

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT NASINU

Criminal File No: MACD 34/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : SEMI SALAUCA MASILOMANI

Accused

Appearances

For Prosecution : Mr. J. Work and Mr. D. Hickes (*FICAC*)

For the Accused : Mr. D. Toganivalu (*Toganivalu Legal*)

Date of Trial : 21st to 23rd August 2019; 25th September 2019; 13th December 2019;
25th and 26th January 2021.

Date of Judgment : 8th February 2022

JUDGMENT

1. The accused person is charged as follows:

Count One

Statement of Offence [a]

OBTAINING FINANCIAL ADVANTAGE: Contrary to Section 326 (1) of the *Crimes Act 2009*.

Particulars of Offence [b]

SEMI SALAUCA MASILOMANI between the period 24th February 2012 and 24th March 2012 at Suva in the Central Division engaged in a conduct, namely falsely claiming subsistence allowances for himself from the Ministry of Health and as a result of that conduct obtained a financial advantage in the sum of \$800 knowing that he was not eligible to receive the said financial advantage.

ALTERNATIVE CHARGE TO COUNT ONE

Statement of Offence [a]

FALSE INFORMATION TO PUBLIC SERVANT: Contrary to Section 201 of the *Crimes Act 2009*.

Particulars of Offence [b]

SEMI SALAUCA MASILOMANI between the period 24th February 2012 and 24th March 2012 at Suva in the Central Division, gave a person employed in the Public Service, namely Dr. Josefa Koroivueta, the Deputy Secretary Public Health, information which he knew to be false namely the subsistence allowance claims pertaining to the 1st, 2nd, 8th,

9th, 15th, 16th, 19th and 22nd March 2012 knowing it to be likely that he would thereby cause said person employed in the Public Service to certify or approve the said subsistence allowance claims which said person in the Public Service ought not to do if the true state of facts were known to the said person employed in the Public Service.”

2. The accused had pled not guilty to the charges and as such the matter proceeded to trial.
3. During the hearing prosecution called four (4) witnesses and tendered twenty (20) exhibits¹.
4. Prosecution then closed their case.
5. Upon the close of Prosecution case there was a concession by learned counsel for the Accused that there was a case to answer
6. As such upon seeking a position from the Accused pursuant to Section 179 of the *Criminal Procedure Act 2009*, the accused gave evidence and a supporting witness gave evidence also.
7. The Accused closed his case thereafter.

The Charge

8. The court restates verbatim the charging sections as follows:

“Count 1

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

(a) engages in conduct; and

(b) as a result of that conduct, obtains a financial advantage for himself or herself from another person; and

(c) knows or believes that he or she is not eligible to receive that financial advantage.”

Alternative Charge

“201. If a person (the first person) gives to any person employed in the public service any information which he or she knows or believes to be false, and intending to cause, or knowing it to be likely that the first person will cause the person employed in the public service —

(a) to do or omit anything which such person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or

¹ Annexure A

(b) to use the lawful power of such person employed in the public service to the injury or annoyance of any person —
the first person commits a summary offence.”

Legal Discussion

9. In order to prove the offences charged, Section 57 and 58 of the *Crimes Act 2009* directs on the following:

“Legal burden of proof—prosecution

57.—(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Act —

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof—prosecution

58.—(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Sub-section (1) does not apply if the law creating the offence specifies a different standard of proof.”

10. The above legal regime had so often been pronounced by the courts and one such example is that which was highlighted by *Aluthge J* in his summing in *State v Baleiwakaya* - Summing Up [2020] FJHC 32; HAC121.2019 (24 January 2020), where he stated:

“7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.”

11. The other is *Woolmington v DPP*² where the court held that "*no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the accused, is part of the common law*".

12. Therefore the burden of proving the accused person's guilt beyond reasonable doubt lies with the prosecution. If the evidence creates any doubt, the benefit of the doubt should be given to the accused.

² [1935] AC 462

The Elements of the Offence

13. The substantive charge shall be considered firstly and depending on the outcome of the court's finding the court shall then consider the alternative charge.
14. In terms of the substantive charge, Prosecution needs to prove the following elements of the offence beyond reasonable doubt arising out of Section 326 (1) of the *Crimes Act 2009* and this is self-evident from the charge itself, that is:
 - i. The accused;
 - ii. Engages in conduct;
 - iii. As a result of that conduct, obtains a financial advantage for himself; and
 - iv. Knows or believes that he is not eligible to receive that financial advantage.”
15. In considering the listed elements it is prudent to consider the position of the accused as highlighted in the closing submissions of his counsel.
16. They have conceded that the first three elements of the offence have been proved beyond reasonable doubt.
17. This court agrees with that concession on the basis that oral evidence from prosecution witnesses, the exhibits and the agreed facts highlight that it was the accused (*The accused*) who submitted a subsistence allowance claim of \$800.00 (*Engages in conduct*) to the Ministry of Health for the 1st, 2nd, 8th, 9th, 15th, 16th, 19th and 22nd March 2012 as premised on being away from the duty station.
18. As a result of his subsistence claim he was paid \$800.00 (*As a result of that conduct, obtains a financial advantage for himself*).
19. This means the evidence of Josefa Koroivueta (PW1), Aseri Kula Matewale (PW2) and Josateki Raibevu (PW3) as it relates to the physical elements of the offence are proved.
20. Given this court's discussions above-herein at paragraph 15, 16, 17, 18 and 19, this court is satisfied that Prosecution has proved the first three elements of the offence beyond reasonable doubt.
21. This leaves the final element of the offence, that is, '*Knows or believes that he is not eligible to receive that financial advantage*'.

22. The final element under the current legal regime as propounded under the *Crimes Act 2009* is the fault element.

23. This is stated on basis of the use of the words 'Knows or believes'.

24. Prosecution by way of the particulars of offence has chosen 'knowledge' as the fault element. This is evidenced by the following wordings from the particulars of offence that is, "**knowing** (emphasis mine) that he was not eligible to receive the said financial advantage."

25. Section 20 of the *Crimes Act 2009* defines knowledge in the following manner:

“

Knowledge

20. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

26. In *Fiji Independent Commission Against Corruption (FICAC) v Bakani* [2014] FJHC 572; HAC026.2009 (6 August 2014), *Bandara J* (as he then was) discussed the term as follows:

“

20. *Lord Denning MR, in Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd. The Eurysthenes* [1976] 3 All ER 243 at 251, [\[1977\] QB 49](#) at 68):

"And when I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should not know it for certain – then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it."

The Roskill LJ commented on actual **knowledge** as:

"I add the word "believed" to cover the man who deliberately turns a blind eye to what he believes to be true in order to avoid obtaining certain knowledge of the truth."

21. In the case of *Agip(Africa) Ltd v. Jackson* [1992] 4 All ER 385, [1990] Ch 265, Millet J analyzed 'knowledge' in following terms;

"**Knowledge** may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analyzed by Peter Gibson J in [*Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* (1982) [1992] 4 All ER 161 at 235, [\[1993\] 1 WLR 509](#) at 576-577 as comprising. "(i) actual **knowledge**; (ii) willfully shutting one's eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) **knowledge** of circumstances which would indicate the facts to an honest and reasonable man; and (v) **knowledge** of circumstances which would put an honest and reasonable man on inquiry." According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual **knowledge**, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) and (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not?

22. The 'issue' of 'knowledge' is best explained in the above citations. If the existing circumstances show either affirmatively or can be inferred through circumstances that the accused had

actual **knowledge** of the facts or he willfully shut his eyes to the obvious truth or did not make queries, either willingly or recklessly, as expected from a honest and reasonable man, it is the obvious conclusion that he had the '**knowledge**' of the existed situation. If somebody continues to exist, within a given scenario, as if like he does not have any '**knowledge**' of what is happening around him, whilst everybody else can see the reality, he is undoubtedly having some 'improper motive' to do so. The simple question is as to why he maintained a stoic silence?

27. The excerpt from Bakani's case (supra) was aptly summarized in *Fiji Independent Commission Against Corruption (FICAC) v Laqere* - Summing Up [2017] FJHC 336; HAC56.2014 (1 May 2017) as follows:

“

Knowledge

32. I now take your attention to the third element, which the accused knew or believed that the loss will occur or that there is a substantial risk of the loss occurring. Knowing or believing is **knowledge**. **Knowledge** can either be direct **knowledge** or inferred **knowledge**.

33. In determining the **knowledge**, it is sufficient to have the necessary awareness or the understanding of the act and its consequences. However, in some instances, **knowledge** includes “willfully shutting one's eye's to the truth”. If a person deliberately or intentionally refrains from making an inquiry about the act or the consequence of it, that also falls with the meaning of “**Knowledge**”

28. Noting the legislative definition and that of case law as above cited, has Prosecution proved beyond reasonable doubt that the accused had the knowledge that he was not entitled to claim but claimed anyway or he was uncertain on whether he could claim, failed to make an inquiry but claimed anyway?

29. It is Prosecution's submission that the accused as a National Emergency Coordinator (a management role) he ought to have known what his entitlements were.

30. This position is garnered from the evidence of PW-1 Dr. Koroivueta who held the position of Deputy Secretary and would oversee the work of the Accused.

31. PW1 – Dr. Koroivueta in his evidence-in-chief had stated that the accused was expected to know all his entitlements as arising out of the General Orders.

32. He re-iterated during cross examination that the General orders were widely circulated to all staff and further added during cross examination that every 2nd week during Management meetings, the General Orders would form part of the agenda.

33. He also read out Clause 106 of the General Orders which was authority for the view that all established civil servants were required to know the General Orders.

34. PW4 (Dinesh Prakash) in his evidence states that Clause 103 of the General Orders highlights that the General Orders applied to all public officers, temporary officers and those on contract.
35. He also stated that all persons employed as highlighted at paragraph 34 above-herein were mandated to know the General Orders and its application to them.
36. Given the discussions at paragraph 29 to 35 above-herein it is established by Prosecution that the accused is assumed to have known his entitlements, including any subsistence claims as per the General Orders.
37. This is established given the proven fact that the Accused had made subsistence claims for the period 1st, 2nd, 8th, 9th, 15th, 16th, 19th and 22nd March 2012.
38. It proves that the accused was also aware of the matters set out under General Orders 500 and 501.
39. Be that as it may, knowing your entitlements and making a subsistence claim is one matter, the other is whether you knew that you were not entitled to claim but claimed anyway or not being fully sure whether you could claim, but failed to clarify and claimed anyway are separate matters altogether.
40. In this case, it is proved beyond reasonable doubt that the accused had made subsistence claims and was paid for the period 1st, 2nd, 8th, 9th, 15th, 16th, 19th and 22nd March 2012.
41. PW1 stated that he signed off as correct all those subsistence claims which were later paid out to the accused. This is the supervisor of the accused.
42. PW2 - Aseri Kula, who is the Senior Accountant stated in-chief that she had processed the accused's claims upon authorization by PW1 and verification by her.
43. She further states during cross examination³ that the accused was entitled to claim for the 2nd of March 2012 and according to her interpretation⁴ whatever claim was processed for the accused he was entitled to.

³ Verbatim Report page 9

⁴ Verbatim report page 13

44. PW4 (Dinesh Prakash) an experienced human resource and policy personnel for the Civil service, was asked to consider the scenario of the accused's claims on 1st, 2nd, 8th, 9th, 15th, 16th, 19th and 22nd March 2012. He stated that as per the interpretation of clause 500 and 501 of the General Order such a scenario meant the person claiming was not entitled.
45. However, he also stated during cross examination⁵ that any claim form can be filled by any officer and even endorsed by a supervisor however every accounting officer who deals with meal allowance and subsistence allowance is required to scrutinize the claim.
46. The discussions at paragraphs 40 to 45, is sufficient to show that the final element of the offence (knowledge) is not made out.
47. However, the caution interview of the accused was tendered⁶ by consent. Particular interest is drawn towards Q & A 80, which this court regurgitates as follows:
- “ Q.80. Mr. Masilomani, it states that on this running sheet for vehicle number FX235 dated 03/03/2012, the vehicle left Valelevu at 5am to transport the Emergency Typhoid Team and went to Cunningham, Kinoya, Nadi, Lautoka, Ba, Koroboya, Ba Town, Ba Mission and then reached Koroboya at 9pm. What can you say to this?
- A. I am not aware of this as I have said before, the travelling to Nadi and the West is done on Friday afternoons and Friday evenings because the Principal accountant then, Ms. Nina, she said you could only claim for the subsistence if you are at the site before 12 midnight or otherwise from Koroboya, you can only claim for Thursday or for Friday if you leave for Koroboya after 12midnight to come to Suva and it just comes along after our debriefings, we rest for a while then we come for Friday mornings.”
48. This excerpt highlights that advice was rendered to the accused in terms of the qualifying requirements of his subsistence claim. It is clear that he was advised of his entitlement to claim by the accounts team, that is, if he was to claim for the night he left Koroboya to travel back to Suva then he should have left after 12 midnight and conversely when he leaves Suva to travel back to Koroboya he must arrive before 12 midnight.
49. Prosecution Exhibits 13 A & B, 14, 15, 16, 17 and 18 (Daily Running Sheet for Motor Vehicle Registration FX235 and GN972) which were for 1st, 2nd, 8th, 9th, 15th and 16 March 2012 highlight that the accused did not spend the night in Koroboya when he had claimed that he did.
50. This was the evidence of Josateki Raibeve (PW3) who was the driver responsible for driving the accused and had noted the journey, destination and the time of the journey. Although he was cross examined on the veracity of his entries he maintained that whatever he recorded was accurate.

⁵ Verbatim report page 32 - 33

⁶ Prosecution Exhibit No.1

51. This also applied to Prosecution exhibit 9 and 11 for the 19th and 22nd of March 2012.
52. The caution interview of the accused highlights that the accused was not aware of the contents of the Daily Running Sheet until the same was shown to him during the course of the caution interview.
53. As per the caution interview he stated that the times were not accurate, however this was stated two (2) years after those trips were made.
54. Given the above discussions, most of the evidence led by Prosecution does not sustain a finding that the accused had the requisite knowledge.
55. However, as discussed at paragraphs 47 to 50 the court is satisfied that the accused was aware of the limitations of his claim (refer to Question and Answer 80 of the Caution Interview) and the daily running sheets confirm for the period 1st, 2nd, 8th, 9th, 15th, 16th, 19th and 22nd March 2012 that he was not on site at Koroboya as claimed.
56. As a result to this court, the fourth and final element of the offence is proved beyond reasonable doubt.

Defence Case

57. The accused was not required to prove his innocence but given that the court is satisfied that Prosecution has proved all the elements of the offence, he was only required to prove his defence on a balance of probabilities.
58. His defence was two-fold, that is, he was unaware of the contents of the running sheet and as such he had a valid claim of right. In fact he was disputing the time that was recorded on the running sheets.
59. The accused needed to prove that it was more probable than not that his version of events could be accepted and therefore be considered a valid defence.
60. Alipate Rogo was called to try to establish this defence, as he was third person privy to the information which the accused wishes to discredit.
61. Unfortunately Mr. Rogo did not direct any of his evidence towards the fact that the time recorded on the running sheet for the impugned period was incorrect.

62. This means that the evidence of PW3 which was supported by documentary evidence (Daily running sheet) carries more weight than the suggestion of the accused which is not supported by documentary or oral evidence.

63. As such the accused has not been able to prove his defence on the balance of probabilities.

Conclusion

64. This court has accepted that Prosecution has proved its case beyond reasonable doubt and has dismissed the defence raised on the basis that it was not proved on the balance of probabilities.

65. Therefore being satisfied as a result of the above finding, this court finds the accused guilty for one count of Obtaining Financial Advantage.

66. The alternative charge is not considered as a result.

67. The court shall now accept mitigation from the accused or his counsel and sentencing submissions from prosecution.


JEREMIA N.L SAVIO
Resident Magistrate



ANNEXURE A

- i. Prosecution Exhibit No.1- Caution Interview Statement
- ii. Prosecution Exhibit No.2 – Letter of Acting Appointment
- iii. Prosecution Exhibit No.2A – Employee Performance Assessment
- iv. Prosecution Exhibit No.3 – Extension of Acting Appointment
- v. Prosecution Exhibit No.4 – General Orders
- vi. Prosecution Exhibit No.5– Cheque # 263271
- vii. Prosecution Exhibit No.5A– Allowance Claim
- viii. Prosecution Exhibit No.6 – Subsistence Claim Form
- ix. Prosecution Exhibit No.7 – Cheque invoice # 264057
- x. Prosecution Exhibit No.7A –Cheque (BSP) # 264057
- xi. Prosecution Exhibit No.7B – Subsistence allowance form-claim
- xii. Prosecution Exhibit No.8 –BSP Payment voucher cheque # 264482
- xiii. Prosecution Exhibit No.8A – BSP cheque # 264482
- xiv. Prosecution Exhibit No.8B– Subsistence Claim Form
- xv. Prosecution Exhibit No.9 – Running Sheet 19/3/2012
- xvi. Prosecution Exhibit No.10 – Running Sheet 20/3/2012
- xvii. Prosecution Exhibit 11 – Running Sheet 22/3/2012
- xviii. Prosecution Exhibit 12 – Running Sheet 23/3/2012
- xix. Prosecution Exhibit 13A – Running Sheet 01/3/2012
- xx. Prosecution Exhibit 13B - Running Sheet 02/3/2012
- xxi. Prosecution Exhibit 14 - Running Sheet 08/3/2012
- xxii. Prosecution Exhibit 15 - Running Sheet 9/3/2012
- xxiii. Prosecution Exhibit 16 - Running Sheet 15/3/2012
- xxiv. Prosecution Exhibit 17 - Running Sheet 16/3/2012
- xxv. Prosecution Exhibit 18 – Running Sheet 16/3/2012
- xxvi. Prosecution Exhibit 19 – Statement of Alipate.R. 25/2/2014
- xxvii. Prosecution Exhibit 20 – Statement of Alipate.R. 15/7/2014