

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

CRIMINAL APPEAL: AAU 161 OF 2016
(High Court HAC 2 of 2014)

BETWEEN : TIMOCI NAULU

Appellant

AND : FIJI INDEPENDENT COMMISSION
AGAINST CORRUPTION

Respondent

Coram : Calanchini P

Counsel : Mr E Maopa for the Appellant
Ms F Puleiwai for the Respondent

Date of Hearing : 24 April 2018

Date of Ruling : 31 May 2018

RULING

[1] Following a trial in the High Court at Lautoka the appellant was convicted on two counts of bribery contrary to section 4(2) (a) of the Prevention of Bribery Act 2007. At the

conclusion of the evidence the assessors had returned unanimous opinions of guilty on one of the counts (count 2) and not guilty on the other count (count 1). The learned trial Judge agreed with the unanimous opinions of guilty on count 2 but disagreed with the unanimous opinions of not guilty on count 1. In a reasoned judgment delivered on 12 October 2016 the trial Judge set out what he described as his cogent reasons for disagreeing with the unanimous opinions of not guilty on count 1. On 17 October 2016 the appellant was sentenced to a term of three years imprisonment for each count to be served concurrently with a non-parole term of 2 years. In addition, the appellant was fined \$1,500.00 to be paid immediately, in default of which the appellant was ordered to serve a further 150 days imprisonment to be consecutive to the terms imposed for the offences.

- [2] The background to the convictions may be stated briefly. The appellant was the Crime Officer of the CID branch of the border police station at Nadi. At the time of the offence the appellant held the rank of Acting Inspector. In the first count it was alleged that between 25 and 29 September 2013 the appellant as a public servant without lawful authority or reasonable excuse solicited an advantage of \$5,000.00 from Kamlesh Kumar in return for abstaining from performing his duty in not filing charges against Kamlesh Kumar. The second count alleged that the appellant actually received FJ\$200 and AUD\$200 from Kamlesh Kumar on 29 September 2013 as a public servant without lawful authority or reasonable excuse in return for abstaining from performing his duty in not filing charges against Kamlesh Kumar.
- [3] On 18 November 2016 the appellant filed a summons seeking an order for an enlargement of time to file an appeal against conviction and sentence. It was out of time by 2 days. The respondent has not addressed the issue of timeliness and as a result to the extent that an enlargement of time is necessary it is granted pursuant to sections 26 and 35(1) of the Court of Appeal Act 1949 (the Act).
- [4] This is the appellant's application for leave to appeal against conviction and sentence under section 21(1) of the Act. The appellant may appeal on any ground involving a

question of law only as of right. To appeal on grounds involving questions of mixed law and fact or fact alone, leave is required. Leave is required to appeal sentence. Section 35(1) of the Act gives a judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the grounds are arguable. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion: Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 23 November 2013.

[5] The grounds of appeal against conviction are:

- "1) That the trial Judge erred in law and in fact in convicting the Appellant when he overturned the assessors verdict of not guilty in count one.*
- 2) That the trial judge erred in law in fact when he convicted the appellant on counts 1 (one) and 2 (two) as there are duplicity in the charges and or in the alternative the charges are bad in law when he considered and combine the elements of offence "without lawful authority or reasonable excuse" into one.*
- 3) The trial judge erred in law and in fact when he failed to separate in both counts the element of offences (ii) without lawful authority or reasonable excuses in the summing up and he failed to address the assessors on the use of the word "or" and the meaning of without lawful authority and reasonable excuse.*
- 4) That the trial judge erred in law and in fact when he failed to advise the assessors on the correct number of elements of the offences in each count where at the closing address by both counsels submit different number of elements of offences present in each charge/count to be proved by the prosecution.*
- 5) That the trial judge erred in law and in fact in convicting the appellant on both counts when the prosecution failed to adduce evidence and prove beyond reasonable doubt that the accused abstained from performing the act namely not to file charges against the complainant, Kamlesh Kumar."*

[6] The grounds of appeal against sentence are:

- "6) That the sentence imposed by the trial judge is excessive and harsh in all circumstances.*
- 7) That the trial judge erred in law and in fact when he imposed the final sentence for three(3) years for each of the two counts [at paragraph 19 of the sentencing remarks] and later pronounced in his conclusion period for the first count in the said paragraphs 24(i) and (ii). Hence the inconsistency with his sentencing remarks.*
- 8) That the fine of \$1,500.00 is harsh and excessive.*
- 9) That the learned trial judge erred in law and in fact when he said "at the conclusion of the hearing you.... solicited an advantage....from one Kamlesh Kumar in order to finish two pending cases against with the Board Police [at paragraph 2 of the sentencing remarks] when there was no detail facts of the two pending cases adduced in evidence by Kamlesh Kumar;.*
- 10) That the trial judge fail to cite any authority to support his proposition in refusing to consider the accused mitigation as a first offender and of a good character."*

[7] Ground 1 concerns the decision of the trial Judge to disagree with the not guilty opinions on count 1 (soliciting \$5,000). Section 237 of the Criminal Procedure Act 2009 allows the trial judge to give a judgment that does not conform to the opinions of the assessors. Section 24 of the Prevention of Bribery Act 2007 states that the burden of proving a defence of lawful authority or reasonable excuse rests on the accused. However the conclusion in paragraph 15 is confusing. To the extent that it appears that the trial judge has shifted the burden of proving an element of the offence (i.e. that the appellant acted in his capacity as a public servant) which is one of the particulars of the offence on to the appellant as a consequence of his remarks in paragraph 15 of his judgment, the ground is arguable. As for the submission in relation to paragraph 13 of the judgment, it is apparent in my judgment when the summing up is read as a whole, that the judge appreciated that the standard for the prosecution was beyond reasonable doubt. Leave is granted only in relation to the comments in paragraph 15 of the judgment.

- [8] Ground 2 claims that the judge erred when he combined the elements of the offence “*without lawful authority or reasonable excuse.*” The elements of the offence under section 4(2) (a) relevant to this case are that (a) the appellant, (b) being a public servant, (c) solicited an advantage and (d) on account of his abstaining from performing an act in his capacity as a public servant. In the event that the prosecution established those elements beyond reasonable doubt, the burden of establishing a defence of lawful authority or reasonable excuse shifted to the appellant. It must be noted that the observations in paragraph 13 of the summing up that “*in certain instances the law requires the accused to prove certain elements or facts of the offence*” is misleading. Nevertheless in paragraphs 24 – 26 of the summing up the correct position is clearly stated. The issue is really whether in paragraph 15 of the judgment the learned judge is referring to an element of the offence or to a defence to the offence. To that extent the issue is the same that was raised in ground one and is arguable.
- [9] In relation to ground 3 the claim is that the learned judge has listed the defences available to the appellant as elements of the offence under section 4(2)(a). This issue appears to have caused some confusion in the mind of the trial judge and is arguable.
- [10] Ground 4 raises the same issue.
- [11] Ground 5 relates to the issue of the evidence adduced at the trial to establish the element of abstaining from performing the act of not filing charges against the complainant. There were two versions in relation to the issue. The trial Judge preferred the evidence adduced by the precaution and is in the best position questions of fact. Once that is accepted the issue is whether that evidence was sufficient to establish guilt beyond reasonable doubt. This can only be determined when the record becomes available. The ground is arguable.
- [12] In an appeal against sentence the test for leave is whether the appellant can demonstrate an arguable error in the exercise of the sentencing discretion. Harsh and excessive as a


ground of appeal does not by itself indicate that an arguable error has been established. The inconsistency between paragraph 19 and paragraph 24 is clearly due to a typographical error in paragraph 24 and is not an arguable error. The fine of \$1,500.00 is neither harsh nor excessive when it is noted that the maximum sentence is a fine upto \$500,000.00 and a term of imprisonment up to 7 years. However what is unreasonable is the requirement that the appellant be ordered to pay the fine immediately when he is at the same time sentenced to a term of imprisonment that is also to commence immediately. There is an arguable error in relation to that requirement. The situation is made worse since the appellant, in default of immediate payment, is required to serve an additional 150 days imprisonment cumulative to the sentence for the offences.

- [13] Ground 9 raises issues that are more concerned with the conviction rather than any arguable error in sentencing.
- [14] Ground 10 challenges the assertion in paragraph 17 of the sentencing decision that the appellant is not entitled to any discount for good character since he committed the offences while he was a member of the police force. The Full Court should comment on that assertion. The ground is arguable.

Orders:

- 1). *Leave to appeal against conviction is granted.*
- 2). *Leave to appeal against sentence is granted on grounds 8 and 10.*




Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL