

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 63 of 2017

STATE

V

KAMLESH ARYA

Counsel : Mr. Sam Savumiramira with Ms. Laite Bokini for the State
Dr. Gregory Woods QC with Mr. Vijay Maharaj for the Accused

Date of Hearing : 2 May 2019

Date of Ruling : 6 May 2019

RULING

NO CASE TO ANSWER

[1] As per the Information filed by the Fiji Independent Commission Against Corruption (FICAC), the Accused in this case is charged with the following offences:

FIRST COUNT

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence (b)

KAMLESH ARYA, between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, did arbitrary acts for gain in abuse of the authority of his office, namely authorized loans amount to \$116,500 from the Free Education Grant provided by the Ministry of Education to the said Bhawani Dayal Memorial Primary School, which was prejudicial to the rights of the said Ministry of Education and Bhawani Dayal Memorial Primary School.

SECOND COUNT

Statement of Offence (a)

GENERAL DISHONESTY – CAUSING A LOSS: Contrary to Section 324(2) of the Crimes Decree 2009.

Particulars of Offence (b)

KAMLESH ARYA, between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar of the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, dishonestly caused a risk of loss to Bhawani Dayal Memorial Primary School by authorizing the Free Education Grants as loans amounting to FJD\$116,500, and knowing that the loss will occur or substantial risk of the loss will occur to Bhawani Dayal Memorial Primary School.

- [2] In summary the case for the prosecution is that the Accused, Kamlesh Arya, whilst acting as the School Manager for Bhawani Dayal Memorial Primary School (BDMPS), authorized loans amount to \$116,500 from the Free Education Grant (FEG) provided by the Ministry of Education (MOE) to the said BDMPS, during the period 1st January 2014 and 31st December 2014, which are alleged to be arbitrary acts, in abuse of the authority of his office and done for gain. It is further alleged that the acts of

authorizing the loans were prejudicial to the rights of the MOE and the BDMPS. This is what the Accused has been charged for in the First Count.

[3] As for the Second Count, it is alleged that the Accused, Kamlesh Arya, by authorizing the Free Education Grants as loans, amounting to FJ\$116,500, dishonesty caused a risk of loss to BDMPS, and that he knew that the loss will occur or substantial risk of the loss will occur to BDMPS.

[4] During the trial of this case, the prosecution led the evidence of the following 9 witnesses:

1. Dr. Brij Lal

- (i) He was the former Permanent Secretary for Education, National Heritage, Culture and Arts. He was appointed as Permanent Secretary in June 2010, and held the position for 4 years.
- (ii) He testified that in the 2013 Budget, the Government announced an increased allocation of the students grant to schools, with effect from 1 January 2014. He referred to it as Fee Free Grant or Students Grant.
- (iii) Prosecution Exhibits PE 6 was a circular or directive issued by him, dated 13 December 2013, setting out the manner in which the said FEG should be utilised.
- (iv) The witness also made reference to Prosecution Exhibit PE 12 which was the Financial Management in Schools Manual which was developed in May 2014, by the Asset Monitoring Unit of the MOE. The Manual which is based on the directive (PE6) was said to have been used at the training sessions conducted in December 2013.

2. Ravineet Ritesh Sami

- (i) Currently, he is the Executive Director Finance at the University of Fiji. In May 2014, he was appointed as the Chief Finance and Facilities Officer at the University. In 2013-2014, he was the National General Treasurer of the Arya Pratinidhi Sabha of Fiji (APS) and was also elected as a Trustee for APS in June 2014. He was also the Executive Director Finance of the University of Fiji in 2014. As the General

Treasurer of APS he had access to the Westpac Internet Banking and simultaneously granted access to manage the cash flows of all accounts of the APS.

- (ii) The witness had been granted a letter of immunity by the Deputy Commissioner of FICAC in respect of this case (Prosecution Exhibit PE 45).
- (iii) The witness testified that the APS is the controlling authority of the University of Fiji. The APS also has 6 secondary schools and 15 primary schools under its control.
- (iv) The witness said that the APS holds Annual General Meetings (AGMs) where the Executives are appointed. Soon after the AGM, the APS holds a Post Executive Meeting at which Managers and Board Members are appointed for each school.
- (v) As National General Treasurer of the APS, the witness had internet access to all APS Bank Accounts.
- (vi) The witness also testified to the inter loan system between the APS schools. He said that the inter loan system between the APS schools existed for more than 50 years.
- (vii) The witness also testified at great length to the email correspondence found as Prosecution Exhibit PE 14.

3. Satyendra Singh

- (i) Currently he is serving as the Principal of the Dilkusha High School.
- (ii) In 2013, he joined the MOE and was the Acting Senior Education Officer for the Policy Unit. His responsibilities include the drafting, reviewing and formulating Policy for the MOE. The said policies had to be implemented in consultation with the various stake holders involved.
- (iii) The witness testified at length regarding the FEG introduced by the Government in November 2013. He was shown Prosecution Exhibits PE5, PE6, PE7 and PE12 and asked to elaborate on the contents of the said documents.

4. Makarita Voi Fuata

- (i) Currently, she is retired and said to be working for the Roman Catholic Church of Fiji.
- (ii) She worked at the MOE for 24 years and retired from service in 2016. In 2014, she was promoted as Acting Director Finance in the MOE.
- (iii) At the time the FEG was announced in November 2013, she was the Principal Accounts Officer of the MOE and was attached to the Finance Section of the Ministry.
- (iv) Her role in relation to the FEG was meeting with the officers from the Prime Minister's Office, Bank personnel and Post Office to ensure the schools get the FEG by January 2014. Her role was to distribute the FEG to all schools accounts.
- (v) This witness too, further elaborated on Prosecution Exhibits PE 6, PE 12, PE 42 and PE 43.

5. Moshin Shaheed Ali

- (i) Currently, he is the Director Audit at the Office of the Auditor General. He has worked at the Office of the Auditor General for 13 years.
- (ii) His role is to manage portfolio of Audits which are distributed by the Auditor General on an annual basis.
- (iii) In 2015, he was the serving as Audit Manager and reporting to his Director. The portfolio under that Director was all the Ministries and Departments under the Social Service Section – Ministry of Health, Ministry of Education, Ministry of Social Welfare and Ministry of Youth and Sports.
- (iv) He testified that based on the risk assessment done, 18 schools (10 Secondary Schools and 8 Primary Schools) were audited in the year 2015.

- (v) He testified that he audited the accounts of BDMPS, which was a school controlled by the APS.

6. Mosese Matanisiga

- (i) He is an Investigator attached to FICAC. He has worked at FICAC for the past 9 years. Prior to that, he was working in the Fiji Police Force for 20 years.
- (ii) In the instant case, he was assisting the investigating officer in the course of the investigations.
- (iii) He was also present as the witnessing officer during the recording of the Caution Interview Statement of the Accused. The Caution Interview Statement was recorded by FICAC Commission Officer (CO), Siteri Vuidreketi.

7. Tawake Gaunavou

- (i) He is currently working as Senior Relationship Manager at Westpac Bank. He has been attached to Westpac since 2013.
- (ii) He tendered to Court a Banker's Affidavit, which is marked as Prosecution Exhibit PE 48.

8. Ruci Daulako

- (i) Currently, she is serving as the Senior Human Resource Officer with the MOE, attached to the Employee Administration Unit.
- (ii) She confirmed that the Accused, Kamlesh Arya was appointed as School Manager of BDMPS in 2012. As per the records, she confirmed that the Accused was the School Manager of BDMPS in the year 2014.

9. Talica Ratulevu

- (i) Currently, she is the Financial Investigator at FICAC. She has worked at FICAC for 7 years.

- (ii) She tendered to Court Prosecution Exhibits PE 49, which were the Bank Statements of BDMPS (Account No. 24564700) for Term 1 and 2 of 2014; and graphs depicting the loans for Term 1 and 2 of 2014.

[5] The following documents were tendered to Court by consent of both the prosecution and defence, and are marked as **PE 1 to PE 49** respectively:

PE 1	Letter of Appointment of Mr Kamlesh Arya, dated 11 December 2012, from the University of Fiji
PE 2	Letter of Appointment of Mr Ravineet Sami, dated 12 September 2013, from the University of Fiji
PE 3	Arya Pratinidhi Sabha of Fiji Directory 2014-2015
PE 4	Bhawani Dayal Memorial Primary School Southern District Primary Board Meeting School Report – Term II, 2012
PE 5	Ministry of Education Standard Power point slides regarding Financial Management in Schools
PE 6	Ministry of Education Circular dated 13/12/13 from PS Education, National Heritage, Culture and Arts to School Managers, Head Teachers and Principals, Subject : Free Education – Directive on Use of Government Grants
PE 7	Ministry of Education, National Heritage, Culture and Arts Media Release MR 131/13 – School Leaders and Management to Attend Financial Management Workshop
PE 8	Ministry of Education School Management Handbook
PE 9	Ministry of Education Act Cap 262
PE 10	University of Fiji Decree No. 26 of 2011
PE 11	Ministry of Education Presentation on Free Education Management Workshop format
PE 12	Financial Management in Schools Manual, May 2014
PE 13	Ministry of Education Finance Manual for the year 2013
PE 14	Copies of Emails Printout emails as per folders with following subject headings: i) Creditors payments ii) Excess in accounts (16 accounts) iii) Free Education Directive from MoE iv) Media Release v) MOE Grants vi) APS Updates/MOE Workshop Update vii) Vunimono Arya Primary School MOE Allocation viii) Short Term Advance ix) Salary Clearance Transfers

PE 15	Payment Voucher No. 1019140-1019236 dated 27/1/14, sum of \$2,554,608.00 being payment of Term I Free Education Grant, 2014 – Primary inclusive of Term I WBC listings
PE 16	Payment Voucher dated 29/4/14, sum of \$1,617,131.00 being payment of Term II Free Education Grant, 2014 – Primary Schools inclusive of the breakdowns for each schools
PE 17	Payment Voucher dated 12/8/14, sum of \$1,819,609.00 being payment of Term III Free Education Grant, 2014 – Primary Schools inclusive of the breakdown for each schools
PE 18	Bhawani Dayal Memorial Primary School Debit and Credit Transfers for the Year 2014 and 2015
PE 19	Bhawani Dayal Memorial Primary School Cash Payments Journal 2014
PE 20	Bhawani Dayal Memorial Primary School Cash Receipts Journal 2014
PE 21	Bhawani Dayal Memorial Primary School Financial Statements dated 31 December 2014
PE 22	Westpac Banking Corporation Authority to Account Access to individuals at Arya Pratinidhi Sabha
PE 23	Westpac Banking Corporation Internet transfer for Account No. 24564700 from 01/01/2014 to 01/06/15
PE 24	FEMIS Spending Detailed Report, Bhawani Dayal Memorial Primary School, 2014
PE 25	Minutes of the University of Fiji Council Meeting dated Saturday 24/05/14
PE 26	Minutes of the University of Fiji Council Meeting dated Saturday 06/09/14
PE 27	Minutes of University of Fiji Council Meeting dated Saturday 6/12/14
PE 28	Minutes of Arya Pratinidhi Sabha of Fiji Annual General Meeting dated 08/06/14
PE 29	Minutes of Arya Pratinidhi Sabha of Fiji Internal Meeting dated 13/09/14
PE 30	Minutes of Arya Pratinidhi Sabha of Fiji Internal Meeting dated 29/11/14
PE 31	Agenda of the Southern District Primary School Committee Meeting dated 5/3/14 inclusive of Minutes dated 12/11/13
PE 32	Agenda of the Southern District Primary School Committee Meeting dated 31/8/14 inclusive of Minutes dated 12/03/14
PE 33	Agenda of the Southern District Primary School Committee Meeting dated 9/9/14 inclusive of Minutes dated 13/08/14
PE 34	Analysis of 2014 Bank Statement of Bhawani Dayal Memorial

	Primary School, Westpac Bank Corporation Account No. 24564700
PE 35	Terms Analysis of 2014 Bhawani Dayal Memorial Primary School, Westpac Bank Corporation Account No. 24564700
PE 36	Westpac Bank Corporation Bank Statement for University of Fiji, Account No. 9800966104, dated 4 January 2014 to 12 January 2015
PE 37	Westpac Bank Corporation Bank Statement for Bhawani Dayal Arya College, Account No. 17103500, dated 3 December 2013 to 2 January 2015
PE 38	Westpac Bank Corporation Bank Statement for Arya Pratinidhi Sabha of Fiji, Account No. 91057100, dated 3 January 2014 to 2 January 2015
PE 39	Westpac Bank Corporation Bank Statement for Bhawani Dayal Primary School, Account No. 24564700, dated 3 January 2014 to 2 January 2015
PE 40	Westpac Bank Corporation Bank Statement for Vunimono Primary School, Account No. 24566300 dated 3 December 2013 to 2 February 2015
PE 41	Internet transfer from 01/01/11 to 08/07/16 on Account Number 9800966104
PE 42	Audit Memorandum (DAM) of the Ministry of Education, National Heritage, Culture and Arts for the year ended 31 December 2014
PE 43	Email printout dated 15/04/15 from Kamlesh Arya re: BDAC Audit with attachments
PE 44	Arya Pratinidhi Sabha of Fiji Annual General Meeting Minutes dated 08 June 2014
PE 45	Immunity Letter of Mr. Ravineet Sami dated 22 November 2016
PE 46	Caution interview of Kamlesh Arya dated 22/3/16, 8/11/16, 9/11/16, 11/11/16, 21/11/16
PE 46A	Separate typed portions of the Caution Interview Statement of Kamlesh Arya
PE 47	Statement made to FICAC by Ravineet Ritesh Sami
PE 48	Affidavit of Tawake Gaunavou, (Banker's Affidavit)
PE 49	Bank Statements of Bhawani Dayal Memorial Primary School (Account No. 24564700) for Term 1 and 2 of 2014; and graphs depicting the loans for Term 1 and 2 of 2014

[6] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "Agreed Facts":

1. **THAT** the Accused in this matter is Mr. Kamlesh Arya (hereinafter referred to as the “the Accused”), 64 years old of Quarters 6, Gurukul Primary School, Saweni in Lautoka.
2. **THAT** the Accused was appointed to the position of “Registrar at the University of Fiji (hereinafter referred to as “University”) on the 11 December 2012 for a period of three (3) years which was renewed for another three (3) years in 2015.
3. **THAT** the Accused is responsible to the Vice Chancellor for the satisfactory performance of his duties.
4. **THAT** the Accused is also responsible for all the administration of the University, including the Finance and Facilities aspects of the University during the material time of the offence.
5. **THAT** the Accused was appointed to be the School Manager for a few Sabha schools including Bhawani Dayal Memorial Primary school (“**BDMPS**”), Bhawani Dayal Arya College (“**BDAC**”), Nadroga Arya College, DAV College, Ba Pundit Vishnu Deo, DAV Primary School and Arya Kanya Pathshal during the material time of the offence.
6. **THAT** the Accused was appointed to be the School Manager for the abovementioned schools based on merits through the Sabha Annual General Meeting and Executive Meeting as outlined in the Sabha Constitution.
7. **THAT** the Accused duties and responsibilities as the School Manager is to manage the school in terms of its infrastructure, be part of the management board, take decisions for development and be the liaison between the management and the Ministry of Education.
8. **THAT** the Accused was one of the Trustees for the Arya Pratinidhi Sabha of Fiji (hereinafter referred to as “**APS of Fiji**”). The other Trustees were Mr Arun Padarath, Mr Bhuwan Dutt, Mr Ravineet Ritesh Sami and Mr Shanti Saraj.
9. **THAT** between January to June 2014, Mr Sami was the National General Treasurer of APS of Fiji and was elected as a Trustee for APS in June 2014.
10. **THAT** Mr Sami was also the Executive Director Finance of the University of Fiji in 2014.
11. **THAT** Mr Sami was appointed as the General Treasurer of APS Westpac Internet Banking and simultaneously granted access to manage the cash flows of all accounts of Sabha.

Procedure on the use of Free Education Grant from Ministry of Education

12. **THAT** the government through the Ministry of Education (hereinafter referred to as “**MOE**”) initiated the Free Education Grant (“**FEG**”) for both primary and secondary schools in 2014.
13. **THAT** the grants were calculated per student according to the roll provided by the school management. Each student was supposed to receive \$250 each Term to be utilised for the purpose outlined in the Financial Management Handbook (hereinafter referred to as “**Handbook**”).

Term 1 FEG

14. **THAT** on the 6th January 2014, Bhawani Dayal Memorial Primary School had received \$83,076.00 into its Westpac Account No. 24564700 for the Term 1 allocation in 2014.
15. **THAT** on the 31st January 2014, \$27,500 was loaned to BDAC from BDMPS FEG via internet transfer. [In evidence it has transpired that in actual fact the \$27,500 was loaned to BDAC in the following manner: On 16 January 2014, \$20,000; on 31 January 2014, \$500; and on 4 February 2014, \$7000].
16. **THAT** on the same date another \$30,000 was loaned to the University from BDMPS grant through internet transfer as well.
17. Thereafter, on the 26th February 2014, again another \$9,000 was loaned to Vunimono Arya School (“**VAS**”) via internet transfer from BDMPS grant. [In evidence it transpired that in actual fact \$9,000 was transferred by VAS to the credit of the BDMPS account].
18. **THAT** on the 14th March 2014, another loan transfer of \$11,800 was done to the BDMPS grant to the APS Administration Account through internet transfer. [There is no record of such a transaction. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].

Term 2 FEG

19. **THAT** on the 13th May 2014, BDMPS had received \$83,423.00 into its Westpac Account No. 24564700 for the Term 2 allocation in 2014.
20. **THAT** on the 15th May 2014, a loan transfer of \$25,000 was done to the BDMPS FEG to BDAC account via internet transfer.
21. **THAT** on the 3rd June 2014, another loan transfer of \$9,000 to VAS was done to the BDMPS grant via internet transfer.
22. **THAT** on the 15th July and again on the 15th August 2014, two loan transfers were conducted to the BDMPS grant to the University amounting to

\$25,000 and \$10,000 respectively via internet transfer. [In evidence it transpired that in actual fact \$10,000 was transferred by the University of Fiji to the credit of the BDMPS account].

23. **THAT** the Accused was interviewed under caution at the FICAC Office in Lautoka on the 22/03/16, 08/11/16, 09/11/16 and the 11/11/16 in the English language by FICAC Commission Office (CO) Siteri Vuidreketi with Assistant Commission Officer (ACO) Mosese Matanisiga present as the Witnessing Officer before the interview was concluded on the 21/11/16 at the FICAC Office in Suva by the same mentioned officers.

24. **THAT** on the 22nd November 2016, the Accused was formally charged at the FICAC Office in Suva in the English language by the Senior Commission Officer (SCO) Alivereti Wakanivesi with CO Siraz Ali present as the Witnessing Officer before the Accused was produced in court on the same date.

[7] Since the prosecution and the defence have consented to treat the above facts as “Agreed Facts” without placing necessary evidence to prove them the above facts are considered as proved beyond reasonable doubt.

[8] At the close of the Prosecution case, the Counsel for the Accused made an application in terms of Section 231 (1) of the Criminal Procedure Act, that there is no evidence that the Accused committed the offences charged and as such the Court should record a verdict of not guilty against him.

[9] This preliminary matter was taken up for hearing before me on 2 May 2019. Both Counsel for the Accused and Counsel for the State were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[10] Section 231 (1) of the Criminal Procedure Act provides as follows:

When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the Accused person (or any one of several Accused) committed the offence.

[11] In the case of **State v. Waisale Tuivuya** [2003] FJHC 186; HAC 15X of 2002S (4 November 2003); it was held:

*“The test to be applied under Section 293 of the Criminal Procedure Code is whether there is evidence in respect of each ingredient of the offence. If there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence, then there is a prima facie case (**Sisa Kalisoqo –v- State** Criminal Appeal No. 52 of 1984, **State –v- Mosese Tuisawau** Criminal Appeal No. 14 of 1990).*

.....

Accordingly, the question to be addressed at this stage of the proceedings is whether there is some relevant and admissible evidence in respect of each element that must be proved before the Accused could be convicted of the offences alleged against him in the information.”

[12] In the case of **State v Ratu Inoke Takiveikata** [2011] FJHC 129; HAC 5 of 2004 (28 February 2011); it was stated that:

*“The phrase ‘no evidence’ has been interpreted to mean that there is no evidence on an essential element of the charged offence (**Sisa Kalisoqo v State**, Criminal Appeal No. 52 of 1984). If there is some evidence on the essential elements of the charged offence, the application for a no case to answer cannot succeed. The credibility, reliability and weight are matters for the assessors and not for the trial judge to consider at a no case to answer stage.”*

[13] It is clear that since Section 231(1) of the Criminal Procedure Act has retained the provisions similar to that of Section 293(1) of the now repealed Criminal Procedure Code (Chapter 21) in respect of no case to answer, the test remains the same. If there exists some relevant and admissible evidence, direct or circumstantial, touching on all the essential ingredients of the offence or offences charged, then there is a case to answer.

[14] This was further reiterated by His Lordship Justice Goundar in **FICAC v Rajendra Kumar and Jaswant Kumar** HAC 001 of 2009 (11 February 2010); in the following terms:

*“The test is that there must be some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence. The credibility, reliability and weight of the evidence are matters for the assessors (**Sisa Kalisoqo v. State** Criminal Appeal No. 52 of 1984, **State v. Mosese Tuisawau** Criminal Appeal No. 14 of 1990)”.*

[15] As indicated earlier the Accused in this case has been charged with two counts. The First Count is Abuse of Office, in terms of Section 139 of the Crimes Act No. 44 of 2009

(Crimes Act); and the Second Count is General Dishonesty Causing a Loss, in terms of Section 324 (2) of the Crimes Act.

[16] Section 139 of the Crimes Act defines the offence of Abuse of Office in the following manner: *“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.”*

[17] The Section provides that the maximum penalty for Abuse of Office simpliciter is 10 years imprisonment. However, if the act is done or directed to be done for *gain* the maximum penalty is enhanced to 17 years imprisonment.

[18] The State in their written submissions has made reference to the following cases where the elements of the offence of Abuse of Office were explained:

1. ***State v. Peniasi Kunatuba*** Criminal Case HAC 018 of 2006;
2. ***FICAC v. Laisenia Qarase*** [2012] FJHC 1242; HAC027.2009 (30 July 2012);
3. ***Laisenia Qarase v. FICAC*** [2013] FJCA 44; AAU66.2012 (30 May 2013); and
4. ***FICAC v. Laqere & Others*** [2017] FJHC 336; HAC56.2014 (1 May 2017).

[19] However, I wish to outline the elements of the offence of Abuse of Office in the following manner in relation to the First Count. In order to prove the First Count, the Prosecution has to establish that:

- (i) The Accused;
- (ii) During the specified time period (in this case between 1 January 2014 and 31 December 2014);
- (iii) At Suva, in the Central Division;
- (iv) Whilst being employed in the Public Service;
- (v) Did arbitrary acts;
- (vi) For gain;
- (vii) In abuse of the authority of his office;
- (viii) Which was prejudicial to the rights of the MOE and BDMPS.

- [20] The arbitrary acts, done for gain, in abuse of the authority of his office, has been categorized as authorizing loans amounting to \$116,500 from the FEG provided by the MOE to the said BDMPS.
- [21] It is an admitted fact that the Accused in this case is Kamlesh Arya. There is also no dispute as to the specified time period during which it is alleged the offence was committed or as to the place of offence.
- [22] The next element requires careful consideration. That is whether the Accused was employed in the Public Service at the relevant time. In the particulars of the offence it is stated thus *“whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School”*.
- [23] It is an admitted fact that the Accused was appointed to the position of Registrar at the University of Fiji on the 11 December 2012, for a period of three years, which was renewed for another three years in 2015. Therefore, it is clear that at the relevant time the Accused was the Registrar at the University of Fiji.
- [24] However, in this matter the prosecution ran its case on the basis that the alleged arbitrary acts, in abuse of the authority of his office, was carried out by the Accused in his capacity as the School Manager of BDMPS. Therefore, the prosecution has to establish that the position of School Manager of BDMPS fulfils the requirement of being employed in the Public Service.
- [25] The offence of Abuse of Office is contained in Part 11 of the Crimes Act which sets out the ‘Offences Against the Administration of Lawful Authority’, and specifically under Sub Division A-Bribery and Related Offences (Sections 133 to 140 Of the Crimes Act).
- [26] It is to be noted that a distinction is drawn in this Sub Division between the terms “public official” (as referred to from Sections 134-137) and being employed in the Public Service, as is found in Section 139.
- [27] Section 4 (1) of the Crimes Act states "public official" means—
- (a) the President or Vice-President;*

(b) any person who is appointed or nominated under the provisions of any Act or promulgation or decree or by election, including all—

(i) Ministers;

(ii) Members of Parliament of Fiji; and

(iii) Local Government Councillors;

(c) any person employed in the public service;

(d) any person holding an office under the Constitution of Fiji;

(e) any judge or magistrate, or any person holding any other judicial or quasi-judicial office;

(f) any person who holds or performs the duties of an office established by or under any law;

(g) any person who is an officer or employee of a government authority or agency, whether or not the authority or agency is established by an Act;

(h) any person who is a contract service provider for a government contract; and

(i) any person who is an officer or employee of a contracted service provider to or under a government contract.

[Emphasis is mine].

[28] Section 4 (1) of the Crimes Act goes on to define “person employed in the public service” in the following manner:

"person employed in the public service" means any person holding any of the following offices or performing the duties of that office, (whether as a deputy or otherwise), namely —

(a) any civil office including the office of President or Vice-President;

(b) any office to which a person is appointed or nominated under the provisions of any Act or by election or by promulgation or decree;

(c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of paragraphs (a) or (b);

(d) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

(e) a member of a commission of inquiry appointed under or in pursuance of any Act;

(f) any person employed to execute any process of a court;

(g) all persons belonging to a disciplined service of Fiji;

(h) all persons in the employment of any government department; and

(i) a person in the employ of a local authority;

[29] The prosecution is relying on sub-sections (b) and (c) above to establish that the Accused was a person employed in the public service.

[30] The University of Fiji is established under Section 4 (1) of the University of Fiji Act 2011. Section 11 of the Act provides for the appointment, by the University Council, of a Registrar of the University. The prosecution submits that since the Accused is appointed to the position of Registrar in accordance with Section 11 of the University of Fiji Act, the Accused is caught up within the definition of sub-section (b) in the definition of “person employed in the public service”.

[31] The above may very well be so. However, as I have stated earlier, the prosecution ran its case on the basis that the alleged arbitrary acts, in abuse of the authority of his office, was carried out by the Accused in his capacity as the School Manager of BDMPS and not as the Registrar of the University of Fiji. If the prosecution had framed the First Count on the basis that the Accused, as the Registrar of the University, had authorised the loan transactions to be made, then the situation may have been different. However, in this case, the prosecution alleges that the arbitrary acts, in abuse of the authority of his office, were carried out by the Accused in his capacity as the School Manager of BDMPS. Therefore, what the prosecution has to prove is that the Accused in his capacity as School Manager of BDMPS was a “person employed in the public service”.

[32] The prosecution submits that as School Manager of BDMPS, the Accused was employed in the public service in terms of sub-section (c) above. The basis for this assertion is that since the Permanent Secretary of the MOE is a person employed in the public service, that he has the power of removal of a School Manager in terms of the provisions of Section 12 of the Education Act.

[33] Section 12 of the Education Act (as amended), which deals with the vesting of management of schools, is reproduced below:

12.—(1) The management of every registered and recognized school or group of schools shall be vested in a properly constituted controlling authority which shall appoint a manager and submit his name, and, if a manager is appointed ex-officio, his title, to the Permanent Secretary for registration.

(2) The Permanent Secretary may register such manager or may refuse to register him if he is a person who has been or is liable to be prohibited from managing or assisting in the management of a school.

(3) The Permanent Secretary shall have power, by notice in writing, to prohibit any person from managing, or assisting in the management of, any school or group of schools if—

(a) he has been convicted of any offence involving dishonesty, fraud, violence or immorality; or

(b) he is an undischarged bankrupt; or

(c) while he was manager or assisting in the management of any school any of the circumstances mentioned in paragraphs (a), (c) and (d) of subsection (1) of section 24 arose, in consequence of which the school was closed under the powers conferred by that section (Amended by Section 4 Act No. 30 of 1976).

(4) Any person who manages or assists in the management of a school or group of schools when not registered as the manager or after he has been prohibited from so doing under the provisions of subsection (3) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred dollars and in default of payment to imprisonment for a term not exceeding six months.

[34] As per Section 12 of the Education Act it is clear that the Permanent Secretary has the power to register or refuse to register a School Manager. He also has the power to prohibit any person from managing or assisting in the management of any school.

[35] However, the Act does not grant the Permanent Secretary the power to appoint or remove a School Manager from that position.

[36] It is an agreed fact that the Accused was appointed to be the School Manager for a few Sabha schools including Bhawani Dayal Memorial Primary School, Bhawani Dayal Arya College, Nadroga Arya College, DAV College, Ba Pundit Vishnu Deo, DAV Primary School and Arya Kanya Pathshal during the material time of the offence. It is also an

agreed fact that the Accused was appointed to be the School Manager for the abovementioned schools based on merits through the Sabha Annual General Meeting and Executive Meeting as outlined in the Sabha Constitution.

[37] The Learned State Counsel contended that the power to prohibit any person from managing or assisting in the management of any school was synonymous with the power of removal. However, this Court cannot accept such an interpretation of Section 12 of the Education Act.

[38] The Learned State Counsel also referred to the case of *Kenji Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC)* [2018] FJSC 4; CAV0014.2017 (26 April 2018) to support his contention that the Accused was a person employed in the public service. However, I am of the opinion that the facts of that case are clearly distinguishable from the facts of the instant case.

[39] In his written submissions, the Learned Queen's Counsel submitted that sub provision (b) under the definition "person employed in the public service" as found in Section 4 of the Crimes Act should be read *eiusdem generis* with the rest of the section, where the assumption is that the roles and offices in question are paid, not performed out of charity. This recognized approach to the interpretation of statutory provisions is based on reading the provisions, where there are multiple categories listed, as if they belong to the same category or genus – *eiusdem generis*.

[40] *Eiusdem generis* means "Of the same kind or nature". This is a rule of interpretation of statutes where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted to things of the same type as the listed items.

[41] It is submitted that sub-provision (b) should be read *eiusdem generis* with the other sub-provisions, thereby the reference in the sub-section is to persons who are employed and paid and excludes an office performed out of charity.

[42] Considering all the above, this Court is of the opinion that the prosecution has failed to provide any relevant or admissible evidence, direct or circumstantial, to establish an

essential ingredient of the offence of Abuse of Office, namely that the Accused, as School Manager of BDMPS, was employed in the Public Service.

[43] In the circumstances, I hold that the Accused has no case to answer in respect of the First Count.

[44] Since I have decided in this manner, I find it inexpedient to determine whether the prosecution has elicited any relevant or admissible evidence, direct or circumstantial, to establish the remaining elements of the offence.

[45] The Second Count against the Accused is General Dishonesty Causing a Loss, in terms of Section 324 (2) of the Crimes Act.

[46] Section 324 of the Crimes Act defines Causing a Loss as follows:

324.—(1) A person commits a summary offence if he or she does anything with the intention of dishonestly causing a loss to another person.

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

(a) dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and

(b) person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.

[47] Therefore, in order to prove the Second Count, the Prosecution has to establish that:

- (i) The Accused;
- (ii) During the specified time period (in this case between 1 January 2014 and 31 December 2014);
- (iii) At Suva, in the Central Division;
- (iv) Dishonestly;
- (v) Caused a risk of loss to BDMPS;
- (vi) Knowing that the loss will occur or a substantial risk of the loss will occur.

[48] Although, in the particulars of the offence describing the Second Count it is again stated that the Accused ‘whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for BDMPS...’, I agree

with the Learned State Counsel that this is not an essential ingredient that the prosecution has to prove so as to establish the charge of Causing a Loss.

[49] The Accused is taking up the defence of mistake of fact in terms of Section 34 of the Crimes Act and, in particular, to a mistake of fact in relation to claim of right, in terms of the provisions of Section 38 of the Crimes Act, in respect of both counts 1 and 2.

[50] However, I am of the opinion that any such defence cannot be considered at a no case to answer stage.

[51] Furthermore, since the Accused is not challenging the admissibility of his caution interview statement, the statement has been tendered to Court by consent of both the prosecution and the defence [PE 46 and PE 46A]. The Accused also admits to making the statement. However, the truthfulness of the statement and the question of what weight to attach to the admissions made in the said statement is a matter of fact for the Assessors to decide. Therefore, it is my opinion that such matters cannot be decided at this stage of the proceedings.

[52] Considering the totality of the evidence led by the prosecution, a summary of which I have referred to in this Ruling, and also considering the several documents tendered by the prosecution as Prosecution Exhibits PE 1- PE 49, I am satisfied that there exists some relevant and admissible evidence, touching on all the ingredients of the offence of General Dishonesty Causing a Loss. Thus a prima facie case has been made out by the prosecution in respect of Second Count.

[53] In the circumstances, I hold that there is a case to answer by the Accused in respect of the Second Count.

[54] **FINAL ORDERS:**

1. The Accused has no case to answer in respect of the First Count. Accordingly, I record a verdict of not guilty against him in respect of the First Count and the Accused is acquitted of the First Count.
2. There is a case to answer by the Accused in respect of the Second Count and accordingly I call for his defence in respect of the said Count.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 6th Day of May 2019

**Solicitors for the State : Fiji Independent Commission Against Corruption (FICAC),
Suva.**

Solicitors for the Accused : MC Lawyers, Barristers & Solicitors, Suva.