

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Lautoka

CRIMINAL APPEAL No. AAU 092 of 2020
High Court Criminal Appeal Case No. HAA 57 of 2019
Magistrates Court at Lautoka Case No. 72 of 13

BETWEEN : **SULIASI SUKANAIVALU**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST**
CORRUPTION (FICAC)

Respondent

Coram : **Justice I Maitoga, RJA**
Justice P Andrews, JA
Justice G Andrée Wiltens, JA

Counsel : **Appellant, in person**
Ms M Fatafehi, on behalf of the Respondent

Date of Hearing : **5 September 2024**

Date of Judgment : **27 September 2024**

JUDGMENT

Maitoga, RJA

[1] I agree with the reasons and conclusions in Andrews, JA's judgment.

Andrews, JA

Introduction

- [2] This appeal considers the issue as to the proof required before an accused person can be convicted of the offence of “soliciting an advantage” under s 3 of the Prevention of Bribery Promulgation No 12 of 2007 (now, the Prevention of Bribery Act 2007).¹ In particular, the Court has considered whether the prosecution is required to prove “mens rea”; that is, that the accused person acted intentionally. In the present case, the issue is whether the prosecution was required to prove that in “soliciting an advantage” the appellant acted deliberately, and knowing that it was wrong to do so.
- [3] In view of the importance of the issue, this judgment is issued as a judgment of the Full Court, to which all members of the Court which heard the appeal have contributed.

Factual Background

- [4] At the time of the alleged offending the appellant had been employed by the respondent (“FICAC”) as an Assistant Complaints Officer since 12 April 2011. His employment was terminated on 28 December 2012.
- [5] On 16 October 2012, Muneshwar Avikash Vinod (“Muneshwar”) called to see the appellant (whom he knew) at the FICAC office in Lautoka to lodge a complaint about issues that had arisen from an agreement he had to buy land from Aseri Cama (“Aseri”). The appellant advised Muneshwar to lodge his grievance with the iTaukei Land Trust Board (“TLTB”). At this time, the appellant asked Muneshwar for a loan of \$500. This was the subject of the charge brought against the appellant of “soliciting an advantage” under s 3 of the Prevention of Bribery Act (“the s 3 charge”).

¹ We will refer in this judgment to the Prevention of Bribery Act. The relevant provisions are (except as noted in this judgment) in identical terms to the Prevention of Bribery Promulgation.

- [6] While the TLTB assisted Muneshwar with another piece of land, issues arose with that land as well, and Muneshwar went back to see the appellant at FICAC. The appellant then assisted Muneshwar with preparing a Particulars of Claim form for a claim to the Small Claims Tribunal, which Muneshwar then filed in the Small Claims Tribunal. A hearing date of 28 November 2012 was endorsed on it. Muneshwar then asked the appellant to assist him with service on Aseri. They went together to Aseri's house but he was not there so they left the form on the front porch.
- [7] On 15 November 2012, Aseri went to the FICAC office and asked the appellant if he could pay the claimed sum in instalments. On 19 November 2012, Aseri paid the appellant \$400 as an instalment on Muneshwar's claim. The appellant did not pass the payment on to Muneshwar. He said this was because Muneshwar wanted the entire claim to be paid at once, not in instalments. The appellant later used the \$400 for travelling expenses of his own. This payment was the subject of a charge brought against the appellant under s 326 of the Crimes Act 2009 ("the s 326 charge").
- [8] On 28 November 2012, Muneshwar attended at the Small Claims Tribunal for his case against Aseri, but was told that the affidavit of service on the Small Claims Tribunal form had not been completed and the matter would be called again on 14 December 2012. The appellant subsequently altered the form by amending the hearing date to 14 December 2012 and completing the affidavit of service to state that service had been effected on 29 November 2012. The affidavit was sworn on 11 December 2012. It was the subject of a charge brought against the appellant under s 177 of the Crimes Act ("the s 177 charge").
- [9] The appellant was convicted after trial in the Magistrates Court at Lautoka on all three charges on 15 April 2019.² He was sentenced on 6 May 2019 to 56 months' imprisonment, comprising concurrent terms of imprisonment of 32 months and eight months respectively on the s 326 charge and the s 3 charge, and a cumulative term of 24 months' imprisonment on the s 177 charge. The Magistrate also imposed a fine of \$1,000, in default 100 days'

² *Fiji Independent Commission Against Corruption v Sukanaivalu* [2019] FJMC 63; Private Prosecution 72 of 2013 (15 April 2019).

imprisonment. The Magistrate further ordered that the appellant serve a non-parole period of three years imprisonment.³

Appeal to the High Court

[10] The appellant appealed to the High Court against conviction and sentence. In a judgment delivered on 29 June 2020, his Honour Justice Sunil Sharma dismissed the appeal against conviction, but allowed the appeal against sentence.⁴

[11] The Judge addressed the appellant's submissions as to the s 3 charge as follows, at paragraphs [26] – [33] of the High Court judgment:

[26] *In respect of Count One the counsel submits that there was no evidence in respect of the final element of the offence that the appellant had solicited an advantage when he obtained \$500 from Muneshwar for his sick wife since it had nothing to do with the appellant being a FICAC officer. Counsel argues there was no promise or advantage given to [Muneshwar] by the appellant and that intention being a fault element of this offence the appellant in his caution interview had stated that he had taken the money as a loan.*

[27] *Finally, counsel submits that there was no evidence to suggest that the appellant had offered to return a favour as a FICAC officer and that the transaction that had accrued did not give rise to the offence of soliciting an advantage therefore the appellant was wrongly convicted.*

[28] *The above submission is misconceived firstly the offence of soliciting an advantage does not have the intention of the appellant as an element of the offence. The following are the elements of the offence of soliciting an advantage:*

- (a) *A prescribed officer;*
- (b) *Without the general permission of the President;*
- (c) *Solicits any advantage.*

[29] *It was undisputed at the trial that the appellant was a FICAC officer and he did not have the permission of his appointing authority to ask for the sum of \$500 from the complainant.*

³ *Fiji Independent Commission Against Corruption v Sukanaivalu* [2019] FJMC 122; Criminal Case 72 of 13 (6 May 2019)

⁴ *Sukanaivalu v Fiji Independent Commission Against Corruption* [2020] FJHC 451; HAC 211.2018L (29 June 2020).

...

[32] *[Muneshwar] had told the court that it was the appellant who had asked for \$500 for his wife's treatment which was handed over in cash to the appellant whilst he was employed as a FICAC officer. From the evidence of the complainant he had gone to FICAC to lodge a complaint regarding his land matter and he was assisted by the appellant. The complainant was assisted by the appellant in lodging his Small Claims Tribunal forms and so on. It was during this time that the appellant had asked for \$500 from the complainant which he had given to him.*

[33] *The appellant also did not deny receiving the \$500 as a loan from Muneshwar per his charge statement, the fact that the appellant had asked for the money which was given to him the offence was committed. It is immaterial for what purpose the appellant had received the money.*

[References to ss 2(1)(a) and 2(2)(b) of the Prevention of Bribery Act omitted]

[12] It is necessary to note that at paragraph [26] the High Court Judge stated that “the appellant in his caution interview had stated that he had taken the money as a loan”. We have not found any mention of a payment of \$500 from Muneshwar to the appellant in the record of the caution interview in the High Court Record: the interview focussed on Aseri's payment of \$400, service of the Small Claims Tribunal Notice of Claim, and completion of the affidavit of service. The matter of Muneshwar's payment of \$500 to the appellant is referred to in his charge statement taken on 21 June 2013, two months after the caution interview. It appears from the record of the charge statement that the three charges were read to the appellant and he then said in respect of the charge under s 3 of the Prevention of Bribery Act:

I deny the charge. This is in relation to charge number one, the money that was given by Munesh which is the amount of \$500 was a loan and it was not payment for a job that I need to do. We have agreed on that and the amount will be paid back to Munesh as it was a loan.

[13] It is also necessary to note that in his narration of the background facts, the High Court Judge stated (at paragraph [13]) that the appellant asked Muneshwar for \$500 “the same day” as Aseri paid \$400 to the appellant as an instalment on the payment claimed by Muneshwar: that is, 19 November 2012. It is clear from the evidence before the Magistrates Court that the payment of \$500 from Muneshwar was made on 19 October 2012.

[14] The appellant was sentenced afresh to three years and eight months' imprisonment (comprising concurrent sentences of 32 months' and eight months' imprisonment respectively on the s 326 and s 3 charges and a cumulative sentence of 12 months' imprisonment on the s 177 charge. The High Court ordered the appellant to serve a non-parole period of two years imprisonment. He was also ordered to pay fines of \$200 (in default one month imprisonment) on the s 3 charge and \$200 (in default one month's imprisonment) on the s 177 charge.

Appeal to the Court of Appeal

[15] A "Notice of Application for Leave with which to Appeal Conviction and Sentence" was signed by the appellant on 23 July 2010, and lodged in this Court's Registry on 18 August 2020. The appellant later abandoned his appeal against sentence.

[16] The application was considered by a single judge of the Court of Appeal, Prematilaka RJA, in a Ruling dated 22 October 2021.⁵ As his Honour stated at paragraphs [7] – [9] of the Ruling:

[7] *... the right of appeal against a decision made by the High Court in its appellate jurisdiction is given in s 22 of the Court of Appeal Act [1949]. In a second tier appeal under s 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only ...*

[8] *There is no jurisdiction given to a single judge of the Court of Appeal under section 35(1) of the Court of Appeal Act to consider an appeal made under section 22 for leave to appeal, as leave is not required under s 22 but a single judge could still exercise jurisdiction under section 35(2) and if the single judge of this court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal the judge may dismiss the appeal under s 35(2) of the Court of Appeal Act.*

[9] *Therefore, upon filing an appeal under s 22 of the Court of Appeal Act a single judge of the Court of Appeal is still required to consider whether there is in fact a question of law that should go before the full court. Designation of a point of appeal as a question of law by the appellant or*

⁵ *Sukanaivalu v Fiji Independent Commission Against Corruption* [2021] FJCA 171; AAU0092.202 (22 October 2021).

his pleader would not necessarily make it a question of law. What is important is not the label but the substance of the appeal point. This exercise should be undertaken by the single judge not for the purpose of considering leave under s 35(1) but as a filtering mechanism to make sure that only true questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance is not a question of law then the single judge could act under s 35(2) and dismiss the appeal altogether.

[Underlining as in the Ruling; citations omitted]

[17] His Honour recorded at paragraph [15] of the Ruling that the appellant’s ground of appeal against the s 3 charge was:

... that the learned High Court Judge had erred at paragraph 28 of the judgment in stating that the intention of the appellant was not an element of the offence set out in count 01 and that the appellant had committed the offence when he solicited money and for what purpose he received it was immaterial.

[18] He concluded, at paragraph [27], that the appellant’s appeal against conviction on the s 3 charge involved “a question of law only under section 22(1) of the Court of Appeal Act 1949 which should be more fully considered by the full court for an authoritative pronouncement for clarity and future guidance”. He further concluded, at paragraph [33], that the appellant’s appeal against the s 326 charge was “essentially a question of fact or at best a question of mixed law and fact and cannot be entertained under section 22 of the Court of Appeal Act” and, at paragraph [35], that the appellant’s appeal against the s 177 charge raised what was essentially a trial issue, which should have been canvassed at the trial stage.

[19] Accordingly, this Court is required to address only the appellant’s appeal against the High Court’s dismissal of his appeal against conviction on the s 3 charge.

The charge under s 3 of the Prevention of Bribery Act

[20] The appellant was charged that he:

... on or about the 19th day of October 2012, in Lautoka in the western division whilst being a prescribed officer namely an Assistant Complaints Officer of the

Fiji Independent Commission Against Corruption without the general or special permission of the President solicited an advantage of \$500.00 from one Muneshwar Avikash Vinod.

[21] Section 3 provided at that time:

3 Any prescribed officer who, without the general or specific permission of the President, solicits or accepts any advantage shall be guilty of an offence.

Section 3 was amended as from 10 June 2016 so that “the President” now reads “his or her appointing authority”.

[22] The terms “prescribed officer”, “solicits”, and “advantage” are defined in s 2, as follows:

[a] In s 2(1):

“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 ...

“prescribed officer” means

...

(3) any member of the staff of the Fiji Independent Commission Against Corruption;

...

[b] In s 2(2)(b):

For the purposes of this Act:

...

(b) a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands, invites, asks for or indicates willingness to receive an advantage, whether for himself or for any other person; ...

Submissions on appeal

[23] The appellant submitted that in order to prove the charge against him under s 3 of the Prevention of Bribery Act, the prosecution was required to prove a “mental element”. As

the appellant put it, the prosecution had to prove that he was “ready to act outside the law for the purpose of gain”. He submitted that the High Court Judge was wrong to set out the elements of the offence at paragraph [28] of the High Court Judgment without including the mental element, and wrong to find at paragraph [33] that the fact that he asked for the loan meant that the offence was complete.

[24] In her written submissions for the respondent, Ms Fatafehi submitted that the mens rea element of a s 3 offence is linked to the physical element of soliciting the advantage without the permission of the President (or, as the section now reads, the accused’s appointing officer). She submitted that “permission” is a statutory defence given to the accused to prove, and if it is not proved then the offence is complete upon the solicitation being made.

[25] However, in oral submissions, Ms Fatafehi conceded that irrespective of whether the defence of “permission” is raised, the prosecution is required to prove intention: that the person accused of an offence under s 3 of the Prevention of Bribery Act solicited an advantage, intentionally and knowing that it was wrong.

Discussion

[26] Ms Fatafehi’s concession was appropriately made. In her written submissions, she referred to the Prevention of Bribery Ordinance of Hong Kong from which, she submitted, the Prevention of Bribery Act in Fiji was taken. She referred the Court to academic commentary to the effect that for the equivalent offence in Hong Kong to a s 3 offence, “no specific corrupt mens rea is required and all that prosecution must prove is an intent to ‘do the acts forbidden by the section’”.⁶

[27] However, as the respondent accepted, offences under the Prevention of Bribery Act are dealt with as criminal proceedings, hence the provisions of the Crimes Act apply. The Crimes Act deals expressly with the “fault elements” of elements required to be proved, in

⁶ McWalters SC, Ian: *Bribery and Corruption Law in Hong Kong*, 3rd ed. Lexis Nexis, Hong Kong, 2105, at p 292, para 7.10(b).

ss 18-23 of the Act. Sections 18, 19, and 23 are relevant to this appeal, and provide as follows:

18 Fault elements

- (1) *A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.*
- (2) *Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.*

19 Intention

- (1) *A person has intention with respect to conduct if he or she means to engage in that conduct.*
- (2) *A person has intention with respect to a circumstance if he or she believes that it exists or will exist.*
- (3) *A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events...*

...

23 Offences that do not specify fault elements

- (1) *If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
- (2) *If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.*

[28] As his Honour Prematilaka RJA observed at paragraph [19] of his Ruling, “at first blush, s 3 [of the Prevention of Bribery Act] does not have a fault element inbuilt in it”. Having reviewed s 3, this Court is satisfied that an offence under that section is within the class of offences that do not specify a fault element, and that the physical element of the offence consists only of conduct: that is, soliciting an advantage. Accordingly, an offence under s 3 of the Prevention of Bribery Act falls under s 23(1) of the Crimes Act, and “intention” is the “fault” element for the “physical” element.

[29] In order to prove that the appellant was guilty of an offence under s 3, the prosecution was required to prove the following:

[a] He was a “prescribed officer”;

[b] He “solicited an advantage”;

[c] He did not have “the permission in writing of the President” (now, “his or her appointing officer”); and

[d] He did so intentionally: that is, deliberately and knowing it was wrong to do so.

[30] Both the Magistrate and the High Court Judge erred in law in finding that intent is not an element of an offence against s 3 of the Prevention of Bribery Act.

[31] It was not contested that the appellant was a “prescribed officer”, that he “solicited an advantage” (asked for a loan), or that he did not have “the permission in writing of the President”.

Evidence as to Muneshwar’s payment of \$500 to the appellant

[32] As recorded earlier, the appellant was not questioned under caution about his request for a loan of \$500 from Muneshwar. He did not give evidence at trial. The only statement given by the appellant regarding the s 3 charge was in his charge statement, where he denied the charge and said that the loan “was not payment for a job that I need to do”.

[33] In submissions to the Magistrates Court, counsel for FICAC set out Muneshwar’s evidence as to his payment of \$500 to the appellant as follows:

Q Who has asked you for the \$500?

A Brother Suli

Q So what happened next?

A He asked me for \$500 I went to the FICAC office but I don’t know I forgot why I went to the FICAC office and he told me that his wife is sick and he wants to go to Suva so when he got his wages then he will pay me back the \$500.

Muneshwar then gave evidence as to withdrawing \$600 from his savings account.

[34] No evidence was adduced that the appellant asked Muneshwar for a loan deliberately, and knowing that it was wrong to do so. In the absence of any such evidence, the Magistrate erred in law in convicting the appellant on the charge under s 3 of the Prevention of Bribery Act and the High Court Judge erred in upholding the conviction.

Disposition

[35] As recorded earlier, the appellant's appeal proceeded solely in respect of the s 3 charge. His convictions on the s 326 and s 177 charges still stand, as do the sentences imposed on those charges. The appellant has completed the term of imprisonment imposed by the High Court and he has been released.

[36] Ms Fatafehi urged this Court, if it concluded that the appellant was wrongly convicted on the s 3 charge, to exercise its discretion under s 22(6) of the Court of Appeal Act 1949, which provides:

22 Appeals from High Court in its appellate etc jurisdiction in criminal cases

...

(6) On any appeal brought under the provisions of this section, the Court of Appeal may, notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred.

[37] In the light of this Court's finding that the appellant was wrongly convicted and sentenced on a charge of soliciting an advantage under s 3 of the Prevention of Bribery Act, the Court will not exercise its discretion to dismiss the appeal. The appeal against conviction on the s 3 charge must be allowed. Further, as the (concurrent) sentence of imprisonment on the s 3 charge was imposed on the basis of an error of law, that sentence must be quashed.

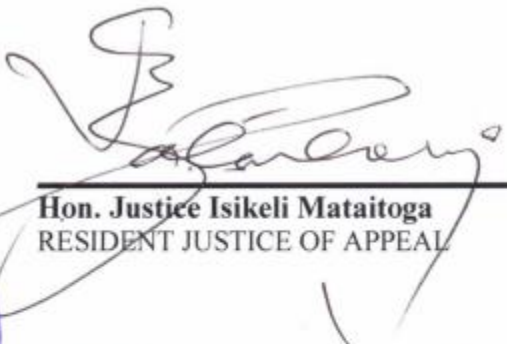
Andrée Wiltens, JA


[38] I concur with the decision of Andrews, JA.

ORDERS

- (1) *The appellant's appeal against conviction of an offence under s 3 of the Prevention of Bribery Act is allowed.*
- (2) *The appellant's conviction and sentence on the charge under s 3 of the Prevention of Bribery Act are quashed.*




Hon. Justice Isikeli Maitoga
RESIDENT JUSTICE OF APPEAL


Hon. Justice Pamela Andrews
JUSTICE OF APPEAL


Hon. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL