

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT NASINU

Criminal File No: MACD 13/2021 NAS

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : XU YUFENG

Accused No.1

QIAN JIN SIN

Accused No.2

Appearances

For Prosecution : Mr. D. HICKES (*FICAC*)

For the Accused : Mr. G. O'Driscoll (*Messrs. O'Driscoll & Co*)

Date of Trial : 7th February 2022

Date of Judgment : 25th March 2022

JUDGMENT

1. The accused persons were charged as follows:

Statement of Offence [a]

BRIBERY: Contrary to Section 4 (1)(a) of the *Prevention of Bribery Act No.12 of 2007*.

Particulars of Offence [b]

XU YUFENG AND QIAN JIN SIN on or about 2nd August 2017, at Nakasi in the Central Division whilst being the Director and Translator/Salesman, respectively, of Tong Xin Auto Trade Company (Fiji) Limited, without lawful authority or reasonable excuse, offered advantages to a total sum of FJ \$200 to one NOMNEET CHAND and one MARIKA TURAGABECI, both public servants employed in the Standards and Engineering Department of the Land Transport Authority, on account of the said NOMNEET CHAND and MARIKA TURAGABECI's performing acts in their capacities as public servants .

2. Both accused had pled not guilty to the charges and as such the matter proceeded to trial.
3. During the trial prosecution called two (2) witnesses and tendered two (2) exhibits.
4. Prosecution then closed their case.

5. Upon the close of Prosecution case this court acquitted the 1st accused on a No Case To Answer on the basis that neither Prosecution witnesses identified the 1st accused and also that there was no evidence led in terms of joint enterprise even though the 1st and 2nd accused were charged jointly.
6. This court ruled however that the 2nd accused had a case to answer.
7. As such upon seeking a position from the 2nd Accused pursuant to Section 179 of the ***Criminal Procedure Act 2009***, the accused chose to give evidence and did not choose to call any witness.
8. The Accused closed his case thereafter.

The Charge

9. The court restates verbatim the charging section as follows:

“4.—(1) Any person who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or on the account of the public servant’s —

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his or her capacity as a public servant;

...”

Legal Discussion

10. In order to prove the offences charged, Section 57 and 58 of the ***Crimes Act 2009*** directs on the following:

“Legal burden of proof—prosecution

57.—(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Act —

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Standard of proof—prosecution

58.—(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Sub-section (1) does not apply if the law creating the offence specifies a different standard of proof.”

11. The above legal regime had so often been pronounced by the courts and one such example is that which was highlighted by *Aluthge J* in his summing in ***State v Baleiwakaya*** - Summing Up [2020] FJHC 32; HAC121.2019 (24 January 2020), where he stated:

“7.The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.”

12. The other is ***Woolmington v DPP***¹ where the court held that "*no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the accused, is part of the common law*".
13. Therefore the burden of proving the accused person’s guilt beyond reasonable doubt lies with the prosecution. If the evidence creates any doubt, the benefit of the doubt should be given to the accused.

The Elements of the Offence

14. Prosecution needs to prove the following elements of the offence beyond reasonable doubt arising out of Section 4(1)(a) of the ***Prevention of Bribery Act 2007*** and this is self-evident from the charge itself, that is:
- i. The accused whilst in Fiji;
 - ii. Without lawful authority or reasonable excuse;
 - iii. Offers any advantage to a public servant (Nomneet Chand & Marika Turagabeci) on account of;
 - iv. The public servant’s (Nomneet Chand & Marika Turagabeci) performing acts in their capacity as a public servant.”

Summary of Evidence

Prosecution

15. Prosecution led their evidence to tell a story of a how a company namely Tong Xin Auto Trade Company had applied to the Land Transport Authority to be certified as an Authorised Motor Vehicle Dealership, specifically selling motor vehicles whose carrying capacity exceeded 3.5 tonnes.
16. As part of the Application process it was necessitated that an on-site inspection be undertaken by the employees of the Land Transport Authority and following the inspection there would be a report to indicate the level of compliance required prior to an approval or certification as an Authorised Motor Vehicle Dealership.

¹ [1935] AC 462

17. The first inspection was conducted by Isireli Buadromo an employee of the Land Transport Authority. He was prosecution's first witness (PW1).
18. He informed the court that he had inspected Tong Xin Auto Trade Company on the 8th of July 2016 and had prepared a report. The report was tendered².
19. PW1 had stated that his report highlighted that approval would be recommended if certain conditions were met by the company. PW1 was not able to identify anyone in court.
20. The second prosecution witness (PW2) was Nomneet Chand also an employee of the Land Transport Authority³, received a second application from Tong Xin Auto Trade Company in 2017.
21. Just like PW1 he went to inspect the premises with a colleague and they were met by a man named Ivan and another man he described as a Company Director.
22. PW2 and his colleague introduced themselves as Land Transport Authority employees and then initiated their inspection.
23. Whilst in the midst of their inspection, they were approached by Ivan wherein Ivan offered to give them a bundle of \$100.00 notes as a gift. According to PW2 Ivan had stated that the money was a gift.
24. PW2 and his colleague refused to accept the same and also stated that he was not authorized to collect revenue for the Land Transport Authority. PW2 and his colleague were then later informed by Ivan of the company director's request for dinner however PW2 and his colleague also refused this.
25. Following the inspection PW2 and his colleague returned to their office. A report was prepared and signed off by PW2 and his colleague. PW2 tendered⁴ the report as part of his evidence.
26. There was an objection by learned defense counsel in terms of the report, on the basis of some appendices mentioned in the report not being present. Upon a perusal this court agrees with the contentions of Defence counsel. In fact, PW2 himself during cross examination stated that there were two versions of the report.

² Prosecution Exhibit No.1

³ The fact that PW2 was an employee of the Land Transport Authority was not challenged

⁴ Prosecution Exhibit No.2

27. However, be that as it may this does not invalidate the report itself as such the objection is dismissed as a result.
28. PW2 in his evidence also stated that the report specified that all the requirements were met by Tong Xin Auto Trade Company. In fact a perusal of the report specifically paragraph 4.0 garners the same.
29. PW2 identified the person he was referring to as Ivan was in fact the 2nd accused.
30. When cross examined PW2 reiterated that he was offered money but he refused to accept the same. He also agreed in cross examination that in the report the recommendation was that Tong Xin Auto Trade Company was compliant and that there was no influence put on him to make that recommendation.

Defence

31. The 2nd accused gave evidence and he did not deny offering two hundred dollars to PW2 and his colleague.
32. However, he stated that his Director had given the money to him to give the same to the officers as their lunch money because he was able to converse in English being the translator.
33. In addition, he also stated that it was customary for Chinese persons to offer lunch to any visitor.

Analysis

34. The evidence led by prosecution has established the first two elements of the offence against the 2nd accused, as he was identified by PW2 in court and also that PW2 was not authorized to collect revenue for the Land Transport Authority.
35. In terms of the fourth element, there is a positive recommendation made on behalf of the Tong Xin Auto Trade Company for the approval of their Authorised Motor Vehicle Dealership. This was recommended in the report tendered by PW2 who was not challenged on his employment status as an employee of the Land Transport Authority.
36. Therefore, the fourth element is proved on the basis that PW2 performed an act by making a positive recommendation as a Land Transport Authority employee.
37. So as we stand three out of a possible four elements of the offence have been proved.

38. However, what troubles this court is the fact that the third element requires Prosecution to prove that the advantage offered was on the account of PW2 and his colleague performing an act.
39. PW2 was the only witness called to prove this point and not his colleague who is mentioned in the charge. There can be no inference drawn from the absence of the colleague and the only person equipped to answer the question is PW2.
40. PW2 out rightly refused the offer and also agreed during cross examination that whatever transpired at Tong Xin Auto Trade Company had no effect on the positive recommendation in the report. Compounding this agreement is the fact PW2 did not explain the reasons for his agreement during re-examination.
41. Prosecution invites this court to consider the legal position of ‘on the account of’ as was expressed in *Attorney-General v Chung Fat Ming* [1978] HKLR 480 and which was considered in *Fiji Independent Commission Against Corruption v Laqenisici* [2018] FJHC 807; HAA48.2017 (29 August 2018) and more recently in *Fiji Independent Commission Against Corruption v Shekeb* [2020] FJCA 50; AAU46.2018 (6 May 2020).
42. Whilst the submission is valid, Prosecution cannot escape onus and standard of proof where direct or circumstantial evidence exists to prove the said element.
43. This court’s discussion at paragraphs 38, 39 and 40 highlight that they have not been able to do so.
44. As such the third element of the offence has not been proved beyond reasonable doubt.

Conclusion

45. Considering the discussions above-herein, this court finds that Prosecution has not been able to prove all the elements of the charge against the 2nd accused.
46. As a result the 2nd accused is acquitted of the same.
47. Any party aggrieved, has 28 days to appeal to the High Court.


JEREMAI N.L SAVOCA
Resident Magistrate

