IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Criminal Case No. HACDM 002 of 2024S

BETWEEN	**:**	**SHALENDRA KUMAR** **Appellant**
AND	**:**	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION** **Respondent**
Counsel	**:**	Mr M Saneem & Ms N Shanha for the Appellant Ms S Fatafei for the Respondent
Hearing	**:**	19 December 2024
Judgment	**:**	11 April 2025

JUDGMENT

[1] The appellant was found guilty in the Magistrates Court of dishonestly obtaining a financial advantage and attempting to pervert the course of justice. He was sentenced to 7 years imprisonment with a 5 year non-parole period. He appeals from both his conviction and sentence.

[2] The appellant says that his conviction is unsafe and that his sentence is excessive.

Background

[3] The appellant was, at the material time, the owner of Professional Stationary Services, a supplier of stationary products. Professional Stationary Services was one of a number of businesses that supplied stationary products to the Public Works Department (**PWD**).[1] The allegation against the appellant was that he and a number of PWD employees colluded to misappropriate monies from PWD in the amount of $34,236.77. PWD, like any government department in Fiji, has a procurement process that minimizes the risk of internal and external abuse. Before PWD receives and makes payment for stationary products the following process must be followed:[2]

- A PWD employee completes an internal memorandum requesting a stationary item – the request must be signed off by the accountant.

- If approved, the stationary item is recorded in the requisition book – which is also signed off by the accountant.

- A check is made with Government Supplies for the item and if it does not have the item Government Supplies provides a stamp to that effect.

- Three quotations must then be obtained from private suppliers. PWD accepts the cheapest quote – sign off is provided by the accountant to prepare a purchase order.

- A purchase order is completed for the stationary item – which is signed off by the senior accountant or accountant. The purchase order is sent to the supplier who provided the cheapest quote.

[1] A government entity.
[2] I have relied here on the evidence of PW1 at pages 7-10 of transcript.

- The supplier then provides the stationary item along with its invoice and a delivery docket.

- The delivery docket and invoice is provided to PWD's Accounts section for preparation of a payment voucher – all the relevant documents are supplied to Accounts including the internal memorandum and 3 quotations. The payment voucher is signed off by a senior officer.

- A cheque is then prepared in the name of the supplier in the amount provided in the invoice.

[4] The prosecution case was that the appellant and several PWD employees colluded to misappropriate monies from PWD by arranging for payment to be made to the appellant's business where it did not supply any goods. PWD employees organized for false requisitions to be made – where the stationary items requisitioned were not needed. The appellant prepared quotations for Professional Stationary Services as well as false quotations for two other businesses – Professional Stationary Services providing the cheapest of the three quotes. Invoices were provided by the appellant but the goods were not supplied to PWD. Payments were made by PWD to the appellant's business as per the invoices. The monies from the payments were split between the appellant and his PWD accomplices. There were 14 separate transactions over the period from January to May 2010 that were the subject of the charges, totaling $34,236.77.

[5] In 2013, following an investigation by Fiji Independent Commission Against Corruption (**FICAC**), the appellant and twelve PWD employees were charged with offences under the Crimes Act 2009. The PWD employees were employed in various roles such as accounts officers, clerical officers, secretary and store persons (3 store persons were charged). The PWD employees were charged in the Magistrates Court with abuse of office and causing a loss whilst the appellant was charged with obtaining a financial advantage. The proceedings were transferred to the High Court in 2014. The appellant was subsequently charged with two further counts of attempting to pervert the course of justice arising from events while the prosecution was on foot.

[6] The trial proceedings ran from late 2013 to 2024. In that time, two accused passed away and another (being PW4 in the present matter) agreed to provide evidence for FICAC against her co-accused in return for immunity from prosecution. Amelia Vunisea and Laisa Halafi (PW1 in the present matter) pleaded guilty on 2 March 2018 and were sentenced by Temo J (as he was then) on 10 August 2018 to six years' imprisonment to be served concurrently with sentences that the two were already serving. A third Amended Information was filed in July 2019 against the six remaining accused, including the appellant. On 17 September 2019, four of the six accused pleaded guilty to the charges. Temo J sentenced the four accused on 18 November 2019 to three years' imprisonment to be served concurrently with sentences they were already serving.

[7] The proceedings against the appellant, who had pleaded not guilty, were remitted back to the Magistrates Court. FICAC laid an amended charge on 15 April 2021 with the following three 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 FJ34,236.77 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 two

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 day of October 2018 at Suva in the Central Division whilst being the Director of Professional Stationary Supplies attempted to pervert the course of justice by influencing one Mosese Vuetimaiwai a former RICOH employee to make a false statutory declaration to refute his FICAC statement in the case against the said Shalendra Kumar.*

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.*

[8] The trial was heard over 11 days in 2022 and 2023. At the commencement of the trial the parties filed two sets of Agreed Facts pertaining to the 14 transactions. A bundle of Agreed Documents was also filed, containing documents pertaining to the 14 transactions and a letter from the appellant's previous solicitor, Gavin O'Driscoll, dated 16 January 2019. The letter was addressed to FICAC and annexed a statutory declaration for PW5 (which is the subject of count 2) and delivery dockets (which are the subject of count 3). FICAC called seven witnesses. The appellant provided evidence in his defence. The

learned Magistrate issued a decision on 11 August 2023 finding the appellant guilty of counts one and three but not guilty of count two. FICAC relied, in respect to count 2, on the evidence of Mosese Vuetimaiwai (PW5) whom the Magistrate found not to be a trustworthy witness in respect to his evidence on count 2 – the Magistrate appears to have accepted PW5's evidence as it pertained to count 1.

[9] The Magistrate sentenced the appellant on 19 February 2024. Taking an instinctive synthesis approach, the Magistrate sentenced the appellant to an aggregate sentence for counts 1 and 3 of seven years imprisonment with a non-parole period of five years.

Magistrate' Decision

[10] The Magistrate dealt first with count 1. Four elements were identified, arising from s 326(1) of the Crimes Act, being:

i. The accused;
ii. Engages in conduct;
iii. As a result of that conduct, obtains a financial advantage for himself; and
iv. Knows or believes that he is not eligible to receive that financial advantage.

[11] The Magistrate found that the first three elements were admitted by the appellant in the Admitted Facts, and that the sole issue to be determined was whether the appellant knew that he was not eligible to receive the financial advantage. The Magistrate set out the law in respect to knowledge, determining that the prosecution had satisfied the same beyond reasonable doubt. The Magistrate relied on the following to arrive at this finding:

> *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 Vuetimaiwai (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.*

[12] The Magistrate accepted that PW1 and PW4 were accomplices, and that PW4's evidence required corroboration as she had been granted immunity from prosecution by FICAC. However, in respect to PW1, she had already been sentenced and as such the Magistrate found that she had no motivation to provide evidence for FICAC and, therefore, did not require corroboration. The Magistrate found that PW1's evidence corroborated PW4's evidence.

[13] The Magistrate determined that FICAC had proved beyond reasonable doubt that counts 1 and 3 had been satisfied and turned to the appellant'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.*

[14] The Magistrate went on to conclude that the prosecution had proved its case beyond reasonable doubt.

Appellant's case on appeal

[15] I do not propose to restate the appellant's ten grounds of appeal against conviction. They are, instead, summarized as follows:

i. The appellant argues that a critical fact in the case against him, in respect to count 1, is that he did not deliver the stationary items to PWD. He argues that the prosecution failed to prove this fact beyond reasonable doubt.

ii. The appellant argues that in order to prove the critical fact the prosecution needed to produce PWD's stock cards in evidence or call one of PWD's store persons (who were responsible for receiving the stationery).

iii. The appellant argues that the Magistrate erred in placing the burden on him to prove delivery. Further, there was evidence before the Magistrate proving such delivery in the form of the PWD signatures on the invoices from Professional Stationary Services.

iv. The appellant is critical of the Magistrate's treatment of the accomplice evidence from PW1 and PW4. The appellant argues that both witnesses required corroboration of their evidence whereas the Magistrate only required corroboration of PW4's evidence, treating PW1's evidence as

corroborative of PW4's evidence. The appellant was also critical of the evidence of PW1 and PW4, arguing that they were discredited and unreliable.

v. With respect to count 3, the appellant argues that PW1 and PW4 contradicted each other on material parts of their evidence and, therefore, their evidence ought not to have been accepted.

[16] The appellant argues that his sentence was excessive, failed to take into account his attempts at restitution, and failed to give proper credit for him being a first offender. Further, the sentence was at odds with the sentences of his co-accused by the High Court.

Decision

[17] This appeal is brought under s 256 of the Criminal Procedure Act 2009. The High Court may confirm, reverse or vary the decision of the Magistrates Court. It may remit the matter back to the Magistrates Court, order a new trial or make such other order as may seem just. The High Court may also substitute its own sentence for that of the Magistrates Court.

Appeal against conviction

[18] The evidence of PW1 and PW4 was central to the case against the appellant. They stated that they met with the accused and received their share of the misappropriated monies from him. PW1 explained the internal PWD process for the requisition of stationery and the payment of the same. It is lengthy and process-driven, requiring a number of documents to be completed and constant independent sign off. It is a process designed to minimize the risk of misappropriation of public monies. In order to circumvent this process, a number of PWD employees were in on the collusion – at least twelve according to the initial charges laid in December 2013. The appellant's role was pivotal. He

completed a quote for his business, Professional Stationary Services, as well as arranged for two false quotations from his competitors. He sent invoices to PWD and received payment on those invoices despite not supplying the goods. Once he received the monies he met with his accomplices to give them their share.

[19] While the evidence from PW1 and PW4 was pivotal to the case against the appellant, the evidence from the other prosecution witnesses was still important. PW2, PW3 and PW5 supported the allegations that the appellant supplied false quotations. PW2 stated that invoices shown to her as allegedly prepared by Office 2000[3] (where she was employed at the material time) were not genuine. PW3 was employed at Professional Stationary Services. She stated that quotation forms for other companies, including Office 2000, were held at Professional Stationary Services and that the appellant had directed employees, including herself, to complete quotations on the forms for these other businesses. PW5 stated that a number of quotations for Office 2000 with his alleged signature[4] were not signed by him. PW6 confirmed that the internal PWD requisition process had not been followed and that the monies spent on stationary items in 2010 was well in excess of that budgeted for such spending.

[20] If the evidence of PW1 and PW4 is believed as true, then there was an arrangement between a number of PWD employees and the appellant to provide false quotations for stationery items that were not required by PWD and not delivered by the appellant (with the exception of two transactions which were partially supplied). Invoices were supplied by the appellant which PWD paid. The total amount paid being $34,236.77 for 14 transactions. These misappropriated monies were shared between the appellant and his PWD accomplices.

[21] There are three broad issues that arise from the appellant's grounds of appeal, namely:

[3] For some of the 14 transactions that made up count 1.
[4] Again, in respect to quotations that were the subject of the 14 transactions.

i. Whether the stationery that was itemized in the appellant's invoices was supplied to PWD – this was the appellant's defence to count 1?

ii. Whether the learned Magistrate was correct to find that PW1's evidence did not require corroboration and that, as such, her evidence provided the requisite corroboration for PW4's evidence?

iii. Whether there was sufficient evidence to prove count 3?

[22] The fact that the stationary was not delivered to PWD was a critical plank in the prosecution's case for count 1. FICAC does not agree. It says that the delivery is not referred to in count 1. Count 1 is, indeed, silent on the 'conduct' by the appellant that procured the financial advantage. Nevertheless, there can be no doubting that FICAC placed reliance on the fact of non-delivery for its case. In its closing submissions to the Magistrate dated 30 May 2023 FICAC identified non-delivery as being part of the 'conduct' in question (para 28) and described the collusion between PWD employees and the appellant as '*an under the table arrangement made between PW1, the accused, and the store men that instead of delivery of the items they would receive cash (kickbacks)'* (para 31). Non-delivery was also central to FICAC's case that the appellant knew he was not eligible to receive the payments '*since he did not deliver the items to PWD'* (para 40). Non-delivery was not some incidental part of the prosecution case against the accused but a critical aspect of the conduct from which it could also be inferred that the appellant knew he was not entitled to the financial advantage.

[23] There are both legal and evidential issues that arise with respect to the question of non-delivery of the stationary. The legal question is where the fact of delivery falls in respect to the 4 elements under s 326(1) and who carries the legal burden of proving this fact. If the onus is on the prosecution, the evidential question is whether the prosecution proved this fact beyond reasonable doubt.

[24] The learned Magistrate determined that the fact of non-delivery went to the appellant's mens rea, that the appellant knew he was not eligible to receive the financial payment

from PWD. In my view, the fact of non-delivery goes to the 'conduct' of the appellant. Namely, that he supplied false quotations and false invoices without supplying the stationary itemized in the fabricated documents. It was as a result of this 'conduct' that the appellant received payment from PWD, being the financial advantage under element 3. If proven, it also goes to element 4, being the appellant's knowledge. It may be inferred from the fact of non-delivery that the appellant knew he was not entitled to the payments from PWD.

[25] It is, therefore, necessary in order to find the appellant guilty of count 1 that the Magistrate have made a finding that the non-delivery of the stationary was proven beyond reasonable doubt. In my view, the learned Magistrate failed to do so. The Magistrate stated at paragraph 30 that '*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'*.[5] The term 'suggests' in my view falls short of the requisite standard, beyond reasonable doubt. It was necessary for the Magistrate to clearly and expressly state that he was satisfied beyond reasonable doubt that the stationary items were not delivered – or the same to be plain from a reading of the judgment.

[26] A reading of the judgment shows that the learned Magistrate placed the burden on the appellant to prove, on the balance of probabilities, that the stationary had been delivered. The prosecution has the burden of proving each and every element of an offence beyond reasonable doubt.[6] An accused has the burden of proving a matter where the legislation imposes the burden on an accused.[7] The appellant carries no such burden under s 326(1).

[27] I turn to the evidential issues raised by the appellant. The appellant argues that FICAC was unable to establish beyond reasonable doubt that the stationary was delivered without producing the PWD stock cards in evidence or calling a store person to provide direct evidence of non-delivery. While I agree that such evidence would be strong it is not the

[5] My emphasis.
[6] Section 57 of the Crimes Act 2009.
[7] See ss 59 and 60 of the Crimes Act.

only evidence that the Magistrate could rely to make a finding, beyond reasonable doubt, that the items had not been delivered. The Magistrate was entitled to rely on the evidence of PW1 and PW4 to this effect. Both had direct knowledge of this on the basis of their communications with the appellant and the arrangement that was in place with the appellant and the other PWD accomplices, including the store men. The suggestion by the appellant that the signatures on the invoices from Professional Stationary Services is proof of delivery ignores the evidence of PW1 and PW4. In any event, the invoices for transactions 1 and 2 were not signed as received.[8] PW4 stated that she signed the invoice for transaction 4[9] even though two of the three items were not delivered.[10] PW4 stated that she signed the invoice for transaction 3[11] yet confirmed that none of the items in the invoice were delivered.[12]

[28] The appellant argues that PW1 and PW4 were accomplices and the Magistrate erred in finding that the evidence of PW1 did not require corroboration and, in fact, corroborated PW4 (who did require corroboration).

[29] In *Saukuru v State* [2024] FJCA 182 (27 September 2024) the Court of Appeal provided the following discussion on the rule on the treatment of accomplice evidence:[13]

> *[10] It has been held in Fiji that the law* ***requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated****. Although the common law rule about accomplice warnings is a rule of law, and in the ordinary case the requirement for a warning does not depend upon a request being made by trial counsel,* ***the rule is not so mechanical as to call for a warning in every case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case****. The application of the rule must be related to its*

[8] Pages 111 and 123 of Volume 1.
[9] Page 150 of Volume 1.
[10] Page 220 of transcript.
[11] Page 136 of Volume 1.
[12] Pages 27 and 28 of transcript.
[13] Footnotes not included.

purpose, and will require a consideration of the issues as they have emerged from the way in which the case has been conducted. ***Needless to say, independent evidence that supports the accomplice's account increases the likelihood that the testimony will be considered reliable by the court****. The onus remains on the court to guide the assessors properly, ensuring they understand the risks of relying solely on the testimony of a co-accused or accomplice.*

[11] In Singh v State [2018] FJCA 146; AAU134.2014 (4 October 2018) the Court of Appeal further discussed the law relating to accomplice evidence and the current trend in judicial thinking, as follows:

> *[21] Fiji has followed the common law rule of practice, which had crystallized into a rule of law, and adopted by the UK courts for many years that it was obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person when that person is an alleged accomplice of the accused.*
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> *[22] It is of interest however to take note of the development of the law in regard to accomplice evidence in the UK, Canada and Seychelles. In the UK, the requirement that it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of an alleged accomplice has now been abrogated by section 32 of the Criminal Justice and Public Order Act of 1994.*
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> *[23] In the Canadian Supreme Court case of Vetrovec –v- The Queen [1982] 1 SCR 811, it was said*
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> > *"**None of the arguments put forward to look for corroboration of accomplice evidence can justify an invariable rule regarding all accomplices. All that can be said is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witnesses. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of law of evidence a blind and empty formalism**. Rather than attempt to pigeon-hole a witness into a category and then recite a ritualistic incantation, the **Trial Judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness**. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may*

instruct accordingly. ***If on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary****."*

[24] The Court of Appeal of Seychelles said in the cases of Jean Francois Adrienne & another –v- The Republic CR App SCA 25 & 26/2015 and the case of Dominique Dugasse & others –v- The Republic [SCA 25, 26 & 30 of 2010]: that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and that it should be left at the discretion of judges to look for corroboration when there is an evidential basis for it.

[25] Reference was made to such an evidential basis by Lord Taylor C.J. giving the judgment of the court in Makanjuola, 1995 1 WLR 1348 and R –v- Easton 1995 2 Cr. App. R. 469 CA when he said:

"Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."

[30] In the present matter, there is no dispute that PW4, having been given immunity, had a motive to lie and her evidence required corroboration. PW1 on the other hand, whilst an accomplice, had no obvious reason to lie. She had pleaded guilty and had already been sentenced some years prior to giving her evidence against the appellant. Her explanation for providing evidence for FICAC was '*because I have done the wrong which I have admitted…I want to come clean by serving my God'*.[14] It was open for the Magistrate to make a finding that PW1 was a trustworthy witness and did not require a warning of the need for corroboration. In light of this the Magistrate was entitled to treat PW1's evidence as corroborative of PW4's evidence. No less important, in this context, was the Magistrate's finding that none of the prosecution witnesses were discredited in respect to count 1. Further, there was evidence available to the Magistrate (from PW2, PW3, PW5 and PW6) that corroborated material parts of the evidence of PW1 and PW4.

[31] The result is that only one of the appellant's arguments succeed in respect to the non-delivery of the stationary items. Nevertheless, I am satisfied that the learned Magistrate

[14] Pages 82-83 of transcript.

erred in placing the burden on the appellant to prove delivery of the stationary. Pursuant to s 256(2) of the Criminal Procedure Act 2009 this Court may remit the matter back to the Magistrates Court[15] for a new trial or '*dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred'*[16]. The test under s 256(2)(f) was considered by the Court of Appeal in *Munendra v State* [2023] FJCA 65 (25 May 2023). Prematilaka JA, giving the judgment of the Court of Appeal, stated:

> *[40] The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see R. v. Haddy [1944] K. B. 442; 29 Cr. App. R. 182; Stirland v D. P. P. [1944] A.C. 315; 30 Cr. App. R. 40; R. v. Farid 30 Cr. App. R 168)].*
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> *[41] The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.*
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> *[42] The Court of Appeal in Aziz v State [2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:*
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> > *'[55] ……..**if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice**. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
> >
> > *[56] This test has been adopted and applied by the Court of Appeal in Fiji in R –v- Ramswani Pillai (unreported criminal appeal No. 11 of 1952; 25 August 1952); R –v- Labalaba (1946 – 1955) 4 FLR 28 and Pillay –v- R (1981) 27 FLR 202. In Pillay –v- R (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and*

[15] Section 256(2)(c).
[16] Section 256(2)(f).

adopted the observations of North J in R –v- Weir [1955] NZLR 711 at page 713:

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred****."*

[57] ……..when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

In Vuki –v- The State (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:

> *"The application of the proviso to section 23(1) _ _ _ of necessity,* ***must be a very fact and circumstance – specific exercise****."*[17]

[32] Having found that the learned Magistrate erred, I turn to the question whether I should nevertheless dismiss the appeal on the basis that there has been no miscarriage of justice. Am I satisfied on the totality of the facts that the only reasonable and proper verdict is one of guilty (or should I remit the matter back to the Magistrates Court for a new trial)?

[33] I have carefully considered the transcript of the evidence at trial and the documents produced by the parties in the Agreed Bundle. I have also taken note of the learned Magistrate's finding that he considered that none of the prosecution witnesses were discredited, including PW1 and PW4. On this basis I am satisfied that on the totality of the facts that the only reasonable and proper verdict on count 1 is guilty. The evidence of PW1 is particularly damaging for the appellant, but so too is PW4's evidence. It is worth setting out parts of their evidence to illustrate the same.

[34] PW1 held the position of purchasing clerk with PWD. She described an arrangement between the appellant and several PWD employees, including herself, accounts staff and

[17] My emphasis.

several store men.[18] PW1 explained the correct process for requisitioning and payment of stationary items. She stated that this process was not followed for the 14 transactions that were the subject of count 1. PW1 went through the transactions beginning with transaction 1. PW1 stated that she prepared the purchase order, the requisition and the payment voucher for transaction 1. The items requisitioned were 4 toners valued in the invoice from Professional Stationary Services at $1,980. She stated that contrary to correct procedure, no internal memorandum was prepared, no stamp was obtained from Government Supplies and no delivery docket was received from Professional Stationary Services. She stated that the appellant supplied all 3 quotations including quotations prepared on forms for Neon's Office Supplies and Office 2000 Ltd. It is worth pointing out at this juncture that PW2, an employee of Office 2000 confirmed that the quotation did not come from that company. PW5 who is alleged to have signed the quotation for Office 2000 confirmed that the signature on the quotation was not his and that he did not prepare the quotation. PW3 stated that the appellant held Office 2000 quotation forms and directed staff to complete the same. PW1 stated that PWD arranged for a cheque to be paid on the invoice supplied by the appellant for transaction 1. The following answers are worth setting out:[19]

FICAC: *Can you explain to the court why payment was made when there was no delivery docket.*

PW1: *Cheque was made on this particular payment and there was no delivery note because there was no item received on this particular purchase.*

FICAC: *You said no item received on this particular purchase. Why is that?*

PW1: *It was already dealing with us, storeman plus the company that we wont be receiving any items or instead of the item we receive cash.*

FICAC: *Now you mentioned that instead of receiving items you would receive cash?*

PW1: *Yes.*

[18] Pages 15, 23 and 24 of transcript.
[19] Page 15 of transcript.

FICAC: *How was this arranged between you, the storeman and the company?*

PW1: *We talked it over in Suva Street in Toorak [where Professional Stationary Services was located]. The storeman introduced Mr Shalen to me, so they were mentioning it that when we did any dealings for the payment and everything so when we need something so instead of getting the item we'll get the money.*

[35] PW1 explained that the payment arrangement was that the appellant would deduct the VAT portion from the total and the first half of the remaining payment went to the appellant while the second half was divided among the PWD accomplices.[20] PW1 stated that she went to the appellant's office at Suva Street, Toorak, and *'[f]rom there then he'll give the money to us, myself plus the storeman'*.[21] PW1 stated that she, the appellant, and one of the store men (being Thomas Harvey, Eparama Racumu or Dan Railala[22]) would be present.[23]

[36] PW1 went through each transaction and explained her involvement and what procedures were not followed. She explained that no delivery dockets were supplied by the appellant to PWD for any of the 14 transactions.

[37] PW4's evidence was consistent with the evidence of PW1. PW4 was the secretary to Divisional Engineer Central/Eastern (DECE). PW1 knew and dealt with the appellant. She described her role with respect to transaction 4 – being the requisition of a heavy duty stapler, heavy duty paper punch and a calculator. These items were invoiced by Professional Stationary Services for $1,366.88. PW4 stated that the appellant organized all 3 quotations which the appellant gave to PW4 directly. PW4 prepared an internal memorandum but forged the DECE's signature at the foot of the memorandum. PW4 stated that the appellant delivered the stapler but not the other items and that PW4 signed the items as received at the foot of the invoice. PW4 stated that other items were not

[20] Page 15 of transcript.
[21] Page 36 of transcript.
[22] All co-accused in the original charge filed in December 2013.
[23] Page 37 of transcript.

delivered. The appellant gave PW4 $200 in cash. PW4 stated, *'[w]ith this payment he came over to the office and he called me outside in his transport and he gave to me to sign the delivery…invoice*.[24]

[38] PW4 went through other transactions that she was also involved in.

[39] If the evidence of PW1 and PW4 is accepted as true then the appellant colluded with a number of PWD employees to misappropriate monies from PWD where invoices were rendered by the appellant's business for stationary items that were not delivered. The fact that no delivery dockets were held by PWD for these transactions is consistent with the evidence of PW1 and PW4.

[40] Given that PW4 was an accomplice of the appellant and had been given immunity from prosecution for providing evidence for FICAC, and thus had a motive to lie, it was necessary for the Magistrate to warn himself about the danger of relying on such evidence unless corroborated. He did so. The corroboration came from PW1 and, in part, from the evidence of PW2, PW3, PW5 and PW6. The first three witnesses, in particular, providing evidence entirely consistent with the allegations that the appellant supplied false quotations. PW6 confirmed that the process followed for the 14 transactions was contrary to their internal procedure.

[41] Did the evidence of the appellant raise a reasonable doubt with the Magistrate? The learned Magistrate wrongly imposed a burden on the appellant to prove delivery and did not make any express findings with respect to the appellant's evidence. However, it is plain that the Magistrate rejected the appellant's evidence as the appellant's case was that the 14 transactions were legitimate and that he supplied the goods for which his business was paid. The appellant denied that there was any arrangement with the PWD employees to misappropriate monies from PWD. Having carefully considered the transcript of the

[24] Page 220 of transcript.

accused's evidence I am satisfied that there was a proper basis to reject the appellant's evidence.

[42] The appellant's evidence was that the stationary itemized in his invoices were supplied to PWD - in every other respect his case was one of denial. He referred to the fact that many of the invoices were signed by an employee of PWD as having been received. He accepted that he did not supply delivery dockets with the stationary items but stated that it was not required that the delivery dockets be supplied. He denied meeting PW4 in his car or giving her $200. He denied any arrangement with PW1 and the store men. With respect to the alleged falsification of the delivery dockets in 2014/2015 again he denied any involvement. He stated that the PWD employees dropped the delivery dockets in an envelope at his office when he was out doing deliveries (no evidence was given from his staff to support this). The appellant's evidence on this was as follows:

Examination in chief:[25]

> *…I was in court together in a court case in the High Court where the matter was so after the court case Ms. Laisa Halafi approached me and she said we got some documents for you and we want to come to your office. I told them [PW1 and PW4] I am going out to do my sales, I'm going to visit my customers and I had some deliveries in my car to go and deliver, then they said they might come up to your office and I didn't answer but I went to do my work and later before lunch that day one of my office staff called me that these two ladies are there with the envelope in their hand, they want to see you and they are waiting for you. Then I told my staff I will be late I will come by 1 or 1.30pm. As per my staff he told them and they waited for me but I was late so they gave the envelope to him and they went but when I came after 1, then he gave me the envelope.*[26]

[25] Page 317 of transcript.
[26] The appellant did not call his employee to corroborate this evidence.

In cross-examination, the appellant denied that he asked PW1 and PW4 to sign the delivery dockets in 2014/2015. He restated that they left the envelope containing the delivery dockets at his office.[27] He stated that he provided the delivery dockets to his previous lawyer, Mr O'Driscoll. He accepted that Mr O'Driscoll was his lawyer in 2019. However, he denied that he instructed, or had any knowledge of, Mr O'Driscoll's letter of 16 January 2019 which requested FICAC to withdraw the charges against the appellant, relying in part of the delivery dockets which were attached to the letter. It appears that at the conclusion of the appellant's evidence, he considered calling Mr O'Driscoll to provide evidence but decided not to do so.[28]

[43] Mr O'Driscoll expressly stated in his letter of 16 January 2019 that he was acting on behalf of the appellant. The solicitor requested that FICAC withdraw the charges against the appellant. In light of this, it is difficult to accept that the accused was unaware of the representation to FICAC. I note that the appellant did not state in his evidence that he informed Mr O'Driscoll that the delivery dockets were not genuine. It is not surprising that the Magistrate rejected the appellant's evidence. The Magistrate was satisfied with the credibility of the prosecution witnesses. The appellant's denials did nothing to undermine the same. The appellant's evidence regarding the fabricated delivery dockets further damaged his credibility.

[44] On a broad consideration of the evidence produced by the prosecution there is no escaping the conclusion that the appellant was party to the dishonest enterprise undertaken in the first half of 2010. PWD paid $34,236.77 for goods it did not receive. The appellant was central to this enterprise. He arranged for false quotations by businesses with which he had no association. He supplied invoices for which he did not supply the goods. Payment was made to his business. It was only after these payments were made to his business that he and his co-accused were able to get their hands on the misappropriated monies. The evidence of FICAC's witnesses support this picture. Certainly, PW1 and PW4 are key witnesses but the other 4 witnesses provide corroboration to key parts as well.

[27] Page 335 of transcript.
[28] Page 343 of transcript.

[45] Finally, I turn to consider count 3. The appellant argues that the evidence of PW1 and PW4 is contradictory, the two witnesses were cousins and that Mr O'Driscoll was not called by the prosecution to provide evidence on this matter. The contradictions relied on by the appellant are that PW1 stated that there was information in the delivery dockets when she signed while PW4 stated that the dockets were not already filled out - it appears that PW4 was unsure whether the dockets were already filled as she later stated in evidence, with respect to delivery docket '65'[29], that she could not recall if the information written on the docket was on the page when signed it.[30]

[46] There were certainly some inconsistencies between the evidence of PW1 and PW4 on the events the day when they signed the delivery dockets. However, the core of their evidence was the same. They stated that the appellant approached them on a day when their case was called in the High Court, that the appellant asked them to come back to his office, they caught a taxi together to the appellant's office and thereat they signed the delivery dockets (that were later attached to Mr O'Driscoll's letter of 16 January 2019) in each other's presence while the appellant was also present. The learned Magistrate was entitled to rely on their evidence. He was best placed to consider the truthfulness of the evidence having observed them provide evidence. It was not necessary for FICAC to call Mr O'Driscoll. The letter of 16 January 2019 was produced by consent. There was no dispute that Mr O'Drsicoll was the appellant's lawyer at the time and that he wrote the letter and sent it to FICAC. It was the appellant's evidence that he did not instruct the lawyer to write the letter or was aware that he had done so. If the appellant wished to shore up this evidence he could have called his previous lawyer but chose not to do so. The Magistrate clearly rejected the appellant's evidence. In my view, there was a reasonable and proper basis for the Magistrate to do so.

[47] The delivery dockets were supplied by the appellant's lawyer to FICAC in January 2019 with the intention of persuading FICAC to withdraw the charges. The appellant did not dispute that the delivery dockets were false. It was his evidence that the delivery dockets

[29] Page 1154 of Volume 3.
[30] Page 227 of transcript.

were prepared by PW1 and PW4, and not the appellant. That of course is difficult to reconcile with the fact that the appellant's lawyer relied on these falsified documents to seek a withdrawal of the charge against the appellant. It was open for the Magistrate to conclude that the false documents were produced by the appellant to pervert the course of justice by providing support for the appellant's defence – indeed, in my view that was the only reasonable conclusion available on the facts.

Appeal against sentence

[48] The appellant argues that his sentence is disproportionate to the sentences for his co-accused, having regard to the fact that the co-accused were charged with more serious offences carrying a higher maximum sentence. He also argues that the Magistrate did not take proper account of his previous good character and his attempts at restitution.

[49] In my view, the learned Magistrate erred with respect to the sentence imposed on the appellant. Firstly, the sentence is too high. The maximum sentence under s 326(1) is 10 years imprisonment. The appellant received 7 years despite being a first offender. The added offence under s 190(e) does not justify the high sentence. I look here for support from the decision by Rajasinghe J in *FICAC v Laqere* [2017] FJHC, (4 May 2017). That case involved proceedings against many of the same accused from PWD as were charged in the present proceeding. In that case, the supplier and PWD employees were involved in 101 transactions, misappropriating monies from PWD in the amount of $362,944.37 (ten times more than the amount in the present case). The Judge sentenced the supplier to 4 years imprisonment with a non-parole period of 3 years.

[50] Secondly, the appellant's sentence is inconsistent with the sentences given to his co-accused who committed the more grievous breach of trust, being abuse of office for gain, which carries a higher maximum sentence of 17 years imprisonment. This appears to have been recognized by Rajasinghe J in *FICAC v Laqere*. In that case the PWD employees received higher sentences of between 6 to 10 years imprisonment – while the supplier

received 4 years. In the present case the PWD accomplices received sentences by the High Court of 3 and 6 years imprisonment (it is to be noted that the other accused pleaded guilty and received a discount for the same). Even allowing for the discount for the plea of guilty (which I note the High Court made a deduction of 6 months and 12 months) the appellant's sentence is still well above the more serious offending of his co-accused.

[51] In light of the above, it is necessary for this Court to consider afresh the sentence for the appellant. I will take an aggregate sentence for the two offences given they are related. I note that the learned Magistrate applied the tariff in *FICAC v Serau* [2020] FJHC 983 of 5 to 10 years. I consider that tariff too high and instead prefer the tariff in *FICAC v Mohammed* [2015] FJHC 479 (24 June 2015) at 29:

> *There is much authority to dictate that the tariff for "Obtaining Financial Advantage by Deception" (s. 318)* ***lies between 2 to 5 years*** *but a tariff has never been set for the present offence. It is a summary offence and for that reason the tariff cannot be set too high. Absent the element of deception, the tariff should be 2 to 4 years but in cases where the obtaining is linked to a far more perfidious crime then the sentence for that crime should flow on to the sentence for the obtaining offence. This will apply particularly where a financial advantage has been obtained through corruption.* ***Therefore if this offence is charged alone the tariff of 2 to 4 years should apply but if charged in conjunction with another "enabling "offence, it will adopt the sentencing tariff for that particular offence****.*[31]

[52] Applying the tariff in *Mohammed*, I take a starting point of 3 years (noting the amount misappropriated from PWD is one tenth of the amount taken by the supplier in *Laqere* where the starting point there was 4 years). The aggravating factors are theft of public monies, the impact on public confidence, the 6 month duration of the offending, the degree of planning required by the appellant and his co-accused, and the efforts made to avoid conviction by preparing false delivery documents. I add 2 years imprisonment taking the

[31] My emphasis.

sentence to 5 years imprisonment. The mitigating facts are that he is a first offender and the proceedings have been hanging over him since December 2013 - almost 10 years by the time he was found guilty. That is an extraordinarily long time and a significant discount is justified.[32] I deduct 2½ years resulting in a head sentence of 2½ years imprisonment. This is not a suitable case to suspend the appellant's sentence. A deterrence is required for offenders who misappropriate public monies.

Orders

[53] My orders are as follows:

i. The appeal against conviction is dismissed.

ii. The appeal against sentence is allowed. The learned Magistrate's sentence is quashed. I substitute my own sentence for the appellant. He is sentenced to 2½ years imprisonment with a non-parole period of 1 year 10 months. The sentence is to commence from 19 February 2024.

iii. Thirty (30) days to appeal to the Court of Appeal.

Solicitors:

Saneem Lawyers for the Appellant

Office of Fiji Independent Commission Against Corruption

[32] I note that Temo J (as he was then) in his sentence of the co-accused's on 18 November 2019 made a deduction of 1 year for the then delay of 6 years.