

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Case No. HACDM 002 of 2024S

BETWEEN : **SHALENDRA KUMAR**
Applicant

AND : **FIJI INDEPENDENT COMMISSION AGAINST**
CORRUPTION (FICAC)
Respondent

Counsel : Mr M Saneem & Ms N Shanha for the Applicant
Ms S Fatafei for the Respondent

Hearing : 16 May 2024

Judgment : 6 June 2024

JUDGMENT

(Application for Bail pending Appeal)

[1] Mr. Shalendra Kumar was found guilty in the Magistrates Court of the following two counts:

Count one

Statement of Offence

OBTAINING FINANCIAL ADVANTAGE: *Contrary to section 326(1) of the Crimes Act 2009.*

Particulars of Offence

SHALENDRA KUMAR *between 1st January 2010 and 31 May 2010 at Suva in the Central Division whilst being the Director of Professional Stationaries engaged in a conduct namely caused payments amounting to FJ\$4,236.77 to be made to Professional Stationaries and as a result of that conduct obtained a financial advantage amounting to \$34,236.77 from the*

Public Works Department and knowing that he was not eligible to receive the said financial advantage.

Count Three

Statement of Offence

ATTEMPT TO PERVERT THE COURSE OF JUSTICE: *Contrary to section 190(e) of the Crimes Act 2009.*

Particulars of Offence

SHALENDRA KUMAR *sometime on or about the 1st February 2014 and 31 December 2015 at Toorak, Suva in the Central Division attempted to pervert the course of justice by creating false backdated Professional Stationery delivery dockets in order to be used as evidence in the case against the said Shalendra Kumar.*

- [2] Mr. Kumar was sentenced by the learned Magistrate to seven years imprisonment for the two offenses with a non-parole period of five years. He appeals against both the conviction and sentence. Mr. Kumar seeks bail pending his appeal.

Background

- [3] The prosecution of Mr. Kumar stretched over a decade. He was, along with twelve others, charged in the Magistrates Court in 2013 in respect to the 2010 criminal conduct. The allegation by FICAC, found by the learned Magistrate to be proven beyond a reasonable doubt, was that Mr. Kumar (the Director of Professional Stationaries) along with 12 employees from the Public Works Department (PWD) conspired to dishonestly misappropriate the sum of \$34,236.77 from PWD. False invoices were furnished on behalf of Professional Stationaries to PWD for goods that had not been supplied. PWD made payments to Professional Stationaries on the basis of the false invoices.
- [4] The case was transferred to the High Court in 2014. Charges were later added for attempting to pervert the course of justice. The allegation was that in 2014/15 Mr. Kumar colluded with several PWD employees to prepare false delivery dockets in respect to the goods that had been the subject of the 2010 false invoices.

- [5] Mr. Kumar's co-offenders pleaded guilty in 2018. They were sentenced to prison terms ranging from two to six years.
- [6] Mr. Kumar's case was remitted back to the Magistrates Court in 2019. The trial was heard over 11 days in 2022 and 2023. FICAC called six witnesses. Mr. Kumar provided evidence in his defence. The learned Magistrate issued a judgment on 11 August 2023 finding the Applicant guilty on counts one and three but not guilty on count two.
- [7] The false invoices, that had been furnished by Professional Stationeries to PWD, were admitted by consent at trial. As per the Agreed Facts, Mr. Kumar admitted that not only were the invoices presented by Professional Stationeries to PWD but that PWD made payment on the invoices. There were 14 invoice transactions amounting to \$34,236.77. Two of the witnesses called by FICAC were Mr. Kumar's co-offender's, namely Laisa Halafi (PW1) and Tavenisa Tavaga (PW4).
- [8] With respect to count one, the learned Magistrate stated at paragraph 17:

Considering the sentiments in Vasu (supra) as a result of the agreed facts the following elements of the offence are proved beyond reasonable doubt:

- i. The accused, (paragraph 1 of the Agreed Facts);*
- ii. Engages in conduct (paragraphs 7 to 40 of the Agreed Facts);*
- iii. As a result of that conduct, obtains a financial advantage for himself (paragraphs 41 to 53 of the Further Agreed Facts and paragraphs 2, 3 and 4 of the Agreed Facts). In fact, the deposits were made into the Westpac Bank account for Professional Stationary Services, which was a registered business and not a limited liability company. This meant effectively that the accused was personally responsible for the business.*

- [9] Having noted that the first three elements were established by way of the agreed facts, the Magistrate stated, '[t]his leaves the final element of the offence, that is, 'knows or believes that he is not eligible to receive that financial advantage'. The learned Magistrate considered the definition of 'knowledge' and stated:

25. *Noting the legislative definition and that of case law as above cited, has Prosecution proved beyond reasonable doubt that the accused had the knowledge that he is not entitled to receive the \$34,236.77.*
26. *Prosecution premised this on four things.*
27. *Firstly, was the fact that the accused supplied three (3) quotations from his business and two other businesses as per evidence of Laisa Halafi (PW1) Sala Biukoto (PW3), and Tavenisa Tavaga (PW4). PW3 stated that while she was employed for the accused's business, that is, Professional Stationary Services, they would issue quotations for other companies because they had them with them.*
28. *One of the businesses referred to by PW3 was Office 2000, wherein Leena Ana Marie, (PW2) and Mosese Vuetimāiwai (PW5) confirmed to the court that all the quotations under the banner of Office 2000 for the fourteen (14) transactions were not made by Office 2000.*
29. *Secondly, was the fact that the VAT portion for transaction 3, 6, 10, and 11 were invoiced twice as per the evidence of Sen Jeet, (PW6).*
30. *Thirdly, whilst the accused's business, as per further agreed facts, paragraphs 41 to 53, was paid the sum of FJ34,236.77, the evidence of PW1 and PW4 suggests that there was no stationary delivered for Transaction 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13, whilst Transaction 4 and 14 were only supplied partially.*
31. *PW1 and PW4 also stated that sometime in 2014 they had gone to the office of the accused and were made to sign the delivery dockets for thirteen (13) of the fourteen (14) transactions when the stationary were ordered, paid and should have been supplied between 1 January 2010 and 31 May 2010.*

32. *Fourthly, the accused had been complicit with the PW1 and PW4 in all the transactions because PW1 and PW4 with others, as per the evidence, would receive cash following the payment of a transaction.*
33. *Even though all the witnesses were cross-examined in terms of the final element, this court is of the view that none of them were discredited as such.*
34. *PW1 and PW4, however, were accomplices in this matter. This is a fact they do not deny.*

...

39. *Consequently, following from the above discussions, the fourth and final element of the offence is proved beyond reasonable doubt.*

[10] With respect to count 3, the Magistrate relied on the evidence of PW1 and PW4, noting at paragraph 48 that PW1 and PW4 stated in evidence that they were made to sign the delivery dockets by Mr. Kumar for 13 of the 14 transactions. The Magistrate relied on this evidence to determine that FICAC had proved count 3 beyond reasonable doubt.

[11] The learned Magistrate then turned to Mr. Kumar's defence, noting:

52. *His defence in terms of count 1 was that he had supplied all stationary ordered, which his business was paid to do. He, however, denies colluding with PW1 and PW4.*
53. *He did allude to the court that the PWD stock card would have shown that the items were supplied, however, he only made oral suggestions of its existence without actually attempting to produce a copy or call as a witness the person employed by PWD who was responsible for the stock card.*
54. *In terms of count 3, the accused denied the allegation outright, however, gave no other plausible explanation of his denial.*

55. *Considering what the accused had raised in his defence, it is the court's considered view that the weight of prosecution's evidence should have been rebutted by the accused on a balance of probabilities.*

56. *Given the court's deliberations at paragraphs 50 to 54 above-herein, the defence raised by the accused is dismissed for failing to meet the required standard.*

[12] Mr. Kumar was sentenced on 19 February 2024. The Magistrate stated at paragraph 4:

The accused person via counsel submitted written mitigation and also called a character witness. The court has considered the same.

[13] The Magistrate discussed the tariff for the two offences; being, a maximum of 10 years for count 1, with a range of between 5 to 10 years for amounts greater than \$10,000, and a range of between 6 months to 3 years for count 3. The Magistrate adopted the instinctive synthesis approach and proceeded at paragraphs 11 and 12 to state:

11. *Looking at the nature of the offence, the mitigation, the fact that there is no restitution, and sentencing submissions from the State, this court shall impose an aggregate sentence of seven (7) years' imprisonment for both offences.*

12. *Pursuant to section 18(1) of the Sentencing and Penalties Act 2009, a non-parole period of five (5) years is imposed.*

Parties Respective Positions

[14] Mr. Saneem made the following arguments on behalf of the Applicant:

- i. The conviction is unsafe. He states that it is a requirement when establishing the element of '*engages in conduct*', that FICAC demonstrate that the goods in the invoice for which PWD made payment had not been delivered to PWD. The

learned Magistrate did not, allegedly, make a finding on this issue and, therefore, FICAC has not established all the elements of the offence for count one. Mr. Saneem was critical of the learned Magistrate's reliance on the admitted facts to accept that delivery of the goods had not been made to PWD.

- ii. Mr. Saneem argued that Mr. Kumar's sentence was excessive. Further, that there were significant flaws with the sentencing, not least the alleged failure of the learned Magistrate to provide any reasoning for the final sentence.

[15] Ms. Fatefehi argued in response:

- i. The evidence from PW1 and PW4 demonstrated that there was no delivery of the goods in 2010 and this was referred to in the learned Magistrate's judgment.
- ii. Mr. Kumar's sentence was within the tariff for such offending and, therefore, reasonable.

Legal principles

[16] Pursuant to s 3(4) of the Bail Act, the presumption in favour of the granting of bail is displaced where a person has been convicted and is appealing against the conviction.

[17] Section 17(3) of the Bail Act reads:

When a court is considering the granting of bail to a person who has appealed against conviction or sentence, the court must take into account:

- (a) The likelihood of success in the appeal;*
- (b) The likely time before the appeal hearing;*
- (c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.*

[18] In *Balaggan v State* [2012] FJCA100 (3 December 2012) the Court of Appeal stated:

[5]. *The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Act, the presumption in favour of granting bail is displaced.*

...

[7]. *Although section 17(3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In Apisai Vuniyayawa Tora and Others –v- R (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal.

[8]. *The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17(3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17(3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider*

when determining the chances of success.

[9]. *This second aspect of exceptional circumstances was discussed by Ward P in Ratu Jope Seniloli and Others –v- The State (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17(3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for bail pending appeal to delve into the actual merits of the appeal. That as was pointed out in Koya's case (Koya v The State unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it.

...

[11]. *The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant...¹*

Decision

[19] Mr. Kumar has been sentenced to seven years in prison with a non-parole period of five years. He was sentenced in February 2024 and has, therefore, served about four months of his five-year non-parole period. The only delay with the appeal to date is awaiting the court record from the Magistrates Court. It is anticipated that the appeal will be heard and determined in 2024. As such, there will be no material delay and Mr. Kumar will not

¹ Mataitoga RJA reaffirmed these principles recently in *Naicker v State* [2024] FJCA (3 May 2024).

have served a significant proportion of his sentence by the time the appeal outcome is known.

- [20] Mr. Kumar contends that he should have received a suspended sentence. I consider that to be overly optimistic given the custodial sentences provided to Mr. Kumar's co-offenders. Mr. Saneem raises a number of grounds to support the appeal against sentence; for example, he is critical of the Magistrate's use of the instinctive synthesis approach, he says there was a failure by the Magistrate to take specific account of Mr. Kumar's mitigating factors, the length of the proceedings was allegedly excessive, Mr. Kumar tried to make restitution, etc. Even if Mr. Kumar is successful with these matters, the only likely adjustment to the sentence will be to reduce the term of imprisonment.
- [21] On the information presently available, in my view the only realistic basis for Mr. Kumar to be granted bail is to demonstrate that there is a very high likelihood that he will succeed with his appeal against conviction. In this respect, Mr. Saneem argues that the learned Magistrate erred in finding, as an admitted fact, that the stationary goods, that were the subject of the 14 invoices, had not been delivered to PWD.
- [22] It is appropriate at this time to set out the elements of the offence of obtaining financial advantage under s 326 of the Crimes Act. These are:
- i. Mr. Kumar engages in conduct;
 - ii. As a result of the conduct, Mr. Kumar obtains a financial advantage for himself from another person;
 - iii. Mr. Kumar knows or believes that he is not eligible to receive the financial advantage.
- [23] The 'conduct' that is alleged against Mr. Kumar is that he furnished falsified invoices to PWD for goods rendered where the goods had, in fact, not been delivered to PWD. I accept that this element requires FICAC to prove beyond a reasonable doubt that the goods had not been delivered to PWD. Likewise, it was necessary for the Magistrate to make a finding on this matter before determining that Mr. Kumar was guilty of count one.

[24] The learned Magistrate stated at paragraph 17 of the Judgment that the element of 'engages in conduct' was admitted in the agreed facts. That cannot have been the case as reflected by the learned Magistrate's later acknowledgment at paragraph 52 that Mr. Kumar's defence to count 1 was that 'he had supplied all stationary ordered'. If that was the extent of the Magistrate's judgment on the matter, I would accept that Mr. Kumar has a strong likelihood of succeeding with his appeal against conviction. However, the learned Magistrate does appear to have considered whether the goods were delivered. The learned Magistrate did so under the third and final element, being that Mr. Kumar 'knows or believes that he is not eligible to receive that financial advantage'. The learned Magistrate found that this element had been proven by FICAC and provided four reasons for this, the third reason being:

30. Thirdly, whilst the accused's business, as per further agreed facts, paragraphs 41 to 53, was paid the sum of FJ34,236.77, the evidence of PW1 and PW4 suggests that there was no stationary delivered for Transaction 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13, whilst Transaction 4 and 14 were only supplied partially.

31. PW1 and PW4 also stated that sometime in 2014 they had gone to the office of the accused and were made to sign the delivery dockets for thirteen (13) of the fourteen (14) transactions when the stationary were ordered, paid and should have been supplied between 1 January 2010 and 31 May 2010.²

[25] The learned Magistrate subsequently made a finding that he accepted the evidence of PW1 and PW4.³ Consequently, not only was there evidence before the Magistrate that the goods had not been delivered but the learned Magistrate expressly accepted this evidence.

[26] Therefore, I am not satisfied that there is a very high likelihood that Mr. Kumar will succeed on this ground.

² My emphasis.

³ At paras 37 & 38.

[27] Accordingly, Mr. Kumar has not established that there are exceptional circumstances justifying the grant of bail and his application for bail is dismissed.




D.K.L Tuigereqere
JUDGE

Solicitors:

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