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

CRIMINAL APPEAL NO.AAU 68 of 2019
[In the High Court at Suva Case No. HAC 063 of 2017]

BETWEEN	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**
		Appellant
AND	:	**KAMLESH ARYA**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. Savumiramira for the Appellant**
	:	**Mr. I. Lloyd KC and Dr. T. Hickie for the Respondent**
Date of Hearing	:	**03 October 2022**
Date of Ruling	:	**30 December 2022**

RULING

[1] The respondent had been indicted in the High Court at Suva with one count of Abuse of Office contrary to section 139 of the Crimes Act, 2009 and one count of General Dishonesty – Causing a Loss contrary to section 324(2) of the Crimes Act, 2009. The charges read as follows.

'***FIRST COUNT***

Statement of Offence (a)

ABUSE OF OFFICE*: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence (b)

KAMLESH ARYA, *between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, did arbitrary acts for gain in abuse of the authority of his office, namely authorized loans amount to $116,500 from the Free Education Grant provided by the Ministry of Education to the said Bhawani Dayal Memorial Primary School, which was prejudicial to the rights of the said Ministry of Education and Bhawani Dayal Memorial Primary School.*

SECOND COUNT

Statement of Offence (a)

GENERAL DISHONESTY – CAUSING A LOSS*: Contrary to Section 324(2) of the Crimes Decree 2009.*

Particulars of Offence (b)

KAMLESH ARYA, *between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar of the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, dishonestly caused a risk of loss to Bhawani Dayal Memorial Primary School by authorizing the Free Education Grants as loans amounting to FJD$116,500, and knowing that the loss will occur or substantial risk of the loss will occur to Bhawani Dayal Memorial Primary School.*

[2] At the close of the prosecution case the trial judge held that there was no case to answer regarding the 01st count but called for the defense in respect of the 02nd count and the trial continued. After the conclusion of the summing-up, the assessors had unanimously opined that the respondent was guilty of the 02nd count but the learned trial judge had disagreed with the assessors and acquitted the respondent of the 02nd count.

[3] The appellant had preferred a timely application for leave to appeal against acquittal. Written submissions on behalf of both parties had been filed subsequently.

[4] Grounds of appeal urged on behalf of the appellant are as follows.

Count 1: Abuse of Office

***Public Servant issue:* Grounds 1, 2 & 3**

1. *The Learned Judge erred in law and fact by acquitting the Respondent of the 1st Count on the basis that the Prosecution had failed to prove the first element of the abuse of office, namely that the Respondent was a person employed in the public service.*

2. *The Learned Judge erred in law when the Court wrongly considered the principle of ejusdem generis when deciding that the position of School Manager did not fall within the definition of "persons employed in the public service" under section 4 of the Crimes Act 2009.*

3. *The Learned Judge erred in law by misconstruing the section 4 of the Crimes Act 2009 and section 12 (3) of the Education Act when ruling that the Respondent was not a person employed in the public service*

***No Case to Answer Issue*: Ground i**

4. *The Learned Judge erred in law in not assessing all the evidence pertaining to each and every element of Count 1 during the No case to answer stage as the Learned judge did not follow the legal test of considering whether there was evidence touching on all the elements of the offence.*

Count 2: General Dishonesty - Causing a Loss
***Dishonesty issue:* Grounds ii, iii, iv.**

5. *The Learned Judge erred in law and misguided himself, during the judgment, by not adhering to the Court's own directions on the legal test for dishonesty set out in the Summing Up.*

6. *The Learned Judge erred in law by failing to rely on the legal test for "dishonesty" under either section 290 of the Crimes Act 2009 or the common law case of R v Ghosh [1982] QB 1053 during the judgment.*

7. *The learned Judge erred in law and fact when finding the Respondent not guilty on the basis that the decision to authorise the loans from BDMPS FEG was made collectively by the Arya Pratinidhi Sabha of Fiji (APSF) Executives, and not made by the Respondent alone, without considering that the Respondent alone had the actual fiduciary duty to safeguard the BDMPS FEG as he was the BDMPS School Manager recognised by the Ministry of Education.*

***Risk of Loss Issue*: Ground v.**

8. *The Learned Judge erred in law and fact when finding that the Respondent had not caused a substantial risk of loss to BDMPS when evidence showed that the full amount of $116,500 loaned out from BDMPS FEG was not fully paid back to the school in the year 2014.*

<u>Teething problems and Caution Interview Issue</u>: Grounds vi, vii, viii.

9. *The Learned Judge erred in law and fact in accepting the defence of "teething problems" without any cogent evidence in respect of the same.*

10. *The Learned Judge erred in law and fact in stating that the Caution Interview of the Respondent showed his "truthfulness" when the same clearly showed the Respondent's evasiveness and proven lies.*

11. *The Learned Judge erred in law and fact, when overturning the unanimous guilty verdict of the assessors, considering the totality of the evidence.*

[5] In terms of section 21(2)(a) of the Court of Appeal Act, the appellant could appeal against an acquittal on a question of law alone but only with leave of court on a question of fact alone or a question of mixed law and fact under section 21(2)(b). The test for leave to appeal is **'reasonable prospect of success'** (see **<u>Caucau v State</u>** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **<u>Navuki v State</u>** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **<u>State v Vakarau</u>** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **<u>Sadrugu v The State</u>** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87) in order to distinguish arguable grounds [see **<u>Chand v State</u>** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **<u>Chaudry v State</u>** [2014] FJCA 106; AAU10 of 2014 and **<u>Naisua v State</u>** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The respondent has suggested that the test for the granting of leave for a prosecution appeal against acquittal involving grounds of mixed fact and law or fact only, should, (as Dixon CJ noted in **<u>Vallance v R</u>** (1961) 108 CLR 56; [1961] HCA 42), not be on the same footing as the lower test for an accused's appeal against conviction, that is, '*reasonable prospect of success',* for the purpose of a prosecution appeal on an acquittal should be to lay out principles for the governance and guidance of lower courts (as Dixon CJ explained in ***Vallance***) and not simply the correction of judicial error in a particular case. The respondent has further submitted that the prosecution should be required to surmount two hurdles; it must identify a **<u>House v The King</u>** error (1936) 55 CLR 499 & [1936] HCA 40 in any discretion exercised by the trial judge and then negate why the discretion of the appeal court should not be exercised.

In the absence of any counter arguments or assistance on this point by the appellant in its written submissions and therefore, without the benefit of full argument, I am not disposed to consider this aspect any further in this appeal at this stage.

[7] The respondent has also submitted that if this court is not inclined to do so, then the test should be, as per Calanchini P in **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019), that is, '*more in keeping with the observations of the Supreme Court in Naisua'* so as to apply to *'the appeal itself as having a reasonable prospect of success rather than any particular ground of appeal',* that is, a global approach. However, without the benefit of the certified appeal records including judge's notes, if any and transcripts of audio recording of trial proceedings, this court at this stage cannot assess the potential prospect or otherwise of success of the appeal itself.

[8] However, if this court, due to the non-availability of complete trial transcripts, cannot determine whether a particular ground of appeal has a reasonable prospect of success or not on the material available such as the *voir dire* ruling, summing-up, judgment & sentencing order or any other incidental orders, it may still grant leave to appeal or enlargement of time to appeal, as the case may be, if it appears to court that such a ground of appeal may have merits or otherwise deserve to be examined by the full court in the interest of justice or if the court is of the view that it should be considered by the full court to establish a guiding principle for the lower courts or develop jurisprudence at large. However, the court will not have recourse to this course of action as a matter of routine but only in special and really deserving instances.

01st ground of appeal

[9] The appellant submits in relation to the 01st count of abuse of office that trial judge has erred in law and fact by concluding that the prosecution failed to prove that the respondent was not employed in the public service when it ran its case on the basis that the respondent had been employed simultaneously as a registrar of the University of Fiji and as a manager of Bhawani Dayal Memorial Primary School (BDMPS) and therefore he was a person employed in the public service or at least, by virtue of being

the registrar of the University, he was employed in the public service at the time the offence was committed.

[10] The trial judge had accepted that at the relevant time the respondent was the registrar at the University of Fiji and also the school manager of BDMPS. However, he had stated that the prosecution ran its case on the basis that the alleged arbitrary acts in abuse of the authority of his office, were carried out by the respondent in his capacity as the school manager of BDMPS and not as registrar of the University of Fiji and therefore, the prosecution had to establish not only that the position of school manager of BDMPS fulfilled the requirement of being employed in the public service but also that authorizing loans amounting to $116,500 from the Free Education Grant provided by the Ministry of Education to BDMPS was done by the respondent in his capacity as the school manager of BDMPS and not as registrar of the University of Fiji. The trial judge had concluded in the end that the respondent could not be said to have been employed in public service in his capacity as the school manager of BDMPS.

[11] The particulars in the information is equivocal as to whether the respondent did the alleged arbitrary acts in his positions as registrar of the University of Fiji and manager of BDMPS or only in one of them and if so which one. The appellant seems to have not accepted the position that the respondent had engaged in the alleged arbitrary acts in his capacity as manager of BDMPS but seems to argue that he was in fact employed in public service as school manager of BDMPS at the relevant time and therefore, he was caught within the offence of Abuse of Office.

[12] The appellant also seems to argue that it did not really matter that the respondent did the alleged arbitrary acts in his capacity as manager of BDMPS because since he was still at the relevant time employed in public service as the registrar of University of Fiji, he was liable for Abuse of Office. According to the appellant **Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC)** [2018] FJSC 4; CAV0014.2017 (26 April 2018) supports the proposition that a person holding two positions of which the public has an interest in the duty performed in any of the positions is said to be a person employed in the public service. It is also submitted by the appellant that in **Qarase v Fiji Independent Commission Against Corruption**

[2013] FJCA 44; AAU66.2012 (30 May 2013) the court rejected the notion of a single person holding two independent positions and that when the same person holds two positions, one in a private company and one in a statutory body and he performs the duties of both positions together, the notion that in one he can be a person employed in the public service and the other in the company was not accepted.

[13] The High Court judge had distinguished ***Dakuidreketi*** from the facts of this case. ***Qarase*** does not appear to have been cited in support of its case by the appellant to the High Court judge. The respondent had not made any submissions on the applicability or otherwise of ***Qarase*** to the facts of the respondent's case.

[14] The appellant also argues that it had proved the 01st count against the respondent as in any event the appellant was under a fiduciary duty as manager- BDMPS in relation to the government funds received and was in breach of the procedure of managing the same and the trial judge had not considered this aspect of the matter. The appellant cites ***Dakuidreketi*** and ***Qarase*** as containing authoritative pronouncements in this regard in that a public officer is a person who discharges any duty in the discharge of which the public is interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. It is argued that the trial judge failed to consider that there is a fiduciary duty on the respondent to manage funds given for the students specifically attending BDMPS, according to the procedure laid out by the Ministry of Education. The argument seems to be that even if the respondent was strictly not employed in public service as manager- BDMPS, still he was under a fiduciary duty to handle government funds received as per the procedure laid down by the Ministry of Education and if not, he could still be guilty of Abuse of Office.

[15] It is not clear whether this argument was placed before the trial judge by the appellant. The respondent has not dealt with it in his written submissions either.

[16] Since, the matters under this ground of appeal involve interpretation and application of section 139 and section 4(1) of the Crimes Act, section 11 of the University Act and section 12 of the Education Act and the legal implications of the respondent being

under an alleged 'fiduciary duty' in the factual context the full extent of which is not known at this stage due to the lack of a complete case record, I think it is in the interest of justice that the full court is allowed to examine these matters carefully under the 01st ground of appeal.

02nd ground of appeal

[17] The gist of the argument under this ground of appeal is that the trial judge's interpretation that the sub-provision (b) in section 4(1) of the Crimes Act defining 'person employed in the public service' should be read *eiusdem generis* with the other sub-provisions, thereby the reference in the sub-section is only to persons who are employed and paid and excludes an office performed out of charity, is wrong. This interpretation is purportedly based on the assumption that those roles and offices given under (a) & (c) to (i) are paid, not performed out of charity and sub provision (b) should therefore be read *eiusdem generis* with the rest of the section.

[18] Thus, the argument in favor of the respondent is that his position as manager-BDMPS was not apparently paid (but, it is not clear whether he was in fact paid or not in that capacity) but if he was performing his duties out of charity he could not be a person 'being employed in the Public Service' under section 139.

[19] The appellant points out that this is too narrow an interpretation and *eiusdem generis* rule is only a guide to the construction of a statute and cannot be the one and only interpretative tool because the body of jurisdiction developed in Fiji over the years on the Penal Code and the Crimes Act has not favoured such a restrictive interpretation. It is submitted by the appellant that there are many an unpaid positions considered as part and parcel of public service or public sector and therefore, whether one is remunerated or not should not be the only criteria to determine whether someone is employed in the public service/sector. The appellant submits that the main element of 'being employed in the Public Service' should be whether the office entails 'public duty and trust' and if remunerated it makes the capacity obvious.

[20] The respondent disagrees. He argues that even if one concedes the appellant's interpretation of 'being employed in the Public Service', it has not explained how the respondent as the manager – BDMPS was employed in public service. By contrast, the respondent suggest a narrower interpretation in that he submits that the test should be whether the position was a 'public office' or whether the holder was fulfilling a 'public duty' or a responsibility of the government to determine that question.

[21] Since, this ground of appeal is concerned *inter alia* with interpretation of 'being employed in the Public Service', it raises an important legal question for determination of the full court and I am inclined to grant leave to appeal.

03rd ground of appeal

[22] The appellant contends that the appointment of a manager is a statutory obligation under section 12 of the Education Act and the power to prohibit any person from managing or assisting in the management of any school under section 12 is synonymous with the power of removal of a manager. The latter proposition was not accepted by the trial judge. The appellant joins issue with the trial judge's literal interpretation of section 12 of the Education Act and section 4(1)(b) and (c) of the Crimes Act by arguing that the power to register the name of a manager of a school or refuse to do so and power to prohibit a person from managing any school vested in the Permanent Secretary is wide enough to include the incidental power of removal of a manager in the larger scheme of the Education Act and therefore such a person comes within the definition of 'being employed in the Public Service' irrespective of who controls or owns the school.

[23] The appellant further submits that since the respondent was appointed under section 12 of the Education Act as manager- BDMPS and thereafter was performing the duty of managing *inter alia* public funds he fell within the definition of 'person employed in the public service' in terms of section 4(1) of the Crimes Act. The appellant once again relies on ***Dakuidreketi*** in support of its position but the respondent as before agrees with the trial judge that the facts in ***Dakuidreketi*** are distinguishable.

[24] The answer to this pertinent question appears to lie in the interpretation given to the powers of the Permanent Secretary under section 12(3) of the Education Act read with section 4(1)(b) and (c) of the Crimes Act. The respondent concedes that interpretation of section 12(3) of the Education Act is a question of law only while that of section 4(1)(b) and (c) of the Crimes Act is a matter of fact and law.

[25] I am persuaded by the arguments of both parties to hold that interpretations involving section 12(3) of the Education Act and section 4(1)(b) and (c) of the Crimes Act are worthy of being considered by the full court *inter alia* in the interest of justice and for future guidance.

04th ground of appeal

[26] The appellant's complaint is that the trial judge had not looked at all the elements of the offence of Abuse of Office at the close of the prosecution case as required by the proper test for no case to answer application, but only the element of 'being employed in the Public Service' where he held that the appellant failed *'to establish an essential ingredient of the offence of Abuse of Office, namely that the Accused, as School Manager of BDMPS, was employed in the Public Service'*. I assume that it is not the position of the appellant that it had placed no evidence with regard to any other element/s of Abuse of Office.

[27] I do not agree. Perusal of the no case to answer ruling reveals that the trial judge had indeed considered all other elements of the offence and applied the test of examining to see whether there was evidence on all elements as evidenced by paragraphs 5, 7, 8, 10, 12, 13 and 14. Then he had considered each of the elements *vis-à-vis* the evidence at paragraphs 19-24 and concentrated on the element whether the appellant could be said to have been employed in the Public Service as that was the most crucial to the decision whether to proceed further on the 01st count or not. There is nothing to indicate that the trial judge had similar doubts with regard to any of the other elements.

[28] There is no error in the test applied to determine whether there was a case or no case to answer in terms of section 231(1) of the Criminal Procedure Act in so far as the 01st count was concerned. The purported error complained of by the appellant is the manner in which the trial judge answered the element of 'being employed in the Public Service'.

[29] I refuse leave to appeal on this ground of appeal.

05th ground of appeal

[30] The appellant's argument is that the trial judge had correctly directed the assessors on the legal test for dishonesty which resulted in them expressing the opinion of guilty against the respondent, however, when it came to his own judgment the judge failed to direct himself on the same test in overturning the assessors' opinion.

[31] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) the Court of Appeal stated as follows on the trial judge's duty when disagreeing with the assessors.

> *'[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*
>
> *[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed*

that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide ***Rokonabete v State*** *[2006] FJCA 85; AAU0048.2005S (22 March 2006),* ***Noa Maya v. The State*** *[2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and* ***Rokopeta v State*** *[2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].*

[32] The trial judge had directed himself according to the summing-up and therefore he should be deemed to have directed himself correctly on the legal test for dishonesty and also on factual matters placed before the assessors. There is no complaint by the appellant that the trial judge had not addressed the assessors on facts relating to the element of dishonesty. Therefore, the trial judge should be considered to have been mindful of the same though not repeated in the judgment.

[33] On a perusal of the judgment it appears that the trial judge was quite mindful of the legal test for dishonesty and the need for the appellant to prove it in respect of every transaction. Paragraphs 28-34 had been devoted to discuss the issue of dishonesty and for the reasons given therein, the trial judge had concluded at paragraph 38 that '*it is very clear that the accused did not have any dishonest intention at the time he authorized the inter school loans*'.

[34] Therefore, one cannot say that the trial judge had not given cogent reasons for his conclusion that the appellant had not proved the element of dishonesty. The judge's decision is legally binding as the sole and ultimate judge of fact and law unlike the opinion of the assessors who are not expected to give reasons for their opinion. Thus, one can only speculate what drove the assessors to form their opinion whereas trial judge's reasons for disagreeing with the assessors are on record.

[35] Therefore, on the material available at this stage, I cannot say that this ground of appeal has a reasonable prospect of success.

06th ground of appeal

[36] This is inextricably interwoven with the previous ground of appeal. The appellant complains that the trial judge had not considered the legal test for 'dishonestly' under section 290 of the Crimes Act or the common law test in **R v Ghosh** [1982] QB 1053; 3 WLR 110; [1982] EWCA Crim 2.

[37] It appears that there is hardly any material difference between the two. Dishonesty is judged first by a subjective standard and then by an objective standard. Firstly, it must be decided whether according to the standards of reasonable and honest ordinary people, what was done was dishonest. If not, the element of dishonesty is not proven. If it was dishonest by those objective standards, then it must be considered whether the offender knew that what he was doing was by those standards dishonest. This is the subjective standard. In a practical situation, the trier of facts would have to put himself in both situations.

[38] The appellant's argument is that the trial judge had only applied the objective test but not the subjective test. There is little doubt that the trial judge was well informed of these tests as even according to the appellant *'....the summing up had been substantive in which the evidence was covered and the test for dishonesty had been thoroughly explained'*. When one considers paragraphs 6, 8, 9 & 28-34 the trial judge was looking at evidence in relation to the objective aspects of dishonesty. Then, from paragraphs 35-37 he had discussed the subjective aspects of dishonesty.

[39] Thus, it appears that the trial judge had not been satisfied of the proof of objective aspects of dishonesty. However, he had still considered the subjective aspects of dishonesty and ruled that out as well.

[40] Although, the trial judge had not used the technical terms of 'objective' and 'subjective' standards in analyzing the evidence in in his conclusions, it appears that the judge had been quite mindful to see whether both had been proven.

[41] Therefore, on the material available at this stage, I cannot say that this ground of appeal has a reasonable prospect of success.

07th ground of appeal

[42] The appellant is critical of the trial judge's finding that the respondent was not alone responsible for the disbursement of loans from FEG received by BDMPS but collectively the Executive Committee of Arya Pratinidhi Sabha of Fiji was responsible for that. The gist of the appellant's argument is that Free Education Grant (FEG) had been given to the schools to be managed according to the procedure and process laid out by the Ministry of Education (MOE) and the respondent may well have known that the FEG could not be loaned out or donated. The respondent was aware of the fiduciary duty of managing the funds on behalf of MOE and on behalf of the students for the purpose which the funds were given for. It is not the duty of the executive committee to protect this interest and the respondent had the sole authority to protect these interests as per the Education Act and Regulations issued by the Permanent Secretary for MOE.

[43] The trial judge at paragraph 30 had admitted that the FEG could not be loaned out from one school or one institution to another and that the respondent may well have known that the FEG could not be loaned out or donated but had given reasons at paragraphs 28 & 29 as to why the respondent was not alone responsible for doing so. In paragraphs 32-33 & 34 the judge had stated as to why he concluded at paragraph 31 that a breach of a regulation or directive alone does not necessarily tantamount to dishonesty or to a criminal offence.

[44] Whether the trial judge was completely wrong to have drawn these inferences cannot be confirmed at this stage without further material by way of trial proceedings.

[45] Therefore, I am not inclined to grant leave to appeal on this ground of appeal.

08th ground of appeal

[46] The appellant argues that the conclusion by the court that no loss or substantial risk of loss had been caused to BDMPS is an error of fact and law because the trial judge himself had accepted that the amount loaned out by BDMPS was $116,500 over the period of one year (2014). It is further submitted that the loaned-out funds were never paid back in 2014 and even thereafter and there was substantial evidence that BDMPS and its student were deprived of funds loaned out to other institutions.

[47] The respondent has submitted that the trial judge had at paragraphs 39-41 considered this question and concluded that though the entire sum was not repaid in 2014, the entire amount had been returned during 2015-2016 and as a result no loss or substantial risk of loss had occurred.

[48] The appellant had not specifically stated what the loss was for BDMPS as a result of disbursement of $116,500 which in full appears to have been received back by the school by the end of 2016. Nor had the appellant said that any students of BDMPS were deprived of school fees to be funded out of $116,500 as a result of the loans given outside BDMPS. It is not possible to ascertain the alleged 'substantial evidence' of the loss at this stage.

[49] Therefore, I am not disposed to grant leave to appeal on this ground of appeal.

09th ground of appeal

[50] The appellant submits that the trial judge was wrong to have accepted that there were 'teething issue' in the implementation of the Free Education Grant (FEG) but at no time had evidence been presented to support the claim by the respondent. The appellant points out that the respondent's answers relating to the so called 'teething issue' in his cautioned interview contradicts the judge's conclusion. Firstly, the respondent's position was that funds were automatically transferred as a result of an understanding between the APS and the bank whereas the court had concluded that it was done by Ravneet Sami upon approval of the trustees and manager. Secondly, the alleged contradiction relates to the appellant stating in the cautioned interview that in

2015 all monies were returned but the court had concluded that it was done in 2015 & 2016.

[51] The trial judge's discussion on this issue is at paragraphs 32, 33 and 34 and the respondent submits that in answer to question 76 in the cautioned interview he did not speak to any automatic transfers but only on the fact that inter loan system was in existence for over 50 years as affirmed by prosecution witness Ravneet Sami. The judge has referred to this at paragraph 37.

[52] I do not see a reasonable prospect of success of this ground of appeal at this stage.

10th ground of appeal

[53] The appellant challenges the trial judge's finding that that the respondent had been truthful in his answers in the caution interview and his acceptance of such explanations given by the respondent.

[54] The points made to substantiate this ground of appeal is more or less the same as those submitted for the previous ground of appeal. One is on the respondent's alleged claim in the cautioned interview that there was an arrangement between the bank and APS on automatic transfers which was contradicted by the banker. The other relates to the appellant's assertion in his interview that all loaned funds were repaid in 2015 whereas the court concluded that it was in 2015 and 2016 the repayments were completed. Thus, the appellant argues that the respondent's answers in his caution statement were not truthful.

[55] The respondent's response is that going by his answer to question 76 all what he said was that there was an understanding between the Sabha and the bank on the inter loan system and not that any transfers were automatic. It is in the same answer that the respondent had said that all monies were returned in 2015 whereas the trial judge found through documents DE3 that the repayment was completed in 2016. It is not clear whether the respondent had been shown DE3 at the time he was answering question 76.

[56] However, it appears that the trial judge as the sole arbiter of fact, law and credibility of witnesses had not thought that those two issues had affected the credibility of the respondent's explanations in the cautioned interview.

[57] I cannot say that there is a reasonable prospect of success in this ground of appeal at this stage.

11th ground of appeal

[58] The summary of the appellant's contention is that the trial judge's conclusion at paragraph 42 of the judgment '*that the unanimous opinion of the Assessors in finding the accused guilty is perverse and not justified'* is not justified and impliedly seeks a reinstatement of the assessors' verdict.

[59] As I have pointed out above, the assessors only express an opinion and no accused could be convicted or acquitted on their opinion. It has always been the trite law that the trial judge alone would decide the guilt or otherwise of an accused. There is no question of preferring the assessors' opinion to the verdict of the trial judge. It is not as if the assessors' opinion and the trial judge's verdict are on par with each other and one has to be balanced with the other. In Fiji with effect from 12 February 2021 assessors do not participate in criminal proceedings after the promulgation of Criminal Procedure (Amendment) Act 2021 whereby the institution of assessors was abolished.

[60] I have held in **Bavesi v The State** [2022] FJCA 2; AAU044.2015 (3 March 2022):

> *'[75] Therefore, in my view for a trial judge to disagree or overturn the assessors' opinion such opinion need not necessarily be perverse. Needless to say that a trial judge is most likely to overturn a perverse opinion but 'perversity' is not a prerequisite or a condition precedent to the trial judge to disagree and overturn the assessors' opinion.*

[61] The trial judge had undertaken a comprehensive analysis of all contentious issues in his 12 page judgment in addition to 31 page summing-up which according to the appellant is *'...substantive in which the evidence was covered and the test for*

dishonesty had been thoroughly explained.'. Thus, he need not have found the opinion of the assessors to be perverse to be overturned.

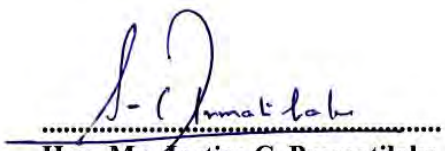
[62] I do not see a reasonable prospect of success in this ground of appeal as formulated. What matters is whether the verdict of acquittal is unreasonable or cannot be supported having regard to the evidence or should be set aside on any wrong decision on any question of law or on any other ground amounting to miscarriage of justice [vide section 23 (1) (b) of the Court of Appeal Act].

[63] The Court of Appeal in **Ralivanawa v State** [2022] FJCA 39; AAU077.2016 (26 May 2022) discussed as to when the appellate court would interfere with a finding of fact by a trial judge and adopted **Watt v Thomas** [1947] AC 484:

> *'[11] The House of Lords in **Watt v Thomas** [1947] AC 484 laid down the principles on which an appellate court should act when the appeal is against the findings of fact by the trial judge. The Lords held that when a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.*

Orders:

1. Leave to appeal against acquittal on the 01st count is allowed only on the 01st, 02nd and 03rd grounds of appeal.
2. Leave to appeal against acquittal on the 02nd count is refused.



Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL