

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
Judgment on : 20 April 2018

JUDGMENT

1. The accused persons are charged with 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.

2. The assessors returned with the unanimous opinion that both accused are not guilty of the offences they are charged with.
3. I direct myself in accordance with the summing up delivered to the assessors this morning and the evidence adduced during the trial.

4. To prove the offence of bribery under section 4(1)(a) of the Prevention of Bribery Promulgation No. 12 of 2007 ("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.
5. 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.
6. 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.
7. The burden of proving a defence of lawful authority or reasonable excuse on a balance of probability shifts to the accused once the prosecution proves the above elements in each offence beyond reasonable doubt.
8. It was the contention of the prosecution with regard to the element "on account of performing an act in the his (public servant's) capacity as a public servant" that if the question "would that gift have been given or could it have been

effectively solicited if the person in question were not the kind of public servant he in fact was?" is asked and the answer is 'of course not' then the advantage had been offered on account of the second accused's capacity as a public officer. In my view to accept that position would amount to creating a presumption which is not promulgated in the Bribery Promulgation.

9. The first count involves the vehicle HV 915. The second prosecution witness who was employed as a salesman in Ariana Used Cars and Spare Parts ("Ariana") under the first accused during the time material to this case and who is no longer employed there clearly admitted in his evidence that there was nothing unusual when the second accused paid a deposit and took the vehicle and it was a normal transaction between a buyer and a seller. It is pertinent to note that during re-examination, the second prosecution witness said that the first accused told him to call Mr. Sudeshwar Ram for the second time to check whether the loan can be approved before the vehicle was released to the second accused. The prosecution did not challenge this evidence.
10. Even though PE 09 bears the date 08/04/15 and had been issued in the month of July 2015 that is not sufficient to draw an irresistible inference that no deposit was paid on 02/04/15. The quotation PE 11 indicates that a deposit of \$4000 was given. The evidence in this case does not point out to any purpose that could have been achieved either by the first accused or the second accused by having PE 09 dated for 08/04/15. On the other hand I have no reason to doubt the evidence of the first accused that he wrote the date the second accused told him as he could not remember the date and the evidence of the second accused that he gave that date because at that time he thought that was the correct date the deposit was paid.
11. Therefore the evidence does not suggest that the vehicle HV 915 was given by the first accused as a gift to the second accused. However, it would still come within the definition of an "advantage" as the registering of the vehicle under the second accused's name and handing over same without the payment of the

total price and without any sales and purchase agreement, can be regarded as a service or a favour the first accused provided for the second accused. However, the entirety of the evidence does not establish beyond reasonable doubt that the said advantage was offered on account of the second accused performing any act in his capacity as a public servant or this was a 'keeping sweet' situation as vehemently argued by the prosecution. The first accused's admissions to the effect that he did not do anything to regain possession of the vehicle in question because he did not want to have problems with the authorities cannot be regarded as an admission that he offered the advantage to keep the situation sweet.

12. On the other hand, especially given the evidence of the second prosecution witness that Ariana used to handover vehicles to customers of good standing upon receiving a deposit, I find that it is more probable that the first accused considered this as a commercial transaction and he had a reasonable excuse to provide this service or favour to the second accused.
13. Therefore, I would agree with the unanimous opinion of the assessors that the first accused is not guilty of the first count.
14. With regard to the alternative count to the first count though I am satisfied that the first accused was a person who had dealings with FRCA within the meaning of section 8(2) of the Bribery Promulgation, given my above finding regarding the reasonable excuse the first accused had, I also find that the first accused is not guilty of the said alternative count.
15. In relation to the second count which is against the second accused, though I would accept that he did accept an advantage in line with my findings above, given the totality of the evidence, I am not satisfied that it has been established beyond reasonable doubt that he accepted it on account of his performing any act in his capacity as a public servant. Therefore, I agree with the unanimous


opinion of the assessors that the second accused is not guilty of the second count.

16. The third and fourth counts involves the \$4000 the second accused obtained from the first accused in order to have his loan application processed. I cannot agree with the argument of the defence that the said \$4000 the second accused obtained is the second accused's money and it was not a loan. It was in deed a loan. Evidence of the third prosecution witness does not suggest that he requested the second accused to bring the deposit the second accused paid to the first accused. On the contrary the said witness said the second accused was not required to pay \$4,000 to the bank as deposit as it had been paid to the car dealer. However, it can be reasonably assumed from the evidence that the second accused needed to show that he had funds in his bank account in order to have the loan approved. Therefore the \$4000 the second accused obtained from the first accused had nothing to do with the deposit the second accused paid on 02/04/15 and it was clearly an advantage.
17. However, as far as the first accused was concerned the second accused wanted \$4000 to deposit in the second accused's bank in order to have the loan approved. Obviously, he was interested in this loan being approved as it was money due to his company. Therefore, a reasonable inference cannot be drawn from the evidence led in this case that the aforementioned advantage was provided on account of the second accused performing any act in his capacity as a public servant. The fact that this advantage was given for the purpose of securing the aforementioned loan in my view is a reasonable excuse for the first accused given the nature of evidence in this case. Therefore, I agree with the unanimous opinion of the assessors that the first accused is not guilty of the third count and also of the alternative count to the third count.
18. In relation to the fourth count, though I would reject the evidence of the second accused that he requested his \$4000 deposit from the first accused on the instructions of the third prosecution witness, I am not satisfied beyond

reasonable doubt that he received the \$4000 loan as an advantage on account of his performing any act in his capacity as a public servant. It can be reasonably inferred that what went through his mind when he requested and obtained that \$4000 loan was to secure the loan from BSP in order to pay for the vehicle. Therefore, I agree with the unanimous opinion of the assessors that the second accused is not guilty of the fourth count.

19. In this case, the prosecution failed to adduce evidence to establish beyond reasonable doubt the case that was expounded during the opening address and also to an extent during the closing address.
20. In the result, I find the first accused not guilty of the first and third counts and not guilty of the alternative counts. I find the second accused not guilty of the second and fourth counts.
21. Both accused acquitted accordingly.




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