and he could not check his records.

- f) During cross examination on behalf of the second accused he agreed that the second accused came to his yard with two other customs officers to inspect the vehicle around 20/03/15. He said he would provide assistance with financing to all his customers. He agreed that the second accused provided the necessary documents for the loan within one to two days and he forwarded those documents to Sudeshwar Ram at BSP. He agreed that BSP indicated through his salesman Sheik Shareem that there is a good chance of the second accused getting the loan. He agreed that he instructed his salesman to register the vehicle in the second accused's name thereafter.
- g) He agreed that on 02/04/15 the second accused paid him \$4,000 as a deposit. He agreed that he is absolutely certain that the deposit indicated for 02/04/15 in 1DE 1 is the deposit the second accused paid to him on the same day. He agreed that his salesman followed up with the bank and the second accused regarding the loan. He said the vehicle was released to the second accused on 8th or 9th April.
- h) He agreed that after the vehicle was released the second accused had to bring the vehicle back several times for repairs during April to May 2015. He agreed that the third time the vehicle was brought for repairs he kept the vehicle for about two weeks. He agreed that the price of the vehicle was reduced because of the defects identified in the vehicle during the period between April to May and therefore the revised quotation dated 28/05/15 was issued.
- i) He agreed that the second accused came around 19/07/15 to request the deposit of \$4,000 initially paid by the second accused and he agreed that the said \$4,000 was second accused's money. No loan agreement was signed with regard to the said \$4,000 and he agreed that it was not a loan. He agreed that the registration of the vehicle HV 915 under the second accused's name was a commercial transaction and it was not a gift given to the second accused. He said 'no' when he was asked whether the second accused assisted him during January 2015 to July 2015 in the second accused's capacity as the Acting National Manager Border.
- j) During cross examination on behalf of the prosecution he said that he first met the second accused in January 2015. He admitted that he was referred to the second accused when some vehicles imported by his company were being detained by FRCA due to issues pertaining to the mileage. He was told by the second accused to go to the Customs Investigation Branch. He admitted that this was between the months of January 2015 and July 2015.
- k) He said the second accused indicated his interest to buy a vehicle sometimes in February after a meeting he had with the second accused regarding the vehicle issues of his company. He said he told the second accused about the shipment from Dubai and that he will inform the second accused when the said shipment arrives in Fiji. He admitted that he instructed PW 2 to keep one vehicle aside for the second accused to come and inspect.
- l) He said they sold the vehicle to the second accused as 'accident free' but when the second accused complained they found out that there was an accident. Therefore, after having spoken to the supplier they decided to give the second accused a discount of \$4,000.
- m) He said he didn't want to have any problem with the government officers but however when the bank declined to give the loan to the second accused they seized the vehicle and requested the second accused to transfer the vehicle back to the company. When it was suggested that he did not want to seize the vehicle from

April until July because he wanted to be in the good books of the second accused he denied and said that he waited because a deposit was paid and the loan was on process.

- n) When he was asked whether he maintains that his caution interview statement is a true record of the interview that day, while agreeing he said that because his English is not good he was confused with some questions but he answered 'yes'. He said he asked for a Persian Interpreter but he was informed that only English and Fijian interpreters are available and that is why he selected 'English'.
- o) It was pointed out to him that he had said in answer to question 204 of the caution interview "... he will make me problems" and was suggested to him that it was the reason he did not take the vehicle from the month of April until the loan was declined in July. In response, he said he didn't want to make any issue with any government officers. He said because of the issue with mileage, he requested his supplier from Japan to check the vehicles with the corresponding papers one by one because he did not want any problems with any authorities in Fiji.
- p) When he was questioned regarding the call he received on the 19th July from the second accused regarding the \$4,000 deposit, he said he was busy when he received the call which was on a Friday and he told the second accused to come on the next day which was a Saturday or a government holiday to collect the receipt. He said he can't remember the exact date he issued the receipt (PE 8) but he agreed that it was issued in July.
- q) He denied the suggestion that PE 8 is the receipt for the \$4,000 loan that was given to the second accused. He said he could not check his records when he issued the receipt, PE 8 because the office girl was not there and the documents were all over the place.
- r) He said that the second accused asked for the second accused's own deposit of \$4000 to deposit same in the bank account for the purpose of obtaining the loan. He agreed that the second accused paid that \$4,000 back to his company within 2 to 3 days.
- s) When it was suggested that there was no requirement from the bank to pay that \$4,000 deposit to the bank because the quotation was sufficient, he said it was the second accused who was dealing with the bank and the second accused told him that the bank officer had requested the second accused to show \$4,000 in the second accused's bank account.
- t) During re-examination he said the FICAC officer did not ask him during the cautioned interview whether he deposited the amount paid by the second accused in his bank account. He said the vehicle was parked in his premises when it was taken away by FICAC.

27. The second accused said in his evidence that;

- a) From May 2014 to May 2015 he was the acting National Manager Border Control in FRCA. He said in January 2015 the first accused came to his office enquiring about a vehicle that was seized by his border officers. After checking in his system he informed the first accused that the matter had been escalated to the Customs Investigation Branch.
- b) After a meeting he had with the first accused who came to enquire about certain seized vehicles he asked the first accused whether there are any SUVs. He said he was looking for an SUV and he had visited several car dealers in search for one before that and he could not find a suitable vehicle. The first accused told him that a shipment is coming from Dubai and that he will send photographs of the vehicle

- through email. He then gave the first accused his business card. He said, at that meeting, the first accused did not offer him the vehicle in return for him helping the first accused to have the vehicles released.
- c) He said though the National Manager Border has the discretion to resolve matters concerning seizure reports it is not done in isolation and it involves consultation with others.
 - d) He said after being notified about the arrival of the vehicle by the first accused over the phone he went on 20/03/15 to Ariana during his lunch break to inspect the vehicle. He went with two other customs officers. He said he took the two officers with him because he did not want to compromise his position and be seen as influencing the price. After the inspection he wanted to buy the vehicle. The first accused informed him that the price was \$34,000 and also informed him of the documents needed to be submitted in order to obtain a bank loan. The first accused also told him that he can make arrangements with BSP for the loan. He was also informed to pay \$4,000 as a deposit.
 - e) He emailed scanned copies of his pay slip and the TIN letter on the same day. It took him few days to submit a 3 months bank statement. He paid the deposit of \$4,000 on 02/04/15 and was issued with the quotation, PE 11 which indicated the payment of the deposit. He signed the LTA registration form on 07/04/15. He was informed that one Sudeshwar Ram of BSP had confirmed that his loan will be approved.
 - f) He said he was given a receipt for the deposit in July 2015 and it is dated 08/04/15. Though he can clearly remember now that he paid the deposit on 02/04/15 and not on 08/04/15, at that time he thought it was paid on 08/04/15.
 - g) He took the possession of the vehicle on the 9th or 10th of April 2015. He had to return the vehicle the same day to fix the air conditioner. On the next day he took the vehicle home and parked it. He said he would normally use his other vehicle FE 747 which he bought in 2006 and which was about 18 years old in 2015. When he drove the vehicle HV 915 again after one week, he noticed that the side mirror and the boot cover were not working. He returned the vehicle to fix those defects and it took Ariana few days for the repair. After two weeks he noticed that the vehicle was pulling towards the left side. So he returned the vehicle again. He said this was towards the end of May and it took Ariana around two weeks for the repair. He said the price of the vehicle was reduced from \$34,000 to \$30,000 due to the defects and that the quotation tendered as PE 10 was accordingly issued on 28/05/15.
 - h) He said though Sudeshwar Ram from BSP was calling him regarding the loan application, there was a delay in signing the application on his part because of the changes that were happening in FRCA at that time. He had to attend a lot of meetings and lot of training were conducted. He had to travel with the Chief Executive Officer to China towards the end of May 2015. He also was in the process of handing over to a new National Manager Border. He finalized the handing over process towards the middle of July 2015 and took his annual leave on 16/07/15. Thereafter he went to sign his loan application on 17/07/15.
 - i) He said he was told by Sudeshwar that he need to deposit in his ANZ account the amount of \$4,000 he paid as deposit to Ariana and should obtain a bank statement. He also had to clear a data bureau issue where Credit Corporation had failed to update their system regarding a loan which he had already settled.
 - j) Thereafter he went to Ariana on 19/07/15 and asked the first accused for his \$4,000 deposit as instructed by Sudeshwar Ram. He deposited that \$4,000 in his account and obtained a bank statement and took it to Sudeshwar Ram. After few days he withdrew the \$4,000 and re-deposited it in Ariana.

- k) *He said FRCA officers took the documents from BSP while his loan application was still being processed. Then the loan process was stopped and he was informed that he should clear his name. After the BSP loan was stopped he applied for a loan from Kontiki Finance. On 24/07/15 he was served with a suspension letter and therefore he withdrew his loan application with Kontiki Finance.*
- l) *Thereafter he informed the first accused to come and take the vehicle because he could not pay for the vehicle. He said he did not sign the transfer papers to transfer the vehicle back because of the pending investigation. He said he was not aware of the investigation against him by FRCA when he went on leave on 16/07/15. He only became aware of this when he was served with the suspension letter on 24/07/15. His employment with FRCA was terminated on 06/10/15 and he tendered his termination letter as 2DE 1.*
- m) *He denied that he accepted the motor vehicle as a gift and he said it was a transaction. He denied accepting a loan from Ariana in the sum of \$4,000 and said that it was in own money. He said he did not assist the first accused to have the detained vehicles released.*
- n) *During cross examination on behalf of the prosecution he admitted that he was acting as the National Manager Border Control from mid-2014 to July 2015. He admitted that towards the end of 2014 the Border Customs Unit started receiving vehicles imported by Ariana. He agreed receiving seizure reports in relation to Ariana since the end of 2014 and that he continued to receive such reports in 2015. He agreed that he forwarded the first seizure report which he received in 2014 to the Customs Investigation Compliance Division.*
- o) *He agreed that he solved one seizure report he received against Ariana in 2015 without referring to the Customs Investigation Branch. He said after consultation with his border management and also with National Manager Revenue the said vehicle was released because they came to the conclusion that the vehicle was not supposed to be detained. He said he emailed acting Manager Customs Investigations Branch and also the Manager International in order to have further background checks before releasing the vehicle.*
- p) *He said when he went to inspect the vehicle at Ariana he was not in uniform as the executive officers do not wear uniforms. The two other officers were in their uniforms. He admitted that he did not go to the bank though he was receiving calls from PW 3 during the period between 07/04/15 to 28/05/15. He denied the suggestion that he went on annual leave on 16/07/15 because he found out that there was an allegation against him on facebook and said that according to the procedure in FRCA his application for leave was made before 16/07/15. He agreed that according to his bank statement tendered as PE 16 a deposit of \$4,000 was made on 20/07/15 and again \$4,000 was withdrawn on 21/07/15. He said he withdrew that money to re-deposit it with Ariana.*

28. That is a summary of the evidence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

29. In this case, you have been given a trial bundle which contains 19 documents. Those 19 documents which includes the cautioned interview statements of the two accused are tendered with consent as PE 01 to PE19. PE 19 contains the photographs of the vehicle in question and in fact the said vehicle was tendered as an exhibit. The defence also tendered 1DE 1 and 2DE 1 as exhibits. With regard to those documents tendered in evidence, it is a matter for you to decide what weight you would give to the contents of each document.
30. With regard to the cautioned interview statements PE 17 and PE 18, please note that both accused admit that they made their respective statements. You should consider each cautioned interview statement as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it is true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.
31. During the closing submission, the prosecutor stressed that the second accused went to the bank on 17/07/15 because "a facebook allegation came up in July". You may have noted that there was no evidence led by the prosecution to establish that there was a facebook posting that contained any allegation against the second accused. Therefore you are unaware of the date and the contents even if there was such a posting on facebook. It was put to the second accused that he went on annual leave on 16/07/15 because there was an allegation against him on facebook and this was denied by the second accused. I wish to remind you that a suggestion made by a counsel during the cross-examination of a witness is not evidence if the witness did not accept that suggestion.
32. Now I will take you through the elements of the offences you are required to deal with.
33. To prove the offence of of bribery under section 4(1)(a) of the Bribery Promulgation in this case (first count and the third count), the prosecution should prove the following elements beyond reasonable doubt;

- a) the accused;
 - b) offered an advantage;
 - c) to a public servant;
 - d) on account of that public servant's performing any act in his capacity as a public servant.
34. The first element of the offence is concerned with the identity of the person who committed the offence. In this case there is no dispute with regard to the identity.
35. Second element is offering an advantage. A person offers an advantage if he, or any other person acting on his behalf, directly or indirectly gives, affords or holds out, or agrees, undertakes or promises to give, afford or hold out, any advantage to or for the benefit of any other person.
36. Advantage means;
- (a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;
 - (b) any office, employment or contract;
 - (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
 - (d) any other service, or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;
 - (e) the exercise or forbearance from the exercise of any right or any power or duty; and
 - (f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage within the meaning of any of the preceding paragraphs (a), (b), (c), (d) and (e).
37. An employee of a public body is a public servant in terms of the Bribery Promulgation and Fiji Revenue and Customs Authority is a public body. There is no dispute in this case that the second accused was employed in the Fiji

Revenue and Customs Authority during the time material to this case. Therefore the third element above is not in dispute.

38. To prove the fourth element the prosecution should prove beyond reasonable doubt that the advantage was offered on account of performing or abstaining from performing any act in the second accused's capacity as a public servant. The 'act' can be one of the general duties of the second accused and it is not required for the prosecution to point out a particular act. However, you should be certain that the advantage was offered on account of performing such act. In considering this element you are to ascertain the state of mind of the first accused.
39. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can draw an inference on the state of mind of the accused from the facts and circumstances you would consider as proved. You may take into account all the circumstances involving the offering of the advantage including the nature of the advantage and the relationship between the first accused and the second accused when you consider this element.
40. When you consider the first count and the third count against the first accused, you should remember that if it is proved that the first accused offered any advantage to the second accused on account of the second accused's doing any act, believing or suspecting or having reason to believe or suspect that the second accused had the power, right or opportunity so to do, it shall be no defence that the second accused had no such power, right or opportunity.
41. The first accused is charged with alternative counts in relation to the first count and the third count under section 8(2) of the Bribery Promulgation. To prove the offence under section 8(2) of the Bribery Promulgation the prosecution should prove beyond reasonable doubt that;

- a) the accused;
- b) while having dealings of any kind with any public body;
- c) offered an advantage;
- d) to any public servant employed by that public body.

42. As I said before, there is no dispute regarding identity in this case therefore the first element above is not in dispute.

43. To prove the second element the prosecution should prove beyond reasonable doubt that the accused had dealings of any kind with any public body. Fiji Revenue and Customs Authority is a public body. Therefore the issue you have to decide is whether the first accused had dealings of any kind with Fiji Revenue and Customs Authority. You should bear in mind that though the term "dealings" usually refer to business relations or commercial activity, given the context the said word is used in the above section, it is not necessary to prove that there was a business relationship or commercial activity between the first accused and FRCA. It would be sufficient for the first accused to have some form of ongoing interaction with the activities of FRCA.

44. I have already explained to you how you should approach the third element above.

45. There is no dispute regarding the fourth element, that is the fact that the second accused was a public servant employed at FRCA during the time material to this case.

46. To prove the offence under section 4(2)(a) of the Bribery Promulgation which is the offence the second accused is charged with on the second and the fourth counts the prosecution should prove beyond reasonable doubt that;

- a) the accused;
- b) being a public servant;

- c) accepted an advantage;
- d) on account of his performing any act in his capacity as a public servant.

47. There is no dispute regarding the first two elements above.
48. I have explained to you what an advantage is. A person accepts an advantage if he, directly or indirectly takes, receives or obtains, or agrees to take, receive or obtain any advantage, whether for himself or for any other person.
49. The fourth element above involves the state of mind of the second accused. As I have explained in relation to the offence under section 4(1) of the Bribery Promulgation, you should deduce the state of mind of the second accused taking into account all the circumstances involving the accepting of the advantage including the nature of the advantage and the relationship between the first accused and the second accused when you consider this element. You should be satisfied beyond reasonable doubt that the advantage was accepted on account of performing any act in the second accused's capacity as a public servant.
50. When you consider the charges against the second accused, you should remember that if it is proved that second accused accepted any advantage, believing or suspecting or having grounds to believe or suspect that the advantage was given on account of his doing any act, it shall be no defence that;
- (a) he did not actually have the power, right or opportunity so to do;
 - (b) he accepted the advantage without intending so to do; or
 - (c) he did not in fact so do.
51. It is a defence in respect of all the above offences that the accused had a lawful authority or a reasonable excuse to do what he did. However, the burden of proving this defence lies on the accused. That means if the elements of a particular offence have been proved beyond reasonable doubt by the prosecution, it is up to the accused to prove on a balance of probability that he

had lawful authority or a reasonable excuse to offer or accept the advantage as the case may be. The accused has to satisfy you that it is more probable for him to have had lawful authority or a reasonable excuse to do what he did. You need not be sure. It is often compared to weighing the cases in a set of scales. If one side of the scale is weighed down even slightly than the other side, that is sufficient.


Analysis

52. As I have stated before the fact that the second accused was a public servant employed at the Fiji Revenue and Customs Authority which is a public body during the time material to this case is not disputed in this case.
53. The prosecution alleges that without reasonable excuse or lawful authority the vehicle HV 915 was offered as an advantage by the first accused to the second accused and the second accused accepted the said vehicle as an advantage during the period between 1st day of April 2015 and the 30th day of April 2015 on account of the second accused performing any act in his capacity as a public servant.
54. The defence says that the vehicle HV 915 was purchased by the second accused from the first accused and it was a commercial transaction. The defence points out that the second prosecution witness admitted that it was a commercial transaction.
55. Prosecution alleges that without reasonable excuse or lawful authority a loan of \$4000 was offered as an advantage by the first accused to the second accused and the second accused accepted that loan as an advantage on or about 19/07/15 on account of the second accused performing any act in his capacity as a public servant.

56. The defence admits that \$4000 was requested by the second accused from the first accused and that the first accused gave \$4000 to the second accused on or about 19/07/15. But the defence says that the said \$4000 was required for the purpose of obtaining the vehicle loan to pay for the vehicle HV 915 as the second accused needed to have it deposited in his ANZ account and submit a bank statement indicating that amount to BSP. It is further submitted that this \$4000 was the second accused's money kept as a deposit in the first accused's company and it was not a loan.
57. You must remember to assess the evidence for the prosecution and defence using the same yardstick. Remember that the burden of proving lawful authority or reasonable excuse on a balance of probability regarding a particular offence shifts to an accused only if the prosecution proves all elements of that offence beyond reasonable doubt.
58. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements against the accused beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, and you find that the burden of proving lawful authority or reasonable excuse on a balance of probability is not discharged by the accused then your proper opinion would be that the accused is 'guilty' of the offence.

59. Any re-directions?
60. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against each accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
61. Your possible opinion should as follows;
- 1st count (first accused) – guilty or not guilty
If not guilty
Alternative count to the 1st count – guilty or not guilty
- 2nd count (second accused) – guilty or not guilty
- 3rd count (first accused) – guilty or not guilty
If not guilty
Alternative count to the 3rd count – guilty or not guilty
- 4th count (second accused) – guilty or not guilty




Vincent S. Perera
JUDGE

Solicitors:

Fiji Independent Commission Against Corruption for the prosecution
Iqbal Khan & Associates for the 1st accused
Faktaufon & Bale Lawyers, Suva for the 2nd accused