

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 137 of 2010

BETWEEN : **THE STATE**

AND : **MAHENDRA PAL CHAUDHRY**

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. P. Bodor Q.C. with Mr. M. Hutchings for the
accused

Mr. C. Grossman S.C, Q.C. with Ms. E. Yang &
Mr. M. Korovou for the State

Dates of hearing : 2, 3 April 2014

Date of Summing up : 4 April 2014

SUMMING UP

Ladies & Gentlemen Assessors,

1. It is my duty to sum up the case for you. I will direct you on matters of law which you must accept and act upon. You must apply the law as I tell you the law is, in this case.
2. As far as the facts are concerned however, what evidence to accept, what evidence to reject, what weight to give to certain evidence, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so, it is entirely a matter for you whether you accept what I say or form your own opinions. In other words, you are the judges of fact. I have to tell you that most of the facts in this case are agreed and they are as a result facts which you must accept.
3. Counsel for the prosecution and the defence have made strong submissions to you about how you should interpret the facts of this case. They had a duty to do so, in accordance with their roles as counsel. However, you are not bound by what counsel on either side has told you about the facts of the case. You are the representatives of the community at this trial, and it is you who must decide which version of the evidence you accept.
4. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you would all be agreed. Your opinions are not binding on me, but I will give them great weight when I come to deliver my judgment.
5. On the question of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. That burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused person to prove his innocence. Under our system of

criminal justice, an accused person is presumed to be innocent until he or she is proved guilty.

6. The standard of proof is one of proof beyond reasonable doubt. That means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about his guilt, then it is your duty to express an opinion that he is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.
7. Your opinions must be based solely on the evidence you have heard in this Courtroom and upon nothing else. You must totally disregard anything you have read in the media, seen on TV or heard on the radio. Your duty is to apply the law to the evidence you have heard. As I said to you when you were sworn in, the fact that the accused is a very well known political figure in Fiji is irrelevant to your findings in this case. You will not favour him, have sympathy with him because of that, nor will you hold it against him. He is a normal accused and you will judge him on the evidence and nothing else. However you will bear in mind what Mr. Bodor says and that is that as a former Prime Minister and a former Minister for Finance it is very unlikely that he would knowingly commit an offence involving finance. It is a matter for you.
8. The accused is charged with three offences. Although they overlap to a large extent, you must nevertheless look at each offence separately because they each have separate considerations. Therefore your verdicts on each count need not necessarily be the same.
9. As you are well aware the accused is charged with three offences under the Exchange Control Act ("ECA") which was introduced in Fiji in 1952.

10. At the time of its introduction it may have had an essential purpose to stabilise Fiji's balance of payments situation, but whatever its purpose then the fact is that it is still the law of this country no matter what we think of it in 2014 and people alleged to be in breach of that law can properly be charged under the legislation as has Mr. Chaudhry. It is my duty as a Judge to uphold all the laws of Fiji and this is one of them. That is why I am now about to direct you in detail as to the elements of offences of this law as they impact on Mr. Chaudhry and you will accept what I tell you and apply them to the facts that have been placed before you.

11. The first charge that the accused faces is a charge alleging that he is in breach of section 4 of the Act. That section in the simplest of terms says that any person resident in Fiji who has money overseas in foreign currency and he is not a person authorised to have it, then he must offer that money to a person who is authorised to hold it, unless he has permission from the Minister to keep that money or permission to give it to somebody else. Persons authorised are called "*authorised dealers*" and for the purposes of the Act are only in Fiji, usually banks. So what the State must prove to you so that you are sure is this :
 - (1) That at the time, that is from November 2000 to July 2010 the accused was a resident of Fiji.
 - (2) That he had foreign currency overseas.
 - (3) That he was not an authorised person to hold foreign currency.
 - (4) That he did not have the Minister's permission to have the Funds.
 - (5) That he did not bring the funds into Fiji.

12. So where do you find the evidence for these elements of the offence?
The agreed facts which you must accept say this.

- (1) That the accused was at the relevant times "*resident*" (Fact 2).
- (2) That he had foreign currency in 7 different accounts. (Fact 3).
- (3) He was not an "*authorised dealer*" (or authorised person) to hold it (Fact 7.)
- (4) The funds were never offered to an authorised dealer in Fiji. (Fact 31).

and in addition there is no evidence before you that the accused had permission to hold the funds. On the contrary, there is evidence in p(3) a letter of the Reserve Bank that the accused had no authority to hold the funds.

13. There is no legal requirement for the accused to be "*directed*" or given notice of his impending breach. You might think that it was unfair not to be given full details of his breach before he was charged and you might think that it was discourteous of the Reserve Bank not to reply to Mr. Chaudhry's letter of 18 November 2009 but those matters are not elements of the offence and should not play a part in your deliberations.

14. In looking then at the second count; an offence under section 3 of the Exchange Control Act. The matters that the State must prove to you so that you are sure for you to find the accused guilty of this offence are:

- 1) That the accused was resident in Fiji between November 2009 and July 2010.
- 2) That he lent AUD \$1.5 million to unauthorised dealers.

- 3) That he did not have the permission of the Reserve Bank.

Again Ladies & Gentlemen, the prosecution would say to you that the first element is proved by fact 2; there is no evidence before you that the accused had permission from the Governor of the Reserve Bank to lend the money. I direct you as a matter of law that investing funds and by placing funds in banking institutions are loans to those banks which the banks must repay on demand¹, so the accused's admissions in paragraph 3 of the agreed facts would satisfy the second element.

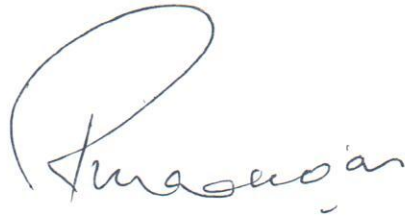
15. The accused says again that the monies are a gift from India with no reference to the Inland Revenue of Fiji but that is not relevant to the charges in the ECA. He also says that he did not receive proper notice from the authorities to warn him of his alleged breach.
16. Once more as is the case with Count 1 Ladies and Gentlemen there is no legal obligation on the authorities, be it the Reserve bank, or its solicitors or any "*competent authority*" to so warn a person thought to be in breach, so in law this defence is not available to the accused.
17. The third count the accused faces is called a failure to collect debts. It simply means that being a holder of foreign exchange abroad, and being resident in Fiji, he delayed bringing those funds back into the Fijian banking system and kept them for himself by continuing to reinvest them. To prove to you so that you are sure before you can find the accused guilty the State must establish the following elements of the offence:
- 1) That the accused was resident in Fiji between November 2000 and July 2010.

¹ Arab Bank v. Barclays Bank [1954] AC 405

- 2) That he had AUD \$1.5 million in various financial institutions.
 - 3) That he delayed bringing the funds back into Fiji, and
 - 4) That he did not have the consent of the Governor of the Reserve Bank.
18. Now Ladies & Gentlemen the State would say the first element is proved by Fact 2, the second element by Fact 3, the third element is proved by Fact 31 and that there is no evidence before you to prove that he had consent of the Governor.
19. Mr. Bodor spent quite some time going through the Siwatibau & Sloan letter with you telling you that it was an inadequate instruction to Mr. Chaudhry to bring back his money to Fiji. You of course will consider what Mr. Bodor says and gave it the weight you think fit.
20. However I direct you in law that for the first two counts there is no requirement for a warning "direction" so the letter is unnecessary for your deliberations on those 2 counts. For the third count, s.26 of the Act says that the authorities may give a direction to an account holder to repatriate his funds but it is not compulsory. If you think that the solicitor's letter is giving a direction you may then wish to consider what Mr. Bodor says about it.
21. At the end of the prosecution case you heard me tell the accused what his rights are in defence. He could remain silent or give evidence. In either case he could call witnesses. He chose to remain silent and call no witnesses. The accused is perfectly entitled to do that because he has nothing to prove. It is the State that must prove their case so that so that you are sure of it. You are not to make any adverse finding against the accused just because he gave no evidence. You must judge the case on the strength of the prosecution evidence and nothing else.

22. The three offences are what we call in law offences of "*strict liability*". What that means is that if the elements of the offences are established, then the offence is proved. It is irrelevant that the accused does not think he has offended; it is irrelevant that he does not know that the offences exist.
23. I remind you of what Mr. Bodor said to you in closing. Bear in mind that what he did say is not evidence but he was merely trying to persuade you not to convict his client. He says that it is extraordinary that if Mr. Chaudhry had been offending since 2000 and the State says he had, he was only charged in 2010. Make of that what you will. He also says that if Mr. Chaudhry was in breach of exchange regulations in 2007, why on earth would he have been made Minister of Finance? It is all a matter for you to consider whether these submissions are relevant and what weight you might want to give them.
24. A final point of law I would direct you on Ladies & Gentlemen is that it is not for you to make a judgment on whether the law is a good law or not, whether it is useful or not, or whether as Mr. Bodor questions: are charges pursuant to the law "*good governance*". It is a law that exists and any charges laid under it must be tried by evidence and adjudicated on, a matter which this Court is asking you to do.
25. You will retire now to consider your opinions. You can take as little or as much time as you wish and when you are ready, you will let my clerk know and I will reconvene the Court. Your available opinions are "guilty" or "not guilty". You may retire now but just before you do I am going to ask counsel if there is anything they wish me to amend or add to these directions.

26. Counsel?



P.K. Madigan
Judge



At Suva

4 April 2014