

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**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victims. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favor or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
  - (i) Did the accused, between 1 and 3 August 2011, at Suva in the Central Division, while being employed in the Public Service, abuse the authority of his office, by directing Ministry of Provincial Development staff under his supervision, to sign Delivery Docket No. 1763 and accept a supply of building materials worth \$184,000 from Central City Hardware



Limited, when only building materials worth \$46,081.60 was supplied by Central City Hardware Limited, an arbitrary act prejudicial to the rights of the Ministry of Provincial Development?

**E. THE OFFENCE AND IT'S ELEMENTS**

9. The accused was charged with one count of "abuse of office", contrary to section 139 of the Crimes Act 2009. It was alleged that, between 1 and 3 August 2011, at Suva in the Central Division, while being employed in the Public Service, in abuse of his authority, directed Ministry of Provincial Development staff under his supervision, to sign Delivery Docket No. 1763 to accept a supply of \$184,000 worth of building materials from Central City Hardware Limited, when only \$46,081.60 worth were received, an arbitrary act prejudicial to the rights of the Ministry of Provincial Development..
10. For the accused to be found guilty for the offence, the prosecution must prove beyond reasonable doubt, the following elements.
  - (i) the accused was employed in the Public Service,
  - (ii) he did an arbitrary act;
  - (iii) he acted in abuse of the authority of his office; and
  - (iv) the act was prejudicial to the rights of another.
11. We will now discuss the above elements of the offence. First, under paragraph 10(i) above, the accused, at the material time, must be employed in the Public Service, that is, he or she must be a public official. Under section 4 of the Crimes Act 2009, a "public official" means "any person employed in the Public Service or any person who is an officer under a government contract".
12. Second, the officer must do an "arbitrary act". An arbitrary act is an act which is dependent upon the will or pleasure of the official. It is an act based on the opinion or preference of the official. It is nothing more than the exercise of the official's own free will. It is an act of his own choice, and an act which is not guided by rules and regulations but the whims of the official.

13. Third, the act must be done in abuse of the authority of his office. When someone abuses the authority of his office, he must use his position for some illegitimate agenda, that is, some reason which is not a proper reason and not according to the institutional procedure. He acts in bad faith, for an improper motive to harm someone, or to give someone an advantage or favour. To decide what is an abuse of office, you need to consider what motivated the accused to act the way he did. If he had some improper motive or acted in bad faith and used his position to achieve his motive, then this element is proven. In order to understand what the accused had in his mind, you need to look at all the evidence and draw your own conclusion from what he said and did and the surrounding circumstances, to decide whether or not he acted in abuse of his office.
14. Lastly, the accused's act was prejudicial to the rights of another. This simply means that the accused arbitrary act harmed or was likely to harm the rights of others. The others may be entitled to some benefits, be it financial, physical, or otherwise. As a result of the accused's act, those others had lost their entitlement.
15. If you find that the prosecution had proven beyond reasonable doubt, the above four elements of the offence, then you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

**F. THE PROSECUTION'S CASE**

16. The prosecution's case were as follows. Between 1 and 3 August 2011, the accused (DW1) was the manager of the Rural Housing Unit (RHU) within the Ministry of Provincial Development, a government department of the Republic of Fiji. He first joined the department in 1989 and rose through the ranks. He had certificates in construction studies and timber engineering from the then Fiji Institute of Technology. At the time, DW1 was responsible for the purchasing of building materials and the supply of the same to the Northern Division, for the rehabilitation of 20 rural housings, allegedly damaged as a result of Cyclone Thomas.
17. As shown in Prosecution Exhibit No. 1, was the Ministry's Organizational Structure, or chain of commands, from the Permanent Secretary at the top, to the labourers at the bottom. In terms of the chain of command, the accused was fourth down the line from the Permanent Secretary. He



was in charge of the Rural Housing Unit, and under his supervision and directions were 35 staff officers. He supervises the Building Supervisor (BS), the Senior Technical Assistant (STA), the Technical Assistant (TA), the OC Top Yard, the Storeman, Clerk A and B, 17 carpenters, 3 drivers, 5 laborers, the gateman and 2 watchmen.

18. According to the prosecution, he was put in charge and was to oversee the purchase and supply of \$184,000 worth of building materials, from Central City Hardware Limited (CCHL) to the Ministry's Top Yard at Walu Bay, and the onward supply of the same to the Northern Division, for the rehabilitation of 20 rural housings, allegedly affected by cyclone Thomas. According to the prosecution, the Ministry had standard procedures for obtaining building supplies from Hardware Companies. According to the prosecution, the Ministry had authorized the purchase of \$184,000 worth of building materials from Central City Hardware Limited (CCHL) via a Purchase Order, dated 25 July 2011. (Prosecution Exhibit No.8). Central City Hardware Limited agreed to supply the materials via invoice 1005, 1006, 1007 and 1008 (Prosecution Exhibits No. 3, 4, 5 and 6).
19. According to the prosecution, Central City Hardware Limited, through its delivery driver, Mr Ritesh Kumar (PW2), delivered only \$46, 081.20 worth of building materials to the Ministry Top Yard on 1 August 2011. He had allegedly not delivered the \$184,000 building materials itemized in the invoices mentioned above. Central City Hardware Limited, through PW2 and a Central City Hardware Limited director, allegedly pressured the Ministry to certify receiving the \$184,000 worth of building materials, when only \$46, 081.20 had been received. The storeman (PW4), Mr. Emosi Basu (PW3 – clerk B) and Raghuraj (PW5 – clerk A) allegedly refused to certify the \$184,000 worth of materials received, because only \$46,081.20 had been supplied.
20. According to the prosecution, the accused than allegedly pressured and/or forced PW4, PW5 and PW3 to certify receiving the \$184,000 worth of building materials when only \$46,081.20 had been received. According to the prosecution, the accused later endorsed the above invoices via the Purchase Order, dated 25 July 2011. As a result of the above, Central City Hardware Limited was later paid \$184,000 when it only supplied \$46, 081.20 worth of building materials. As a result of the above, according to the prosecution, the Ministry's rights were prejudiced as it was not able to rehabilitate the 20 rural housings affected by cyclone Thomas in the Northern Division.



21. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

22. On 16 July 2018, the first day of the trial, the information, which was later amended, was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called no witness, in his defence. That was his right.
23. The accused's case was simple. On oath, he denied the allegation against him. He said, the storeman, Mr. Dharmendra Sharma (PW4), Mr. Emosi Basu, Clerk B (PW3) and Mr Raghuraj, Clerk A (PW5) certified invoices 1005, 1006, 1007 and 1008 (Prosecution Exhibits No. 3, 4, 5 and 6) out of their own free will. He said, he did not instruct or direct them to sign the invoices. He said, they signed the same out of their own accord. He said, the storeman also signed the delivery docket No. 1763 out of his own free will and accord. He said, they were mistaken in their allegation against him. He said, he signed the Purchase Order (Prosecution Exhibit No. 8) on the strength of the certified invoices no. 1005, 1006, 1007 and 1008, and the signed delivery docket No. 1763. He said, he did not pressure and/or forced PW3, PW4 and PW5 to sign the invoices and the delivery docket.
24. Because of the above, he asks you, as assessors and judges of facts, to find him not guilty as charged. That was the case for the defence.

**H. ANALYSIS OF THE EVIDENCE**

**(a) Introduction:**

25. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts" and it's significance; then the Prosecution Exhibits; then the State's

case against the accused. Then we will discuss the accused's case. Then we will consider the need to look at all the evidence.

**(b) The Agreed Facts:**

26. The parties submitted an "Agreed Facts", dated 27 October 2017. A copy of the same is with you. Please, read it carefully. It has 8 paragraphs of Agreed Facts. Because, the parties are not disputing the same, you may take it that, the prosecution had proven those facts beyond a reasonable doubt, and you may treat the same as established facts.

27. The significance of the "Agreed Facts" are as follows. In paragraph 1 to 6, the accused had admitted that he was employed as the Manager of the Rural Housing Unit of the Ministry of Provincial Development, at the material time, and had been with the Ministry since 1989. He also outlined his role as Manager in paragraph 4 of the Agreed Facts, and those that work under him in paragraph no. 5. In paragraph 6, he admitted, he was involved in the Cyclone Thomas Housing Rehabilitation Program. As you will see in paragraph 10(i) and 11 hereof, the first element of an "Abuse of Office" charge, was that the accused was employed in the Public Service. In the Agreed Facts abovementioned, the accused had already admitted that the first element of the offence had already being satisfied.

**(c) The 17 Prosecution Exhibits:**

28. The prosecution had submitted into evidence the following exhibits:

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|--------|------------------------------|---------------------------------------|
| (i)    | Prosecution Exhibit No. 1 -  | Ministry's Organization Structure;    |
| (ii)   | Prosecution Exhibit No. 2 -  | Manager RHU: Job Description;         |
| (iii)  | Prosecution Exhibit No. 3 -  | Invoice No. 1005                      |
| (iv)   | Prosecution Exhibit No. 4 -  | Invoice no. 1006                      |
| (v)    | Prosecution Exhibit No. 5 -  | Invoice No. 1007                      |
| (vi)   | Prosecution Exhibit No. 6 -  | Invoice No. 1008                      |
| (vii)  | Prosecution Exhibit No. 7 -  | Delivery Docket No. 1763              |
| (viii) | Prosecution Exhibit No. 8 -  | Purchase Order No. 99011-001503       |
| (ix)   | Prosecution Exhibit No. 9 -  | Payment Voucher                       |
| (x)    | Prosecution Exhibit No. 10 - | CNB Cheque No. 25386                  |
| (xi)   | Prosecution Exhibit No. 11 - | Material List Expected to be Received |
| (xii)  | Prosecution Exhibit No. 12 - | Material Received                     |



- |        |                              |   |
|--------|------------------------------|---|
| (xiii) | Prosecution Exhibit No. 13 - | Material Not Received                                 |
| (xiv)  | Prosecution Exhibit No. 14 - | Investigation Report                                  |
| (xv)   | Prosecution Exhibit No. 15 - | CNB Bank Statement for Permanent Secretary Account.   |
| (xvi)  | Prosecution Exhibit No. 16 - | Central City Hardware Limited, Westpac Bank Statement |
| (xvii) | Prosecution Exhibit No. 17 - | Ministry of Finance memorandum, dated 4.8.11          |

29. It is to be noted that none of the contents of the above documents, tendered as Prosecution Exhibits No. 1 to 17, were ever disputed by the parties. In other words, the facts as stated in those documents were not disputed by the parties. So, you have to read those documents carefully, as they speak to the facts of this case. The admissibility of the documents were not challenged during the trial. In fact the admissibility of some of the documents, were part of the Agreed Facts.
30. Please, concentrate on invoices No. 1005, 1006, 1007 and 1008. Please, read the Ministry's stamp at the back of the invoices. It stated, "Certified received as per Agreement". The Agreement is implied in each of the Invoices that Central City Hardware Limited is supplying the materials mentioned therein to the Ministry of Provincial Development. The Ministry's stamp, and the evidence given by those who signed said, Emosi Basu (PW3) signed on behalf of OC Top Yard; Dharmendra Sharma (PW4) signed as storeman and Raghuraj (PW5) signed as a clerk. PW4 said, he also signed delivery docket 1763. The accused said, in his evidence, that because of the above signed invoices and delivery docket, he signed the Purchase Order.
31. As a result of the above, the Ministry processed the payment of \$184,000 to Central City Hardware Limited, and their Westpac Bank Account showed the money was received into their account on 5 August 2011. Prior to the signing of the abovementioned invoices and delivery docket, PW3, PW4 and PW5 said only \$46,081.20 worth, instead of \$184,000 worth of building materials, were supplied to the Ministry's Top Yard at Walu Bay on 1 August 2011. As of today, the balance of the building materials had not been supplied.

**(d) The State's Case Against the Accused:**

30. The State's case against the accused really rest on whether or not, you, accept the evidence of Mr. Emosi Basu (PW3); the evidence of Mr. Dharmendra Sharma (PW4) and the evidences of Mr. Rajhuraj (PW5). You have watched and heard the evidence of the above witnesses when they



gave evidence in court. You have watched and heard them answer the questions leveled at them by the prosecuting and defence counsel. I am sure their evidence is still fresh in your minds, and I will not bore you with the details. From the evidence given, it is accepted that, the procedure for receiving and verifying the receipt of building materials are as follows. The hardware company delivers the building materials requested by the Ministry to its Top Yard at Walu Bay. The Storeman physically checks the delivery of the materials and its quality. The storeman in this process is assisted by Clerk A and B. Once all the materials are received, the OC Top Yard or in his absence, one of the Clerks A or B, signs on his behalf, then the storeman, then other clerk. The delivery docket is then signed by the storeman. On the basis of the due completion of these documents, the Manager Rural Housing Unit signs the purchase order and the cost of the materials is processed by the Ministry's Account Section and the money paid to the Hardware Company via a Ministry's cheque.

33. According to PW3 and PW4, they did not want to sign the Ministry's stamp at the back of each invoice because all the building materials have not been supplied. Both of them said, they signed the same when the accused directed them to sign the same. They said, the accused was their boss, and they signed the same because of his direction. PW5 said, he signed the invoices because PW3 and PW4 had already signed. All of them said they were afraid of disobeying the accused because they might be dismissed from their jobs.
34. If you accept PW3, PW4 and PW5's evidence, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

**(e) The Accused's Case:**

35. I had summarized the accused's case to you from paragraphs 22 to 24 hereof. I repeat the same here. The accused, on oath, denied the allegation against him. He said, he did not direct Mr. Emosi Basu (clerk B) and Dharmendra Sharma (Storeman) as alleged. He said, he also did not direct Raghuraj (Clerk A) as alleged. He said, he signed the Purchase Order on the strength of the invoices and delivery dockets signed by Basu, Dharmendra and Raghuraj. He said, he did nothing wrong. If you accept the Accused's sworn evidence, you must find him not guilty as charged. If

otherwise, assess the whole of the prosecution's case and make your decision accordingly. It is a matter entirely for you.

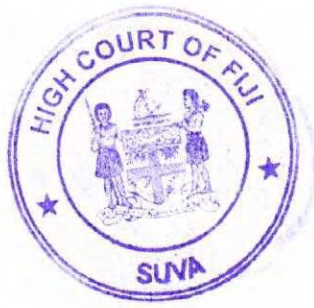
**(f) The Need To Consider All the Evidence:**

36. The prosecution called 6 witnesses. The defence called one witness. The prosecution tendered 17 exhibits. You have to consider all the evidence. You will have to compare them and analyze them together. If I didn't mention a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you may accept the whole or some of his or her evidence, in your deliberation. If you find a witness not credible, you may reject the whole or some of his or her evidence, in your deliberation. You are the judges of fact.

**I. SUMMARY**

37. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
38. Your possible opinions are as follows:
- (i) Abuse of Office : Accused : Guilty or Not Guilty
39. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.





**Salesi Temo**

**JUDGE**

**Solicitor for State** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for Accused** : **E. Koroi, Barrister and Solicitor, Suva and**  
**S. Valenitabua, Barrister and Solicitor, Suva**