IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 46 of 2018
[High Court of Suva Case No. HAC 331 of 2016]

BETWEEN	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ('FICAC')**
		Appellant
AND	:	**ABDUL SHEKEB**
		01st Respondent
	:	**JOSEFA RABOILIKU MARAWA**
		02nd Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. R. Aslam with Ms. F. Puleiwai for the Appellant**
	:	**Mr. I. Khan for the 01st Respondent**
	:	**Mr. J. Bale for the 02nd Respondent**
Date of Hearing	:	**01 May 2020**
Date of Ruling	:	**06 May 2020**

RULING

[1] The respondents had been charged in the High Court of Suva on four counts of Bribery contrary to section 4(1) (a) and 4(2) (a) of the Prevention of Bribery Promulgation No.12 of 2007 (now Act) [POBA] and two alternative counts of Bribery of Public Servants by Persons Having Dealings With The Public Bodies against the 01st appellant contrary to section 8(2) of the Prevention of Bribery Promulgation No.12 of 2007. The charges were as follows.

FIRST COUNT

Statement of Offence

Bribery: *Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

ABDUL SHEKEB, *between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered an advantage namely a Toyota Harrier vehicle registration no. HV 915 to one* ***JOSEFA RABOILIKU MARAWA,*** *a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.*

SECOND COUNT

Statement of Offence

Bribery: *Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

JOSEFA RABOILIKU MARAWA, *between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority of reasonable excuse, accepted an advantage namely a Toyota Harrier vehicle registration no. HV 915 from one* ***ABDUL SHEKEB,*** *Director and owner of Ariana Used Cars and Spare Parts, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.*

THIRD COUNT

Statement of Offence

Bribery: *Contrary to Section 4 (1) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

ABDUL SHEKEB, *on or about the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, offered a loan of FJ$4,000.00 to one* ***JOSEFA RABOILIKU MARAWA,*** *a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.*

FOURTH COUNT

Statement of Offence

Bribery: *Contrary to Section 4 (2) (a) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

JOSEFA RABOILIKU MARAWA, *on or about the 19th day of July 2015 at Suva in the Central Division, whilst being a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority, without lawful authority or reasonable excuse, accepted a loan of FJ$4,000.00 from one* ***ABDUL SHEKEB,*** *Director and owner of Ariana Used Cars and Spare Parts, on account of his performing any act in his capacity as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.*

ALTERNATIVE CHARGE TO FIRST COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: *Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

ABDUL SHEKEB, *between the 1st day of April 2015 and the 30th day of April 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the course of having dealings with the Fiji Revenue and Customs Authority, offered an advantage namely a Toyota Harrier vehicle with registration number HV 915 to one* ***JOSEFA RABOILIKU MARAWA,*** *a public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.*

ALTERNATIVE CHARGE TO THIRD COUNT

Statement of Offence

Bribery of Public Servants by Persons Having Dealings With The Public Bodies: *Contrary to Section 8 (2) of the Prevention of Bribery Promulgation No. 12 of 2007.*

Particulars of Offence

ABDUL SHEKEB, *on or about the 19th day of July 2015 at Suva in the Central Division, without lawful authority or reasonable excuse, in the course of having dealings with the Fiji Revenue and Customs Authority, offered a loan of FJ$4,000.00 to one* ***JOSEFA RABOILIKU MARAWA,*** *a*

public servant employed as Acting National Manager Border, Customs at the Fiji Revenue and Customs Authority.

[2] After trial, the assessors had expressed an opinion of not guilty in favour of the respondents on all counts on 20 April 2018. The learned High Court judge in the judgment delivered on the same day had agreed with the assessors and acquitted the respondents of all charges.

[3] The appellant had filed a timely notice of appeal against acquittals on 17 May 2018 containing 05 grounds of appeal seeking quashing of the acquittal and a re-trial. Later an amended notice of appeal was filed on 29 April 2020 to include the relief of leave to appeal against the acquittal without objection on the part of the respondents. Written submissions on behalf of the appellant had been filed on 22 July 2019 while the respondents' written submissions had been tendered on 19 August 2019.

[4] In terms of section 21(2) (b) of the Court of Appeal Act, the appellant could appeal against an acquittal only with leave of court unless the appeal was on a question of law alone in which event no leave is required (vide section 21(2) (a) of the Court of Appeal Act). Therefore, the matter had been taken up for hearing on leave to appeal on 07 November 2019. However, due to the demise of Suresh Chandra RCJ the ruling could not be delivered. Therefore, the matter was once again taken up for hearing on 01 May 2020 and all counsel made oral submission and agreed to abide by the written submissions already filed.

[5] The appellant had urged the following grounds of appeal.

(i) *The learned High Court judge erred in law by refusing to accept and, failing to direct assessors on the legal test known as the 'Capacity test' enunciated in Common Law with regard to the offence of Bribery under section 4 of the Prevention of Bribery Act No.12 of 2007.*

(ii) *The learned High Court judge erred in law by failing to apply and properly direct the assessors on the legal principle of 'General Sweetener or keeping Sweet Situation' as expounded in Common Law with regards to the offence of Bribery under section 4 of the Prevention of Bribery Act No.12 of 2007.*

(iii) *The learned High Court judge erred in law and fact by failing to consider and address the unchallenged evidence that proved the 'General Sweetener/Keeping Sweet Situation' in regard to the 4th element of the offence of Bribery under section 4 of the Prevention of Bribery Act No.12 of 2007*

(iv) *The learned High Court judge erred in law and fact by failing to apply the legal definition of advantage under section 2 of the Prevention of Bribery Act No.12 of 2007 that would cover 'favour' a an advantage and was misconceived that the advantage alleged in the 1st and 2nd counts was a 'gift' alone.*

(v) *The learned High Court judge erred in law and fact and misconceived by applying his findings on the negative element of 'reasonable excuse' under count 1 and 3 to the alternative counts under section 8 of the Prevention of Bribery Act No.12 of 2007*

[6] Some background facts could be ascertained from the summing-up of the learned trial judge as follows.

> *"53.The prosecution alleges that without reasonable excuse or lawful authority the vehicle HV 915 was offered as an advantage by the first accused to the second accused and the second accused accepted the said vehicle as an advantage during the period between 1st day of April 2015 and the 30th day of April 2015 on account of the second accused performing any act in his capacity as a public servant.*
>
> *54.The defence says that the vehicle HV 915 was purchased by the second accused from the first accused and it was a commercial transaction. The defence points out that the second prosecution witness admitted that it was a commercial transaction.*
>
> *55.Prosecution alleges that without reasonable excuse or lawful authority a loan of $4000 was offered as an advantage by the first accused to the second accused and the second accused accepted that loan as an advantage on or about 19/07/15 on account of the second accused performing any act in his capacity as a public servant.*
>
> *56.The defence admits that $4000 was requested by the second accused from the first accused and that the first accused gave $4000 to the second accused on or about 19/07/15. But the defence says that the said $4000 was required for the purpose of obtaining the vehicle loan to pay for the vehicle HV 915 as the second accused needed to have it deposited in his ANZ account and submit a bank statement indicating that amount to BSP. It is further submitted that this $4000 was the second accused's money kept as a deposit in the first accused's company and it was not a loan."*

[7] The learned judge's conclusions given in his judgment are as follows.

> *"11. Therefore the evidence does not suggest that the vehicle HV 915 was given by the first accused as a gift to the second accused. However, it would still come within the definition of an "advantage" as the registering of the vehicle under the second accused's name and handing over same without the payment of the total price and without any sales and purchase agreement, can be regarded as a service or a favour the first accused provided for the second accused. However, the entirety of the evidence does not establish beyond reasonable doubt that the said advantage was offered on account of the second accused performing any act in his capacity as a public servant or this was a 'keeping sweet' situation as vehemently argued by the prosecution. The first accused's admissions to the effect that he did not do anything to regain possession of the vehicle in question because he did not want to have problems with the authorities cannot be regarded as an admission that he offered the advantage to keep the situation sweet.*
>
> *12. On the other hand, especially given the evidence of the second prosecution witness that Ariana used to handover vehicles to customers of good standing upon receiving a deposit, I find that it is more probable that the first accused considered this as a commercial transaction and he had a reasonable excuse to provide this service or favour to the second accused.*
>
> *13. Therefore, I would agree with the unanimous opinion of the assessors that the first accused is not guilty of the first count.*
>
> *14. With regard to the alternative count to the first count though I am satisfied that the first accused was a person who had dealings with FRCA within the meaning of section 8(2) of the Bribery Promulgation, given my above finding regarding the reasonable excuse the first accused had, I also find that the first accused is not guilty of the said alternative count.*
>
> *15. In relation to the second count which is against the second accused, though I would accept that he did accept an advantage in line with my findings above, given the totality of the evidence, I am not satisfied that it has been established beyond reasonable doubt that he accepted it on account of his performing any act in his capacity as a public servant. Therefore, I agree with the unanimous opinion of the assessors that the second accused is not guilty of the second count.*
>
> *16. The third and fourth counts involve the $4000 the second accused obtained from the first accused in order to have his loan application processed. I cannot agree with the argument of the defence that the said $4000 the second accused obtained is the second accused's money and it was not a loan. It was in deed a loan. Evidence of the third prosecution witness does not suggest that he requested the second accused to bring the deposit the second accused paid to the first accused. On the contrary the said witness said the second accused was not required to pay $4,000 to the bank as deposit as it had been paid to the car dealer. However, it can be reasonably assumed from the evidence that the second accused needed to show that he*

had funds in his bank account in order to have the loan approved. Therefore the $4000 the second accused obtained from the first accused had nothing to do with the deposit the second accused paid on 02/04/15 and it was clearly an advantage.

17. However, as far as the first accused was concerned the second accused wanted $4000 to deposit in the second accused's bank in order to have the loan approved. Obviously, he was interested in this loan being approved as it was money due to his company. Therefore, a reasonable inference cannot be drawn from the evidence led in this case that the aforementioned advantage was provided on account of the second accused performing any act in his capacity as a public servant. The fact that this advantage was given for the purpose of securing the aforementioned loan in my view is a reasonable excuse for the first accused given the nature of evidence in this case. Therefore, I agree with the unanimous opinion of the assessors that the first accused is not guilty of the third count and also of the alternative count to the third count.

18. In relation to the fourth count, though I would reject the evidence of the second accused that he requested his $4000 deposit from the first accused on the instructions of the third prosecution witness, I am not satisfied beyond reasonable doubt that he received the $4000 loan as an advantage on account of his performing any act in his capacity as a public servant. It can be reasonably inferred that what went through his mind when he requested and obtained that $4000 loan was to secure the loan from BSP in order to pay for the vehicle. Therefore, I agree with the unanimous opinion of the assessors that the second accused is not guilty of the fourth count."

[8] The relevant sections of the Prevention of Bribery Act No.12 of 2007 are as follows

'"advantage" means-

(a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;

(b) any office, employment or contract;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any other service, or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;

(e) the exercise or forbearance from the exercise of any right or any power or duty; and

(f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage within the meaning of any of the preceding paragraphs (a), (b), (c), (d) and (e),

Bribery

4.-(1) Any person who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's -

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b).....

***(2)** Any public servant who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his -*

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b).....

Bribery of public servants by persons having dealings with public bodies

***8.**-(1).....*

***(2)** Any person who, without lawful authority or reasonable excuse, while having dealings of any kind with any other public body, offers any advantage to any public servant employed by that public body, shall be guilty of an offence.*

[9] The test for leave to appeal is ***'reasonable prospect of success'*** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

01st ground of appeal

[10] The learned trial judge had accepted that, vehicle bearing no. HV 915 would come within the definition of an "advantage" as defined in section 2 of POBA. Nevertheless he had acquitted the respondents of both counts 1 and 2 on the basis that the evidence had not established beyond reasonable doubt that the said

advantage was offered by the 01st respondent or accepted by the 02nd respondent on account of the second accused performing any act in his capacity as a public servant or the advantage had been offered or accepted in a 'keeping sweet' situation. With regard to the first conclusion, probably, the trial judge was right. However, the trial judge had not dealt with 'general sweetener' or 'keeping sweet' situation in any detail for its applicability to the facts of the case to rule out such a scenario except the only reference to it in paragraph 11 of the entire judgment. No reference to 'general sweetener' or 'keeping sweet' is found in the summing-up either. Obviously, the learned trial judge was looking for evidence establishing the performance of a specific act beyond reasonable doubt.

[11] This is where the appellant complains that the trial judge should have considered the facts to see whether the offer and acceptance of HV 915 vehicle fell within the test known as 'general sweetener' or 'keeping sweet' situation which would make the respondents still liable under sections 4(1)(a) and 4(2)(a) of POBA.

[12] The argument of the appellant is that the provisions in POBA, particularly section sections 4(1)(a) and 4(2)(a) are found in verbatim in Prevention of Bribery Ordinance in Hong-Kong where the exact provisions had been judicially interpreted to include 'general sweetener' or 'keeping sweet' situations and the courts trying cases under the same provisions in Fiji are bound to apply the same test to determine liability under identical provisions of POBA.

[13] Contrary to the submissions of the appellant, no foreign decisions are binding upon courts in Fiji which is a sovereign country and it has an independent judiciary. To put it very simply, the doctrine of stare decisis is a legal doctrine that obligates courts to follow previous decisions when making a ruling on a similar case and it binds courts below in the hierarchy to follow legal precedents set by higher courts in previous decisions. Of course, there are a large number of principles subject to which the doctrine of stare decisis operates. The doctrine of stare decisis does not apply across sovereign and independent countries. However, foreign decisions can be of persuasive value in appropriate situations. The degree of persuasion depends on so many considerations. Therefore, the decisions in Hong-Kong interpreting legal

provisions similar to 4(1)(a) and 4(2)(a) of POBA are certainly persuasive and may be adopted by courts in Fiji not because they are binding on them but because they may enrich the local jurisprudence in the areas of activity administered and regulated by POBA.

[14] The concept of 'general sweetener' or 'keeping sweet' situation has been developed by the Court of Appeal of Hong Kong in **Attorney General v Chung Fat-Ming** (1978) HKLR 480) and then approved in **R v. Ip Chiu** (1979) HKLR 11. McMullin J in the context of section 4(2)(a) said:

> *"The distinction which we are invited to consider is a distinction between the solicitation or acceptance of an advantage which is clearly identified by the evidence as directly related to the performance, or abstention from performance, of some particular act within the capacity of the given public servant in the performance of his duty, as against the solicitation, or acceptance, of an advantage which cannot be shown to be related to any specific incident of performance or non-performance of any such act, and which yet can be seen to be related to the nature and performance of his office generally. To put the matter more concretely the distinction which has been argued before us is between the advantage which is seen to be solicited or accepted as a 'quid pro quo" for some particular act or abstention identifiable as to place and time on the one hand and, on the other, an advantage solicited or accepted as a general earnest of good relations- the "keeping sweet" situation."*

[15] Having said that the overall intention was to cast the net very widely in order to draw as many malversation as possible within the area of control, McMullin J further said in ***Chung Fat-Ming*** that advantage as an inducement can be regarded as prospective and an advantage as a reward could be regarded as retrospective, while "otherwise on account of" could be regarded as one having no express purpose but which would be susceptible of proof by showing of mere solicitation itself coupled with proof of the relative positions of the parties. His Lordship elaborated that

> *"Moreover, the third expression in the formula seems to me to provide most exactly for the "keeping sweet" situation in its most tenuous and insidious form. Whereas "inducement" and "reward" are terms apt to cover situations where positive breach of duty can be proved, directly or by necessary inference, there will be cases in which nothing more can be shown then an*

unexplained, and prima facie inexplicable, gratification linked with the incumbency of a particular office although no malfeasance or nonfeasance can be proved. In that case the solicitation or gratification may reasonably be said to be "on account of" the performance by the official of "an act" within the capacity as a public servant even where that act is nothing more than the performance by him of his normal duty. I understand the phrase: "an act" to be a generic denotation of any and all acts which may fall within the scope of such duties and not to be limited to the showing of some specific act within that range. "The solicitation of an advantage as an inducement ..."

[16] Therefore, the argument of the appellant seems to be that in a 'keeping sweet' or 'general sweetener' situation the prosecution does not have to prove a specific act as contemplated under section 4(1)(a) or 4(2)(a) of POBA. However, in my view if the prosecution intends to rely on the concept of 'keeping sweet' or 'general sweetener' situation against an accused to prove its case, it must be made very clear to the accused at the earliest opportunity possible and not taken up as an argument at the end of the trial, for otherwise the accused may be prejudiced in his or her defence even to the extent of depriving him of a fair trial.

[17] It is clear that the learned trial judge has not considered the case before him in the light of 'general sweetener' or 'keeping sweet' situation as developed in ***Chung Fat-Ming.*** Nor does it appear from the summing-up and the judgment that the prosecution had run its case on that basis from the inception. Neither is it on record that the learned trial judge had refused to apply ***Chung Fat-Ming*** or any subsequent decisions on this point altogether as complained by the appellant. The full case record only would provide answers to these questions.

[18] Undoubtedly, ***Chung Fat-Ming*** appears to be a bench mark decision in the application of law relating to bribery in Hong-Kong and FICAC is entitled to urge the courts in Fiji to consider it for application in appropriate cases. I find that in **Fiji Independent Commission Against Corruption v Laqenisici** [2018] FJHC 807; HAA48.2017 (29 August 2018) another division of the High Court had adopted ***Chung Fat-Ming.*** All accused facing charges under POBA should be tried under the same law and principles and it would be very unsatisfactory if some trial courts in Fiji were to adopt the broad interpretation given in ***Chung Fat-Ming*** in respect of

sections 4(1)(a) or 4(2)(a) of POBA and some courts were not inclined to do so. The all-important uniformity of the law in its application would then be lost.

[19] Therefore, I think that as to whether ***Chung Fat-Ming*** and subsequent decisions such as ***Ip Chiu*** and **HKSAR v. Hui Rafeal and others** Criminal Appeal No.44 of 2014 affirming ***Chung Fat-Ming*** , should be adopted and followed in appropriate cases in Fiji is not only a question of law but also one of public importance.

[20] Thus, I allow leave to appeal as a matter of formality (though technically leave is not required on a question of law) on the first ground of appeal.

02nd ground of appeal

[21] Capacity test, the appellant argues, is applicable more to the part *'performing an act **in his capacity as a public servant'*** in sections 4(1)(a) or 4(2)(a) of POBA as propounded in **KONG Kam-piu & Another v. The Queen** [1973] HKLR 120, **So Sun-Leung v R** Cr App 261/73, **Attorney General v Chung Fat-Ming** (supra) and **Attorney-General v Ip Chiu** [1980] HKLR 11. The appellant argues that to decide whether an accused performed an act in his capacity as a public servant, the court needs to pose the question *"Could that advantage have been effectively solicited if the person in question was not the kind of public servant who could have performed some act as a public servant to the benefit of the person solicited."*.

[22] Leonard J in ***Chung Fat-Ming*** held that:

> *"The learned judge does not appear to have had drawn to his attention the fact that the word "corruptly" had been omitted from the present section 4 and, I think, obviously deliberately. The Crown does not have to prove "corruption" in strictu sensu. Again the present section 4 does not prohibit the acceptance of a quid pro quo. It forbids the acceptance of an advantage on account of performance of an act in the capacity of a public servant. In KONG Kam-piu & Another v. The Queen (3) in considering the culpability of a gift given to or accepted by a government servant to abstain from a proposed course of action, I posed as the test the question "Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?" This test was approved by the Full Court in SO Sun-leung & Another v. The Queen (4). Both cases were cases in which an advantage had been accepted. In a case of*

solicitation pure and simple where no advantage has been offered or accepted. I think that I might more accurately (or pedantically?) have framed the test to read:

"Could that advantage have been effectively solicited if the person in question was not the kind of public servant who could have performed some act as a public servant to the benefit of the person solicited."

[23] The learned trial judge had determined in paragraph 8 of the judgment that an answer in the affirmative to the above question would give rise to or amount to creating a presumption not intended by the legislature. However, in **Fiji Independent Commission Against Corruption v Laqenisici** [2018] FJHC 807; HAA48.2017 (29 August 2018) another division of the High Court had cited and seemingly approved ***Chung Fat-Ming.***

[24] Therefore, I think that as to whether ***KONG Kam-piu***, ***So Sun-Leung***, ***Chung Fat-Ming*** and ***Ip Chiu***, should be adopted and followed in appropriate cases in Fiji is a question of law that needs to be determined by the Full Court at least to bring uniformity to the application of POBA in Fiji, if not anything else.

[25] Thus, I allow leave to appeal as a matter of formality (though technically leave is not required on a question of law) on the second ground of appeal as well.

3rd and 5th grounds of appeal

[26] The 3rd and 5th grounds of appeal are inexorably interwoven with the answers to be given to the questions of law on the 01st and 02nd grounds of appeal. They would not arise for determination if those answers are in the negative. They also have to be considered in the light of the evidence led in the case for which the availability of the full case record is essential. Therefore, I make no ruling on the 3rd and 5th grounds of appeal.

04th ground of appeal

[27] The appellant argues that the learned trial judge had failed to apply the legal definition of 'advantage' given in section 2(1)(1) of POBA. However, I find that in paragraph 35, 36 and 48 of the summing-up and paragraph 11and 16 of the judgment the trial judge had sufficiently dealt with the definition of 'advantage' and considered vehicle HV915 as an advantage and $4000.00 as a loan. A loan is included in the definition of 'advantage'.

[28] Thus, I hold that the 04th ground of appeal has no reasonable prospect of success and I refuse leave to appeal on the 04th ground of appeal.

[29] Before parting with this ruling, I would like to place on record two matters of law which the Full Court may be inclined to address for future clarity.

[30] From the way the learned trial judge had itemised the elements of the offences under sections 4(1)(a), 4(1)(b) and 8(2) of POBA and from paragraphs 51 and 57 of the summing-up and paragraph 7 of the judgment, it appears that he had not considered 'without lawful authority or reasonable excuse' as elements of those offences but the presence of lawful authority or reasonable excuse as a defence to be proved by the accused on a balance of probability. I am afraid that this does not appear to be the correct view of the law.

[31] The legal burden is on the prosecution to prove beyond reasonable doubt that the accused acted 'without lawful authority or reasonable excuse' in terms of section 57(1) and 58 (1) of the Crimes Act, 2009. The accused in this instance does not seem to carry even an evidential burden to prove that he acted with lawful authority or reasonable excuse because the element 'without lawful authority or reasonable excuse' in offences under 4(1)(a), 4(1)(b) and 8(2) of POBA may not be considered as coming under section 59 of the Crimes Act. Burden of proof on balance of probability arises only in the case of a legal burden being cast on the accused under section 60 of the Crimes Act. If the accused has an evidential burden in this instance in terms of section 59(2) and (3) of the Crimes Act he has only the burden of

adducing or pointing to evidence suggesting a reasonable possibility that he had lawful authority or reasonable excuse to offer or accept an advantage. However, these are matters that the Full Court may consider to pronounce upon in order to clarify the law.

[32] The second question of law that arises from the summing-up is where the learned High Court judge had in paragraphs 38 and 49 of the summing-up considered the phrase *'on account of that public servants' performing any act in his capacity as a public servant'* as relevant to or involving or imposing a requirement to ascertain the state of mind of the accused. If this is a reference to a possible fault element of the offences set out in the information, in my view, that is an important matter of law that needs an authoritative pronouncement by the appellate courts, for *prima facie* sections 4(1)(a), 4(1)(b) and 8(2) of POBA do not seem to incorporate any fault element/s such as intention, knowledge, recklessness or negligence and those sections do not seem to specify any other fault elements either. However, in terms of sections 13, 18, 23, 24 and 25 of the Crimes Act there may still be a fault element or fault elements in sections 4(1)(a), 4(1)(b) and 8(2) of POBA. The full court of the Court of Appeal may consider this issue of law as well.

Order

1. Leave to appeal on the 01st and 02nd grounds of appeal is allowed.
2. Leave to appeal on the 04th ground of appeal is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL