

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC (FICAC) 2 OF 2014

BETWEEN : **FIJI INDEPENDENT COMMISSION
AGAINST CORRUPTION (“FICAC”)**

AND : **TIMOCI NAULU**

Counsel : **Ms F. Puleiwai & Ms L. Mausio for State
Mr E. Maopa for Accused**

Date of Hearing : **29th September 2016 to 30th September 2016
3rd October 2016 to 5th October 2016**

Date of Closing Submissions : **6th October 2016**

Date of Summing Up : **11th October 2016**

SUMMING UP

1. Madam and Gentleman assessors, you have heard the evidence adduced by the prosecution and the defence and also the respective closing submissions of the learned counsel for the prosecution and the defence. Now, it is my duty to sum up the case to you. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

2. Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case.
3. It is also my function to remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case. You and you alone must decide what evidence you accept, what evidence you do not accept and what evidence you are not sure about; and when you come to consider your opinion, you and you alone, must do that.
4. You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the accused has been proved. You will do that by having regard to the whole of the evidence including the material tendered as exhibits and forming your own opinion about the witnesses, and which evidence is reliable and which is not. The evidence consisted of the oral testimony of witnesses, both prosecution and defence and the material tendered as exhibits.
5. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. You have sworn an oath or affirmed that you will deliver a true opinion according to the evidence. Therefore you must decide this case only on the evidence which has been placed before you.
6. You must reach your opinion on evidence. Evidence is what the witnesses, both from the prosecution and the defence, said from the witness box, documents and

other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.

7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimonies, agreed facts and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.
8. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
9. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty

dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

10. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offences.
11. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
12. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused person's guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.
13. However, in certain instances, the law requires the accused to prove certain elements or facts of the offence, which is known as reverse onus. If the law places

the legal burden on the accused to prove certain elements or facts of the offence, then the accused is required to prove them on balance of probability.

Information

14. The accused is being charged with two counts of Bribery, contrary to Section 4(2) (a) of the Prevention of Bribery Promulgation No 12 of 2007. The particulars of the offences are before you. Therefore I do not wish to reproduce them in my summing up.
15. You may find that the two counts are founded on the same Section of the Prevention of Bribery Promulgation. However, the two counts constitute two distinguish elements. I now explain you the difference between the two counts. In the first count, the prosecution alleges that the accused solicited an advantage of FJD 5000 from the Complainant in order to drop the charges against the complainant. The second count is with regard to the acceptance of an advantage of FJD 200 and AUD 200 from the Complainant in order to drop charges against the complainant with the Border Police Station.
16. Accordingly, the main elements of the first count are that;
 - i) The accused being a public servant,
 - ii) Without lawful authority or reasonable excuse,
 - iii) Solicit an advantage of FJD 5000 as an inducement or reward,

iv) To drop two pending charges against the complainant with the Border Police Station,

17. In respect of the second count, the main elements are that;

i) The accused being a public servant,

ii) Without lawful authority or reasonable excuse,

iii) Accept an advantage of FJD 200 and AUD 200 as an inducement or reward,

iv) To drop two charges pending against the complainant at the Border Police Station,

18. I now draw your attention to the agreed fact, which are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to consider them as proven facts beyond reasonable doubt by the prosecution.

19. According to the agreed fact, both the parties have agreed that the accused was employed by the Fiji Police Force as an Acting Inspector of Police and was stationed at the Border Police Station as the Crime Officer. Hence, both of the parties have agreed that the accused is a public officer as defined under the Prevention of Bribery Promulgation.

20. They have further agreed that the accused was involved in the investigations against the complainant, Mr. Kamlesh Kumar during the time material to these charges. He had arrested Kamlesh on the 24th of September 2013. Subsequently,

he has met Kamlesh at the Crime Office of the Border Police Station on the 25th of September 2013. The accused has then met the Complainant at the "Chicken Bites" Restaurant on the 29th of September 2013, where he received sum of FJD 200 and AUD 200 from Kamlesh Kumar. Hence, both of the parties have agreed that the accused in his capacity as the crime officer at the Border Police Station had been involved in the investigations against Kamlesh. He then received FJD 200 and AUD 200 from Kamlesh at the "Chicken Bites" restaurant on the 29th of September 2013.

21. Accordingly the main disputed issue in respect of the first counts is that;

Whether the accused solicited FJD 5000 as an advantage from the Complainant in order to drop the pending charges against the Complainant?

22. In respect of the second count the main disputed issue is that;

Whether the accused received FJD 200 and AUD 200 at the Chicken Bits Restaurant in order to drop the pending charges against Kamlesh with the Border Police Station?

23. "Soliciting" means asking or trying to obtain something from someone. In this case if you are satisfied beyond reasonable doubt that the accused asked the complainant to give him FJD 5000, then the accused has performed an act of soliciting.

24. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused solicited the said advantage of FJD 5000 from Kamlesh to finish

off the pending charges against Kamlesh, then you have to consider whether the accused had a lawful authority or reasonable excuse to do so.

25. Likewise, if the prosecution proved beyond reasonable doubt that the accused accepted FJD 200 and AUD 200 from Kamlesh in order to finish off the pending charges against Kamlesh, then you have to consider whether the accused had a lawful authority or reasonable excuse to do so.
26. The burden of proving the existence of a lawful authority or a reasonable excuse is on the accused. The accused does not need to prove it beyond reasonable doubt. He is only required to establish in evidence that it is more probable that he had a lawful authority or a reasonable excuse. The burden of the accused is known as balance of probability.
27. The prosecution has charged the accused with two counts of Bribery. As judges of facts, you are required to consider each and every counts separately. If you found the accused is guilty of one count, that does not automatically make him guilty for the remaining counts.
28. I must advise you, do not consider the complainant as an accomplice by the reason he made the payment of the money to the accused.
29. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution

30. The first witness of the prosecution is Mr. Kamlesh Kumar. He is the complainant of this matter. He lives in Australia and came to Fiji for a vacation in July 2013. During the visit, he was arrested by the Border Police Unit for an allegation of forged passport. The officer who involved in that investigation was the accused, Acting Inspector of Police Timoci Naulu. He was the crime officer of the CID branch at the Border Police Station. I will now summarised the evidence given by Kamlesh.

31. Kamlesh met IP Timoci again in September 2013 when he was arrested at the Nadi International Air Port, while he was traveling to Australia. That was on the 24th of September 2013. He was detained at the Border Police Station and then at Namaka Police Station. During the period of his detention at the Border Police Unit, IP Timoci met Kamlesh in his office on the 25th of September 2013. IP Timoci told him that two criminal charges were still pending against him. He then asked Kamlesh to give him FJD 5000 and he will not charge him for those two pending cases. Kamlesh agreed to the said proposition. Timoci then said that they will not object him in the court.

32. Alvin Kumar, a friend of Kamlesh came to the Border Police Station to visit Kamlesh on the 25th of September 2013. He was also in the room of the accused with Kamlesh, when the accused came in to meet Kamlesh. Timoci told Alvin to leave the room as he was not allowed to be there. While Alvin was walking out, he heard Timoci asking FJD 5000 in order to drop the charges against Kamlesh.

33. The following morning, that was on 26th of September 2013, Kamlesh called Timoci while he was detained in the Border Police Station, to inquire the time that the police was planning to produce him in court. Kamlesh was allowed to keep his mobile phone with him during his detention at the Border Police Station. IP Timoci was using two mobile phones at that time, one was his official phone and other one was his personal phone.
34. Kamlesh was produced before the Magistrate's court on the 26th of September 2013 and granted bail. When Kamlesh came out of the court, Alvin asked him why was Timoci asking FJD 5000. He told Alvin about Timoci's request. Alvin told Kamlesh not to give him money.
35. At the same time, Timoci called him and asked about the money .Timoci called him again and he recorded the said telephone conversation using the phone of Alvin. He has recorded two telephone conversations that have taken place between him and Timoci on the 26th of September 2013. Both of these occasions, Timoci used his personal phone number to called Kamlesh. Likewise Kamlesh recorded two more telephone conversations he had with Timoci on the 27th of September 2013. The recording of those four conversations and the transcripts of them were tendered as prosecution exhibits and are before you.
36. Kamlesh went to FICAC and reported this matter on the 26th of September 2013. While he was making his complaint, Timoci called him and it was heard by the FICAC officers as well. He received six calls from Timoci on the 26th of September 2013.

37. FICAC informed him that they will investigate his complain. The next day FICAC called him. He went to the FICAC office and told everything about this allegation to the boss as he referred in his evidence. FICAC called him again on the 29th of September 2013. They then arranged the operation at the "Chicken Bites" Restaurant in Nadi. Kamlesh went and withdrew FJD 200 from Alvin's bank account as he had no money at that time. He had AUD 200. He gave that money to an officer of FICAC. They photocopied it out and asked him to signed on it. FICAC gave him the money back and a recording device, which he kept in a bag. He was advised to record the conversation he was going to have with Timoci. Five or six FICAC officers were with him and they were stationed inside and outside of the restaurant.
38. While Kamlesh was waiting for Timoci at the restaurant, Timoci called him on his mobile phone and asked about the person who was standing beside him. He also asked about the FICAC van that was parked beside MH Namaka. When Timoci came, they both went inside the restaurant and purchased drinks. Timoci was happy when they went into the restaurant. He kept looking outside and asked Kamlesh whether he complained to FICAC. They then went to the corner of the restaurant and sat there. Timoci seated opposite to Kamlesh. Kamlesh explained him about his difficulties and told him that he has only FJD 200 and AUD 200. He asked about Kamlesh's commonwealth bank card. Timoci kept on telling Kamlesh to wait and wait. It was because he saw FICAC van had parked outside of the restaurant. Eventually they walked out from the restaurant. Timoci came out first and he was holding the money in his hand. Kamlesh signaled the FICAC officers by rubbing his head indicating Timoci received the money.

39. When FICAC officer's arrested Timoci, he kept on saying "not my money". Kamlesh in his evidence, identified the currency notes that he gave to FICAC officers for this operation with the respective serial numbers. Moreover, Kamlesh tendered the audio-recording of the conversation that took place at the Chicken Bites Restaurant as one of the prosecution's exhibits. He identified the voices found in the recorded conversation as his and Timoci's.
40. Timoci found Kamlesh's commonwealth bank card when he was checking his wallet at the Border Police Station. He then took Kamlesh to the ATM machine at the Air Port and found that it has AUS 50,000. Kamlesh said that it was his house loan money and he could not withdraw it. Kamlesh said Timoci asked money for him and for his family.
41. During the cross examination, Kamlesh explained about the nature of the two charges that are still pending against him in the court. Timoci has asked Kamlesh to give him FJD 10,000 on the 24th of July 2013. Kamlesh did not state about it during the evidence in chief. He has not told about it to his lawyers, as he did not want to get more trouble. Kamlesh said Alvin came to see him during the time that he was detained at the Border Police Station. According to the evidence given by Kamlesh, he has never made an offer to donate FJD 5000 to the Border Police Station.
42. During the cross examination, Kamlesh stated that Timoci did not ask him directly to give FJD 5000 in any of the four recorded telephone conversations. However, Timoci called him because he wanted the money. During the third telephone conversation, Timoci responded saying "yes' when Kamlesh said that he will give him the money. Timoci kept on saying wait and wait at the Chicken

Bites Restaurant before he received the money. Kamlesh did not pushed Timoci to take money. Timoci did not refuse the money, but kept on saying wait and wait. Kamlesh said that he did not bribe the accused at the Chicken Bites Restaurant. During the conversation Timoci warned him about bribes, but he still wanted the money. He just told Kamlesh to wait.

43. The mobile phone number used by Kamlesh during the time material to this matter was 9300688. During the four recorded telephone conversations, the accused has never mentioned about a donation. Timoci started to talk about donation only at the Chicken Bites Restaurant. Timoci has never told Kamlesh about the information that he wanted to gather from Kamlesh regarding his wife. At the Chicken Bites Restaurant, Timoci told Kamlesh "not now and talk for sometimes". Timoci told Kamlesh that there is nothing against him in the court, but with them he still have two clear cases pending. However, Timoci has never explained him about those two pending cases. Timoci never told Kamlesh not to give him money at the Chicken Bites Restaurant. He neither complained to any of the FICAC officers at the Chicken Bites Restaurant that Kamlesh was trying to bribe him.
44. The second witness of the prosecution is Alvin Kumar. He could recall that he received a call from Kamlesh on the 24th of September 2013, stating that he was arrested at the Nadi International Air Port by Border Police Unit. Alvin then went to Border Police Station and visits him. He visited Kamlesh again on 25th of September 2013 and met Kamlesh in a room at the Border Police. When he went into the room it was only Kamlesh was inside. Within less than a minute, Timoci came into the room and asked Alvin to leave the place as he was not allowed to be there. While he was leaving the room he heard Timoci asking Kamlesh to give

him FJD 5000 and he will finish off the pending cases against him. He saw Timoci was angry and banged on the table. During the cross examination Alvin explained that he did not actually see, but only heard the sound of Timoci banging on the table.

45. On the following day, Alvin asked Kamlesh about the conversation he heard. That was after Kamlesh was granted bail by the court. At the same time, Timoci called on Kamlesh's mobile phone and asked him money. Alvin told Kamlesh not to give him money. He further told Kamlesh to record the calls coming from Timoci and he can then produce them to FICAC. Alvin then started to record the calls coming from Timoci using his I-phone. Both of them then went to FICAC and reported the matter on the 26th of September 2013. He went to FICAC office again on the 29th of September 2013. He withdrew FJD 200 from his bank account and gave it to Kamlesh. Kamlesh gave that money together with AUD 200 to the FICAC officers.
46. During the cross examination, Alvin explained about his visit to the Border Police Unit on the 25th of September 2013. He said that he is telling the truth about what he heard. He explained that he told the FICAC officers about everything he heard, when he made his statement on the 29th of September 2013. Alvin could not recall what informations contain in the recorded telephone conversations, but could confirm that he recorded them in his phone.
47. The third witness of the prosecution is Mr. Jope Ralulu. He was the Deputy Police Commissioner, Western in the year 2013. He supervised all the police stations from Sigatoka to Rakiraki, including the Border Police Unit. He knew all the officers who were attached to Border Police Station in the years 2013. IP

Timoci was in-charge of the crime unit, known as CID. Mr. Ralulu in his evidence explained about the procedure of conducting an operation in the police. It starts with an operation order and then have a meeting to discuss about the plans and tasking of the officers. Then the operation is being carried out. Senior officers need to be informed when conducting an operation involving of bribery or serious crimes.

48. Mr. Ralulu recalls that he met IP Timoci on the 27th of September 2013, where he advised him in respect of his duties and responsibilities. He received a SITREP, that is the situation report regarding a driving license used by Kamlesh Kumar. Timoci did not inform him about any donation during that meeting.
49. Mr. Ralulu explained about the procedure of receiving any donation to the Police Department. The approval of the Police Commissioner is required to receive any form of donation to the police department pursuant to the Force Standing Orders. Normally more than 2 or more officers are required to conduct an operation by the police. The nature of the operation determines the number of the officers involved in it. If an officer was offered any bribes by someone, he has to report is immediately. Then another officer must conduct the investigation on such allegation. IP Timoci never informed him about Kamlesh was trying to donate FJD 5000 to the Fiji Police Force when he met him on the 27th of September 2013. Mr. Ralulu was not aware about any operation conducted by IP Timoci against Kamlesh on the 29th of September 2013.
50. During the cross examination Mr. Ralulu explained about the appointments and promotions earned by Timoci during his career in the Police Department. He then explained about the chain of communication in the Police Force. He further

explained that IP Timoci could not directly communicate with him. Timoci has to first communicate with his Commanding Officer at the Border Police Station. Usually the Deputy Commissioner of Police is being briefed about the operations in the Western Division on every Monday.

51. In his re-examination Mr. Ralulu said that it would not take more than 24 hours to reach any communication to his office, if Timoci wanted to communicate with him through the accepted chain of communication.
52. The fourth witness of the prosecution is Mr. Manasa Talala. I will now summarised the evidence presented by Mr. Talala.
53. He was the Divisional Crime Officer - Western in the year of 2013. He has supervised the overall investigations of the police stations in the Western Division, which includes the Border Police Station as well. Previously, he was the commanding officer of the Border Police Station in the year 2011. He explained that all of the operations at the Border Police Station are controlled by the Commanding Officer- Border. He seeks direction from the Divisional Police Commander Western. In respect of the investigations done by the CID department, the Crime Officer - Border who heads the CID department advices or brief the Commanding Officer- Border. Commanding Officer would then brief the Divisional Crime Officer-Western.
54. The nature of the operation in a bribery case depends on the Crime Officer and the manner he carried out the operation. He could either seek advice from the Divisional Crime Officer or do it on his own and advice the Divisional Crime Officer later. If he decided to carry it out on his own, he must advice his

Commanding Officer and deals it with the officers under his command. However, the Crime Officer cannot conduct such operation alone.

55. Mr. Talala in his evidence stated that he was aware about the investigation against Kamlesh Kumar regarding a false complaint lodged at the Nadi Police Station. It was briefed to him through telephone calls. He has also visited the police station to see the said report. He has not received any other report regarding Kamlesh Kumar. He went to the Border Police Station and spoke to IP Timoci, the crime officer. Mr. Talala said that Timoci did not tell him reading a report of bribery in respect of Kamlesh Kumar. Neither about that Kamlesh wanted to donate money to the police.
56. The proper procedure of receiving donation to the police has been stipulated under Force Standing Orders. The Commissioner of the Police has to approve any donation to the Police Department. It is not a proper thing to receive donation from a suspect. He was not aware of any bribery operation conducted by Timoci against Kamlesh Kumar on the 29th of September 2013. Timoci was using the mobile phone number of 9905884, that was his official mobile phone, which he used to communicate with Mr. Talala.
57. During the cross examination, Mr. Talala said that Kamlesh did not complain him about any bribery request made by Timoci when he visited the Border Police Station on the 25th of September 2013. When he visited the Border Police Station, Kamlesh was being interview by the police. Mr. Talala explained that the Border Police Unit conducts operation to gather intelligence. He was not aware that IP Timoci was conducting such an operation to gather intelligence against Kamlesh when he was arrested on the 29th of September 2013.

58. Mr. Talala explained the procedure of conducting operation of intelligence gathering. Any police officer who conducts such operation has to record the information gathered in their official note book. He did not receive any verbal briefing that Timoci was conducting such intelligence gathering.
59. The fifth witness of the prosecution is Mr. Avneel Prasad. He is a commission officer of FICAC and presently attached to Lautoka office of the FICAC. He is the investigation officer of this matter. He explained the general duties of the investigation officer in an investigation of this nature. He was called into a briefing by their Chief Investigation Officer on the 29th of September 2013 and explained about this complain made by Kamlesh Kumar. During the briefing, he was appointed as the investigation officer and other officers were given other specific task in the investigation. Subsequently, Kamlesh Kumar was called in and he explained them about the nature of his complaint. Kamlesh then gave him FJD 200 and AUD 200 and audio - recordings of four telephone conversations that have taken place between Kamlesh and the accused. Avneel then photocopied the money and gave the original currency notes back to Kamlesh. He then asked Kamlesh to sign on the photocopies in order to confirm that he was going to give the same currency notes to the accused. Moreover, Avneel gave Kamlesh a recording device and instructed him to record the conversation that he was going to have with the accused.
60. Kamlesh left with the money and recording device. He then called the FICAC officers and informed them that he was going to meet the accused at Chicken Bites Restaurant. He was advised to signal them when the money was given to the accused. They then went to Chicken Bites Restaurant. Avneel went into the restaurant with three of FICAC officers. They were SCO Umit Singh, SCO

Sokoveti Lutua and Tomasi. They sat inside the restaurant and waited for the complainant to come with the suspect.

61. Kamlesh and Timoci then came into the restaurant and sat at the table which was near to the door and to the TV. He could see Kamlesh, but could only see the right side of the face of Timoci. He did not hear the conversation of the accused and the complainant as the inside of the restaurant was very noisy. Timoci appeared worried when he came in. He continuously stood up and went out as he was checking something. He repeatedly did it for about five times. He repeatedly looked at FICAC officers who were seated inside the Restaurant. Timoci did not approach any of FICAC officers and complain to them about that Kamlesh was offering him bribes. They sat there for about an hour. Kamlesh then gave them a signal and officers then went and arrest the accused. Timoci was arrested as he was walking out of the restaurant. He was hostile and pushed the arresting officers. Somehow they managed to take him back to the restaurant. He kept on saying that you set me up and not my money. SCO Umit Singh then seized the money that were on the table and handed them over to Avneel at the FICAC office when they returned.
62. He reached back to Lautoka around 5.10 p.m. The accused was escorted in another vehicle. They also reached to the office as of same time as Avneel did. Avneel did not see how the money came on to the table when it was seized by Umti Singh. He was trying to video record the incident of arrest. When he returned to the office, he followed the normal procedure and formalities of entering notes in their notes books. He then made a search list. He checked and found the money seized by Umit Singh was the same money that he photocopied before the operation. Once he finished the search list, he gave it to the accused to

sign it. Avneel then recorded the statement of Kamlesh and then listened to the recorded conversations and made the transcript of them. He put his signature on each of the transcripts after he made the declaration.

63. Avneel then obtained the history of the call records of the mobile phones used by the accused and Kamlesh. The accused was using two mobile phones, one was his official phone, that was 9905884. The second phone was his personal phone, that was 8425260. Kamlesh's mobile phone number was 9300688. Avneel in his evidence explained the number of times the accused has called on the mobile phone of Kamlesh. Timoci has used his personal mobile phone to call Kamlesh during the period between 25th of September 2013 and 29th of September 2013. He has never called Kamlesh using his official mobile phone. Kamlesh has called few times on the official mobile phone of the accused during the said period. These call records have been tendered as exhibits of the prosecution.
64. Avneel stated that the evidence gathered during the investigation confirmed that the complaint made by Kamlesh was true. Avneel has made an affidavit in order to tender in court during the hearing of the application made by the accused on the ground of entrapment. He stated that the accused was not entrapped. He was never induced directly or indirectly to commit the offence.
65. Moreover, Avneel in his evidence stated that it was revealed that no operation was being conducted by the accused on the 29th of September 2013 against Kamlesh in respect of bribery allegation. He neither found any donation was made by Kamlesh to the Border Police Station on the 29th of September 2013.

66. During the cross examination of Avneel, it was revealed that the statements of the complainant and the other witnesses were recorded after the arrest of the accused on the 29th of September 2013. He explained the structure of the FICAC, where it has a separate department to receive complaints. Once the complaint went through the proper channel and the deputy commissioner gave his direction to proceed with the investigation, the investigation department commence the investigation. Before the operation was carried out, he investigated the recordings of the telephone conversations and the money brought by the complainant for the operation. He first met the complainant only on the 29th of September 2013.
67. Avneel was tasked to take video recording of this alleged money transaction, but he was not able to video record it. He explained that the condition inside the restaurant did not allow him to video record the incident as the accused is an experience police officer and it might jeopardise the operation. He said he did not see Kamlesh was giving the accused money. He only saw the signal given by Kamlesh. Avneel further said that SCO Jone Cama carried out a search at the office of the accused at the Border Police Station and found a Collin's diary. He is aware of this diary but did not go through it as SCO Sokoveti investigated the contents in the said diary.
68. During the re-examination Avneel stated that he did not see any money on the table when the accused was arrested.
69. The last witness of the prosecution is Sokoveti Lutua. She is a senior commission officer of FICAC and presently attached to FICAC office of Lautoka. She could recall that she was called for a briefing about this matter on the 29th of

September 2013. She was asked to witness the transaction that was going to take place between the complainant and the accused at the Chicken Bites Restaurant with three other FICAC officers. She was further tasked to take photographs of the incident. They then proceeded to Chicken Bites Restaurant and seated inside it. She was with officer Tomasi Momoivalu. Avneel and Umit were seated together at another table. The accused appeared suspicious and worried when he was walking into the restaurant. He walked out and in about five times. She did not hear the conversation they had. She saw two uniform police officers were standing near the bus stop outside the restaurant. Accused did not go and speak to them at any time during the period of this operation. He neither came to any of the FICAC officers and complain about hat Kamlesh was offering him bribes.

70. When Kamlesh gave them the signal, SCO Umit went and arrested the accused, as he was just waking out of the restaurant. Accused first walked out and he was followed by Kamlesh. At the time of the arrest, the accused was holding the money and he threw it to the table when he was arrested. The accused was aggressive and wanted to run away from the scene. He said that it was not his money and told the complainant that you set me up. Subsequent to the arrest, the accused was escorted to the FICAC office at Lautoka.
71. She then participated in a search in the evening. Subsequently, she conducted the caution interview of the accused. The caution interview commenced at around 2329 hours of the 29th of September 2013 and lasted for three days, concluding it on the 1st of October 2013. Ms. Sokoveti explained that FICAC had sufficient evidence to commence the caution interview of the accused at that time. They witnessed the accused receiving money from the complainant and also had four recordings of the telephone conversations that have taken place between the

accused and the complainant. During the course of the interview, they have verified the information provided by the accused. FICAC conducted a search at his office and obtained a diary, which the accused mentioned during the caution interview. She in her evidence, then explained the questions that she posed to the accused regarding the entries made by him in the said diary and the answers given by the accused for them in the caution interview. Investigation Officer Mr. Avneel verified from Deputy Commissioner of Police (Western), Divisional Crime Officer (Western), and the officers at the Border Police Station whether the accused had actually conducted an operation against Kamlesh regarding any bribery or any donation promised by Kamlesh.

72. During the cross examination, Ms. Sokoveti said that the verification was initially done by contacting the officers in person. Subsequently, their statements were recorded. She was questioned about the entries made by the accused in his diary on the 22nd of July 2013, 23rd of July 2013, 25th of July 2013, 24th of September 2013, 25th of September 2013 and 28th of September 2013 respectively. She explained the entries made by the accused on those respective dates in his diary. She stated the accused was produced before the court within 48 hours of his arrest.
73. During the re-examination, Ms. Sokoveti stated that apart from the days questioned by the learned counsel for the accused during the cross examination, the accused has not made any entries regarding any of operation involving the complainant in his diary.

Evidence of the Defence

74. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused persons opted not to give evidence on oaths. However, he called two witnesses for his defence.
75. The first witness of the defence is Constable Filipe Ratini. He is a police officer who presently works at the CID branch of the Border Police station. The accused was the head of the crime department in 2013. On the 24th of September 2013, they received a report against Kamlesh Kumar and Corporal Filipe was appointed as the investigation officer for that report. He interviewed Kamlesh at the Border Police Station inside a 6x 6 meter room. While he was interviewing Kamlesh, he overheard a conversation between Kamlesh and Timoci where Kamlesh was trying to donate FJD 5000 to the Border Police Station. Kamlesh had another matter as well with the Border Police Station and it was investigated by PC Navin.
76. He was at the Border Police Station at around 2p.m. on the 29th of September 2013. He found that he had received few calls on his mobile phone from Timoci. His mobile phone was on silent mode. He did not call him back as he had no funds to call. He explained that normally Timoci gave them instruction in writing. Kamlesh has only two pending cases and they are still pending in the court.
77. During the cross examination Corporal Filipe was questioned about the inconsistent nature of his statement made to the FICAC on the 30th of September 2013 with the evidence he gave in court. In his statement he had stated that he

heard from Timoci during a casual conversation they had at the Border Police Station that Kamlesh wanted to give some donation to the Border Police. Corporal Filipe said that he told the FICAC officer about what he heard from Timoci about the donation. He further said in his evidence that he told Kamlesh that he could not make any donation as he was a suspect when he heard the conversation about the donation. This conversation has also not been recorded in his statement made to the FICAC. He initially said that he informed the learned counsel for the prosecution about this version of event, but later he changed his position and said he did not inform the learned counsel as he claimed before. Corporal Filipe further explained that actually the interview he had with Kamlesh on the 24th of September 2013 was not under caution. It was just a verbal interview and no recording was made out of it.

78. Corporal Filipe further stated that he was aware that Timoci was conducting an operation to gather intelligence about the donation offered by Kamlesh. There was no formal complaint being made against Kamlesh, that he was trying to bribe on the 29th of September 2013. Timoci told Filipe and Corporal Williame about this intelligence gathering about Kamlesh. He said that a police officer cannot receive money from a suspect during the intelligence gathering.
79. The second witness of the Defence is Acting Inspector of Police Nitya Gounder. He is presently attached to Border Police Unit. He is the head of the Administration Department of the Border Police Station. IP Gounder in his evidence stated that he could recall that he met Timocii at the crimes office on the 28th of September 2013 with two other officers. During that meeting, IP Timoci told them that Kamlesh wanted to give him some money. Timoci further told them that he informed Kamlesh that he can give the money to the Commanding

Officer, but Kamlesh was insisting Timoci to receive the money. IP Gounder knew that Kamlesh has a matter with the Border Police Station. He warned Timoci to make a report if Kamlesh insists him to accept the money. However there was no such report made against Kamlesh. He was not aware of any operation conducted by Timoci on the 29th of September 2013.

80. IP Gounder further stated that sometimes, even one officer could conduct an operation. An officer cannot accept money from the source of the information during the intelligence gathering. He further explained that if an officer conducts an operation he has to record it either in the station diary or his official note book.
81. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis and Directions

82. You have heard the evidence presented by the prosecution and the defence. Prosecution claims that the accused solicited financial advantage from Kamlesh in order to finish the pending investigation against him with the Border Police Station. The accused then went to the Chicken Bites Restaurant on the 29th of September 2013 and received FJD 200 and AUD 200 from Kamlesh in order to drop the pending investigation against him with the Border Police Station.

83. In contrast, the accused claimed Kamlesh wanted to donate money to the Border Police Station. He then started an operation by his own to arrest Kamlesh when he was going to give that money.
84. The prosecution and the defence presented evidence in the forms of
- i) Direct Evidence,
 - ii) Circumstances evidence,
 - iii) Documentary evidence and recorded materials,
85. The direct evidence is the evidence of a person who saw, heard and/or felt the offence being committed. This evidence may directly prove a thing or fact.
86. If a Witness who actually did not see, hear or feel the offence being committed, but gives evidence of relevant circumstances and the events, from which you are able to make certain conclusion or inference of the commission of the offence, are considered as circumstantial evidence. If you find such evidence is reliable, then you are allowed to make an inference of the existence of another fact. You need to be careful that such inferences should certainly and only find the accused is guilty of the offence. If the circumstances or the event established by evidence suggest you some other probable circumstances or inferences as well, which show the innocence of the accused or creates doubts as of his guilt or innocence, you are not entitled to draw any inference of guilt of the accused person.
87. The evidence presented in the form of documents is considered as documentary evidence. The evidence can be presented in other forms of recorded formats. In

this case, the prosecution tendered audio recording of the conversations that took place between the Complainant and the accused. They have been stored in a compact disc.

88. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused have committed the two offences, you have to consider the credibility of the witnesses, and the reliability of their evidence. In doing this, you have to consider the witnesses from both the prosecution and the defence. 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
89. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that, you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
90. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence.

91. In considering the evidence, you must bear in your mind that the questions posed by the counsel to witnesses are not evidence unless the said witness adopted or accepted the proposition posed by the counsel in such questions.
92. You might recall that the learned counsel for the prosecution and the accused proposed you in their respective closing addresses, to consider the inconsistent nature of the evidence given by certain witnesses with the previously made statements to the police by them.
93. I will now explain you the purpose of considering the inconsistent nature of the evidence given by a witness in court and the previously made statement by the same witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness.
94. The evidence is what a witness told us in court on oath/affirmation. If you are satisfied that a witness had made a statement which is in conflict with his evidence given in court, you are allowed to take into account that inconsistency when you determine the credibility and reliability of the evidence given by the witness.
95. In examining such suggested inconsistencies, you have to first determine whether there is in fact and in true context, an inconsistency; and if you decide that there is one, then you have to decide whether it is material and relevant or, on the other hand insignificant or irrelevant. If there is an inconsistency, it might lead you to conclude that the witness is generally not to be relied upon; alternatively, that a part only of his evidence is inaccurate; or you may accept the

reason he has provided for the inconsistency and consider him to be reliable as a witness.


96. In considering the inconsistencies as explained, you have to consider that the passage of time will affect the accuracy of memory. Memory is fallible and you might not accept every detail to be the same from one account to the next.
97. Having considered whole of the evidence presented during the course of the hearing, if you are not satisfied that the prosecution has proven beyond reasonable doubt that the accused solicited FJD 5000 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station, you must find the accused is not guilty for the first count and acquit him accordingly,
98. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused solicited FJD 5000 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station, still you have to consider whether the accused has established on balance of probability, that he had a lawful authority or a reasonable excuse to solicit the said advantage. If you are satisfied that the accused has established on balance of probability, that he had a lawful authority or a reasonable excuse, you have to find the accused is not guilty for the first count and acquit him accordingly.
99. Likewise, Having considered whole of the evidence presented during the course of the hearing, if you are not satisfied that the prosecution has proven beyond reasonable doubt that the accused accepted FJD 200 and AUD 200 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station, you

must find the accused is not guilty for the second count and acquit him accordingly.

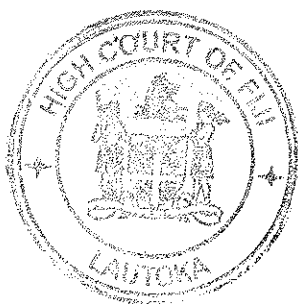
100. In a like manner, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused accepted FJD 200 and AUD 200 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station, still you have to consider whether the accused has established on balance of probability, that he had a lawful authority or a reasonable excuse to solicit the said advantage. If you are satisfied that the accused has established on balance of probability, that he had a lawful authority or a reasonable excuse, you have to find the accused is not guilty for the first count and acquit him accordingly.
101. Having considered whole of the evidence presented during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused solicited FJD 5000 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station without any lawful authority or reasonable excuse, then you have to find the accused is guilty for the first count.
102. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused accepted FJD 200 and AUD 200 from Kamlesh Kumar in order to finish his pending charges with the Border Police Station without any lawful authority or reasonable excuse, then you have to find the accused is guilty for the second count .
103. Madam and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinion on the

charges against the accused. Each of you have taken an oath or affirmation to return a true opinion according to the evidence. This is a responsibility you must fulfill. Each of you takes into this penal of assessors your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening and giving due consideration to the views of others. There must necessarily be a discussion and debate, as a result of which an individual may be persuaded to accept a view which he or she did not previously hold. But, of course, you must at all times stay true to your oath or affirmation to give a true opinion according to the evidence.

104. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
105. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
11th of October 2016



**Solicitors: Office of the Fiji Independent Commission against Corruption
Messrs Babu Singh & Associates for the Accused person**