

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 48 OF 2017

BETWEEN: **FIJI INDEPENDENT COMMISSION** **APPELLANT**
 AGAINST CORRUPTION ("FICAC")

A N D: **SANITA LAQENISICI** **RESPONDENT**

Counsel: Mr. R. Aslam with Ms. S. Datt for the Appellant
 Ms. L. Manulevu for the Respondent

Date of Hearing: 30th May 2018

Date of Judgment: 29th August 2018

JUDGMENT

Introduction

1. The Respondent and another person had been charged with three counts of Bribery, contrary to Section 4 (2) (a) of the Prevention of Bribery Act. The particulars of the offences are that:

FIRST COUNT

Statement of offence (a)

BRIBERY: *Contrary to Section 4 (2) (a) of the Prevention of Bribery
Promulgation No. 12 of 2017.*

Particulars of the Offence (b)

SANITA LAQENISICI AND ILISONI TADAU on or about the 12th day of February 2014 at Suva in the Central Division whilst being public servants namely, Police Constable and a Corporal respectively of the Fiji Police Force without lawful authority or reasonable excuse accepted an advantage of FJ\$100 from Avinesh Kumar on account of performing an act in their capacity as public servants namely to release the mobile phone held in their custody to Avinesh Kumar.

SECOND COUNT

Statement of offence (a)

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

Particulars of the Offence (b)

ILISONI TADAU on or about the 13th day of February 2014 at Suva in the Central Division being public servant namely, a Corporal of the Fiji Police Force without lawful authority or reasonable excuse solicited an advantage of FJ\$200 from Avinesh Kumar in lieu of his mobile phone, on account of abstaining from performing an act in his capacity as a public servant namely not taking Avinesh Kumar into police custody.

THIRD COUNT

Statement of offence (a)

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

Particulars of the Offence (b)

SANITA LAQENISICI on or about the 15th day of February 2014 at Suva in the Central Division being public servant namely, a Police Constable of the Fiji Police Force without lawful authority or reasonable excuse

accepted an advantage of FJ\$100 from Avinesh Kumar on account of his abstaining from performing an act in his capacity as public servant namely by not interfering with the affairs of the said Avinesh Kumar.

2. The respondent and his co-accused pleaded not guilty for these offences. Hence, the matter proceeded to hearing. During the course of the hearing, the prosecution has presented evidence of five witnesses. They are, the complainant Mr. Avinesh Kumar, Ms. Sonam Chand, Mr. Netani Vulakoro, DC. Mosese Naiova and Mr. Maika Rauqera. The statement made to the police by Mr. Seamus Chang was tendered in evidence with the consent of both parties.
3. Having heard the submissions made by the parties, the learned Magistrate, at the end of the prosecution's case, has ruled that the prosecution has failed to make a case against the respondent and his co-accused in respect of the first and second count. The respondent and his co-accused were acquitted from the first and second count accordingly. Subsequently, the learned Magistrate had invited the respondent to present his defence in respect of the third count. The respondent gave evidence for his defence. The learned Magistrate in his judgment dated 31st of October 2017, found the respondent not guilty for this offence of Bribery, contrary to Section 4 (2) (a) of the Prevention of Bribery Act and acquitted him from the same accordingly.

Grounds of Appeal

4. Aggrieved with the said judgment, the appellant files this appeal on the following grounds:
 - i) *That the Learned Magistrate erred in law by failing to consider the Section 2 of the Prevention of Bribery Act properly which explicitly states that an 'advantage' covers any form of 'loan'.*
 - ii) *That the Learned Magistrate erred in law and fact at Paragraph 27 by stating that that the said 'advantage' obtained by the Accused was simply a*

monetary advantage but with the intention of paying back PW-1 as the receipt of money by the Accused was a 'loan'.

- iii) That the Learned Magistrate erred in law by not following the essential tests stated in the case law referred to by Prosecution in analyzing the elements of offence.*
- iv) That the Learned Magistrate erred in law by failing to accurately address the section 11 of the Prevention of Bribery Act at the No Case To Answer ruling and the Judgment.*
- v) That the Learned Magistrate erred in law and fact by considering hypothetical facts at Paragraph 29 which were not adduced in evidence by the Accused or any other party and based his analysis on those hypothetical facts.*
- vi) That the Learned Magistrate erred in law and fact by failing to analyze the direct and the circumstantial evidence of Prosecution objectively in its entirety.*
- vii) That the Learned Magistrate erred in law and fact at Paragraph 27 by stating that the Accused person's action was a breach of the Fiji Police Force Code of Ethics as opposed to the current charge of Bribery, thereby being mistaken as to the charge.*
- viii) That the Learned Magistrate erred in law by being mistaken of the role of the adjudicator as a magistrate in criticizing the investigations in not investigating further about the defence of 'loan' whereas there was no such necessity in law to conduct such further investigation.*

The Law

5. The Fiji Court of Appeal in Prasad v State [2002] FJCA 85; AAU0052U.1999S (31 May 2002) has discussed the scope of the appeal from the Magistrates' Court to the High Court, where it was held that:

"Unlike the appeal to this Court, which is restricted to questions of law only, the appeal from the Magistrates' Court to the High Court may be on a

matter of fact as well as on a matter of law. (Section 308(3) Criminal Procedure Code.) And the appeal is by way of rehearing, on the record of the proceedings before the Magistrate. The learned Judge was entitled to review the whole of the evidence adduced before the Magistrate, and to test the adequacy of the findings made by the Magistrate against the evidence adduced. The learned Judge reached the conclusion that the acquittal was against the weight of evidence, and the verdict was unreasonable having regard to the evidence. He concluded that the Magistrate could not have reached the conclusion that he did, if he had properly directed himself. The learned Judge was entitled to find, as he did, that the misconception in the learned Magistrate's reasoning and the doubt that he entertained arose from the error in the date in the charge"

6. For the convenience, I shall summarise the above stated grounds of appeal as follows:
 - i) The learned Magistrate has failed to properly understand the main elements of the offence of Bribery as charged, (ground 1, 2)
 - ii) The verdict of acquittal of the learned Magistrate does not support the evidence adduced in the hearing,
 - iii) The learned Magistrate erred in law by criticising the investigators in his judgment.

First Ground

7. The main contention of the appellant in respect of the first ground is founded on the argument that the learned Magistrate has failed to properly comprehend the definition of an advantage as stipulated under Section 2 of the Prevention of Bribery Act.

8. Section 2 (1) of the Prevention of Bribery Act has defined an advantage as:

"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).*

9. Accordingly, a loan also falls within the definition of an advantage pursuant to Section 2 (1) (a) of the Prevention of Bribery Act.

10. Section 4 (2) (a) of the Act states that:

"Any public servant who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his -

- a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;"*

11. Accordingly, the main elements of the offence of Bribery as charged are that:

- i) The accused, who is a public servant,
- ii) Without lawful authority or reasonable excuse,
- iii) Solicits or accepts,
- iv) Any advantage,
- v) As an inducement to or rewards for or otherwise on account of
- vi) His performing or abstaining from performing or having performed or abstained from performing any act in his capacity as a public servant.

12. Having referred to Sections 2 and 4 of the Prevention of Bribery Act, the learned Magistrate has correctly identified the main elements of the offence in paragraph 6 of his judgment as follows.

- i) *Any public servant who, whether in Fiji or elsewhere, (The accused) ,*
- ii) *Without lawful authority or reasonable excuse,*
- iii) *Solicits or accepts any advantage,*
- iv) *As an inducement to or rewards for or otherwise on account of his,*
- v) *performing or abstaining from performing or having performed or abstained from performing, any act in his capacity as a public servant,*

13. In paragraph 18 of the judgment, the learned Magistrate has found that a loan falls within the definition of advantage as stipulated under Section 2 of the Prevention of Bribery Act. The learned Magistrate has held that:

"It is clear from these agreed facts that the acceptance of an advantage of a \$100 (a monetary advantage) from the complainant by the first accused is already established. Although the position of the first accused in his cross examination is that this money was given as a loan, the interpretation given

to the term "advantage" as per section 2 of the Prevention of Bribery Promulgation includes a "loan" as well."

14. The learned Magistrate has further held in paragraph 19 of his judgment that:

"In view of the findings at the no case to answer stage and the agreed facts for the accused, the remaining elements for the prosecution to establish in respect of this count was as follows, that the accused accepted the \$100 advantage by the PW1;

- i) without lawful authority or reasonable excuse,*
- ii) As an inducement to or rewards for or otherwise on account of his,*
- iii) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant."*

15. In view of the findings of the learned Magistrate in paragraphs 18 and 19 of the judgment, I find that the learned Magistrate has accurately considered the fact that a loan falls within the scope of an advantage.

16. However, in his conclusion, the learned Magistrate had found that this transaction of \$100 between the complainant and the respondent was merely a loan and it was not given as an inducement to or reward for or otherwise on account of performing any of the act as stipulated under Section 4 (2) (a) of the Act.

Second Ground

17. I now proceed to determine whether the verdict of not guilty given by the learned Magistrate in his judgment is properly supported by the evidence adduced during the course of the hearing.
18. Before I proceed to review the evidence adduced during the course of the hearing, it would be prudent to understand the definition of *"as an inducement to or rewards for or*

otherwise on account of performing any of the act” as stipulated under Section 4 (2) (a) of the Act.

19. The learned counsel for the Appellant and the respondent in their respective written and oral submissions relied on some of the leading case authorities from the jurisdiction of Hong Kong. The Prevention of Bribery Act of Fiji is a verbatim resemblance of the Prevention of Bribery Act of Hong Kong. The learned counsel for the Appellant in his oral submissions stated that Fiji has actually adopted the Hong Kong model, including the Prevention of Bribery Act of Hong Kong in order to expand the domain of bribery and corruption laws in Fiji. Therefore, I find the definition given by the Court of Appeal of Hong Kong in Attorney General v Chung Fat-Ming (1978) HKLR 480 in respect of section 4 (2) of the Prevention of Bribery Act of Hong Kong can safely be adopted in order to define the scope of “as an inducement to or rewards for or otherwise on account of performing any of act as stipulated under Section 4 (2) (a), (b), and (c) of the Prevention of Bribery Act of Fiji.
20. In **Attorney General v Chung Fat-Ming (supra)** the Court of Appeal of Hong Kong was invited to determine the scope of Section 4 (2) (a) of the Act, where McMullin J found that:

“The distinction which we are invited to consider is a distinction between the solicitation or acceptance of an advantage which is clearly identified by the evidence as directly related to the performance, or abstention from performance, of some particular act within the capacity of the given public servant in the performance of his duty, as against the solicitation, or acceptance, of an advantage which cannot be shown to be related to any specific incident of performance or non-performance of any such act, and which yet can be seen to be related to the nature and performance of his office generally. To put the matter more concretely the distinction which has been argued before us is between the advantage which is seen to be solicited or accepted as a ‘quid pro quo’ for some particular act or abstention

identifiable as to place and time on the one hand and, on the other, an advantage solicited or accepted as a general earnest of good relations- the "keeping sweet" situation."

21. McMullin J in **Attorney General v Chung Fat-Ming (supra)** has further elaborated holding on the view that advantage as an inducement can be regarded as prospective and an advantage as a reward could be regarded as retrospective, while "otherwise on account of" could be regarded as one having no express purpose but which would be susceptible of proof by showing of mere solicitation itself coupled with proof of the relative positions of the parties. McMullin J expounded that:

I think it is evident that the overall intention was to cast the net very widely in order to draw as many malversation as possible within the area of control. I have tried to read subsection 2 as providing for three quite different sorts of situation in the following way: the solicitation of an advantage as an "inducement" to be regarded as prospective, that is to say as looking forward to the performance, or non-performance, of some identified and agreed act or abstention, or series of acts or abstentions, in the future; the solicitation of a "reward" to be regarded as retrospective, that is to say as looking back to some already accomplished act or abstention, or series of acts or abstentions; a solicitation "otherwise on account of" the many acts and abstentions described in paras. (a), (b) and (c) to be regarded as one having no express purpose but which would be susceptible of proof by the showing of the mere solicitation itself coupled with proof of the relative positions of the parties. Perhaps this symmetry of allocation is too contrived, and I am by no means sure that I have correctly understood the distinction which was in the mind of the Legislature in using the third of those three expressions. But this interpretation has at any rate the merit of saving a special function for those words, over and above the function served by the earlier two expressions regarded as covering proposed and completed improprieties and in the end I am not persuaded that I should relinquish my earlier opinion, obiter though it was. Moreover,

the third expression in the formula seems to me to provide most exactly for the "keeping sweet" situation in its most tenuous and insidious form. Whereas "inducement" and "reward" are terms apt to cover situations where positive breach of duty can be proved, directly or by necessary inference, there will be cases in which nothing more can be shown than an unexplained, and prima facie inexplicable, gratification linked with the incumbency of a particular office although no malfeasance or nonfeasance can be proved. In that case the solicitation or gratification may reasonably be said to be "on account of" the performance by the official of "an act" within the capacity as a public servant even where that act is nothing more than the performance by him of his normal duty. I understand the phrase: "an act" to be a generic denotation of any and all acts which may fall within the scope of such duties and not to be limited to the showing of some specific act within that range. "The solicitation of an advantage as an inducement "

22. Moreover, McMullin J in **Attorney General v Chung Fat-Ming (supra)** has explained the reasons for such a wider definition for Section 4 (2) of the Act in a comprehensive manner, where his Lordship held that:

"What a public servant is entitled to in return for the performance of his duty is his official wage with whatever allowances and perquisites that may include – and nothing more. It is corrupt to accept a gift for carrying out one's public duty even if one intends to carry it out properly; even if one has carried it out properly. The evil of so doing is that the other party, and any other person who may be aware of the transaction, will not know or will not believe in the purity of one's intention to perform one's duty properly whether gratified or not. By any such act the confidence which private citizens ought to be able to repose in the impartial performance of their duty by public officials is eroded. It is salutary to remember that the great Chancellor Bocon, expelled from office and confined – though briefly – to

the Tower for taking bribes, maintained throughout that he had never permitted his conduct in office to be influenced by such gifts and yet he pleaded guilty to bribery and did not attempt to defend the practice although it is recorded that in several instances he actually had given judgment against persons from whom he had received such gifts. It may be asked: where, in this latter case is the "quid pro quo"? It is true that the notion is attenuated but nevertheless I think that it can be said to persist if only in the form of a warm glow in the mind of the giver, or solicitee, occasioned by the feeling, justified or not, that he has won a friend in office."

23. Accordingly, the court has to take into consideration the nature of the relationship and the nature of the duties of the public servant if a public servant solicits or accepts any advantage without any *quid pro quo* for some particular performance or abstention. Such situation falls within the scope of "otherwise on account of" as stipulated under Section 4 (2) of the Prevention of Bribery Act.
24. Leonard J in **Attorney General v Chung Fat-Ming** (*supra*) held that:

"The learned judge does not appear to have had drawn to his attention the fact that the word "corruptly" had been omitted from the present section 4 and, I think, obviously deliberately. The Crown does not have to prove "corruption" in strictu sensu. Again the present section 4 does not prohibit the acceptance of a quid pro quo. It forbids the acceptance of an advantage on account of performance of an act in the capacity of a public servant. In KONG Kam-piu & Another v. The Queen (3) in considering the culpability of a gift given to or accepted by a government servant to abstain from a proposed course of action, I posed as the test 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?" This test was approved by the Full Court in SO Sun-leung & Another v. The Queen (4).

Both cases were cases in which an advantage had been accepted. In a case of solicitation pure and simple where no advantage has been offered or accepted. I think that I might more accurately (or pedantically?) have framed the test to read:

“Could that advantage have been effectively solicited if the person in question was not the kind of public servant who could have performed some act as a public servant to the benefit of the person solicited.”

25. The learned Magistrate in paragraphs 24 and 25 of the Judgment has referred to and reproduced the findings of the ruling of No Case to Answer dated 29th of May 2017. In view of the above paragraphs 24 and 25 of the judgment, it appears that the learned Magistrate has already accepted the evidence of the complainant as credible and reliable in his ruling made pursuant to Section 178 of the Criminal Procedure Act. I do not contemplate at this stage, to venture into discuss the correct test of no case to answer in the Magistrates’ Court pursuant to Section 178 of the Criminal Procedure Act, since it is not the main contentious issue in this appeal.
26. On contrary to his own findings in paragraphs 24 and 25 of the judgment, the learned Magistrate in paragraph 14 of his judgment has reiterated his finding which he had made in his ruling of No Case to Answer, in respect of the demeanour and deportment of the complainant, as follows:
 - i) *Avoided maintaining any eye contact with the court when answering most of the questions in cross examination. He was most of the time looking down or at the back when the court had already reminded him that he is answering to court and not to the counsel at his back.*
 - ii) *The evidence of the witness was self-contradictory on many instances and when confronted the witness was adamant either to state he is not sure or without answering the question, to re-question the counsel on the authenticity and validity of the question paused,*

iii) It was strongly observed by court that this witness was trying his best to evade questions during the cross examination,

iv) That this witness created quite a suspicion on himself as per the manner and tone of his answers."

27. In view of these two contrasting conclusions about the evidence of the complainant, it is not clear whether the learned Magistrate has taken into consideration the above mentioned adverse demeanours and deportment of the complainant, when he made his conclusion that the evidence given by the complainant is reliable and credible.
28. Be that as it may, I now take my attention to determine whether the conclusion of the learned Magistrate in respect of the demeanours and deportments of the complainant are correctly supported by the evidence adduced during the course of the hearing.
29. In paragraph 13 (ii) of the Judgment, the learned Magistrate has merely stated that the evidence of the complainant was self-contradictory on many instances. However, the learned Magistrate has not specifically identified or discussed about any of those alleged instances of contradictions made by the complainant in his evidence.
30. Having carefully considered the evidence given by the complainant as it has been recorded in the record of the proceedings in the Magistrates' Court , I do not find that complainant has contradicted any material facts which directly relevant to the main dispute in this matter. He has specifically stated that, it was the respondent who called him on the 15th of February 2014, asking for \$100 in order to stop all the harassment that he had been through.
31. I find that the complainant was not sure about the numbers of call, who made them and what time they were made on the 15th of February 2014. However, he later confirmed that the respondent made two phone calls to his mobile phone. Moreover, he had also made two

phone calls to the respondent in order to clarify the location of the meeting. The numbers and the time of those calls were not disputed by the parties as the statement of Mr. Seamus Chang was tendered in evidence by consent of the parties.

32. The evidence given by the complainant in relation to the incidents that took place on the 12th of February 2014 is being corroborated by the evidence of Mr. Netani and DC Mosese. The learned Magistrate in paragraphs 15 and 16 of his judgment has found Mr. Netani and DC Mosese as honest and truthful witnesses. The complainant in his evidence specifically stated that he did not engage in any conversation with the respondent about the possible business propositions, while they were traveling to Tamavua in the police vehicle. Mr. Netani, who was seated next to the complainant and the respondent, on the back seat of the police vehicle, said that he did not hear any conversation between the complainant and the respondent when they were traveling to Tamavua in the vehicle.
33. The learned Magistrate has further found in paragraph 13 (ii) of the judgment, that the complainant was adamant when he was confronted. The complainant, either said that he was not sure or did not answer to the questions. The learned Magistrate had further found that the court has strongly observed that the complainant tried his best to evade the questions during the cross examination.
34. Having carefully considered the evidence of the complainant as recorded in the record of the proceedings of the hearing, I do not find any instances, where a question put to the complainant during cross examination had gone unanswered.
35. I find that in few instances the complainant had answered, stating that he is not sure. (**vide pages 46, 49, 50, 52, and 53 of the record of the proceedings of the Magistrate's court**). Except of one of those instances, all other instances, where the complainant had given such an answer, are related to the issue of making of two telephone calls to the respondent by the complainant on the 15th of February 2014. The complainant had said that he was not sure whether he made a call or he received calls from the respondent. However, the numbers and the time of making calls to the respondent by the complainant

and *vice versa* were not disputed by the parties during the hearing. Therefore, I find that the answers given by the complainant to the effect that he was not sure cannot be construed as an evasiveness of the complainant.

36. Moreover, the learned Magistrate has found that that the complainant avoided in maintaining any eye contact with the court when answering most of the questions in cross examination. The complainant was looking down or at back most of the time, even though the court had reminded him that he was answering to the court and not to the counsel. (vide paragraph 13 of the judgment).

37. It has been discussed in Cross on Evidence, 10th edition, para 3285, at peg 238, that;

"In assessing the credibility of witnesses and the weight of particular items of evidence, the trier of fact is entitled to take into account 'such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence'. That is the case for expert witness as well as non-experts. The law assumes that if a witness gives evidence in a forthright, apparently, convincing manner and is unshaken in cross examination, the testimony may be relied on more than if it had proceeded from a halting and prevaricating witness of unsatisfactory demeanour. This assumption is not regarded by all critics as sound, but it underlies rules which make it relatively difficult to appeal against apparently demeanour-based findings of facts."

38. Accordingly, the court is allowed to take into consideration the demeanour and the deportment of the witness when it considers the credibility and reliability of the witness and his or her evidence. However, the demeanour only assists to form an assumption and the court need to take all other relevant factors into consideration in order to conclude its determination on the credibility and reliability of the witness and his or her evidence. Moreover, the court must take into consideration that some witnesses are not used in giving evidence in court and may find the different environment in the court house distracting.

The mere fact that the witness gave evidence without keeping his eye contact with the bench, does not automatically make his evidence unreliable and discredited. I am mindful of the fact that this court does not have the benefit of observing and hearing the vocal sound of the complainant. The typed transcript does not carry the vocal sounds but only the printed version of the words uttered by the complainant in his evidence.

39. Having taken into consideration the above discussed reasons, I find the conclusion of the learned Magistrate about the demeanour and the deportment of the complainant is based upon a misguided assessment or evaluation of the evidence presented in the hearing.
40. The learned Magistrate in paragraphs 20 and 23 of his judgment has accepted the evidence of the respondent as reliable and acted upon it. In doing that the learned Magistrate has made the following observations, that:
 - i) *The accused claims he had obtained a loan from the PW 1,*
 - ii) *The object to obtain the same was to send the money to his children, who was residing and schooling in Ba at the time,*
 - iii) *He was desperate to get the money as the children was in need and his pay was not received at that time,*
 - iv) *The accused was on interdiction at the time of this incident and that he was only receiving half pay,*
 - v) *He has said the same in his caution interview which is also in evidence for the prosecution's case,*
 - vi) *The accused was sometimes evasive in answering the questions posed to him in the cross examination and has also contradicted himself on certain facts,*
 - vii) *Though this court has observed that the accused had been at times evasive in answering, I do not find him to have totally evaded the cross examination,*
 - viii) *Neither do the court finds the contradictions in the evidence of the accused to run to the root of his evidence and discredited the evidence*

as a whole,

- ix) The accused had been consistent as to his version of the events, when his evidence is considered overall with the facts in the caution interview statement of the accused,*
- x) Accordingly, in overall consideration of the accused's evidence, I do not find the evidence of the accused to have been totally discredited,*
- xi) Court therefore find the evidence of the accused, considered wholly, is reliable and can be acted upon.*

- 41. The learned Magistrate has not specified any instances or the evidence of the respondent which he finds as contradictions. However, he has concluded that such contradictions have not gone into the root of the version given by the respondent in his evidence. Therefore, such contradictions have not discredited the evidence of the respondent.
- 42. I now take my attention to identify the contradictions made by the respondent in his evidence.
- 43. The respondent in his evidence said that he received information from one of his informers that a group of people were planning to rob one of the business complexes in suburb of Suva. He had then called a police vehicle to go and check the information. The police vehicle which was driven by DC Mosese came and picked him in the morning of 12th of February 2014. Instead of going to check this information, the police officers in the vehicle had gone to investigate the matter involved with the complainant. The complainant was also in the vehicle when the respondent got into it. The respondent was present throughout the investigation relating to the complainant on the 12th of February 2014. The respondent knew the complainant as he had questioned the complainant previously in 2008 in relation to a case of robbery. He knew the complainant had a history of criminal background. While they were traveling in the vehicle, the complainant had proposed to the respondent about a business proposition. After investigating the matter relating to the complainant, the police vehicle had dropped the complainant at his place and then the respondent at his house without proceeding to investigate the information received by the

respondent regarding the planned robbery. This information of planned robbery has never been investigated by the police thereafter.

44. On the 15th of February 2014, the respondent wanted to send \$100 to his children who were studying in Rakiraki. He had no money with him, therefore, he had tried to contact two of his friends, but failed to get them through. The respondent had then called the complainant. The respondent in his evidence had said that the complainant told him on the 12th of February 2014, that he could help him if the respondent helps the complainant in his business. He had then requested the complainant \$100 as a loan. The respondent said that he had planned to send the said money with the driver of the bus, which was scheduled to leave to Rakiraki from Suva at 6 .p.m.
45. According to the agreed facts filed by the parties, it has been agreed by the appellant and the respondent that the respondent had given a call to the mobile phone of the complainant at 6.05 p.m on the 15th of February 2014, asking the complainant to meet him near Samabula Mosque.
46. The above admitted fact has been tendered in court pursuant to Section 135 (2) of the Criminal Procedure Act. The court is allowed to consider such agreed facts as sufficiently proven facts. (**vide Section 135 (1) of the Criminal Procedure Act**).
47. Contradicting his own admission made pursuant to Section 135 of the Criminal Procedure Act, the respondent in his evidence has said that it was the complainant who suggested to meet him near Samabula Mosque. The respondent had requested the complainant to come to his house, but the complainant had refused it, saying that there may be other police officers around.
48. Moreover, I find that the learned counsel for the respondent had not put this preposition to the complainant to make his comments during the cross examination. I find this contradiction goes to the main root of the version given by the respondent.

49. The respondent had claimed that he wanted \$100 to send it to his children in Rakiraki. According to his evidence the respondent had said that he was planning to send that money with the driver of the bus that was scheduled to leave to Rakiraki from Suva at 6 p.m. That was the last bus going to Rakiraki.
50. According to the evidence given by the respondent, that he had called and told the complainant that the bus going to Rakiraki will be leaving at 6 p.m. and he wants the money before that. That was second call made to the complainant by the respondent in the evening of 15th of February 2014. According to the agreed facts and also to the statement of Mr. Seamus Chang, the respondent had made only two calls to the complainant on the 15th of February 2014. The second call of the respondent to the complainant had made at 6.05 p.m. However, the respondent in his evidence had claimed that he made this second call to inform the complainant that the bus will be leaving at 6 p.m. and he wants the money before that. **(vide pages 184 and 185 of the Record of the Proceeding)**. Once again the respondent had contradicted his evidence with the agreed facts and the statement of Mr. Chang, which was tendered in evidence by consent of both parties. I find these contradictions go to the very root of the version given by the respondent and his credibility.
51. According to the statement of Mr. Chang, the complainant had made his second call to the respondent at 6.25 pm. The complainant in his evidence said that he made this call to clarify the location of the meeting. In contrary, the respondent in his evidence said that the complainant made this second call to inform him that the complainant can meet him near the mosque and not at the house of the respondent. Regardless of these contradicting versions given by the respondent and the complainant, it is clear that this alleged transaction had taken place after 6.25 p.m., that was 25 minutes after the last bus to Rakiraki was scheduled to leave. Even after collecting the money from the complainant, the respondent had not straight away gone to the bus stand. Instead, he had gone back to his house. The FICAC officers found the respondent at his house.
52. These contradictions go to the very root of the respondent's claim that this alleged transaction was a loan that he asked for, from the complainant as he wanted to send money

to his children in Rakiraki. It appears that the learned Magistrate has not taken into consideration any of these contradictions in order to determine the credibility and reliability of the evidence given by the respondent.

53. Pursuant to Section 24 of the Prevention of Bribery Act and Sections 60 and 61 of the Crimes Act, the respondent has the legal burden to prove that he had a lawful authority or reasonable excuse to obtain this advantage from the complainant. Pursuant to Section 61 of the Crimes Act, the respondent has to discharge this legal burden on the balance of probability.
54. The respondent claims that he obtained this \$100 merely as a loan and it was not as an inducement for or a reward or otherwise in account of performing or not performing any act specified under Section 4 (2) (a) of the Prevention of Bribery Act. As mentioned above, the respondent has the legal burden of proving it on balance of probability. Pursuant to Section 57 (2) of the Crimes Act, the prosecution has no legal burden of disproving the claim of the respondent. Moreover, the prosecution case was founded on the allegation that the respondent demanded \$100 in order to stop the interference of the police with the affairs of the complainant. Therefore, I do not find any merit in the conclusion made by the learned Magistrate in paragraphs 26 and 27, stating that the prosecution has failed to provide any evidence to establish that the respondent had no need to obtain a loan from the complainant. The learned Magistrate has stated in paragraph 26 that:

"The flow with the prosecution's submissions is that there is no evidence submitted by the prosecution knowing very well the fact that the accused had taken the same position in his caution interview, that the accused had no need to have obtained a loan from the PW1 and that there were no reasonable circumstances that existed for this money to have been received by accused as a loan."

55. In paragraph 27 the learned Magistrate has held that:

"It is to be noted that the prosecution had the benefit of the version of the Accused as given in his caution interview. It was clearly open for the prosecution to have further investigated the version of the Accused. If that was done it could have cleared away the doubts on the purpose or the object of the receipt of the money and the underlying circumstances under which the money was received by the Accused. However, this was not done so and no explanation is tendered by the prosecution for their failure for not doing so. Thus the doubt remains."

56. Even though, the learned Magistrate has decided to accept the version of the respondent, the learned Magistrate is still required to take into consideration the nature of the relationship that the respondent had with the complainant. The respondent in his own evidence had admitted that he came to know about the complainant when he questioned the complainant in 2008 in relation to a case of robbery. He had then met the complainant only on the 12th of February 2014, when the police was conducting an investigation relating to some of the mobile phones that were found in possession of the complainant.
57. The learned Magistrate in paragraphs 15 and 16, has accepted Mr. Netani and DC Mosese as honest and truthful witnesses. Both of these witnesses have stated that they did not hear any conversation between the respondent and the complainant while they were traveling to Tamavua in the police vehicle on the 12th of February 2014. The learned Magistrate has not stated whether he believes the said evidence of Mr. Netani and DC Mosese. It appears that the learned Magistrate has not taken these evidence into consideration, when he consider the claim of the respondent, that he had a conversation with the complainant regarding a business proposition, while they were traveling to Tamavua in the police vehicle.
58. In paragraph 26 of the judgment, the learned Magistrate has given the reasons for his conclusion that this transaction was merely a loan, where he stated that:

"The Accused was interdicted from the police force during the time of this incident. He had met the PW-1, about two days back from the alleged incident on the 15/02/2014. The circumstances under which the Accused had met the PW-1 is such he should have had a knowledge that the PW-1 may be a potential suspect or a witness in an ongoing investigation. The Accused had come to know from the PW-1 that he operates a business and that he repair mobile phones. The Accused was desperate to get money as he wanted it to be sent to his children in Ba. He was only receiving half pay through this period of time. The prosecution submits that under these circumstances the Accused took advantage of the circumstances and demanded a bribe from the PW-1, to keep the police officers away from PW-1. However, under the same circumstances, it is prudent to think, in the eyes of a reasonable man, that the Accused, who was desperately in need of money, may have taken advantage of the circumstances and would have asked for a loan, so that the PW-1, may not have refused it under the given circumstances. It is reasonable to think, in the shoes of a reasonable man, when in desperate need of money, a person would ask for a loan (if he is to do so) from a another, that he would believe, to have the most number of reasons not to refuse his request. The flow with the prosecution's submission is that there is no evidence submitted by the prosecution; knowing very well the fact that the Accused had taken the same position in his caution interview, that the Accused had no need to have obtained a loan from the PW-1 and that there were no reasonable circumstances that existed for this money to have been received by Accused as a loan. (underline is mine)."

59. In this paragraph the learned Magistrate has discussed the circumstances under which the respondent met the complainant on the 15th of February 2014. The learned Magistrate has accepted that the respondent had the knowledge that the complainant was a potential suspects or a witness in an ongoing investigation. Moreover, the respondent would have known that the complainant was running a business. The prosecution has submitted that

under these circumstances the respondent took the advantage by demanding a bribe from the complainant. The learned Magistrate had then suggested another possible scenario, stating that the respondent may have taken an advantage of the prevailing circumstances in order to ask for a loan as he was in a desperate need of money. The learned Magistrate has gone further and applied a reasonable person's test, stating that the accused who was in desperate need of money, may have taken advantage of the circumstances and would have asked for a loan from the complainant knowing that the complainant may not have refused it under the given circumstances as it is reasonable to think that a man in desperate need of money would ask for a loan from another, that he would believe to have the most number of reasons not to refuse his request for a loan.

60. The test adopted by the learned Magistrate is the very wrongful act that the legislation intends to prevent in Section 4 (2) (a) of the Prevention of Bribery Act. If the respondent took an advantage of the fact that the complainant was a potential suspect or a witnesses in an ongoing investigation, to ask for a loan, thinking that the complainant would not refuse his request for a loan due to the said circumstances, that constitute the offence of bribery as stipulated under Section 4 (2) (a) of the Prevention of Bribery Act. Instead of finding the respondent guilty, the learned Magistrate has taken into consideration this reason to find him not guilty for the offence of bribery.
61. Moreover, the learned Magistrate had found in paragraph 29 of the judgment, if the respondent was demanding a bribe and not a loan, he would have demanded a substantial amount of money instead of \$100. The learned Magistrate has stated that:

"If the Accused was not asking for a loan but was demanding a bribe from the PW-1, whom he knew to be in deep trouble with the police, it is then also doubtful why he would only settle from \$100.00. He could well have demanded a substantive amount from PW-1 considering the fact that the PW-1 was running a business."

62. There is no evidence adduced before the learned Magistrate to suggest that if a person is demanding a bribe, he must demand an amount that is above a certain level. It appears that the conclusion of the learned Magistrate is founded on some fictional speculations. I do not wish to make any further comment about the paragraph 29, as it is not founded on any evidential basis.
63. In view of the reasons discussed above, I find that the learned Magistrate has not properly taken into consideration the evidence presented before him. Thus, I find that the verdict of not guilty, given by the learned Magistrate in his judgment, does not support the evidence adduced in the hearing. Therefore, the verdict of not guilty has caused a substantial miscarriage of justice. Therefore, it is my considered option that the appeal against the judgment of the learned Magistrate should be allowed.

Third Ground

64. I now draw my attention to the third grounds, which is founded on the contention that the learned Magistrate has erroneously criticised the investigators in his judgment. This contention of the appellant is based upon the findings of the learned Magistrate in paragraph 28 of the judgment. I do not wish to discuss this issue in detail as I have already discussed about the paragraph 26 of the judgment above.

Re-Trial

65. Having concluded that a substantial miscarriage of justice has occurred in relation to the verdict of not guilty given by the learned Magistrate in his judgment dated 31st of October 2017, I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Act.
66. The Fiji Court of Appeal in Azamatula v State (2008) FJCA84; AAU0060.2006S (14 November 2008) held that the power of a High Court to order a retrial is discretionary and it must always be exercised judicially. The Fiji Court of Appeal held that:

"As was said by the Privy Council in Au Pui-kuen v Attorney-General of Hong Kong ([1980] AC 351) 'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also Ting James Henry v HKSAR [2007] HKCFA 71). The overriding consideration in the exercise of the power is the interests of justice (Aminiasi Katonivualiku v. The State (CAV 0001/1999S; 17 April 2003).

In the case of Au Pui-kuen the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Togara v. State (by Majority) [1990] FJCA 6)."

67. It appears that the prosecution case is mainly founded on the evidence of the complainant, Mr. Netani, DC Mosese, Mr. Chang and Mr. Maika Rauqera. The allegation is founded on a transaction which happened between the complainant and the respondent. Hence the evidence of the complainant is the main foundation of the case of the prosecution. Accordingly, I am satisfied that the prosecution has a quality and strong case against the respondent.

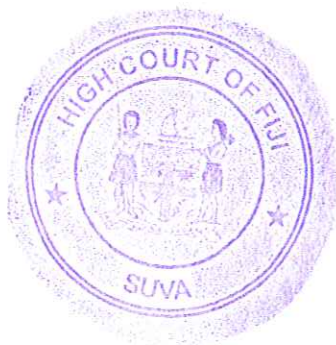
68. Having considered the reasons discussed above, it is my opinion that the strength of the prosecution case and the interest of justice have outweighed any prejudicial impact on the respondent if an order of retrial is granted. Hence, I find a re-trial against the respondent would serve the interest of justice. I would therefore order a re-trial.


Conclusion

69. The orders of the Court are:

- a) Appeal against the judgment of the learned Magistrate dated 31st of October 2017 is allowed,
- b) The judgment of the learned Magistrate dated 31st of October 2017 is set aside,
- c) An immediate re-trial is ordered before another Resident Magistrate,
- d) The case to be listed before the Chief Magistrate on the 4th of September 2018 to take appropriate steps for an immediate re-trial,

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




R.D.R.T. Rajasinghe
Judge

At Suva
29th August 2018

Solicitors

Fiji Independent Commission Against Corruption for the Appellant.
Office of the Legal Aid Commission for the Respondent.