

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 0015 of 2017**  
**[In the High Court at Suva Case No. HAA 11 of 2016]**  
**[In the Magistrates' court at Suva Criminal Case No.55 of 2014]**

**BETWEEN** : **RASEWAI NIMA**

**Appellant**

**AND** : **STATE**

**Respondent**

**Coram** : **Prematilaka, RJA**  
**Gamalath, JA**  
**Nawana, JA**

**Counsel** : **Mr. M. Fesaitu for the Appellant**  
: **Ms. J. Prasad for the Respondent**

**Date of Hearing** : **03 November 2022**

**Date of Judgment** : **24 November 2022**

## **JUDGMENT**

### **Prematilaka, RJA**

[1] The appellant had been charged in the Magistrates' Court at Suva with a single count of abuse of office contrary to section 139 of the Crimes Act No. 44 of 2009, committed on 22 August 2013 at Suva in the Central Division.

[2] At the end of the trial, the learned Magistrate had acquitted the appellant of the charge of abuse of office. However, acting on section 162 of the Criminal Procedure Act, 2009 the Magistrate had convicted him of obtaining financial advantage contrary to section 326 (1) of the Crimes Act No. 44 of 2009. The appellant had been sentenced on 17 May 2016 to 21 months of imprisonment suspended for a period of 03 years.

- [3] The appellant appealed against the conviction to the High Court and the learned High Court judge had dismissed the appeal. The appellant had then appealed to the Court of Appeal in terms of section 22 of the Court of Appeal Act. Thus, this is a second tier appeal against the conviction.
- [4] The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act. In a second-tier appeal under section 22 (1) of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also paragraph [11] of **Tabekusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017) and designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). It is therefore counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).
- [5] A sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].
- [6] The single ground of appeal urged on behalf of the appellant against the conviction is as follows:

**“Ground 01**

*The learned Appellate Judge erred in law in holding that obtaining a financial advantage is an alternative or lesser offence to abuse of office, when in fact, the offence of abuse of office does not have an alternative or lesser offence, as provided under section 162 of the Criminal Procedure Act.”*

- [7] The offence of abuse of office and obtaining a financial advantage are described in the Crimes Act, 2009 as follows:

**“Abuse of office**

*139. A person commits an indictable offence which is triable summarily if, being employed in the public service, the person does or directs to be*

*done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another. Penalty—10 years imprisonment*

*If the act is done or directed to be done for gain – Penalty -17 years imprisonment.*

*Obtaining financial advantage*

*326.—(1) A person commits a summary offence if he or she—*

- (a) engages in conduct; and*
- (b) as a result of that conduct, obtains a financial advantage for himself or herself from another person; and*
- (c) knows or believes that he or she is not eligible to receive that financial advantage.*

*Penalty — Imprisonment for 10 years.*

*(2) A person commits a summary offence if he or she —*

- (a) engages in conduct; and*
- (b) as a result of that conduct, obtains a financial advantage for another person from a third person; and*
- (c) knows or believes that the other person is not eligible to receive that financial advantage.*

*Penalty—Imprisonment for 10 years.*

*(3) For the purposes of sub-section (2), a person is taken to have obtained a financial advantage for another person if the first-mentioned person induces the third person to do something that results in the other person obtaining the financial advantage.”*

[8] Section 162 of the Crimes Act, 2009 dealing with lesser or alternative offences is as follows:

*“162. — (1) Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after due process for —*

- (a) the lesser offence of infanticide where the charge has been for murder of a child under the age of 12 months;*
- (b) the lesser or alternative offence of killing an unborn child where the charge has been for murder, manslaughter, infanticide or for unlawful abortion in relation to the unborn child;*

- (c) *the alternative offence of unlawful abortion where the charge has been killing an unborn child;*
- (d) *the lesser offence of concealment of birth where the charge has been for murder, infanticide or with killing an unborn child;*
- (e) *the lesser offence of careless or dangerous driving where the charge has been for manslaughter;*
- (f) *any sexual offence where the charge has been for rape;*
- (g) *the alternative offence of carnal knowledge where the charge has been for incest;*
- (h) *any other applicable sexual offence where the charge has been for defilement of a girl under 16 years, by however such an offence may be termed;*

**(i) any other applicable property related offence where the charge has been burglary or any other property related offence, including -;**

- (i) *the alternative offence of receiving where the charge has been for theft;*
- (ii) *the alternative offence of embezzlement where the charge has been for theft;*
- (iii) *the alternative offence of theft where the charge has been for embezzlement;*
- (iv) *an alternative offence of obtaining by false pretences (however such an offence may be termed) where the charge has been for theft;*
- (v) *an alternative offence of theft where the charge has been for an offence of obtaining by false pretences (however such an offence may be termed);*
- (vi) *an alternative offence of assault with intent to rob where the charge has been for robbery.*

**(2) The court may record convictions for certain offences in accordance with sub-section (1) notwithstanding that no charge has been laid for the lesser or alternative offence in accordance with the provisions of this Decree.”**

[9] Section 163 (2) states that section 162 shall be construed as being without prejudice to the generality of the provisions of sections 160 and 161. Sections 160 and 161 read as follows:

“160. — (1) *When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of the minor offence although he or she was not charged with it.*

(2) *When a person is charged with an offence and facts are proved which reduce it to a minor offence, the person may be convicted of the minor offence although he or she was not charged with it.*

Conviction of attempt

161. *When a person is charged with an offence, the person may be convicted of having attempted to commit that offence, although he or she was not charged with the attempt.”*

[10] The appellant’s argument is twofold. Firstly, his counsel submits that the determination of the High Court judge that the applicability of the legislative provision contained in the first part of section 162(1)(i) is not restricted to sub-paragraphs (i) to (vi) is wrong. In other words, the counsel argues that the words ‘*any other applicable property related offence*’ in section 162(1)(i) should be restricted to offences set out from sub-paragraphs (i) to (vi) under 162(1)(i). The argument continues that obtaining financial advantage, not being among the lesser or alternative offences set out under sub-paragraphs (i) to (vi), the appellant could not have been convicted for that offence.

[11] **Maxwell on The Interpretation of Statues** Twelfth Edition by P. St. J Langam (LexisNexis) at page 270-271 sheds adequate light on how to interpret a statutory provision when the words ‘*include*’, ‘*includes*’ or ‘*including*’ appears as opposed to the word ‘*mean*’ or ‘*means*’ as given below.

[12] When a statute provides that a word shall ‘mean’ what the section says it shall mean, the word is restricted to the scope indicated in the definition section (**R v Britton** [1967] 2 Q. B. 51).

[13] However, when the word ‘include’ is used ‘in order to enlarge the meaning of the words or phrases occurring in the body of the statute’; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (Per Lord Watson at pages 105-106 in **Dilworth v Commissioner of Stamps** [1899] A.C. 99). In other words, the word in respect of

which 'includes' is used bears both its extended statutory meaning and 'its ordinary, popular, and natural sense whenever that would be properly applicable' (**Robinson v. Barton-Eccles Local Board** (1883) 8 App.Cas. 798, per Earl of Selborne L.C. at p. 801).

- [14] Therefore, it is clear that the use of the word 'includes' only enlarges what is signified by the words '*any other applicable property related offence*' and such property related offences are not restricted to the offences covered under sub-paragraphs (i) to (vi) of section 162(1)(i) of the Criminal Procedure Act. '*Any other applicable property related offence*' would include those offences in sub-paragraphs (i) to (vi) but not limited to them, which term encompasses many a property-related offences not specified under sub-paragraphs (i) to (vi) as applicable in any given factual scenario. This is the ordinary and natural meaning that can be assigned to the words '*any other applicable property related offence*'.
- [15] Secondly, the appellant's counsel contends that abuse of office falls under offences against the administration of lawful authority in the Crimes Act, 2009 and therefore, cannot be considered a property related offence and therefore, when the appellant was acquitted of abuse of office he could not have been convicted for obtaining financial advantage under section 162(1)(i) of the Criminal Procedure Act, 2009 particularly because abuse of office necessarily requires the accused to be in public service but for obtaining financial advantage it is not a requirement. The same argument could be extended to the offence of obtaining financial advantage too. Neither abuse of office nor obtaining financial advantage falls under Part 16 – 'Offences against property' in the Crimes Act.
- [16] It appears that for the operation of section 162(1)(i) of the Criminal Procedure Act the primary/principal offence which the accused is charged with should be a property related offence and the lesser or alternative offence which he is convicted of, too should be any other property related offence as applicable to the facts and circumstances of the case. The words '*any other....*' in section 162(1)(i) of the Criminal Procedure Act read with the words '*an offence*' in section 162(1) clearly suggests that this is the case.

- [17] In the Crimes Act the offence of abuse of office is set out under Part 11 – ‘Offences against the administration of lawful authority’, then, it comes under Division 1 – ‘Corruption and abuse of office’ and finally under Sub-division A – ‘Bribery and related offences’.
- [18] The offence of obtaining financial advantage comes under Part 17 – ‘Fraudulent conduct’ and then is set out under Division 4 – ‘Other offences involving fraudulent conduct’.
- [19] Offences against property are set out under Part 16 – ‘Offences against property’ and subdivided into Division 1 – ‘Preliminary’ and Division 2 – ‘Theft and other property offences’. Division 2 has Sub-division A – ‘Theft offences’, Sub-division B – ‘Theft of postal articles’ and Sub-division C – ‘Other property offences’.
- [20] **Maxwell on The Interpretation of Statutes** (supra) also discusses the effect of Headings in a statute at pages 11 & 12. Lord Goddard C.J at pages 32, 33 said in **R v. Surrey (North-Eastern Area) Assessment Committee** [1948] 1 K. B. 29 that:
- ‘while the court is entitled to look at the headings in an Act of Parliament to resolve any doubt that may have as to ambiguous words, then law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning.’*
- [21] Winn J. said in **R. v. Board of Trade, ex p. St. Martins Preserving Co., Ltd.** [1965] 1 Q. B. 603, at p. 619 that it is legitimate and proper to have recourse to the sub-headings in a statute to find guidance for the construction of ambiguous terms. However, Lord Uthwatt said in **Shelley v. L.C.C.** [1949] A.C. 56 that a heading to one group of sections cannot be used to interpret another group of sections.
- [22] Therefore, little assistance could be derived from Part 16 of the Crimes Act to interpret Part 11 and Part 17. In my view, there is no ambiguity at all in the words ‘..... *property related offence*’ because it is clear that the legislature has deliberately used the word ‘..... *property related offence*’ in section 162(1)(i) to denote a broader

category of property related offences in addition to ‘Offences against property’ described under Part 16 of the Crimes Act. All ‘Offences against property’ would be ‘property related offences’ but all ‘property related offences’ need not necessarily be ‘Offences against property’ as set out in Part 16 of the Crimes Act, 2009. Offences against property under Part 16 represent only one segment of property related offences.

- [23] In order to identify a property related offence, one needs to look at the particulars of the charge and other evidence, if available. The particulars of the charge against the appellant was as follows:

*‘.... On the 22<sup>nd</sup> day of August 2013, at Suva in the Central Division, being a person employed in public namely Detective constable in the Fiji Police Force, in abuse of authority of his office did an arbitrary act by selling Scaffolding material valued at \$20,000.00 which was kept as an exhibit at the Samabula Police Station Compound and registered as Exhibit Number 94/13, for his gain which was an act prejudicial to the rights of the Fiji Police Force.’*

- [24] To my mind in this instance, both abuse of office and obtaining financial advantage are indeed property related offences. Not only the particulars of the charge but also the evidence demonstrates that fact and support that conclusion. Therefore, in this instance the offence of obtaining financial advantage can be rightly treated as any other property related offence in so far as the primary/principal offence of abuse of office is concerned.

- [25] Therefore, the learned Magistrate was right in convicting the appellant for the offence of the lesser or alternative offence of obtaining financial advantage under section 162(1)(i) of the Criminal Procedure Act, 2009. Accordingly, the learned High Court was right in upholding the conviction on the basis that in this instance abuse of office is a property related offence and similarly obtaining financial advantage is also a property related offence and therefore it was permissible for the Magistrate to have convicted the appellant for the lesser or alternative offence of obtaining financial advantage.



- [26] Although, the learned High Court judge had also justified the conviction on the application of section 160 of the Criminal Procedure Act, 2009 on the premise that obtaining financial advantage can be considered a minor offence to abuse of office, that endeavour was not really necessary for the appeal before him in as much as the conviction for obtaining financial advantage could be upheld on the application of section 162(1)(i) of the Criminal Procedure Act.
- [27] On the other hand, neither party had brought to the notice of the High Court judge the interpretation given to ‘minor offence’ in section 2 of the Criminal Procedure Act, 2009 which states that "minor offence" means any offence prescribed in the Minor Offences Act. The offences created by the Minor Offences Act are set out from sections 3 to 20 none of which resembles the offences of abuse of office or obtaining financial advantage.
- [28] Whether the word ‘minor offence’ in section 160 should be given an extended and a broader meaning based on the common law test propounded in the case of *Springfield* 53 Cr. App. R. 608 at 610 and followed in Fiji in **Nawaqabuli v R** [1977] FJSC 45, **Bulewa v State** [2002] FJCA 15; AAU0036U.2002S (15 November 2002) and **Nagalu v State** [2013] FJSC 9; CAV011.12 (26 August 2013) or the interpretation given to ‘minor offence’ in **Attorney- General v Vijay Paramanandan** (1968) 14 FLR 6 at page 15, is a matter to be decided by the Court of Appeal or the Supreme Court in the future. I shall only place on record that none of the appellate courts in the above cases had the occasion to consider section 2 of the Criminal Procedure Act, 2009 in interpreting what a minor offence is as set out in the Criminal Procedure Code (sections 163 & 169) and Criminal Procedure Act (section 160).
- [29] A similar issue came-up in **Chand v State** AAU 162 of 2020 (04 July 2022) where *inter alia* the rationale of the trial judge appeared to be that under the Criminal Procedure Act, 2009 he could convict an accused for a minor offence only if such offence comes under the Minor Offences Act, 1971 and leave to appeal was granted to the full court considering that as a question of law only.

[30] However, as stated earlier in order to dispose of this appeal, the application of section 160 of the Criminal Procedure Act is not required to be considered and in any event the learned Magistrate had not relied on section 160 of the Criminal Procedure Act but only on section 162 of the Criminal Procedure Act to convict the appellant of the lesser or alternative offence of obtaining financial advantage while acquitting him of the offence of abuse of office.

[31] I have already dealt with the application of section 162 (1)(i) and held that obtaining financial advantage is indeed a lesser or alternative property related offense to abuse of office in this instance and the conviction for the former is justified. Accordingly, this appeal should stand dismissed and conviction should be confirmed in terms of the proviso to section 22(3) of the Court of Appeal Act.

**Gamalath, JA**


[32] I have read the judgment in draft and the conclusion of Prematilaka, RJA and I agree.

**Nawana, JA**

[33] I agree with the reasons and the conclusion of Prematilaka, RJA.


**Orders of the Court:**

1. Appeal is dismissed.
2. Conviction is confirmed.

  
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**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**



  
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**Hon. Mr. Justice S. Gamalath**  
**JUSTICE OF APPEAL**

  
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**Hon. Mr. Justice P. Nawana**  
**JUSTICE OF APPEAL**