IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.: HAA 117 OF 2017

(Ba Criminal Case No: 328 /14)

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)

APPELLANT

AND : FILIMONI BOLA

RESPONDENT

Counsel: **Mr. Aslam with Mr. J. Work for Appellant**
Mr K. Tunidau for Respondent

Date of Hearing: **05 June, 2018**

Date of Judgment: **14 August 2018**

JUDGMENT

Introduction

1. This is a timely appeal filed by the Appellant against the acquittal recorded by the learned Magistrate at Ba on 5th October, 2017 in Criminal Case No. 328/14.

2. The Respondent was charged by the Fiji Independent Commission Against Corruption (FICAC) with one count of Bribery contrary to Section 4 (2) (a) of the Prevention of Bribery Act 2009. The information reads as follows:

Statement of Offence

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

Particulars of the Offence

FILIMONI BOLA *on the 7th of March, 2014, at Ba, in the Western Division, whilst being a Public Servant employed at the Land Transport Authority of Fiji as a Certifying Officer, without lawful authority or reasonable excuse accepted an advantage namely $50.00 from one Sandeep Narayan on account of his performing his duty in his capacity as a public servant, namely the passing of vehicle registration EH 840 without conducting an inspection for its fitness.*

3. At trial, the Prosecution called 5 witnesses in support of its case. At the close of Prosecution's case, Counsel for the Appellant made an application for 'No Case to Answer'. Thereafter, both parties were given an opportunity to file their submissions. The Court in its ruling on the said application stated that there was a case to answer and put the Respondent to his defence. Thereafter the Respondent elected to give evidence and the matter proceeded to further hearing and was concluded on the same day.

4. The Court, having considered the closing submissions filed by both parties delivered the judgment on the 5th of October, 2017, acquitting the Respondent.

5. The Appellant on 6th November 2017 filed its petition and grounds of appeal against the said acquittal. Both parties filed helpful written submissions and further made oral submissions at the hearing.

6. The Prosecution at trial adduced evidence that the Respondent who was employed as a Certifying Officer attached to the Land Transport Authority (LTA) accepted a bribe of FJ $ 50 from one Sandeep Narayan (PW 2) to pass a vehicle without conducting an inspection for its fitness.

Grounds of Appeal

(a) That the Learned Magistrate erred in law by taking into account the wrong element of the Charge against the accused, namely the fourth (4th) element of the charge which is on account of performing his duty in his capacity as a public servant as opposed to abstaining from performing his duty in his capacity as a public servant.

(b) That the Learned Magistrate erred in law by considering inadmissible evidence that was not adduced during trial namely the denial of allegations by the accused in his Caution Interview.

(c) That the Learned Magistrate erred in law by failing to address the negative averment of the offence.

(d) That the Learned Magistrate erred in law and fact by failing to analyze the evidence of Prosecution Witness 2 namely Sandeep Narayan objectively and imputing corrupt practice on Prosecution Witness 2 contrary to law.

(e) That the Learned Magistrate erred in law and fact by failing to analyze the evidence of Prosecution Witness 3 namely Abdul Khalik objectively.

(f) That the Learned Magistrate erred in law and fact at Paragraph 95 by being mistaken as to the relevance and significance of Defence Exhibits (DEX 1 & 2) to the prosecution case and making adverse inferences towards prosecution for not tendering the same.

(g) That the Learned Magistrate erred in law and fact at Paragraph 98 by stating that the basis for the Accused to be charged was for the breach of LTA Codes of Practice as opposed the current charge of Bribery and performance of an act in that capacity, thereby being mistaken as to the charge.

(h) That the Learned Magistrate erred in law and fact by failing to analyze the evidence of Prosecution Witness 4 namely Jimione Korovou objectively and entirely disregarding his evidence which points out the mens rea and guilt of the accused directly.

(i) That the Learned Magistrate erred in law by being mistaken of the role of the adjudicator as a magistrate in criticizing the investigations and prosecutions of the Appellant without sufficient basis.

Ground A

7. The Appellant submits that the learned Magistrate erred in law by taking into account a wrong fourth element of the offence namely, 'abstaining from performing his duty in his capacity as a public servant' as opposed to 'on account of performing his duty in his capacity as a public servant' which should have been the correct element.

8. The Respondent was charged in the Magistrate Court under Section 4 (2) (a) of the Prevention of Bribery Promulgation 2007 (now Act) and the particulars of the charge read:-

> *"Filimoni Bola on the 7th day of March 2014, at Ba in the Western Division, whilst being a public servant employed at the Land Transport Authority of Fiji as a certifying officer, without lawful authority or reasonable excuse accepted an advantage namely FJ$50 from one Sandeep Narayan on account of his performing his duty in his capacity as a public servant, namely the passing of vehicle registration EH 840 without conducting an inspection for its fitness"*

9. The learned Magistrate at paragraph 88 of his judgment describes the elements of the offence as follows;

1. A public servant (LTA officer)

2. Without lawful authority or reasonable excuse

3. Solicits or accepts any advantage and an inducement to or reward for ($50)

4. On account of his abstaining from performing (an inspection of EH 840)

5. Any act in his capacity as a public servant (vehicle examiner)

10. It is clear that the learned Magistrate had identified a wrong element when he stated "on account of his abstaining from performing" as the fourth element of the offence. The allegation constitutes a positive act of performance rather than an abstention from performing. The learned Magistrate appears to have directed his mind on a wrong footing and considered evidence in support of that element, ('abstaining from performing') when in fact the actual element should have been 'performing an act' in his capacity as a public servant, namely filling of the Vehicle Inspection Sheet (PEX 2) without physical inspection and thereafter issuance of a Certificate of Competency (PEX 2A) for an otherwise defective vehicle.

11. The learned Magistrate erroneously looked for evidence in relation to 'abstaining from performing' by focusing merely on the vehicle inspections and agreed with defence's contention that the Respondent had not abstained from performing the said inspection. The learned Magistrate failed to analyze Prosecution Exhibits PEX2 and PEX2A which were in evidence showing positive performance of a wrongful act. He rejected the evidence that the Respondent accepted an advantage ($50) not just to refrain or abstain from inspecting the vehicle, but also to perform alleged dishonest acts namely filling the required inspection form and issuing a certificate of competency without following the due process. Evidence of the performance of such acts were crucial to the prosecution case and therefore by failing to give due weight to crucial prosecution evidence, the learned Magistrate erred in law. Therefore this ground should succeed.

Ground B

12. The Appellant submits that the learned Magistrate erred in law by considering inadmissible evidence that was not adduced during trial namely the denial of allegations by the accused in his caution interview.

13. The learned Magistrate at paragraph 106 had stated that '*for court clarification, the Accused had totally denied the allegations in his caution interview*'.

14. It is obvious that the learned Magistrate had fallen into error for two reasons. Firstly, in order to consider any document, it has to be properly tendered in evidence at the trial and exhibited through the relevant witness in court or exhibited as an agreed document. It is only after the evidence has been properly admitted in evidence that the court is at liberty to consider the probative value of such evidence. In the present case, the caution interview which is an out of court statement was never tendered nor was there any mention of it at the trial. And also neither party had admitted the same. The submission made by the defence counsel from the bar table at 'no case to answer' stage is no evidence. The purported use of the caution interview is unlawful as it is not evidence in the case. This ground succeeds.

15. Secondly, it is trite law that previous out of court consistent statement of a witness is generally inadmissible except in exceptional situations. The former rule against hearsay prevented out of court statements being admitted to prove the truth of their contents. This meant that generally, a witness's previous statement could not be offered in evidence if it was consistent with the witness's testimony in court. While there were certain exceptions to this that would render a previous consistent statements admissible, such as 'recent complaint' evidence (in a case of sexual nature)

and statements forming part of the *res gestae*, the statement could still only be used to bolster the witness's credibility, rather than to prove the truth of its contents.

16. By considering a denial of the accused in his caution interview, the learned Magistrate considered an extraneous matter which should otherwise be rendered inadmissible. The apparent reason for the Magistrate to use the caution interview was to satisfy himself as to the truthfulness of the statement of the Respondent as to his denial. This ground succeeds.

Ground C

17. The Appellant submits that the learned Magistrate erred in law by failing to consider the negative averment of the offence.

18. The learned Magistrate did not consider the negative averment pursuant to element 2 of the charge which is 'without lawful authority' or 'reasonable excuse'. At paragraphs 89 and 90 of the judgment he had correctly stated that the burden of proof was always on the prosecution in the circumstances of this case. The Respondent did not admit that he accepted an advantage. His defence was one of complete denial and therefore the question whether he had lawful authority or reasonable excuse did not arise in this particular trial. If he had accepted the receipt of an advantage and availed the defence of lawful authority or reasonable excuse then the burden would have shifted to the defence to prove their defence on a balance of probabilities. Therefore the learned Magistrate did not fall into an error when he did not direct his mind to the negative averment and the burden of proof thereof. This ground has no merit.

19. Grounds D and E can be addressed together for the purpose of convenience as they both concern the purported failure of the learned Magistrate to analyze evidence of PW 2 and PW3 objectively.

Ground D

20. Prosecution Witness 2, namely, Sandeep Narayan was called to prove that the Respondent accepted an advantage of $ 50 to perform his official duty. He also gave evidence that the vehicle (EH 840) was never inspected by the Respondent before the issuance of PEX and PEX2A. PW 2 stated that he had visited the Respondent in his office at Ba and handed an envelope that contained the relevant documentation for passing the vehicle (EH 840) and a $50 note, and the Respondent, having seen the $50 therein, went on to pass the vehicle in question and issued Vehicle Inspection Sheet (PEX 2) and Competency Certificate (PEX 2A) without conducting an examination on vehicle.

21. The learned Magistrate rejected the evidence of PW 2 because he found that the said witness had committed a forgery when he filled up and signed the application for Inspection (DEX1) without obtaining authorization from the owner of the vehicle. The learned Magistrate stated at paragraph 92 that '*PW 2 had committed fraud in itself and before climbing up the stairs of LTA that 'fateful day' his intentions were already clothed in deceit'*.

22. The learned Magistrate is not justified in coming to the conclusion he did because he had not done a proper analysis to satisfy himself that an application for examination could necessarily have been filled up and signed by the owner himself or whether PW2 had obtained proper authority from the owner of the vehicle.

23. PW 2 admitted that he signed DEX 1 on the authority of Abdul (PW 3) who was an employee of the company which owned the vehicle. The owner company had given instructions and money to PW3 who was an employee to get the fitness test done. PW 3 had authorized PW2 to sign the application on behalf of the company. Witness Lutua of LTA (PW 5) said that the application for inspection is (generally) filled by the applicants for inspection purposes/fitness. She further said that Sandeep (PW 2) was the applicant for that matter. According to PW 3's evidence the application had been filled by the Respondent. There was no evidence that PW 2 had breached a rule of law or that he had committed a forgery. The learned Magistrate had discredited PW2 on mere speculation. By making the observation he did at paragraph 92 (supra) the learned Magistrate had already formed an adverse inference towards PW 2 without analyzing all the evidence adduced by the said witness objectively.

24. It must be noted that the Respondent had filled in the latter portion of DEX1. However the learned Magistrate had not drawn any adverse inference towards the Respondent. At the end of the prosecution case the learned Magistrate, in his Ruling on no case to answer, did not find PW2 implausible on the ground he did at the end of the trial. The evidence of PW2 was not so manifestly discredited that would justify inclining towards the Respondent's version and disregarding the entire evidence of PW2.

25. The learned Magistrate had not properly analyzed or considered Prosecution exhibits tendered by PW 2 (PEX 2 & PEX 2A) which were crucial as it proved the element of performance of a positive act by the Respondent. Instead of analyzing such evidence of PW2 in support of the elements of the offence charged the learned Magistrate had imputed corrupt practice on PW 2. This ground succeeds.

Ground E

26. The PW 3 was called to corroborate 2nd and 3rd elements of the current charge of bribery against the Respondent. PW 3 corroborated the evidence of PW 2 that he had accompanied PW2 to Ba LTA office for passing of the vehicle in question. He further confirmed that PW2 had visited the Respondent whilst he was in his vehicle and within ¾ of an hour returned with documents (PEX2 and PEX 2A). He confirmed handing $50 over to PW 2 to be given to the Respondent. He also confirmed that the vehicle in question (EH 840) had various defects and that it was parked at Lautoka at all material times and no inspection was done on it before the certificate was issued.

27. Thus the learned Magistrate had erred in law by failing take account of the probative value of the evidence of PW 3 in support of the evidence of PW 2. The learned Magistrate in stating that PW 3 was an aider and abettor of a fraud and 'fraud enforcer' had completely ignored the crucial evidence he adduced in support of the 2nd and the 3rd elements namely that an advantage was accepted by the Respondent through PW 2 without a lawful authority, and thereafter the vehicle in question was passed on the same day without physical inspections.

28. Instead of analyzing the evidence furnished by PW 3 objectively, the learned Magistrate commented on as to how PW 3 should have given evidence or what evidence should have been given by him, thus examining extraneous factors.

29. PW 2 and PW 3 were not standing trial but were called by the Prosecution as witnesses. By virtue of Section 22 of the Prevention of Bribery Act they should not have been regarded as accomplices but solely as witnesses giving evidence in regards

to the current charge. In failing to understand the same the learned Magistrate had erred in law.

30. Section 22 of the Prevention of Bribery Act states:

> *"Notwithstanding any Act, Promulgation, rule of law or practice to the contrary, no witness shall, in any proceedings for an offence under Part II, be regarded as an accomplice by reason only of any payment or delivery by him or on his behalf of any advantage to the person accused or, as the case may be, by reason only of any payment or delivery of any advantage by or on behalf of the person accused to him"*

31. By virtue of the above section, PW 2 and PW3 who were called as witnesses should not have had any adverse inference drawn against them, PW2 by virtue of being the person who gave the advantage and PW 3 by virtue of the person on whose behalf the $50 advantage was given and should not have been regarded as accomplices. Grounds D and E succeed.

Ground F

32. The Appellant contends that the learned Magistrate erred in law and fact at paragraph 95 by being mistaken as to the relevance and significance of Defence Exhibits (DEX 1 & DEX2) to the prosecution case and making adverse inference towards prosecution for not tendering the same.

33. The prosecution had in total called 5 witnesses and tendered six (6) prosecution exhibits to prove the elements of the offence. The only contentious elements were in regards to elements (iii) (accepting an advantage of $50) and (iv) (on account of performing an act in his capacity as a public servant). The acceptance of the $50 was proven by virtue of evidence of PW 2 & PW 3 and the performance of the duty as a public servant was supported by key documents namely the Vehicle Inspection Sheet (PEX 2) and the Competency Certificate (PEX 2A) which were documents ought to have been issued after following the due process (competency test). Those documents had been issued to the PW2 immediately after the envelope containing $50 was handed over to the Respondent without any physical inspection being conducted on the vehicle. Furthermore evidence of PW2 and PW 3 was further bolstered by PW4 who tendered in evidence the Defect Order (PEX 4) dated 14/03/14 and PEX 5 & PEX5A which were vehicle inspections certificate and Vehicle Test Result Sheets dated 30/07/14 after actual inspection was conducted, indicating that the vehicle with such defects could not have been passed had it been physically inspected. Thus the said documents supported the evidence of PW2 and PW3 and the evidence adduced by the prosecution was sufficient to prove the contentious elements of the offence.

34. The prosecution witnesses had not denied the existence of DEX1 and DEX2. PW2 in his evidence had admitted that after the said vehicle was passed he was advised by the Respondent to make payments to the cashier which thereafter resulted in the issuance of the said documents. PW 4 also confirmed the existence of those documents in the process. Therefore there was no dispute as to the existence of those documents and that they formed part of the series of steps and procedure necessary to complete the process of how a vehicle is passed.

35. The learned Magistrate had referred to DEX 1 and DEX2 in his analysis from paragraph 92 to paragraph 95 and had afforded undue weight to those documents. The learned Magistrate had speculated as to why such evidence was not tendered by

prosecution and had come to the conclusion that the prosecution had strategically suppressed the said documents as they would be adverse and detrimental to their case. He had then drawn an adverse inference against the case of prosecution.

36. DEX 1 and DEX 2 would explain part of the certification process and the non-production of those documents could not have weakened the case for prosecution. Therefore by drawing a negative inference towards the prosecution's case by the mere fact of non-production of those documents by the prosecution, the learned Magistrate was misconceived as to the relevance and significance of the said documents (DEX 1 & DEX2). The mere non-production of those documents by the prosecution had not in any way discredited the version of events of their case. This ground succeeds.

Ground G

37. It was contended by the Appellant that the learned Magistrate erred in law and fact by stating at paragraph 98 that the basis of the charge was the breach of LTA Code of Practice whereas the current charge of bribery was actually based on performance of an act by the Respondent in his capacity as a public servant.

38. The learned Magistrate at Paragraph 98 stated the following:-

> *"More so this so called code of practice was never tendered in evidence by the state. In effect this is the basis upon which the Accused was charged is it not? At least that is what PW 4 swore as his oath. It was because the Accused had breached the so-called code of practice".*

39. It is obvious that the charge against the Respondent was Bribery based on Section 4 (2)(a) of the Prevention of Bribery Promulgation (Act) for him having performed an act in his capacity as a vehicle examiner and not having violated the LTA Code of Practice. Hence the learned Magistrate was misconceived when he stated that the Respondent was charged for breach of LTA Code.

40. In his analysis the learned Magistrate had suggested that the said Code of Practice ought to have been tendered. This suggestion indicates that the learned Magistrate had considered the failure on the part of the prosecution to tender the said Code of Practice as a major lacuna in the prosecution's case.

41. It appears however that the prosecution had adduced evidence as to the said Code of Practice as a peripheral piece of evidence that provides guidance to the fact that the Respondent had an ulterior motive when he issued the certificate without following the due process. According to the evidence of PW4, the Code of Practice served as guidance in the exercise of discretion of an examiner. For Respondent to exercise his discretion he should have examined the vehicle in the first place. The Prosecution case was that the Respondent had never examined the vehicle at Ba before he issued the certificate. The prosecution led evidence to show that the vehicle was parked somewhere in Lautoka when the certificate of competence was then and there issued by the Respondent from the Ba LTA office. Therefore the question whether the Code of Practice was followed by the Respondent never arose at the trial as part of the prosecution case. This misdirection appears to have confused the learned Magistrate as to the real charge against the Respondent when he said at paragraph 99 that *'this court needs to be convinced of what code the accused is alleged to have breached'*. This ground should succeed.

Ground H

42. The Appellant further contends that the learned Magistrate erred in law and fact in failing to analyze the evidence of PW4 namely Jimione Korovou objectively and entirely disregarding his evidence which points out the *mens rea* and guilt of the Respondent directly.

43. PW4 of LTA office had given evidence in support of element (iv) of the charge of Bribery namely on account of performing an act in his capacity as a public servant. In his evidence PW4 stated that the vehicle in question had major defects and until those defects were rectified it would not have been possible for the vehicle to get through the fitness test. He had tendered PEX4 (Defect Order dated 14/03/14), PEX5 (Vehicle Inspection Certificate dated 30/04/14) and PEX 5A (Vehicle Test Result dated 30/04/14) and stated that if the said vehicle had been inspected on the 7th of March 2014, he would have failed it due to such apparent defects.

44. The learned Magistrate appears to have basically accepted the evidence of PW 4. Instead of analyzing the evidence elicited from PW 4 objectively in relation to the 4th element, the learned Magistrate stated at paragraph 103 that PW 4's *evidence was cut short abruptly to examine another component of his evidence* and due to this deviation the '*opportunity was lost to State's favour' and therefore the court will have to accept the accused's evidence'*.

45. The reason given by the learned Magistrate in support his decision to accept the version of the Respondent is not justified in light of credible evidence given by PW 4 which was not disputed by Defence. The prosecution had not disputed the payments process nor was it part of the prosecution case. The crux of the contention was in

relation to the passing of the vehicle without inspection, the defects evident in the said vehicle and, whether the same could have been passed by an examiner without inspection. The prosecution had led evidence to explain the due process that was in contention, the process of inspections and the role of relevant officers. The answers elicited from prosecution witnesses were crucial in identifying whether the vehicle in question (EH 840) if physically examined in its current condition could have been passed and whether it was in fact inspected. Therefore the learned Magistrate fell into error when he disregarded the crucial and relevant part of PW4's evidence. This ground succeeds.

Ground I

46. The Appellant submits that the learned Magistrate erred in law by being mistaken of the role of the adjudicator as a Magistrate in criticizing the investigations and prosecution of the Appellant without sufficient basis.

47. At paragraphs 104 and 105 of the judgment the learned Magistrate had criticized the evidence of Sokoveti Lutua (PW5) in stating that she had not done a proper investigation regarding the case. He faulted PW 5, being a former police officer, for not carrying a note book to put contemporaneous investigation notes and being evasive. He also regarded the statement of PW5 as a major contradiction to evidence of PW 2 on the question as to why the Respondent had visited the Ba LTA office.

48. The learned Magistrate at paragraph 104 has highlighted some parts of PW 4's evidence to justify his claim that *"PW 5 was more evasive than helpful"*. However, failure on the part of the witness to answer those questions could not affect the credibility of the investigation or the prosecution's case. The learned Magistrate was

not justified in impeaching the credibility of her evidence merely on the basis that she could not recall or had not made some observation pertaining to the investigation.

49. As regards the so called contradiction, it appears from the Record that PW 2 had stated that the purpose of going to Ba LTA was to check if the vehicle in question with the major defects (EH 840) would be passed. When asked, PW 5 in her evidence admitted having done both checking and 'passing' on the same day. It must be noted that the response of PW 5 was on the basis of her investigations which revealed that though PW2 had initially gone for the purposes of enquiry their real intention was also to get the vehicle passed should the Respondent agree to the corrupt transaction. Therefore there is no major contradiction between the two versions that could have rendered the version of the prosecution implausible.

50. The Learned Magistrate observed at paragraph 105:

> *"Looking at her responses above an adverse inference is quickly dawn by the court in concluding that a less than potent investigation was conducted here leaving much to be desired? Hear, that court will equate "I cannot recall" to an emphatic "no" This is a classic example of selective memory and can only mean that the Accused was already guilty even before the investigations began such that the investigations were neither efficient nor effective. If anything it was "tip of the iceberg" stuff of investigations"*

51. The above comments, based merely on the fact that the investigator failed to remember certain facts, are not expected from an impartial adjudicator. Furthermore, the learned Magistrate is not justified in drawing the adverse inference he did leading

him to the eventual rejection of PW 5's evidence and the whole investigation conducted, without analyzing the evidence objectively.

52. In the South African Case of City of ***Johannesburg Metropolitan –v- Patrick Ngobeni***, [In Supreme Court of Appeal of South Africa, Case: 341/11], the court upon appeal had to consider inter alia the conduct of the trial judge and made the following statement:-

> *"In a trial the judge has to act as an impartial arbiter. The law requires that a judicial officer must conduct the trial open mindedly, impartially and fairly and such conduct must be manifest to all those who are concerned in the trial and its outcome"*

53. In view of the above observation and the circumstances of current case the conduct of the learned Magistrate in criticizing prosecution and investigations of the State clearly implies certain biases by the learned Magistrate and is evident by the use of emotive words in the judgment ... At paragraph 105 the learned magistrate said: "*This is a classic example of selective memory and can only mean that the accused was already guilty even before the investigations began such that the investigation was neither efficient nor effective, if anything, it was "tip of the iceberg stuff of investigations*"... and at paragraph 101 stating "that *accused was therefore right all along. Why was he prosecuted in the first place?* ... The learned Magistrate further stated that "*a less than potent investigation was conducted by PW 5 leaving much to be desired and by virtue of such response an adverse inference is quickly drawn*". Sentiments expressed by the learned Magistrate are not at all appropriate for an impartial and fair adjudicator. Appeal ground (i) should succeed.

54. In light of the finding on each ground of appeal, I find that there is no impediment in ordering a retrial.

55. Section 178 the Criminal Procedure Decree applies to trials in the magistrates' court and addresses the function of the court at the close of the prosecution's case.

> *"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."*

56. At the close of prosecution case, the learned Magistrate found that there was a case to answer and put the Respondent to his defence. In deciding whether there is a case for an accused to answer on a particular charge, a magistrate is required to ask himself two questions. First question is, whether there is credible and reliable evidence on each element of the offence and, the second question is, whether the evidence presented by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal would safely convict the accused on that evidence. [Moidean v Reginam (1976) 22 FLR 206]

57. Therefore, when a magistrate decides that there is a case to answer on a particular charge, he is in fact making a finding that there is relevant and admissible evidence on all the elements of the charge and that evidence is not discredited as a result of the cross-examination and is not manifestly unreliable to the extent that a reasonable tribunal would not safely convict on that evidence. [FICAC v Reddy [2018] FJHC 525; HAA50.2017 (22 June 2018)]

58. The learned Magistrate at the end of the prosecution case found that there was a case to answer and did not find any issues at that stage with credibility or reliability of any of the witnesses for the prosecution. Therefore the learned Magistrate could have come to the conclusion he reached at the end of the trial only because he was satisfied that a reasonable doubt was created by the evidence presented for defence so that the required standard of proof expected in a criminal case of the prosecution was not reached on each element of the offence.

59. The learned Magistrate by putting the Respondent to his defence he was satisfied that the evidence led in the course of the prosecution case was capable enough to reasonably convict the Respondent unless he did create a reasonable doubt in the prosecution case by adducing some evidence for defence.

60. The only contentious elements were in regards to elements (iii) (accepting an advantage of $50) and (iv) (on account of performing an act in his capacity as a public servant). PW 2 and PW3 had given evidence on the third element and PW4 and PW5 had given evidence on the fourth element.

61. It is obvious that the learned Magistrate had discredited PW2 and PW3 in his final judgment not because he found that the evidence of Respondent had created a reasonable doubt on the testimony of these two witnesses but because he found them to be part of a fraudulent scheme. Therefore his final judgment on plausibility of evidence of PW2 and PW3 cannot be justified on the strength of the Respondent's evidence.

62. The learned Magistrate had impeached the credibility of PW4 and PW5 on number of grounds including the demeanour and evasiveness of PW5. Therefore it appears that the finding of the learned Magistrate on credibility of these two witnesses is in issue.

Therefore, it is my considered opinion that it is not safe to record a conviction based on what is recorded in the Record of the Magistrates Court without having the benefit of seeing and hearing the witnesses.

63. In ***Benmax v Austin Motor Co. Ltd*** [1955] AC 370, (1955) 72 RPC 39 it was said;

> *"While a judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are virtually unassailable, an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness"*

64. Lord Reid said:

> *"it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations"*

Conclusion

65. Having considered the above observations and the circumstances of this case, I take the view that ordering a retrial as requested by the Appellant in their petition of appeal will serve the purposes of interest of justice.

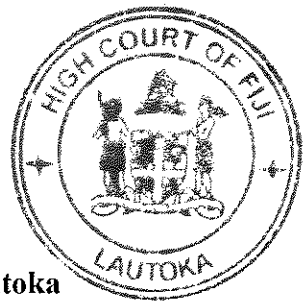
66. There was a fundamental error in judgment from the very beginning not only as to the relevant law and legal principles, but also in assessing the evidence. The learned Magistrate erred in fact and law in failing to properly consider and evaluate the evidence relevant to the elements of the charge before him and fell in error when he found the Respondent not guilty and recorded an acquittal in favour of the Respondent who did not mount a satisfactory defense.

Following Orders are made:

(i). The appeal against acquittal is allowed.

(ii). The order of acquittal by the Magistrate's Court at Ba is quashed and set aside.

(iii). In the interest of justice and in accordance with section 256(2)(c) of the Criminal Procedure Act a retrial is ordered before a different magistrate.



Aruna Aluthge
Judge

At Lautoka
14th August, 2018

Counsel: **Office of the Fiji Independent Commission Against Corruption for the Appellant**
Kevueli Tunidau Lawyers for the Respondent