

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

Criminal Case No. MACD 08 of 2021 SUV

BETWEEN : Fiji Independent Commission Against Corruption

Prosecution

AND : Solo Naivakarurubalavu Mara

Accused

For Prosecution : Mr. S. Savumiramira (**FICAC**)

For the Accused : Mr. D. Sharma (**R PATEL LAWYERS**)

Date of Judgment : 26th January 2023.

JUDGMENT

1. The accused person is charged as follows:

Count 1

Statement of Offence [a]

DISOBEDIENCE OF LAWFUL ORDER: Contrary to Section 202 of the Crimes Act of 2009.

Particulars of Offence [b]

SOLO NAIVAKARURUBALAVU MARA on or about the 24th of January 2020, at Suva in the Central Division, disobeyed a lawful Search Warrant issued by the Court under section 10B of the Fiji Independent Commission Against Corruption No.11 of 2007, by refusing to comply with the said search warrant.

Count 2

Statement of Offence [a]

FALSE INFORMATION: Contrary to Section 333 of the Crimes Act 2009.

Particulars of Offence [b]

SOLO NAIVAKARURUBALAVU MARA on or about the 23rd of January 2020, at Suva in the Central Division, gave information to an investigating officer of the Fiji Independent Commission Against Corruption namely Aporosa Vuinakelo, knowing that the information was false or misleading and the information is given to a person exercising powers under the Fiji Independent Commission Against Corruption No.11 of 2007.

2. The accused had pled not guilty to the charges and as such the matter proceeded to trial.

3. During the trial prosecution called three witnesses namely Alifereti Wakanivesi¹, Mosese Matanisiga² and Aporosa Vuinakelo³.
4. During the course of their evidence, prosecution tendered via their witnesses the following:
 - a. Email correspondence between the Fiji Embassy USA and IT provider (Exhibit P1);
 - b. Information to Obtain Search (Exhibit P2A) and Search Warrant dated 23rd January 2020 (Exhibit P2B);
 - c. Information to Obtain Search (Exhibit P3A) and Search Warrant dated 24th January 2020 (Exhibit P3B);
 - d. Four (4) disc recording of the caution interview of Solo Naivakarurubalavu Mara (Exhibit P4)
5. Prosecution then closed their case.
6. Upon the close of Prosecution case learned counsel for the accused person made a submission of no case to answer.
7. The court (differently constituted) in it's ruling dated 28th January 2020 adjudged that 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 chose to give evidence but decided against calling a witness.
9. The Accused closed his case thereafter.

The Charge

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

¹ Prosecution Witness No.1 – PW1

² Prosecution Witness No.2 – PW2

³ Prosecution Witness No.3 – PW3

Count 1

"202. Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, commits a summary offence."

Count 2

"333. - (1) A person commits a summary offence if he or she -

(a) gives information to another person; and

(b) does so knowing that the information

(i) is false or misleading; and

(c) ...

(ii) the information is given to a person who is exercising powers or performing functions under, or in connection with, any law;"

Legal Discussion

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 -

"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.

Analysis

15. In this case it is alleged in both charges that the accused (Solo N Mara) had not only disobeyed a search warrant by refusing to disclose the password to his personal email account, that is, smara1409@gmail.com (Count 1) but also that the password he did give to FICAC officers with reference to his personal email, that is, smara1409@gmail.com was false (Count 2).

16. The undisputed factual matrix from observing the evidence led by both Prosecution and Defence is that officers from FICAC had approached the accused (Solo N Mara) in the evening on 23rd and 24th January 2020 at his residence in Nasese, Suva empowered by Prosecution Exhibits 2A, 2B, 3A and 3B.

17. A search ensued wherein certain items were seized.

⁴ [1935] AC 462

18. In the course of executing the search warrant the officers of FICAC required from the accused (Solo N Mara) the password to his personal email address, that is, smara@gmail.com.
19. It appears this occurred on 23rd January 2020 wherein the accused (Solo N Mara) gave the officers a password. The password the accused (Solo N Mara) gave the officers was not able to log into the personal email of the accused (Solo N Mara).
20. As a result of what happened on 23rd January 2020, the FICAC officers returned on 24th January 2020 and required that the accused give them the proper password.
21. The accused (Solo N Mara) appears to have then refused to give the password as requested.
22. This factual matrix as described above herein is as the court has gleaned from the evidence led by both parties is undisputed.
23. Be that as it may, there are versions of the facts that are disputed and where there are explanations as to why certain actions were taken. The discussions on these shall be reserved at this point to allow the court to deliberate on a legal issue arising out of the undisputed facts.
24. The legal issue is one where there is contention between the parties and the court is of the view that it is a crucial matter to be discussed at the onset.
25. This legal issue is none other than the question in relation to the Search Warrant and the actions which ensued which were purported to have been allowed under the same.
26. Let us consider that question.

Search Warrant

27. When the term 'lawful' is used it simply paints the picture that an act or omission is sanctioned or is in conformity with the law.
28. In this matter both parties are on opposite ends in their positions with reference to the Search Warrant.
29. Prosecution submits that the Search warrant and the actions taken by FICAC officers as a result were lawful.
30. This was premised on the following submissions:
 - I. That the search warrant was signed by the Chief Magistrate as administered under section 10B of the ***Fiji Independent Commission Against Corruption Act***;
 - II. That the search warrant *inter alia* sought to access privileges and passwords to smara1409@gmail.com from the accused (Solo N Mara) and also authorized a search at night;
 - III. That the judges rules were not breached as a result of the FICAC officers exercising the empowerment as was listed on the Search warrant by asking the accused (Solo N Mara) questions in terms of access privileges and passwords, especially in relation to smara1409@gmail.com;
 - IV. That the rights against self-incrimination and the right to privacy were not breached on the basis that the accused had volunteered a password when questioned and that privacy as a right was not absolute as there was legislated investigative empowerment granted to provide means to access privileges and passwords deemed private; and
 - V. That the incumbent court cannot determine the issue of the validity of the search warrant on the basis that to do so would invoke a power of review, which it does not have.

31. Counsel for the accused submitted the following on the issue:

- I. That the search by night was not endorsed on the Search warrant as is required by Section 99 of the **Criminal Procedure Act 2009**;
- II. That the **Fiji Independent Commission Against Corruption Act** specifically search and seizure powers under **Section 10B** was inconsistent with Section 99 of the **Criminal Procedure Act 2009**; and
- III. That the search warrant had a limited application, specifically to search the accused's (Solo N Mara) premises and seize items listed in the search warrant only. It did not extend to questioning the accused (Solo N Mara) about a password to a personal email account.

32. There is an argument in this matter that seems to suggest that there be a comparative analysis between the search and seizure procedures prescribed under the **Criminal Procedure Act 2009** and that as provided in the **Fiji Independent Commission Against Corruption Act**.

33. The above rhetoric is answered simply by considering the question of jurisdiction. In this regard it is prudent to regurgitate Section 17 of the **Magistrate Court Act 1944** as follows:

Criminal jurisdiction

17. In the exercise of their criminal jurisdiction Magistrates shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Act 2009, this Act or any other law for the time being in force. (emphasis mine)

34. Section 17 of the **Magistrates Court Act 1944** makes it clear where jurisdiction lies in terms of Criminal matters. In relation to FICAC and the question of search and seizure as raised in this

matter, the FICAC legislation has set out the procedure under Section 10B.

35. As such the court shall rightly direct its mind solely on the same and not on search and seizure powers as stated in the **Criminal Procedure Act 2009** because there is no lacuna in the FICAC legislation.

36. The above being stated let us consider Section 10B of the **FICAC Act**.

37. Section 10B of the Fiji Independent Commission Against Corruptions Act provides:

“ [FIC 10B] Search warrants
Without prejudice to section 17(1) of the Prevention of Bribery Act 2007, if a Magistrate is satisfied by information on oath that there is reason to believe that there is in any premises or place anything which is or contains evidence of the commission of an offence to which this Act applies, he or she may by warrant directed to any officer authorise such officer, and any other officers assisting him or her, to enter and search such premises or place and seize such evidence.”

38. Under the FICAC Act, only a Magistrate has powers to authorise a search warrant upon being be satisfied that:

(a) by information on oath

(b) That there is reason to believe that there is in any premises or place

(i) Anything which is evidence of the commission of the offence to which the FICAC Act applies.

39. It appears from the wordings of Section 10B that when a Magistrate is so satisfied, the Magistrate may by warrant directed to any officer authorize such officer and any other officer assisting him or her to enter and search such premises and seize such evidence.

40. A close look at Section 10B of the FICAC Act warrants the conclusion that the empowerment is reserved only to entry upon a premises, search on the said premises and ultimately seizing anything which is or contains evidence of the commission of an offence.
41. There is no specific wording which grants an extension to compel access to devices, computers and the like. If it were so, then the legislation should have made specific reference to the same.
42. The law makers did not grant a secondary power to allow for the same but it appears allowance was only granted to enter and search and seize any computer, device and they may even seize any hard copies of passwords or the like that are present in conspicuous positions. However, it does not appear to extend to compelling access to the devices, computers and the like.
43. In fact from its promulgation in 2007 as Promulgation 28 of 2007 and then becoming Act 13 of 2016, there was no expansion of powers for search and seizure by Parliament (at this stage) to include a power to compel a person to give access privileges or passwords.
44. Perhaps when the FICAC promulgation became an Act in 2016, Parliament may have considered Section 12 (***Freedom from unreasonable search and seizure***) of the Fiji Constitution 2013 and deemed it improper to compel a person to give access privileges or passwords. In fact as this judgment is delivered the powers of search and seizure under Section 10B of the ***FICAC Act*** have not been extended as such.

45. ***Given that there was no legal empowerment to compel the accused to release the password for his personal email, was the search warrant unlawful?***

46. No it was not because it complied with the requirements of Section 10B of the ***FICAC Act***. As stated above it authorized entry, search and seizure of what was listed in the search warrant. Part of the list was access privileges and passwords. There is nothing wrong with listing the same, as long as the access privileges and passwords is discovered as a result of the search in a conspicuous position where there is no need to compel the person to whom the search warrant relates to offer information.

47. ***If the search warrant was not unlawful has the offence been made out?*** Whilst the court has made a finding that the search warrant was not unlawful, there can be no offence because the wordings of Section 10B of the ***FICAC Act*** do not extend to include a right to compel a person named in the search warrant to release access privileges and passwords if they were not in a conspicuous position.

48. As a result the actions of the accused (Solo N Mara) as alleged does not constitute an offence and the only proper conclusion for both offences charged against the accused (Solo N Mara) is that the charges are not made out as a result.

49. The accused (Solo N Mara) is acquitted accordingly on both charged offences.

50. 28 days to appeal.


JEREMIAS N.L. SAVOCA
Resident Magistrate

