

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 353 OF 2016S

STATE

vs

JOVILISI DAU

Counsels : **Ms. M. Khan and Ms. B. Kantharia for State**
Mr. E. Koroi and Mr. S. Valenitabua for Accused

Hearings : **16, 17, 18, 19, 20, 24, 25, 26 and 27 July, 2018**

Summing Up : **30 July, 2018**

Judgment : **31 July, 2018**

JUDGMENT

1. On 16 July 2018, the first day of the trial, the following information, which was later amended, was put to you, in the presence of your counsel:

COUNT ONE

Statement of Offence

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Act 2009.

Particulars of Offence

JOVILISI DAU between the 1st day of August 2011 and the 3rd day of August 2011 at Suva in the Central Division, being employed in the Public Service, in abuse of the authority of his office, directed the Ministry of Provincial Development staff under his supervision, to sign Delivery Docket No. 1763, to accept a supply of building materials to the value of \$184,000 from Central City Hardware Limited, when only building materials to the value of \$46,081.60, were supplied by Central City Hardware Limited, an arbitrary act prejudicial to the rights of the Ministry of Provincial Development.

2. The case was then heard for 9 days before myself and three assessors. Yesterday, I delivered my summing up to the assessors. After deliberating for approximately 45 minutes, the three assessors returned with a unanimous not guilty opinion on the accused regarding the charge.
3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, which reads as follows:

“...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –

(a) written down; and

(b) pronounced in open court.

(5) In every such case the judge’s summing up and the decision of the court together with (where appropriate) the judge’s reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes...”

4. In Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”

5. In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

“...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...”

6. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors on 30 July 2018. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the unanimous guilty opinion of the three assessors.
7. My reasons are as follows.
8. I accept the evidence contained in the documents tendered as Prosecution Exhibit No. 1 to 17. I accept the matters of fact stated in those 17 Prosecution Exhibits. Prosecution Exhibit no. 1 showed a chart of the Ministry of Provincial Development's organisational structure and/or chain of command. At the top of the chain of command was the Permanent Secretary and at the bottom were the labourers. The accused was the manager of the Ministry's Rural Housing Unit, and he had 35 staff officers under his command. In the running of the Unit, the accused was ultimately answerable to the Permanent Secretary of the Ministry of Rural Development.
9. Prosecution Exhibit no. 2 outlined the accused's job description as follows:
- (1) **Provide adequate technical advice to rural dwellers for the building of affordable and cyclone resistant houses according to building code and regulation.**
 - (2) **Provide standard building plan and material list to rural housing client.**
 - (3) **Provides logistic support in purchasing of building materials.**
 - (4) **Checking storage and delivery of Rural Housing Unit clients to rural areas.**
- I accept the matters of fact stated in Prosecution Exhibit No. 2.
10. In my view, the above job description meant that the accused was responsible to the Permanent Secretary of the Ministry, to see that building materials purchase for the Ministry are

delivered to the Ministry's Top Yard at Walu Bay, and they are of good quality. In the chain of command as shown in Prosecution Exhibit No. 1, the Ministry had given him 35 staff officers, to ensure that he fulfilled the responsibilities of his position. In my view, it was his duty to see that the building materials ordered for the cyclone Thomas Rural Housing Rehabilitation Project for the Northern Division, was delivered to the Ministry, as and when required. In my view, as the Manager of the Rural Housing Unit, it was also his duty to see that all building materials were at the Top Yard, Walu Bay, before a single cent is paid to the vendor. It was also his duty to see that all the departmental processes for the receiving of the building materials and the payment thereof, were honestly and properly done.

11. I have heard the evidence of all the six prosecution's witnesses and the accused's sworn evidence. I find Mr. Dharmendra Sharma (PW4), the then storeman, a credible witness, and I accept his evidence. I accept that Mr. Dau, through Mr. Emosi Basu (PW3) and himself, pressured PW4 to sign the invoices (i.e. invoice 1005, 1006, 1007 and 1008) and the Delivery Docket No. 1763, when he knew that the \$184,000 worth of building materials had not been supplied.
12. I also find Mr. Emosi Basu (PW3), the then Clerk B, a credible witness and I accept his evidence. I accept what he said that the accused told him to sign the abovementioned invoices, when he well knew the \$184,000 worth of building materials had not been fully supplied. I also find Mr. Rajharaj (PW5), the then Clerk A, to be a credible witness, and I accept his evidence. I accept what he said that Mr. Dau told him to sign the invoices mentioned above.
13. I have also looked at the Purchase Order, which was Prosecution Exhibit No. 8. The \$184,000 was the payment of the building materials referred to in Invoices No. 1005, 1006, 1007 and 1008, which were tendered as Prosecution Exhibit No. 3, 4, 5 and 6. At the bottom right corner of the Purchase Order was the Permanent Secretary of the Ministry's name, who appeared to have authorised the payment of the above \$184,000 to the vendor Central City Hardware Limited. However, this authority was subject to Mr. Dau certifying that the building materials mentioned in the abovementioned invoices had been received in good conditions. However, Mr. Dau signed the same, well knowing that the materials had not been fully supplied. I reject his denial of the same. In my view, Mr. Dau was an experienced Manager of the Rural Housing Unit, and very well knew what was going on at the Ministry at the time. He had worked at the

Ministry since 1989, and with that experience, he knew what was happening at the Top Yard, at the material time. I reject his denial. To me, he was not a credible witness.

14. Given the above, I make the following finding of facts:

- (i) That the accused was employed in the public service, at the material time, that is, as Manager of the Rural Housing Unit of the Ministry of Provincial Development;
- (ii) That he did an arbitrary act by directing Mr. Dharmendra Sharma (PW4) (storeman); Mr. Emosi Basu (PW3) (Clerk B); and Mr. Raghuraj (PW5) (Clerk A), to sign invoices No. 1005, 1006, 1007 and 1008, when the full \$184,000 worth of building materials has not been supplied, and he further directed PW4 to sign Delivery Docket No. 1763, when he knew the building materials had not been fully supplied; and thereafter signed the Purchase Order, dated 25 July 2011, when he knew the building materials were not fully supplied.
- (iii) That the accused, by doing the arbitrary acts mentioned in (ii) above, abuse the authority of his office, by undermining the functions of his office; and
- (iv) As a result of the above arbitrary acts, the Ministry had lost \$184,000 cash, and the Housing Rehabilitation Project for Cyclone Thomas victims in the Northern Division had collapsed and the cyclone victims thereof had been deprived of their rehabilitated houses.

15. Given the above, I disagree with the unanimous guilty opinion of the three assessors, and I find the accused guilty as charged. I convict him of the charge accordingly.




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JUDGE

Solicitor for State
Solicitor for Accused

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Office of the Director of Public Prosecution, Suva
E. Koroi, Barrister and Solicitor, Suva and
S. Valenitabua, Barrister and Solicitor, Suva