

**IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]**

CRIMINAL CASE NO: HAC 63 of 2017

STATE

V

KAMLESH ARYA

Counsel : Mr. Sam Savumiramira with Ms. Laite Bokini for the State
Dr. Gregory Woods QC with Mr. Vijay Maharaj for the Accused

Dates of Trial : 15-18, 23-26, 29-30 April & 1-2, 6-10 and 13 May 2019

Summing Up : 15 May 2019

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2]** As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution and defence exhibits and any admissions made by the parties by way of admitted facts or agreed facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-

examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and demanding.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

- [16] However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.
- [17] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain

thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [25] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [26] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has called evidence on his behalf does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [27] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [28] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.

- [30] You should disregard all feelings of sympathy or prejudice, either towards the prosecution or the defence. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [31] Let us now look at the charges contained in the Amended Information [As you would recall the Second Count was amended by the prosecution, on 7 May 2019, just prior to the commencement of the defence case].
- [32] There were originally two charges preferred by the Fiji Independent Commission Against Corruption (FICAC), against the accused:

FIRST COUNT

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence (b)

KAMLESH ARYA, between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Registrar at the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, did arbitrary acts for gain in abuse of the authority of his office, namely authorized loans amount to \$116,500 from the Free Education Grant provided by the Ministry of Education to the said Bhawani Dayal Memorial Primary School, which was prejudicial to the rights of the said Ministry of Education and Bhawani Dayal Memorial Primary School.

SECOND COUNT

Statement of Offence (a)

GENERAL DISHONESTY – CAUSING A LOSS: Contrary to Section 324(2) of the Crimes Decree 2009.

Particulars of Offence (b)

KAMLESH ARYA, between 1st January 2014 and 31st December 2014, at Suva, in the Central Division, whilst being employed as the Registrar of the University of Fiji, and whilst acting as the School Manager for Bhawani Dayal Memorial Primary School, dishonestly caused a risk of loss to Bhawani Dayal Memorial Primary School by authorizing the Free Education Grants as loans

amounting to FJD\$116,500, and knowing that the loss will occur or substantial risk of the loss will occur to Bhawani Dayal Memorial Primary School.

[33] As I explained to you during the trial, this Court has made a Ruling that the accused has no case to answer in respect of the First Count. The charge that is remaining against the accused is the Second Count. Therefore, whatever reference is made in this summing up to offence or charge is a reference to the Second Count.

[34] The Second Count against the Accused is General Dishonesty-Causing a Loss, in terms of Section 324 (2) of the Crimes Act No. 44 of 2009 (Crimes Act).

[35] Section 324 of the Crimes Act defines General Dishonesty-Causing a Loss as follows:

324.—(1) A person commits a summary offence if he or she does anything with the intention of dishonestly causing a loss to another person.

(2) A person commits a summary offence if he or she—

(a) dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and

(b) person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.

[36] Therefore, in order to prove the Second Count, the prosecution must establish beyond reasonable doubt that;

- (i) The Accused;
- (ii) During the specified time period (in this case between 1 January 2014 and 31 December 2014);
- (iii) At Suva, in the Central Division;
- (iv) Dishonestly;
- (v) Caused a risk of loss to Bhawani Dayal Memorial Primary School (BDMPS), by authorizing the Free Education Grants (FEG), amounting to FJD\$116,500, as loans;
- (vi) Knowing that the loss will occur or a substantial risk of the loss will occur.

[37] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[38] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[39] The fourth element is the element of dishonesty. You have to consider whether the accused acted dishonestly [and thereby caused a risk of loss to BDMPS, by authorizing the FEG as loans]. “Dishonesty” is a state of mind of the accused. In order to determine whether the accused had a dishonest mind in causing a risk of loss, you have to adopt a two-tiered approach as follows:

First, according to the ordinary standards of reasonable and honest people, you have to decide whether what was done by the accused was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. [Dishonest according to the standards of ordinary people-which is an objective test].

If it was dishonest by those standards, then you must consider whether the accused himself has realized that what he was doing was dishonest by those standards. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the accused himself knew that he was acting dishonestly. It is dishonest for the accused to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting in the manner he did. [Known by the accused to be dishonest according to the standards of ordinary people-which is a subjective test].

Therefore, the prosecution should prove beyond reasonable doubt that the accused acted dishonestly [and thereby caused a risk of loss to BDMPS, by authorizing the FEG as loans].

[40] The fifth element is that the accused caused a risk of loss to BDMPS, by authorizing the FEG amounting to FJ\$116,500 as loans. Loss means a loss in property, which includes money. The prosecution should prove beyond reasonable doubt that the accused caused a risk of loss to BDMPS, by authorizing the FEG as loans.

[41] The final element also concerns the state of mind of the accused. That is that the accused knew that the loss will occur or knew that a substantial risk of the loss will occur. Section 20 of the Crimes Act provides that a person has knowledge of a circumstance or a result of conduct if he or she is aware that it exists or will exist in the ordinary course of events. Knowledge can either be direct knowledge or inferred knowledge. In determining knowledge, it is sufficient to have the necessary awareness or the understanding of the act and its consequences. The prosecution should prove beyond reasonable doubt that the accused knew that the loss will occur or knew that a substantial risk of the loss will occur.

[42] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of General Dishonesty-Causing a Loss.

[43] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of General Dishonesty Causing a Loss.

[44] In this case the accused is taking up the defence of Mistaken Belief arising out of a Claim of Right, as found in Section 38 of the Crimes Act.

[45] Section 38 of the Crimes Act states:

(1) A person is not criminally responsible for an offence that has a physical element relating to property if —

(a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

[46] As I have stated before the term ‘property’ includes money as well. The accused is taking up the defence that at the time of authorization of the loans he mistakenly believed that he had in his own right as School Manager BDMPS and and/or as a Trustee of the Arya Pratinidhi Sabha of Fiji (APS), a proprietary or possessory right to authorize the loans.

[47] As I have informed you before, the prosecution always bears the legal burden of proving every element of the offence charged-in the instant case the offence of General Dishonesty-Causing a Loss. That legal burden must be discharged beyond reasonable doubt. However, an accused who wishes to deny criminal responsibility for that offence, bears what is known as an evidential burden in relation to that matter. This is stated in Section 59 of the Crimes Act.

[48] Section 59 of the Crimes Act is reproduced below and reads as follows:

59. — (1) Subject to section 60, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of this Decree (other than section 28) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

(4) The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(5) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(6) The question whether an evidential burden has been discharged is one of law.

(7) In this Decree (Now Act) —

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

[49] In terms of Section 57 (2) of the Crimes Act it is stated that *"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."*

[50] Therefore, where the accused adduces evidence that suggests a reasonable possibility that the matter (in this case a mistaken belief about a proprietary or possessory right) exists, it would be incumbent on the prosecution to disprove that matter.

[51] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[52] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as *"Agreed Facts"* without placing necessary evidence to prove them:

1. **THAT** the Accused in this matter is Mr. Kamlesh Arya (hereinafter referred to as the "the Accused"), 64 years old of Quarters 6, Gurukul Primary School, Saweni in Lautoka.
2. **THAT** the Accused was appointed to the position of "Registrar at the University of Fiji (hereinafter referred to as "University") on the 11 December 2012 for a period of three (3) years which was renewed for another three (3) years in 2015.
3. **THAT** the Accused is responsible to the Vice Chancellor for the satisfactory performance of his duties.

4. **THAT** the Accused is also responsible for all the administration of the University, including the Finance and Facilities aspects of the University during the material time of the offence.
5. **THAT** the Accused was appointed to be the School Manager for a few Sabha schools including Bhawani Dayal Memorial Primary School ("**BDMPS**"), Bhawani Dayal Arya College ("**BDAC**"), Nadroga Arya College, DAV College, Ba Pundit Vishnu Deo, DAV Primary School and Arya Kanya Pathshal during the material time of the offence.
6. **THAT** the Accused was appointed to be the School Manager for the abovementioned schools based on merits through the Sabha Annual General Meeting and Executive Meeting as outlined in the Sabha Constitution.
7. **THAT** the Accused duties and responsibilities as the School Manager is to manage the school in terms of its infrastructure, be part of the management board, take decisions for development and be the liaison between the management and the Ministry of Education.
8. **THAT** the Accused was one of the Trustees for the Arya Pratinidhi Sabha of Fiji (hereinafter referred to as "**APS of Fiji**"). The other Trustees were Mr Arun Padarath, Mr Bhuwan Dutt, Mr Ravineet Ritesh Sami and Mr Shanti Saraj.
9. **THAT** between January to June 2014, Mr Sami was the National General Treasurer of APS of Fiji and was elected as a Trustee for APS in June 2014.
10. **THAT** Mr Sami was also the Executive Director Finance of the University of Fiji in 2014.
11. **THAT** Mr Sami was appointed as the General Treasurer of APS Westpac Internet Banking and simultaneously granted access to manage the cash flows of all accounts of Sabha.

Procedure on the use of Free Education Grant from Ministry of Education

12. **THAT** the government through the Ministry of Education (hereinafter referred to as "**MOE**") initiated the Free Education Grant ("**FEG**") for both primary and secondary schools in 2014.
13. **THAT** the grants were calculated per student according to the roll provided by the school management. Each student was supposed to receive \$250 each Term to be utilised for the purpose outlined in the Financial Management Handbook (hereinafter referred to as "**Handbook**").

Term 1 FEG

14. **THAT** on the 6th January 2014, Bhawani Dayal Memorial Primary School had received \$83,076 into its Westpac Account No. 24564700 for the Term 1 allocation in 2014.
15. **THAT** on the 31st January 2014, \$27,500 was loaned to BDAC from BDMPS FEG via internet transfer. ***[In evidence it has transpired that in actual fact the \$27,500 was loaned to BDAC in the following manner: On 16 January 2014, \$20,000; on 31 January 2014, \$500; and on 4 February 2014, \$7000].***
16. **THAT** on the same date another \$30,000 was loaned to the University from BDMPS grant through internet transfer as well.
17. Thereafter, on the 26th February 2014, again another \$9,000 was loaned to Vunimono Arya School (“VAS”) via internet transfer from BDMPS grant. ***[In evidence it transpired that in actual fact \$9,000 was transferred by VAS to the credit of the BDMPS account on that day. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***
18. **THAT** on the 14th March 2014, another loan transfer of \$11,800 was done to the BDMPS grant to the APS Administration Account through internet transfer. ***[There is no record of such a transaction. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***

Term 2 FEG

19. **THAT** on the 13th May 2014, BDMPS had received \$83,423 into its Westpac Account No. 24564700 for the Term 2 allocation in 2014.
20. **THAT** on the 15th May 2014, a loan transfer of \$25,000 was done to the BDMPS FEG to BDAC account via internet transfer.
21. **THAT** on the 3rd June 2014, another loan transfer of \$9,000 to VAS was done to the BDMPS grant via internet transfer.
22. **THAT** on the 15th July and again on the 15th August 2014, two loan transfers were conducted to the BDMPS grant to the University amounting to \$25,000 and \$10,000 respectively via internet transfer. ***[In evidence it transpired that in actual fact the \$10,000 was transferred by the University of Fiji to the credit of the BDMPS account, on 15 August 2014. Thus, the prosecution states that this sum does not form part of the \$116,500 of the loaned sum].***

23. **THAT** the Accused was interviewed under caution at the FICAC Office in Lautoka on the 22/03/16, 08/11/16, 09/11/16 and the 11/11/16 in the English language by FICAC Commission Office (CO) Siteri Vuidreketi with Assistant Commission Officer (ACO) Mosese Matanisiga present as the Witnessing Officer before the interview was concluded on the 21/11/16 at the FICAC Office in Suva by the same mentioned officers.
24. **THAT** on the 22nd November 2016, the Accused was formally charged at the FICAC Office in Suva in the English language by the Senior Commission Officer (SCO) Alivereti Wakanivesi with CO Siraz Ali present as the Witnessing Officer before the Accused was produced in court on the same date.

[53] Since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[54] In support of their case, the prosecution led the evidence of the following 9 witnesses:

1. Dr. Brij Lal
2. Ravineet Ritesh Sami
3. Satyendra Singh
4. Makarita Voi Fuata
5. Moshin Shaheed Ali
6. Mosese Matanisiga
7. Tawake Gaunavou
8. Ruci Daulako
9. Talica Ratulevu

[55] The following documents were tendered to Court by consent of both the prosecution and defence, and are marked as Prosecution Exhibits **PE 1 to PE 49** respectively:

PE 1	Letter of Appointment of Mr Kamlesh Arya, dated 11 December 2012, from the University of Fiji
PE 2	Letter of Appointment of Mr Ravineet Sami, dated 12 September 2013, from the University of Fiji
PE 3	Arya Pratinidhi Sabha of Fiji Directory 2014-2015
PE 4	Bhawani Dayal Memorial Primary School Southern District Primary Board Meeting School Report – Term II, 2012
PE 5	Ministry of Education Standard Power Point slides regarding Financial Management in Schools

PE 6	Ministry of Education Circular dated 13/12/13 from PS Education, National Heritage, Culture and Arts to School Managers, Head Teachers and Principals, Subject : Free Education – Directive on Use of Government Grants
PE 7	Ministry of Education, National Heritage, Culture and Arts Media Release MR 131/13 – School Leaders and Management to Attend Financial Management Workshop
PE 8	Ministry of Education School Management Handbook
PE 9	Ministry of Education Act Cap 262
PE 10	University of Fiji Decree No. 26 of 2011
PE 11	Ministry of Education Presentation on Free Education Management Workshop format
PE 12	Financial Management in Schools Manual, May 2014
PE 13	Ministry of Education Finance Manual for the year 2013
PE 14	Copies of Emails Printout emails as per folders with following subject headings: i) Creditors payments ii) Excess in accounts (16 accounts) iii) Free Education Directive from MoE iv) Media Release v) MOE Grants vi) APS Updates/MOE Workshop Update vii) Vunimono Arya Primary School MOE Allocation viii) Short Term Advance ix) Salary Clearance Transfers
PE 15	Payment Voucher No. 1019140-1019236 dated 27/1/14, sum of \$2,554,608.00 being payment of Term I Free Education Grant, 2014 – Primary Schools inclusive of Term I WBC listings
PE 16	Payment Voucher dated 29/4/14, sum of \$1,617,131.00 being payment of Term II Free Education Grant, 2014 – Primary Schools inclusive of the breakdowns for each schools
PE 17	Payment Voucher dated 12/8/14, sum of \$1,819,609.00 being payment of Term III Free Education Grant, 2014 – Primary Schools inclusive of the breakdown for each schools
PE 18	Bhawani Dayal Memorial Primary School Debit and Credit Transfers for the Year 2014 and 2015
PE 19	Bhawani Dayal Memorial Primary School Cash Payments Journal 2014
PE 20	Bhawani Dayal Memorial Primary School Cash Receipts Journal 2014
PE 21	Bhawani Dayal Memorial Primary School Financial Statements dated 31 December 2014

PE 22	Westpac Banking Corporation Authority to Account Access to individuals at Arya Pratinidhi Sabha
PE 23	Westpac Banking Corporation Internet transfer for Account No. 24564700 from 01/01/2014 to 01/06/15
PE 24	FEMIS Spending Detailed Report, Bhawani Dayal Memorial Primary School, 2014
PE 25	Minutes of the University of Fiji Council Meeting dated Saturday 24/05/14
PE 26	Minutes of the University of Fiji Council Meeting dated Saturday 06/09/14
PE 27	Minutes of University of Fiji Council Meeting dated Saturday 6/12/14
PE 28	Minutes of Arya Pratinidhi Sabha of Fiji Annual General Meeting dated 08/06/14
PE 29	Minutes of Arya Pratinidhi Sabha of Fiji Internal Meeting dated 13/09/14
PE 30	Minutes of Arya Pratinidhi Sabha of Fiji Internal Meeting dated 29/11/14
PE 31	Agenda of the Southern District Primary School Committee Meeting dated 5/3/14 inclusive of Minutes dated 12/11/13
PE 32	Agenda of the Southern District Primary School Committee Meeting dated 31/8/14 inclusive of Minutes dated 12/03/14
PE 33	Agenda of the Southern District Primary School Committee Meeting dated 9/9/14 inclusive of Minutes dated 13/08/14
PE 34	Analysis of 2014 Bank Statement of Bhawani Dayal Memorial Primary School, Westpac Bank Corporation Account No. 24564700
PE 35	Terms Analysis of 2014 Bhawani Dayal Memorial Primary School, Westpac Bank Corporation Account No. 24564700
PE 36	Westpac Bank Corporation Bank Statement for University of Fiji, Account No. 9800966104, dated 4 January 2014 to 12 January 2015
PE 37	Westpac Bank Corporation Bank Statement for Bhawani Dayal Arya College, Account No. 17103500, dated 3 December 2013 to 2 January 2015
PE 38	Westpac Bank Corporation Bank Statement for Arya Pratinidhi Sabha of Fiji, Account No. 91057100, dated 3 January 2014 to 2 January 2015
PE 39	Westpac Bank Corporation Bank Statement for Bhawani Dayal Primary School, Account No. 24564700, dated 3 January 2014 to 2 January 2015
PE 40	Westpac Bank Corporation Bank Statement for Vunimono Primary School, Account No. 24566300 dated 3 December 2013 to 2 February 2015

PE 41	Internet transfer from 01/01/11 to 08/07/16 on Account Number 9800966104
PE 42	Audit Memorandum (DAM) of the Ministry of Education, National Heritage, Culture and Arts for the year ended 31 December 2014
PE 43	Email printout dated 15/04/15 from Kamlesh Arya re: BDAC Audit with attachments
PE 44	Arya Pratinidhi Sabha of Fiji Annual General Meeting Minutes dated 08 June 2014
PE 45	Immunity Letter of Mr. Ravineet Sami dated 22 November 2016
PE 46	Caution interview of Kamlesh Arya dated 22/3/16, 8/11/16, 9/11/16, 11/11/16, 21/11/16
PE 46A	Separate typed portions of the Caution Interview Statement of Kamlesh Arya
PE 47	Statement made to FICAC by Ravineet Ritesh Sami
PE 48	Affidavit of Tawake Gaunavou, (Banker's Affidavit)
PE 49	Bank Statements of Bhawani Dayal Memorial Primary School (Account No. 24564700) for Term 1 and 2 of 2014; and graphs depicting the loans for Term 1 and 2 of 2014

[56] Evidence of Dr. Brij Lal

- (i) *He was the former Permanent Secretary for Education, National Heritage, Culture and Arts. He was appointed as Permanent Secretary in June 2010, and held the position for 4 years. The witness is now retired.*
- (ii) *From 2014 to 2018, he was a Member of Parliament.*
- (iii) *He testified that in the 2013 Budget, the Government announced an increased allocation of the students grant to schools, with effect from 1 January 2014. He referred to it as Fee Free Grant or Students Grant.*
- (iv) *Prior to the introduction of the Free Education Grant (FEG) in 2014, The Government was giving a very small grant to help parents and students. However, in the 2013 Budget, it was announced that there would be a huge increase in the grant allocated to the primary and secondary schools. The total grant given to primary schools would be FJ\$250 per student per year.*
- (v) *In the respect of the FEG, his role was:*
1. *To ensure that adequate training was carried out for Heads of Schools and School Committees;*
 2. *To set guidelines for the use of grants; and*
 3. *To monitor the use of grants.*

- (vi) *The training was conducted for Head Teachers and Principals, School Managers, and School Treasurers. A special team from the Ministry of Education (MOE) conducted this training. Training was to provide guidelines as for the usage of funds and clarify any doubts that Heads of Schools or Committees had in this regard.*
- (vii) *Prosecution Exhibit PE 6 was the circular or directive issued by him, dated 13 December 2013, setting out the manner in which the said FEG should be utilised. The directive was addressed to School Managers, Head Teachers and Principals.*
- (viii) *The guidelines sets out the primary and secondary schools eligible to receive the FEG (certain private schools do not qualify for the grant), criteria for distribution and the amounts payable to primary and secondary schools.*
- (ix) *The directive also stipulates the criteria for the usage of the grants as follows:*
- | | |
|--|------------|
| • <i>Administration and Office Operation</i> | <i>12%</i> |
| • <i>Building and Compound maintenance</i> | <i>20%</i> |
| • <i>IT, computers and Vocational materials</i> | <i>18%</i> |
| • <i>Library Books and Text Books</i> | <i>18%</i> |
| • <i>Physical Education, Arts, Music and Science Equipment</i> | <i>14%</i> |
| • <i>Stationery</i> | <i>18%</i> |
- (x) *The witness also made reference to Prosecution Exhibit PE 12, the Financial Management in Schools Manual (Handbook) which was developed in May 2014, by the Asset Monitoring Unit of the MOE. The Manual which is based on the directive (PE 6) was said to have been used at the training sessions conducted in December 2013.*

[57] Evidence of Ravineet Ritesh Sami

- (i) *Currently, he is the Executive Director Finance at the University of Fiji. In May 2014, he was appointed as the Chief Finance and Facilities Officer at the University.*
- (ii) *In 2013-2014, he was the National General Treasurer of the Arya Pratinidhi Sabha of Fiji (APS) and was also elected as a Trustee for APS in June 2014. He was also the Executive Director Finance of the University of Fiji in 2014. As the General Treasurer of APS he had access to the Westpac Internet*

Banking facility and simultaneously granted access to manage the cash flows of all accounts of the APS.

- (iii) The witness had been granted a letter of immunity by the Deputy Commissioner of FICAC in respect of this case (Prosecution Exhibit PE 45).*
- (iv) The witness testified that the APS is the controlling authority of the University of Fiji. The APS also has 6 secondary schools and 15 primary schools under its control.*
- (v) The witness said that the APS holds Annual General Meetings (AGMs) where the Executives are appointed. Soon after the AGM, the APS holds a Post Executive Meeting at which Managers and Board Members are appointed for each school.*
- (vi) As National General Treasurer of the APS, the witness had internet access to all APS Bank Accounts.*
- (vii) The witness also testified to the inter loan system between the APS schools. He said that the inter loan system between the APS schools existed for more than 50 years.*
- (viii) The witness also testified at great length to the email correspondence found as Prosecution Exhibit PE 14.*
- (ix) The statement made by the witness to FICAC during the course of the investigations into this matter, has been tendered as Prosecution Exhibit PE 47.*
- (x) In the said statement, the witness refers to the relevant inter school loans of FJ\$116,500, which is the subject matter of this case and also provides information as to who authorised the said loans in the following manner:*
 - 1. 16 January 2014, FJ\$20,000 loaned to BDAC – “Upon the directive of the office bearers that were Mr Arya, Mr Padarath and Mr Bhuwan Dutt, I did these transfers.”*
 - 2. 31 January 2014, FJ\$500 loaned to BDAC – “The Sabha officials, Mr Kamlesh Arya and Mr Arun Padarath approved this loan either through email or verbally.”*
 - 3. 31 January 2014, FJ\$30,000 loaned to University of Fiji – “I made this Westpac Internet Transfer transactions and Mr Arya and Mr Padarath approved this loan.”*

4. 4 February 2014, FJ\$7,000 loaned to BDAC – “I made this Westpac Internet Transfer transactions and Mr Arya and Mr Padarath approved this loan.”
5. 15 May 2014, FJ\$25,000 loaned to BDAC – “Being the School Manager of Bhawani Dayal Memorial Primary School and Bhawani Dayal College, Kamlesh Arya responded to these email (dated 15 May 2014) and approved to transfer the funds.”
6. 3 June 2014, FJ\$9,000 loaned to VAS – “I made this transfer as the repayment of the loan which was taken earlier on 04.02.2016. I wish to refer to this record of email correspondence dated 06.05.2014 with the subject: Vunimono Arya Primary School MOE Allocation sent by Mr Nirendra Kumar, School Manager at that time of Vunimono Arya School to Mr Padarath, Mr Bhuwan Dutt and Mr Umesh Chand and later forwarded to me. Kamlesh Arya was also forwarded this chain of emails....”
7. 15 July 2014, FJ\$25,000 loaned to University of Fiji – “I would like to show you this record of email correspondence dated 15/07/2014, addressed to Kamlesh Arya and others with the subject : Salary Clearance and Transfers, sent by me to Mr Arya, Mr Padarath and Bank. We advised the Bank to transfer the following funds to clear the University’s salaries, since there was a delay from Government in paying University’s grants.....”

[58] Evidence of Satyendra Singh

- (i) Currently he is serving as the Principal of the Dilkusha High School.
- (ii) In 2013, he joined the MOE and was the Acting Senior Education Officer for the Policy Unit. His responsibilities include the drafting, reviewing and formulating Policy for the MOE. The said policies had to be implemented in consultation with the various stake holders involved.
- (iii) The witness testified at length regarding the FEG introduced by the Government in November 2013. He was shown Prosecution Exhibits PE5, PE6, PE7 and PE12 and asked to elaborate on the contents of the said documents.
- (iv) PE 5 is the Ministry of Education Standard Power Point slides regarding Financial Management in Schools. The witness testified that a copy of the Power Point slides were presented as training material to school leaders

and management throughout the country – in the 4 divisions and 9 districts.

- (v) *PE 7 is a media release issued by the then Minister of Education, Filipe Bole titled “SCHOOL LEADERS AND MANAGEMENT TO ATTEND FINANCIAL MANAGEMENT WORKSHOP.”*

[59] Evidence of Makarita Voi Fuata

- (i) *Currently, she is retired and said to be working for the Roman Catholic Church of Fiji.*
- (ii) *She worked at the MOE for 24 years and retired from service in 2016. In 2014, she was promoted as Acting Director Finance in the MOE.*
- (iii) *At the time the FEG was announced in November 2013, she was the Principal Accounts Officer of the MOE and was attached to the Finance Section of the Ministry.*
- (iv) *Her role in relation to the FEG was meeting with the officers from the Prime Minister’s Office, Bank personnel and Post Office to ensure the schools get the FEG by January 2014. Her role was to distribute the FEG to all schools accounts.*
- (v) *This witness too, further elaborated on Prosecution Exhibits PE 6, PE 12, PE 42 and PE 43.*
- (vi) *PE 42 is Audit Memorandum (DAM) of the Ministry of Education, National Heritage, Culture and Arts for the year ended 31 December 2014.*
- (vii) *PE 43 is an email printout dated 15 April 2015 from Kamlesh Arya regarding BDAC Audit with attachments. In his response, the Accused states as follows:*

“.....

The Management does not deny that Free Education Grant is to be used for the purposes of the recipient school. The Management notes further and states that the figure shown in the table above are automatic bank transfers from one account to another of the Sabha’s institutional accounts to mitigate institution based cash flow situation rather than allowing short term overdrafts at higher interest rates. This is a standing agreement with the Bank.

This has been the practice within the Sabha for decades and well before the FEG was implemented by the Government including the Fee Free Grant period.

.....

The Sabha over the last 97 years of educational partnership with the government has found this to be a most prudent way of managing its operations pre and post of the University of Fiji and denies all allegations of abuse of FFG or FEG.

.....”

[60] Evidence of Moshin Shaheed Ali

- (i) Currently, he is the Director Audit at the Office of the Auditor General. He has worked at the Office of the Auditor General for 13 years.*
- (ii) His role is to manage portfolio of Audits which are distributed by the Auditor General on an annual basis.*
- (iii) In 2015, he was the serving as Audit Manager and reporting to his Director. The portfolio under that Director was all the Ministries and Departments under the Social Service Section – Ministry of Health, Ministry of Education, Ministry of Social Welfare and Ministry of Youth and Sports.*
- (iv) He testified that based on the risk assessment done, 18 schools (10 Secondary Schools and 8 Primary Schools) were audited in the year 2015.*
- (v) He testified that he audited the accounts of BDMPS, which was a school controlled by the APS.*

[61] Evidence of Mosese Matanisiga

- (i) He is an Investigator attached to FICAC. He has worked at FICAC for the past 9 years. Prior to that, he was working in the Fiji Police Force for 20 years.*
- (ii) In the instant case, he was assisting the investigating officer in the course of the investigations.*
- (iii) He was also present as the witnessing officer during the recording of the Caution Interview Statement of the accused. The Caution Interview Statement was recorded by FICAC Commission Officer (CO), Siteri Vuidreketi.*
- (iv) The witness testified that during the recording of the Caution Interview Statement of the accused, an AVR (Audio Visual Recording) machine and a*

computer were used. The written Caution Interview Statement has been tendered to Court as PE 46.

- (v) *The audio visual recording was downloaded or saved in compact discs (CDs). The relevant CDs had been brought to Court.*
- (vi) *During the course of this witness's evidence, several recorded portions of the Caution Interview Statement were played in Court. Since it transpired that, in certain instances, the written statement did not contain the full answer given by the accused a further typed version of the Caution Interview Statement was tendered to Court as Prosecution Exhibit PE 46A.*

[62] Evidence of Tawake Gaunavou

- (i) *He is currently working as Senior Relationship Manager at Westpac Bank. He has been attached to Westpac since 2013.*
- (ii) *He tendered to Court a Banker's Affidavit, which is marked as Prosecution Exhibit PE 48.*
- (iii) *The defence tendered through this witness Defence Exhibit DE 1 which is the Westpac Bank Corporation Bank Statement for Bhawani Dayal Primary School, Account No. 24564700, from 1 January 2016 to 2 February 2017.*

[63] Evidence of Ruci Daulako

- (i) *Currently, she is serving as the Senior Human Resource Officer with the MOE, attached to the Employee Administration Unit.*
- (ii) *She confirmed that the Accused, Kamlesh Arya was appointed as School Manager of BDMPS in 2012. As per the records, she confirmed that the accused was the School Manager of BDMPS in the year 2014.*

[64] Evidence of Talica Ratulevu

- (i) *Currently, she is the Financial Investigator at FICAC. She has worked at FICAC for 7 years.*
- (ii) *She tendered to Court Prosecution Exhibits PE 49, which were the Bank Statements of BDMPS (Account No. 24564700) for Term 1 and 2 of 2014; and graphs depicting the loans for Term 1 and 2 of 2014.*

[65] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence in respect of the Second Count. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also

address Court by himself or his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to call witnesses in support of his case.

Case for the Defence

[66] The accused called the following witnesses in support of his case:

1. Prileshni Kanthi Devi
2. Vijay Chand
3. Bhuwan Dutt
4. Nereo Kanasalusalu

[67] The defence also tendered the following documents as Defence Exhibits **DE 1 to DE 15**.

DE 1	Westpac Bank Corporation Bank Statement for Bhawani Dayal Primary School, Account No. 24564700, dated 1 January 2016 to 2 February 2017.
DE 2	Arya Pratinidhi Sabha of Fiji - School Audited Financial Statements.
DE 3	Tabulated details of transfers from and repayments to Bhawani Dayal Primary School Account Number 24564700.
DE 4	Copy of email – Subject: Bhawani Dayal Primary School Maintenance Work.
DE 5	Copy of email – Subject: Claims
DE 6	Arya Pratinidhi Sabha of Fiji - Payment Voucher (Dated 14/3/17)
DE 7	Arya Pratinidhi Sabha of Fiji - Payment Voucher (Dated 10/4/17)
DE 8	Arya Pratinidhi Sabha of Fiji - 2014 Arya Convention & 97 th AGM (Dated 8/6/14)
DE 9	Arya Pratinidhi Sabha of Fiji - 2012 Arya Convention & 95 th AGM (Dated 7/6/12 – 10/6/12)
DE 10	Bhawani Dayal Arya College - MOE Grant Record 2014 & 2015 : Summary of Building and Compound Allocation
DE 11	Bhawani Dayal Memorial Primary School - MOE Grant Record 2014 & 2015 : Summary of Building and Compound Allocation

DE 12	Photographs – Bhawani Dayal Memorial Primary School (1-12); Bhawani Dayal Arya College (13-21); University of Fiji (22-30); and Arya Pratinidhi Sabha of Fiji Headquarters (31-39)
DE 13	Constitution of Arya Pratinidhi Sabha of Fiji
DE 14	Minutes of National Executive Committee Meeting of Arya Pratinidhi Sabha of Fiji – 30/5/15
DE 15	Copy of email – Subject: Request for Release of School Grants to APS

[68] Evidence of Prileshni Kanthi Devi

- (i) *She is employed as Assistant Accounts and Administrative Officer at the APS Headquarters. She had worked at the APS for 16 years.*
- (ii) *She has viewing access to all the banking records of institutions coming under the APS. This is confirmed by Prosecution Exhibit PE 22.*
- (iii) *The witness testified that she is familiar with the records and correspondence of the APS. She is also familiar with school audit made to the MOE. Records of the audit are kept in the office of the APS. Mr Pande was the Chartered Accountant who prepared the audits. He is now deceased.*
- (iv) *The witness said that she prepared a folder containing Audited Financial Statements of APS Schools. The said folder was produced in Court as DE 2. She referred to notations on each of the audit statements under the heading “Internal Loans.”*
- (v) *Each of the audited statements has a notation to the effect: “Internal loans represent unsecured loans to and from Sabha and Schools managed by the Sabha and are receivable when the funds become available”.*
- (vi) *The witness testified that she is also the author of DE 3: Tabulated details of transfers from and repayments to Bhawani Dayal Primary School Account Number 24564700. She conceded that there were certain typographic errors in the said document.*
- (vii) *Defence Exhibits DE 4 to DE 11 were tendered in Court through this witness.*
- (viii) *The witness testified that she is the author of DE 10 and DE 11. DE 10 is a Summary of the Building and Compound Allocation for Bhawani Dayal Arya College from MOE Grants received in 2014 & 2015. DE 11 is a Summary of*

the Building and Compound Allocation for Bhawani Dayal Memorial Primary School from MOE Grants received in 2014 & 2015.

[69] Evidence of Vijay Chand

- (i) The witness is a professional photographer.*
- (ii) He had been requested by the APS Headquarters to take photographs of BDMPS, BDAC, University of Fiji and APS Headquarters. The photos were taken after this trial had commenced.*
- (iii) The photos were tendered to Court as DE 12.*
 - Bhawani Dayal Memorial Primary School (photos 1-12);*
 - Bhawani Dayal Arya College (photos 13-21);*
 - University of Fiji (photos 22-30); and*
 - Arya Pratinidhi Sabha of Fiji Headquarters (photos 31-39)*
- (iv) The witness testified that he is a member of the APS. In the taking of the photographs he had been guided by Prileshni Devi.*

[70] Evidence of Bhuwan Dutt

- (i) He is a retired civil servant. He retired as Permanent Secretary of the Ministry of Lands and Mineral Resources.*
- (ii) He joined the APS in 1975 as a member of the local Samaj – Central Suva Arya Samaj. He has held a number of positions in the APS. He was Assistant Secretary of the APS. Thereafter, from 1984 to 2003, he was Secretary of the APS. He became National President of the APS for two years. He became a Patron of the APS in 2011 and still holds that position. He is also a Trustee of the APS from 1992.*
- (iii) He testified that the Constitution of the APS (which was tendered as DE 13) provides for a maximum of 5 Trustees. 3 Trustees can operate the APS business. Currently, there are 4 Trustees, namely himself, the accused Kamlesh Arya, Mrs Vidya Singh and Mr Arun Padarath.*
- (iv) The witness has been awarded the Arya Ratna. He said that in terms of the APS Constitution, the Arya Ratna is awarded to a member of the APS who has served in an exemplary way for a long period of time in APS activities. There is a very rigorous selection process. The honour is awarded at the AGM of the APS after a committee has properly verified and interviewed a candidate.*

- (v) *Some of the other recipients of this award includes the accused, Justice Devendra Pathik, Mrs Sushila Pathik and Mrs Urmila Arya.*
- (vi) *The witness testified that the APS was established in 1918. The Gurkul Primary School was built in 1918. There are now 21 schools which are governed by the APS. The University of Fiji was established by the APS and the witness said that he was very much involved in the establishment of the University.*
- (vii) *The witness confirmed that the inter-school loaning system amongst APS institutions has been in existence for a long period of time. He remembers even at that time he joined the APS in 1975, this practice was in force.*
- (viii) *DE 13, DE 14, and DE 15 were tendered through this witness.*

[71] Evidence of Nereo Kanasalusalu

- (i) *He testified that he is a friend of the accused. He has known the accused since 1994. The witness has been employed at the FTU from 1994 to date.*
- (ii) *He said that at the time his father passed away in 1993, he had been schooling. He did not finish his studies and instead looked for employment. He found a job at the Fiji Teachers Union (FTU). When he came looking for a job he had met the accused. The National General Secretary of the FTU had told him to speak to the Industrial Relations Officer (IRO), who he later got to know was the accused.*
- (iii) *The witness testified that the accused did a lot of help for his family in finding a job. The love and care the accused had shown was the reason he was confident in finding a job.*
- (iv) *When he came to the FTU, he brought 7 adopted children. It was difficult to find schools for them. The accused had admitted 3 of the children to the Arya Samaj Primary School. The rest of the children went to the Cathedral Secondary School. The accused continued to assist his children with their school stationery and also with their bus fares. He had also agreed for them to stay in one of the FTU quarters.*
- (v) *When asked as to what his opinion was about the accused as a person, the witness said "when my parents had passed away, he was like a father to our family. He had also provided food on the table. He also gave quarters to my family to live in. And a very difficult thing in the family was his love for my adopted kids."*

Analysis

- [72] The above is a brief summary of the evidence led at this trial. The prosecution in support of their case, led the evidence of nine witnesses and tendered Prosecution Exhibits PE 1 to PE 49. The defence relied on the evidence of four witnesses and tendered as Defence Exhibits DE 1 to DE 15.
- [73] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [74] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [75] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. It is an admitted fact that the Accused in this case is Kamlesh Arya. There is also no dispute as to the specified time period during which it is alleged the offence was committed or as to the place of offence.
- [76] However, the prosecution must prove beyond reasonable doubt the remaining three elements of the offence: namely that the accused acted dishonestly, by authorizing the FEG, amounting to FJ\$116,500, as loans; and thereby that he caused a risk of loss to BDMPS; and that the accused knew that the loss will occur or a substantial risk of the loss will occur.
- [77] The prosecution case is that the accused, Kamlesh Arya, acted dishonestly, by authorizing the FEG, amounting to FJ\$116,500, as loans and thereby caused a risk of loss to BDMPS, and that he knew that the loss will occur or substantial risk of the loss will occur to BDMPS.
- [78] It has been agreed between the parties that the accused was appointed to be the School Manager for a few Sabha schools, including BDMPS, during the material time of the offence. It is also agreed that at the time the accused was functioning as the Registrar at the University of Fiji. It is further agreed that the accused was one of the Trustees for the APS. The other Trustees were Arun Padarath, Bhuwan Dutt, Ravineet Ritesh Sami and Shanti Saraj.
- [79] It is also agreed that between January to June 2014, Ravineet Sami was the National General Treasurer of APS and was elected as a Trustee for APS in June 2014. He was also functioning as the Executive Director Finance of the University of Fiji in 2014. As the General Treasurer of APS, he was appointed for Westpac Internet Banking facility and simultaneously granted access to manage the cash flows of all accounts of APS.

- [80] It has also been agreed between the parties as to how the loaned sum of FJ\$116,500 is made up. This is also clearly depicted in the relevant bank statements and also in document PE 49 (by way of graphs depicting the loans for Term 1 and 2 of 2014).
- [81] The accused denies that he acted dishonestly. He also denies that there was a risk of loss to BDMPS or that he had knowledge that the loss will occur or substantial risk of the loss will occur to BDMPS.
- [82] The defence position is that the new system of FEG was hurriedly implemented and referred to so called “teething problems” in its implementation. The defence also takes up the position that the inter loan system between the APS schools existed for many years. The defence produced Exhibit DE 2, which contains Audited Financial Statements of certain APS Schools, to highlight this fact. Each of the audited statements has a notation to the effect: “Internal loans represent unsecured loans to and from Sabha and Schools managed by the Sabha and are receivable when the funds become available”.
- [83] In any event, the defence states that the entire sum of FJ\$116,500 was repaid to BDMPS. To establish this fact the defence tendered Exhibit DE 3, which is a document prepared by witness Prileshni Devi - Tabulated details of transfers from and repayments to Bhawani Dayal Primary School Account Number 24564700. It is depicted there that the last of the repayments were made on 1 December 2016, in the sum of FJ\$35,700.
- [84] The prosecution states that Exhibit DE 3 does not accurately reflect the true position with regard to the repayment of the loans. In any event, the contention of the prosecution is that the FEG funds could not be loaned out and should have been used for the learning and teaching purposes of the School to which the funds are given during that particular year. The position taken up by the prosecution is that the accused was well aware that in terms of the new system of FEG no loaning of funds or inter school loans could be authorized, but that the accused continued to do so, ignoring the guidelines imposed by the MOE.
- [85] As I have stated before, the accused is taking up the defence of Mistaken Belief arising out of a Claim of Right, as found in Section 38 of the Crimes Act. The accused is taking up the defence that at the time of authorization of the loans he mistakenly believed that he had in his own right as School Manager BDMPS and and/or as a Trustee of the APS, a proprietary or possessory right to authorize the loans.
- [86] As stated in Section 59 of the Crimes Act an accused who takes up a defence and wishes to deny criminal responsibility for an offence, bears what is known as an evidential burden in relation to that matter. Therefore, where the accused adduces evidence that suggests a reasonable possibility that the matter (in this case a mistaken belief about a proprietary or possessory right) exists, it would be incumbent on the prosecution to disprove that matter.

- [87] It is for you to decide, based on all the facts and circumstances of this case, firstly whether the accused has discharged the evidential burden in relation to this matter. If the defence has failed to discharge the burden that defence (Mistaken Belief arising out of a Claim of Right) fails.
- [88] If in your opinion the defence has discharged that burden, then you have to see whether the prosecution has been able to disprove that matter, by way of evidence. If the prosecution has succeeded in disproving the matter then again the defence (Mistaken Belief arising out of a Claim of Right) fails.
- [89] However, if in your opinion, the prosecution has failed in disproving the matter, then the accused cannot be found to be criminally responsible for the charge and the accused should be found not guilty of the charge.
- [90] In this case the prosecution is relying on the admissions made by the accused in his caution interview statement. Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge.
- [91] Since the accused is not challenging the admissibility of his caution interview statement, the statement has been tendered to Court by consent of both the prosecution and the defence [PE 46 and PE 46A]. The accused admits to making the statement and also submits that the answers given by him in the said statement represents his explanation to the allegations against him.
- [92] However, the truthfulness of the statement and the question of what weight to attach to the admissions made in the said statement is a matter of fact entirely for you to decide.
- [93] As to the photographs tendered by the Defence (DE 12), it is clear that the photographs were taken after this trial had begun. As such, it is for you to decide what weight to attach to the said evidence.
- [94] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of General Dishonesty-Causing a Loss, beyond any reasonable doubt.
- [95] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider the defence evidence also for its consistency and also the probability of their version. If you find

the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge.

[96] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.

[97] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved in relation to the offence of General Dishonesty-Causing a Loss. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

[98] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. If you believe the evidence of the defence, then you must find the accused not guilty of the charge of General Dishonesty-Causing a Loss;*
- ii. If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of General Dishonesty-Causing a Loss;*
- iii. If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution to establish the charge of General Dishonesty-Causing a Loss;*
- iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of General Dishonesty-Causing a Loss;*
- v. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge has been established beyond reasonable doubt. If so you must find the accused guilty of General Dishonesty-Causing a Loss. If not you must find the accused not guilty of General Dishonesty-Causing a Loss.*

[99] Any re directions the parties may request?

1. The Learned State Counsel refers to a portion of the evidence given by the witness Ravineet Ritesh Sami, where he made reference to the approval of the loans in the following manner:

Q.And who is the Manager approving the loan from BDMPS to other schools?

A. Mr Kamlesh Arya.

State Counsel moves that I inform the Assessors about this piece of evidence. I directed the Assessors accordingly.

2. Learned Counsel for the Defence submits that my directions in relation to the defence of Mistaken Belief arising out of a Claim of Right, as found in Section 38 of the Crimes Act (paragraphs 85-89 of this summing up), requires re-direction. He submits that in terms of Section 59 (6) of the Crimes Act *"The question whether an evidential burden has been discharged is one of law."* Thus this is a matter for Court and not for the Assessors to determine.

I agree with this contention. Accordingly, I re-direct the Assessors as follows: The accused is taking up the defence of Mistaken Belief arising out of a Claim of Right, as found in Section 38 of the Crimes Act. The accused is taking up the defence that at the time of authorization of the loans he mistakenly believed that he had in his own right as School Manager BDMPS and and/or as a Trustee of the APS, a proprietary or possessory right to authorize the loans.

I directed the Assessors that what they have to determine is only whether the prosecution has succeeded in disproving the matter.

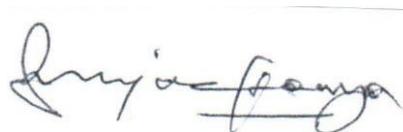
[100] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charge against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[101] Your possible opinions should be as follows:

Second Count

General Dishonesty - Causing a Loss - Guilty or Not Guilty

[102] I thank you for your patient hearing.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

Dated this 15th Day of May 2019

Solicitors for the State : **Fiji Independent Commission Against Corruption (FICAC), Suva.**

Solicitors for the Accused : **MC Lawyers, Barristers & Solicitors, Suva.**