

IN THE RESIDENT MAGISTRATE'S COURT

AT SUVA FIJI ISLANDS

CRIMINAL CASE NO: SCC (L) 30 OF 2016

STATE

-Vs-

REDDY & NANDAN LAWYERS

Before : Resident Magistrate, Kashyapa Wickaramasekara
Date : Friday 29th of March 2019
Counsel : Mr. Raj for the Prosecution
Mr. Reddy for the Accused

JUDGMENT

A. INTRODUCTION

1. Accused in this case is charged with one count of 'Depositing and Abandoning Litter' contrary to sections 10 (2) of the Litter Act 2008. The charge was first initiated by way of a Litter Offence Notice issued under Section 22 of the Act. It reads as follows:

Fixed Penalty Notice and Notice to Attend Court

To **Reddy & Nandan Lawyers** of 29, Raojibhai Patel Street, take notice that you are alleged to have breached Section 10 (2) of the Litter Promulgation 2008 in that you, deposited and abandoned litter in one black plastic bag at Raojibhai Patel Street on the 02nd day of August 2016 at about 5.26 pm. The fixed penalty is \$ 40.00 and if you admit the offence you must within 30 days after the date upon which this notice was served on you, pay the \$ 40.00 at the Cashier's Office, Suva City Council, between the hours

8.30 am and 3.30 pm Mondays to Fridays. And thereupon all liabilities for this offence will be discharged and no further action will be taken.

However, if you fail to pay the fixed penalty of \$ 40.00 or deny the charges You Are hereby Summoned to appear at the Magistrate Court at Suva on the 16th day of September 2016 at 9.00 am to answer the charge(s) set out hereunder.

2. The charge set out in the Notice reads as follows;

Statement of Offence

A person or corporate body or any other organization who both directly or indirectly deposits and abandons any litter in or on any public place commits an offence contrary to section 10 (2) of the Litter Promulgation.

Particulars of Offence

Reddy and Nandan Lawyers of 29 Raojibhai Patel Street, Suva did on the 2nd day of August 2016 at about 5.26 pm at Suva in the Central Division, deposit and abandon litter namely, commercial refuse, in one black plastic bag, in a public place namely, Raojibhai Patel Street, Suva.

3. This Fixed Penalty Notice dated 02/08/2016 also includes an Affidavit of Service by one Lavenia Dimaravu. This affidavit of service confirms that the said Notice have been duly served on one Patricia Nand (Law Clerk) at 29 Raojibhai Patel Street on the 02nd of August 2016.
4. On the 16/09/2016 the Accused had failed to appear in court and the matter had had been adjourned to 18/10/2016. From 18/10/2016 the Accused had appeared and was represented by Mr. Nandan, a partner for the Accused Law Firm. Accused had entered a not guilty plea on the charge on 06/10/2017 and the matter was accordingly fixed for hearing. Hearing proceeded before this court on the 20/06/2018.
5. Prosecution called only one witnesses for their case; the Booking Officer, Lavenia Dimaravu. With this evidence the Prosecution concluded its case. At the conclusion of the Prosecution's case; Accused made an application for no case to answer on the basis of a wrong charge and no proper service and no evidence to support the elements of the charge.

6. By the Ruling delivered on the 20/06/2018, this Court found a case for the Accused to answer and called for the Defence Case. Accused was again explained the charge against him and the options for the Defence case was explained. Accused then informed Court that he would remain silent to the charge and accordingly closed the Defence Case without adducing any evidence.
7. Parties were then allowed time to make closing submissions. Both parties have filed written submissions and the court has carefully considered the submissions and the evidence before the court whilst making its judgement.

B. THE LAW

8. Section 10 of the Litter Act 2008 reads as follows:

- 10.- (1) *A person or corporate body or any other organisation who, both directly or indirectly deposits and abandons any dangerous litter in or on any public place commits an offence.*
- (2) *A person or corporate body or any other organisation who both directly or indirectly deposits and abandons any litter in or on any public place commits an offence.*
- (3) *If a person or corporate body or any other organisation is charged with having committed an offence against subsection (1) and the court decides that the litter which is the subject of the charge is litter but not dangerous litter, that person may be convicted of an offence against subsection (2).*
- (4) *If any person or corporate body or any other organisation commences the act of depositing litter, in any public place and that litter comes to rest in a place other than a public place, that person or corporate body or any other organisation may nevertheless be convicted of an offence against this section.*

9. Section 2 of the Act provides interpretation of the relevant terms as follows;

Litter

"litter" means any matter or thing whether solid or liquid or partly solid or liquid, the possession of which has been abandoned by any person having control of the same in any street or land or public place and includes building, household, shop, garden and trade refuse or waste; human, animal, fish and vegetable refuse or

waste; containers and packaging of any description, whether manufacture in whole or in part, of wood, glass, metal, paper or plastic; household, shop and factory furniture, appliances and machinery or part thereof; timber, wood, glass, iron, concrete, sand, earth, gravel, stone and clay; or any matter or thing which causes or contributes to or tends to the defacement or defilement of any street, land or public place and includes dangerous litter, discarded chewing gum and tobacco, (excluding religious offerings);

Depositing

"depositing" in relation to litter, includes casting, leaving, placing, spilling, throwing, dropping, allowing to drop, or otherwise depositing of litter;

Public Place

"public place" includes -

(a) every highway, road, street, public drain, private street, footpath, access way, services lane, court, mall, thoroughfare and bridge,

10. In respect of proof and evidence relating to an offence under this Act, Section 24 of the Act is relevant:

24. In proceedings for an offence against this Promulgation -

(a) litter which has been deposited shall be presumed to have been abandoned unless the contrary is proven; and

(b) a statement in the complaint that a place referred to therein is a public place is prima facie evidence of that fact.

11. Elements of this offence can be identified as follows:

- i. A person, corporate body or any other organisation (The Accused),
- ii. Directly or indirectly,
- iii. Deposits and abandons any litter,
- iv. In or on any public place.

12. In respect of service of a Fixed Penalty Notice, Section 22 provides as follows:

22. (1) Notwithstanding the requirements of the Criminal Procedure Code, but subject to the succeeding provisions of this section, it shall be lawful for an officer to institute proceedings in respect of the alleged commission of an offence against sections 7(1)(b), 8(5), 10(2), 11, 12(1) and 12(2) by serving personally upon the person alleged by him to have committed the offence a fixed penalty notice.

C. EVIDENCE, ANALYSIS AND FINDINGS

13. The counsel for the Accused had taken up the position in the Hearing as well as in his closing submissions that the service of the 'Notice' was not proper as it was not served to any of the 'Partners' of the Accused Law Firm personally as stipulated by section 22 (1) of the Act. It was also submitted that the 'Law Firm' was not a Company and as such the 'Notice' could not have been served at their registered office or on an employee of the Accused except personally on the partners. Prosecution witness was questioned whether she had checked the legal status of the 'Law Firm' and checked the relevant legal provisions in the Companies Act. Accordingly it was submitted that the proceedings is a nullity and thus should be dismissed.
14. Since this submission is in respect of the validity of these proceedings itself and thus relates to the jurisdiction of the court to continue and deal with the case, court shall first address this issue.
15. The evidence of the prosecution witness, Lavenia Dimaravu, the booking officer, in respect of the service of the notice is to the effect that; after noticing the deposited and abandoned litter on Raojibhai Patel Street, Suva on the eve of 02/08/2016 and identifying the same to be belonging to 'Reddy & Nandan Lawyers', she had approached the front desk officer of the 'Reddy & Nandan Lawyers' and had spoken with the officer regarding the offence. She had then directed the witness to one 'Patricia Nand' who was a law clerk at the Accused' office, to be the person in charge of the office at the time. The witness had then explained the said 'Patricia Nand' of the offence and had served the 'Litter Notice No. 1714'. The contents of the 'Notice' was also explained to the said person. In cross-examination, the witness stated that the front desk officer had referred the witness to 'Patricia Nand' as the person in charge of the office at the time of service of the notice as the partners of the Law Firm were not available at that time. She claimed that the service is not defective as it was served to a person in-charge of the Accused' office at the time of the commission of the offence.
16. As per section 10 (2) of the Act, three different entities have been identified as potential offenders under the Act:
 - a) A person

- b) A corporate body
- c) Any other organisation

17. However, section 22 of the Act only provides 'personal service' of Fixed Penalty Notices. As such the 'personal service' needs to be interpreted in relation to the above three entities. The Act do not recognises the legal differences between companies, limited liability companies, partnerships, charities, NGO's, so forth and so on, dwelling into subtle legal definitions of such institutions. This Act provides for prevention of littering. The long title of the Act reads:

"Promulgation to prohibit and regulate the deposit of litter in the environment of the Fiji islands and to provide for enforcement and related matters"

18. Accordingly, 'personal service' on 'a corporate body' or 'any other organisation' must be interpreted as service on a person in charge of such entity and not otherwise. To interpret otherwise shall be to defeat the intention of the parliament in enacting this legislation. A law-firm shall fall under the category, 'any other organisation' according to the Act. Therefore the service of the 'Fixed Penalty Notice' on a law-firm should be on a person in charge of such law-firm. At the time of service of this particular 'Notice' on the Accused law-firm, the partners of the law-firm were not available. This fact has not been challenged by the defence. The front desk officer at the law-firm had referred the 'booking officer', Lavenia, to one 'Patricia Nand', a law clerk of the firm, as the person in charge of the office at that time. The offence was duly explained to this person and the 'Notice' was served and contents explained to 'Patricia Nand'. There was no evidence before this court of 'Patricia Nand' refusing to accept the 'Notice' or denying to be the person in charge of the office at the particular time. There is no evidence to the effect that 'Patricia Nand' was not an employee of the Accused Law Firm at the time of service. As such the court finds the service of the 'Notice' to one 'Patricia Nand' of Reddy & Nandan Lawyers duly construe personal service under section 22 of the Act.

19. The court accordingly finds that the challenge to the service of the 'Notice' is fallacious, misguided and misleading. The submissions in challenging the validity of the service of

the 'Notice' and thus the legality of these proceedings holds no water. The service was not defective or irregular. Thus the initiation of the proceedings is legal and there is no issue in respect of the jurisdiction of this court to deal with the case.

20. Having dealt with the issue of jurisdiction, I now move on to consider the burden and standard of proof relevant to prove this charge. The burden of proof and standard of proof in Fiji is as same as in all Common Law countries. Guidance to this legal position can be noted at Section 57 of the Crimes Act 2009, which states that it is the prosecution that bears the legal burden of proving every element of an offence relevant to the guilt of the person charged. As per section 58 of the Crimes Act, the legal burden of proof on the prosecution, must be discharged beyond reasonable doubt. It is therefore clear that the prosecution cannot rely on the defence case to prove their charge. The defence case is considered by court only if the court finds a case to be answered by the accused to see whether the accused through his case is successful in casting a reasonable doubt on the prosecution's case. Therefore the legal burden on the prosecution to prove all elements of the charge beyond reasonable doubt shall never be shifted to the accused unless the contrary is specifically enacted in a law creating an offence.

21. Having stated the burden of proof and standard of proof which rests with the prosecution, it is noted by court that the third element in this particular offence, 'Deposits and abandons any litter', is an element which partly bears a reverse burden of proof. As per section 24 (a) of the Act, in respect of **litter which has been deposited, (it) shall be presumed to have been abandoned unless the contrary is proven.** Thus when the prosecution establish in evidence pursuant to their burden and standard of proof, that litter had been deposited by the Accused in or on a public place, it is for the defence to prove that such litter have not been abandoned.

22. Section 60 of the Crimes Act make provisions relating to the defence burden of proof;
60. A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly —
(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

Thus it is for the prosecution to prove that the accused had deposited litter in a public place and it is for the defence to prove that that such litter was not abandoned. Both prosecution and accused alike carries a legal burden of proof in respect of this particular element.

23. I will now consider the evidence of the sole prosecution witness in respect of the offence. The witness, Lavenia Dimarau, stated that she is an authorised litter prevention officer appointed by Suva City Council. On the 02/08/2016, she had had been carrying out inspections and bookings in respect of litter offences. Aaround 5.26 pm she had had been at 29 Raojibhai Patel Street. She had then noticed a 'black plastic bag' on the street. Having inspected the same she had found office documents with the logo of 'Reddy & Nandan Lawyers'. Having identified this litter belonging to the above law-firm, the witness had approached the office of 'Reddy & Nandan Lawyers' at 29 Raojibhai Patel Street and had spoken with the front desk officer. This officer had then directed the witness to one 'Patricia Nand', a law clerk of the firm to be the person in charge of the office at that time. The witness had then spoken with this Patricia Nand, explained her of the offence and had served her the Litter Offence Notice No. 1714 and explained the contents of the Notice to her. She stated that the fine of \$ 40.00 as per the Notice had not been paid until now.
24. The witness was subjected to rigorous cross-examination. However, she was firm, confident and was readily forthcoming with answers to all questions posed by the defence. I have already discussed the evidence in respect of the service of the Notice. As such shall not reiterate her evidence under cross-examination on that point. Apart from that issue, the witness was questioned in respect of the use of the 'black plastic bag' to deposit litter. It was questioned and suggested by the defence, that a law which prohibits the 'use of black plastic bags', usually referred to as 'garbage bags' had not been mentioned in the charge and as such the charge was defective. The witness claimed that there are by-laws of the Suva City Council that prohibits 'black plastic bags' in depositing litter and which regularize and authorize proper 'receptacles' for depositing litter. The defence counsel even requested court to take judicial notice that 'black

garbage bags' are an acceptable manner in depositing litter for the City Council to collect litter.

25. This line of questioning unfortunately has no bearing over the alleged offence. The offence is one of 'depositing and abandoning litter in a public place' and not a 'failure to use proper 'receptacle' to deposit litter for garbage collection' by the City Council. There was no evidence before this court that the litter was deposited for the City Council to collect for garbage disposal. As such there is no defect in the charge. In any event for the purpose of clarity, it should be noted here the interpretation given in the Act for a 'receptacle' which can be used for proper disposal of garbage;

"Receptacle means a bin or other suitable similar container designed for the deposit of litter". (Emphasis added)

A 'garbage bag' is not a 'bin or other suitable similar container', unless the law specifically provides and includes it in the interpretation of a 'receptacle'.

26. Having heard and observed the sole witness for the prosecution giving evidence in court and the manner in facing rigorous cross-examination, the court was able to gauge the demeanour and deportment of the witness. She was firm and forthcoming with her answers. She was consistent and persistent with her evidence. There were no evidential gaps which were left out unanswered in her evidence. No material contradictions or omissions were highlighted in her evidence. Her evidence was logical and conquered with common reason. Court therefore finds the evidence for the prosecution credible and reasonable.

27. Accordingly, having considered the evidence for the prosecution *in toto*, the court finds that the prosecution has established beyond reasonable doubt that the Accused had deposited litter (trade refuse containing documents which bore the logo of Reddy & Nandan Lawyers and letterheads), at 'Raojibhai Patel Street'. This is a public Street and the complaint of the prosecution bears a statement to the effect that it is a public place. As per the presumption under section 24 (a) of the Act, this litter is presumed 'abandoned' until the contrary is proved. The defence neither during their cross-examination nor in the defence case proved that the litter was not abandoned. Having placed the litter in a black plastic bag, which is usually known as a 'garbage bag' does not prove that the litter was not abandoned. As per the prosecution's evidence placing

litter in 'black plastic bags' is not a proper way of disposing litter. 'Black plastic bags' are not identified in the Act as 'receptacles'.

28. The defence during cross-examination questioned whether the prosecution can produce exhibits of the 'litter', in essence requiring physical evidence of the abandoned litter. The offence deals with litter. In other words garbage. No sane person can expect garbage to be collected as physical evidence and to be produced in court. The primary intention of the Parliament in enacting this legislation is to ensure that litter or garbage is duly disposed ensuring that the environment is protected and unharmed. Moreover, the rule on 'best evidence' is no longer considered an essentially valid rule in law in the common law systems around the world. As such this argument is preposterous and defies common sense.
29. As per the evidence for the prosecution, the abandoned litter had been found deposited on a public road which was in fact at 29 Raojibhai Patel Street at which the Accused has its office. The litter was identified by the prosecution witness as belonging to the Accused Law-firm, having inspected its contents. Thus it can be safely construed from this evidence that it is the Accused that has directly or indirectly deposited and abandoned this litter on a public place.
30. Having thoroughly considered the evidence before this court, I find that the prosecution has discharged their legal burden in respect of all elements according to the offence and has thus proved beyond reasonable doubt all elements of the offence; with relevant, admissible and credible evidence. The Accused has failed to discharge their legal burden in respect of the reverse burden of proof pursuant to section 24 (a) of the Act on the element of 'abandoning litter'. Accused remained silent to the charge when the defence was called. It was the right of the Accused to do so. However, when there is a legal burden of proof casted on the Accused by section 24 (a) of the Act, remaining silent was not to the advantage of the Accused. Furthermore the Accused has failed to cast any reasonable doubt on the prosecution's case, after this court ruled that there was a *prima facie* case for the Accused to answer.

D. CONCLUSION.

31. Upon the evidence that was adduced during the course of the Hearing, this Court has safely found that the Prosecution has proved the charge against the Accused beyond reasonable doubt.
32. Accordingly I find that the Accused is guilty as charged and convict him on one count of depositing and abandoning litter in a public place contrary to section 10 (2) of the Litter Act 2008.
33. Accused is now invited to make submissions in mitigation and the Prosecution to make sentencing submissions.

29/03/2019.


L.K. Wickramasekara,
Resident Magistrate.

