

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAM 050 OF 2014

BETWEEN : **KENI DAKUIDREKETI**

AND : **FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION [FICAC]**

Counsel : Mr. Keene B QC with Mr. Clarke W for the
Applicant
: Mr. Aslam R and Ms. Puleiwai for the FICAC

Date of Ruling : 13th June 2014

RULING

1. The applicant filed a Notice of Motion supported with an Affidavit on 11th of April 2014 seeking the following 'particulars' to be provided to him in respect of count No. 2, 4, 6, 8 and 10 in the substantive matter, HAC 36/2009. The applicant faces five (5) separate charges of 'Abuse of Office' contrary to section 111 of the Penal Code (Cap 17) along with Mr. Kalivati Bakani in the said matter.
 - (a) The date of the arbitrary act of facilitation;
 - (b) the nature of the arbitrary act of facilitation complained of constituting the offence;
 - (c) which office the arbitrary act of facilitation was in abuse of;
 - (d) the gain or gains which was or were the purpose of the arbitrary act of facilitation; and
 - (e) the intended recipient or recipients of the gain.

2. The main concern of the applicant was that if the FICAC alleges that there will be more than one act to be involved in the term, 'facilitation' used in the provided 'Particulars of Offence', in the said charges, the above requested 'particulars' are highly necessary for them to formulate their defence. It was further contended by the learned counsel for the applicant that they are ready to treat the 'Information letter', which was sent to them by the FICAC, dated 21st of February 2014, as "formal particulars".
3. The response of FICAC came with a letter to court dated 12th May 2014. It said that, "For the avoidance of doubt, the letter attached is not and should not be construed as any 'formalization of particulars'." Then the court invited both parties to file their written submissions on the issue of 'formal particulars'. The written submissions filed on behalf of the applicant were succinct and really helpful.
4. When this court ruled a previous application from the applicant to quash the charges against him on the basis of 'duplicity', it was held that "simply because that several criminal acts do comprise of a single activity or one transaction, such a charge cannot be held bad for duplicity". It was in fact, after the dismissal of the applicant's request to quash the proceedings on duplicity that this issue of 'particulars' cropped up.
5. Section 58 of the Criminal Procedure Decree No. 43 of 2009 stipulates what should be contained in a charge or information.

58. Every charge or information shall contain—

- (a) a statement of the specific offence or offences with which the accused person is charged; and
- (b) such particulars as are necessary for giving *reasonable information* as to the nature of the offence charged.

6. In **Chaudhry v. The State** (Criminal Miscellaneous matters HAM 236/2013 and HAM 239/2013 [6th March 2014], Justice Madigan said that:

"Clearly the operative words on section 58 are "as are necessary – giving reasonable explanation [information] and the provision of particulars is not to be regarded as to provide a complete itemization of the prosecution case."

7. In dealing with the issue of “particulars”, section 66 of the Criminal Procedure Decree No. 43 of 2009, which talks about the “General Rule as to description”, is also important.

66. Subject to any other provisions of this Division, it shall be sufficient to describe any place, time, thing, matter, act or omission to which it is necessary to refer in any charge or information in —

(a) ordinary language; and

(b) in such a manner as to indicate with *reasonable clearness* the place, time, thing, matter, act or omission referred to.

8. A plain look at both sections, section 58 and 66, shows that what a charge demands is “reasonable information” as to the nature of the offence with reasonable clearness”. That is, of course, an objective standard. What is expected from the ‘Particulars of Offence’ of a charge is to provide adequate facts or background knowledge for an accused person to recognize the ‘specific criminal transaction’ that he is been charged with. Especially, in a context where the alleged ‘offence’ consists with ‘several acts’, it is important, not only to the accused, but to the trial court as well, to have clarity about the charge. In certain instances where less complicated or straight forward charges are involved, there is no actual need for detailed particulars. The reasonable information on a charge undoubtedly enables the accused to prepare for his defence without any hesitation and secure a fair trial.

9. Archbold Criminal Pleadings, Evidence and Practice 2014 at 1 – 190 says that:

“Where an offence charged depends on allegations which could be put on several different footings it is incumbent on the prosecution to particularize the facts on which it relies in support of their allegations”.

10. The important role of particulars of offences has been discussed in several decided case authorities in overseas jurisdictions. **R. v. Saunders** [1990] 1 S.C.R, a decision of the Canadian Supreme Court on an appeal from the Court of appeal for British Columbia, says that,

"The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways." (pages 1023/1024)

It was a case where the prosecution or the Crown particularized the offence as 'conspiracy to import heroin'. But, it was transpired during the trial that the alleged conspiracy was not to import heroin, but cocaine. It was stressed that,

"It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved...To permit the crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars..." (page 1023).

11. As it was decided in **Stephen Ronald Warburton - Pitt** (1991) 92 Cr. App. R. 136, the 'particulars' can be served to the accused in the charge itself or by way of "written voluntary particulars". It is always open for the defence to make a request to court for the 'particulars', in case prosecution fails to provide the same. Even in the absence of such a request from the defence, the trial judge, on his own motion, could direct the prosecution to particularize their charges, if the court feels it is necessary for justice to be done.
12. In **Gamble v. R.** [2012] NZCA 91 the New Zealand Court of Appeal held that,

[31]"An accused is entitled to know, with all available particularity, the substance of that with which he is charged. And he has the right to have each specific allegation tested separately under the criminal process according to law. Where allegations relate to "a long time ago", the need for all possible specificity is, if anything, the greater"


Section 329 of the Crimes Act of New Zealand recognizes the need of providing "reasonable information" of the "circumstances of the alleged crime" concerning the act or omission to be proved against the accused and identify the transaction referred to in the charge. But, it says that "the absence or insufficiency of such details shall not vitiate the count". Section 24 (a) of the New Zealand Bill of Rights Act 1990 also recognizes the accused's right to be informed promptly in detail of the nature and cause of the charge.

13. It is worthy to note that Article 14 (2) (b) of the Constitution of the Republic of Fiji accepts the right of a person charged with an offence:
“to be informed in legible writing, in a language that he or she understands, of the nature of and the reasons for the charge.”
14. It is with this legal background, the FICAC, at last, though pretty late, agreed that the “information” that they provided to the applicant through their letter dated 21st February 2014 to be considered as ‘formal particulars’. Nevertheless, the matter did not end there. The FICAC in their letter dated 10th May 2014, whilst agreeing to the “particulars” tendered on 21st February 2014 as “formal”, came out with two more “particulars” they wish to include to count No. 4. The learned Queens Counsel for the applicant vehemently objected to this move. He said that in a situation where the prosecution is still struggling to find their way, it will surely be prejudicial to formulate their defence with the material which emerges from time to time.
15. It is needless to say the practical difficulties that the applicant’s camp faces with this type of sudden moves, which affects the entire fabric of the defence. On the other hand, the differences on factual matters might have the result of different defences. Yet, this court noted that the material pertaining to the proposed “formalized particulars” had been disclosed to the applicant by the FICAC along with their disclosures. The learned counsel for the FICAC was optimistic that this could be the final adjustment to the ‘particulars’. His optimism has to be viewed with the fact that the trial is to be handled by yet another counsel.
16. In the light of the above discussed legal and factual background, this court wishes to point out that in a context where the trial of the substantive matter is yet to begin, though just several days left, the attempt of the prosecution to serve further ‘particulars’, the primary objective of which is to provide a better view of the charges to the applicant, should not be obstructed. Apart from the considerable amount of delay, it is rather “unnatural” and unheard of to ‘prohibit’ the prosecution from providing certain particulars to the defence. It is the prerogative of the prosecution to decide certain things like the charge, the particulars, the evidence and their witness. The court will not intervene, unless and until it is convinced that a substantive miscarriage of justice is inevitable with the decisions of the prosecution.
17. Providing adequate ‘particulars’, must not in any way mean restricting the prosecution’s case or a disclosure of every nook and corner of its case. The

“particulars”, as stated earlier, will outline the ‘elements’ of an offence and in return will provide the accused a better view of where he stands to counter the allegation. The prosecution would not be permitted to depart from the initial particulars, if they wish to do so in the course of the trial, if it causes a substantive prejudice to the defence case.

18. Hence, the ‘particulars’ tendered by the FICAC with their letters dated 21st February 2014 and 10th June, 2014 are ordered to be treated as “written voluntary particulars”. It will have the same effect of the ‘particulars’ incorporated to the charge or the information.
19. Even though not a party to this application, the FICAC is ordered to provide the necessary particulars to Mr. Kalivati Bakani, the 1st accused of the substantive matter, HAC 026/2009, on or before 14th June 2014.
20. The application is dismissed accordingly.




Janaka Bandara
Judge

At Suva

Solicitors

Howards Lawyers for Applicant

Office of the Fiji Independent Commission Against Corruption for the Respondent