

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
246(1) of the Criminal Procedure Act 2009.
[APPELLATE JURISDICTION]

STATE

Appellant

CASE NO: HAA. 23 of 2020

[MC Suva, Crim. Case No. CF 380 of 2009] **Vs.**

SHAINAAZ MOHAMMED

1st Respondent

ATISH KUMAR

2nd Respondent

Counsel : Ms. J. Prasad for the Appellant
Mr. S. Raramasi for the 1st Respondent
Ms. N. Choo for the 2nd Respondent

Hearing on : 19 November 2020

Judgment on : 29 January 2021

JUDGMENT

Introduction

1. The first respondent was charged with four counts of corrupt practice contrary to section 376 (a) of the Penal Code and both respondents were jointly charged with one count of conspiracy to commit a misdemeanour contrary to section 386 of the Penal Code, before the Magistrate Court at Suva.

2. The charges read thus;

FIRST COUNT

Statement of Offence (a)

CORRUPT PRACTICE: Contrary to section 376 (a) of the Penal Code Cap. 17.

Particulars of Offence (b)

SHAINAAZ MOHAMMED d/o ABDUL KHAN on the 13th of March, 2009 at Suva in the Central Division being employed as a receptionist with NEW ZEALAND IMMIGRATION SERVICES corruptly attempted to obtain additional \$500.00, the sum exceeding the official fees, from **SANJAY KUMAR LAKHAN** s/o RAM LAKHAN as an inducement or reward in consideration for issuing New Zealand Visitors Visa to the said **SANJAY KUMAR LAKHAN** s/o RAM LAKHAN on his Fiji Passport number 762772, an act related to the affairs of New Zealand Immigration Services.

SECOND COUNT

Statement of Offence (a)

CORRUPT PRACTICE: Contrary to section 376 (a) of the Penal Code Cap. 17.

Particulars of Offence (b)

SHAINAAZ MOHAMMED d/o ABDUL KHAN on the 13th of March, 2009 at Suva in the Central Division being employed as a receptionist with NEW ZEALAND IMMIGRATION SERVICES corruptly attempted to obtain additional \$500.00, the sum exceeding the official fees, from **SUDESH KUMAR** s/o GANDA PRASAD as an inducement or reward for issuing New Zealand Visitors Visa to the said **SUDESH KUMAR** s/o GANDA PRASAD on his Fiji Passport number 660856, an act related to the affairs of New Zealand Immigration Services.

THIRD COUNT

Statement of Offence (a)

CORRUPT PRACTICE: Contrary to section 376 (a) of the Penal Code Cap. 17.

Particulars of Offence (b)

SHAINAAZ MOHAMMED d/o ABDUL KHAN on the 13th of March, 2009 at Suva in the Central Division being employed as a receptionist with NEW ZEALAND IMMIGRATION SERVICES corruptly attempted to obtain additional \$500.00, the sum exceeding the official fees, from **KRISHNAL SINGH** s/o DIP SINGH as an inducement or reward for issuing New Zealand Visitors Visa to the said **KRISHNAL SINGH** s/o DIP SINGH on his Fiji Passport number 692059, an act related to the affairs of New Zealand Immigration Services.

FOURTH COUNT

Statement of Offence (a)

CORRUPT PRACTICE: Contrary to section 376 (a) of the Penal Code Cap. 17.

Particulars of Offence (b)

SHAINAAZ MOHAMMED d/o **ABDUL KHAN** on the 13th of March, 2009 at Suva in the Central Division being employed as a receptionist with **NEW ZEALAND IMMIGRATION SERVICES** corruptly attempted to obtain additional \$500.00, the sum not being part of the official fees, from **SANJAY KUMAR** s/o **RAM HARAK** as an inducement or reward for issuing New Zealand Visitors Visa to the said **SANJAY KUMAR** s/o **RAM HARAK** on his Fiji Passport number 767408, an act related to the affairs of New Zealand Immigration Services.

FIFTH COUNT

Statement of Offence (a)

CONSPIRACY TO COMMIT A MISDEMEANOUR: Contrary to section 386 of the Penal Code Cap. 17.

Particulars of Offence (b)

SHAINAAZ MOHAMMED d/o **ABDUL KHAN** and **ATISH KUMAR** on the 13th of March, 2009 at Suva in the Central Division conspired together to commit a misdemeanour namely, corruptly obtaining money from **SANJAY KUMAR LAKHAN** s/o **RAM LAKHAN**, **SUDESH KUMAR** s/o **GANDA PRASAD**, **SANJAY KUMAR** s/o **RAM HARAK** and **KRISHNAL SINGH** s/o **DIP SINGH** as an inducement or reward for issuing New Zealand Visitors Visa to the said **SANJAY KUMAR LAKHAN**, **SUDESH KUMAR**, **SANJAY KUMAR**, and **KRISHNAL SINGH** on their Fiji Passports.

3. The case was first called before the Magistrate Court on 23/03/09. The case was thereafter fixed for hearing on numerous occasions, but vacated predominantly due to various applications made on behalf of the respondents, on the face of it. Finally, the voir dire hearing on the admissibility of the confessions had commenced on 03/10/19 and the trial proper on 31/10/19. Upon closing the case for the prosecution on 01/11/19, submissions on no case to answer were made on behalf of both respondents. On 01/04/20, the Learned Magistrate ruled that there is no case for each respondent to answer in relation to their respective charges and accordingly acquitted both respondents.

4. Being aggrieved by the aforesaid decision of the Learned Magistrate the appellant has taken steps to file a timely appeal raising the following grounds of appeal;
 - i. *That the learned Magistrate erred in law and in fact in acquitting the first Respondent on Counts 1,2,3, and 4 by holding that the Prosecution had to prove that the first Respondent issued or was responsible for issuing a New Zealand Visitor's Visa to the said individuals named in the charge which is not an element of the offence of corrupt Practices;*
 - ii. *That the learned Magistrate erred in law and in fact in acquitting the first and second Respondent on Count 5 when she made a finding that there was no relevant and admissible evidence to prove that they had conspired together thus ignoring circumstantial evidence and the full confessions of the Respondents.*

Discussion

5. The impugned decision is made in terms of section 178 of the Criminal Procedure Code which reads thus;

178. 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.
6. In deciding whether 'a case is not made out against the accused person sufficiently to require him or her to make a defence', a magistrate is required to consider whether there is evidence to prove all the essential elements of the relevant offence and, whether that 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. [*Moiden v R* (1976) 27 FLR 206]
7. It is pertinent to note that having referred to the aforementioned case of *Moiden* (supra) and to the correct test enunciated in the said case in the impugned decision, the Learned Magistrate had then referred to a ruling the High Court had delivered on a no case to answer application in a high court trial. Moreover, it appears that the Learned Magistrate had in fact applied the test for no case to answer that is

applicable to high court trials in the instant case which would constitute only the first limb of the test that is applicable for magistrate court trials. However, none of the parties have advanced any argument in this connection, taking up the position that the evidence that the Learned Magistrate had relied on in her deliberations was so discredited or unreliable within the meaning of the second limb of the relevant test alluded to above.

Factual Matrix

8. In brief, PW3 who is the sister-in-law of the second respondent was told by the second respondent to write some names and phone numbers on a piece of paper. This paper which was tendered in court includes the names of PW4, PW5 and PW6 among others. The visa applicants PW4, PW5 and PW6 receive calls from an individual who asks for \$500 for their passports with New Zealand visitor visa to be returned and informs them where they should meet that individual. It was the second respondent who comes to hand over the passports and to collect the money from those witnesses. PW6 was a police officer and he alerts other police officers when he was informed to pay \$500 which led PW7 (a police officer) to arrest the second respondent on 13/03/09 when the second respondent came to meet PW6.
9. Some passports including those of PW4, PW5 and PW6 were handed over to the first respondent on 12/03/09 by PW2 for the purpose of returning them to the respective applicants. The first respondent was employed as a receptionist and PW2 as a Technical Adviser at the New Zealand Immigration Services.
10. The Learned Magistrate had ruled the cautioned interviews of the two respondents as admissible evidence. I would highlight certain relevant admissions being mindful of the rule that a confession is only admissible against its maker. Accordingly, the first respondent had admitted in her cautioned interview that she gave passports including PW6's passport to a person to obtain money for (issuing) visa. The second respondent had admitted in his cautioned interview that upon receiving a call he went to the New Zealand Embassy on 13/03/09 around 9.30am and met the person who called him. He says that this person during the call gave

him 5 names that includes PW4, PW5 and PW6 and told him to contact them and to collect money from them. When he met this person, they discussed to obtain \$500 from those visa applicant's. Then he goes out, contacts the applicants in the list and comes back to meet the same person. Then he receives passports including the passports of PW4, PW5 and PW6.

First ground of appeal

11. The first ground of appeal is relevant to the first four counts where the first respondent is charged with the offence of corrupt practice contrary to section 376 (a) of the Penal Code.

12. Section 376 (a) of the Penal Code reads thus;

376. If-

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

...

he is guilty of a misdemeanour, and is liable to imprisonment for two years or to a fine of six hundred dollars.

13. Accordingly, the elements of the offence relevant to the first four counts could be identified as follows;

- a) The accused;
- b) Being an agent;
- c) corruptly accepted/ or obtained/ or agreed to accept/ or attempted to obtain, from any person;
- d) any gift or consideration for the accused or any other person;
- e) as an inducement or reward for;
- f) doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business.

14. Section 375 of the Penal Code provides that, for the purposes of the chapter that contains the offence of corrupt practice, the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

15. According to the particulars of offence the allegation relevant to each charge is that the first respondent being employed as a receptionist at New Zealand Immigration Services corruptly attempted to obtain \$500 from another person as an inducement or reward for issuing New Zealand visitor visa for that person.

16. A summary of the evidence that was considered by the Learned Magistrate in relation to the first four counts as reflected in the impugned decision is as follows;

"PW2 Shobna Chanel gave evidence that she gave the envelopes containing the passports and the phone numbers to the first accused Shainaaz.

In her caution interview (redacted copy PEx9) the 1st Accused admitted that she called a person and arranged for the person to pick up some passports on 13.3.09. The person was to call the clients and obtain money for visas.

PW3 Vandana Chand in her evidence stated that she wrote the names of certain people on a piece of paper whilst the 2nd Accused was speaking to a person on the phone.

...
...

PW2 gave evidence that the role of the 1st Accused was to man the reception and dispatch passports. This was the only evidence as the role of the 1st Accused at the Immigration Services apart from her Caution Interview. PW2 stated that the Visa officers would consider the applications and grant a visa. She would also at times assist in the process. The sealed envelopes with passport and client names and phone numbers was given to the 1st Accused to call clients to collect their passports."

17. In concluding that there was no case for the first respondent to answer in relation to the first four counts, the Learned Magistrate in the impugned decision has stated thus;

The particulars of the offence for each count 1 – 4 read "...as an inducement or reward in consideration for issuing New Zealand Visitors Visa to the said Sanjay Kumar Lakhan, Sudesh Kumar, Krishnal Singh and Sanjay Kumar".

*Therefore the specific act which is complained of by Prosecution **inducement or reward in consideration for issuing New Zealand Visitors Visa.***

PW4 and PW5 stated that they met a man and gave him \$300 each for their passport. They did not receive any calls from any lady nor were in contact with any lady from New Zealand Embassy.

The passports of the various individuals were not tendered to show whether the visas were issued or not. PW4 and PW5 stated that they had valid New Zealand Visas on their passport when [they] received it from the man however there is no evidence as to who "issued" the said visas.

I find that there is no relevant and admissible evidence before this Court to show that it was the 1st Accused who issued or was responsible for issuing New Zealand Visitor's Visa to the said individuals.

18. The appellant submits that the Learned Magistrate had erred in making the finding that the prosecution has to prove that the first respondent either issued or was responsible in issuing the relevant visas. The appellant argues that what the prosecution was required to prove was that issuing the relevant visas was part of the principal's business.
19. It is understood that the fact that the first respondent was an agent of the New Zealand Immigration Services is not in dispute. According to the evidence the Learned Magistrate appear to have accepted, the first respondent was tasked with the responsibility of dispatching the passports that are submitted to the New Zealand Immigration Services. In relation to the case at hand she was handed over the passports of PW4, PW5 and PW6 ("visa applicants") among other passports for her to call those visa applicant's and to hand over those passports. This suggests that the first respondent was involved in the process of issuing the relevant visas and dispatching the passports received in relation to visa applications was one of her responsibilities as an employee of the New Zealand Immigration Services.
20. From the perspective of visa applicants PW4, PW5 and PW6, \$500 was solicited and the relevant applicants paid the relevant amounts in relation to the issuing of the

relevant visas. That was the act that was intended to be induced or rewarded with the money so solicited. There was evidence placed before the Learned Magistrate that the first respondent being an agent of the New Zealand Immigration Services which issues the relevant visas, and who had a role to play in the issuing of visas, attempted to obtain money for that act of issuing visas. Thus, it is manifestly clear that the first respondent attempted to obtain money in relation to the affairs or business of the New Zealand Immigration Services.

21. In this case, the first respondent did have a role to play in relation to the act in question. In my view, such a nexus is not always required when it comes to the offence of corrupt practice by agent under section 376(a) of the Penal Code, given the nature of evil the said offence was expected to combat with.
22. As the counsel for the appellant had correctly pointed out, what is required to be established is that the relevant act constitutes the principles affairs or business and the relevant gift or consideration was aimed at the said act. Thus, it is not necessary for the accused (being an agent) to even have the capacity to perform the act in question or any connection to it, as long as the act in relation to which the relevant gift or consideration was corruptly obtained (as the case may be) constitutes the principal's affairs or business.
23. All in all, I find that the Learned Magistrate had erred by misconstruing the relevant last element of the offence of corrupt practice under section 376(a) of the Penal Code in her deliberations pertaining to the no case to answer application in the case at hand.
24. The first ground of appeal should therefore succeed.
25. As clearly noted in the preceding discussion, there is evidence that is relevant and admissible on the relevant final element of the offence pertaining to counts one, three and four. I do not find the said evidence to be 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. Hence, there is a case for the first respondent to answer in respect of count one, count three and count four.

26. However, it is pertinent to note that the visa applicant pertaining to count two has not given evidence and as far as the first respondent is concerned, I find that there is no evidence on an essential element relevant to the second count. Thus, there is no case for the first respondent to answer in respect of the second count.

Second ground of appeal

27. This ground relates to the fifth count where both respondents are charged with conspiracy to commit a misdemeanour and the relevant misdemeanour is the same offence of corrupt practice by an agent which is discussed above.
28. In arriving at the conclusion that there is no case for each respondent to answer in respect of the fifth count, the Learned Magistrate had stated thus;

“In respect of the 2nd element, I find that Prosecution has failed to adduce any relevant and admissible evidence that the 1st and 2nd Accused conspired together. The Caution interviews of each Accused (redacted copies) indicate that each Accused did talk to another person about passports and money, however there was no evidence adduced that it was the 1st Accused and 2nd Accused who conspired together.”

29. Since the Learned Magistrate had referred to the term ‘redacted copies’ I consider it appropriate first to discuss briefly on the law relevant to the use of one accused’s confession against a co-accused.
30. Archbold Hong Kong (2013 edition) discusses the principles governing the editing of a co-accused’s cautioned interview statement as follows, at 15-112 (page 998);

In *R v Lake* (1976) 65 Cr App R 172, the Court of Appeal affirmed the general principle that an offence committed by two or more persons should be tried even if this meant that inadmissible evidence would be given before the jury and the possible danger that prejudice to one or

more of the defendants may result (at 175). There will be cases where the prejudicial effect of a co-defendant's statement is so great against the other that no matter how strong may be the judge's direction the jury would not be able to put the effect of the statement out of their minds, that being so separate trials may be ordered. Such orders will be rare: *R v Chau Wai Keung & Another* [1993] 1 HKCLR 299 and *Tan Siew Gim v R* [1995] HKCLR 299. Where the prejudicial effect of one defendant's statement, is such that it can only be cured by editing his statement, then the judge should do so. In *Lobban v The Queen* [1995] 1 WLR 877, PC Lord Steyn, in his Opinion, canvassed the principles governing the editing of co-defendant's statements in some detail (at 886G to 887B):

"It is now necessary to examine counsel's argument [on editing a co-accused's statement] from the point of view of legal principle. Two principles are clearly established, first, a trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value. This power has probably existed since *Rex v Christie* [1914] AC 545, but, in any event, it was expressly affirmed by the House of Lords in *R V Sang* [1980] AC 402. The power is based on the trial judge's duty in a criminal trial to ensure that a defendant receives a fair trial. The width of the discretion is circumscribed by the purpose for which it exists. This common law discretion is the foundation of judge's power to cause part of a written statement made by a defendant, which is adduced by the prosecution to be edited in the interests of justice. It is wide enough to allow a trial judge to exclude evidence, which is tendered by the prosecution in a joint trial and which is probative of the case against one co-defendant on the ground that it is unduly prejudicial against another co-defendant. *R v Rogers and Tarran* [1971] Crim L R 413 was such a case. In such cases it is in the interests of both defendants that the disputed part of the document be edited: the distinctive feature of the present case is that there is a conflict between co-defendants as to editing."

31. Essentially, editing of a cautioned interview statement of an accused is done with the aim of avoiding any prejudice to the co-accused in trials before jurors or assessors, to prevent the minds of the jurors or assessors, as the case may be, being prejudiced based on any confession of the accused that implicates a co-accused.

Therefore logically, such a course of action is not required in trials before the Magistrate Court. On the other hand, there are instances where a cautioned interview statement of an accused would not be edited though it would contain prejudicial material against a co-accused.

32. Blackstone's Criminal Practice (2007 edition) at F17.42 (page 2616) explains that there is no discretion to restrain a co-accused from defending himself by adducing admissible evidence as follows;

Gunewardene was applied in *Lobban v The Queen* [1995] 1 WLR 877, where the issue before the Privy Council was whether the exculpatory part of a mixed statement made by L's co-accused, R, which incriminated L in a murder, could be excluded or edited in the exercise of the court's discretion to protect L from prejudice, given that the statement was hearsay and inadmissible as against him. The answer was that it could not; the prosecution had placed reliance upon the mixed statement as against R, and the exculpatory parts were therefore admissible evidence for R (see F17.44). There was no discretion to restrain a co-accused from defending himself by adducing admissible evidence, and nothing to support the suggestion made in earlier cases that the judge had a discretion to edit a confession so as to deprive one defendant of relevant defence evidence in order to minimise injustice to another (see, e.g., *Rogers* [1971] Crim LR 413).

...

33. Blackstone's Criminal Practice (2007 edition) further highlights that a confession should not be amended when the effect of editing leaves the jury with an incomplete or unsatisfactory picture: At F17.42 it states thus;

In *Mitchell* [2005] EWCA Crim 3447, the Court of Appeal was concerned with the editing of two sets of statements. In the first, *Lobban* applied because the prosecution was relying on the whole of the interview and the effect of editing out references to the co-accused would have been to leave the jury with an incomplete and unsatisfactory picture of what the maker has said.

34. Therefore, in the case at hand, it was not in fact necessary for redacted copies of the cautioned interviews to be tendered. What was required by the Learned Magistrate was to be mindful that a confession is only admissible against its maker and is inadmissible against a co-accused, when assessing the evidence.
35. It is trite law that though jointly charged, the case against each accused should be considered separately. The first respondent in her cautioned interview statement had clearly confessed that she gave passports including PW6's passport to a person named Atish Kumar to obtain money for (issuing) visa. This confession to the effect that the first respondent conspired with the second respondent is admissible against the first respondent.
36. In the same manner the second respondent had confessed that he discussed with the first respondent about collecting \$500 from five individuals whose passports were given to him at the New Zealand Embassy by the first respondent where the five names included the names of PW4, PW5 and PW6. This confession to the effect that the second respondent conspired with the first respondent is admissible against the second respondent.
37. Moreover, it is noted that the above confessions are supported by the circumstantial evidence that are available in this case as outlined in paragraphs 8 to 10 above in this judgment.
38. Accordingly, I find that the Learned Magistrate had erred in concluding that no evidence was adduced to establish that the first and the second respondent conspired with each other.
39. The second ground of appeal should therefore succeed.
40. I find that there is evidence on all the elements of the offence relevant to count five, evidence which is not discredited as a result of cross-examination or manifestly unreliable so that no reasonable tribunal would safely convict the accused on that


evidence. Hence, there is a case for the first respondent and the second respondent to answer in respect of count five.

41. In the result, I would allow this appeal.

Orders;

- a) Appeal allowed;
- b) The acquittals entered on 01/04/20 in Suva Magistrate Court Case No, 380 of 2009 in respect of the first respondent on counts one, three, four and five are quashed;
- c) The acquittal entered on 01/04/20 in Suva Magistrate Court Case No, 380 of 2009 in respect of the first respondent on counts two is affirmed;
- d) The acquittal entered on 01/04/20 in Suva Magistrate Court Case No, 380 of 2009 in respect of the second respondent on count five is quashed;
- e) The relevant court record to be sent back to Magistrate Court No. 02 forthwith for the Learned Magistrate to take steps in terms of section 179 of the Criminal Procedure Act 2009 and to continue with the trial;
- f) Magistrate Court No. 02, the prosecution and the defence counsel are hereby directed to give priority to this matter and to take steps to have the matter concluded expeditiously;
- g) Case to be mentioned before Magistrate Court No. 02 on 10/02/21 at 9.00am;
- h) Both respondents to be released on the same bail conditions that were effective as at 01/04/20 and they are hereby warned to appear before Magistrate Court No. 02 accordingly.




Vinsent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the Appellant
Raramasi Law, Labasa for the 1st Respondent
R. Patel Lawyers, Suva for the 2nd Respondent