

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 115 OF 2017

BETWEEN : **THE STATE**

APPELLANT

A N D : **DAYENDRA PRASAD**

RESPONDENT

Counsel : Ms. R. Uce for the Appellant.
: Ms. V. Narara [LAC] for the Respondent.

Date of Hearing : 12 July, 2018

Date of Judgment : 30 July, 2018

JUDGMENT

1. The respondent (Dayendra Prasad) was charged with one count of obtaining money by false pretences contrary to section 309 (a) of the Penal Code Cap 17.
2. It was alleged that the respondent with others between the month of December 2008 and January, 2009 at Lautoka, with intent to defraud, obtained the sum of \$93,286.18 cash from Fiji National Provident Fund account number 0711416 of Suresh Chand for the use, benefit or account of the said respondent.

3. The respondent pleaded not guilty to the charge and the matter proceeded to trial on 7 and 8 November, 2016. The prosecution called 11 witnesses and tendered four (4) prosecution exhibits.
4. At the close of the prosecution case, the learned trial Magistrate held that the respondent had a case to answer. The respondent was given his options. He opted to give evidence and also called one defence witness.
5. On 15 September, 2017 the Magistrate's Court acquitted the respondent of the charge.
6. On 22 March, 2018 this court granted State leave to appeal out of time. In compliance with the order of this court State filed a Petition of Appeal on 23 March, 2018.
7. The State advanced the following grounds of appeal in its Petition of Appeal:

(a) The learned Trial Magistrate erred in fact when he failed to consider that even though PW1 had stated that he did not know the person in the photograph, PW1 had confirmed that he had trusted the person in good faith to be his patient and that the person who came to see him would be the same person whose photograph is attached in the Form;

(b) The learned Trial Magistrate erred in law when he held that the bank officer had to conduct a dock identification to confirm that the person in the photograph is the same accused in the witness box;

(c) The learned Trial Magistrate erred in law and in fact in failing to consider that the evidence of the bank officers was strong circumstantial evidence to prove the identification of the Respondent;

(d) The learned Trial Magistrate erred in law and in fact in not considering all the evidence of the prosecution witnesses and exhibits tendered during trial and properly analyse the elements of the charge against the Respondent before arriving at his decision to acquit the Respondent.

8. Both counsel filed helpful written submission and also made oral submission during the hearing for which this court is grateful.

GROUND ONE

The learned Trial Magistrate erred in fact when he failed to consider that even though PW1 had stated that he did not know the person in the photograph, PW1 had confirmed that he had trusted the person in good faith to be his patient and that the person who came to see him would be the same person whose photograph is attached in the Form.

9. The learned counsel for the State submitted that Dr. Jayant Patel (PW1) had signed the letter of identification by referee which was used to open a bank account at the Colonial National Bank, Ba Branch. This witness relied on the information given by the person who had brought the form that he was a patient of the witness in Tavua.
10. The witness also confirmed in court that the person who had brought the document for signing was the same person whose photograph was attached to the document he had signed.
11. Counsel further submits that the learned trial Magistrate erred when he failed to consider the evidence of this witness in its totality which affected the decision of the court in properly evaluating the element of identification.
12. In his judgment at paragraph 33 the learned Magistrate mentioned the following about the role of PW1 in this case:

“There was evidence before the court on the identity of the accused during the opening of the account at the Colonial Bank of Fiji under the name Suresh Chand. The bank had relied on the Letter of Identification that was signed by PW1 however PW1 did not know the person in the photograph to be the same in the application. The photograph of the accused was attached to the application under the name of Suresh Chand...”

13. The evidence of Dr. Jayant Patel a medical practitioner makes it clear that he had signed a letter of identification by referee for the person who had presented himself as his patient from Tavua. The witness did not do any background check on the person who had brought the form to him. The thrust of his evidence was that he signed the document on the basis that the person who had come to him was the same person in the photograph that was attached to the form given to him.
14. The following cross examination questions are relevant:

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- Q: *Doctor is it possible that someone that may have looked like my client presented this to you for signing and you had signed it?*
- A: *Yes, photo and the person is the same.*
- Q: *Is it possible if there had been someone that looked like this person – looked like the person in the photograph presented this document to you for signing and saying the same things – you would have signed it?*
- A: *No.*
- Q: *I am putting it to you that it is possible that someone that may have looked like our client presenting these documents to you to sign and you had signed it?*
- A: *Not really.*
- Q: *I am putting it to you Doctor that just like you took the person that brought this document to you on his word that he was your patient you would have done the same?*
- A: *If he says that he was my patient probably I would - the photo and the person were similar and if he says I am your patient I would agree.*

15. In considering this ground of appeal this court has kept in mind the observations made by Hyne C.J. in *Kamchan Singh vs The Police* 4 FLR 69 that:

“An Appellate Court will not allow an appeal on facts where the conclusion in the Court below is arrived at after careful consideration of the evidence unless the court finds that the conclusion arrived at was clearly and plainly wrong...”

16. The learned Magistrate’s assessment of the fact was incorrect and plainly wrong when he stated that PW1 did not know the person in the photograph to be the same person in the application form. The evidence was that the witness had signed the document on the basis that the person who had presented himself was the same person whose photograph was in the document. In this regard the fact that the witness did not know the person or had failed to do a background check to ascertain whether the person was indeed his patient was immaterial. The conclusion reached by the learned Magistrate that Dr. Patel did not know the person in the photograph to be the same person in the form was erroneous.

GROUND TWO

The learned Trial Magistrate erred in law when he held that the bank officer had to conduct a dock identification to confirm that the person in the photograph is the same accused in the witness box.

GROUND THREE

The learned Trial Magistrate erred in law and in fact in failing to consider that the evidence of the bank officers was strong circumstantial evidence to prove the identification of the Respondent.

17. Both grounds can be dealt with together.

18. The State Counsel submitted that when paragraph 33 of the judgment is taken into account the learned Magistrate was implying that there was a need for the bank officers to identify the accused in court as the person who had opened the bank account. There was no dispute that the photograph attached to the application form to open a personal bank account belonged to the respondent.
19. The State Counsel stated that prosecution witness's three (3) to five (5) were bank officers who informed the court that they had relied on the letter of identification by referee which contained the photograph of the respondent. Furthermore, all the bank officers also told the court that any person who wanted to open an account had to be personally present at the bank. The letter of identification had affixed to it the photograph of the person opening the bank account. In this case the respondent had spent considerable time in the Bank giving relevant information, signing documents and undertaking a PIN creation.
20. The counsel further submits that there was no need for dock identification in light of the strong circumstantial evidence that was adduced in court.
21. At paragraph 33 of the judgment the learned Magistrate had stated:

“There was evidence before the court on the identity of the accused during the opening of the account at the Colonial Bank of Fiji under the name of Suresh Chand... The bank officers had relied on the photograph however this was not verified in open court as if the person in the photograph is the same as the accused person in the accused box when he opened the bank account at Colonial Bank. The applicant had provided a birth certificate when lodging his application and how the accused was in possession of Suresh Chand birth certificate was not verified. According to the bank officer, the accused was the same person before the officer when the application for the opening of the bank account was approved.”

22. The learned Magistrate at the beginning of paragraph 33 states that there was evidence before the court on the identity of the accused during the opening of the account at the Bank. The evidence of the bank officers (PW3, PW4 and PW5) was that the person in the photograph affixed to the letter of identification witnessed by Dr. Patel was present in the Bank in full view of them when they were attending to his formalities in opening his bank account. The evidence of Sanjeev Kumar Sumer (PW5) was that it took at least half an hour to approve an application for a new account. Furthermore, this witness (PW5) had given evidence that he had spoken with the person who was in the photograph in the application form.
23. Although the bank officers were not asked to identify the accused in court as the person they had seen at the Bank it was not fatal in view of the evidence given by independent and experienced bank officers. The bank officers were satisfied that the person who had come to open the bank account was the same person whose photograph was in the application form. This was supported by the letter of identification by referee which was enough to confirm the identity of the respondent.
24. The defence contention that the person who had opened the bank account was not the respondent but a person with similar features hence a case of mistaken identity was denied by the bank officers.
25. The bank officers had seen the respondent for a considerable period of time and there was no reason for the bank officers not to believe the referee (PW1) since the person who had presented himself to them was the same person in the photograph.
26. The photograph and the evidence of all the bank officers were strong circumstantial evidence which pointed towards the only reasonable inference that the bank account was opened by the respondent and no one else. There was no other reasonable inference consistent with the innocence of the respondent or a reasonable doubt about him.

27. The photograph was admissible in evidence to establish the following:

(a) Whether an offence was committed; and

(b) Who committed it?

28. The learned Magistrate had the photograph with him during the trial which was comparable with the respondent sitting in the dock. The Court of Appeal in *Dodson and Williams [1984] 79 Cr. App. R. 220*, in particular Watkins LJ at page 228 said:

“What are perils which the jury should be told to beware of?... We do not think the provision by us of a formula or series of guidelines upon which a direction by a judge upon this matter should always be based would be helpful. Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant’s appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of relevance in this context in a particular case...”

29. The bank account was opened in December, 2008 in the presence of the bank officers. The matter proceeded to trial in November, 2016 about 8 years later. Taking into account the time lapse from the time the bank officers had seen the respondent the State Counsel was correct in not inviting the bank officers to make dock identification since there was no proper foundation for such identification.

30. The learned Magistrate erred when he came to the conclusion that the bank officers had to conduct a dock identification of the respondent to confirm that the person in the photograph was the respondent when there was strong circumstantial evidence to allow for such an inference to be drawn.

GROUND FOUR

The learned Trial Magistrate erred in law and in fact in not considering all the evidence of the prosecution witnesses and exhibits tendered during trial and properly analyse the elements of the charge against the Respondent before arriving at his decision to acquit the Respondent.

31. The State Counsel submitted that the learned Magistrate had failed to consider the evidence adduced and the exhibits tendered properly and also failed to analyse all the elements of the offence.
32. The prosecution called 11 witnesses and tendered four exhibits as follows:
 - (a) Prosecution exhibit no. 1 - Personal Account Application Form
 - (b) Prosecution exhibit no. 2 - Withdrawal Receipts for account no. 6779306
 - (c) Prosecution exhibit no. 3 - Transaction History Listing
 - (d) Prosecution exhibit no. 4 - Fiji National Provident Fund Withdrawal Application Migration Form
33. The defence called two witnesses namely the Respondent and Inspector Terotuma Voi.
34. The following evidence unfolded during the hearing (important ones are mentioned). The first prosecution witness Dr. Jayant Patel a medical practitioner confirmed signing a letter of identification by referee of one Suresh Chand. He signed after the person who had personally brought the document had stated that he was a patient of the witness. The witness relied on this representation, he did not do any background check to ascertain if the person before him was indeed a patient of his.
35. The witness signed the letter of identification because the person who had brought the form and the photograph in the form was the same.

36. In cross examination the witness stated that he did not know the person who had brought the form personally, however, the photograph and the person in front of him were the same.
37. The second witness was Suresh Chand who was a bus driver for the past 10 years, prior to this employment he had worked at the Emperor Gold Mines as a Supervisor. He was a member of the Fiji National Provident Fund and his membership no. was GK 416. On 22 January, 2009 he went to the District Officer's office to apply for partial withdrawal of his FNPF money since he had been affected by a natural disaster.
38. Here he came to know that all his money had been withdrawn on grounds of migration to New Zealand. The witness further stated that he had only withdrawn money for his son's education and for no other purpose. The witness stated that he did not apply for a withdrawal of his FNPF money and that he did not travel to New Zealand or make any application for migration to New Zealand. Furthermore, this witness said that he had an account with Westpac Bank and not with Colonial National Bank.
39. The letter of identification by referee has his name and details but the photograph was not his. He does not know the person whose photograph was attached to the form. He never made any application to open any account at the Colonial National Bank.
40. In his evidence this witness confirmed that his FNPF money had been withdrawn without his knowledge and that he had not made any such application. He had not applied to travel to New Zealand nor has he been to New Zealand in his lifetime. The witness recalled that sometime ago he had given his passport, birth certificate and marriage certificate to a person by the name of Shalendra Sen Sinha who was recruiting people for overseas employment. He never received these documents back. The above documents were given to Sinha a long

time ago. The witness does not know the respondent and had never seen him.

41. There were four (4) bank officers called by the prosecution. Praneel (PW3), Ashika (PW4) and Sanjeev (PW5) were employed by the Colonial National Bank when an account was opened at the Ba Branch in the name of Suresh Chand. Their evidence was that the bank does not allow any third party to open an account which meant the person who wanted to open an account had to be personally present at the Bank to sign the documents and for the PIN to be allocated.
42. In this case the person who wanted to open an account was present, he had produced a birth certificate together with a letter of identification by referee. The process of opening an account was explained in court which was a verification process between one officer to the other. The person had to wait for a while. According to Sanjeev (PW5) it may take up to half an hour for the account to be opened. This witness also confirmed that he had spoken to the person who had opened an account with the Bank after all the formalities were completed.
43. According to these bank officers they relied on the letter of identification by referee which had a photograph of the person who wanted to open a bank account. None of the officers had any doubts that the person who had presented himself at the bank was not the person whose photograph was attached and certified by the referee.
44. The account in the name of Suresh Chand was opened after all the formalities were complied with. Sanjeev (PW5) stated that he would not have approved the application to open an account if the person present was someone with similar features to the person in the photograph.

45. The sixth witness Salim Buksh was working for Colonial National Bank at the time confirmed all the withdrawals made in account no. 6979306 through the individual receipts and the transaction history.
46. This witness also confirmed that if any person was in possession of an ATM Card and knew the PIN of the card withdrawals could be made. For large withdrawals a person could withdraw from inside the Bank. In this case two large withdrawals were allowed for the purchase of building materials as stated by the customer who was personally present in the bank to make withdrawal. The maximum withdrawal from the ATM was \$1,000.00.
47. Joseph Fisher was employed by the Fiji National Provident Fund who confirmed receiving a withdrawal application for migration in the name of Suresh Chand sometimes in December 2008. He checked all the requirements and found the address submitted and the employment history was not corresponding. He identified in court the documents that were attached with the application form such as copies of the passport, marriage certificate, bank account, statutory declaration and travel ticket. The bank account details in the form were account no. 6979306 of Colonial National Bank, Ba Branch under the name of Suresh Chand.
48. The witness also stated that there was no verification done to confirm whether the thumb print on the application form belonged to the registered member. The signature on the form was verified by the processing officer who checked the documents.
49. The final prosecution witness Inia Vukialau was employed by the Fiji National Provident Fund. In January, 2009 he was the Acting Ethical Standard Officer, his duties included inter alia investigating complaints of unethical behaviour of employees from the board of directors to the staff.

50. In January, 2009 he investigated a case of theft of membership funds of member number 0711416 under the name of Suresh Chand. As part of preliminary investigation he checked the IT System of all FNPF employees who had logged into FNPF number 0711416. Thereafter, he recorded statements from the officers involved in the processing and approval and the likely suspect who had accessed the member's account without any justifiable reason.
51. The matter was then referred to the police with all the documents lodged with the withdrawal application form. During his internal investigation the witness discovered that one of the FNPF staff had accessed the member's account about 55 times without any justification which was done after normal working hours that is after 5pm.
52. The witness further stated that the FNPF employee had an external accomplice who had been assisted in the electronic transfer of money from FNPF into the bank account at the Colonial National Bank, Ba. The name of the external party was Dayendra Prasad the respondent.
53. In cross examination the witness stated that apart from the photograph of the respondent in the Colonial National Bank Application Form there was no other link to the respondent. The police investigation revealed that the application came from Dayendra Prasad purporting to be Suresh Chand. The witness was not sure whether the member's signature was verified or not.

DEFENCE CASE

54. The accused informed the court that he had no idea about the charge, he went to New Zealand around 2009 he was visited by the Interpol saying that he was wanted in Fiji for fraud. At the time of the alleged crime he was in Fiji in Lovu, Lautoka with his uncle.
55. The accused stated that he had never met or seen Suresh Chand in his life. When shown prosecution exhibit no. 1, he confirmed the

photograph affixed to the document was his photograph. In the year 2008 he had given his passport, photo and \$300.00 to one Shalendra Sen Sinha for work permit in Australia. After Sinha was not doing anything towards his work permit he applied for a tourist visa and went to visit New Zealand.

56. He also stated that the photograph in the application form was his old photograph which he had given to Sinha and he does not know how the photograph ended up on the Colonial National Bank Application Form.
57. The accused also stated that he had never seen or met Dr. Patel who had signed the letter of identification by referee which was attached to the Bank Account Application Form. He had never seen the form before.
58. The handwriting in the FNPF form does not belong to him and the thumb print was also not his since he had injured his left thumb when he was in class 8.
59. He does not know anything about the method of payment or account number in the application form since he had never been to this bank in his entire life.
60. In cross examination the accused maintained that he had given his passport, photo and \$300.00 to Shalendra Sen Sinha for job recruitment. He then changed his position to say that Sinha had taken the photocopy of his passport and returned his passport to him. The amount of money he had given Sinha was only \$300.00 so he did not report the matter to the police. The accused denied the allegation and also stated that he was telling the truth that he had given his photo to Shalendra Sen Sinha which was used in the new account application at Colonial National Bank.
61. The second defence witness Inspector Terotuma Ravai Voi informed the court that he was in charge of the Forensic Section of the Fiji

Police Force. On 7 February, 2011 the witness received some FNPF documents from the Investigating Officer since he was a finger print expert the witness was requested to check the finger prints on the FNPF documents.

62. The prints from the FNPF document was checked against the document under the name of the respondent which was found to be negative this meant it was not the thumb print of the respondent.
63. In cross examination the witness confirmed that he used the thumb print on the FNPF document at the bottom of the page to match the thumb print of the respondent. The witness was unable to say by looking at the document whether it was left thumb print or the right thumb print since the print was not done properly it looked double, not in relative sequences, not the same, but in different positions and phases. Based on this, his findings were negative.
64. The learned Magistrate had analysed the evidence in relation to the elements of the charge at paragraphs 32 to 36 of the judgment as follows:

"[32] There were 11 witnesses for the prosecution and 2 for the defence. The complainant did not know on how his account at FNPF was withdrawn for migration purpose. He denied signing any document and thumb print in the application was not his. The complainant had given his old passport to Salend Siha for stamping for work opportunity at Australia. He came to know about the withdrawal of his FNPF's account on the 22nd of January, 2009 when he applied for hurricane assistance.

[33] There was evidence before the court on the identity of the accused during the opening of the account at the Colonial Bank of Fiji under the name of Suresh Chand. The bank had relied on the Letter of Identification that was signed by PW1 however PW1 did not know the person in the photograph to be the same in the

application. The photograph of the accused was attached to the application under the name of Suresh Chand. The bank officers had relied on the photograph however this was not verified in open court as if the person in the photograph is the same as the accused person in the accused box when he opened the bank account at Colonial Bank. The applicant had provided a birth certificate when lodging his application and how the accused was in possession of Suresh Chand birth certificate was not verified. According to the bank officer, the accused was the same person before the officer when the application for the opening of the bank account was approved.

[34] On the particular of the account transaction the money was verified that on 2nd January, 2009, there was a deposit of \$93,286.18 in the account of Suresh Chand number 6979306. There were 19 withdrawals and this was confirmed by PW6 however anyone could withdraw if he/she had the card and knew the pin number. There was no evidence to verify on how the money was paid to account number 6979306 or if the money came from the FNPF's account of Suresh Chand.

[35] The application for migration withdrawal was received by post at the FNPF's office in Lautoka with the copy of the passport, copy of the visa, bank statement and birth certificate. There was discrepancy in the application and was referred to the Manager according to PW10. He however came to know of the approval in Tavua when PW2 applied for relief assistance.

[36] PW2 had provided his old passport and marriage certificate to Salend Siha of Nadi. The same documents with; visa, birth certificate, travel itinerary and bank statement were used for FNPF migration withdraw from PW2's FNPF account number 0711416. There was no evidence of the particular of the bank statement that was attached to the application however if it was the same bank

statement opened by accused under PW2 than he could be the person responsible for the withdrawal of PW2's account. On the other hand Salend Siha can be responsible in applying for the withdrawal of FNPF as he was given with PW2 passport and birth certificate and could have obtained the bank statement from the accused. There is no clear evidence to who have actually tried to falsely pretend to be PW2 when he tried to withdraw the FNPF fund for PW2 and also to defraud PW2."

DETERMINATION

65. The question before this court is whether this court can make a determination on the basis of what is stated in the copy record without having the benefit of seeing the witnesses give evidence. This case was based on circumstantial and documentary evidence. The learned Magistrate in his judgment did not make any findings of credibility or reliability of any witness. The issue is can a proper inference to be drawn from proven facts by this court in its appellate jurisdiction.

66. In view of the above, the observations of Lord Reid in *Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326 at page 329* is helpful:

"...I think that the whole passage...refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion..."

67. In my view a proper inference can be drawn from the proven facts of this case accordingly, this court is in a good position to evaluate the evidence as the Magistrate's Court.
68. The elements of the offence which the prosecution must prove beyond reasonable doubt were:
- (a) The accused;
 - (b) Obtained money;
 - (c) From another;
 - (d) For his own use/benefit;
 - (e) By false pretence;
 - (f) With intent to defraud.
69. From the evidence the following facts were not in dispute:
- (i) A bank account in the name of Suresh Chand (PW2) was opened at the Colonial National Bank, Ba Branch with the birth certificate belonging to PW2 on 17 December, 2008. The account number was 6979306;
 - (ii) The photograph of the respondent was affixed on the application form in particular to the letter of identification by referee;
 - (iii) A Withdrawal Application – Migration Form was submitted to the Fiji National Provident Fund on 18 December, 2008. The application was made under membership no. 0711416 belonging to PW2;
 - (iv) On 2 January, 2009 the withdrawal of money was approved by Fiji National Provident Fund from the membership account of PW2;

- (v) On the same day the sum of \$93,286.18 was deposited into account number 6979306 at Colonial National Bank, Ba Branch;
 - (vi) After the money was transferred to the above account numerous withdrawals were made.
70. This court notes that there was no dock identification of the accused that he had opened a bank account at the Colonial National Bank.
71. The photograph of the accused was affixed to the letter of identification by referee, which was part of the application for the opening of a new bank account at the Colonial National bank. The accused confirmed that it is his old photograph that was affixed to the application form. Dr. Patel PW1 confirmed signing the letter of identification, he also certified the photograph of the respondent which was affixed to the form. Although PW1 did not know the person personally, however, he relied on the words of the person who had brought the letter of identification by referee as a patient of his when he was practising in Tavua. This witness signed the letter of identification since the person who had brought the form was the same person whose photograph was affixed to the form.
72. The bank officers PW3, PW4 and PW5 were all employed by the Colonial National Bank at the time, told the court that they were involved in the opening of the bank account. They told the court that the person opening the bank account was present when the account was opened. They also relied on the letter of identification by referee and the birth certificate to open the account.
73. PW5 Sanjeev had spent some time with the customer since he had greeted and thanked the customer for opening the bank account with Colonial National Bank. It would take about half an hour to open an

account and the person whose account was to be opened would be in full view of the bank officers.

74. The above evidence taken in its entirety was sufficient to establish that the only reasonable inference that could be drawn was that it was the respondent who had lodged the application to open an account at the Colonial National Bank.
75. Furthermore, the information contained in the application form lodged at Colonial National Bank and at the Fiji National Provident Fund were similar. The evidence of PW2 Suresh Chand is that he did not make any application to open a bank account at Colonial National Bank, the photograph was not his and that he always banked with Westpac Bank.
76. Moreover, the only FNPF withdrawal PW2 had carried out was for educational purposes and that he had never applied for migration to New Zealand. It cannot be a coincidence that all the relevant information belonging to PW2 would be found in both applications.
77. The second element of “obtained money” is supported by the evidence that there was a transfer of money from FNPF membership account no. 0711416 belonging to PW2 into the Colonial National Bank account no. 6979306. PW2 had not opened the bank account nor made any application at FNPF for the withdrawal of his funds and also his photograph was not in the application form lodged with the bank. On the evidence it was the respondent who had obtained the money by his actions as per prosecution exhibits 2, 3 and 4.
78. In respect of the third element of “from another”, there is no dispute that the sum of \$93,286.18 was withdrawn from the FNPF account of PW2 and deposited into a Colonial National Bank Account. This was done without the knowledge of PW2. When the complainant came to

know that his FNPF money had been withdrawn he reported the matter to the police.

79. In respect of the fourth element of “for his own use or benefit” Salim Buksh (PW6) confirmed there were withdrawals made from the Colonial National Bank account under the name of Suresh Chand account no. 6979306. This witness informed the court that for the withdrawal of large sums of money particularly \$43,950.00 and \$36,100.00 from the account, the customer was personally present in the Bank to make such withdrawals.
80. Upon inquiry by PW6 the reason given for the large withdrawals was that the money was for the purchase of building materials. It can be inferred from the evidence adduced in court that it was the respondent who had withdrawn all the money belonging to the complainant for his own use or benefit.
81. In respect of the fifth element of “false pretence” this means any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true, is a false pretence.
82. In this case the evidence of false pretence can be inferred by the conduct of the accused in particular the application forms which were completed to open an account at the Colonial National Bank and the application for withdrawal of the complainant’s FNPF funds. The false representation also comes from the photograph of the respondent affixed on the letter of identification by referee (prosecution exhibit no. 1).
83. The contents of both application forms mentioned above shows that it is the complainant Suresh Chand (PW2) who was making the

application but in reality this was not the case. The facts represented by the respondent was false which was well known to him.

84. The final element of the offence "intent to defraud" can be inferred from the fact that an application was made to open a bank account at the Colonial National Bank, Ba Branch and subsequently the withdrawal application from the FNPF under the name of Suresh Chand. The complainant whose name was used had nothing to do with the applications, in fact he was not aware of what was happening. The evidence in court shows that there was an intention by the respondent to defraud the complainant of all his FNPF funds which was transferred to the bank account opened by the respondent at the Colonial National Bank.
85. The respondent in his evidence denied the allegation, he had no idea about the charge he stated that he had given his passport, photo and \$300 cash to one Shalendra Sen Sinha for his visa application to Australia. Mr Sinha did not do anything to further his application so he applied for a visa to go to New Zealand on a tourist visa. The accused did not lodge any police complainant against Shalendra for the \$300.00.
86. The respondent confirmed it was his photograph used in the application to open the bank account, but he had no idea how it ended up in the application. The accused does not know Suresh Chand (PW2) and Dr. Patel (PW1) and that he did not have any bank account in Fiji and he had never been to the bank.
87. In cross examination the accused stated that he was given his passport back by Shalendra after a photocopy was made by Shalendra. He agreed that he had said in his evidence in chief that Shalendra had never returned anything to him. During cross examination of the prosecution witness the accused had taken the

position that it was a person with similar features as him who had been engaged in the conduct and not him.

88. Inspector Voi the second defence witness stated that finger print in prosecution exhibit 4 was checked against the document of the respondent but the prints did not match.

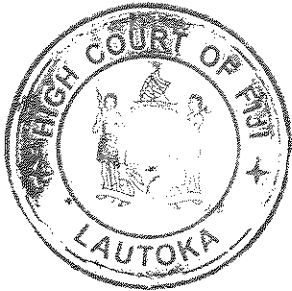
CONCLUSION

89. On the totality of the evidence adduced by the prosecution and the defence the learned Magistrate failed to make a reasonable inference that the offence was committed by the respondent. It is also obvious to this court that the learned Magistrate had erred and/or misdirected himself on the law and fact and had also erred in properly analysing the facts of the case which led to a conclusion which was clearly and plainly wrong.
90. This court is satisfied beyond reasonable doubt that the respondent with others between the month of December, 2008 and January 2009 at Lautoka with intent to defraud, obtained the sum of \$93,286.18 cash from Fiji National Provident Fund account number 0711416 of Suresh Chand for the use, benefit or account of the respondent.
91. The appeal against acquittal is allowed. The acquittal by the Magistrate's Court is quashed and set aside. In the interest of justice and in accordance with section 256(2) of the Criminal Procedure Act this court finds the accused guilty as charged and he is convicted accordingly.

ORDERS

1. The appeal against acquittal is allowed.

2. The order of acquittal by the Magistrate's Court is quashed and set aside.
3. The respondent is found guilty and convicted of the offence of obtaining money by false pretences contrary to section 309(a) of the Penal Code Cap. 17.
4. The accused is remanded in custody for sentencing.



At Lautoka
30 July, 2018


Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the Appellant.

Office of the Legal Aid Commission for the Respondent.