

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 148 OF 2014  
(High Court HAC 5 of 2010)

BETWEEN : MAHENDRA MOTIBHAI PATEL  
*Appellant*

AND : FIJI INDEPENDENT COMMISSION AGAINST  
CORRUPTION  
*Respondent*

Coram : Calanchini P

Counsel : Mr. H. Nagin for the Appellant  
Mr. A. Lomani with Ms. Fatafehi for the Respondent

Date of Hearing : 5 December, 2016

Date of Ruling : 19 December 2016

R U L I N G

- [1] This is a timely application for leave to appeal against conviction and sentence. The Appellant had been charged with one count of abuse of office contrary to Section 111 of the Penal Code Cap 17. The particulars of the offence were that the Appellant on or about 29 June 2006 at Suva being a person employed in the public service namely as

Chairman of the Board of Directors of Post Fiji Limited in abuse of the authority of that office, did an arbitrary act, namely he extended the contract of the Managing Director of Post Fiji Limited, Tevita Peni Mau for a term of three years without the approval of the Board of Directors of Post Fiji Limited which was prejudicial to the rights of the Post Fiji Limited.

- [2] The Appellant pleaded not guilty. Following a lengthy trial in the High Court at Suva before a Judge sitting with three assessors, the assessors returned majority opinions of guilty. The learned trial Judge agreed with the majority opinions and in a reasoned judgment convicted the Appellant of the offence of abuse of office. On 24 November 2014 the Appellant was sentenced to 12 months imprisonment which sentence was ordered to start from the day of his arrest for which a bench warrant was issued. At this stage it should be noted that the Appellant was not present at his trial.
- [3] Being dissatisfied with the conviction and sentence the Appellant filed his Notice of Appeal on 15 December 2014. Pursuant to Section 21(1) (b) of the Court of Appeal Act Cap 12 (the Act) the Appellant requires the leave of the Court to appeal on any ground that involves a question of mixed law and fact or a question of fact alone. Pursuant to Section 21(1) (c) of the Act the Appellant requires leave to appeal against sentence passed on conviction. The power of the Court to grant leave to appeal may be exercised by a Judge of the Court under Section 35(1) of the Act. The question to be determined is whether the Appellant should be granted leave to appeal against conviction and sentence. The test for granting leave to appeal against conviction is whether any ground of appeal raises an arguable error requiring the further consideration of the Court of Appeal. The test for granting leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion (Naisua – v- The State CAV 10 of 2013; 20 November 2013).
- [4] In relation to an appeal against conviction leave is not required in the case of a ground of appeal that involves a question of law alone (Section 21(1) (a) of the Act). In order to come within Section 21(1) (a) a ground of appeal must be raised, which is, in the opinion of the Court, a question of law. It is not sufficient for a ground of appeal to be described



as a question of law alone in the Notice of Appeal or by counsel in his submissions at a later stage. I am of the view that no point of law alone arises in these proceedings.

- [5] It follows that the 23 grounds of appeal against conviction are subject to Section 21(1) (b) of the Act and the threshold requirement of leave. In determining whether leave should be granted the criteria set out in Section 23(1) of the Act and the proviso are directly relevant to the exercise.
- [6] The first ground alleges that the Appellant was prejudiced by the decision taken by the learned trial Judge to proceed with the trial in the absence of the Appellant. Although described as an error of law, the ground necessarily involves issues of fact and is therefore a ground for which leave is required.
- [7] The circumstances under which a trial for a person charged with an offence may proceed in his absence are set out in article 14 (2) (h) of the Constitution. For the purposes of this appeal article 14 (2) (h) states that the trial may proceed in the absence of the accused if the Court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial and has chosen not to attend. This right must also be read with article 15(1) which provides that every person charged with an offence has the right to a fair trial before a Court of law. It appears not to be disputed that the Appellant had left the jurisdiction and had not returned for his trial. He was represented by counsel at the trial. The Appellant claims that his absence was for medical reasons. The Respondent claims that the Appellant had simply absconded and chose freely not to return for his trial. In my judgment the learned Judge in his decision delivered on 28 February 2014 has considered the issues and has exercised his discretion to proceed in the absence of the Appellant in accordance with the relevant principles. Leave is refused on this ground.
- [8] Another ground (ground 2(1)) states that the learned trial Judge in his opening remarks to the assessors indicated that the Appellant had absconded. Although the learned Judge in paragraph 90 of the summing up has dealt with the absence of the Appellant in appropriate terms, it may be argued that the opening remarks could have been recalled by the assessors when considering their opinions. However, in his judgment the learned

Judge, who is the ultimate judge of facts and law, has made no reference to absconding when stating his reasons for agreeing with the majority opinions of the assessors. Leave is refused on this ground.

- [9] All the remaining grounds of appeal against conviction raise in many different ways the point that on the particular elements of the offence there was no evidence to be left to the assessors upon which the learned trial Judge, as the ultimate judge of fact, could have convicted the Appellant. In my view the grounds are arguable and leave is granted.
- [10] I also consider that it is appropriate to give leave to appeal against sentence. The maximum penalty of 3 years to which the learned judge referred applies to the offence when pleaded as a felony. The Appellant was charged with the offence as a misdemeanor for which the maximum penalty is two years.

#### Orders

1. Leave to appeal against conviction is granted other than on ground 1 and ground 2(1).
2. Leave to appeal against sentence is granted.



*W. Calanchini*

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**Hon. Mr. Justice W. Calanchini**  
**PRESIDENT COURT OF APPEAL**