

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE’S COURT AT SUVA

Criminal File No: MACD 49/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : SEMISI HAVEA WAQA & Anor.

Accused

Appearances

For Prosecution : Ms. S. Datt (*FICAC*)

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

Date of Trial : 15th, 16th and 23rd June 2020; 2nd February 2022

Date of Judgment : 29th April 2022

JUDGMENT

1. The accused person was initially charged¹ for the following offences.

Count 1: Conspiracy to Defraud- Causing a Loss: Contrary to Section 328 (2) of *Crimes Act of 2009*

Count 2: General Dishonesty –Causing a Loss: Contrary to Section 324 (2) of the *Crimes Act of 2009*.

Count 3: General Dishonesty –Causing a Loss: Contrary to Section 324 (2) of the *Crimes Act of 2009*.

Count 4 General Dishonesty –Causing a Loss: Contrary to Section 324 (2) of the *Crimes Act of 2009*.

2. The accused had pled not guilty to the charges and as such the matter proceeded to trial. Apart from count 1 (where the accused was charged with Nilson Nilesh Narayan), the accused was charged solely for the remaining counts.
3. During the hearing prosecution called seven (7) witnesses and tendered four (4) exhibits².

¹ Annexure A – Charge Sheet

4. The four items exhibited were part of a bundle of documents which were agreed³ upon by the parties and were handed over to the court to form part of the court record.
5. Prosecution then closed their case.
6. Upon the close of Prosecution case the court (my predecessor) ruled that on count 1, 2 and 4 the accused was acquitted (this also meant that Nilson Nilesh Narayan was acquitted as well).
7. However on Count 3, there was a case to answer.
8. As such upon seeking a position from the Accused pursuant to Section 179 of the *Criminal Procedure Act 2009*, the accused gave evidence and called two (2) supporting witnesses who gave evidence as well.
9. The Accused closed his case thereafter.

The Charge

10. The court restates verbatim the charging section as follows:

“Count 3

(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.”

Legal Burden

11. 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 —

² Annexure B.

³ Annexure C – Agreed Bundle of Documents.

"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.”

12. 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.”

13. The other is *Woolmington v DPP*⁴ 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*".

14. 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.

The Elements of the Offence

15. In terms of the charge, Prosecution needs to prove the following elements of the offence beyond reasonable doubt arising out of Section 324 (2) of the *Crimes Act 2009* and this is self-evident from the charge itself, that is:

- i. The accused;
- ii. Dishonestly causes a risk of a loss;
- iii. Knowing that a loss would occur or that there was a substantial risk of a loss.”

⁴ [1935] AC 462

Agreed Facts

16. Arising out of the Agreed Facts⁵ the following are proved pursuant to Section 135(1) of the *Criminal Procedure Act 2009*, that is:

- i. The accused is Semisi Havea and he was employed as a Public Servant;
- ii. The accused prepared a Local Purchase Order (LPO) on 27th November 2012 for Aashees Motors Repairs, which was sent to the Ministry of Health;
- iii. He received an invoice between November 2012 to 31st January 2013 amounting to \$5458.00 for the repair of motor vehicle registration GM 382;
- iv. A cheque amounting to \$5,458.00 was raised and paid to Aashees Motors Repairs on 24th December 2012.

Prosecution Evidence

17. PW1 – Miriama Rarubi gave an overview of the process when goods or services are being rendered to the Ministry of Health.

18. She was employed as an accounts officer and she relayed that there needed to be a request and thereafter a Local Purchase Order would be issued to the supplier of the good or service.

19. Once the good or service was supplied or rendered payment would be processed to the supplier of the good or service.

20. There was a monetary cap in terms of approvals, that is, any amount below \$2000,00 could be approved by Senior Admin officer or Admin officer, whilst any amount beyond that would be forwarded to their asset team at the Head Quarters.

21. In terms of motor vehicles belonging to the Ministry of Health, the transport officer would make a request to kick off the process. In this case the accused was the transport officer at the material time.

22. However, PW1 did not make any mention of motor vehicle GM382.

23. When she was cross examined she agreed that during the material time (end of 2012) it was the closure of accounts and the Ministry of Finance had informed all government ministries to have all payments processed.

⁵ Annexure D

24. She also stated that it was practice to try to utilize the budgetary allocated funds towards the end of the year for motor vehicles, granted that the services had been rendered and the transport officer or whoever signs the bottom part of the Purchase order to confirm that the service had been rendered.
25. However, approvals could not be given by the transport officer.
26. In re-examination PW1 stated that the transport officer was responsible for obtaining quotations and would go to individual garages to obtain them.
27. PW2 was Paula Veiqaravi. He was the transport officer for the Ministry of Health based at the headquarters.
28. He highlighted that at the divisional level, the transport officer responsible is required to liaise with reputable garages to determine the repair needs of a motor vehicle. The garages would then supply quotations wherein the transport officer would recommend the garage which should conduct the repairs. The Ministry was required to accept three (3) quotations.
29. The recommendation would then be submitted to the senior officer who would give approvals for Purchase Orders.
30. PW2 recalled motor vehicle GM382 as he had gone to the garage which was repairing the same. He stated that he could not recognize the motor vehicle as it was in a state of repair and without its number plate. However, he reconciled the chassis number and the engine number as that which belonged to motor vehicle registration GM382.
31. He also stated that when he went to observe the motor vehicle it was still in a state of repair and the repairs had not been completed.
32. In cross examination PW2 agreed that a transport officer like the accused would check the repair works and confirm whether repair works had been done prior to payment being made by the Ministry of Health.
33. He also agreed in cross examination that he could not recall the year when he inspected the vehicles however it was at a time when the accused was still employed.
34. PW3 was Rupeni Lagilagi a senior vehicle examiner for the Land Transport Authority.

35. His evidence was that he had inspected motor vehicle registration GM382 at the Land Transport Authority's Valelevu office in 2013.
36. Upon inspection he did not deem the motor vehicle as road worthy due to the defects on the same.
37. He also prepared a report on 10th February 2014 where his opinion under 'recommendation', was that the quotation for works required to be done was not done and that there were no signs that the new parts had been fitted on the motor vehicle.
38. His recommendations were based on his findings from his report which he had read out in court.
39. In cross examination PW3 agreed that there is a part inside the alternator which is changed and that he would not be able to determine whether it was changed or not.
40. However, he stated that the quotation given suggests that a totally new alternator would be fitted and from his observations it was not.
41. PW4 was Kitone Solinadrotini and he gave evidence with reference to motor vehicle GM132 which is not the motor vehicle which count 3 refers to. As such for the purposes of the third (3rd) count his evidence is irrelevant and shall not be referred to.
42. PW5 was Mohammed Imran and he had given evidence that the exhibits he tendered⁶, did not come from him and that his signature was not on the quotations. One of the quotations related to GM 382.
43. However, his evidence was geared towards establishing the offence under the first (1st) count which has been dealt with at the no case to answer stage. As such for the purposes of the third (3rd) count his evidence is irrelevant and shall not be referred to.
44. PW6 was Uate Biutasera and he was the team leader of the investigations and was aware of the caution interview of the co-accused. Again the co-accused has been dealt with at the no case to answer stage. As such for the purposes of the third (3rd) count his evidence is irrelevant and shall not be referred to.

⁶ Prosecution Exhibits 1,2 and 3

45. PW7 was Rusiate Cokanasiga and he had conducted the caution interview of the co-accused. Again the co-accused has been dealt with at the no case to answer stage. As such for the purposes of the third (3rd) count his evidence is irrelevant and shall not be referred to.

Defence Evidence

46. The accused gave evidence as the first defence witness (DW1).

47. He stated in his evidence that at the material time he was employed at the Ministry of Health Divisional Office as an acting executive officer looking after transportation.

48. Further he stated that motor vehicle GM 382 was needed urgently to be used by the Dental team as requested by the Divisional Medical Officer Central.

49. As a result he obtained three quotations wherein the lowest priced quotation belonged to Aashees Motor Repairs. Aashees Motor Repairs had also done some work previously for the Ministry of Health.

50. It was his evidence that a Local Purchase Order was issued and full payment paid upon him noting down that the repair works were complete. This was endorsed by the Permanent Secretary for Health.

51. He further stated that even though it was noted that the repair works were done, the same was not done as the vehicle was still in the process of being repaired. However, he had to note that the works were done because it was the end of the year which meant that before the closure of the calendar year they had to clear outstanding payments.

52. The vehicle was returned after repairs.

53. When cross examined the accused agreed that he had signed off on the Local Purchase Order as it was the practice. In fact, to symbolize that it was the practice, the permanent secretary signed off as well.

54. In re-examination the accused clarified that when he joined the Ministry of Health it was a practice to use up the budgetary allocation at the end of the calendar year. In this case it was December 2012 and also that his superiors (Permanent Secretary) had signed off on it.

55. DW2 was Akanisi Delana who worked as clerical officer in the Accounts Section of the Ministry of Health in 2012.
56. She informed the court that upon the closing of accounts all payments needed to be processed as to not affect the budget. This was a practice that was done upon the close of the financial year.
57. In the accused's instance the transaction was authorized by the Permanent Secretary.
58. DW3 was Ruci Nadavolana who was the Acting Admin officer for the Ministry of Health. In 2012 she was working with the accused at Divisional Medical Office, in fact the accused reported directly to her.
59. She stated that the accused had processed payments for motor vehicle registration GM 382 but the vehicle was not delivered in December 2012.
60. This was done because at the end of the financial year, invoices were requested in order for it to be paid.
61. In this case there was a submission to the Asset Management Team, and then the Permanent secretary.
62. She further stated that the Ministry was aware of the risk of non-delivery but this was the practice.
63. In fact she stated that the vehicle was repaired and brought back to the Ministry of Health.
64. When cross examined she stated that she was asked about GM 132 by FICAC investigators and not GM382, however she was aware of GM 382 as she was involved in the process.
65. She agreed that although the finance manual states that the invoice is raised when work is done, when it comes to the end of the year where any pending payment has to be cleared quickly even when goods and services have not been received.
66. This is done as to not affect the budget for the new year.
67. Upon the courts clarification DW3 stated that even though the Finance Manual does not state that goods and services can be paid for even if it is not supplied at the end of the financial year, it was a practice that was present when the accused was employed.

68. DW3 further clarified that payments should only be made when repairs are done.

Element of the Offence Not Disputed - Identity

69. The Agreed facts and the evidence led by prosecution highlight that it is not in dispute that it was the accused. As such in terms of Identity of the accused, the same is proved beyond reasonable doubt.

70. Therefore the first element of the offence is proved by prosecution beyond reasonable doubt.

71. This leaves us with the two remaining elements.

Dishonestly causes a risk of a loss;

72. The term ‘dishonest’ in the *Crimes Act 2009* at Section 290 and section 348 define it thus:

“... dishonest means -

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.”

73. In *Chute v State* [2016] FJHC 1114; HAA015.2016 (8 December 2016) *Perera J* (as he then was) referred to Black’s law dictionary (6th edition) to define ‘dishonesty’ as follows;

“Disposition to lie, cheat, deceive, or de- fraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray.”

74. Has prosecution been able to prove beyond reasonable doubt that the accused’s actions were as described in Chute’s case (supra). This court interprets the definition to simply mean, that the accused was aware that the actions he undertook was not allowed, yet did so anyway.

75. The agreed facts and the evidence of PW1, PW2, PW3 show that the physical elements are present, that is, firstly the accused made the request wherein a Local Purchase Order was prepared.

76. Thereinafter, a cheque was raised and payment made to the garage however when payment was made the motor vehicle was still in a state of repair.

77. PW1 was firm in her evidence that the regulated procedure under the Finance Manual for the Public Service was that payment should only have been made when goods and services had been delivered or in this case once the repairs were finalized and the vehicle returned.
78. It is not disputed by the accused, that he did all that.
79. He however states that at the material time there was a practice in the Ministry of Health that would allow for such transactions to be processed on the basis that it was the end of the year close of accounts and all pending payments had to be made.
80. This was confirmed by DW2 and DW3 who were employed at the Ministry of Health at the material time. In fact DW3 was the accused's immediate supervisor.
81. Such was the practice that even the permanent secretary had signed off on the transaction.
82. This position by the accused shows to the court, the balance of his mind during the material time.
83. Be that as it may, it is not for the accused to prove his innocence but for Prosecution to prove his guilt.
84. What is left outstanding under the second (2nd) element for Prosecution to prove is the mental element. They have been successful in showing the court that money had left (loss) the coffers of the Ministry of Health, however what remains is whether the accused was dishonest.
85. To this point prosecution has done very little because they have not addressed this court that the accused's actions was not reasonable considering the standards of an ordinary person.
86. It was prudent for Prosecution to highlight that the accused had the intent of being dishonest not only by his actions but also that there being no other reasonable explanation for his actions.
87. PW1 who is the most relevant to address this point gives a general overview of accepted procedure, however she never was asked on how an approval for payment was granted when repair works for GM382 was not done.
88. She was in the court's view the 'star' witness and she would have been the best person to give an insight into how the accused's superiors were allegedly hoodwinked into approving the transaction by the accused. This is stated in light of the fact that the amount paid (exceeded

\$2000.00) was approved from the Permanent Secretary who is based at the Headquarters for the Ministry, whilst the accused is based at the Divisional office.

89. There is no reasonable explanation and this court cannot speculate the ‘What If’ questions. There should be no doubt in the court’s mind, as to the intent of the Accused. It should have come via evidence that the accused knew it was not allowed but proceeded anyway.
90. What is clear though to this court is the explanation by the accused which was supported by DW2 and DW3 and deems on a balance of probabilities that his actions were not dishonest given the accepted practice at the material time.
91. As a result this court is unable to form the view that the accused was dishonest because prosecution has not been able to prove the same beyond reasonable doubt. This element is not proved as a result.

Knowing that a loss would occur or that there was a substantial risk of a loss.

92. Given that the 2nd element of the offence has not been proved beyond reasonable doubt, this court shall not endeavor to discuss the third element of the offence, suffice to say that it suffers the same fate as the 2nd element.

Conclusion

93. Therefore being satisfied as a result of the above finding, this court finds the accused not guilty for the remaining count⁷ of General Dishonesty. The accused is acquitted accordingly.
94. 28 days to appeal.


JEREMAI N.L SAVOCA
Resident Magistrate



⁷ Count 3