Pacific Judicial Officers' Handbook on

Fraud and Corruption Offences

PJIP | Pacific Judicial Integrity Program

FEDERAL COURT OF AUSTRALIA

Papua New Guinea Centre for Judicial Excellence

Australian Government

Department of Foreign Affairs and Trade

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Introduction

This Handbook is a resource for judicial officers in Federated State of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga and Vanuatu. Divided into three parts, the Handbook is intended to provide a practical and useful tool to support judicial officers considering fraud and corruption cases in their respective jurisdictions:

1. **Generally applicable principles and concepts** related to Fraud, Bribery, Corruption, Money Laundering and Proceeds of Crime offences as well as International Co-operation (Mutual Assistance and Extradition) and Criminal Asset Confiscation provisions. The section provides an overview, references and where appropriate, links to further information. The information has been drawn from the Pacific Judicial Integrity Program's Judicial Officers' curriculum.
2. **Overview and comparative analysis of legislative provisions on fraud and corruption related offences in each jurisdiction.**
3. **Jurisdiction-specific guide to offences and jurisprudence.** This section provides a detailed analysis of the elements of related offences. It includes notes on jurisdiction-specific legislation and jurisprudence. Legislation and cases are hyperlinked where publicly available.

Use and Support

This Handbook is available online. It may be used electronically, or sections may be printed.

Helen Burrows
Director, International Programs

Federal Court of Australia

Abbreviations

A Crim R	-	Australian Criminal Reports
AC	-	Appeal Cases
ADP	-	Asian Development Bank
AFP	-	Australian Federal Police
AUSTRAC	-	Australian Transaction Reports and Analysis Centre
CACT	-	Criminal Assets Confiscation Taskforce
CAP	-	Chapter
CC	-	Criminal Code
CLR	-	Commonwealth Law Reports
CPO	-	Commonwealth Public Official
Crim App R	-	Criminal Appeal Reports
Cth	-	Commonwealth
DPP	-	Director of Public Prosecutions
FCA	-	Federal Court of Australia
FIU	-	Financial Intelligence Unit
FTR	-	Financial Transactions Reporting Act
GST	-	Goods and Services Tax
HCA	-	High Court of Australia
ILPOCS	-	Integrated Local Purchase Order Claims
IOJT	-	International Organization for Judicial Training
IRAC	-	Issues, Rule, Analysis, Conclusion
MACMA	-	Mutual Legal Assistance in Criminal Matters Act
MAR	-	Mutual Assistance Requests
MIRC	-	Marshall Islands Revised Code
MLA	-	Mutual Legal Assistance
N	-	Papua New Guinea National Court of Justice
NCD	-	National Capital District
NSWCCA	-	New South Wales Court of Criminal Appeal
NSWLR	-	New South Wales Law Reports
OECD	-	Organisation for Economic Co-operation and Development
PILON	-	Pacific Islands Law Officers' Network
PNGDF	-	Papua New Guinea Defence Force
PNGLR	-	Papua New Guinea Law Reports
POCA	-	Proceeds of Crime Act
QB	-	Queen's Bench
QCA	-	Queensland Court of Appeal
Qd R	-	Queensland Reports
QSC	-	Queensland Supreme Court
QWN	-	Queensland Weekly Notes
SBCA	-	Solomon Islands Court of Appeal
SC	-	Supreme Court

SCR	-	Supreme Court Reports
StAR	-	Stolen Asset Recovery
UNCAC	-	United Nations Convention Against Corruption
UNDP	-	United Nations Development Programme
UNODC	-	United Nations Office on Drugs and Crime
UN-PRAC	-	United Nations Pacific Regional Anti-Corruption Project
VR	-	Victorian Reports
VSC	-	Victoria Supreme Court
VUCA	-	Vanuatu Court of Appeal
VUSC	-	Supreme Court of Vanuatu
WLR	-	Weekly Law Reports (UK)
FATF	-	Financial Action Task Force
AML	-	Anti-Money Laundering
CFT	-	Counter-Terrorist Financing
LSJS	-	Law Society Judgment Scheme (South Australia)
SASR	-	South Australian State Reports

Part 1

General Principles and Concepts

Part One: General Principles and Concepts

Judicial Ethics

Session 1: Judicial Ethics (fedcourt.gov.au)

Drawn from papers presented by Chief Justice Sir Gibbs Salika, Supreme and National Courts of Papua New Guinea, and Justice Rangajeeva Wimalasena, President of Nauru Court of Appeal, as part of the PJIP's fraud and corruption workshops.

The judiciary performs a vital role in democratic societies. It ensures the fair and impartial application of the law, protects individual rights, and maintains integrity in the rule of law. Judicial ethics are a specialised framework of rules and standards that govern a judicial officers' behaviour both inside and outside of court and are the bedrock upon which public trust in the justice system rests. Judicial ethics have existed for centuries. Articulated in ancient Roman law, canon law in medieval Europe, and broadly among common law traditions.

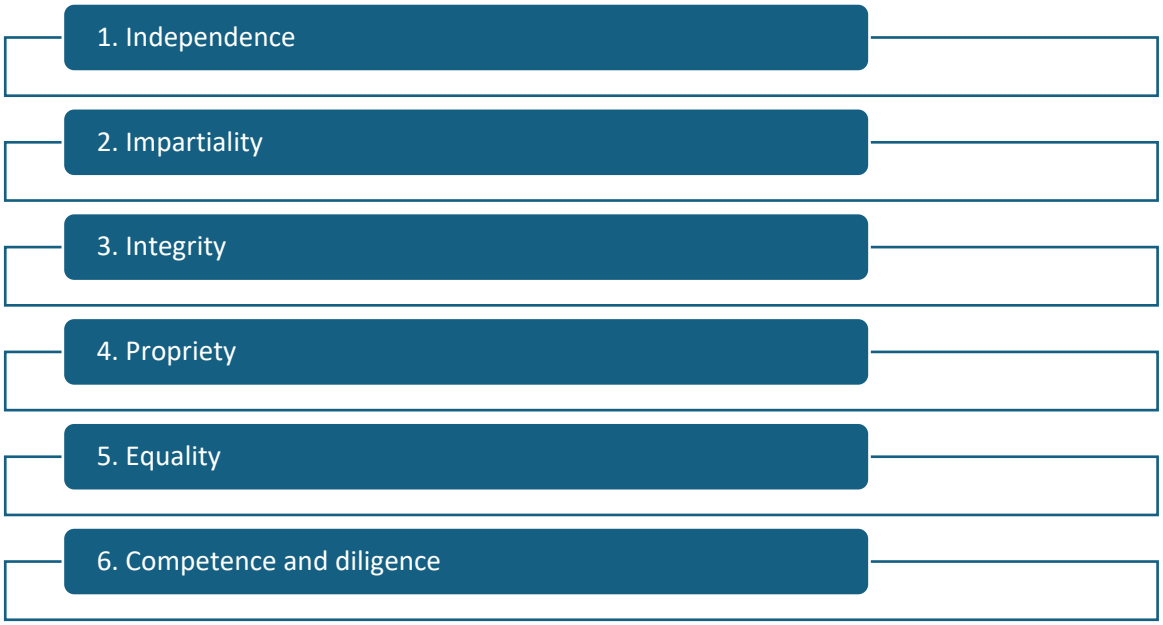
The Bangalore Principles

To create a globally harmonised approach to and standard of judicial conduct, a guiding framework was developed and adopted in 2002. Known as the Bangalore Principles of Judicial Conduct, they focus on impartiality, independence, integrity, fairness and transparency. The Principles have been adopted by all Pacific members of the United Nations, many of which have transposed them into domestic codes of judicial conduct – Federated States of Micronesia, Fiji, Papua New Guinea, Kiribati, Niue, Vanuatu, Republic of the Marshall Islands, Tonga, Tuvalu and the Solomon Islands.

The Principles were devised and adopted by the United Nations Judicial Integrity Group. They were accepted and endorsed by the United Nations (UN) in 2003.

The Principles are not legally binding or enforceable but offer guidance.

There are six Bangalore Principles that are expressed as values:



Principle 1: Independence

The concept of judicial independence forms part of the Doctrine of the Separation of Powers i.e. each branch of government is separate from each other – the judiciary, the legislature, and the executive. It is intended to ensure that there is a check on and balance to state power to guard against tyranny and preserve liberty.

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. As a judicial officer you must uphold and exemplify judicial independence in both its individual and institutional aspects.

How does a judicial officer ensure they are acting independently?

For the individual, judicial independence requires that the facts of each case are assessed and the law applied free of any extraneous influences, inducements, pressures, threats, or interference, direct or indirect, from anybody or for any reason.

You have an obligation to be independent in relation to society in general and in relation to the particular parties to a dispute which you must adjudicate. You must be free from any inappropriate connections with the other arms of government, i.e. the legislature and the executive; the parties to a case before you or their legal/other representatives

In performing judicial duties, you must be independent of judicial colleagues with respect to decisions. You can still talk with a colleague on a hypothetical basis. However, judicial decision-making is your individual responsibility.

Principle 2: Impartiality

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decisions you make but also to the process by which those decisions are made. You must perform your duties without favour, bias, or prejudice.

How does a judicial officer ensure they are acting impartially?

Refrain from ever making any comments, taking any actions in court, in public or to the media (including any social media platforms you might participate in) that might impair, or be perceived to impair, the fairness of the judicial process. Even when the case is concluded, it would be inappropriate for you to communicate with disappointed litigants. Generally, it is also inappropriate for you to defend judicial reasons publicly and private communications between a judicial officer and any legal representatives during a case are prohibited.

Impartiality requires more than the omission of such statements and actions however, extending to include a positive responsibility to:

1. Inform all parties and include in the court record any communication received ex parte from a party, a witness or a juror, any other party or their legal/other representatives; and
2. Consideration of whether you might be presenting any visible demeanour (i.e., body language) that might be reasonably construed as demonstrating some level of bias against one party to a case before you.

Political activity

All partisan political activity and association should cease when you become a judicial officer. Partisan actions and statements involve a judicial officer publicly choosing one side of a debate over another. Such activity may undermine impartiality and lead to public confusion about the nature of the relationship between the judiciary, the executive and legislative branches.

As a judicial officer you should not be a member of a political party and should not make any comments publicly, to the media, including any social media platforms, about political issues and debates.

Disqualification

You should disqualify (recuse) yourself from hearing any proceedings in which you are unable to decide the matter impartially or in which it may appear, to a reasonable observer, that you are unable to decide the matter impartially.

Some examples of situations where a judge should disqualify themselves include, but are not limited to situations where you:

- have previously served as counsel or a witness in the matter currently under adjudication
- have strong opinions or beliefs, or have made statements about individuals or issues involved in the case
- have been involved in ex parte communication with one party
- or a family member has a direct or indirect financial interest in the outcome of the case
- are in an intimate relationship with one of the counsel in the case
- have any other real or perceived direct or indirect conflict of interest.

Unconscious Bias

Judicial officers spend considerable time consciously avoiding personal biases and prejudices in the discharge of their functions and responsibilities. However, being truly impartial is far more complicated than we realise. The reason is the existence and operation of biases and prejudices that we are unaware of. These are called **unconscious biases**.

Unconscious biases may prevent a judicial officer from acting impartially and come from a suite of associations developed during our lives triggered through implicit mental processes beyond our conscious awareness. They can potentially impair our ability to reach correct decisions.

Recognising the existence and possible influence that unconscious biases can have on judicial decision-making, provides us the opportunity to carefully consider all aspects of a decision, which in turn allows us to reach the most correct outcome. Recognition is the first step toward seeking to eliminate whatever improper influences they might bring to the decision-making process.

Unconscious biases are a normal part of human brain function. We are unaware of them. Biases begin to form during our formative years when we learn to associate items that commonly go together - thunder and rain, or grey hair and older people. We learn to expect them to co-exist in other settings - which sometimes they do, and sometimes, they do not.

These biases are relevant to judicial officers as they can emerge in your decision making and produce behaviours and responses that do not align with our avowed beliefs and principles accumulated throughout our lifetime. Many will have formed when we were young from what we saw, heard, and experienced within our families, upbringing, teachers, friends, peers, community, and others. Our experiences were infused with layers and generational knowledge, assessments, opinions, and judgments about all facets of life and the people within it. Invidious biases may form from structural inequalities defined by gender, religion, ethnicity, and social class.

Governments try to remedy these inequalities through policies and law e.g. anti-discrimination statutes or affirmative action policies - which we must then enforce in our courts. Another example is gender inequality issues, which become entrenched through our societal or cultural norms.

Types of Unconscious Biases

We all hold biases. They are not uniform. They vary greatly in nature, magnitude, and impact. They may prevent judicial impartiality. Below are listed some common types of unconscious biases that may impact judicial decision making.

Confirmation bias. It is human nature to seek out evidence to support our preliminary theory when trying to solve a problem. We do it all the time. It is called confirmation bias. As a judicial officer you should make every effort to resist this bias whether considering written evidence or oral testimony.

Anchoring bias. Describes the common human tendency to rely too heavily on the first piece of information offered ("the anchor") when making a decision. Anchoring occurs when individuals use an initial piece of information to make subsequent judgments. For example, two suits on sale marked Kina 800, but one is reduced from Kina 1800. Many will have a favourable bias towards the reduced item due to its higher initial price - the anchor - and will buy it thinking they are getting a better deal. Irrespective of whether the reduced-price suit is in fact the best product/purchase.

Anchoring bias is relevant to our work as judicial officers. An example is found in research into sentencing decisions. Research among a group of German trial judges found that the judges were influenced by the sentencing recommendations made by the prosecutor. They found that where longer sentences were recommended, they were often given and, vice versa.

In Group Bias. This is the phenomenon of favouring members of our own group, or a group we identify with, over members of a group that we do not identify with. This manifests as trusting others in your group or inferring positive attributes to them – such as those you confer on yourself. On the flip side – you may be more likely to distrust or accept negative characteristics to those who are not in your group. For example, a judicial officer might inadvertently consider the testimony of a police officer as more credible than that of a convicted felon.

Racial, ethnic, gender and religious biases are forms of this bias. One might attach negative assumptions to races, ethnicities, and social groups with gender biases. If we associate different genders with their traditional roles – such as women historically being considered responsible for taking care of the home and children, rather than pursuing careers - we may not treat people fairly in the dispute resolution process or its outcomes.

Over Confidence Bias. This relates to the view we privately hold about ourselves. We may tend to be more confident in our own ability than is objectively reasonable. We may assume because we are intelligent, well educated, wise and make decisions according to law and a strong moral compass, we will make the right decisions.

As judicial officers, we should be confident in our knowledge of the law and our skill to apply it, but this assumption cannot automatically extend to confidence in our attitudes. If we do so, it can cause us to act without adequate reflection. We cannot be overconfident and complacent in our abilities to control our unconscious biases.

Framing bias. Describes the process by which people react to a particular choice in different ways depending on how it is presented e.g. as a loss or as a gain. Framing affects many realms of decision-making. As a judicial officer, you must be vigilant to the framing effect of the way in which a problem is presented to you either by parties, witnesses, or lawyers. It can create a bias.

Challenges in the Pacific

Biases are compounded by several contextual realities faced by courts and judicial officers in our region. We have the challenge of adopting imported legal codes that are normatively different in some key areas from our traditional and cultural norms. They require us to examine our culture and practices and, in some instances, set aside our culture, giving precedence to norms that were, at first, quite alien to us. Setting aside our culture of gift giving is an example of this.

The Pacific region has many informal systems of justice operating where the formal system does not physically exist. These systems dispense justice according to local, cultural norms, many of which are rooted in deeply held inequalities and biases. Most people, particularly those who live outside urban centres, are afraid of and lack familiarity with formal courts and our region generally lacks sufficient human and physical capital investment in our courts and justice systems and many people have no legal representation.

How do judicial officers mitigate biases?

Adopting a neutral perspective and a professional commitment to equality is not enough. We need to have the capacity to compensate for the effects of our unconscious biases that accumulate and are reinforced during our lifetimes, we cannot expect to extinguish them without conscious effort.

Acknowledging our biases will assist us to reduce or eliminate the effects of unconscious bias on our judicial decision-making. We do this by compensating for these biases, and actively checking that our decisions are not unconsciously biased. Legislation is a powerful reminder to check and counter bias, and a requirement to actively do so. Building awareness of our own unconscious biases and navigating the cognitive path to correcting ourselves, is not a skill we are necessarily born with. We need to be trained.

Intuitive and Deliberative Decision-Making

A way to stop bias is to quieten our intuition and rely instead on deliberative decision-making. This means applying the law to the facts in a logical and mechanical manner. Adopting an intuitive model – you follow instincts to resolve disputes which is later rationalised and deliberatively explained – or put more simply – we retrofit our logic to fit our instinctive response. Intuitive thought processes occur spontaneously and involve decisions that are made automatically, effortlessly, and quickly.

Deliberative thought processes occur through controlled processing and involve decisions that are rule governed and made slowly, self-critically, and with great effort. The relationship between intuitive thought processes and deliberative thought processes is complicated, and judicial decision-making can be seen to involve both types of thought processes. The potential impact of unconscious bias seems likely to impact both intuitive and deliberative reasoning. Minimising the number of 'in-the-moment' decisions a judicial officer is required to make can assist. For instance, rulings on significant issues may in some cases be better considered if made on written briefs with time for judicial officers to research and reflect.

We must promote the quality and fairness of our decisions and engage in conscious and deliberative decision-making to ensure we negate the impact of these biases in our conclusions. Taking the time to write down our reasons assists us to gather and organise our thoughts coherently, logically, and defensibly.

Stereotype-incongruent models

These models are effective in enabling judicial officers to acknowledge and address their biases through exposure to stereotype-incongruent models. For example, better representation of women in the judiciary is a constant reminder and promotes a court's inherent and learned capacity to ensure we pursue gender-equal outcomes for parties before us. Better representation within the judiciary of our diverse racial and ethnic minorities is another way to generate stereo-type incongruent models.

Principle 3: Integrity

In essence, integrity is the behavioural manifestation of all ethical principes combined. It requires judges to act transparently with unwavering honesty, impartiality and fairness, while always maintaining public trust and confidence in the judiciary. As the saying goes 'justice must not merely be done but must also be seen to be done'. Integrity therefore extends to includes perceptions of integrity including clear and consistent demonstration of the principles that underpin it in all aspects of a judges' professional and personal life.

You must be a good person as well as a good judicial officer. The standard of conduct is expected to be higher than that of the rest of society.

Principle 4: Propriety

Propriety, and the appearance of propriety, are essential to the performance of the activities of a judicial officer. Propriety refers to conforming to established standards of behaviour, or manners, suitability, rightness, or justness. A judicial officer must expect to be the subject of constant public scrutiny and comment and must therefore accept some restriction on his or her activities.

Social hospitality and attending social events.

It may be difficult to decide where to draw the line regarding social hospitality offered to you as a judicial officer. The line between "ordinary social hospitality" and an improper attempt to gain your favour can be difficult to draw. The context is important and no one factor will usually determine whether it is proper for you to attend an event or not.

One question that should be asked is whether acceptance of such hospitality would adversely affect, or be reasonably perceived to affect your:

- independence
- integrity
- obligation to respect the law
- impartiality; and
- dignity or the timely performance of your judicial duties.

Other considerations should include:

- the length of your relationship with your host
- your host's reputation in the community
- the size of the gathering
- whether the gathering is spontaneous, or has it been long arranged?
- does anyone attending have a case pending before you?
- are you by attending receiving a benefit not offered to others that will reasonably raise suspicion or criticism?

Principle 5: Equality

Ensuring equality of treatment to all before the courts is essential to the due performance of your role as a judicial officer. The Bangalore Principle of equality is divided into five sub-principles.

Principle 5.1: Lists specific aspects of diversity and differences in society to which a judge should be sensitive, when carrying out his or her duties. They include race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status. Notwithstanding the facets included, the list should not be considered exhaustive, and judges should ensure that they actively avoid discriminating against people based on any element of difference between them.

Principle 5.2: A judicial officer shall not, in the performance of judicial duties, by word or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. Any indication or suggestion by a judicial officer that he or she is not giving everyone the same consideration and respect is unacceptable.

Conduct offending this Principle would include making irrelevant or derogatory comments based on racial, cultural, sexual, or other stereotypes and conduct implying that persons before the court will not be afforded equal consideration and respect. Making disparaging comments about ethnic origins and improper and insulting remarks about litigants, advocates, parties, and witnesses would also offend this principle.

Principle 5.3: Provides that a judicial officer shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

Principle 5.4: A judicial officer shall not knowingly permit court staff or others subject to their influence, direction, or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground.

Principle 5.5: A judicial officer requires lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Wider gender related issues

There are some gender-related topics not explicitly mentioned in the Bangalore Principles. Each of these issues raises potential breaches of the Principles, in addition to a breach of the equality Principle. They include:

- sexual harassment [Integrity, Propriety]
- sexual discrimination [Impartiality]
- gender bias [Impartiality]
- gender stereotyping [Impartiality]
- sextortion [Independence, Impartiality, Integrity, Propriety].

Sexual harassment: is defined as unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Sexual discrimination: this occurs where a person is either directly or indirectly treated differently because of their sex.

Gender bias: is a preference or prejudice toward one gender over the other. It can be conscious or unconscious, and may manifest in many ways, both subtle and obvious.,

Gender stereotyping: involves preconceived ideas whereby females and males are arbitrarily assigned characteristics and roles determined and limited by their gender. For example, women are caregivers, women should raise children, women are weak, men are leaders, men provide for the family and men do not cry. While we may all unwittingly harbour gender biases/stereotypes, acknowledging them goes a significant way to reducing or eliminating their impact during a hearing/trial.

Sextortion: is a form of corruption where those in positions of power exploit their authority to demand sexual favours in exchange for services, benefits, or avoiding penalties.

Principle 6: Competence and Diligence

Competence and diligence are prerequisites to the due performance of judicial office. Judicial duties must take precedence over all other activities. A judicial officer must perform all judicial duties (including delivery of reserved decisions) efficiently, fairly, and reasonably promptly.

You must demonstrate adequate control of your cases and courtroom ensuring that they progress and are concluded as quickly as is reasonably possible.

This Principle also requires judges to understand the spirit and letter of the law, remaining informed about developments in domestic and international law, procedure and jurisprudence, including international conventions and other instruments establishing human rights norms.

Principles of Judicial Training

On 8 November 2017, the International Organization for Judicial Training (IOJT), composed of 129 judicial training institutions from 79 countries, unanimously adopted the following principles of judicial training:

1. Judicial training is essential to ensure high standards of competence and performance.

Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.

2. To preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training.

3. Judicial leaders and the senior judiciary should support judicial training

4. All States should:

(i) Provide their institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives; and

(ii) Establish systems to ensure that all members of the judiciary are enabled to undertake training.

5. Any support provided to judicial training should be utilized in accordance with these principles, and in coordination with institutions responsible for judicial training.

6. It is the right and the responsibility of all members of the judiciary to undertake training.

Each member of the judiciary should have time to be involved in training as part of their judicial work.

7. All members of the judiciary should receive training before or upon their appointment and should also receive regular training throughout their careers.

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.

9. Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.

10. Judicial training should reflect best practices in professional and adult training program design. It should employ a wide range of up-to-date methodologies.

Social and General Media

While social media did not exist when the Bangalore Principles were adopted, their guidance naturally applies and extends to it, and the media more generally.

For any judges wishing to create or use social media profiles, it is first important to ensure that you protect your privacy and safety. This includes:

1. Ensuring that your home address and telephone numbers are not included in your profiles;
2. That you set your profiles to viewable only by people you have agreed to be connected not (i.e., not the public); and
3. That you do not share information about plans for holidays, travel or other movements.

Do not share details of or otherwise discuss ongoing cases, or judicial decisions, and do not post anything that might damage public confidence in the impartiality of the judiciary, including political views or your private views about matters of public debate. If a judge and/or their decisions are criticised – do not respond. Judges who are attacked on social or general media should however inform their Chief Justice for them to decide if a response should be made. The guidance in this paragraph applies equally to social media and general media.

Fraud & Related Offences

Session 2: Fraud & Related Offences (fedcourt.gov.au)

Drawn from papers presented by Justice Teresa Berrigan, Supreme and National Courts of Papua New Guinea, as part of the PJIP's fraud and corruption workshops.

Fraud and related offences are often regarded as one of the more complex areas of criminal law. This results from the complex nature of property itself, the various forms it takes and the rules governing ownership at civil law, together with the responses by legislators to address these issues. In addition, fraud is conducted in increasingly sophisticated ways, sometimes involving multiple actors, complex schemes and cross-border transactions.

The Offence Charged

The offence charged, its elements and the way it has been particularized by the prosecution will be central to the issues to be determined at almost every stage of and with respect to almost every decision to be made during the course of a criminal matter, from giving directions for the management of the case to determining the admissibility of evidence, determining whether the prosecution has established its case beyond reasonable doubt, and if so, an appropriate sentence.

Elements of an Offence

In general terms, offences are made up of **physical** and **mental** elements (historically referred to as the actus reus and mens rea. In some jurisdictions mental elements are referred to as “fault elements”.)

The physical elements of an offence are the acts or omissions which must be proven to establish liability and in some cases the circumstances in which those acts or omissions took place.

The mental element of an offence is the state of mind that the accused must hold at the relevant time. For instance, an offence may require that the accused acted intentionally, knowingly, negligently or recklessly.

Reaching Verdict

In determining whether the prosecution has established the guilt of the accused beyond reasonable doubt, it is necessary to ask:

1. What are the **elements** of the offence?
2. What is the **evidence** in support of each of those elements?
3. Does the evidence **establish or prove** each of the elements beyond reasonable doubt?
4. Is there a **defence**?

Analysing a charge

When considering those matters it is necessary to first identify the elements of the offence on the face of the statutory provision that creates the offence.

Consideration should then be given to what is required to prove those elements and the principles applying by reference to:

- any **specifically enacted provisions** for that purpose within the legislation itself
- the **general interpretation section** within the legislation
- **binding authority** in your own jurisdiction
- **persuasive authority** in your own jurisdiction
- **if necessary, persuasive authority** from similar jurisdictions (BUT be cautious)

In most cases it will be necessary to go no further than the authorities in your own jurisdiction. If, however, an issue arises that has not been considered in your jurisdiction before it may be useful to consider authorities from similar jurisdictions, which whilst not binding might be regarded as persuasive. Be cautious, however, in approaching such authorities as legislative requirements and case law may differ.

The paramount consideration will always be the elements of the offence as prescribed and the principles applying in your jurisdiction.

Fraud and related offences

Fraud offences are sometimes referred to as offences against property and in general terms are concerned with the wrongful use of another person's property (interest or right).

The number and type of such offences has developed over the years and such offences take different forms and are known by different names in different jurisdictions, for instance, larceny, conversion, stealing, theft, misappropriation, false pretence or obtaining by deception, amongst others.

Whilst the specific elements of offences and their requirements will differ, in general terms it will be necessary to consider:

- what constitutes the **subject of the charge** – for instance is it "property" or some other thing?
- who **owns or has an interest** in that property or thing?
- what must the **accused do** with respect to that property or thing?; and
- with what **intention(s)?**

Property or thing

How is the "property" or "thing" the subject of the charge defined?

Must it be capable of being stolen?

Some older offences provide that the "property" or "thing" must be capable of being stolen. Historically this requires that the property is tangible or "moveable or capable of being moved": e.g. s 364(1), *Criminal Code*, PNG (*Kasaipwalova v The State* [1977] PNGLR 257); ss 123, 124 *Penal Code*, Vanuatu (*Public Prosecutor v Wilkins* [2003] VUSC 66).

Is it defined in broad terms?

Some jurisdictions have addressed this issue by creating new offences or expanding the definition of property.

For instance, s 383A(3)(d) *Criminal Code* PNG provides that "property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property".

Similarly, ss 288 and 297(4) of *Crimes Decree*, Fiji defines "property" to include "real property, personal property, money, a thing in action or other intangible property" and "money" includes anything that is equivalent to money (cheques, negotiable instruments, and electronic funds transfers).

To whom does the property belong?

Does the offence require:

- **legal ownership** of or title to the property?
- **physical possession** of the property?
- **control** over the property?
- or an **expanded definition** of ownership? e.g. "Any legal or equitable interest in or claim to the property": s 383A(3) for the purposes of s 383A *Criminal Code*, PNG; including where property is given to a person on condition that it be applied for a particular purpose: *Brian Kindi Lawi v The State* [1987] PNGLR 183; *Wartoto v The State* (2019) SC1834; or "a person receives property from or on account of another and the person is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way": 296(1) for the purposes of Division 2 Offences: *Crimes Decree*, Fiji.

Dealing with the property or thing

What **conduct** is required? Does it require:

- the physical **taking or moving** of tangible property?
- the **obtaining of legal title** or **ownership** and not merely possession? For example, must an accused obtain legal title and not merely possession as for the historical offence of obtaining by false pretence: *Amaiu v The State* [1979] PNGLR 576
- the **obtaining of possession, custody, or control?** e.g. as for obtaining by deception: 317(1)(a) Fiji *Crimes Decree*
- an **application to the accused's own use** or the use of another e.g. as for misappropriation under s 383A *Criminal Code*, PNG
- an **appropriation of the owner's rights** e.g. **"**any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property": as for theft under s 291, applying s 293(1) *Crimes Decree*, Fiji.

With what mental state or intention?

Generally, it is useful to consider the mental element last. The accused must hold the requisite intention at the time they do the act(s) constituting the offence. So, it follows that you must be satisfied beyond reasonable doubt that the physical elements are established – that the accused did the act(s) constituting the offence in the circumstances required - before you can be satisfied that they held the requisite intention at that time.

Does the offence require:

Intention to permanently deprive the owner

This element appears in most of the penal statutes across the Pacific in one offence or another. Some of those statutes explicitly define what is required by an intention to permanently deprive, others do not.

Generally, the intention to permanently deprive the owner of the thing means to treat as the person's own and to dispose of it regardless of the other person's rights. See for instance s 300 *Crimes Decree*, Fiji. Similarly, it has been held that "an alleged intention to restore with no reasonable prospect of doing so is, in practical terms, an intention permanently to deprive the owner unless a pious hope be fulfilled": *Toritelia v The Queen* [1987] SBCA 2.

Dishonesty

It appears that in most Pacific jurisdictions a **subjective test** applies such that to prove dishonesty the prosecution must establish beyond reasonable doubt that:

- what the accused did **was dishonest** according to the standards of ordinary honest people, and
- the accused in fact **knew that what they were doing was dishonest** according to those standards.

In PNG it has been held that the objective standards of ordinary honest people may be taken into account in determining whether the accused must have in fact known that what they were doing was dishonest according to those standards: *Brian Kindi Lawi v The State* [1987] PNGLR 183; *Wartoto v The State* (2019) SC1834; *Havila Kavo* (2015) SC1450.

In this regard it may be relevant to consider the personal circumstances of the accused, including their age, intelligence, education and experience in determining whether the State has established beyond reasonable doubt that they acted dishonestly.

In addition, intention may be inferred from examining an accused's conduct prior to, at the time of, or subsequent to the act constituting the offence: see *Ikalom v State* (2019) SC1888.

With an intention to defraud

The leading statement at common law is found in the words of Viscount Dilhorne in *Scott v Metropolitan Police Commissioner* [1975] AC 819:

"'to defraud' ordinarily means … to deprive a person dishonestly of something which is his or something which he is or would be or might but for the perpetration of the fraud be entitled".

Case Examples

Scott v Metropolitan Police Commissioner [1975] AC 819

The accused was convicted of conspiracy to defraud owners of the copyright and distribution rights of cinematographic films. He and other employees of film theatres agreed, without the consent or knowledge of the copyright owners, to temporarily take and make unauthorised copies of films for commercial distribution thus depriving the copyright owners of the profit they might have made if the copies had been shown to the same customers in the authorised film theatres.

Peters v The Queen (1998) 192 CLR 493

The accused, a solicitor, was convicted of conspiracy to defraud on the basis that he was a party to an agreement to conceal the true amount of his client's income through sham mortgage transactions and thus deprive the Commissioner of Taxation of tax payable on that income.

Toohey and Gaudron JJ, at [30] to [33] stated that a conspiracy to defraud involves an agreement "to use dishonest means to deprive another person of money or property, or to put the money or property of that other person at risk, or to imperil some lawful right, interest, opportunity or advantage of another person knowing that he or she has no right to deprive that person of that money or property or to prejudice those rights or interests".

More than one mental element

Some offences require more than one mental element to be established.

For instance, s 291(1), *Crimes Decree*, Fiji, 2009 provides, "A person commits a summary offence if he or she **dishonestly** appropriates property belonging to another **with the intention of permanently depriving** the other of the property".

Conspiracy to defraud

A conspiracy to defraud is an **agreement** between **two or more persons** to use dishonest means to deprive a person of property which is his or hers or to which he or she might be entitled or to put the property of that other person at risk, or to imperil some lawful right, interest, opportunity, or advantage of another person.

It is established upon the entry into an agreement, express or implied, which need never be implemented.

It is complete without the doing of any act save the act of agreement.

In addition to the act of agreement, it requires an intention in the mind of the alleged conspirator to carry out the unlawful purpose.

See *Scott, Peters,* and *Roland Tom v The State* (2019) SC1833 for a discussion of principles.

Forgery

Forgery is a common law offence which has been codified in most jurisdictions. See for instance Kiribati (ss, 329, 330 and 334 of the *Penal Code 1977* Kiribati) and the Solomon Islands (ss. 336, 337 and 347 of the *Penal Code 1963* Solomon Islands).

To establish the offence of forgery under s 462 of the *Criminal Code*, PNG, the prosecution must establish beyond reasonable doubt that the accused:

- makes
- a document or writing
- that is false
- knowing it to be false
- with intent that it may be used or acted on as genuine

- to the prejudice of a person; OR
- with intent that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act.

See ss 462, 460(2), *Criminal Code*, PNG; *Kane v The State* (2022) SC 2201; *Rolyn Yugari v The State* (2018) SC169; *Karapen v The State* (2022) SC2333.

The legislation further defines the meaning of "make", "document" and "writing": ss 459, *Criminal Code*.

Meaning of "false" - purports to be something it is not.

Whether a document or writing is "false" will depend upon the legislation governing the offence in the applicable jurisdiction.

Generally, a document is not "false" for the purposes of the offence, however, because it contains a false statement. Most offence provisions reflect the requirement at common law that a false document is one that "purports" to be something which it is not, i.e. it "must tell a lie about itself": see *R v More* [1988] 86 Crim App R 234; *Brott v R* (1992) 173 CLR 426. Some offence provisions provide an extended definition of false document in certain circumstances, see for instance s 459(2)(a), *Criminal Code,* PNG.

Defence of Honest Claim of Right Without Intention to Defraud

One of the most common defences raised in this area is the defence of honest claim of right without intention to defraud. It is available in most Pacific jurisdictions although its application and the principles applying may differ.

Section 23(2), *Criminal Code,* PNG provides that "A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud".

Elements of the defence

For s 23(2) to apply it is necessary that:

- the offence must be one relating to **property**
- the act done or omitted to be done must be done or omitted to be done **with respect to property**
- the act done must be **in the exercise of an honest claim of right**; and
- the act done was done **without intention to defraud**.

Wartoto v The State (2019) SC1834; *Kaya v The State* (2020) SC2026

Key principles applying in that jurisdiction:

- The accused must honestly believe that they are entitled to do what they did with respect to the property the subject of the charge: *R v Pollard* [1962] QWN 13 at 29; *R v Magalu* [1974] PNGLR 188.
- The accused must believe that they have a legal entitlement to the property the subject of the charge (and not just a moral one): *Ikalom & Anor v The State* (2019) SC1888.
- The belief must be honest, but it does not have to be reasonable (albeit that one that is unreasonable may be less likely to be believed as being honestly held): *The State v Felix Luke Simon* adopting *Macleod v The Queen* (2003) 214 CLR 230).
- The accused must also act without an intention to defraud.
- The defence is an excusatory one and must be excluded beyond reasonable doubt by the State once fairly raised on the evidence.

Other Pacific Jurisdictions

Other jurisdictions have similar but not identical provisions.

Section 38(1) of the Crimes Decree, Fiji provides "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.

(3) This section **does not negate criminal responsibility for an offence relating to the use of force against a person"**.

See *Mass v Public Prosecutor* [2016] VUCA 11; Criminal Appeal 15-8 (15 April 2016) at [14], [16] and [17] for a discussion of principles applying in Vanuatu.

In some jurisdictions, e.g. Tonga and Samoa, the claim is referred to as a "colour of right". See for instance s 143 of *Laws of Tonga Chapter 18 (Criminal Offences)* as follows - "Theft is the dishonest taking without any colour of right…".

Bribery & Official Corruption Offences

Session 3: Bribery & Official Corruption (fedcourt.gov.au)

Drawn from papers presented by Justice Teresa Berrigan, Supreme and National Courts of Papua New Guinea, and Justice Michael Wigney, Federal Court of Australia, as part of the PJIP's fraud and corruption workshops.

Bribery

In general terms, bribery is the giving or receiving or offering to give or receive anything of value in connection with the performance of a position of trust.

Bribery, Official Corruption and Abuse of Office

These offences recognise that those who are entrusted to exercise the power and authority of public office must be accountable to the public: see *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73; *The State v Yawijah* (2019) N7767; *The State v Joel Luma* (2020) N8798. Furthermore, that official corruption or abuse of office may occur at any level of the public service or by any person holding public office, albeit in general terms, the more senior the official the more serious the offending: *The State v Joel Luma* (2020) N8798.

Official corruption, s 87(1), Criminal Code, PNG

Official corruption contrary to s 87(1), *Criminal Code* is the bribery offence most often prosecuted in PNG. It is similar, and in some cases identical, to offence provisions in other Pacific jurisdictions.

Section 87(1), *Criminal Code,* provides:

"A person who–

(*a*) being–

(i) employed in the Public Service, or the holder of any public office; and

(ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice), corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of anything done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; or

(*b*) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years, and a fine at the discretion of the court."

Section 87(1)(a) applies to a person employed in the Public Service or holding public office.

Section 87(1)(b) applies to a person who gives or offers to give any benefit to a person employed in the Public Service or holding public office.

Elements of s. 87(1)(a) Criminal Code Offence

To establish the offence the prosecution must prove beyond reasonable doubt that the accused:

- being employed in the Public Service or the holder of any public office
- charged with the performance of any duty by virtue of that employment or office
- corruptly
- asks, receives or obtains, or agrees or attempts to receive or obtain

- any property or benefit
- for himself or any other person
- on account of any thing done or omitted to be done, or to be done or omitted to be done by him
- in the discharge of the duties of his office.

State v Gamato & Hetinu (2021) N9250

Being employed in the Public Service or the holder of any public office

Section 83A(c), Criminal Code, PNG defines a "person employed in the Public Service" to include:

(*a*) a member of any of the State Services established under or by authority of section 188 (*Establishment of the State Services*) of the *Constitution*; and

(*b*) a constitutional officeholder as defined in section 221 (*Definitions*) of the *Constitution*; and

(*c*) a member of or person employed by a constitutional institution, being any office or institution established or provided for by the Constitution including the Head of State, a Minister, or the National Executive Council; and

(*d*) a member of the National Parliament or of a provincial assembly; and

(*e*) a person employed under the *Official Personal Staff Act 1980* or the *Parliamentary Members' Personal Staff Act 1988*; and

(*f*) a person employed by a provincial government; and

(*g*) a member, officer or employee of a body or corporation established by statute.

Section 83A(c) provides an inclusive definition (i.e. it is not confined to those matters expressly stated) and "employed in the Public Service" should be interpreted broadly: *Reference by the Attorney General of Papua New Guinea and Principal Legal Adviser to the National Executive Council* (2021) SC2112.

Charged with the performance of a duty by virtue of that employment or office

The prosecution must particularize the duty it alleges the accused is charged with the performance of by virtue of that employment or office.

"By virtue of" means "because or as a result of". So, the duty must arise because of the employment or office held.

> Examples
> The accused whilst holding public office as the Minister for Forestry charged with the duty of issuing forest permits …
>
> The accused whilst employed in the public service as a customs officer charged with the duty of inspecting cargo …

Asks, receives, or obtains, or agrees or attempts to receive or obtain

It is not necessary for the prosecution to prove that the accused actually received the benefit, it is enough that the accused asked, agreed or attempted to receive it: *The State v Gamato and Hetinu* (2020) N9250.

Any property or benefit

The benefit does not have to be financial. The word "benefit" in the phrase "property or benefit of any kind" should be given its natural meaning. It is not limited to a proprietorial benefit of any kind: *R v Smith* [1993] 1 Qd R 541.

For the accused or any other person

The benefit may be sought or obtained for the accused or for someone else.

On account of any thing done or omitted to be done, or to be done or omitted to be done by him

"On account of" bears its ordinary meaning: "because of", "by reason of", or "in recognition of": *Smith; Hetinu.*

The asking, receiving, agreeing or attempting to receive a benefit may be for an act *or* an omission. It may be for an act or an omission already *done or to be done* at the time or in the future.

> Case Example
> *State v Runny Dau* (2021) N9253
>
> A customs officer was convicted of receiving a benefit on account of omitting (deliberately failing) to screen a container leaving the port (which contained counterfeit cigarettes).

The accused does not have to implement the agreement or even intend to implement the agreement. The offence lies not in the act or omission but in the asking or receiving of the benefit "on account of" the act or omission: *Herscu v The Queen* (1991) 173 CLR 276.

"It is not required, of course, that the receiver of the benefit should subsequently fully implement the plot or even perhaps genuinely intend to do so at the time that he receives the benefit but an arrangement or actions having the features described in the subsection must be arrived at or performed": *R v Lewis* [1994] 1 Qd R 613.

The conduct does not have to be mutual or transactional:

"Whilst the two offences in s 87 are reflections of one another, it is not necessary that an offence be committed by both persons before one can be convicted…. In the case of an offence under s 87(1) **it is the fact that the office-holder asks for or agrees or attempts to receive property or a benefit that is critical.** If he does that and the other elements are established it is immaterial that the person in respect of whom the request or attempt is made does not respond positively in any way to the approach, or that although the other person may give the appearance of agreeing, he had no intention other than to expose the criminal conduct of the office-holder in so doing, or that he simply intended to appropriate the gift or benefit and not fulfill his part of the "bargain"*: Herscu.*

> Example
> The Minister for Forestry commits the offence when he asks for K150,000 to grant a forestry permit regardless of whether he ever grants the forestry permit or intends to do so and whether or not the person he asks the money from agrees to the request.

In the discharge of the duties of his or her office

Critically, the receipt of or agreement to receive a benefit must concern an act or omission done or to be done in the discharge of "the duties of his office", i.e. it must be connected or concerned with the duties of the public office held.

Case Example

The State v Waesa Mollo [1988] PNGLR 49

Major Loa, a member of the Defence Force, was charged with corruptly receiving moneys pursuant to s 87(1)(a) in connection with his duties as Chairman of the Papua New Guinea Defence Force Savings and Loan Society, a body established under the *Savings and Loan Societies Act*. Mr Mollo was charged with corruptly giving him the monies contrary to s 87(1)(b).

Major Loa was acquitted on the basis that his duties as Chairman were not those of a public servant but rather those of an official of a private corporation and the receipt of moneys was therefore not in connection with the corrupt use of any office held in the Public Service.

It followed that Mr Mollo did not give the monies for the discharge of any duty held in the public service and he too was acquitted.

Act or omission need not be in the proper exercise of duty

Whilst the act or omission must be connected to the duties of the office held, it is the seeking or receiving of monies in connection with that duty that constitutes the offence and not whether the act or omission would otherwise be a proper or improper exercise of duty.

"The section is concerned with the violation or attempted violation of official duty rather than with the actual performance of official duty. Official corruption necessarily involves impropriety and it is not to be supposed that s 87 is limited to those cases where the act or omission in question would, apart from the corrupt influence, be proper": *Herscu*.

Case Example

S v Gamato and Hetinu (2021) N9250

The offender whilst being employed in the Public Service as the Election Manager of the National Capital District (NCD), charged with the responsibility of organising and conducting elections in the NCD, corruptly received monies in the sum of K184,300 on account of paying polling officials to ensure the successful election of one particular candidate.

The intended act of ensuring the election of a particular candidate over others in *Gamato and Hetinu* was clearly improper. In *S v Tatut*, however, the offence was established not because there was any impropriety in the issuing of the title itself. The corruption lay in receiving monies for that purpose, or in other words in receiving monies to simply perform her duty (or do her job).

Case Example

S v Tatut (2021) N9023

Ms Tatut was a Lodgement Officer in the Titles Section of the Department of Lands and Physical Planning who asked for and received K450 in cash for herself to issue a replacement title in accordance with her normal duties.

Corruptly

The meaning of "corruptly" has been the subject of much judicial debate.

In PNG the weight of authority says that it means **dishonestly**: *State v Toamara* [1989] PNGLR 24; *State v Mataio* (2004) N2531; *State v Duncan* (2015) N5010 but see the discussion in *Gamato and Hetinu*.

In Australia there is some authority that "corruption is not to be equated with dishonesty and dishonesty does not necessarily connote corruption": *Re Lane,* QSC, Ryan J, 9 October 1992, unreported.

"A power was used corruptly if it was used to obtain some private advantage or for any purpose foreign to the power": *Re Austin* (1994) 1 Qd R 255; *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452.

The word "corruptly" means the discharge of the person's duty for an **improper purpose**: *Willers v R* (1995) 81 A Crim R 219.

Offence of Bribery pursuant to the Criminal Code (Cth), Australia

Section 141.1 of the Australian *Criminal Code* creates the offence of bribery of a Commonwealth public official (CPO). Section 141.1(1) creates the offence of **giving** a bribe. This offence can be divided into the following elements:

- **Conduct.** The required conduct is that the accused must provide a benefit, cause a benefit to be provided, offer, or promise to provide a benefit, cause an offer or promise etc – to another person.
- **Dishonestly.**
- **Fault element.** With the intention of influencing a public official (who may be the other person) in the exercise of their duty.
- The public official must be a **Commonwealth Public Official**.

Section 141.1(2) creates the offence of a CPO **receiving** a bribe. The offence can be divided into the following elements:

- **Conduct.** CPO asks for benefit (for himself, herself, or other person), receives or obtains benefit, agrees to receive or obtain.
- **Dishonestly.**
- **Fault element.** With the intention that the exercise of the official's duties as a CPO will be influenced or inducing, sustaining, or fostering a belief that the exercise of the official's duties will be influenced.

Meaning of "dishonestly"

"Dishonestly" is defined in s 130.3 to mean dishonest according to the standards of ordinary people (partly objective element) and known by the defendant to be dishonest according to the standards of ordinary people. The definition is based on *R v Ghosh* [1982] QB 1053.

Giving a corrupting benefit s. 142.1 Criminal Code

Section 142.1 creates the offence of giving a corrupting benefit. The offence can be divided into the following elements:

- **Conduct**. The accused must provide a benefit, cause a benefit, offer to provide, cause an offer to provide…to another person.
- **Dishonestly.**
- **The receipt** or expectation of the receipt of the benefit would tend to influence a public official (who may be the other person) in the exercise of the officer's duty as a Commonwealth public official (i.e. a circumstance).
- **Fault element** (not specified, but by virtue of s 5.6(2) – fault element would be **recklessness** – but by virtue of s 5.4(4) proof of intention or knowledge would also prove recklessness.

Abuse of Office

The common law offence of misconduct in public office has been codified in most Pacific jurisdictions.

In PNG it is reflected in s 92, *Criminal Code,* abuse of office and s 202, *Criminal Code,* refusal by public officer to perform duty.

Section 92, *Criminal Code*, PNG provides:

"(1) A person employed in the Public Service who, in abuse of the authority of his office does, or directs to be done, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour.

Penalty: Subject to Subsection (2), imprisonment for a term not exceeding two years.

(2) If an act prohibited by Subsection (1) is done, or directed to be done, as the case may be, for purposes of gain, the offender is liable to imprisonment for a term not exceeding three years."

Offence is broad in nature.

S 92 of the *Criminal Code* is cast in broad terms. "[T]he circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse": *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [61]; *The State v Joel Luma* (2020) N8798.

Elements of the Offence

The prosecution must prove beyond reasonable doubt that the accused:

- Whilst **employed in the Public Service**
- In **abuse of the authority** of his or her office
- Did or directed to be done **any arbitrary act**
- **Prejudicial** to the rights of another.

State v Luma (2021) N8798; affirmed *Luma v State* (2022) SC2249; applied *State v O'Neill* (2021) N9213.

If the prosecution also pleads and proves in aggravation that the act was done for the purposes of gain a higher maximum penalty under s 92(2) will be available.

Whilst employed in the Public Service

See the discussion above regarding the meaning of "public service".

Did or directed to be done any arbitrary act.

An "arbitrary act" is one that is not based on a reason, system, or plan, or is unfair or done without restriction or without considering other people: *The State v Joel Luma* (2020) N8798; *State v O'Neill* (2021) N9213.

Prejudicial to the rights of another

As act will be prejudicial to the rights of another person if it is detrimental to or puts at risk the rights of another person. It may be prejudicial to the rights of a natural person, a corporation or the State: *Luma*.

In abuse of the authority of his or her office

Abuse of authority will occur when bad, improper or wrongful use is made of the authority of the public office: *Luma; State v O'Neill* (2021) N9213.

Such conduct need not be dishonest, nor corrupt, nor done for profit nor in a conflict of interest. The conduct need not be done out of malice, friendship, or indifference. The presence of such matters may be relevant to establishing the offence but they are not necessary to it.

Wilful and warranting criminal punishment

The abuse must be wilful, and it must be so serious that it is worthy of condemnation and criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects. The conduct must fall so far below acceptable standards as to amount to an abuse of the public's trust in the officer holder warranting criminal punishment: *Luma; R v Quach* (2010) 201 A Crime R 522; *Attorney General's Reference No 3 of 2003; R v Chapman* [2015] 2 Cr App R 10 adopted; *R v Boulanger* [2006] 2 SCR 49; and *Potape v State* (2015) SC1613 considered.

Case Example

State v Joel Luma

The accused was the Secretary of the Department of Works. He was convicted of awarding multiple contracts to a particular company to the value of K4,309,000 in abuse of office contrary to s 92(1) of the *Criminal Code*.

It was not alleged that he had any relationship with the company awarded the contracts nor that he benefited financially or otherwise from his conduct. The evidence established, however, that the Secretary had deliberately avoided the normal procurement processes. He concealed the contracts from the First Assistant Secretary Operations. He deliberately structured the contracts to fall just below his financial limit as Secretary of the Department in each case, to circumvent the tender process required under the *Public Finance (Management) Act* and knowingly issued certificates of inexpediency in his position as Secretary without any such authority and without justification. He directed his First Assistant Secretary, Finance to pay the company on the basis that the Central Supply and Tenders Board had been unable to meet for three weeks to consider the Department's submission when he was aware that no such submission had been made and on the basis that the materials had been urgently requested by provincial works managers when no such requests had been made.

Refusing or failing as a public officer to perform his duty: s 202 Criminal Code, PNG

As above, s 202 is complementary to s 92 of the Criminal Code, PNG.

Section 92 is concerned with the doing of an arbitrary act prejudicial to the rights of another in the abuse of authority of the office held in the public service. Whereas section 202 is concerned with the perverse omission or refusal to do an act that is the person's duty to be done by virtue of their employment in the public service.

Examples

Failure of police officer to intervene in offences committed in their presence: *Shaw v Macon* (1857) 21 Ga 280 or to act on credible complaints of serious offences: *Creagh v Gamble* (1888) 24 LRI 458 at 472-473; *DPP v Bartley* [1997] IEHC 94.

Trial Management

Session 4 - Trial management (fedcourt.gov.au)

Drawn from papers presented by Chief Judge Brian Devereaux SC and Judge Brad Farr SC, District Court of Queensland, as part of the PJIP's fraud and corruption workshops.

Fraud and corruption related cases are often factually and legally complicated and contain large amounts of documentary evidence.

Proactive management by the trial judge, both before and during the trial can help define the real issues and reduce the length of a trial.

Some jurisdictions have legislation, procedural rules or practice directions which require that certain steps must take place within set timeframes prior to trial. Enforcing parties' compliance with those rules will facilitate efficiencies. In the absence of, or in addition to, any legislation, rules or practice directions, a judge might consider making specific case management directions in any particularly complex matters before them.

Why is Trial management important?

It is important for the following reasons:

- the running of the trial by counsel
- the time the trial takes
- the way in which documentary evidence is presented
- the early resolution of disputes of law; and
- the fairness of the trial.

Length of Trial

Active pre-trial management is an important tool to ensure that the parties are ready for trial and to avoid late applications for rulings on evidence and late applications for adjournments of the trial.

District Court of Queensland's Approach to Trial Management

By way of illustration, the approach taken by the District Court of Queensland in the pre-trial management of fraud and related cases is proactive. The Court holds mentions or pre-trial reviews on a regular basis where a range of issues can be addressed.

First Mention

At the first mention, the Prosecution will present the indictment to the Court. At this stage the parties will inform the Court about the way the matter is to be dealt with, that is by way of trial or sentence.

Often, the indictment will be adjourned for at least a month to enable the lawyers to obtain instructions as to the how the matter is to proceed. Complicated matters may be adjourned for longer, depending on the nature of the charge and the complexity of the evidence. Long or complicated matters are usually allocated to the trial judge to manage.

Mentions

Judicial officers should ensure that the parties are given reasonable but strict deadlines for further mentions or the trial itself. This will ensure the case continues progressing.

Issues in contest

During mentions, it is useful to ask the parties to identify the issues that will be in contest and whether they are issues of law or fact. Such a course will focus counsel's mind on what is important. It also assists to identify:

1. Issues that will require a pre-trial ruling;
2. Prosecution witnesses required to give evidence;
3. Exhibits that are intended to be relied upon at trial and through which witness they will be tendered; and
4. If admissions can be made regarding non-controversial matters.

The defence is not obliged to reveal its case at this stage but should be encouraged to work with the prosecution lawyers to ensure that the Court's time is not wasted on irrelevant or uncontested matters.

List of witnesses

It is useful to require the prosecution to provide to the defendant a list witnesses it intends to call at trial, a summary of the evidence each witness will give plus a list of the exhibits that will be tendered through each witness.

This can assist the defence and prosecution if provided in conjunction with the particulars of the charges, i.e. the act/s or omissions/s the prosecution rely upon as constituting the offending behaviour on the part of the defendant.

Admissions

It is also helpful to encourage the parties to confine the evidence to the issues in contest. It can be suggested that admissions made may be considered by the Court, if the defendant is convicted, to be an indication of the defendant attempting to co-operate with the administration of justice.

Particulars

The provision of the information mentioned above can be very helpful to both the prosecution and the defence, but only if provided in conjunction with the particulars of the charges. Section 573 of the *Criminal Code Act* 1899 (Qld) provides that a court may direct particulars to be delivered to the accused person on any matter alleged in the indictment and may adjourn the trial for the purpose of such delivery.

In *Johnson v Miller* (1937) 59 CLR 467 at 497 – 498, Evatt J said:

> "It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the Court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularise the offence charged, neither the Court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged."

Why are particulars important?

Particulars should be read in conjunction with the indictment in defining the terms of the charge and the case which the Crown must prove. Particulars are important to allow the defence to:

1. Bring applications concerning the admissibility of evidence particularly as to irrelevancy
2. Make important forensic judgements about the cross-examination of prosecution witnesses; and martialling and deploying its own evidence.

Early provision of Particulars is important.

The particulars will inform the defendant at an early stage of the case that must be met and provide the framework within which determinations as to the admissibility of evidence will be made.

Providing particulars at an early stage also has the benefit of causing the lawyers to assess their respective cases at an early stage, such that if further investigations or further statements from witnesses are needed, that can be addressed. Also from a defence point of view, it is not infrequent that the provision of particulars can cause the defence lawyers to re-assess the defendant's position and his or her prospects of successfully defending the matter – which in turn can lead to them advising the defendant that the best option may be to plead guilty or to try to negotiate with the prosecution as to the facts that are to be asserted or as to the submissions on sentence.

Checklist of issues to be addressed during pre-trial.

It is suggested that as a judicial officer you might address the following issues pre-trial:

1. **Require the prosecution to provide a trial plan for the witnesses it intends to call.** This provides the defendant with a fair opportunity to prepare cross-examination of each witness and avoids any chance of the trial being delayed because the defendant was caught by surprise by the timing of the calling of a witness. It also enables a reasonably accurate assessment to be given of the length of the prosecution case.
2. **Require the prosecution to place on the record that all witnesses have been contacted/subpoenaed and advised of the likely date** they are available and will give evidence. This focuses the mind of counsel on how the trial will proceed but also ensures that all witnesses have been contacted and arranged well in advance of the trial thereby negating the risk of delay during the trial itself because of the unavailability of a witness.
3. Require the prosecution to identify if any **evidentiary aides** are to be used i.e. graphs, tables, videos etc. This would result in the defendant being provided in a timely way a copy of any such aides and then to have the opportunity of raising objection at the pre-trial stage. If any aides are to be utilised, the Prosecution should also identify through which witness each aide will be tendered or whether they might be the subject of an admission. The Court should require the defendant in a timely way to identify any objections to the use of such aides and the basis for such objections.
4. If the rules permit and necessary equipment is available, whether the trial could be conducted electronically, by **e-trial?**
5. How will **each document** be treated when tendered? This is of particular importance for trials with voluminous documentary exhibits. Is it intended to have each document read into the record as it is tendered? For some trials this can be extraordinarily time consuming and often not particularly productive.
6. Are any **admissions** to be made during the trial? The value of admissions cannot be underestimated. All trials involve issues on facts which are not in contest and about which oral evidence from witnesses or the tendering of exhibits need not occur. The benefit of an admission is that it places before the Court evidence that is not in contest in a succinct and easily understandable form and the making of admissions can dramatically shorten the length of a trial.
7. Require the prosecution to identify **witnesses** it will seek leave to call remotely i.e. via video or audio-link. The Court should then require the defendant to identify any objections that he or she may have in that regard and deal with those objections at the pre-trial stage. During the trial the Court should ensure that the equipment for taking evidence remotely is working appropriately. Testing of the equipment should be done at the start of each day. In some Pacific jurisdictions it may not be possible to take evidence remotely.
8. The Court should factor in **holiday periods** when listing matters for trial. For example, the Court should not list a trial that is expected to take four weeks to start four weeks before Christmas. Remember that accurately estimating the length of a trial is a difficult task and is frequently fraught with uncertainty. It is always best to have the capacity for the trial to go longer than expected.

Trial Management during the Trial

Note Taking

Making succinct notes at the end of each day of evidence from each witness will assist when returning to consider the whole case and write a judgment, particularly if the case is long, complex and/or involves many witnesses and/or much evidence. The benefit of these notes increases if they include:

1. The issue/s the witness' evidence is potentially relevant to;
2. A note of any exhibit/s of particular relevance to the issues in the trial; and
3. Any thoughts you had about the credibility or reliability of the particular witness.

Ask counsel to assist you during the trial

Do not be reticent to ask counsel to assist during the trial. This might include asking counsel to:

- Provide the list of elements for each of the offences as agreed upon;
- Prepare draft directions on particular points as agreed upon if possible; and
- Provide an early identification of possible defences and to detail the evidence upon which such possible defences rely.

Multiple Accused

In trials involving more than one defendant, other issues can arise. Frequently, not all the evidence is relevant to each of the defendants. It may be that some evidence is only relevant to one or some of the defendants. It is very difficult for a trial judge to keep track of such evidence and the defendant or defendants to whom certain evidence is or is not relevant.

A suggested option is to require counsel to provide to the Court, at the earliest stage possible, a table showing the evidence that only relates to one or some of the defendants and the identity of the defendant or defendants in that regard. This table would be marked for identification.

This approach takes the onus off the judicial officer and places it fairly and squarely on counsel where it belongs, subject to the requirement for you to make a ruling in the case of a dispute between parties as to what and how, evidence may or may not be admitted as against a particular defendant.

Defendants-in-person

It is becoming increasingly common for persons to "represent themselves". This includes in fraud and related cases. If a person is unrepresented this can add to the judicial burden of presiding over the trial, as well as adding, sometimes substantially, to the length of the trial.

In such circumstances, the District Court of Queensland adopts the following approach:

- At pre-trial hearings or mentions, the judge may urge the defendant to consider **obtaining legal representation**. There is no impediment to the defendant being advised of the difficulties and potential adverse outcomes of representing oneself.
- It is not uncommon for an unrepresented defendant to be given, at a pre-trial mention, a **written copy of the directions** that the trial judge will give to him or her at the commencement of the trial. Such directions detail how a trial is conducted and the requirements that are placed on unrepresented litigants in conducting their own case. It is incumbent on the judge to ensure that the defendant has understood the directions that have been given.
- At pre-trial mentions, it is helpful to have the prosecutor place on the record that **full disclosure to the defendant** has occurred and have the defendant acknowledge the same.

- The unrepresented litigant is strongly advised that the judge **will not do the defence's job** for them but can assist if the defendant is unsure of something or of some process.

In such trials, the judge will need to pay close attention to:

- The way the **defendant conducts himself or herself**. Some unrepresented litigants behave in ways that disadvantage them – such as risking self-incrimination or moving towards denying themselves a line of legitimate defence. If that occurs it is incumbent on a judge to point it out to the defendant, to give them a chance to change the behaviour before it disadvantages them.

- The **manner of questions** asked by the defendant. Despite having received specific directions on how to structure and ask questions, most unrepresented litigants are not aware of how to structure and ask legal questions. Trial judges must be proactive whenever questions are asked in inappropriate ways.

- If a party fails to challenge the evidence of a witness on some point but later makes assertions, or calls evidence to show, that the witness should not be believed, they have failed to **comply with the rule in *Browne v Dunn*** (1893) 6 R 67. It is a general rule of practice that a cross-examiner should put to an opponent's witness matters that are inconsistent with what that witness says, and which are intended to be asserted in due course.

- The **issues that are in contest** and that the defendant may need to be reminded about those issues (sometimes frequently); and

- The **conduct of the trial by the prosecutor** to ensure that the prosecutor does not attempt to unfairly benefit in some way from the fact that the defendant is unrepresented. Remember the primary duty of a trial judge is to ensure that a trial is conducted fairly to both sides and in accordance with the law.

Overall, it may expedite trials involving unrepresented defendants by allowing them to make whatever submissions they wish to make on a topic, and then deliver a ruling without engaging in, for instance, legal discussions with the unrepresented litigant.

Evidence

Session 5: Evidence (fedcourt.gov.au)

Drawn from papers presented by Judge Vicki Loury KC, District Court of Queensland, as part of the PJIP's fraud and corruption workshops.

This part of the Handbook considers evidentiary issues in fraud and corruption related cases. The common law with respect to evidence has been modified by statutory provisions in both Australia and Pacific Island jurisdictions.

Admissibility of Evidence

Relevance

The starting point for a consideration of the admissibility of any piece of evidence is **relevance.**

Evidence is not admissible unless it is relevant. In *HML v The Queen* (2008) 235 CLR 334. Gleeson CJ observed at p 351:

'Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative.'

Under the Australian *Uniform Evidence Acts* evidence is relevant if, were it accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

As a general rule at common law relevant evidence is admissible if it has probative value. This is expressly reflected in the statutes of several Pacific jurisdictions (Federated States of Micronesia, Palau, Republic of Marshall Islands, Solomon Islands, Tonga).

Evidentiary issues that may arise in a trial involving allegations of fraud/corruption.

Evidentiary effect of documents

Fraud and corruption related cases will often involve a large amount of documentary evidence.

Once a document is admitted into evidence the Court must determine what the document or the statement/s contained in a document, is/are evidence of and what weight should be attached to the evidence. As with oral testimony, the fact a document is admitted **does not mean** of necessity that it will be accepted by the court or that it will give any particular weight.

What is a document?

How does your jurisdiction define a 'document'? It is necessary to understand what definition is given to a document in your Evidence Act.

In fraud and corruption related cases most documents are in in the form of business records, bank records, ledgers, invoices, receipts etc and, email exchanges.

Authentication of documents

At common law, a document must be proved to be what it is alleged before it is admissible. A witness could not be asked about the contents of a document until the original was produced and authenticated (*Queen's Case* (1820) 2 Brod. & B. 284). An inference as to the authenticity of a document could not be drawn from its form and content - *National Australia Bank v Rusu* (1999) 47 NSWLR 309.

There are presumptions to be made as to authenticity if a document is at least 30 years of age and is produced from 'proper custody', that is, the place where it would be expected to be found. The presumption extends to the

date of execution which the document bears. In most if not all Australian jurisdictions that period has been reduced by statute to 20 years.

Under the Australian *Uniform Evidence Acts* a party tendering a document must prove its **provenance and authenticity**. **Provenance** means where the document comes from, and **authenticity** means that the document is what it purports to be. For example, authenticity of a business record can be proved (and ordinarily would be proved) by a person involved in the conduct of the business, if that person either compiled the document, found it in the business records or recognised it as a record of the business.

Check the statute or rules of evidence in your jurisdiction regarding authentication requirements.

If an issue arises in a trial with respect to the authenticity of a document, objection should be taken so that either additional evidence relating to the authentication of the document can be called or the question left for determination by the Court on the whole of the evidence. If documentary exhibits are admitted without objection, they form part of the evidence upon which the Court can act subject to considerations as to the weight to be given to the document or its rational persuasive power.

Can an inference as to authenticity be drawn from the document itself?

Most Australian jurisdictions have accepted that such an inference *can* be drawn from the document itself. Sections 58 and 183 of the *Evidence Act 1995* (Cth) provide for the Court to be able to draw inferences from the documents themselves as to their authenticity or identity.

However, in *Commissioner of The Australian Federal Police v Zhang (Ruling No 2)* [2015] VSC 437 it was stated that a Court should apply rigorous scrutiny in any examination of documents from which an inference is said to be available, particularly if that inference is one of authenticity in the absence of further supporting evidence.

Provenance and authenticity of a tape recording

A document, by definition, can include a recording, such as an electronic recording of a confession. The provenance and authenticity of a tape recording need to be established before it is admissible.

In *Butera v DPP (Victoria*) (1987) 164 CLR 180 the High Court extended the best evidence rule from documents bearing written language to covert recordings of conspiratorial conversations of drug traffickers. The best evidence rule requires a party relying upon the words in a document for any purpose other than identifying it to adduce the original of its contents. However, Lord Denning in *Garton v Hunter* [1969] 2 QB 37 said that the best evidence rule had largely 'gone by the board long ago'. The only remaining application was if an original document was available in a party's hands, it had to be produced– a copy would not suffice. As Lord Denning said at p 44, 'nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence'.

In *Butera,* it was explained that it was not the tape itself that was the admissible evidence but what was recorded on it. The plurality considered the admissibility of copies of recordings and held that the best evidence rule was not applicable to exclude evidence derived from tapes which are mechanically or electronically copied from an original tape. Provided the provenance of the original recording, the accuracy of the copying process and the provenance of the copy are proved, the copy could be played to the Court to produce admissible evidence of the conversation.

In *Director of Public Prosecutions v Selway (No 9)* [2007] VSC 247 enhancements of recordings were admissible as evidence of the sounds so recorded.

Legislation enabling the admission into evidence of a tape recording is different in various countries. Domestic legislative requirements about the admissibility of tape-recorded evidence should first therefore be checked.

The Rule against Hearsay

"I saw X taking the money" is admissible evidence, but "Y told me he saw X taking the money" is hearsay.

The rule excludes hearsay because it may be unreliable. There is an absence of opportunity to cross-examine on it, because the person who reportedly made the statement in question is not the witness. Witnesses are only permitted to give evidence about matters that they personally experienced, witnessed or heard.

Whether evidence of a statement made out of Court by a person not called as a witness at a trial is hearsay depends upon the use sought to be made of that evidence (*Walton v The Queen* (1989) 166 CLR 283, 301).

In *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 the Privy Council stated the hearsay rule as follows:

> Evidence of a statement to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made…'

If what is relevant is the fact the statement was made, rather than the truth of what is said, it will not be hearsay.

Whether an out-of-court statement is admissible will depend upon what fact the statement intends to prove. Identifying the purpose behind the tender and assessing that purpose in the context of the issues in dispute in the trial will assist in determining whether the evidence offends the rule against hearsay.

If the evidence is not relied upon as evidence of the truth of the statement, the question which naturally arises is, what is its purpose? How is the fact that the statement was made relevant to the issues in dispute at trial if reliance upon the truth of the statement is not its purpose? Asking these questions of the party seeking to rely upon the evidence will properly focus attention on the true purpose of the tender and may reveal that despite what is said the true purpose of the tender is to elicit inadmissible hearsay evidence.

There are many exceptions to the rule against hearsay which have their genesis in an acceptance of the likely reliability of the evidence because of the circumstances in which the statement is made. We will now consider those that often arise in a criminal trial.

Exceptions to the rule against hearsay

In Australia and all Pacific jurisdictions, there are statutory or common law exceptions to the rule against hearsay evidence. Most jurisdictions (Federated States of Micronesia, Kiribati, Palau, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Fiji and Papua New Guinea) have statutory provisions about the admissibility of business records or bankers' books. The exceptions to the rule (discussed below) tend to relate to an acceptance that a particular type of hearsay evidence is likely reliable.

Res Gestae statements

Res gestae statements are contemporaneous statements about an event. These are often an instinctive reaction to an event so less likely to be concocted or distorted and thus a reliable source of evidence.

Statements such as those accompanying the act or recognition of a suspect at an identification parade fall within this exception to the rule against hearsay. Another example is the content of telephone calls to a residence where police are executing a search warrant in relation to the sale of illicit drugs. The act of calling and the explanation for the purpose of the call are admissible under this exception. The explanation for the call throws light on the nature of the act of calling which is said to make this reliable.

Admissions and Confessions

Admissions and confessions are considered reliable because a person is not likely to implicate himself/herself in a crime unless it is true. Silence may also be regarded as an implied admission or confession. It may be considered as such because if a person is confronted with an allegation that they know to be false it would be expected that they would deny it: known as a '**common sense inference**'. Silence may indicate a consciousness of guilt or make

any defence advanced difficult to believe, so that the opposing case, being uncontradicted, becomes stronger. The legality of drawing these inferences will vary from case to case and from jurisdiction to jurisdiction. Check the Evidence Act in your jurisdiction for the legally permissible inferences that may be drawn from a defendant's silence in the face of an accusation. If silence in the face of an accusation is relied upon as an admission it needs to be established that the accused heard the statement and would be expected, in the circumstances to have denied it if it were untrue.

Another matter you must be alert to when considering admissions and confessions, is whether voluntariness is an issue in your jurisdiction. In some instances, legislation has changed the common law approach to such matters.

Business Records

Business records are an exception to the rule against hearsay. The rationale behind this exception is that because the statements are made in documents being used by a business, that provides a strong incentive for accuracy. Things recorded or communicated in the course of a business about that business, are by their very nature, likely to be correct. Those running the business rely upon the accuracy of the records that are kept, to operate an efficient and hopefully profitable business.

Not all documents retained by a business are business records. You should consider your own Evidence Act to determine whether a particular record is a business record.

By way of example, section 4 of the *Evidence Act* 1944 Fiji provides:

Admissibility of certain trade or business records in criminal proceedings.

In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—

(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he or she supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he or she supplied.

By reference to this example business records are documents which record the normal operational, financial and other activities of a business. Generally for a document to be admissible as a business record, it must be an internal record kept in an organised form accessible in the usual course of business, recording the business activities themselves. You should consider the type of document; its contents and whether it is kept as a record in determining if it is a business record. A record suggests some degree of permanence.

A business record can include:

- computer records
- books of account and invoices
- terms of a contract between customer and business
- screenshots of a web page
- emails (internal and external) if they relate to the business and are for the purpose of the business
- document(s) received from another business.

The hearsay rule does not apply if the representation recorded in the document for the purposes of the business was made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact or based on information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

Screenshots of a webpage may fall within the 'business records' exception to the rule against hearsay. For an online retailer the webpage will ordinarily contain the product name, a description of it including a photograph. The webpage will ordinarily include the terms and conditions of the transaction that the buyer agrees to in purchasing the product online. It is appropriate to infer that the information on the website was put in by a person who might reasonably be supposed to have had personal knowledge of the facts asserted. Screenshots of a webpage were found to be admissible as business records in *Pinnacle Runway Pty Ltd v Triangl Ltd* (2019) 375 ALR 251

Check the Evidence Act in your jurisdiction regarding the admissibility of business records as the provisions vary somewhat. For example, three jurisdictions (Fiji, Tonga, and Samoa) specify that witnesses must not be available before the business records can be admitted.

Other exceptions to the Rule against Hearsay

There are many other exceptions to the rule against hearsay, which can include:

- statements of deceased persons
- statements in public documents
- evidence in earlier proceedings; and
- recent complaint in sexual offence cases.

Proving a negative

The Australian *Uniform Evidence Acts* provide for the reception of evidence of what is termed **negative hearsay**. If the occurrence of an event of a particular kind is in question and in the course of a business, a system has been followed of making and keeping a record of the occurrence of *all* events of that kind, the hearsay rule does not apply to the evidence that tends to prove there is no record of the occurrence of the event kept in accordance with that system.

Other documents

Text Messages

Text messages and other electronic communications are considered documents. In Australia mobile phones and laptop computers fall into the category of 'notorious scientific instruments'. There is a rebuttable presumption at common law as to the accuracy of notorious scientific or technical instruments. Mobile phones and computers have been in common use in the community for many years. Young and old are very familiar with the processes of sending and receiving text messages on mobile phones, and of downloading data from computers. It is also a matter of general knowledge and experience that these processes are accurate in the sense that the data displayed (or printed out) replicates what is there.

in *R v SDI* [2023] QCA 67 the Queensland Court of Appeal held that printouts of a computer screen or a PDF of a computer screenshot, showing what a complainant had personally seen on a computer was admissible evidence.

In the Pacific except for Papua New Guinea and Tonga, there is a lack of evidentiary rules applicable to electronic evidence generally. The Evidence Acts of both those countries contain provisions expressly governing the admissibility, authenticity and weight of electronic evidence.

The common law presumption as to the accuracy of a scientific instrument or device means that when it is proved that what was used belongs to a class of notoriously accurate scientific instruments, what is produced can be admitted into evidence without more unless the opposing party adduces evidence which displaces that presumption by suggesting inaccuracy in some way.

CCTV Footage

Security camera footage is real evidence of what occurred. A person can give oral evidence of the descriptions and actions of an offender he/she observed on replaying CCTV footage when it has been mistakenly destroyed. The rationale for its admission is that the evidence generated by the CCTV footage is real evidence of the acts visually captured by it. The best evidence rule does not apply to mute images.

In *R v Sitek* [1988] 2 Qd R 284 the Queensland Court of Appeal found that a person can give admissible evidence of matters which she saw on closed circuit television footage.

Snapchat

In *Athans v The Queen (No 2)* (2022) 300 A Crim R 389 the complainants were sent sexually explicit 'snaps' via Snapchat which by the very nature of that app are deleted shortly after being viewed. What was in issue in the trial was whether it was the appellant who sent the images and whether they were sexually explicit. The complainants described what they had seen for those few seconds before the images were deleted which included a reference to the brand written on the underwear that the person in the snaps was wearing.

Livesay J and Lovell JA approached their determination of the appeal on the basis that the snap was a document and that the best evidence rule (as modified by the High Court in *Butera*) applied by analogy.

Snapchat does not produce a permanent, easily accessible record of the image. It does not operate in the same way as a document, image or video produced by a computer or mobile device. Such documents are stored and can be easily reproduced. Livesay J and Lovell JA considered that with respect to a snap that it is difficult to apply the best evidence rule including the concepts of original and secondary evidence. Livesay J considered that the better analogy is when a photograph, audio tape or video tape has been seen, heard or viewed but then lost or destroyed without fault on the part of the complainant or prosecution. Livesay J considered that through applying the best evidence rule by analogy, secondary oral evidence could be given because there was a satisfactory explanation for the absence of the 'original' image and data: they no longer exist.

Kourakis CJ held that the best evidence rule, in its current form, does not preclude secondary evidence of images (or sounds) unless such evidence is led to prove the words written on those images or made by those sounds, when a fact in issue is whether a person wrote or said those words or subscribed or assented to them. He reasoned that the best evidence rule does not preclude testimonial description of documents which evidence a fact in issue that is not concerned with the meaning or legal significance of the writing or speaking of words or numbers. The testimony given at the trial of the brand of the underwear worn by the man in the snap was evidence of this kind and so was admissible.

Circumstantial Evidence

Circumstantial evidence differs from direct evidence that aims to prove a fact. Circumstantial evidence (e.g., fingerprints or behaviour) instead, can indicate the existence of a fact.

In fraud cases circumstantial evidence may be the only evidence of the intent of a defendant. You must **assess circumstantial evidence as a whole –** do not look at it piecemeal. The weight to be given to any piece of circumstantial evidence depends on the nature of the evidence, the issues in contest and the strength of other evidence.

In Australian jurisdictions, where the prosecution case rests substantially on circumstantial evidence, the trier of fact cannot return a guilty verdict unless the prosecution has excluded all reasonable hypotheses consistent with innocence: *The Queen v Baden-Clay* (2016) 258 CLR 308 at [46], [50]; *Barca v The Queen* (1975) 133 CLR 82 at 104.

For an inference to be reasonable it must rest upon something more than mere conjecture: *The Queen v Baden-Clay* at [47] quoting *Peacock v The King* (1911) 13 CLR 619 at 661; *Gwilliam v R* [2019] NSWCCA 5 at [101], [104].

It is not for the defence either to establish that some inference other than guilt should be drawn from the evidence or to prove particular facts tending to support such an inference: *The Queen v Baden-Clay* at [62] citing *Barca v The Queen* at 105. It is enough that an accused's hypothesis consistent with innocence can be derived reasonably from the evidence in the prosecution case. No standard of proof applies: *Wiggins v R* [2020] NSWCCA 256 at [65].

Cross-admissibility in multi-accused cases

Where several people commit an offence together, statements made by one offender in the absence of others may be admissible as original evidence that the offender entered into an agreement with others to do the unlawful act with which they are charged. This is not to prove the truth of what was said but to establish, from the fact that the acts were done, or the statements were made, the inference that an agreement which constituted a conspiracy or common purpose had been entered.

Such statements may also be admitted under the co-conspirators' principle (sometimes referred to as the '**co-conspirators' rule**') which permits their admission as evidence of the truth of the statements made, even though made in the absence of the accused. Such statements are admissible on the basis that each conspirator or party to the common purpose is deemed to be the agent of the others in relation to assertions made in furtherance of the common purpose.

To rely on such evidence, the court needs to be satisfied that:

1. There was a combination or common purpose or shared intention.
2. The acts done, or declarations made by the other parties to the combination were said or done in furtherance of or in carrying out the common purpose.
3. That there is evidence that the offender is a participant in that common purpose.

You should be aware of the difference between a narrative statement or account of some event which has already taken place and statements made in furtherance of the conspiracy or common purpose. Statements made in furtherance of a conspiracy or common purpose will often be instructions or arrangements.

Before such evidence can be relied upon as evidence of the truth of the statement there must be reasonable evidence of the person's participation in the conspiracy or common purpose.

This rule is reflected at common law in several jurisdictions, for instance, Papua New Guinea.

The legislation in some Pacific jurisdictions recognises that statements made by one offender in the absence of others may be admissible as original evidence that the offender entered into an agreement with others to do the unlawful act with which they are charged. These jurisdictions include Palau, Solomon Islands, Tokelau and Tonga.

Expert or Opinion Evidence

An expert witness is permitted to give opinion evidence. The expert opinion must be on a matter which is a proper matter for expert opinion. There must be a field of specialised knowledge in which the witness is an expert. The opinion expressed must be based wholly or substantially upon the witness' expert knowledge. If the process of reasoning is not dependent on specialised knowledge and expresses a process which could be undertaken by the fact finder without the expert's assistance, it is not admissible.

The most common types of expert testimony in fraud trials come from forensic accountants.

The facts on which the expert's opinion is based must be identified. Expert evidence is inadmissible unless the facts on which the opinion is based are identified and proved in evidence. If the opinion is based upon assumed or accepted facts, those facts must be identified and provided in some way. To the extent that the opinion rests on facts "observed" by the expert, they must be admissibly proved by the expert, for example an expert may prove an experiment.

The expert must state, in evidence in chief, the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert to reveal that the opinion is based on the expert's expertise. The process of reasoning that leads to the expert's opinion will assist you in giving reasons for your decision particularly if you have to assess the evidence of competing experts.

See Makita (Aust) Ptd Ltd v Sprowles (2001) NSWLR 705 and *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 for the requirements for the admissibility of evidence of expert witnesses.

In all Pacific jurisdictions, expert opinion evidence is admissible as an exception to the rule against the admissibility of opinion evidence. Some jurisdictions (Federated States of Micronesia, Palau, Republic of Marshall Islands, Samoa, Solomon Islands, Tokelau and Tonga) have provisions in their statutes or court rules pertaining to the qualification of experts or competency of witnesses more generally.

The fact that a witness might be called an 'expert' does not mean that their evidence must be accepted. Ultimately that is a decision for the factfinder, whether a judge or a jury. The following is list of the matters to consider when considering expert evidence.

1. The fact we call a witness an 'expert' does not mean that their evidence has automatically to be accepted – as the fact-finder you must make this decision.
2. What are the qualifications of the expert?
3. What and how much experience does the expert have?
4. What is the sphere of the expertise they can reliably give their expert opinion about?
5. Is the witness impartial or partial to either side, independent and uninfluenced by the potential outcome of the case?
6. Does the opinion of the expert accord with whatever other facts you find proved?
7. Have the facts, from which the expert's opinion is based, been established?
8. Does the expert have a conflict of interest?
9. If there are two competing experts, how can their evidence be reconciled?
10. An expert cannot prove disputed facts by inadmissible hearsay.
11. It is common for courts to allow expert witnesses to have their written report in front of them whilst giving evidence.

Character witnesses

A defendant may introduce evidence to show that he/she is of good character. By doing so, however, they put their character in issue and the prosecution may cross-examine witnesses or, in some cases, the defendant about their character and about any previous convictions. The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the defendant upon conviction of an offence.

The common law, at least in Australia, proceeds on the assumption that a witness is creditworthy. So, evidence-in-chief going only to the character of a witness (even another witness) is generally inadmissible. Evidence of a prior consistent statement is not admissible. Things might change however if a witness's character or reliability are challenged, the response might include assertions of good character.

Good character

An accused person may adduce evidence of good character. Good character can be raised in cross-examination of a prosecution witness, or a witness called by a co-accused or, by calling witnesses to attest to the defendant's good character.

Evidence of good character should be given in general terms, without supporting detail. Evidence of character, strictly speaking, may only be given by statements of reputation. The purpose for leading evidence of good

character is to persuade the court that the defendant, given his/her (reputed) character, is unlikely to have committed the offence and, if the defendant gave evidence, that it supports the credibility and reliability of the evidence.

Weight to be given to character evidence

It is a regular submission, upon a plea of guilty by a person without any criminal history, or without criminal history like the offence then before the Court, that the offending is 'out of character' for the defendant. When pressed for what that means, counsel usually repeat that the defendant has not committed such conduct before, that the defendant has been a hardworking, contributing citizen whose colleagues and family and perhaps other senior community figures have all given references to his or her previous good character. However, the Court knows that people may be guilty of serious offending even while they relate to, and are regarded by, all around them as a person of impeccably good character.

Bad character

The prosecution may not, generally, adduce evidence of the defendant's character. However, if the defence leads or extracts evidence of good character, that is, puts character in issue, the prosecution may rebut it by cross-examining the defendant or the character witnesses and by leading extrinsic materials. In some places, this is governed by statute. Check in your jurisdiction whether statute covers this.

The material that may be introduced includes not just previous convictions but other discreditable conduct.

Hostile Witness

It is important to define the term 'hostile' witness and to distinguish between an 'unfavourable' and 'hostile' witnesses. An unfavourable witness is one who fails to prove the fact they are called to prove or proves an opposite fact. A hostile witness is one who refuses to tell the truth.

An unfavourable witness might be contradicted by other evidence tendered in the case, but their credit cannot be attacked by the party who called the witness.

Some Pacific countries have legislation dealing with this matter. For those that do not, the common law applies. The legislation allows a party to prove a prior inconsistent statement of a hostile witness.

Common law position on hostile witnesses

At common law if a witness disappoints the party calling them, another witness could be called to give a different account. It is also settled that it is permissible for a party calling a witness to ask questions about prior inconsistent statements. However, at common law, doubt remains as to the probity of attempting to prove a prior inconsistent statement of an adverse witness.

Statutory provisions on hostile witnesses

Statutory provisions have resolved the doubts of the common law by allowing for proof of prior inconsistent statements of an adverse witness while maintaining the prohibition on a party impeaching the credibility of their own witness in a general way. Some statutory provisions including s. 17 of the *Evidence Act* 1977 (Qld) introduced the concept of an 'adverse' witness as opposed to a 'hostile' witness.

In *R v Hayden & Slattery* [1959] VR 102 at103, Scholl J stated '… adverse must mean, in this field, unwilling if called by a party who cannot ask him leading questions, to tell the truth and the whole truth in answer to non-leading questions – to tell the truth for the advancement of justice'.

Most Pacific jurisdictions have statutory provisions regarding hostile witnesses although the term 'hostile' is not always used. Below is a comparison of some statutory provisions from Pacific jurisdictions dealing with hostile witnesses.

Kiribati

Section 7 of the *Evidence Act 2003* Kiribati provides that a party producing a witness shall not be allowed to impeach the witness' credit by general evidence of bad character but may contradict him/her by other evidence, or may, *by leave of the court,* prove that the witness has made at other times a statement inconsistent with the present testimony.

Samoa

Section 79 of the *Evidence Act 2015* Samoa provides that the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

Tonga

Section 147 of the *Evidence Act 2020* Tonga provides a witness cannot be cross-examined nor his credit impeached by the party calling him except by permission of the Court. Permission shall only be granted when in the opinion of the Court the witness has shown himself to be a hostile witness. The section defines a hostile witness as one 'that is not desirous of telling the truth to the court.'

Vanuatu

Section 85 of the *Criminal Procedure Code* [CAP 136] Vanuatu provides for a mechanism that may be used to deal with 'refractory witnesses'. A refractory witness includes a witness who is required to give evidence but refuses to be sworn, or once sworn refuses to answer any question put to them or neglects or refuses to produce any document or thing they are required to produce. The section provides for the possible committal of the person to prison for up to eight days, or until they do what is required of them, should the court consider that to be appropriate.

Dealing with a hostile witness in practice

The following is a list of matters to consider when dealing with a hostile witness.

1. The party who is calling the witness will lead evidence-in-chief.
2. They should establish all relevant evidence from a witness, but it may become apparent to counsel that there are major inconsistencies in the evidence given by the witness compared to their statement
3. Counsel should then raise the issue with you and seek a ruling that the witness is adverse.
4. This should be followed by a *voir dire.*
5. Counsel should seek leave to cross-examine on the *voir dire.*
6. At this point cross examination is not intended to attack the credit of the witness but to establish inconsistencies in their evidence that demonstrates the witness is adverse.
7. Counsel seeking to have the witness declared adverse should put the prior inconsistent statement(s) to the witness.
8. Once the witness has given evidence on the voir dire the parties will make their submissions (in the absence of the witness).
9. The judge decides whether to declare the witness adverse and, if declared adverse, should set limits about what the witness can be cross examined on to avoid counsel cross examining the witness 'at large'.
10. 'at large'.

Sentencing

Session 4: Sentencing (fedcourt.gov.au)

Drawn from papers presented by Justice Michael Wigney, Federal Court of Australia, and Justice Teresa Berrigan, Supreme and National Courts of Papua New Guinea, as part of the PJIP's fraud and corruption workshops.

Sentencing laws vary and can be complex. In considering an appropriate sentence regard should be had to the applicable statute, leading judicial precedents and comparable cases in your own jurisdiction.

On occasion, for instance, when dealing with a novel offence, it may be useful to consider precedents in a similar jurisdiction, which whilst not binding might have some persuasive value.

General Principles

Broad Discretion

The Court has a broad discretion on sentence.

Consideration should be given to protection of the community, punishment, rehabilitation and deterrence: see for instance *Acting Public Prosecutor v Aumane & Ors* [1980] PNGLR 510.

The Purposes of Sentencing

There are four main purposes of sentencing. They overlap and are not listed in order of priority:

Punishment (retribution) and denunciation.

One of the key purposes of sentencing is to punish. A penalty should be imposed which is of a severity which is appropriate in all the circumstances of the offence and meets community expectations: *Ryan* [2001] HCA 21; 206 CLR 267 at [46]; [55] *Markarian* [2005] HCA 25; 228 CLR 357 at [82].

Protection of the community.

To achieve this purpose the sentence may require removing the offender from the general population, for instance by imprisonment or removing them from a position where they may re-offend.

Deterrence – specific and general.

Specific deterrence aims at deterring the offender from re-offending. Whereas general deterrence aims at deterring others who might be tempted to offend. General deterrence can be a particularly important factor in sentencing for offences involving fraud and corruption: see for instance *R v Hannes* [2000] NSWCCA 503 at [394].

Reform and rehabilitation

Imprisonment is more punitive than rehabilitative. See *Muldrock* [2011] HCA 39; 244 CLR 120 at [57]. Rehabilitation may in an appropriate case require the court to consider alternatives to full time custody: *Veen (No 2)* [1988] HCA 14; 164 CLR 465, 476.

Approach

"There is no mathematical or scientific formula for arriving at a particular specific sentence from the general principles": *Rex Lialu v The State* [1990] PNGLR 487 at 489.

The Court must identify and ascribe weight to the relevant factors and make a value judgment as to what is an appropriate sentence in the light of them, referred to in Australia as "instinctive synthesis". The sentencer is called on to reach a sentence which balances many different and conflicting features: *Markarian,* [39]; *Wong* [2001] HCA 64; 207 CLR 584 at [78]. Sentencing is a discretionary and evaluative exercise and there is no single correct sentence.

Avoid a staged, incremental, "tiered" or mathematical approach. For example, avoid starting with a sentence and then adjusting by mathematical values given to one or more features: *Wong* at [74]-[77]. There may be exceptions to this rule in jurisdictions where legislation prescribes percentage discounts for assistance to authorities and early guilty pleas: *Markarian* at [74].

Relevant factors and considerations

Sentencing requires a consideration of the objective seriousness of the offence and offending conduct and the offender's subjective or personal circumstances. Many jurisdictions refer to such considerations as aggravating, extenuating and mitigating factors. Avoid a "checklist" approach.

In *Wellington Belawa v The State* [1988-89] PNGLR 493 the Supreme Court of PNG identified the following factors which may be relevant to the determination of sentence in a case concerning an offence of dishonesty:

- the amount of monies involved
- the quality and degree of trust reposed in the offender
- the period over which the offence was perpetrated
- the impact of the offence on the public and public confidence
- the use to which the money was put
- the effect upon the victim
- whether any restitution has been made
- remorse
- the nature of the plea
- any prior record
- the effect on the offender
- any matters of mitigation special to the accused such as ill health, young or old age, being placed under great strain, or perhaps a long delay in being brought to trial
- the need for personal and general deterrence.

Fraud is not a victimless crime

An offence of fraud can have very real and often enduring consequences for those who lose the benefit of the monies.

Where significant State monies are concerned, the entire community may be affected, particularly those most vulnerable: *State v Paraka* (2023) N10484 at [89]. It should also be recognised that large scale offences against public funds have the potential to tarnish a country's standing at the international level and deter foreign investors with potentially far-reaching consequences for its development: *Paraka* at [42].

Maximum Penalty

The maximum penalty is reserved for the most serious instances of the offence: *Goli Golu v The State* [1979] PNGLR 653. Whilst the maximum penalty should be reserved only for the worst sort of cases, that is not to say that the case must be "the very worst in the book" (*Goli Golu v The State* [1979] PNGLR 653) or the worst imaginable example of the offence (*The Queen v Kilic* (2016) 259 CLR 256).

In some jurisdictions a minimum penalty may apply to certain offences.

Guidelines and Comparative Cases

For common offences there may be guideline judgements by a superior court which will provide a useful starting point when determining an appropriate sentence.

Regard should also be had to comparative cases, i.e. sentences imposed in previous cases which are comparable. These may also be useful for identifying unifying sentencing principles that should be applied and for disclosing discernible sentencing patterns of a range of sentences for such cases.

Caution should be exercised where there are insufficient cases to establish a range or the range may not be of great weight or cases may not be truly comparable.

Whilst guideline judgements and comparable cases are important considerations, they do not constrain the sentencing discretion of the judge: *Markarian* at [255].

Every sentence must be determined according to its own facts and circumstances: *Lawrence; Simbe v The State* [1994] PNGLR 38, amongst others.

Proportionality

The sentence imposed must be proportionate to the gravity of the offence committed. A sentence should not be increased beyond what is proportionate to the crime in order to extend the period of protection of society: see *Veen (No 2)* at 472.

Cumulation, Concurrency and Totality

There is no "all-embracing" rule as to when sentences for two or more convictions should be made concurrent. Sentences should generally speaking be made concurrent where a series of offences is committed in the prosecution of a single purpose or the offences arise out of the same or closely related facts: *Tremellan v The Queen* [1973] PNGLR 116. Where the offences are different in character, or concern different victims, the sentences should normally be cumulative: *Public Prosecutor v Kerua* [1985] PNGLR 85.

It may be relevant to consider the nature, purpose, date, location, victim(s) and gravity of the offending for each offence.

There are three stages in coming to a total sentence:

1. Consider the appropriate sentence for each offence charged.
2. Consider whether the sentences should be made concurrent or cumulative.
3. Where a decision is made to make two or more sentences cumulative, the sentencer is then required to look at the total sentence and see if it is "just and appropriate" having regard to totality of the criminal behaviour and to avoid a total sentence that is excessive in the whole of the circumstances: see for instance : *Mill v the Queen* [1988] HCA 70; 166 CLR 58 at 63; and *Mase v The State* [1991] PNGLR 88.

Imprisonment is a sentence of last resort

The court must generally be satisfied that no penalty other than imprisonment is appropriate before imposing such a penalty.

Some jurisdictions provide for alternatives to imprisonment, including good behaviour bonds, community service or home detention. Some jurisdictions allow for suspension of custodial terms on certain conditions.

Subject to applicable legislation, a judge has a discretion to deduct the time already spent in custody from the sentence to be served.

Parity

The principle of 'parity' requires that like offenders be treated in a like manner. Parity is a matter to be determined having regard to the circumstances of the co-offenders and their respective degrees of culpability. Equal justice requires that like should be treated alike but that if there are relevant differences due allowances must be made for them.

"It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she

played in the commission of the offence, have to be taken into account": Gibbs CJ in *Lowe v The Queen* (1984) 154 CLR 606.

In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. The parity principle recognises, however, that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance': see also *Sanawi v The State* (2010) SC1076 adopting *Mario Postiglione v The Queen* [1997] HCA 26; *Lowe v The Queen* (1984) 154 CLR 606; affirmed *Kaya v The State* (2020) SC2026.

Official Corruption/Abuse of Office

Public Trust

The more senior the official the more serious the offending. *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73; *The State v Yawijah* (2019) N7767; *The State v Joel Luma* (2020) N8798.

"Corruption is like cancer"

"It is deadly because it can kill a nation if it is not dealt with swiftly and sternly. It is like a cancer that grows in the human body and if not treated quickly, can grow big and cause death. Its impact on the society must never be underestimated. It has far reaching consequences. A nation's progress and development is dependent on its work force and if public officials who make up the bulk of the work force in this country indulge in corrupt activities, their actions can bring down the entire nation.": *S v Robert Konny* (2012) N4691.

"The corruption in this case is particularly insidious and difficult to detect. Officials demand monies for simply doing their job. This case is the perfect example of the type of cancer that grows until, like the situation in some countries, it becomes so entrenched that it simply becomes accepted as a necessary part of dealing with the public service.": *S v Doreen Tatut* (2021) N9023.

Money Laundering

The offence of money laundering is deliberately broad and designed to capture a wide range of conduct relating to money or other property arising from crime. Given its breadth the maximum penalty has been designed to accommodate a very broad range of offending behaviours.

In the circumstances sentencing will require a careful assessment of the objective seriousness of the offending under consideration: *Thorn v R* [2009] NSWCCA 294, adopted *State v Edward Bae* (2019) N8029.

The following considerations may be relevant in determining an appropriate sentence:

- the **amount or value** of the criminal property involved
- the **source of the criminal property** dealt with or the **seriousness of the criminal conduct** from which the property derived
- the **period over which** the offence was perpetrated, and the number of transactions involved
- the **sophisticated nature of the offence** and the **extent of planning** involved
- the **role of the offender, or the authority** with which he acted
- the **nature of the dealing or the use to which the money was put**, including the extent to which the offender personally benefited
- the **state of mind of the offender,** or the extent to which he knew the property was criminal property
- the extent to which the offender **abused a position of power or trust**
- the **impact of the offence on the public and public confidence.**

State v Edward Bae (2019) N8029; adopting *Wellington Belawa*; *R v Ansari* (2007) 70 NSWLR 89; *R v Huang* (2007) 174 A Crim R 370; *R v Li* (2010) 202 A Crim R 195; *R v Guo* (2010) 201 A Crim R 403.

General Deterrence

A sentence for money laundering should normally reflect the need for general deterrence to a very significant degree because of the serious nature of the offence and the potential risks posed to the economy and society and the difficulty for detection.

Decision Making

Session 5: Decision Making (fedcourt.gov.au)

Drawn from papers presented by Justice Kathleen Salii, Supreme Court of the Republic of Palau, as part of the PJIP's fraud and corruption workshops.

Decision making is an essential part of judicial life. People are more likely to respect the law if they understand it. They will be cynical about the courts if they lose a case and cannot figure out why. For this reason, when reaching a decision, whether oral or in writing, judges should avoid technical, foreign, or legalistic words, replacing them by plain language.

A key factor in decision making is the identification and resolution of issues. This issue-driven approach is useful not just for delivery of oral decisions or writing judgments, but also for conducting efficient trials or hearings. It is as useful for counsel preparing submissions as it is for judges crafting their judgment.

A recognised and accepted approach to judicial decision making is the IRAC approach:

I: Identification of **issues**

R: Application of the **rule**

A: **Analysis**

C: **Conclusion.**

Fact finding steps

It is possible to summarise the fact-finding steps a judge must follow when reaching a decision. These are discussed in more detail below. A judge must:

1. Identify with precision the issues in the case.
2. Identify who has the onus to prove the facts in issue and remember that throughout the case. A case may fail because the side with the onus to prove the facts has not don't so.
3. Consider the importance of any special rules of evidence such as the rule against hearsay, a failure to call a witness and a failure to put a proposition to a witness for comment (The Rule in *Browne v Dunn*).
4. Search for other indicators such as internal or external inconsistencies and inherent implausibility in determining the credibility of a witness – do not just rely on the demeanour of a witness.

Challenging aspects of decision making

The real issue in any case, whether civil or criminal, is finding the key facts in issue. Sometimes a case may come down to only one real issue. For example, the issue might be **who said what** in relation to various matters or it might be **who did what?**

To form a view about what happened when a witness is unreliable on a particular point, or in relation to all their evidence, a judge can review their findings of fact. If a witness has been found to be untruthful on one aspect of their evidence, it does not follow that they are necessarily untruthful about all aspects. Then it is a matter of drilling down and working out who and what is to be believed. A judge will act like a bit like a detective working out what he or she thinks happened.

Starting a case

Focus on – **what are the issues in the case** and analyse each issue one by one.

There is however, a need for **reasonable efficiency**. in some instances, a written decision or oral decision will require a fair bit of reflection, it is necessary and consistent with the objective of justice that there not be too excessive a delay in delivering a judgment. There is a valid argument that if a delay in decision making is too long, it is no longer tenable for the judge to accurately record and recall what it was that people were saying in the case.

Determining the Issues

You should request counsel to **agree the issues** that are in dispute at the **beginning** of the case. If not, then any issue will be an **unagreed issue**. An accompanying rule is that the judge should expect the opening and closing submissions of counsel - oral or written, to be directed only to that list of issues. Topics such as credibility etc can clearly fall within those issues as well.

The problem is if counsel do not follow this approach they will be arguing about completely different things and their arguments will falter and the entire structure of the judgment will be lost.

First Instance

At first instance it is essential to make sure everyone is on the same page as to **what the issues are**. That does not affect the law in relation to who has the onus of proof - it just identifies **what** must be proven.

The role of the courts is to quell disputes and invariably this requires conclusions to be reached on facts that are in dispute.

Reasons for decision

It is vital for confidence in the judicial process that **reasons for a decision** must always be given by the judge.

Even if it is a simple case where the real issue is the credibility of a particular witness. The reasons for accepting or rejecting the credibility of a witness should be explained to preserve confidence in the system.

These recommendations apply equally to oral *ex tempore* judgments as to written judgments.

If you have the luxury of time – preparation is the key.

Onus of proof

Who has the onus of proof in a case is a very important issue. It is not just critical in criminal cases but also in civil cases. The plaintiff carries the onus of proof in civil case whereas the prosecution bears the onus of proof in a criminal matter. The plaintiff/prosecution must prove all the elements of the case. If all aspects of the claim are not proven there may be no need for the defending party to give evidence at all.

The onus of proof might shift from the accusing party to the defending party on a particular fact and the rules in different jurisdictions may vary.

It is important to be alive to the fact that the onus might shift and in circumstances where the defending party is the only party able to give evidence on a topic – it may be permissible to infer that the failure to give any evidence means that the evidence would not be capable of supporting the defending party's case. In Australia a failure to call a witness or a failure to give evidence may not be the subject of comment in criminal cases. The rule in civil cases is called the rule in *Jones v Dunkel* 1959 101 CLR 298.

Standard of proof in civil cases with a criminal element

What is the proper standard of proof in civil cases that may involve a criminal element? For example, in a defamation case in Australia, *Lehrman v Network Ten Pty Ltd* [2024] FCA 369 (15 April 2024) the trial judge was required to determine if a rape had occurred. In Australia to prove a criminal element in that case rape, in a civil case, requires the court to be conscious of the seriousness of the allegation but is does not rise so high as to require proof to be beyond reasonable doubt. The matter requires proof on the balance or probabilities (the civil standard of proof) but considering the seriousness of the accusation.

If a fraud occurred in a civil case this would not be required to be proved beyond a reasonable doubt but the seriousness of an allegation of fraud needs to be considered in addressing the balance of probabilities. This is the approach in Australian courts which may be different in various Pacific jurisdictions.

Laws of evidence

The laws of evidence are relevant to decision making. Above, there was discussion about a situation in which a party failed to call a witness who would support their case – the court does have a discretion in certain circumstances to infer from the fact that the failure to call a witness would suggest that the evidence that they would give would not be favourable to that party's case. Judge's need to exercise such a discretion with care.

There is a requirement that if a proposition is to be relied upon as part of a person's case – procedural fairness demands that that proposition be put to the other side so that it may be commented on. In Australia this is called the rule in *Browne v Dunn* 1893 6 r 67. It is a discretionary element. The court must form a view as to whether there was a fair opportunity for the defending party to be conscious of the evidence to be relied upon by the other side. Quite often it will not be necessary to conclude that the party cannot rely upon that if the essential, fundamental proposition has been put forward.

Other evidentiary rules should also be considered.

Bias

Judges inherently bring certain unconscious biases to their work. That is inherent and a result of our life experience. There are several types of biases, each of which present themselves differently and result in different outcomes which can undermine the reaching of a just and fair decision.

One such bias is called **compensatory bias**. For example, some judges may have practiced in a field of law prior to their appointment as a judge where they almost always act for one particular side e.g. they may have always been a prosecutor or defence counsel, acted for employers, insurers, unions, doctors or for patients.

There is a suggestion that if these people are made judges this will lead to a bias in favour of who they once acted for. In truth this is rarely the case. Judges take the judicial oath very seriously and when proper fact-finding processes are applied to a list of issues rarely does that sort of bias in fact affect the decision-making process. On the other hand, if a judge has acted for many years for example for doctors in malpractice suits and is now a judge, is there a compensatory bias where the judge would avoid reaching a favourable conclusion in favour of a doctor? Does the judge lean the other way? There is such a risk, but it is minimal. Judges minimise the impact of these biases simply by acknowledging them. The impact is ameliorated almost entirely, when judges adopt the issue-based fact-finding processes discussed above. Ensuring the reasoning is transparent and includes a list of reasons why a conclusion is reached is the appropriate result of this process.

It is less likely if appropriate decision-making techniques are adopted that any bias – either real or perceived - will emerge whether it is based on compensatory bias or the more common forms of bias such as apprehended and unconscious bias.

A range of unconscious biases relevant to judicial decision-making are discussed here.

Practical Tools to Assist Judges in fact - finding

What role does the demeanour of a witness play in fact finding? A substantial part of litigation has now shifted to the written word. However, it is an unusual case where no oral evidence is given. For decades there was a presumption of a significant advantage for the trial judge in seeing and hearing evidence given by witnesses. That is an advantage not shared by an appeal court in most instances because evidence on appeals is unusual. But more recently such an advantage of observing the demeanour of the witness and thereby reaching a conclusion as to who is telling the truth has been very seriously doubted. Judges receive little or no training in assessing credibility. Determining whether a witness is telling the truth by reference only to the way the witness performs or behaves in the witness box is fallible for several reasons including:

1. Witnesses have different personalities. Some witnesses will be more fearful of the occasion even though they are entirely truthful or innocent.
2. Some people will be perplexed by the language used by lawyers including when they ask questions that the witness does not understand. This is a critical failing on the part of the cross examiner.

Using only the witnesses' demeanour as a yardstick is dangerous and caution is required. As a judge you need to go back to issues such as:

- Who has the onus in the case?
- What are the probabilities?
- What are the surrounding circumstances?

Searching for inconsistencies

One of the most important tasks for a cross examiner in a trial is to **search for inconsistencies** in the evidence of a witness. Any good cross examiner in preparation for a trial will be searching for inconsistencies which throw doubt on the reliability of the evidence of a witness. In many cases the cross examiner will have searched for internal and external inconsistencies.

The cross examiner may devise alternate pathways of questioning depending on which answers are given. It may be necessary at the end of a cross examination for the judge to ask a question or two of the witness by way of clarification. This is possible in the Australian legal system.

After you have questioned the witness, if this is necessary and permitted, the judge should offer counsel the opportunity to ask any questions that arise from that exchange. They might lead to some conclusions being made on the credibility of a witness. But if the material has not been raised in cross examination and the judge wants to rely on that material it is very important that the witness can comment on that material.

Inherent Probabilities

In addition to inconsistencies the next most important yardstick for fact finding is the identification of **inherent probabilities**. There are some circumstances in which the evidence given is so inherently improbable that an adverse conclusion as to credibility can be readily reached. This is an area where it is particularly important to fully explain why it is that the judge considers evidence given by a witness to be unsound. In fairness to the fact-finding process, it is crucial that the **reason for reaching the conclusion** be explained clearly to a witness and explained fully in the reasoning.

Community standards

What role do community standards play in judicial decision making? A typical situation where this might arise is where a judicial question must be decided by a test of **reasonableness**. What does reasonableness mean? That is quite a difficult question.

The judge may be expected to import current community standards in deciding whether conduct on a particular occasion is reasonable. Would it have been reasonable for a person to have acted in that way? Relevant factors would include whether there has been a breach of a reasonable standard of care or whether a particular reaction to circumstances was reasonable or whether the making of a particular statement was a reasonable representation of the truth. For example, would it be reasonable that the public would believe that it was scientifically proven that a particular toothpaste is the cheapest and best toothpaste in the world, or would a court conclude that the public would be more likely to consider such a statement to be advertiser's puffery.

It is also important to try and distinguish one's personal views on this topic and it is therefore quite difficult as a judge to determine what a reasonable member of the public would regard as right.

Documentary evidence

Documentary evidence is a most important tool in fact finding. You should view the documents chronologically. The written word closest to the time (self-serving statements aside) often tells you much more about what happened than reconstruction after the event. When considering a witness' credibility even an honest memory can be fallible. A person will have a belief about what happened but that may be a faded memory.

Writing/delivering judgments

Choice of language in judgments

Try and choose language which is simple when you are writing or delivering a judgment. Remember you are delivering a judgment for everybody who has a stake in the decision. Styles of judgment writing or delivery will vary but **clarity is always the key**.

Facts do not have to be found to an absolute degree of certainty because facts do not agree to an absolute degree of certainty in real life. Except where facts are absolutely black or white. In most cases it will be difficult for a judge to say that he or she has found the evidence of a witness wholly untruthful. The important thing is to determine the particular issue and ascertain whether the evidence touches on that issue. Usually, other than in extreme cases you will be able to say that 'I accept the evidence of x for these reasons' or 'I don't accept the evidence of y for these reasons'.

The function of a judge is to reach a decision to quell the dispute of parties, and parties are aware that the decision may go against them. If the process of reasoning is transparent even if it does rely on the credibility of a witness, this discharges your function to resolve the dispute. There is no need to be too uncomplimentary to the losing party about the state of their evidence.

Written Judgments

The following are five steps for an orderly, reader-friendly, issue-driven judgment:

1. Identify the issues and write a case-specific heading for each.
2. Arrange the issues in a sequence that makes sense.
3. Write a beginning, telling the story that gives rise to the issues.
4. Analyse each issue; and
5. Write a conclusion.

Issues

Issues are what the litigants are arguing about. They might be arguing about the facts. Or they might be arguing about the law. Or they might be arguing about both. At the trial level, every element in the statement of claim or every element in the statutory definition of a crime can be an issue. But practically speaking, the issues are those elements of the claim or the charge that the respondent or defendant contests. If the parties agree there is no issue.

In an **introduction**, issues can be expressed as **'that' statements**. For example, in a case where a person has been charged with official corruption, the issues might be stated this way: The prosecution must prove **that** X was employed in public office, **that** he corruptly received a benefit, and **that** X did corruptly receive the same in the discharge of the duties of the office he held. The defence argues **that** the benefit he received was not in the discharge of the duties of the office he held and therefore he is not guilty of the offence of official corruption.

Or they may be expressed as **'whether' statements**: I must decide **whether** X was employed in the public office, **whether** he corruptly received a benefit and **whether** he received same in the discharge of the duties of the office. If all these elements are established by the prosecution X is guilty of official corruption and I must decide what penalty I will impose.

Or they may be expressed as **questions**:

1. Was X employed in public office?
2. Did X corruptly receive a benefit?
3. Did X corruptly receive the same in the discharge of the duties of the office he held.
4. If the answer to questions 1-3 is yes, what penalty should I impose on X?

Arrange the issues in a sequence that makes sense

Headings should be logically arranged: first things first (e.g., jurisdiction, venue, identification of the accused if it is challenged); last things last (e.g., sentence, damages, costs). Although there is no universal rule about typography for headings, they should be in a font - boldface, italics, or underlined - that makes them stand out from the rest of the text.

In some cases, if there are several issues and the first issue is resolved in the negative there would be no reason to address the other issues. Using the example above regarding the offence of official corruption, if it could not be established that X was employed in public office there would be no need to consider whether he corruptly received a benefit or whether he received the same in the discharge of the duties of the office he held. Similarly, if it was established that X was employed in public office, but it could not be established that he corruptly received a benefit it would not be necessary to establish whether he received the same in the discharge of the duties of the office he held.

In criminal cases, the statutory elements are often arranged in a logical sequence and can be turned into headings to organize the body of a judgment. For example, if the charge is forgery the statutory elements (that is, the offence as defined in the relevant legislation) might be turned into issues / questions like these:

- Did the accused make a false document or writing?
- Did the accused make the document or writing knowing it to be false?
- Did the accused make the document or writing with intent that it may be used or acted on as genuine?
- Did the accused make the document or writing to the prejudice of a person?; or
- With intent that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act?

The accused might admit some of the elements. Those elements are not really issues. Only the contested elements are issues. If, for example, the accused admits making the false document or writing, but denies that he knew it to be false then the first element (Did he make the writing or document?) is not an issue. But the second element is.

If the prosecution cannot prove beyond a reasonable doubt that the defendant made a false document or writing, then he must be acquitted. Sometimes a defendant will concede all the elements except the last one: **intent.** It must be shown that the defendant intended that a person may, in the belief that it is genuine, be induced to do or refrain from doing any act? In a case like this, there would be only a single issue, and it would be up to the prosecution to prove beyond a reasonable doubt that the defendant intended that a person, in the belief that the document or writing was genuine, be induced to do or refrain from doing any act.

Write a beginning analysis for each issue, apply the relevant rule, reach a conclusion and provide reasons. You can state the conclusion as follows: 'For the reasons above, the court finds that ….'

A checklist for written judgments

The following issues can guide judges in the preparation of a written judgment.

Read the **first page** and check it contains the following:

- Does it say who (allegedly) did what to whom or who is arguing about what before anyone set foot in court, in a nutshell, without legal jargon?
- Does it include names, dates, procedural history, and citation of laws or precedents that have nothing to do with the issues at hand?
- Does it announce the issues in a predictive sequence, without clutter but not too abstractly?

Read the **Headings** and check they contain the following:

- Have the issues listed in the introduction been turned into questions and used as headings?
- Would the headings make sense to a non-lawyer?
- Are they arranged in a sequence that makes sense?
- If there are additional headings, are they necessary, logical, and helpful?

Read the **Background Section** (If There is One) and check:

- If it provides procedural history or names of counsel, do we really need this information?
- Is it justified because it contains facts or law relevant to more than one issue?

Read the **Analysis of the Issues** and check:

- If it is a question of law, does the analysis include an impartial statement of the losing party's position followed by its flaw, clearly stated?
- Is the controlling law or principle cited?
- If it is a question of fact, does it summarise each party's evidence?
- Does the evidence justify the finding?
- Are the standard and burden of proof correctly applied?
- Has the writer made the mistake of narrating the trial or hearing instead of dividing the evidence according to the issues?
- Does the reader have to jump from beginning to end to middle?

Read **the Conclusion**

- Is the order written in language that would be clear to your next-door neighbour?
- If appropriate, is the analysis succinctly summarised?
- If appropriate, are the consequences of the ruling explained?

On the whole:

- Are there any words or phrases (e.g., jargon, Latin, or legalisms) that would seem out of place in a good newspaper?
- Are there any sentences more than two lines long that should be broken up?
- Is there any repetition that could be eliminated?
- Does it contain huge patches of cutting and pasting from the parties' submissions (instead of succinct summaries)?
- Does it contain block quotations that are not preceded by summaries?
- What, if anything, could be left out or added?
- What, if anything, is repeated?
- Will impartial readers feel that the losing party had a fair hearing?
- Will impartial readers be persuaded by the result?

Mutual Legal Assistance in Criminal Matters & Extradition

Authored by Suzanne Mayhew and reviewed by the Federal Court of Australia under the Pacific Judicial Integrity Program.

Mutual Legal Assistance

What is Mutual Legal Assistance?

Fraud, corruption and bribery offences are often cross-border crimes, or the proceeds of those crimes may have been laundered offshore. In such cases, countries may require the assistance of judicial and investigative authorities in other countries to properly investigate and prosecute these matters, and to recover the proceeds of crime and criminal assets. International cooperation is critical in investigating crimes that have a transnational element.

Mutual Legal Assistance is the formal mechanism by which countries make requests and respond to requests for assistance from other countries for criminal investigations and prosecutions. The requests for assistance in gathering evidence for use in criminal cases may be through police, state legal processes (e.g. a judicial order) or a compulsory measure (e.g. the search of a residence). In the investigation of foreign bribery and associated money laundering cases, mutual legal assistance is usually a crucial mechanism by which information and evidence is obtained.

Mutual Legal Assistance vs Alternatives

Mutual Legal Assistance (MLA) involves a formal request for evidentiary material or assistance. There are alternative methods that law enforcement officers can use to obtain information and evidence from foreign countries. Police-to-police assistance is a form of cooperation between police in one country and police in another country, outside of the formal process. Examples of police-to-police assistance include exchange of intelligence information or preliminary enquiries to determine whether any information or evidence of an offence was committed in a foreign country.

Police-to-police assistance is often used at the early investigative stage or to obtain evidence that does not require the use of coercive powers. Informal mechanisms of obtaining information and intelligence are an important part of an investigation, however often the formal mutual assistance request channels and procedures are required to be followed in order that the material might be properly used as evidence in criminal proceedings in court.

Legal Basis

The legal basis for a mutual assistance or extradition request and response are contained in the domestic laws of the relevant countries, which have implemented all or part of international treaties in their domestic law to meet their treaty obligations. The relevant mutual assistance legislation in each of the partner jurisdictions is set out in Part 2 and Part 3 of this Handbook. Requests may be made under various interstate treaties, schemes and conventions, such as the United Nations Convention Against Corruption (UNCAC).

The UNCAC has been described as:

'[a] groundbreaking landmark in seeking to overcome legal differences and provides a set of common principles for providing MLA in corruption matters. The UNCAC addresses a wide range of issues that are relevant to MLA and money laundering, including provisions on international cooperation, bank secrecy, MLA, law enforcement cooperation and joint investigations. In principle, all MLA requests in international corruption cases can be based on the convention, making MLA possible with all other parties to the convention. This can be considered a major step forward in combating international corruption, especially between countries where there is no bilateral treaty.

In addition, although the convention deals with the same basic field of cooperation as some previous instruments, the convention seeks to overcome the obstacles associated with the principle of dual criminality.[1]

For those countries which are members of the Commonwealth, the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (the Harare Scheme) and in 2017, the Commonwealth Secretariat developed the Model Legislation on Mutual Legal Assistance in Criminal Matters as a guide to assist member countries in implementing the Revised Harare Scheme. It provides a framework to support comprehensive international collaboration in criminal matters.

The Pacific Islands Forum adopted the *Honiara Declaration on Law Enforcement Cooperation* (the Honiara Declaration) in 1992, stating in relation to Mutual Assistance in Criminal Matters:

'*The Forum recognised that the establishment of a framework of Mutual Assistance in Criminal Matters between themselves would enhance cooperation between their Courts, prosecution authorities and law enforcement agencies. Forum members therefore strongly urged member governments to adopt procedures to assist one another in identifying persons, in searching for and seizing evidence, and in arranging for witnesses to give evidence either in their own country or in the country in which the trial takes place.'*

In relation to Extradition the Honiara Declaration stated:

'The Forum recognised that, while most members have Extradition Acts which reflect the pre-1986 text of the London Scheme for the Rendition of Fugitive Offenders, there was still a need to review extradition arrangements within the region. The Forum agreed that members should review their extradition legislation and, if required, take steps to introduce and bring into force legislation based on the United Nations Model Treaty on Extradition or on the current London Scheme for the Rendition of Fugitive Offenders within the Commonwealth.'

Common Mutual Assistance Requests (MAR)

It is important for judicial officers to be aware of the common types of assistance that are requested in a MAR and the applicable law and principles when they are called on to exercise powers, such as granting search and arrest warrants. Common requests can include:[2]

Locating or Identifying a Person

Where hypothetical "Country A" sends a request to another country seeking assistance in locating or identifying a person, the relevant provision in the MLA legislation of hypothetical "Country B" is likely to require two things:

1. The MAR relates to what would be a criminal matter in Country A; and
2. There are reasonable grounds for believing that the person to whom the request relates is in Country B, and is/might be involved with, give evidence in court, or provide assistance relevant to, the criminal matter.

Service of Process

A MAR may request assistance in arranging service of process (i.e. documents). The test for this type of assistance is unlikely to be onerous and is usually satisfied if there are reasonable grounds for believing that the person to be served is located in Country B. Country B can probably instruct police to serve the person and then arrange for the police officer to provide an affidavit of service (or equivalent) to be sent back to Country A. Service of process on a person can likely be done even when no court proceedings have begun and regardless of the seriousness of the offence.

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[1] Chêne, M. (2008) *Mutual legal assistance treaties and money laundering Bergen*: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute (U4 Helpdesk Answer Helpdesk) Mutual legal assistance treaties and money laundering (u4.no)

[2] This section is adapted from the PILON publication which can be found at Chapter 3: Mutual Legal Assistance (MLA) – PILON – Pacific Islands Law Officers' Network (pilonsec.org)

Executing a Search Warrant or Production Order

Often information needed for an investigation or prosecution in Country A is held in another country (i.e. Country B). In the digital age, it is increasingly common for information to be in another country. Information could include bank records, company registration records, telephone records, internet records (e.g. email, social media posts, and subscriber details), computers, physical documents or objects. Often electronic evidence will be held by a communication service provider based in the United States of America (e.g. Facebook, Google).

If the information sought by Country A is subject to a reasonable expectation of privacy (which most of those listed above are), it will probably need to be obtained by a coercive power – usually a search warrant or a production order. Where a search warrant is required to obtain evidence or the information requested in a MAR, Country B will have to satisfy the test for a search warrant as set out in Country B's MLA legislation. The test to authorise and issue a search warrant is likely to mirror the test for requesting a search warrant in Country B's domestic criminal procedure legislation. This test often requires there to be 'reasonable grounds to believe' an article or thing relevant to the criminal matter is in Country B. The country receiving the MAR (i.e. Country B) will be bound by its own test to obtain a search warrant in order to provide the assistance.

Case Examples

By way of example, some of the issues which may arise for consideration by judicial officers in such matters, see these Vanuatu cases:

- *PKF Chartered Accountants v Supreme Court* [2008] VUCA 32; [2009] 3 LRC 254 (25 July 2008)
- *Partners of PKF Chartered Accountants v Supreme Court of the Republic of Vanuatu; Batty v Supreme Court of the Republic of Vanuatu; Moores Rowland (a Firm) v Attorney General [2008] VUCA 15; Civil Appeal Case 15, 16 and 17 of 2008 (25 July 2008)*
- *In re Mutual Assistance in Criminal Matters Act 14 of 2002* [2008] VUSC 91; Civil Case 68-08 (10 July 2008).

Obtaining Evidence from Witnesses

Requests for a voluntary statement from a witness.

If such an approach is agreeable to both countries, a request for a voluntary witness statement may be dealt with informally outside of the MLA process on a police-to-police basis. However, sometimes Country A may require the formal MLA process to be followed to ensure the evidence will be admissible in accordance with their own domestic procedural requirements. In such a case, Country B can execute the MAR by liaising with their police to interview the witness and obtain a statement.

Country A may request that a witness located or resident in Country B give evidence in court either in person or by alternative means such as video link. Some options can be expensive and if it appears that costs involved will be excessive, countries may discuss whether Country A is able to meet some, or all, of the costs. Giving evidence in person would involve the witness travelling to Country A to give evidence in court. Frequently the requesting country will provide an undertaking to meet the witness's travel expenses in this type of case. Domestic legislation will usually set out any other relevant conditions, such as that the witness has freely consented to attend, and that the person will be returned to the original country in accordance with agreed arrangements.

Alternatively, Country A may request that the witness give their evidence via video link (or otherwise electronically) from Country B, and that this be facilitated by Country B. Depending on Country A's domestic legal requirements, Country A may require the witness to give evidence via video link from a court in Country B to a court in Country A. However, it may be sufficient for the witness to give evidence via a video link or electronic platform. If permitted under both Country A and B's respective domestic legislation, this can be a much simpler and more cost-effective solution. The requesting country, Country A, may need to consider whether counsel from Country B can be present and actively participate in the court hearing (e.g. conduct the examination of the witness), or whether counsel from Country A will examine the witness (e.g. either in person by travelling to Country B, or via video link).

Material Lawfully Obtained

Country A may make a request for material that was previously lawfully obtained by Country B's law enforcement in its own domestic investigation, where Country B is still lawfully in possession of that material. This can often be useful when Country A's law enforcement becomes aware that a foreign law enforcement agency has previously, or concurrently, carried out investigations involving the same suspect or offence and may have material to assist. This material may be shared on an informal police-to-police basis or through intelligence channels, however, it may need to be formally requested through MLA for that material to be admissible in court. For example, in Australia, s13A of the *Mutual Assistance in Criminal Matters Act 1987* deals with requests made from foreign countries for material lawfully obtained by Australian law enforcement agencies (such as the Australian Federal Police) pursuant to an investigation or proceeding.

Assistance Related to Proceeds of Crime

When Country A needs assistance with the restraint and recovery of the proceeds of crime from Country B the process for this will usually be set out in both countries' MAR legislation. It is likely the regime may allow for assistance at four stages of the confiscation process:

- Country A may request that Country B obtains an examination order, a production order, or a search warrant on its behalf.
- Country A may request Country B to obtain an interim foreign restraining order, or to register a foreign restraining order.
- Country A may request Country B's authorities to authorise the Commissioner of Police to make an application for registration of the foreign forfeiture order to the relevant court. This stage is also referred to as confiscation.
- It is possible that the assistance that Country B provides at the disposal stage may not be prescribed by legislation.

Extradition

What is Extradition?

Extradition is the formal legal surrender by one country to another of a person who has been accused or convicted of a criminal offence in the jurisdiction of the second country for the purpose of prosecution or to enforce a sentence. Each State will have its own legislation and extradition regime, however there are some basic principles which will be common across all.

Basic Principles of Extradition[3]

Double (dual) criminality

Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the requested and requesting countries. The emphasis is on the conduct in question. The critical issue is that the criminal conduct is criminalised in both countries and not whether the offence has the same name or is categorised in the same way.

The rule of specialty

Under the *rule of specialty*, which is codified in numerous bilateral extradition treaties and regional extradition schemes, an extradited person shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than the offence for which extradition was granted or any other offence in respect of which the requested State consents. Specialty serves as a safeguard against prosecutions in the

[3] This section is adapted from Organized Crime Module 11 Key Issues: Extradition (unodc.org)

requesting State for political offences and violations of other substantive rules of extradition law, such as dual criminality.

The non-extradition of nationals

According to the principle of *non-extradition of nationals*, some States decline any obligation to surrender their own citizens. In some countries, there are constitutional provisions which prohibit the extradition of that country's nationals. Despite this general principle, public international law dictates that States have the legal obligation to either extradite or prosecute people who commit serious international crimes. This obligation is based on the extraterritorial nature of international crimes and reflects an attempt by the international community to ensure that perpetrators are prosecuted either by the national authorities of that State or by another.

Risk of persecution in the requesting State

A *non-discrimination clause* stipulates that requested States have no obligation to extradite if there are reasons to believe that the person would be persecuted in the requesting State on account of gender, race, religion, nationality, ethnic origin, or political opinion.

The political offence exception

The *political offence exception* for extradition has been one of the most controversial features of the extradition process. While in theory this principle provides the requested State with the right to refuse extradition for political crimes, the practical obligation of this principle is far from settled as there is no universally accepted definition of 'political crime'. Recent developments also suggest that attempts are being made to restrict the scope of the political offence exception or even abolish it. The increase, for example, in international terrorism has led to the willingness of States to limit the extent of the political offence exception, which is generally no longer applicable to crimes against international law.

Risk of unfair trial in the requesting State

There is no obligation for the requested State to surrender individuals in cases of the possible risk of torture and other inhuman or degrading treatment in the requesting State or in cases there are grounds to believe that the requesting State cannot provide a fair trial or secure minimum guarantees in criminal proceedings.

Double jeopardy

It is also very likely that the requested State will not surrender a person who has already been prosecuted (independently from the result of the prosecution) by its authorities in respect to the offence for which extradition is requested ('double jeopardy').

Central Authorities

Most States will have a designated 'Central Authority' through which formal MLA and Extradition requests are directed and dealt with. Most countries will not accept MARs made directly by law enforcement officials, prosecutors or judges, and expect requests to come through the designated Central Authority. The International Institute for Justice and the Rule of Law Good Practices for Central Authorities are designed to guide the work of these institutions and set out the legal and practical considerations needed to create and support durable legal institutions.

Example Central Authority - Australia

The Australian Attorney-General's Department is responsible for seeking and providing government-to-government assistance in criminal matters. Australia's mutual assistance system is governed by the *Mutual Assistance in Criminal Matters Act 1987.* Australia also makes mutual assistance requests to obtain documents from foreign countries in a form admissible in Australian courts under the *Foreign Evidence Act 1994* (Cth). An overview of the mutual assistance process in Australia is available on the Australian Attorney-General's Department website and is summarised in the Fact Sheet.

The Australian Government processes all incoming and outgoing international extradition requests in accordance with the *Extradition Act 1988* (Cth). Information about extradition in Australia is available on the Australian Attorney-General's Department website, including a Fact Sheet which provides an overview of the extradition process.

Example Central Authority - Vanuatu

The Office of the Public Prosecutor of Vanuatu is responsible for seeking and providing government-to-government assistance in criminal matters. In Vanuatu, mutual legal assistance is governed by the *Mutual Assistance in Criminal Matters Act 2003* [CAP 285]. This legislation facilitates both requests made by Vanuatu to other countries and request made from other countries to Vanuatu.

Links to Resources and References

United Nations Office on Drugs and Crime (UNODC)

Organized Crime Module 11 Key Issues: Mutual Legal Assistance (unodc.org)

Manual on Mutual Legal Assistance and Extradition

Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters

UNDP-UNODC Pacific Regional Anti-Corruption (UN-PRAC) Project

International Cooperation: The Pacific's implementation of Chapter IV of the UN Convention Against Corruption

Asian Development Bank (ADB) and Organisation for Economic Co-operation and Development (OECD)

Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific: Frameworks and Practices in 27 Asian and Pacific Jurisdictions Thematic Review – Final Report

Pacific Islands Law Officers' Network (PILON)

Chapter 3: Mutual Legal Assistance (MLA)

Other

Mutual legal assistance treaties and money laundering

Mutual Legal Assistance (MLA) in criminal matters in the UK and in developing countries: A scoping study

Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges

Request for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities outside of the United Kingdom

Restraint, Confiscation and Forfeiture of Criminal Assets

Authored by Suzanne Mayhew and reviewed by the Federal Court of Australia under the Pacific Judicial Integrity Program.

This section is to be distinguished from the section above on proceeds of crime and money laundering offences. There is often considerable overlap between proceeds of crime and money laundering offences, and criminal assets confiscations in relation to the legislation and definitions, however this section relates to the broader topic of restraint, confiscation and forfeiture of criminal assets: proceeds of crime, instruments of crime, and tainted property.

Purpose

The relevant legislation for each partner jurisdiction is set out in Overview Table 2 in Part 2 of this Handbook, and a more detailed description for each of the PJIP jurisdictions may be found in Part 3 of this document. Restraint and confiscation action can have a broader application than to only proceeds of crime or money laundering offending. There is a broad range of crimes where asset restraint and forfeiture might apply.

The stated purpose of the legislation in each jurisdiction cover similar areas, including:

- to investigate crimes and trace money and assets ('follow the money trail'); and
- to deprive offenders of their 'ill-gotten gains' and to act as a deterrent for the offender and others; and
- to disrupt continuing illicit enterprises; and
- to enable the use of confiscated assets to further law enforcement efforts, compensate victims of crime, and 'social reuse' of confiscated criminal assets and funds.

Examples

Australia

The *Proceeds of Crime Act 2002* (Cth) (POCA) is *"an Act to provide for confiscation of the proceeds of crime, and for other purposes".*

The principal objects of the POCA are:

> (a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
>
> (b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
>
> (ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived or realised, directly or indirectly, from certain offences; and
>
> (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
>
> (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
>
> (da) to undermine the profitability of criminal enterprises; and
>
> (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
>
> (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and

(g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the *self-governing Territories to be enforced in the other Territories.

Vanuatu

The *Proceeds of Crime Act 2002*[4] [CAP 284] is *'an Act to provide for the confiscation of proceeds of crime, and for related purposes.'*

The principal objects of this Act are:

(a) to deprive persons of the proceeds of, and benefits derived from, the commission of serious offences; and

(b) to provide for the forfeiture of property used in, in connection with, or for facilitating, the commission of serious offences; and

(c) to enable law enforcement authorities to trace such proceeds, benefits and property.

Kiribati

The *Proceeds of Crime Act 2003*[5] is '*an Act to provide for the confiscation of proceeds of crime of money-laundering and for related purposes*.'

The principal objects of this Act are:

(a) to deprive persons of the proceeds of, and benefits derived from, the commission of serious offences; and

(b) to provide for the forfeiture of property used in, in connection with, or for facilitating, the commission of serious offences; and

(c) to enable law enforcement authorities to trace such proceeds, benefits and property.

Republic of the Marshall Islands

The *Proceeds of Crime Act 2002* [31 MIRC Ch.2] stated that it was 'a*n Act to provide measures for identifying, tracing, freezing, and seizure and confiscation of proceeds of serious crime and property used in the commission of a serious offense and, for other purposes.'*

It was amended by the *Proceeds of Crime (Amendment) Act 2011* to read *'the purpose of this Act is to provide for the forfeiture and confiscation of the proceeds of crime, property used or intended to be used in the commission of a serious offense, or property of corresponding value.'*

Administration

Examples

Australia

In the federal jurisdiction in Australia, the *Proceeds of Crime Act 2002* (Cth) (POCA) establishes a scheme to restrain, confiscate and forfeit proceeds and instruments of crime and allows for confiscated funds to be used to benefit the community. Under section 298 of the POCA, confiscated proceeds of crime can be re-invested in programs for relevant purposes, including crime prevention and law enforcement.

The Criminal Assets Confiscation Taskforce (CACT) was launched in 2011 by the federal government to combat the significant threat of serious and organised crime, including through enhancing the identification of criminal assets and strengthening their pursuit. The CACT came into permanent effect on 1 January 2012 after a key

[4] Post-2006 amendments are not reflected in the consolidation on PacLII – see Sessional Legislation.
[5] Post 2003 amendments are not reflected in the consolidation on PacLII – see Sessional Legislation

amendment to the POCA empowered the Commissioner of the Australian Federal Police (AFP) to commence and conduct proceeds of crime litigation on behalf of the Commonwealth.

Prior to the CACT's establishment, this role fell solely to the Commonwealth Director of Public Prosecutions. Led and hosted by the AFP, the CACT also brings together the resources and expertise of the Australian Criminal Intelligence Commission, Australian Taxation Office, Australian Transaction Reports and Analysis Centre (AUSTRAC), and the Australian Border Force. Together, these agencies trace, restrain and ultimately confiscate criminal assets.

Consistent with the principal objects of the POCA, the CACT seeks to deprive persons and criminal groups of the proceeds, instruments and benefits of their offending, to punish and deter persons from breaching laws, and to undermine the profitability of criminal enterprises. The Commonwealth's proceeds of crime laws allow the CACT to restrain both proceeds and instruments of crime based on a civil standard of proof, as well as to obtain financial penalty and unexplained wealth orders, regardless of whether there exists a related criminal prosecution or investigation.

Significantly, the Commonwealth's proceeds of crime laws also provide the CACT with strong information gathering and coercive examination powers, and an ability to restrain the assets of criminal groups without their prior knowledge.

Fiji

The Fiji Financial Intelligence Unit (FIU) is a specialised agency created to collect, analyse and disclose financial information and intelligence. It was established in 2006 by the *Financial Transactions Reporting Act* of 2004. The FTR Act and regulations outlines a range of requirements for financial institutions to implement to prevent the use of Fiji's financial system from money laundering activities and other serious offences.

The Fiji FIU is an integral part of Fiji's fight against money laundering, terrorist financing, fraudulent activities, and other financial crimes. The agency oversees compliance with the *Financial Transactions Reporting Act* and provides information to law enforcement and revenue agencies.

Common concepts

Whilst each jurisdiction has its own law on this topic, there are some common concepts across the jurisdictions. The legislative definitions and judicial interpretation may vary so it is imperative to be familiar with domestic legislation. However, some of the generally applicable definitions and concepts are set out below: see *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* for further general definitions.

Confiscation

'Confiscation of assets or property', also known in some jurisdictions as 'forfeiture', means the permanent deprivation of property by order of a court or other competent authority. See article 2 (g) of the United Nations Convention Against Transnational Organized Crime.

Forfeiture

'Forfeiture' means the permanent deprivation of property by order of a court or other competent authority. The term is often used interchangeably with confiscation. Forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to the State. The persons or entities that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture lose all rights, in principle, to the confiscated or forfeited funds or other assets.

Freezing or Restraint

'Freezing' means temporarily prohibiting the transfer, conversion, disposition or movement of property, usually based on an order issued by a court or a competent authority. The term is used interchangeably with 'restraining', 'attachment', 'preservation' or 'blocking'.

'Freezing order' means an order (usually judicial) that leaves physical possession of the asset with the owner or a third party but imposes specific terms and conditions on their use of the asset, or prohibits any right to sell, lease, destroy or otherwise diminish the value of the asset while the order is in force. Also called 'restraint', 'blocking', 'attachment' or 'preservation' orders in some jurisdictions.

Instruments of crime

'Instruments of crime' or 'instrumentalities' means the assets used to facilitate crime, such as a car used to transport narcotics, or a boat used to traffic humans.

Monitoring Order

'Monitoring order' means a judicial order directed at a financial institution to disclose to an authorized person information concerning transactions carried out through an account held with the institution by a person named in the order. Such an order may require the financial institution to make the disclosure immediately after a transaction has been made; or on suspicion that a transaction is about to be made; or the order may direct the financial institution to refrain from completing or effecting the transaction for a specified period.

Proceeds

'Proceeds of crime' means any property derived from or obtained, directly or indirectly, through the commission of an offence (see article 2 (e) of the United Nations Convention against Trans-national Organized Crime). In some jurisdictions, the terms 'profits of crime' or 'benefit derived from crime' are preferred.

Production order

'Production order' means a judicial order addressed to a specified person to produce for the inspection of an authorized person any document that identifies or locates any property subject to forfeiture or confiscation or that determines the value of the property or benefit derived by a defendant from criminal conduct.

Property

'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets. (See article 2 (d) of the United Nations Convention against Transnational Organized Crime.) See also the section entitled Money Laundering and Proceeds of Crime Offences in Part 1 of this Handbook.

Tainted assets property

'Tainted' assets or property means assets or property connected with a crime in the sense that they were used in committing the crime or were derived from it.

Value-based confiscation / pecuniary penalty order

'Value-based confiscation' or 'pecuniary penalty order' means a method of confiscation that enables a court, once it determines the benefit accruing directly or indirectly to an individual from criminal conduct, to impose a pecuniary liability (such as a fine, usually in multiples of the profit or benefit derived from the crime), which is realizable against any asset of the individual.

Civil-based and criminal-based action[6]

Civil-based, non-conviction-based (or administrative) forfeiture and/or confiscation

'Non-conviction-based confiscation or forfeiture' means asset confiscation or forfeiture in the absence of the conviction of the wrongdoer. The term is used interchangeably with 'civil forfeiture', '*in rem* forfeiture' and 'objective forfeiture'.

A non-conviction-based confiscation occurs independently of any criminal proceeding and is directed at the property itself, having been used or acquired illegally. Conviction of the property owner is not relevant in this kind of confiscation.

Administrative confiscation generally involves a procedure for confiscating assets used or involved in the commission of the offence that have been seized during the investigation. It is often seen in the field of customs enforcement at borders (e.g., bulk cash, drug, or weapons seizures), and applies when the nature of the item seized justifies an administrative confiscation approach (without a prior court review).

This process is less viable when the property is a bank account or other immovable property. The confiscation is carried out by an investigator or authorized agency (such as a police unit or a designated law enforcement agency), and usually follows a process where the person affected by the seizure can apply for relief from the automatic confiscation of the seized property, such as a court hearing. All proceeds of crime are subject to confiscation, which has been interpreted to include interest, dividends, income, and real property, although there are variations by jurisdiction: see A *Good Practice Guide for Non-conviction-based Asset Forfeiture* by the Stolen Asset Recovery (STAR) Initiative with the World Bank and UNODC.

The UN Convention against Corruption includes this type of confiscation in article 54 (1)(c), which encourages States to 'consider taking such measures as may be necessary to allow confiscation of [property acquired through or involved in the commission of an offence established in accordance with this Convention] without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases'.

[6] This section is largely based on the following: Organized Crime Module 10 Key Issues: Confiscation (unodc.org)

Criminal-based, conviction-based confiscation and/or forfeiture

'Conviction-based confiscation or forfeiture' means confiscation by the State of proceeds of a crime for which a conviction has been recorded. This is also called 'criminal forfeiture' in some jurisdictions. In some jurisdictions, confiscation occurs under one of two types of proceedings: conviction-based confiscation or forfeiture and non-conviction-based confiscation or forfeiture. They differ in the level of proof required. Conventionally, non-conviction-based confiscation requires a lower standard of proof (balance of probabilities) than that required to obtain a conviction in a criminal court (beyond a reasonable doubt).

Some jurisdictions use a value-based approach to confiscation, which enables a court to impose a pecuniary liability (such as a fine), once it determines the benefit derived directly or indirectly from the criminal conduct. In some countries, assets may be confiscated even if they are not directly linked to the specific crime for which the offender has been convicted, but clearly result from similar criminal activities (i.e. extended confiscation).

In a conviction-based confiscation, property can only be seized once the owner has been convicted of certain crimes. Criminal confiscation is a common approach to asset confiscation in which investigators gather evidence, trace and secure assets, prosecutors conduct a prosecution, and in some cases, obtain a conviction. Upon the conviction, confiscation can be ordered by the court. The standard of proof required (normally proof beyond a reasonable doubt in criminal matters) for the confiscation order is often the same as that required to achieve a criminal conviction.

Onus of proof

Article 12 (7) of the Organized Crime Convention provides that States parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

Similarly, the Financial Action Task Force (FATF) Recommendation 4 states that countries should consider adopting measures, which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law. It is best practice for countries to implement such measures, consistent with the principles of domestic law (FATF, 2012). The following are two examples of how such measures may be structured.

When considering confiscation, the court must decide whether the defendant has a 'criminal lifestyle'. A defendant will be deemed to have a criminal lifestyle if one of three conditions is satisfied. There must be a minimum total benefit for conditions (2) and (3) below to be satisfied.

The three conditions are:

1. It is a 'lifestyle offence' (for example, drug trafficking);
2. It is part of a 'course of criminal conduct' or
3. It is an offence committed over a period of at least 6 months and the defendant has benefited from it.

The court is required to calculate benefit from criminal conduct using one of two methods:

1) General criminal conduct ('criminal lifestyle confiscation'):

This method is used when the defendant is deemed to have a criminal lifestyle. The court must assume that:

- Any property transferred to the defendant from after a date six years prior to the commencement of the criminal proceedings was obtained because of criminal conduct.
- Any property held by the defendant at any time after the date of conviction was obtained as the result of criminal conduct.
- Any expenditure over the 6-year period mentioned above was met by property obtained because of criminal conduct.

- For valuation purposes, any property obtained by the defendant was obtained free of third-party interests.

Where the criminal lifestyle condition is satisfied, the burden of proof in respect of the origin of the property is then effectively reversed (i.e. the prosecution has met its evidential obligation and the defendant must prove on a balance of probabilities that a particular asset, transfer, or expenditure has a legitimate source).

2) Particular Criminal Conduct ('criminal conduct confiscation'):

This method is used when the defendant is not deemed to have a criminal lifestyle. This requires the prosecutor to show what property or financial advantage the defendant has obtained from the specific offence charged. The law permits the prosecutor to trace property or financial advantage that directly or indirectly represents benefit (for example, property purchased using the proceeds of crime). There is no minimum threshold for this method of calculation of benefit.

Value-based confiscation

Some jurisdictions may use a value-based approach, whereby a convicted person is ordered to pay an amount of money equivalent to the value of their criminal benefit. This is sometimes used in cases where specific assets cannot be located. The court calculates the benefit to the convicted offender for a particular offence. Value-based confiscation allows for the value of proceeds and instrumentalities of a crime to be determined and assets of an equivalent value to be confiscated.

Issues

Concerns regarding the seizure and disposition of property include:

- lawfulness of confiscation
- protecting the rights of third parties
- management and disposition of seized or confiscated assets.

Lawfulness of confiscation

In most jurisdictions, the legislation sets out the specific powers and the limits that guide the confiscation of assets. The procedures permitted correspond with the legal traditions in the country. In most common law jurisdictions, an order to restrain or seize assets generally requires judicial authorisation (with some exceptions in seizure cases).

Legal systems may have strict obligations to give notice to investigative targets, such as when a search or production order is served on a third party such as a financial institution. That third party may be obliged to advise their client of the existence of such orders, which means that the client would be forewarned about an investigative interest. That must be taken into consideration when taking steps to secure assets or use coercive investigative measures (UNODC, 2012).

The rationale behind confiscation or forfeiture is that the government may take property without compensation to the owner if the property is acquired or used illegally. There are several broad mechanisms for accomplishing this, however the three predominant types of processes used to confiscate property are: administrative (no conviction), property or criminal (conviction-based), and value-based (UNODC, 2012).

Protecting the rights of third parties

Concern arises regarding the rights of individuals not involved in criminal activity, but whose property is used in, or derived from, the criminal activity of others (Friedler, 2013; Geis, 2008; Gibson, 2012; Goldsmith and Lenck, 1990). This might include uninformed lien holders and purchasers, joint tenants, or business partners. A person who suspects his or her property is the target of a criminal or administrative confiscation investigation may sell the property, give ownership to family members, or otherwise dispose of it.

Third-party claims on seized property are sometimes delayed in criminal confiscations because the claim often cannot be litigated until the end of the criminal trial. In an administrative confiscation, the procedure moves more quickly because the confiscation hearing usually occurs soon after the confiscation. In some jurisdictions, third parties are protected under the 'innocent owner' exception for non-conviction-based confiscations, if the government fails to establish that they had knowledge, consent, or wilful blindness to illegal usage of the property.

Disposition of confiscated assets

Some of the most confiscated assets are cash, cars and weapons, as well as luxury property such as boats, planes and jewellery. Residential and commercial property are also subject to confiscation. Once an asset is confiscated, it must be appraised to determine the property's value, less any claims against it. The item must be stored and maintained while ownership and any third-party claims are heard in court. If the challenge to the confiscation is not effective, the property is taken for government use or auctioned.

There has been controversy over the use of confiscated assets by some law enforcement agencies. Laws in some jurisdictions earmark specific uses for confiscated assets, such as for education costs. Some have claimed that confiscation of assets that are kept by police provide an incentive for spurious or aggressive confiscations (Bartels, 2010; Skolnick, 2008; Worrall and Kovandzic, 2008).

Country experiences in managing and disposing of confiscated assets

In 2017 the UNODC released a publication titled *Effective Management and Disposal of Seized and Confiscated Assets* to provide States and relevant personnel with guidance on confiscation and seizure. Covering all geographical regions, varying legal systems, and differing levels of development, the study presents the experience of 64 countries on the management and disposal of seized and confiscated assets. The study presents previous experiences to assist anyone tasked with developing legal and policy frameworks and/or responsible for the day-to-day management of seized and confiscated assets on knowing how to either avoid or better manage the associated risks and challenges (UNODC, 2017).

In 2012 the FATF developed a list of recommendations and best practices on the management of frozen, seized and confiscated property: see *Best Practices om Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery*. These Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard. According to FATF, an asset management framework has the following characteristics:

> (a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.
> (b) There are sufficient resources in place to handle all aspects of asset management.
> (c) Appropriate planning takes place prior to taking freezing or seizing action.
> (d) There are measures in place to:
> (i) properly care for and preserve as far as practicable such property;
> (ii) deal with the individual's and third-party rights;
> (iii) dispose of confiscated property;
> (iv) keep appropriate records; and
> (v) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
> (e) Those responsible for managing (or overseeing the management of) property have the capacity to always provide immediate support and advice to law enforcement in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
> (f) Those responsible for managing the property have sufficient expertise to manage any type of property.

(g) There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
(h) There is a mechanism to permit the sale of property with the consent of the owner.
(i) Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety.
(j) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.
(k) To ensure the transparency and assess the effectiveness of the system, there are mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realised.

Case Examples

Australia

The offenders were found guilty after trial for two modern slavery offences contrary to s270.3(1) of the *Criminal Code* (Cth) - possessing and using a person as a domestic slave in their Melbourne home.

The victim arrived in Melbourne from Tamil Nadu, India, on a one-month tourist visa. Prior to the victim's departure from India, an oral agreement was made by the husband-and-wife offenders outlining the domestic services they expected the victim to provide at their home. The victim's travel costs and visa were organised and paid for by the offender and upon arrival, they took the victim's passport. The victim lived at the offenders' family home for eight years. She cared for the offenders' children and undertook a variety of household chores. The offending came to light when an emergency call was made requesting an ambulance attend the home where paramedics found the victim laying barely conscious in a pool of urine on the bathroom floor. She was in a perilous state of health, weighed 40 kilograms and was suffering hypothermia, altered consciousness, urinary sepsis and untreated type 2 diabetes.

The offenders were convicted and sentenced. Offender 1: eight years' imprisonment for the first charge and eight years' imprisonment for the second charge, to be served concurrently, with a non-parole period of four years. Offender 2: six years' imprisonment for the first charge and six years' imprisonment for the second charge, to be served concurrently, with a non-parole period of three years.

Under the *Proceeds of Crime Act 2002* (Cth), the house in which the victim was enslaved, was restrained and subsequently sold. The sale proceeds, some AUD $493,000, were forfeited to the Commonwealth. Ordinarily, amounts forfeited to the Commonwealth under the Act are deposited into a *Confiscated Assets Account*, however, s100(2) of the Act permits the Commonwealth Attorney-General to otherwise direct the proceeds of the property.

In August 2023, the victim made a civil claim for unpaid wages under the *Fair Work Act* and the victim was awarded $485,411.12 in compensation, issued under a direction by the Attorney-General in recognition of unpaid wages and other entitlements owed to her. Following payment to the victim, the remaining balance of $7,588.88 was credited to the *Confiscated Assets Account*.

See *DPP v Kannan and Kannan [2021] VSC 439*

Vanuatu

Public Prosecutor v Bice [2011] VUSC 278; Criminal Case 79 of 2011 (23 September 2011)

Matter	Verdict after Trial
Date	*23 September 2011*
Jurisdiction	Supreme Court of Vanuatu
Corum	Justice D. V. Fatiaki
Charge(s)	1 x possess dangerous drug (cannabis) – s 2(62) *Dangerous Drugs Act* [CAP 12] 1 x sell dangerous drug (cannabis) – s 2(62) *Dangerous Drugs Act* [CAP 12] 1 x possess proceeds of crime – s12 *Proceeds of Crime Act* [CAP 284]
Summary	On 11 May 2011 a search warrant was executed by a team of police officers at a premises where the first defendant occupied a small house in a compound. On arrival at the scene a group of youths were rounded up inside the compound. Amongst them was the third defendant, Aitip Bice. The group of youths was searched, and police found dried cannabis leaves in his pocket. The search moved to the first defendant's house and when it began the first and second defendants were still inside. They too were arrested and escorted outside and then to the police station whilst the search of the house was continued by several police officers. Police found marijuana packets and bags. There was a book and paper with lots of names on the list names of people and the quantity of packets each had and the amount of money due to each. Police located over VT100,000 in cash.
Commentary	The judge set out the elements of the possess proceeds of crime offence at [18]: (a) The first and second defendants had money in their possession (b) The money was derived from the commission of a 'serious offence' (c) The serious offence is one for which the maximum penalty is at least 12 months imprisonment; and (d) The first and second defendants knew or reasonably suspected that the money was the proceeds of crime. The judge noted at [19] that the third ingredient or element of the offence i.e. (c) above, does not need to be proved by evidence as it is established by the penalty prescribed in the Dangerous Drugs Act for an offence of Selling Cannabis is punishable by a fine not exceeding VT100 million or to a term of imprisonment not exceeding 20 years or to both such fine and imprisonment. In other words, it is a matter of law. The property was VT108,754 cash which was located at the home of one co-accused and he had admitted to police that it was the proceeds of the cannabis selling business. They were convicted of the proceeds of crime offence. The Court exercised its power under section 58ZC of the Penal Code [CAP. 135] to order the confiscation of the money seized from the first defendant's house totalling approximately VT100,704 as representing the illegal '... proceeds of the offence (of selling cannabis)' and directed that after the expiration of 14 days, the money shall be forfeited to the State and be paid into the General Revenue by the Chief Registrar at [56].

Links to Resources and References

United Nations Office on Drugs and Crime (UNODC)

Managing Seized and Confiscated Assets: A Guide for Practitioners

Effective Management and Disposal of Seized and Confiscated Assets

Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime

Asset Recovery Handbook A Guide for Practitioners

Other

FATF President's paper: Anti-money laundering and counter terrorist financing for judges and prosecutors

Best Practices om Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery

Proceeds of Crime | The Crown Prosecution Service (cps.gov.uk)

Part 2

Overview of Regional Legislative Provisions

Part Two - Overview of Regional Legislative Provisions

Comparative Analysis

This section outlines some similarities and differences between fraud, bribery and corruption offences across PJIP partner court jurisdictions.[7]

This section also outlines the proceeds of crime and money laundering offence provisions across PJIP partner court jurisdictions and the provisions for criminal assets confiscation and international co-operation in criminal matters.[8]

Fraud Offences

In some jurisdictions, the fraud offence regime is complex and there is significant overlap with various other provisions. All jurisdictions have provisions governing fraud related offences. Seven of the twelve jurisdictions (Fiji, Kiribati, Nauru, Republic of Marshall Islands, Papua New Guinea, Solomon Islands, and Tonga) have provisions that specifically target fraud or embezzlement by public servants.

These offences may be variously referred to as “misappropriation”, “theft”, “cheating”, “obtaining by false pretences”, “obtaining by deception”, or “fraudulent conversion”. Palau is the only jurisdiction where a specific offence of theft of government property by a private individual has been identified – see Overview Table 1 below.

Kiribati and Solomon Islands have identical provisions dealing with the following: [9]

- Frauds and breaches of trust by persons employed in the public service.
- Theft, including taking by trickery or despite knowledge of a mistake on the part of the person defrauded.
- Larceny and embezzlement by public servants.
- Obtaining by false pretences.

Vanuatu has provisions dealing with theft and obtaining by false pretences which are substantially like those in the aforementioned jurisdictions. However, it appears to lack provisions dealing specifically with frauds by public servants, save for the *Leadership Code* which deals specifically with *“leaders”*. The other eight jurisdictions have substantially different regimes.

There is a degree of practical commonality among the fraudulent misappropriation or theft offences in all jurisdictions. There are three main elements of which most jurisdictions include at least two.

These are that the taking of a thing is done:

- Dishonestly, or by fraud or deceit; and
- Without a good faith claim of right (some jurisdictions (Federated States of Micronesia, Fiji, and Nauru) include the requirement that the property belongs to another); and
- With intent to permanently deprive the owner of the thing.

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[7] As outlined in the PJIP Judicial Officer Needs Assessment Survey Report, June 2022

[8] As requested by multiple counterparts and representatives in the feedback in the questionnaire following the PJIP Handbook Concept presentation at the PJIP conference in Port Vila, March 2024.

[9] Fiji has similarly worded provisions.

Kiribati, Nauru, Solomon Islands, Tonga and Vanuatu include all three elements; Palau, Republic of Marshall Islands, Samoa and Tokelau include the first and third. In Papua New Guinea the intention element required will depend on the offence concerned. Honest claim of right without intention to defraud is a defence in that jurisdiction. The Federated States of Micronesia include the second and third of the above elements.

Bribery and Corruption Offences

All jurisdictions have provisions for bribery offences contained within the relevant criminal law of the jurisdiction, such as the Criminal Code, Penal Code, Crimes Act etc. Vanuatu has bribery provisions contained in specific pieces of legislation[10] and Fiji also has specific "bribery" legislation.[11]

All jurisdictions except Nauru focus on bribery in official and political matters, with relevant bribery being bribery of public officials to act in a certain way in the course of their official duties. Nauru, by contrast, focuses on the dishonest provision/receipt of a bribe with the intention of gaining/providing a favour.

All jurisdictions address both directions of bribery, that is, provision and receipt. Papua New Guinea and Fiji have provisions that address bribery of judicial officials. One of the most detailed provisions is that in the Marshall Islands.

There is significant overlap between the legislation for corruption offences and bribery offences. As noted above, some jurisdictions have specific offences within specific pieces of legislation in addition to general and standalone legislation.[12]

Vanuatu has a *Leadership Code* which contains a bribery offence provision but also contains multiple provisions which are classed in this context as "corruption" offences.

Palau, Samoa and Tonga do not have any specific "corruption" offences which are distinct from "bribery" offences. The remainder of the jurisdictions do have "corruption" offences in addition to "bribery" offences – see Overview Table 1 below.

The definition of corrupt/corruptly/corruption varies slightly between jurisdictions but also has similarities in many ways, for example, the need for there to be "intention":

Kiribati:[13]

- *Halsbury's Laws of England* which defines corruptly as: *"Corruptly" imports intention; it does not mean wickedly, immorally or dishonestly or anything of that sort, but doing something knowing that it is wrong, and doing it with the object and intention of doing that thing which the statute intended to forbid"*
- The Court imported the dicta of Blackburn J in the case of *County Norfold (Northern Division) Case, Colman v. Walpole and Lacon*,[99] in which his Honour stated: '*It does not mean corrupt in the sense that you may look upon a man as a knave or a villain, but that it is to be shown that he was meaning to do that thing which the statute forbids.'*[100]
- Lussick CJ came to the conclusion that 'corruptly' required consideration of a respondent's state of mind – that being did they perform the act with the purpose of corruptly influencing a person to act in a particular way.

[10] *Leadership Code, Customs Act and Value Added Tax Act*
[11] *Prevention of Bribery Act 2007*
[12] Fiji *Prevention of Bribery Act 2007* and the Vanuatu *Leadership Code, Customs Act and Value Added Tax Act*
[13] *Teannaki v Tito* – judgment [1996] KIHC 3

- Stroud's Judicial Dictionary (4th edition) citing a South Australian case (C v Johnson [1967] SASR 279): "corruptly" means "with wrongful intention". These gifts were not made with wrongful intention: they were not made corruptly.[111]

Samoa:[14]

- 'Corruptly' is defined within s 132 of the *Crimes Act 2013* as follows: *"corruptly" means a person acts corruptly in relation to any bribe where he or she knows or is reckless to the fact that the bribe is intended to influence the person bribed to act or omit to act in breach of any oath of office, or otherwise than in accordance with his or her legal obligations or duties in relation to any public office.*

Solomon Islands:[15]

- *"... corruptly, there does not mean wickedly or immorally or dishonestly or anything of that sort, but which the object and intention of doing that which the legislation plainly means to forbid... and in all cases where there is evidence... it is a question of fact for the judge whether the intention is made out by the evidence, which in every individual case must stand upon its own grounds."*
- *"Corrupt means doing the thing which legislature forbids. The question whether the intention was to influence the voter must depend upon the circumstances..."*
- In *Rojumana v Regina* [2008] SBHC 23 the former Deputy Chief Justice referred to the word corruption. He said at [34]: "*...The term "corruption" is not defined in the Code. Definitions of corruption vary. But...(corruption) involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them. The definition is relevant to the construction of S.91 of the Code*."

Vanuatu:[16]

- *"Corruptly" is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt…the Privy Council expressly endorsed[68] the approach taken by Willes J in Cooper v Slade including his assertion that word "corruptly" encompasses:*

  [15]...purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner…

  [22] The effect of this is that "corruptly" is to be given its ordinary meaning. The breadth of circumstances that could apply show that it is unproductive to try to burden a word in common usage with restrictive meanings and rules. As the Supreme Court said of the Court of Appeals statement in Field set out at [16] above it is a comment. But it can also be a helpful comment in assessing the improper behaviour to see if it has been carried out "corruptly"… Having said that the correct test in Vanuatu must be to construe the word "corruptly" in its ordinary meaning.

[14] s 132 of the *Crimes Act 2013*
[15] *Sasako v Sofu [*2020] SBHC 7, [13]-[15], [41], [57] and *Aqarao v Philip [*2020] SBHC 22, [5]-[6].
[16] *Public Prosecutor v Tabimasmas* [2021] VUCA 14; Criminal Appeal Case 3532 of 2020 (19 February 2021)

Proceeds of Crime & Money Laundering Offences

No "proceeds of crime" offences have been identified for Nauru and Tokelau. The other jurisdictions have "proceeds of crime" or "money laundering" offences contained within their respective general criminal legislation or within their specific "Proceeds of Crime" legislation – see Overview Table 2 below.

Criminal Assets Confiscations Provisions

All partner jurisdictions, except for the Marshall Islands have specific legislation which provides the framework for the restraint, confiscation and forfeiture of criminal assets and proceeds/instruments of crime – see Overview Table 3 below.

Much of the Proceeds of Crime legislation is similar in terms of the mechanisms available: interim restraining and preservation orders, pecuniary penalty orders, foreign orders, final post-conviction forfeiture orders etc, and similar concepts such as "tainted property", "instruments and proceeds" of crime, and the threshold definition of "serious crime".

Other legislation contains some other mechanisms provisions for confiscation or forfeiture of property, for example the administrative provisions contained in Tokelau's *Crimes, Procedure and Evidence Rules 2003* and the sentencing provisions contained in Vanuatu's *Penal Code*.

Mutual Legal Assistance in Criminal Matters Provisions

All jurisdictions have legislation to enable international cooperation in criminal matters – see Overview Table 4 below. Most jurisdictions have both an Extradition Act and Mutual Assistance Act, including Fiji, Kiribati, Nauru, the Republic of the Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. The Federated States of Micronesia have provisions for both extradition and mutual assistance contained within their Criminal Procedure legislation. Palau has an Extradition Act but the provisions for mutual international assistance in criminal matters are contained in its Criminal Procedure legislation. Tokelau has the Extradition Rules which provide the mechanism for extradition, but no provisions for mutual assistance in legal matters could be located.

Overview Tables

Overview Table 1

Fraud, Bribery and Corruption Offence Provisions by Jurisdiction

Country	Legislation	Fraud	Bribery	Corruption
Federated States of Micronesia	*Code of the Federated States of Micronesia*	ss 601(9), 601(10), 602(1), 602(2), 602(3)	ss 514, 515, 516, 519, 520, 521(1), 521(2), 521(3)	ss 514, 515, 516, 517, 518, 519, 520, 521
Fiji	*CRIMES ACT 2009 - Laws of Fiji;* (For offences committed prior to 1/2/2010 see *Laws of Fiji* Chapter 17 (Penal Code)	ss 200, 201, 291, 317, 318, 319, 322, 323, 324, 325, 327, 328, 329, 330, 332, 333, 334, 335, 349, 350, 351	ss 12, 134, 135, 136, 137	s 139
	Prevention of Bribery Act 2007		ss 3, 4, 5, 6, 8	
Kiribati	*Penal Code 1977*	ss 121, 122, 251, 254, 266, 271, 299, 301, 302, 329, 330, 334	ss 85, 86	ss 85 87, 88, 89, 90
	Customs Act 1993		s 140	
Nauru	*Crimes Act 2016*	ss150, 151, 153, 154, 167, 168, 172, 179 (Division 9.3)	ss 173(1), 173(2), 174(1), 174(2), 175, 176	ss 178(1), 178(2), 179 183
	Criminal Code 1899	ss 398, 398.5, 398.6		
Palau	*Penal Code of the Republic of Palau*;	ss 2600, 2601, 2602, 2603, 2604, 2605, 2614, 2615	s 4100	S3917
Papua New Guinea	*Criminal Code*	ss 372, 373, 383A, 404, 405, 406, 407, 408	ss 87, 97A to 97K, 119, 120	ss 87, 88, 91, 92, 93, 94, 95, 96, 97

Country	Legislation	Fraud	Bribery	Corruption
	Organic Law on the Duties and Responsibilities of Leadership		S11	
	Cybercrime Code Act 2016	S12(1), 12(2), 13(1), 13(2), 15		
	Securities Commission Act 2015	S63(b)		
	Public Health Act (Ch226)		S12	
	Customs Act 1951		S154(a)	
	Excise Act 1956		S73(a)	
	Food Sanitation Act 1991		S40(c)	
	Liquor (Licensing) Act 1963		S115(b)	
Republic of Marshall Islands	*Marshall Islands Revised Code 2014 Title 31 Chapter 1*	ss 223.0, 223.3, 223.4, 224.1, 240.7, 240.8	ss 240.0, 240.1, 242.5	ss 240.2, 240.3, 240.5, 240.6, 240.7, 240.8
Samoa	*Crimes Act 2013*	s 161-172	ss 134, 135, 136, 137, 138, 150, 151	s 147
Solomon Islands	*Penal Code 1963*	ss 129, 130, 261, 273, 306, 308, 309, 336, 337, 341	ss 92, 93, 122	ss 91, 93, 95, 96
Tokelau	*Crimes, Procedure and Evidence Rules 2003*	ss 27, 31, 32, 73(1)	ss 72 (1), 72 (2)	ss 72(1), 72(2), 73
Tonga	*Laws of Tonga* Chapter 18 (Criminal Offences)	ss 53, 54, 143, 144, 145, 148 158, 162, 163, 164, 166	ss 50, 51	
	Electoral Act 1989		s 21	
Vanuatu	*Penal Code*	ss 122, 123, 124, 125, 126	s 73	
	Leadership Code		s 23	ss 19-33
	Customs Act		s 59	
	Value Added Tax Act		s 51(1)(r)	

Overview Table 2

Proceeds of Crime and Money Laundering Offence Provisions by Jurisdiction

Country	Legislation	Proceeds of Crime	Money Laundering
Federated States of Micronesia	*Code of the Federated States of Micronesia*	ss 903(15), 929, 935	ss 903 (12)[17], 918, 919(1), 919(2)
Fiji	*Proceeds of Crime Act 1997*	s 70	s 69
Kiribati	*Proceeds of Crime Act, 2003* (No. 8 of 2003)	s 13	s 12
Nauru	*Anti-Money Laundering and Targeted Financial Sanctions Act 2023*		ss 4, 9, 10
Palau	*Money Laundering and Proceeds of Crime Act 2001*		s 29
	Penal Code of the Republic of Palau;	ss 3916	ss 3301
Papua New Guinea	*Criminal Code*	S508B, S508C	Ss508B, 508C
	Proceeds of Crime Act 2005	S 34, 35	Ss34, 35
	Anti-Money Laundering and Counter Terrorist Financing Act 2015		S36(1), S36(3), S37(1), S37(3), S38(1), S38(3)
Republic of Marshall Islands	*Marshall Islands Revised Code 2014 Title 31 Chapter 1*		s 242.4
	Banking Act 1987		s 166
Samoa	*Crimes Act 2013*		ss 152A, 152C
	Proceeds of Crime Act 2007		s 11, 12, 13
	The Money Laundering Prevention Act 2007		s 26, 33
Solomon Islands	*Penal Code 1963*		
	Money Laundering and Proceeds of Crime Act 2002	s 10	s 17, 18
	Crimes, Procedure and Evidence Rules 2003		
Tonga	*Money Laundering and Proceeds of Crime Act 2000*		ss 17, 18
	Money Laundering and Proceeds of Crime Regulation 2010		
	Laws of Tonga Chapter 18 (Criminal Offences)		
Vanuatu	*Proceeds of Crime Act* [CAP 284][18]	s 12	s 11

[17] Definition of money laundering.

[18] This link is to the 2006 Consolidation only. Please refer to sessional legislation for amendments: Proceeds of Crime (Amendment) Act 2012; Proceeds of Crime (Amendment) Act 2014; Proceeds of Crime (Amendment) Act 2017 (No. 23 of 2017).

Overview Table 3

Criminal Assets Restraint, Confiscation and Forfeiture Provisions by Jurisdiction

Country	Legislation	Criminal Assets Restraint, Confiscation & Forfeiture
Federated States of Micronesia	*Code of the Federated States of Micronesia*	ss 901, 910, 911(1), 911(2), 911(3), 929(1), 929(3), 932(1), 932(2), 933(1), 933(3), 934, 935 (1), 935(2), 935(4), 938(1), 938(2), 940
Fiji	*Prevention of Bribery Act 2007*	ss 12AA, 70B
	Proceeds of Crime Act 1997	ss 11-19 conviction-based forfeiture ss 30 - 19E civil forfeiture ss 20 – 27 pecuniary penalty orders
Kiribati		ss 22 -100
Nauru	*Proceeds of Crime Act 2004*	ss 2, 3, 11, 15, 23, 165(1), 165(2)
Palau	*PNCA Chapter 33 Money Laundering Act*	ss 3, 32, 33
	Penal Code of the Republic of Palau	ss 704
Papua New Guinea	*Proceeds of Crime Act 2005*	Part 1 – Preliminary Part 2 – Measures to Combat Money Laundering Part 3 – The Confiscation Scheme: Division 1 - Restraining orders (ss38 – 57) Division 2 – Forfeiture orders (ss 58 – 83) Division 3 – Pecuniary Penalty orders (ss – 112) Part 4 – Facilitating Investigations and preserving property Division 5 - Production orders and other information gathering powers Division 6 - Monitoring orders Part 5 – Disclosure of Information held by government department Part 6 – Property under the control of the Commissioner of Police Part 7 – Miscellaneous
Republic of Marshall Islands	*Marshall Islands Revised Code 2014 Title 31 Chapter 1*	ss 211(1), 211(2), 212, 213(1), 213(2), 214
	Banking Act 1987	ss 171, 172, 176, 177
Samoa	*Proceeds of Crime Act 2007*	ss 14 - 57
Solomon Islands	*Penal Code 1963*	s 43
	Money Laundering and Proceeds of Crime Act 2002	ss 28 - 79

Country	Legislation	Criminal Assets Restraint, Confiscation & Forfeiture
Tokelau	*Crimes, Procedure and Evidence Rules 2003*	
	Customs Rules 1991	ss 21, 22
	Police Rules 1989	ss 11, 13, 14
Tonga	*Money Laundering and Proceeds of Crime Act 2000* (as amended *2005* and *2010*)	ss 10 – 80
Vanuatu	*Proceeds of Crime Act* [CAP 284] (as amended)	ss 15 - 82
	Penal Code[19]	s58ZC

[19] NB: this link is to the 2006 consolidated version. Please refer to subsequent amendments in the sessional legislation for updates.

Overview Table 4

International Co-operation Provisions by Jurisdiction

Country	Legislation	Mutual Assistance	Extradition
Federated States of Micronesia	*Criminal Procedure [Title 12]*	ss 1705(2), 1706, 1707, 1708	ss 1401, 1402, 1403, 1404, 1501, 1503, 1504, 1505, 1506, 1507, 1513, 1516, 1601, 1602, 1603, 1607
Fiji	*Extradition Act 2003*		ss 3, 4
	Mutual Assistance in Criminal Matters Act 1997	ss 1-51	
Kiribati	*Extradition Act 2003*		ss 1-62
	Mutual Assistance in Criminal Matters Act 2003	ss 1-65	
Nauru	*Mutual Assistance in Criminal Matters Act 2004*	ss 2, 7, 10, 11, 12, 14	
	Extradition of Fugitive Offenders Act 1973		Ss 3, 4, 5, 6, 7
Palau	*Extradition and Transfer Act 2001*		ss 1-63
	Criminal Procedure – Title 18	ss 1301 - 1322	
Papua New Guinea	Mutual Assistance in Criminal Matters Act 2005	Part 1 – Preliminary Part 2 – Requests by PNG for assistance Part 3 – Assistance with Taking Evidence and Production of Documents of [sic] other articles Part 4 – Assistance for Search and Seizure Part 5 – Arrangements for Persons to Give Evidence or Investigations etc.	
	Extradition Act 2005		Entire Act
Republic of Marshall Islands	*Criminal Extradition Act*		ss 204, 205, 206, 207, 208
	Mutual Assistance in Criminal Matters Ac 2002	ss 405, 406, 410, 411, 412	
Samoa	*Extradition Act 1974*		ss 1-22

Country	Legislation	Mutual Assistance	Extradition
	Mutual Assistance in Criminal Matters 2007	ss 1-74	
Solomon Islands	*Extradition Act 2010*		ss 1-62
	Mutual Assistance in Criminal Matters Act 2002	ss 1-19	
Tokelau	*Extradition Rules 2005*		ss 1-18
Tonga	*Extradition Act 1972*		ss 1-19
	Mutual Assistance in Criminal Matters Act 2000	ss 1-17	
Vanuatu	Mutual Assistance in Criminal Matters 2003 [CAP 285] as amended	ss 1 - 60	
	Extradition Act 2003 [CAP 287]		ss 1- 64

Part 3

Elements of Offences and Case Law

Federated States of Micronesia

Elements of Offences and Case Law

Federated States of Micronesia

The most influential common law in the Federated States of Micronesia is that of the United States of America (USA) due to its historical affiliation to the country. Prior to World War II, the island states of Pohnpei, Kosrae, Chuuk, and Yap consisted of settlements of Micronesians, which was followed by the colonisation of the country under the rule of Spain, Germany, and Japan respectively between 16th century and 1919. In 1947, the four island states were made part of the Trust Territory of the Pacific Islands (TTPI) and the USA gained the administration and jurisdiction.

Although Federated States of Micronesia gained independence in 1979, there were limited resources at the time to organize and develop the legal system and a Micronesian-based jurisprudence. As a result of this, judges from the USA were appointed to the role of establishing the foundation of the Micronesian judicial and legal system, which led to the integration and influence of principles and values of the American legal system. Although there are distinctions made regarding the position of customary laws within the Micronesian legal system, the traditions and customs of the island states are also considered to be common law.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Code of the Federates States of Micronesia	
s 601(9)	Theft by deception (definition)	1. A person obtains property of another; 2. Does so purposefully; 3. Does so by deception[20].	N/A
s 601(10)	Theft by extortion (definition)	1. A person obtains property of another; 2. By threat of: a) Inflict bodily injury on anyone or commit any other crime. b) Accused anyone of a crime. c) Expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute. d) Take or withhold action as an official, or cause an official to take or withhold action. e) Testify or provide information or withhold testimony or information with respect to another's legal claim or defence. f) Inflict any other harm which would not benefit the defendant. Defence – s601(10)(b) 1. Affirmative defence for (b), (c), and (d) that; 2. Property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action; 3. Was honestly claimed as restitution or indemnification for harm done.	N/A
s 602 (1)	Theft	1. A person; 2. Commits theft of any property or service; 3. In which another person has any legal, equitable or possessory interest.	10 years' imprisonment
s 602 (2)		Value of stolen property or service 1. Amount involved shall be deemed to be the highest value, by any reasonable standard of the property or service stolen or attempted to steal. 2. In thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining whether a crime has been committed and the grade of such crime for the amounts.	

[20] Definition of deception s601(9)(i)-(iv).

Section	Description	Offence Elements	Maximum Penalty
s 602 (3)		Defence 1. Affirmative defence if the defendant: a) Unaware the property or service was of another. b) Acted under honest claim of right to property or service or that he had a right to acquire or dispose of it as he did. c) Took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.	

Cases

Wolfe v Federated States of Micronesia [1985] FMSC 17; 2 FSM Intrm. 115 (App. 1985) (17 September 1985)

Matter Appeal against conviction

Jurisdiction Supreme Court of the Federated States of Micronesia (appellate jurisdiction)

Coram Hon. Edward C. King, Chief Justice, Hon. Mamoru Nakamura, Temporary Justice, Hon. Herbert D. Soll, Judge, Temporary Justice, FSM Supreme Court

Date of Verdict 17 September 1985

Summary Charles Wolfe wanted to establish an airline in the Federated States of Micronesia (FSM). Wolfe had attempted to develop the airline in the Republic of the Marshall Islands. In September 1982 Wolfe met FSM Senator Raymond Setik of Truk State at the Pohnpei airport. The two men formed an association and friendship. In 1983 Wolfe arrived in Truk State to discuss plans for establishment of an airline to service the outer islands of Truk State. Senator Setik arranged a party and invited several people in Wolfe's honour. The next day Senator Setik escorted Wolfe around the island and arranged a meeting that night with potential investors. At the meeting Wolfe addressed the potential investors, many of whom were Senator Setik's family members. Wolfe made representations that night and other times during the brief visit to Truk, following which he received a total of $60,000 from investors. The investors received for which the investors received little or nothing in return. After trial, Wolfe was convicted of theft by deception, obtaining $60,000 through the creation of a material false impression as to value, intention and state of mind in violation of 11 F.S.M.C. 934.

On appeal Wolfe contended that he had hoped to fulfill all the promises he made and that this should have prevent his conviction for theft by deception. Wolfe also argued that he did not receive a fair trial because he was unable to obtain the testimony of his former attorney. He contended that the trial court erred by denying his motion for an opportunity to take the attorney's deposition in California. The appeal court held that the findings of the trial court that Charles Wolfe intentionally created a false impression in the minds of various investors in Truk as to the existence of a corporation having stock, as to the value of that non-existent stock, and as to the control of that non-existent corporation and Wolfe over airplanes, was amply supported by the record. The record also reflected that Wolfe created these false impressions in the minds of Raymond Setik and the others in order to obtain money from them in the amount of $60,000, and that he was successful in obtaining their money through this deception.

The Appellant's argument that he intended to provide air service and did not intend to permanently deprive the investors of their money was unsuccessful. The crucial point was that by creating the false impression he obtained their money knowing that the risk to them was far beyond any risk to which they would have exposed themselves had his representations been true. The obtaining of money under these circumstances, even though the person obtaining the money had fond hopes of someday making repayment or issuing stock of equal value, nevertheless constituted theft by deception.

Decision Appeal dismissed – decision of trial court affirmed - conviction upheld

Chuuk v Robert [2008] FMCSC 7; 16 FSM Intrm. 73 (Chk. S. Ct. Tr. 2008) (20 August 2008)

Matter Trial

Jurisdiction Chuuk State Supreme Court Trial Division

Coram Hon. Edward C. King Chief Justice

Date of Verdict 20 August 2008

Summary Roman Robert was a long-time member of the Legislature and frequent traveller on official business with substantial experience seeking and obtaining government travel funds. On April 4, 2006, Robert sought to travel abroad on a medical referral with a specified amount of $1500 to be withdrawn from Robert's representation fund account as a 'special allowance', which indicated that the funds were not restricted to any particular use.

After preparation of a travel allowance (TA) by a legislative accountant, the legislature's Budget Officer was required to certify the availability of funds for the requested TA and the Speaker or President was required to authorize and approve the allotment. If approved, the TA was sent to the Department of Administrative Services for final approval and disbursement of the funds. Robert personally brought the TA to the Budget Officer for certification and requested to change the amount to $2500, which was done and initialled before certifying the TA by the Budget Officer. The Department of Administrative Services (DAS) refused to authorize the disbursement of account monies for the purpose of a medical referral. Robert inquired into the status of the TA with DAS, retrieved the TA from the certified accountant, and was shortly provided with an altered version of the TA. The alterations included a handwritten change in the amount from $2500 to $3100 alongside the account from Robert's representation fund account to the Speaker and the staff travel fund account. The initials 'RR' was handwritten next to the alterations of the account and the amount.

The defendant was charged with seven counts of misconduct in public office, grand larceny, cheating, forgery, tampering with records and obtaining signature by deception with respect to $3100 in travel funds.

The defendant was found guilty of misconduct in public office, grand larceny and cheating. Although there was no evidence directly establishing the defendant personally made the alternations, he was the only person with a motive and had the opportunity when the TA was taken from the possession of the certified accountant in the first instance.

The circumstances surrounding the approval and receipt of funds from the altered TA, including Robert's presence at DAS, his inquiry into status of the TA followed by its removal from the certifying accountant, its return in an altered form with the initials 'RR' next to alterations, and its

subsequent approval, as well as his failure to object to receiving TA monies that he should have known were not authorized, lead the court to conclude that Robert either altered the TA himself or directed someone else to do so.

Misconduct of public office

The court must find that the prosecution proved beyond a reasonable doubt that:

1. Robert was a public official, and

2. he did an illegal act under the colour of office, or he willingly neglected to perform the duties of his office as provided by law.

To answer the question of whether he acted illegally, the inquiry must begin with an examination of what if any restrictions were placed on Robert's receiving the travel funds he sought and obtained. This constitutes for the Court accounting for the circumstances of the facts of the case to determine the nature and intent of the defendant's actions in relation to the charges.

Grand larceny

The court must find that Robert

1. stole, took and carried away the personal property of another

2. valued at more than $200.00 but less than $5,000.00

3. without the owner's knowledge or consent, and

4. with the intent to permanently convert it to his own use.

The state was able, in this case, to recover of some of the funds that were not returned and not used for permissible, authorised travel. Such recovery did not excuse the taking. The funds were public monies held in the General Fund to be used only for their designated statutory purposes according to the requirements and procedures provided for by law. The state's ability to recover any or all travel funds advanced to a particular traveller has little to no bearing on whether the traveller unlawfully obtained the funds or used them for an unlawful purpose.

Cheating

The court must find that Robert:

1. unlawfully obtained the property, services or money of another

2. by false pretences, knowing the pretences to be false, and

3. with the intent thereby to permanently defraud the owner thereof

Decision Guilty of misconduct in public office, grand larceny and cheating.

Fred v Federated States of Micronesia [1987] FMSC 2; 3 FSM Intrm. 141 (App. 1987) (30 January 1987)

Matter Appeal against conviction

Jurisdiction FSM Supreme Court Appellate Division

Coram Hon. Richard H. Benson; Hon. Mamoru Nakamura; Hon. Edwel H. Santos

Date of Verdict 30 January 1987

Summary The appellant appealed his convictions of one count each of theft, forgery, conspiracy to commit theft, and of conspiracy to commit forgery. The issue presented was whether the amount in embezzlement counts which had been dismissed at the close of the government's case for lack of jurisdiction can be added to the amount in the theft count for which the appellant was found guilty to reach the court's jurisdictional requirement of $1,000. The appeal court held that the aggregation was improper and reversed the conviction of theft.

Decision Appeal upheld - Conviction reversed (quashed) and charge dismissed.

Pohnpei Community Action Agency v Christian [2002] FMSC 15; 10 FSM Intrm. 623 (Pon. 2002) (9 May 2002)

Matter Civil action

Jurisdiction FSM Supreme Court Trial Division

Coram Hon. Andon L. Amaraich, Chief Justice

Date of Verdict 9 May 2002

Summary The defendants were employees of the Congress and the FSM National Government and were charged with counts of:

1) withholding money appropriated by the Congress to PCAA,

2) taking of a vehicle and a boat from PCAA with a total worth of $52,500,

3) obtaining of funding from the PCAA,

4) failure to abide by the terms of the agreement with the US Housing Preservation Grant to provide $150,000 matching funds.

Outcome Summary judgment in favour of defendants for all counts to hear and deliver judgment of each of the counts as a separate hearing against the motion by the plaintiff to hear all four counts in a summary judgment.

The court held:

[634] This statute, entitled "Over-obligation of funds prohibited," provides that an officer or employee of the national government shall not "make or authorize an expenditure from, or create or authorize an obligation pursuant to any appropriation. . . for purposes other than those for which an allotment has been made."

The Court finds that this statute was intended to provide for criminal penalties for those officers and employees of the national government who misuse or misappropriate government money. Title 55 F.S.M.C. section 222 provides that anyone who wilfully violates section 220 shall, upon conviction, be fined not more than $20,000 or imprisoned for not more than 20 years, or both.

This statute is not intended to create a basis for private parties to sue government officials, but for the government to be able to punish employees and officials who are found to be misusing public funds.

This Court previously has recognized that statutes which do not, by their terms, provide private citizens with a cause of action for money damages cannot be the basis for private damages claims. The Damarlane case is instructive, as the plaintiff in that case attempted to assert several different causes of action in tort based upon the United States government's alleged failure to comply with standards set forth in various United States environmental laws. Similarly, third-party plaintiffs in this case attempt to isolate a particular statutory provision in Title 25, an environmental statute, and read it to create a specific duty upon which they base their negligence tort claim. However, the specific provisions cited by third-party plaintiffs, section 102, cannot be read in a vacuum. Title 25 of the FSM Code does not create a cause of action for a private citizen for monetary damages for violation of any portion thereof.

Like the statute at issue in the M/V Miyo Maru case, the Financial Management Act does not make any provision for damages to be awarded to a private citizen based upon any violation of the Act. The Court will not infer the existence of such a private cause of action in the absence of a clear intent expressed in the statute that such a private cause of action be created.

Decision Summary judgment in favour defendants for all counts.

Panuelo v Sigrah [2019] FMSC 27; 22 FSM R. 341 (Pon. 2019) (21 October 2019)

Matter Civil action

Jurisdiction FSM Supreme Court Trial Division

Coram Larry Wentworth Associate Judge

Date of Verdict 21 October 2019

Summary Nora Sigrah – a court appointed Receiver in Ioanis Peuelo's 2007 bankruptcy case – had, by fraud and conversion, received excessive compensation as Receiver and that, because of Sigrah's action as a Receiver, creditors received more than was their due.

Decision Summary judgment in favour of Nora Sigrah due to ingenuity in the plaintiff's pleadings. Judgment for entitlement of costs of action. The trial proceeded on the basis that the elements of fraud or intentional misrepresentation are:

1. A knowing or deliberate misrepresentation by the defendant;
2. Made to induce action by the plaintiff;
3. With the plaintiff's justifiable reliance upon the misrepresentations;
4. To the plaintiff's detriment[21].

In fraud cases under the civil jurisdiction, the following requirements must be adhered to: Civil Procedure Rule 9(b). The circumstances constituting the fraud must be stated with particularity: CPR 8(a). The extent of particularity requires a short and plain statement of the claim[22].

[21] *Setik v. Mendiola*, 21 FSM R. 537, 556 (App. 2018); *Pohnpei v. Kailis*, 6 FSM R. 460, 462 (Pon. 1994)
[22] *Kailis*, 6 FSM R. at 462

Arthur v Pohnpei [2009] FMSC 41; 16 FSM Intrm. 581 (Pon. 2009) (19 October 2009)

Matter	Civil action
Jurisdiction	FSM Supreme Court Trial Division
Coram	Dennis K Yamase Associate Judge
Date of Verdict	19 October 2009
Summary	The plaintiffs conspired and stipulated as true that a corporation known as AHPW Incorporated was the borrower on a loan, the promissory note of which included several of the plaintiffs as borrowers and the remaining co-accused as guarantors. The court held that guarantors have "the burden to allege such fraud as to support an independent action for relief from judgment. Without the existence of the requisite fraud, an independent action in equity may not be brought. Instead, res judicata prevails."[23]
Decision	Summary judgment in favour of the plaintiff Federates States of Micronesia Development Bank against the plaintiffs.

Sorech v FSM Development Bank [2012] FMSC 4; 18 FSM Intrm. 151 (Pon. 2012) (20 January 2012)

Matter	Civil
Jurisdiction	FSM Supreme Court Trial Division
Coram	CJ Martin G Yinug
Date of Verdict	20 January 2012
Summary	Plaintiff Milo Abello and wife executed a promissory note to the Bank, whereby the plaintiff failed to make the payments. The parties filed a stipulation of entry of judgment and a joint motion for entry of a stipulated order in the aid of judgment. The court regarded fraud as extrinsic where it prevents a party from having a trial or from presenting all his case to the court, or where it operates upon matters pertaining not to the judgment itself but to the manner in which it is procured, so that there is not a fair submission of the controversy.
Decision	Court dismissed the Original and Amended complaints in their entirety, matter was dismissed with prejudice.

Federated States of Micronesia v GMP Hawaii, Inc [2011] FMSC 27; 17 FSM Intrm. 555 (Pon. 2011) (1 July 2011)

Matter	Civil
Jurisdiction	FSM Supreme Court Trial Division
Coram	Dennis K Yamase Associate Judge
Date of Verdict	1 July 2011
Summary	Consultancy contract between GMP and the FSM under which GMP was to administer a project management unit having the duty “to provide planning, project management, conceptual project

[23] *McDonald v. Barlow*, 705 P.2d 1056, 1060 (Idaho Ct. App. 1985)

engineering design services, and construction management." The FSM terminated part of the contract in June 2007 and the remainder in January 2008, whereby the FSM filed suit alleging various damages arising from GMP's conduct. GMP made a counterclaim for damages arising out of the same contract and for the further relief.

The FSM alleges that GMP committed fraud or misrepresentation by including in contract specifications for the Lelu and Utwe school projects that the contractors perform soil testing; by inducing the Chuuk governor to prepare a letter directing GMP to proceed with design work; by offering gratuities to government employees; by placing overly restrictive provisions in its bid documents for the Weno wastewater treatment plant; and by placing exculpatory language in bid documents for the Weno road and Yap Early Childhood Education Center projects.

The court proceeded on the basis that the elements of intentional misrepresentation are:

1. Misrepresentation by the defendant;
2. Scienter or the defendant's knowledge that the statements were untrue;
3. Intent to cause the plaintiff to rely on the misrepresentations;
4. Causation or actual reliance by the plaintiff;
5. Justifiable reliance by the plaintiff;
6. Damages.

Decision GMP granted summary judgment in their favour against FSM's fraud and misrepresentation cause of action.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Code of the Federates States of Micronesia	
s 516	Bribery in official and political matters	1. A person 2. Offers, confers, or agrees to confer upon another[24], or solicits, accepts, or agrees to accept from another: a) Any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public official, or as a voter in any election, referendum, or plebiscite of the FSM; b) Any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion as a public official in a judicial or administrative proceeding; OR c) Any benefit as consideration for a violation of a known legal duty as a public official.	10 years imprisonment; disqualification from holding any position in the National Government.
s 519	Gifts to public servants by persons subject to their jurisdiction	1. A public official[25] 2. Solicits, accepts, or agrees to accept any pecuniary benefit; 3. From a person known to be: a) Subject to such regulation, inspection, investigation, or custody, or against whom such litigation is known to be pending or contemplated; OR b) Interested in or likely to become interested in any such contract, purchase, payment, claim or transaction; OR c) Interested in or likely to become interested in any matter before such public official or a tribunal with which he or she is associated. d) Interested in a bill, transaction, or proceeding, pending or contemplated, before the Congress or any committee or agency thereof.	10 years imprisonment.

[24] For the purposes of this section, 'public servant' or 'public official' includes, in addition to those persons who are defined as such under of this title, persons who have been elected, appointed, hired or designated to become a public official although not yet occupying that position

[25] For the purposes of this section, is a person in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the Government, or having custody of prisoners.

Section	Description	Offence Elements	Maximum Penalty
s 520	Compensating public officials for assisting private interests in relation to matters before him	1. A public official; 2. Solicits, accepts, or agrees to accept compensation; 3. For advice or other assistance in preparing or promoting a bill, contract, claim or other transaction or proposal; 4. Has or likely has an official discretion to exercise. Subsection (2) 1. A person; 2. Pays or offers to pay compensation to a public official; 3. Has knowledge that acceptance is unlawful.	10 years imprisonment.
s 521(1)	Selling political endorsement – special influence	1. A person; 2. Solicits, receives, agrees to receive, or agrees that any other person shall receive any pecuniary benefit; 3. For approval[26] or disapproval[27]: a) Of an appointment or advancement in public service; OR b) Of any person or transaction for any benefit conferred by an official or agency of the Government.	10 years imprisonment; disqualification from holding any position of honour or trust in the National Government.
s 521(2)		1. A person; 2. Solicits, receives, or agrees to receive any pecuniary benefit; 3. As consideration for exerting a special influence[28]; 4. Upon a public servant or procuring another to do so.	
s 521(3)		1. A person; 2. Agrees or confer any pecuniary benefit; 3. Receipt of which is prohibited by this section.	

[26] Approval includes recommendation, failure to disapprove, or any other manifestation of favour or acquiescence.
[27] Disapproval includes failure to approve, or any other manifestation of disfavour or non-acquiescence.
[28] Special power means power to influence through kinship, friendship or other relationship, apart from the merits of the transaction.

Cases

Federated States of Micronesia v Kansou [2006] FMSC 8; 14 FSM Intrm. 132 (Chk. 2006) (4 March 2006)

Matter Criminal

Jurisdiction FSM Supreme Court Trial Division

Coram Richard H Benson J

Date of Verdict 2 March 2006

Summary The defendants Jose and Rosemary Engichy joined by James Fritz and Frank Darra were charged with the offences of conspiracy to defraud the Federated States of Micronesia and accepting bribery as public officials of the FSM.

Both Jose and Rosemary were public officials, during the time of the conspiracy charge timeline but deny that a conspiracy existed. They also deny that they intentionally agreed with anyone to illegally take national government funds and content that the information does not establish probable cause for the conspiracy offence.

The offence of conspiracy to defraud the government of the Federated States of Micronesia is described as the following:

> *A person commits the offence of conspiracy, if , with intent to promote or facilitate the commission of a national offence, he agrees with one or more persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offence and that he or another person with whom he conspired commits an overt act in pursuance of the conspiracy.*
>
> The Court stated that the agreement in a conspiracy to defraud the government need not be explicit:
>
> *A mere tacit understanding will suffice and there need not be any written statement or even a speaking of words which expressly communicates the agreement and a conspiracy exists when either the agreement or the means contemplated for its achievement are unlawful.*

Decision Bribery charge dismissed due to the limitations period having passed, however, the conspiracy charge remains.

Arthur v Pohnpei [2009] FMSC 41; 16 FSM Intrm. 581 (Pon. 2009) (19 October 2009)

Matter Civil action

Jurisdiction FSM Supreme Court Trial Division

Coram Dennis K Yamase

Date of Verdict 19 October 2009

Summary The plaintiffs conspired and stipulated as true that a corporation known as AHPW Incorporated was the borrower on a loan, the promissory note of which included several of the plaintiffs as borrowers and the remaining co-accused as guarantors.

Plaintiffs believe that the defendants committed fraud in their actions surrounding the promissory note.

Decision — Summary judgment rendered in favour of the FSM Development Bank against the plaintiffs because the plaintiffs did not make out a claim for equitable relief and thus, cannot state a claim of fraud. Defendants directed to tax their costs for the matter accordingly.

Rule 60(b) permits an independent action for relief from a judgment based upon fraud upon the court.

Fraud upon the court is defined as the most egregious misconduct directed to the court itself, such as bribery of a judge or fabrication of evidence by counsel, which must be supported by clear, unequivocal and convincing evidence[29].

FSM Development Bank v Ehsa [2016] FMSC 2; 20 FSM R. 286 (Pon. 2016) (6 January 2016)

Matter — Civil action

Jurisdiction — FSM Supreme Court Trial Division

Coram — Ready E Johnny, Associate Judge

Date of Verdict — 6 January 2016

Summary — The defendants applied for a motion for relief from and to vacate pursuant to the default judgment delivered previously.

The Court comments on the concept of 'fraud in the inducement' and defines it as the following:

Fraud occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties or obligations involved.

The Court rejected the defendants' arguments that there the guaranty was carried out and executed with the wrong signature and that no fraud existed based on the definition of fraud:

Fraud in the inducement is a "[f]raud occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved." Black's Law Dictionary 732 (9th ed. 2009). The Ehsas now assert that it was important that the third guaranty be signed by the proper person or they may not have signed.

Decision — The motion for relief from and to vacate was denied for the following reasons:

1) The defendants did not perform their duties as guarantors on the performance of the loan repayments.

The bank sued both the borrower and the guarantors and obtained a default judgment.

Helgenberger v Ramp & Mida Law Firm [2018] FMSC 32; 22 FSM R. 4 (Pon. 2018) (3 August 2018)

Matter — Civil action

Jurisdiction — FSM Supreme Court Trial Division

[29] Ramp v Ramp, 11 FSM Intrm. 630, 636.

Coram Larry Wentworth

Date of Verdict 3 August 2018

Summary The plaintiff filed a lawsuit against the defendants that they colluded to deprive his estate of an asset valued at $400,000 at the time alongside an alleged violation of the Pohnpei probate court's order by opening two separate bank accounts into which the estate's rental incomes are deposited. The defendants were also alleged to have mismanaged the estate, and without the court approval, distribute the estate assets to some heirs, but not others.

Reaffirming the principle of bribery and fraud upon the court as:

> Fraud upon the court is defined as the most egregious misconduct directed to the court itself, such as bribery of a judge or fabrication of evidence by counsel, which must be supported by clear, unequivocal, and convincing evidence.

Decision Order dismissing case in court

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Code of the Federates States of Micronesia	
s 514	Official oppression	1. A person; 2. Acting or purporting to act in an official capacity on behalf of the Federated States of Micronesia; 3. Or taking advantage of such actual or purported capacity; 4. Knows the following conduct is illegal and commits it: a) Subject another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of person or property rights; OR b) Denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.	10 years imprisonment; disqualification from holding any position in the National Government
s 515	Speculating or wagering on official action or information	1. A public official; 2. In contemplation of official action by themselves or by a governmental unit with they are associated; 3. Or in reliance on information to which they have access in their official capacity; 4. Which has not been made public, does the following: a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; b) Speculates or wagers on the basis of such information or official action; OR c) Aid another to do any of the foregoing.	10 years imprisonment; disqualification from holding any position in the National Government
ss 516	Bribery in official and political matters	Please see "Bribery" table above	

Section	Description	Offence Elements	Maximum Penalty
s 517	Threats and other improper influence in official and political matters	1. A person commits a crime if they: a) Threaten unlawful harm to any person with the purpose to influence their decision, opinion, recommendation, vote, or other exercise of discretion as a public official, or a voter in any election, referendum, or plebiscite of the FSM; b) Threaten harm to any public official with purpose to influence their decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceedings; c) Threaten harm to any public official with purpose to influence them to violate their known legal duty; or d) Privately address to any public official who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with the purpose to influence the outcome on the basis of considerations other than those authorised by law. 2. There is no defence that a person whom the defendant sought to influence was not qualified to act in the desired way, whether because they had not yet assumed office, or lacked jurisdiction, or for any other reason.	Ten years imprisonment if a threat to commit a crime was made or made a threat to influence a judicial or administrative proceeding. Five years imprisonment for everything else.
s 518	Retaliation for past official action	1. A person; 2. Harms another by any unlawful act; 3. In retaliation for anything lawfully done by the latter in the capacity of public official.	Ten years imprisonment.
s 519	Gifts to public servants by persons subject to their jurisdiction	Please see “Bribery” table above	
s 520	Compensating public officials for assisting private interests in relation to matters before him	Please see “Bribery” table above	
s 521 (1), (2), (3)	Selling political endorsement – special influence	Please see “Bribery” table above	

Cases

Federated States of Micronesia v Wainit [2006] FMSC 3; 14 FSM Intrm. 51 (Chk. 2006) (6 February 2006)

Matter Criminal

Jurisdiction FSM Supreme Court Trial Division

Coram Associate Judge Martin Yinug

Date of Verdict 6 February 2006

Summary The Government attempted to execute a search warrant at Tadashi Wainit's (defendant) residence and objected to the admission of certain undisclosed oral statements as his. He was convicted of the following charges in the trial:

1. Eleven counts of public corruption for threatening to harm a public official with the purpose to influence them to violate their known legal duty.
2. Eleven counts of resisting arrest.

The elements of the offence of public corruption by threatening public official were noted as per the following by the court:

1. A person;
2. Threatens harms to a public official;
3. With the purpose to influence them to violate their known legal duty.

The court stated that the language of the legislative provision is inclusive of threats made to any public officials of any level and is not restrictive in interpretation to only judges or politicians.

Decision Offences of threatening to harm a public official with the purpose to influence them to violate their known legal duty were prove beyond reasonable doubt and the motion for judgment of acquittal was denied.

Urusemal v Capelle [2004] FMSC 44; 12 FSM Intrm. 577 (App. 2004) (4 August 2004)

Matter Appeal – Civil

Jurisdiction FSM Supreme Court Appellate Division

Coram Chief Justice Andon L Amaraich, Associate Justice Martin G Yinug, Specially Assigned Justice Judah C Johnny

Date of Verdict 4 August 2004

Summary President's petition for writ of prohibition regarding the violation of Article IX Section 7 of the FSM Constitution by the Congressional Resolution No 13-69 and the statute upon which it is based. A justice of the Supreme Court may be removed from office for treason, bribery or conduct involving corruption.

Decision The President's petition for writ of prohibition was granted

Waguk v Waguk [2016] FMSC 68; 21 FSM R. 60 (App. 2016) (28 December 2016)

Matter Appeal – Civil

Jurisdiction FSM Supreme Court Appellate Division

Coram Chief Justice Dennis K Yamase, Temporary Justices Cyprian J Manmaw and Mayceleen J. D. Anson

Date of Verdict 28 December 2016

Summary Tulensru died and left his land to several recipients inclusive of the Municipality, the State of Kosrae and his wife and children (Morris and Tulenkun). Morris left his parcel of land to his son Wilton, and Tulenkun passed his to his three daughters. All parties continued to live on, work and cultivate the land, however, the daughters were given a notice that the land was legally subdivided nearly 20 years ago.

The parties allege that the title was fraudulently conveyed to Morris based on misrepresentations made while he worked at the Kosrae Land Commission and seeks to invalidate Wilton's title to the parcel.

Decision The Kosrae State Court's decision was an abuse of discretion and reserved the judgment.

Buckingham, In re Order of Suspension [2014] FMSC 41; 19 FSM R. 582 (Pon. 2014) (13 October 2014)

Matter Criminal

Jurisdiction FSM Supreme Court Trial Division

Coram Acting Chief Justice Ready E Johnny

Date of Verdict 13 October 2014

Summary An attorney in the Northern Mariana Islands was charged for the following crimes:

1. Use of public supplies, services time and personnel for campaign activities;
2. Use of the name of government department or agency to campaign for a candidate running for public office;
3. Three counts of misconduct in public office;
4. Theft of services;
5. Conspiracy to commit theft of services.

Decision Accused found guilty of all charges and suspended from the practice of law in the Commonwealth of the Northern Mariana Islands.

Chuuk v Hebwer [2020] FMCSC 1; 22 FSM R. 542 (Chk. S. Ct. Tr. 2019) (13 May 2020)

Matter Criminal

Jurisdiction Chuuk State Supreme Court Trial Division

Coram Acting Chief Justice Repeat R Samuel

Date of Verdict 13 May 2020

Summary Tom Hebwer (defendant) charged with one count of misconduct in the public office and one count of forgery.

Decision Court granted the defendant's motion to have counts 3 and 4 dismissed due to the State not finding evidence of probable cause to sustain the counts.

Chuuk v Emilio [2013] FMCSC 7; 19 FSM R. 33 (Chk. S. Ct. Tr. 2013) (8 January 2013)

Matter Criminal

Jurisdiction Chuuk State Supreme Court Trial Division

Coram Associate Judge Midasy O Aisek

Date of Verdict 8 January 2013

Summary Defendants were charged with the following:

1. Two counts of misconduct in the public office;
2. One count of threat;
3. One count of reckless endangering;
4. One count of assault and battery;
5. One count of assault with a dangerous weapon.

Decision The Court granted the defendant's motion to obtain the deposition of the unavailable witness and ordered the plaintiff to bear the costs.

Ambros & Company Inc v Board of Trustees of the Pohnpei Public Lands Trust [2002] FMSC 20; 11 FSM Intrm. 17 (Pon. 2002) (14 June 2002)

Matter Civil

Jurisdiction FSM Supreme Court of Micronesia

Coram Chief Justice Andon L Amaraich

Date of Verdict 14 June 2002

Summary The plaintiffs put in a complaint against the defendants for the following:

1. Concealment, removal or alteration of record or process;
2. Misconduct in public office;
3. Fraudulent destruction, removal or concealment of instruments;
4. Abuse of process;
5. Intervention of contractual relationship;
6. Infliction of emotional distress;
7. Denial of due process;
8. Violation of civil rights; Violation of the Contract Clause of the Pohnpei State Constitution.

Decision The Court granted the defendant's motion to dismiss, without prejudice, the first three causes of action in the plaintiff's complaint as they fail to state a claim for relief to be granted.

Kosrae v Benjamin [2010] FMSC 17; 17 FSM Intrm. 1 (App. 2010) (12 January 2010)

Matter Appeal – Civil

Jurisdiction FSM Supreme Court Appellate Division

Coram Associate Justices Martin G Yinug, Dennis K Yamase, Ready E Johnny

Date of Verdict 12 January 2010

Summary Standon Benjamin, an Utwe municipal police officer, and a state police officer responded to a complaint. A landowner, Sepe M. Mike, objected to their presence and an argument involving shoving ensued, during which Sepe Mike was either pushed or fell to the ground.

Decision The Court dismissed the appeal

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
Code of the Federates States of Micronesia			
s 903 (12)	Definition	1. Engaging, directly or indirectly, in a transaction that involves property which is a proceeds of crime; 2. Receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into the country any property which is a proceeds of crime; 3. Knowing, or having reasonable grounds for suspecting that the property is derive or realized, directly or indirectly, from some form of unlawful activity; 4. Where the conduct is conduct of a natural person, without reasonable excuse, failing to take reasonable steps to ascertain whether or not the property is derived or realized directly or indirectly, from some form of unlawful activity; or 5. Where the conduct is a conduct of a financial institution, failing to implement or apply procedures and control to prevent or combat money laundering.	N/A
s 918	Money laundering offences	1. A person; 2. Acquires, possesses, or uses property, knowing or having reason to believe, that it is derived directly or indirectly from acts or omissions that would constitute a serious offence; or 3. Renders assistance to another person for: a) The conversion or transfer or property derived directly or indirectly from the acts or omissions referred to in subsection (1)(a), with the intention of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence; b) Concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly from the acts or omissions referred to in subsection (1)(a);	10 years imprisonment; $100,000 fine $500,000 fine for corporations, company, commercial, enterprise, commercial entity or other legal person.

Section	Description	Offence Elements	Maximum Penalty
s 919 (1)	Fraudulent accounts	1. A person; 2. Knowingly opens or operates an account with a financial institution or a cash dealer; 3. Under a false name.	5 years imprisonment; $50,000 fine $250,000 fine for corporations, company, commercial enterprise, commercial entity, or other legal person.
s 919 (2)	Compliance with requirements	1. A financial institution or cash dealer; 2. Fails to comply with any requirements of this subchapter[30].	5 years imprisonment; $50,000 fine $250,000 fine for corporations, company, commercial enterprise, commercial entity, or other legal person.

[30] Compliance with requirements under the Court's discretion – s919 (3)
In determining whether a person, or a financial institution or cash dealer has complied with or failed to comply with any requirements, the Supreme Court shall have regard to all circumstances of the case, including such custom and practice as may, from time to time, be current in the relevant trade, business profession or employment, and may take into account any relevant regulations adopted and/or approved by a public authority, exercising public interest supervisory functions tin relation to the financial institution or cash dealer, or any other body that regulates or is representative of any trade, business, profession or employment carried on by that person.

Cases

FSM v Tipingeni [2014] FMSC 28; 19 FSM R. 439 (Chk. 2014) (8 July 2014)

Matter	Criminal
Jurisdiction	FSM Supreme Court Trial Division
Coram	Associate Justice Ready E Johnny
Date of Verdict	8 July 2014
Summary	FSM filed a criminal information charging the defendant, Silisio AKA "Sirco" Tipingeni, with committing the crimes of aiding and abetting the deprivation of others' civil rights to be free from slavery, involuntary servitude, or peonage (eight counts); aggravated criminal mischief; and money laundering. The accused allegedly committed these crimes by deceiving and inducing young Chuukese women into traveling to Guam, ostensibly for lawful paid employment, but was in fact to be coerced and forced into prostitution at the Blue House bar.
Decision	Defendant's motion to dismiss the case was denied.

Proceeds of Crime

Offence Element Table

No additional offence provisions identified.

Cases

Not applicable – see "Money Laundering" above.

Provisions Tables

Summary Table: Proceeds of Crime, Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
	Code of the Federated States of Micronesia	
s 901	Purpose	1. To provide for the confiscation of the proceeds of crime[31] and property used; 2. In the commission of serious crime; and 3. To prevent the use of the financial system to launder the proceeds of serious crime.
s 903 (15)	Definition	"Proceeds of crime" means fruits of a crime, or any property derived or realized directly or indirectly from a serious offense and includes, on a proportional basis, property into which any property derived or realized directly from the offense was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the offense.
s 910	Deriving a benefit	1. Reference to a benefit derived or obtained by or otherwise accruing to a person; 2. Includes reference to a benefit derived, obtained or accruing to a third party; 3. At the first person's request or direction.
s 911 (1)	Benefitting from the proceeds of a serious offence	1. A person has benefitted from an offence if; 2. At any time; 3. Received any payment or other reward; 4. In connection with or derived any pecuniary advantage from the commission of a serious offence.
s 911 (2)		1. Proceeds of a serious offence are: a) Any payments or other rewards received by the person at any time in connection with the offence; and/or b) Any pecuniary advantage derived by the person at any time from the commission of an offence.
s 911 (3)		1. Value of proceeds of a serious offense is the aggregate of the values of all payments, rewards, or pecuniary advantages received by that person in connection with, or derived by the person from, the commission of the offence.

[31] Definition of proceeds of crime – s903 (15)
Fruits of a crime, or any property derived or realized directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the offence.

Section	Description	Provisions
s 929 (1)	Application for confiscation order or pecuniary penalty order	1. Where a defendant is convicted of a serious offence, the Secretary may apply to the Supreme Court for one or both of the following orders: a) A confiscation order against property that is tainted property[32] in respect to the offence; or b) A pecuniary penalty order against the defendant in respect of benefits derived by the defendant from the commission of the offence; i) Application must be made within one year of the date the defendant was convicted for the serious offence.
s 929 (3)		1. Where an application is finally determined, no further application for a confiscation order or a pecuniary order may be made in respect of the offence for which the defendant was convicted without the leave of the Supreme Court. 2. Supreme Court shall grant leave upon satisfaction of the following: a) The property or benefit to which the new application relates, accrued or was identified after the previous application was determined; b) Necessary evidence became available after the pervious application was determined and could not reasonably have been discovered before such determination; or c) It is in the interest of justice that the new application be made.
s 932 (1)	Procedure on application	1. Where an application is made to the Supreme Court; 2. The Supreme Court may, in determining the application, have regard to the transcript of any proceedings against the defendant for the offence.
s 932 (2)		1. Where an application is made; 2. The Supreme Court has not, when the application is made, passed sentence on the defendant for the offence; 3. The Supreme Court may, if satisfied that it is reasonable to do so in all circumstances; 4. Defer passing sentence until it has determined the application for the order.
s 933 (1)	Procedure for *in rem* confiscation order where a person dies or absconds	1. Where an information or a complaint has been filed; 2. Alleges the commission of a serious offence by a person and a warrant for the arrest of the person has been issued in relation to that information or complaint; 3. The Secretary may apply to the Supreme Court for a confiscation order in respect of any tainted property if the defendant has died or absconded[33].

[32] Tainted property definition

[33] Definition of absconded for the purposes of ss 933, 934 – s933(2)
The person is deemed to have absconded if reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during a period of six months commencing on the day the warrant was issued, and the personal shall be deemed to have so absconded on the last day of that period.

Section	Description	Provisions
s 933 (3)		1. For application on confiscation order against any tainted property, the Supreme Court shall, before hearing the application: a) Require notice of the application to be given to any person who in the opinion of the Supreme Court, appears to have an interest in the property; and b) Direct that notice of the application be announced on public radio, posted at the main Post Office and all branch offices, and at the National Government headquarters in Palikir, and published in a newspaper published and circulated in the FSM, containing such particulars and for so long as the Supreme Court may require.
s 934	Confiscation where a person dies or absconds	1. An application for a confiscation order against any tainted property by reason of a person having died, or absconded in connection with a serious offence, and the Court is satisfied that: a) Any property is tainted property; b) Proceedings in respect of a serious offence committed in relation to that property were commenced; and c) The accused charged with the offence referred to in subsection (1)(b) of this section has died or absconded 2. The Supreme Court may order that the property or such property as is specified by the Supreme Court in the order be confiscated.
s 935 (1)	Confiscation order on conviction	1. Upon the Secretary's application; 2. The Supreme Court is satisfied that property is tainted property in respect of a serious offence of which the person has been convicted; 3. The Supreme Court may order that specified property be confiscated. 4. Confiscation of property as ordered by the Supreme Court; amount equalling the value of the property[34].
s 935 (2)		1. In determining whether property is tainted property, the Court ma presume, in the absence of evidence to the contrary: a) The property was used in or in connection with, the commission of the offence if it was in the person's possession at the time of, or immediately after, the commission of the offence for which the person was convicted; and/or b) The property was derived, obtained or realized as a result of the commission of the offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the offence of which the person was convicted, and the Supreme Court is satisfied that the income of that person, from sources unrelated to criminal activity of that person, cannot reasonably account for the acquisition of that property.

[34] Order of amount in money in a confiscation order – s935
The Supreme Court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made, taking account of how such value is to be determined under section 907 of this Act.

Section	Description	Provisions
s 935 (4)		1. In considering whether a confiscation order should be made, the Supreme Court shall have regard to: a) The rights and interests, if any, of innocent third parties in the property; b) The gravity of the offence concerned; c) Any hardship that may reasonably be expected to be caused to any innocent person by the operation of the order; and d) The use that is ordinarily made of the property, or the use to which the property was intended to be put.
s 938 (1)	Protection of third parties	1. For confiscation order against property; 2. A person who claims an interest in the property may apply to the Supreme Court; 3. Before the confiscation order is made under subsection (2).
s 938 (2)		1. If the Supreme Court is satisfied with the following: a) The person was not in any way involved in the commission of the offence; and b) Where the person acquired the interest during or after the commission of the offence, that he or she acquired the interest; i) For sufficient consideration; and ii) Without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he or she acquired it, tainted property; 2. The Supreme Court shall make an order declaring the nature, extent and value [35] of the person's interest.
s 940	Payment instead of a confiscation order	1. Where the Supreme Court is satisfied that a confiscation order should be made, but the property or any party thereof or interest therein cannot be made subject to such an order and, in particular: a) Cannot, on the exercise of due diligence be located; b) Has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest for the purpose of avoiding the confiscation of the property; c) Is located outside the FSM; d) Has been substantially diminished in value or rendered worthless; or e) Has been commingled with other property that cannot be divided without difficulty; 2. The Supreme Court may order the person to pay to the FSM an amount equal to the value of the property, party or interest, taking into account section 907 of this chapter.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[35] At the time the order is made.

Summary Table: Mutual Assistance Provisions

Section	Short Description	Provisions
	Criminal Procedure [Title 12]	
s 1705 (2)	Authority to make and act on mutual legal assistance requests	1. The Secretary may, in respect of any request from a foreign state for mutual assistance un any investigation commenced or proceeding instituted in that state relating to a serious offence: a) Grant the request, in whole or in part, on such terms and conditions as they deems fit; b) Refuses the request, in whole or in part, on the grounds to grant the request would likely prejudice the sovereignty, security or other essential public interest of the FSM; or c) After consulting with the competent authority of the foreign state, postpone the request, in whole or in part, on the grounds that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in the FSM.
s 1706	Saving provision for other requests or assistance in criminal matters	1. The Secretary has the power to make requests to foreign states or act on requests for assistance in investigations or proceedings in criminal matters; 2. The power of any other person or Court to make requests to foreign states or act on requests for forms of international assistance other than those specified in section 1707; 3. The nature or extent of assistance in investigations or proceedings in criminal matters which the FSM may lawfully give to or receive from foreign states.
s 1707	Mutual legal assistance requests by the FSM	1. Requests under the authority of the Secretary include that the foreign state: a) Have evidence taken, or documents or other articles produced in evidence in the foreign state; b) Obtain and execute search warrants or other lawful instruments authorizing a search for things believed in that foreign state, which may be relevant to investigations or proceedings in the FSM, and if found, seize them; c) Locate or restrain any property believed to be the proceeds of crime located in the foreign state; d) Confiscate any property believed to be located in the foreign state, which is the subject of a confiscation order; e) Transmit to the DSM any such confiscated property or any proceeds realized therefrom, or any such evidence, documents, articles or things; f) Transfer in custody to the FSM a person detained in the foreign state who consents to assist the FSM in the relevant investigation or proceedings; g) Provide any other form of assistance in any investigation commenced or proceeding instituted in the FSM that involves or is likely to involve the exercise of a coercive power over a person or property believed to be in the foreign state; or h) Permit the presence of nominated persons during the execution of any request made under this Act.

Section	Short Description	Provisions
s 1708	Contents of requests for assistance	1. A request for mutual assistance shall encompass the following: a) Name of the authority conducting the investigation or proceeding to which the requests relates; b) Description of the nature of the criminal matter and a summary of relevant facts ad laws with a copy of the laws referenced; c) Description of the purpose of the request and nature of the assistance being sought; d) Details of any procedure that the requesting states wished to be followed by the requested state; e) Statement setting out wishes of the requesting state concerning confidentiality; f) Details of the period within which the requesting state wishes the request to be complied with; g) Details of the property to be traced, restrained, sized, or confiscated, and of the grounds for believing that the property is believed to be in the requested state; and h) Information that may assist in giving effect to the request.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Short Description	Provisions
	Criminal Procedure [Title 12]	
s 1401	Scope and limitation	1. The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries; 2. Continue in force; 3. During the existence of any extradition agreement with such foreign government; 4. Shall be read in light o and consistent with the extradition agreement pursuant to which a request is made.
s 1402	Fugitives from foreign country to FSM	1. In the presence of an agreement for extradition between the FSM and any foreign government; 2. Any FSM judge upon the complaint made under oath; 3. Issue warrant for the apprehension of the person charged; 4. To the end that the evidence of criminality may be heard and considered; Upon the hearing: 1. If the judge deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention; 2. Shall certify the same together with a copy of all the testimony taken before him; 3. To the Secretary of External Affairs; 4. A warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Elements of Offences and Case Law

Fiji

The legal system of Fiji incorporates and is heavily influenced by the English common law system due to its history as a British colony, wherein Britain ruled over Fiji until 1970 which marked Fiji's independence. Upon its independence, the country of Fiji adopted a constitutional democratic form of government which is influenced by the Westminster system, which was first developed in England.

Therefore, there is a strong influence of the English common law over the Fijian legal system, with the majority of court decisions referring to the judgments and discussions from the English cases.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 200	Fraud and breaches of trust by persons employed in the civil service	1. a person employed in the civil service 2. in the discharge of the duties of the office 3. commits any fraud or breach of trust against a private person whether or not criminal or civil 4. the fraud or breach of trust affects the public (whether such fraud or breach of trust would have been criminal or not if committed against a private person)	5 years
S 201	False information to public servant	1. a person 2. gives an employee of the civil service 3. any false information 4. which they know or believe to be false and intend to cause the person in the civil service (a) to do or omit anything which such person employed in the civil service ought not to do or omit if the true state of facts respecting which such information is given were known to him or her; or (b) to use the lawful power of such person employed in the civil service to the injury or annoyance of any person	5 years
S 291	Theft	1. a person 2. who dishonestly appropriates property belonging to another 3. with the intention of permanently depriving the other of the property.	10 years
S 317	Obtaining property by deception	1. a person 2. by deception, 3. dishonestly obtains property belonging to another 4. with the intention of permanently depriving the other of the property	10 years
S 318	Obtaining a financial advantage by deception	1. a person 2. by deception 3. dishonestly obtains a financial advantage from another person	10 years
S 319(1)(a)	Conversion	1. a person 2. entrusted either solely or jointly with another person's power of attorney for the for the sale or transfer of any property 3. fraudulently sells, transfers or otherwise converts the property or any part of it to his or her own use or benefit or the use or benefit of any person 4. other than the person by whom he or she was entrusted.	7 years

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 319(1)(b)	Conversion	1. a director, member or officer of any company or other body incorporated 2. fraudulently takes or applies for his or her own use or benefit or for any use or purposes other than the use or purposes of such company or other body 3. any of the property of the company or other body	7 years
S 319(1)(c)(i)	Conversion	1. a director, member or officer of any company or other body incorporated 2. being entrusted either solely or jointly with any other person 3. with any property 4. in order that he or she may retain in safe custody or apply, pay or deliver, for any purpose or to any person 5. the property of any part of it or any proceeds from it, 6. fraudulently converts to his or her own use or benefit or the use or benefit of any other person, 7. the property or any part of it, or any proceeds from it.	7 years
S 319(1)(c)(ii)	Conversion	1. A director, member or officer of any company or other body incorporated 2. having either solely or jointly with any other person 3. received any property for or on account of any other person 4. Fraudulently converted to his or her own use or benefit or the use or benefit of any other person, 5. the property or any part of it, or any proceeds from it.	7 years
S 322(1)(a)(i)	Fraudulent falsification of accounts	1. A clerk, officer or employee (or any person employed or acting in the capacity of a clerk, officer or employee) 2. wilfully and with intent to defraud 3. destroys, alters, mutilates or falsifies 4. any book, paper, writing, valuable security or account which 5. belongs to or is in the possession of their employer	7 years
S 322(1)(a)(ii)	Fraudulent falsification of accounts	1. A clerk, officer or employee (or any person employed or acting in the capacity of a clerk, officer or employee) 2. wilfully and with intent to defraud 3. destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which 4. has been received by him or her for or on behalf of his or her employer	7 years
S 322(1)(b)	Fraudulent falsification of accounts	1. A clerk, officer or employee (or any person employed or acting in the capacity of a clerk, officer or employee) 2. wilfully and with intent to defraud 3. makes, or concurs in omitting or altering, 4. any material particular from or in any such book or document or account	7 years

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 323	General dishonesty – Obtaining a gain	1. A person 2. does something 3. with the intention of dishonestly obtaining a gain 4. from another person.	5 years
S 324(1)	General dishonesty – Causing a loss	1. A person 2. does something 3. with the intention of dishonestly causing a loss to another person.	5 years
S 324(2)(a)(b)	General dishonesty – Causing a loss	1. A person 2. dishonestly causes a loss, or dishonestly causes a risk of loss 3. to another person and 4. the first person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.	5 years
S 325	General dishonesty – Influencing a public official	1. A person 2. does something 3. with the intention of dishonestly influencing a public official 4. in the exercise of the official's duties as a public official.	5 years
S 326(1)	Obtaining financial advantage	1. A person 2. engages in conduct and 3. as a result of that conduct, 4. obtains a financial advantage for him/herself from another person and 5. knows or believes that s/he is not eligible to receive that financial advantage	10 years
S 326(2)	Obtaining financial advantage	1. A person 2. engages in conduct and 3. as a result of that conduct, obtains a financial advantage for another person from a third person and 4. knows or believes that the other person is not entitled to receive that financial advantage	10 years
S 327	Conspiracy to defraud – Obtaining a gain	1. A person 2. conspires with another person 3. with the intention of dishonestly obtaining a gain from a third party	10 years
S 328(1)	Conspiracy to defraud – Causing a loss	1. A person 2. conspires with another person 3. with the intention of dishonestly causing a loss to a third person	10 years
S 328(2)	Conspiracy to defraud – Causing a loss	1. A person 2. conspires with another person 3. to dishonestly cause a loss, or to dishonestly cause a risk of loss to a third person and 4. knows or believes that the loss will occur or that there is a substantial risk of the loss occurring.	10 years

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 329	Conspiracy to defraud – Influencing a public official	1. A person 2. conspires with another person 3. with the intention of dishonestly influencing a public official 4. in the exercise of the official's duties as a public official.	10 years
S 330	General provisions relating to conspiracy to defraud	1. To find someone guilty of conspiracy to defraud – (a) The person must have entered into an agreement with one or more other persons; and (b) The person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement; and (c) The person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.	
S 332(1)	False or misleading statements in applications	1. A person 2. makes a statement whether orally or in document form or in any other way) and 3. does so knowing that the statement is false or misleading or omits any matter or thing without which the statement is misleading and 4. the statement is made in connection with an application for a passport, licence, permit or authority or an application for registration or an application or claim for a benefit[36] and (i) the statement is made to a Government entity; (ii) the statement is made to a person who is exercising powers or performing functions under or in connection with any law; (iii) the statement is made in compliance or purported compliance with any law.	2 years

[36] 'benefit' is defined in s 331, as it applies to Part 17 Division 5, any advantage and is not limited to property.

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 332(3)	False or misleading statements in applications	1. A person 2. Makes a statement whether orally or in document form and does so recklessly as to whether the statement is false or misleading or omits any matter or thing without which the statement is misleading and 3. The statement is made in connection with an application for a passport, licence, permit or authority or an application for registration or an application or claim for a benefit and 4. the statement is made to a Government entity, the statement is made to a person who is exercising powers or performing functions under or in connection with any law or the state is made in compliance or purported compliance with any law.	1 year
S 333	False or misleading information	1. A person 2. Gives information to another person and does so knowing the information is false or misleading or omits any matter or thin without which the information is misleading and 3. The information is given to a Government entity, a person who is exercising powers or performing functions under, or in connection with any law or is given in compliance or purported compliance with any law.	1 year
S 334	Obtaining credit etc by false pretences	1. A person 2. Incurring any debt or liability obtains credit by any false or misleading statement or representation or by means of any other fraud or 3. With intention to defraud his or her creditors, makes or causes to be made any gift, delivery or transfer of or any charge on his or her property or 4. With intent to defraud his or her creditors, conceals, sells or removes any part of his or her property after or within 2 months before the date or nay unsatisfied judgment or order for payment of money obtained against him or her.	5 years
S 335	False or misleading documents	1. A person 2. Produces documents to another person 3. Does so knowing that the document is false or misleading and 4. The document is produced in compliance or purported compliance with any law.	5 years

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 349	Dishonestly obtaining or dealing in personal financial information	1. A person 2. Dishonestly[37] obtains, or deals in, personal financial information and 3. Obtains, or deals in, that information without the consent of the person to whom the information relates.	5 years
S 350	Possession or control of thing with intent to dishonestly obtain or deal in person financial information	1. A person 2. Has possession or control of anything and 3. Has that possession or control 4. With the intention that the thing be used by the person or by another person 5. To commit an offence against s 349 or to facilitate the commission of that offence.[38]	3 years
S 351	Importation of thing with intent to dishonestly obtain or deal in person financial information	1. A person 2. Imports a thing into Fiji and does so with the intention that the thing be used by the person or by another person in committing an offence against s 349 or to facilitate the commission of that offence.	3 years.

Cases

Civil fraud is often considered in the context of land title transfers.

The Privy Council decision in *Assets Company Ltd v Mere Roihi*[39] remains a frequently cited discussion on the meaning of civil fraud.

The High Court of Fiji in *Khan v Mohammed*[40] applied this case in their judgment:

"…. by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further

[37] 'dishonest' is defined in s 348 to mean –
dishonest according to the standards or ordinary people; and
known by the defendant to be dishonest according to the standards of ordinary people.
In Chute v State [2016] FJHC 1114; HAA015.2016 (8 December 2016) Perera J referred to Black's Law Dictionary (6th edition) to define 'dishonesty' as follows;
"Disposition to lie, cheat, deceive, or de- fraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray."

[38] S 350(2) makes it clear that it is not a requirement of s 350 for an accused to be found guilty of an offence against s 349.

[39] [1905] AC 176.

[40] [2016] FJHC 975.

inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty or fraud if he honestly believes it to be a genuine document which can be properly acted upon."[41]

Director of Public Prosecutions v Nand [1977] FJCA 20

Matter Criminal

Jurisdiction Fiji Court of Appeal

Coram Gould VP, Marsack JA, Henry JA

Date of Verdict 25 November 1977

Summary Obtaining credit by false pretences contrary to s 343(a) of the *Penal Code.*

In considering whether a charge of obtaining money by false pretences is to be treated the same as a charge of obtaining credit by false pretences, the Court noted that the two provisions have equal force. It was noted that Holroyd J in *R v Gill and Henry*[42] that in a charge of 'obtaining money by false pretences' that the offence is merely the 'false pretence'. The majority in the present case made the logical leap that if the 'false pretence' constitutes the offence in the offence, this must be treated the same for a charge of obtaining credit by false pretences.[43]

This case, like many others, also notes that a mere allegation of fraud is not sufficient no matter how persuasive the wording used may if it does not have any evidence to support the accusation.[44]

State v Singh [2005] FJHC 433

Matter Judgment on 'No Case' submission

Jurisdiction High Court of Fiji

Corum Winter J

Date of Verdict 23 November 2005

Charge/s False Pretences

Summary This case is authority for the proposition that a person cannot be prosecuted for a future false pretence – where the alleged false pretence has not yet occurred or is alleged of intending to occur.

The High Court of Fiji relied on the case of *Greene v The King*[45] for the position that no representation to do something in future can amount to a pretence:

[41] Assets Company Ltd v Mere Roihi [1905] AC 176, 210.
[42] (1818) 106 ER 341.
[43] Director of Public Prosecutions v Nand [1977] FJCA 20.
[44] Director of Public Prosecutions v Nand [1977] FJCA 20 citing R v Thomas (1931) 23 Cr. App. R. 21.
[45] (1949) 79 CLR 353.

> *"7. From that time forward the law has been that no representation, express or implied, as to the existence of an intention on the part of the prisoner to do something in the future amounts to a pretence for the purposes of the crime of false pretence ...*
>
> *11. But principle makes indispensable to the charge a representation, express or implied, which really relates to an existing state of fact whatever form the representation takes."*

This position was also accepted in a prior High Court of Fiji case by Shameem J in *Ramesh Chand v The State.*[46]

State v Singh [2007] FJCA 46

Matter	Criminal
Jurisdiction	Court of Appeal of Fiji
Coram	Ward P, Ellis JA, Penlington JA
Date of Verdict	25 June 2007
Summary	Appeal to conviction of false pretences contrary to s 309(a) of the *Penal Code.*

This case set aside the previous 2005 conviction in *State v Singh*; however, the judgment does not distinguish the reasoning of the case law of England and Australia – again relying on the statement of Dixon J in *Greene v The King*:

> *"... the law has been that no representation, express or implied, as to the existence of an intention on the part of the prisoner to do something in the future amounts to a pretence for the purposes of the crime of false pretences. But a contract or promise as to a future act or future conduct may itself be based upon or accompanied by a false statement as to a past fact or present state of things and if by means of the false statement the prisoner obtains the property it would form a foundation for a charge of false pretences notwithstanding the contract or promise. Some difficulty appears to have been felt about an inducement consisting partly of a false promise as to future conduct and partly of a false representation of past or present fact. But it was decided that a false representation of existing fact though united with a false promise would sustain an indictment for false pretences if money or property was thereby obtained. ... But principle makes indispensable to the charge a representation, express or implied, which really relates to an existing state of fact whatever form the representation takes."*[47]

[46] [2004] FLR 19.
[47] State v Singh [2007] FJCA 49, [61] citing Greene v The King (1949) 79 CLR 353.

Mohammed v R [1975] 21 FLR 32

Matter Criminal

Jurisdiction Court of Appeal of Fiji

Coram Gould VP, Marsack JA, Henry JA

Date of Verdict 20 March 1975

Summary Obtaining by false pretence.

Although there was discussion in this judgment regarding the case law in Australia and New Zealand having an opposing view to the English common law, the Court of Appeal 'reluctantly' followed the ruling of *R v Ball*[48] because at the time it was the highest authority and had not yet been distinguished.

Within the judgment, the Court had to decide on appeal the proper construction of the meaning of 'obtain' within s 342 of the *Penal Code*. The position in Australia and New Zealand, reflected in *R v Miller,* was that obtaining by false pretences does not require the accused to gain full ownership of the property, merely possession of the property.[49] This is not the position that was adopted by the Court of Appeal of Fiji in 1975 however – instead adopting the position in *R v Ball* which stated:

> *"There is no doubt that 'obtains' means obtain the property and not merely possession, and the obtaining must not for this purpose be under such circumstances as to amount to larceny."*[50]

Fiji has previously adopted the position on appeal that the term 'obtain' requires actual transfer of ownership rather than merely possession as possession amounts to a charge of theft.

State v Rokotakilai [2013] FJMC 356

Matter Criminal

Jurisdiction Magistrate Court of Fiji

Coram Resident Magistrate Chaitanya Lakshman

Date of Verdict 27 September 2013

Summary Obtaining by false pretence.

Foremost, the judgment outlined the offence for s 309 of the *Penal Code* and its mirroring of s 32 of the English *Larceny Act 1916*. In highlighting this provision, the Court noted that s 308 of the *Penal Code* defines false pretence as "any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true, is a false pretence". This judgment simply outlines three elements that are required to be proven for a charge of obtaining money by false pretences.

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[48] [1951] 2 K.B. 109.
[49] R v Miller [1955] NZLR 1038, 1047.
[50] R v Ball [1951] 2 KB 109, 111.

1. First, that the accused obtained the possession, ownership or benefit of any chattel, money or valuable security (or got any chattel, money or valuable security delivered to a third party).

2. Second, that the accused obtained that possession, ownership or benefit by means of a " false pretence ". That is, that there is a direct link between the use of a false pretence and the obtaining of the possession, ownership or benefit. There are three stages to analysing whether there has been a "false pretence".

The State needs to prove:

(i) That there was a "representation", that is, a statement about a matter of present, or past fact, or a statement about a future event, or a statement about an existing intention, opinion, belief, knowledge or some other state of mind;

(ii) That the representation was "false". It will be a false representation if the person making it knew it was false. In short, that the statement was a deliberate lie;

(iii) That the false representation was made with the intention of inducing the person to whom it was made to act on it.

3. Third that the false pretence was made "with intent to defraud". To defraud someone is to deprive that person of something by dishonestly causing that person to believe something that is not true. A person does something dishonestly if he or she does it deliberately and knowing that it is in breach of his or her legal obligations. Even if this is established, if it is claimed that D nevertheless believed that he was "justified" in departing from such a legal obligation, or was "entitled" to so act, it must be shown that D did not honestly believe this.

In summary, the State must prove that the accused without justification or entitlement told a deliberate lie, intending that the complainant would believe it and thereby hand over or deliver something which he or she would not have done if the truth had been known.

State v Naidu [2010] FJMC 189

Matter	Criminal
Jurisdiction	Magistrate Court of Fiji
Coram	Resident Magistrate Mosese Naivalu
Date of Verdict	26 May 2010
Summary	Obtaining money by false pretences contrary to s 309(a) of the *Penal Code.*

The Court was comfortable applying the facts of the case directly to the wording of the provision. This was done based on a previous finding by Winter J in the case of *Maharaj v The State* [2006] FJHC 21 where it was stated that '*What the law requires on a charge of false pretence is readily ascertainable from the Section".*[51]

[51] State v Naidu [2010] FJMC 189, [94].

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 134	Bribery of a public official	1. A person 2. Who without lawful authority or reasonable excuse (a) provides a benefit[52] to another person; or (b) causes a benefit to be provided to another person; or (c) offers to provide, or promises to provide, a benefit to another person; or (d) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and 3. The person does so with the intention of influencing a public official in the exercise of the officer's duties as a public official.	10 years
S 135	Receiving a bribe	1. A public official 2. Without lawful authority or reasonable excuse (a) Asks for a benefit for themselves or another person; or (b) receives or obtains a benefit for themselves or another person or agrees to receive; or (c) obtain a benefit for themselves or another person; and 3. The public official does so with the intention (a) That the exercise of the official's duties as a public official will be influenced; or (b) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a public official will be influenced.	10 years
S 136	Corrupting benefits given to, or received by, a public official	1. A person 2. Without lawful authority or reasonable excuse (a) Provides a benefit to another person; or (b) causes a benefit[53] to be provided to another person; or (c) offers to provide, or promises to provide a benefit to another person; or (d) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and 3. The receipt, pr expectation of the receipt, of the benefit would tend to influence a public official in the exercise of the official's duties as a public official.	10 years

[52] 'benefit' is defined in s 133 to mean any advantage including political gain and is not limited to property.
[53] Under s 138, it is immaterial whether the benefit that is derived is in the form of a reward in ss 136-137.

Section	Description	Offence Elements	Maximum Penalty
S 137	Receiving a corrupting benefit	1. A public official 2. Without lawful authority or reasonable excuse (a) Asks for a benefit for themselves or another person; or (b) receives or obtains a benefit for themselves or another person; or (c) agrees to receive or obtain a benefit for themselves or another person; and 3. The receipt, or expectation of the receipt, of the benefit would tend to influence a public official in the exercise of the officials' duties as a public official.	5 years
		Prevention of Bribery Act 2007	
S 3	Soliciting or accepting an advantage	1. Any prescribed officer 2. Without prior written permission of their appointing authority 3. Solicits or accepts an advantage.	See s 12
S 4(1)	Bribery	1. A person 2. Without lawful authority or reasonable excuse 3. Offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's – (a) Performing or abstaining from performing any act in their capacity as a public servant (b) Expediting, delaying, hindering or preventing the performance of an act whether by that public servant or by another (c) Assisting, favouring, hindering or delaying any person in the transaction of any business with a public body.	See s 12
S 4(2)	Bribery	1. A public servant[54] 2. Without lawful authority or reasonable excuse 3. Solicits or accepts any advantage as an inducement to or reward for or otherwise on account of their – (a) performing or abstaining from performing any act in their capacity as a public servant (b) Expediting, delaying, hindering or preventing the performance of an act whether of their own or another public servant or (c) Assisting, favouring, hindering or delaying any person in the transaction of nay business with a public body.	See s 12

[54] 'public servant' is defined in s 2 to mean –
any prescribed officer;
any employee of a public body; or
any public official as defined under section 4 of the Crimes Act 2009.

Section	Description	Offence Elements	Maximum Penalty
S 5(1)	Bribery for giving assistance etc in regard to contracts	1. Any person 2. Without lawful authority or reasonable excuse 3. Offers an advantage to a public servant as an inducement to or reward for or otherwise on account of such public servant's giving assistance or using influence in, or having given assistance or used influence in 4. The promotion, execution or procurement of – (a) Any contract with a public body for the performance of any work, service or thing or the supplying of any article, material or substance; or (b) Any subcontract to perform any work, service, do anything, or supply any article, material or substance required to be performed, provided, done or supplied under any contract with a public body or 5. The payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as aforesaid.	See s 12
S 5(2)	Bribery for giving assistance etc in regard to contracts	1. Any public servant 2. Without lawful authority or reasonable excuse 3. Solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his or her giving assistance or using influence in, or having given assistance or used influence in (a) The promotion, execution or procuring of; or (b) the payment for in, any such contract or subcontract as is referred to in subsection (1)	See s 12
S 6(1)	Bribery for procuring withdrawal of tenders	1. A person 2. Without lawful authority or reasonable excuse 3. Offers any advantage to any other person as an inducement to or a reward for or otherwise on account of the withdrawal of a tender, or the refraining from the making of a tender, for any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance	See s 12
S 6(2)	Bribery for procuring withdrawal of tenders	1. A person 2. Without lawful authority or reasonable excuse 3. Solicits or accepts any advantage as an inducement to or a reward for or otherwise on account of the withdrawal of a tender, or the training from the making of a tender, for such a contract as is referred to in subsection (1)	See s 12

Section	Description	Offence Elements	Maximum Penalty
S 8(1)	Bribery of public servants by persons having dealings with public bodies	1. A person 2. Without lawful authority or excuse 3. While having dealings of any kind with the Government through any department, office or establishment of the Government 4. Offers any advantage to any prescribed officer employed in that department, office or establishment of the Government	See s 12
S 8(2)	Bribery of public servants by persons having dealings with public bodies	1. A person 2. Without lawful authority or reasonable excuse 3. While having dealings of any kind with any other public body, offers an advantage to any public servant employed by that public body	See s 12
S 12	Penalty for offences	1. Any person guilty of an offence under this Part, other than an offence under s 3, shall be liable – (a) On conviction on indictment – (i) For an offence under s 10, to a fine of $1,000,000 and imprisonment for 10 years; (ii) For an offence under section 5 or 6, to a fine of $500,000 and to imprisonment for 10 years; and (iii) For any other offence under this Part, to a fine of $500,000 and to imprisonment for 7 years; and (b) On summary conviction – (i) For an offence under s 10, to a fine of $500,000 and to imprisonment for 3 years; and (ii) For any other offence under this Part, to a fine of $100,000 and to imprisonment for 3 years; and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him or her, or such part thereof as the court may specify. 2. Any person guilty of an offence under s 3 shall be liable on conviction to a fine of $100,000 and to imprisonment for one year, and shall be ordered to pay to the Government in such manner as the court directs the amount or value of the advantage received by him or her such part thereof as the court may specify. 3. In addition to any penalty imposed under subsection (1), the court may order a person	See description.

Section	Description	Offence Elements	Maximum Penalty
		convicted of an offence under section 10(1)(b) to pay the Government – (a) a sum not exceeding the amount of the pecuniary resources; or (b) a sum not exceeding the value of the property, the acquisition of which by him or her was not explained to the satisfaction of the court. 4. An order under subsection (3) may be enforced in the same manner as a judgment of the High Court in its jurisdiction.	

Cases

FICAC v Shekeb – Ruling on no case to answer [2018] FJHC 310; HAC.331.2016 (16 April 2016).

Matter Criminal

Jurisdiction High Court of Fiji

Coram Perera J

Date of Verdict 16 April 2016

Summary Bribery contrary to s 4(1)(a) of the *Prevention of Bribery Promulgation* No. 12 of 2007.

The case concerned the offering and accepting of advantages by persons employed by the Fiji Revenue and Customs Authority which could have reasonably been accepted as a bribe. The actions were mainly related to motor vehicles and part in exchange for performance of any act in the accused capacity as the 'Acting National Manager Border' of the Customs Authority.

Paragraphs [3]-[5] of the decision outline the elements for each of the alleged offences which will be outlined below:

> *[3] The elements of the offence under section 4(1)(a) relevant to this are;*
>
> *a. the accused;*
> *b. offered an advantage;*
> *c. to a public servant;*
> *d. on account of that public servant's performing any act in his capacity as a public servant.*
>
> *[4] The elements of the offence under section 4(2)(a) relevant to this are;*
>
> *a. the accused;*
> *b. being a public servant;*
> *c. accepted an advantage;*
> *d. on account of his performing any act in his capacity as a public servant.*
>
> *[5] The elements of the offence under section 8(2) are;*
>
> *a. the accused;*
> *b. while having dealings of any kind with any public body;*
> *c. offered an advantage;*
> *d. to any public servant employed by that public body.*

The prosecution in the present case relied on dicta from *AG v Ching Fat Ming* [1978] HKLR 480 which stated that there was no necessity for quid pro quo in the context of providing an advantage, merely that it is a general sweetener'.[55] McMullin J decision in the case of *Chung Fat Ming* (supra) was in fact repealed in due course by the introduction of the Hong Kong Prevention of Bribery Ordinance, which is identical in nature to the Fiji Promulgation.[56] The decision in *Chung Fat Ming* (supra) was also critical of the previously adopted 'Leonard Test' which stated:

> "*As I see it the question which one must ask oneself when considering the corruptness of a gift given to or solicited by a public servant in order to induce him to abstain from a proposed course of action is 'Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?' If the answer is 'Of course not' as it is in this case then the gift has been solicited or given to him in his capacity as a public servant and is a corrupt one."*[57]
>
> *In reference to this test, the High Court of Fiji chose not to affirm the 'Leonard Test', instead requiring that the gift in fact needed to be given on account' of a public servant committing an act or abstaining from – stating the following:*
>
> *In my view, in order to draw the irresistible inference that a particular advantage was offered or received on account of performing or abstaining from performing an act in the capacity as a public servant, one should consider all the circumstances involving the offering or receiving of the advantage including the nature of the advantage and the relationship between the public servant and the person who offered the advantage. Even though it is not necessary for the 'act' in question to be a specific act and it is sufficient for it to be any general duty of the public servant in question, it is still necessary to have evidence to prove beyond reasonable doubt that the advantage was given 'on account' of that 'act'*.[58]

FICAC v Singh [2023] FJHC 409; HACDA08.2021S (20 June 2023)

Matter Appeal from the Magistrates Court

Jurisdiction High Court of Fiji

Coram Kumarage J

Date of Verdict 20 June 2023

Summary Bribery contrary to s 4(2)(b) of the Prevention of Bribery Act 2007.

This case considered the use of s 4(2) of the *Prevention of Bribery Act No. 2 of 2007* as it relates to public servants who accept a bribe. The judgment notes that the prosecution is required to prove:

1. The Accused, (sic), who is a public servant
2. Without lawful authority or reasonable excuse
3. Solicited or accepted

[55] FICAC v Shekeb [2018] FJHC 310; HAC 331.2016 (16 April 2018), [10].
[56] Ibid [13].
[57] KONG Kam-piu & Anor v The Queen [1973] HKLR 120.
[58] FICAC v Shekeb [2018] FJHC 310; HAC 331.2016 (16 April 2018), [17].

4. Any advantage
5. As an inducement to or reward or otherwise on the account of
6. Expediting, delaying, hindering or preventing the performance of an act in his capacity as a public servant.

FICAC v Laqenisici [2018] FJHC 807; HAA48.2017 (29 August 2018)

Matter Appeal from the Magistrates Court

Jurisdiction High Court of Fiji

Coram Rajasinghe J

Date of Verdict 29 August 2018

Summary Bribery contrary to s 4(2)(a) of the *Prevention of Bribery Act.*

In reviewing the first ground for appeal, the High Court of Fiji was required to break down the elements of bribery under s 4 of the Prevention of Bribery Act once again. In this case, the Court noted that 'advantage' is defined in s 8(2) of the Act. Additionally, affirming the judgment of the lower court, the High Court stated that the elements in sections 2 and 4 of the Prevention of Bribery Act were aptly described as:

i. Any public servant who, whether in Fiji or elsewhere, (The accused),
ii. Without lawful authority or reasonable excuse,
iii. Solicits or accepts any advantage,
iv. As an inducement to or rewards for or otherwise on account of his,
v. Performing or abstaining from performing or having performed or abstained from performing, any act in his capacity as a public servant.[59]

The Court in this case was comfortable relying on the decision of *Chung Fat Ming* (discussed above) because of the similarities that can be drawn between the Hong Kong and Fijian bribery legislation.[60] A key difference between the Fijian bribery legislation and other countries is the requirement for the bribe to 'be on the account of' an action as opposed to possibly influencing behaviour. The Court considered the meaning of 'on account of' in the context of s 4(2) of the Bribery Act and concurred with McMullin J – quoting his passage from *Chung Fat Ming:*

> *"The distinction which we are invited to consider is a distinction between the solicitation or acceptance of an advantage which is clearly identified by the evidence as directly related to the performance, or abstention from performance, of some particular act within the capacity of the given public servant in the performance of his duty, as against the solicitation, or acceptance, of an advantage which cannot be shown to be related to any specific incident of performance or non-performance of any such act, and which yet can be seen to be related to the nature and performance of his office generally. To put the matter more concretely the distinction which has been argued before us is between the advantage which is seen to be solicited or accepted as a 'quid pro quo" for some particular act or abstention identifiable as to place and time on the one hand and, on the other, an*

[59] FICAC v Laqenisici [2018] FJHC 807; HAA48.2017 (29 August 2018) [12].
[60] Ibid [19].

> *advantage solicited or accepted as a general earnest of good relations- the "keeping sweet" situation."*[61]

The Court did no go as far as to extinguish the application of the 'Leonard Test' the same way the Court did in *FICAC v Shekeb.*[62] Instead the Court noted that Leonard J had since observed that there was no requirement for the prosecution to prove that anything was done 'corruptly' – similarly to other nearby jurisdictions. Leonard J in *Attorney General v* Chung Fat Ming stated simply that the draft of s 4 'does not prohibit the acceptance of a quid pro quo. It forbids the acceptance of an advantage on account of performance of an act in the capacity of a public servant'.[63]

FICAC v Bola [2018] FJHC 745; HAA117.2017 (14 August 2018)

Matter Criminal Appeal

Jurisdiction High Court of Fiji

Coram Aluthge J

Date of Verdict 14 August 2018

Summary Bribery contrary to s 4(2)(a) of the *Prevention of Bribery Act.*

The High Court in this case found that a lower court erred in finding that an element of s 4(2)(a) of the *Prevention of Bribery Act 2007* was to provide a bribe 'on account of abstaining from performing' an action. His Honour noted that the provision cannot be read to include the abstaining of an action – instead, finding that:

> *'…the actual element should have been 'performing an act' in his capacity as a public servant, namely filling of the Vehicle Inspection Sheet (PEX2) without physical inspection … the learned Magistrate erroneously looked for evidence in relation to 'abstaining from performing' by focusing merely on the vehicle inspections … Evidence of the performance of [a positive act was] crucial to the prosecution case and therefore by failing to give due weight to crucial prosecution evidence, the learned Magistrate erred in law.'*[64]

FICAC v Singh [2024] FJHC 71; HACDA 08.2021S (31 January 2024)

Matter Prosecution appealed against sentence of the lower court whereby the Learned Magistrate found the Respondent guilty, convicted him and imposed a sentence of 21 months imprisonment suspended for 3 years.

Jurisdiction High Court of Fiji (Appellate Jurisdiction)

Coram Kumarage J

Date of Verdict 31 January 2024

Summary Bribery contrary to s 4(2)(a) of the *Prevention of Bribery Act.*

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[61] Attorney General v Chung Fat Ming (1978) HLR 480.
[62] FICAC v Shekeb [2018] FJHC 310; HAC 331.2016 (16 April 2018) [17].
[63] FICAC v Laqenisici [2018] FJHC 807, HAA48.2017 (20 August 2018), [24] citing Attorney General v Chung Fat Ming (1978) HLR 480.
[64] FICAC v Bola [2018] FJHC 745, HAA117.2017 (14 August 2018), [10]-[11].

The case contains a summary on sentencing process for bribery offences. The Learned Judge in referring to section 12(1)(b)(ii) of the Prevention of Bribery Act 2007 states that "it is perceptible that under this section the Legislature in its wisdom has expected the sentencing authority to impose a conjunctive sentence, i.e…, a prison sentence and a fine…"

The Court further provided Guideline Judgment for Sentencing accused after conviction for Summary Offences under the Prevention of Bribery Act 2007.

Ahmed v FICAC [2024] FJHC 350; HAA27.2023 (4 June 2024)

Matter	Appeal by the Appellant against conviction imposed by the Magistrates Court
Jurisdiction	High Court of Fiji (Appellate Jurisdiction)
Coram	Hamza J
Date of Verdict	4 June 2024
Summary	Bribery contrary to s 4(2)(a) of the Prevention of *Bribery Act.*

In the lower Court's decision (Criminal Case No. 622/15), the Court outlined the elements for the prosecution to prove under s 4 of the *Prevention of Bribery Act No. 12 of 2007* as being:

1. The Accused, (sic), who is a public servant
2. Without lawful authority or reasonable excuse
3. Solicited or accepted
4. Any advantage
5. As an inducement to or reward or otherwise on the account of

Expediting, delaying, hindering or preventing the performance of an act in his capacity as a public servant.

FICAC v Naulu [2016] FJHC 934; HAC FICAC 2.2014 (17 October 2016)

Matter	Sentence passed by His Lordship Justice Rajasinghe
Jurisdiction	High Court of Fiji
Coram	Rajasinghe J
Date of Verdict	17 October 2016
Summary	Bribery contrary to s 4(2)(a) of the *Prevention of Bribery Act.*

In the sentencing remarks, the Court was guided by the sentencing guidelines under the UK *Bribery Act 2010.* It was noted that although the punishment for bribery was different in the UK, the guidelines would still be useful in understanding the level of culpability of the accused. His Honour highlighted the following principles as evidence of culpability:

A – *High culpability*

i. *A leading role where offending is part of a group activity*
ii. *Involvement of others through pressure, influence*
iii. *Abuse of position of significant power or trust or responsibility*
iv. *Intended corruption (directly or indirectly) of a senior official performing a public function*
v. *Intended corruption (directly or indirectly) of a law enforcement officer*
vi. *Sophisticated nature of offence/significant planning*
vii. *Offending conducted over sustained period of time*
viii. *Motivated by expectation of substantial financial, commercial or political gain*

B – Medium culpability

i. *All other cases where characteristics for categories A or C are not present*
ii. *A significant role where offending is part of a group activity*

C – Lesser culpability

i. *Involved through coercion, intimidation or exploitation*
ii. *Not motivated by personal gain*
iii. *Peripheral role in organised activity*
iv. *Opportunistic 'one-off' offence; very little or no planning*
v. *Limited awareness or understanding of extent of corrupt*[65]

With these guidelines, the Court was then in a position to attribute a sentence based on the factors listed above as falling within one of three categories:

i. 5-8 years imprisonment for category A,
ii. 3-6 years imprisonment for category B and
iii. 18 months-4 years imprisonment for category C.[66]

[65] FICAC v Naulu [2016] FJHC 934, HAC FICAC 2.2014 (17 October 2016) [12].
[66] Ibid [10].

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		CRIMES ACT 2009	
S 139	Abuse of office	1. A person employed in the civil service 2. Does or directs to be done in abuse of the authority of their office 3. Any arbitrary act prejudicial to the rights of another	10 or 17 depending of severity

Cases

State v Zhang; HAC 061 of 2017S

Matter Criminal

Jurisdiction High Court of Fiji

Coram Temo CJ

Date of Verdict 31 October 2019

Summary Obtaining Property by Deception.

Money Laundering

The accused was found guilty as charged and convicted for the offences of Obtaining Property by Deception and Money Laundering. His Lordship, Chief Justice Temo stated two aggravating factors in this matter; serious breach of trust and well planned and executed fraud on complainant. To differentiate between the two types of offences i.e. obtaining property by deception and obtaining a financial advantage by deception, he made the following comments:

> *"Obtaining property by deception", contrary to section 317 (1) of the Crimes Act 2009, carried a maximum sentence of 10 years imprisonment (count no. 1). In State v John Miller, Criminal Appeal No. 29 of 2013S, High Court, Suva, His Lordship Mr. Justice P.K. Madigan, recognized that there were two deception offences in the Crimes Act 2009, that is, "obtaining property by deception" (section 317) and "obtaining a financial advantage by deception" (section 318). On the tariff for the two offences, His Lordship said:*
>
> *"The penalty for both offences is the same, that is ten years. Under the old Penal Code the maximum for the offence was a term of 5 years and the tariff was between 18 months to three years. As this Court stated in Atil Sharma HAC122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception.*
>
> *From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naive or in any other way socially disadvantaged".*

"Money Laundering", contrary to section 69 (2) (a) and (3) (a) of the Proceeds of Crimes Act 1997, carried a maximum penalty of a fine not exceeding $120,000 or imprisonment for a term not exceeding 20 years, or both (count no.2). In State v Josefa Saqanavere and Others, Criminal Case No., HAC 251 of 2013S, High Court, Suva, I said the following: "…The public through their representative in Parliament, view the offence of "money laundering" seriously, and had prescribed it a maximum penalty of 20 years imprisonment, or a fine not exceeding $120,000, or both (see section 69 (2)(a) of the Proceeds of Crime Act 1997). The tariff for "money laundering" is now set at 5 to 12 years imprisonment: see State v Robin Surya Subha Shyam, Criminal Case No. HAC 146 of 2010S; State v Monika Monita Arora, Criminal Case No. HAC 125 of 2007S, and State v Doreen Singh, Criminal Case No. HAC 086 of 2009S – all Suva High Court authorities. Of course, the actual sentence will depend on the mitigating and aggravating factors…"[67]

Nima v State [2022] FJCA 159; AAU0015.2017 (24 November 2022)

Matter	Criminal
Jurisdiction	Fiji Court of Appeal
Coram	Prematilaka, RJA
	Gamalath, JA
	Nawana, JA
Date of Verdict	24 November 2022
Summary	Abuse of Office

The appellant was charged with the offence of Abuse of Office in the Magistrates Court. He was acquitted of the charge but found guilty and convicted for a lesser charge of Obtaining Financial Advantage. He appealed to the High Court and the decision of the Magistrates Court was upheld. Thereafter, he appealed to the Fiji Court of Appeal. The following comments were made in the appellate court when his appeal was dismissed:

"To my mind in this instance, both abuse of office and obtaining financial advantage are indeed property related offences. Not only the particulars of the charge but also the evidence demonstrates that fact and support that conclusion. Therefore, in this instance the offence of obtaining financial advantage can be rightly treated as any other property related offence in so far as the primary/principal offence of abuse of office is concerned.

Therefore, the learned Magistrate was right in convicting the appellant for the offence of the lesser or alternative offence of obtaining financial advantage under section 162(1)(i) of the Criminal Procedure Act, 2009. Accordingly, the learned High Court was right in upholding the conviction on the basis that in this instance abuse of office is a property related offence and similarly obtaining financial advantage is also a property related offence and therefore it was permissible for the Magistrate to have convicted the appellant for the lesser or alternative offence of obtaining financial advantage."[68]

[67] State v Zhang; HAC 061 of 2017S
[68] Nima v State [2022] FJCA 159

Narayan v *Fiji Independent Commission against Corruption* [2023] FJHC 655

Matter Criminal

Jurisdiction High Court of Fiji

Coram Aluthge J

Date of Verdict 12 September 2023

Summary Abuse of Office

The appellant was challenging the no case to answer ruling of the Magistrates Court. The State's position was that there is no right of appeal for interlocutory applications in criminal proceedings. The revisionary powers and the supervisory powers of the High Court was also discussed at length in this matter. The following comments were made when the appeal was allowed:

> *"The powers under Section 100(6) will be exercised by the High Court only in exceptional cases when there is a real possibility that the rights guaranteed in the Constitution would be in peril. Therefore, there is no basis for anxiety that this decision will open flood gates.*
>
> *When ordering retrials, the appellate courts must always be mindful of the prejudice that will be caused to the parties and the witnesses, the expenses they have to incur and the time wasted in the process of a new trial, not to mention the case management difficulties of the courts below which are already overburdened with huge backlogs. The witnesses lose their memory over time paving way for contradictions with their previous testimonies and some important witnesses may have dead or gone missing by the time of the re-trial. All in all it is the constitutional right to a speedy trial and the confidence in the judicial system that will ultimately be at stake."*

State v Prakash HAA 29 of 2023

Matter Criminal

Jurisdiction High Court of Fiji

Coram Aluthge J

Date of Verdict 26th October 2023

Summary Theft of Public Funds

The State appealed the decision of the Magistrates Court whereby an application was made to withdraw the charge against the accused. A counter application was made by the defence to acquit the accused of the charge. The Magistrates Court ruled in favour of the accused and he was acquitted. The following comments were made when the appeal was dismissed:

> *"When a withdrawal application is made, the Magistrate must choose between the options prescribed in Section 169(2)(b) of the CPA whether to acquit the accused or discharge and exercise his/her discretion based on the facts before the court. The Magistrate would want to know whether there is a reasonable prospect for recharging the accused.*
>
> *For instance, if the reason for withdrawal is that a crucial witness is dead and the court finds that, without that witness's evidence, the charge cannot be maintained, then the acquittal would be the best option available to the Magistrate. On the other hand, if the important*

witness cannot be located or is not available for the time being, the preferred choice would be a discharged. However, the relevant information must come from the prosecutor so that an informed decision can be made. Having kept the Learned Magistrate in the dark by giving no reasons for the withdrawal, the ODPP failed in its duty owed not only to the Court and the accused but also the public whose interest is to see that the offenders are punished.

Assuming that the Sate's position that the DPP is not bound to give reasons for withdrawal is correct, I cannot help but say that, by failing to provide reasons for withdrawal, the ODPP is exposing itself to the risk of being ordered to pay costs under Section 150(3) of the CPA. This section provides that an order for costs shall not be made under subsection (2) unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter. It stands to reason that if the magistrate considers that the prosecutor had no reasonable grounds for bringing the proceedings, he/she is entitled to order reasonable costs payable to the accused."

FICAC v Finiasi [2010] FJHC 354; HAA006.2010 (20 August 2010)

Matter Appeal

Jurisdiction High Court of Fiji

Coram Thurairaja J

Date of Verdict 20 August 2010

Summary Corruption contrary to s 106(a) of the *Penal Code.*

The court noted in the sentencing remarks the importance of deterrence for crimes by public officials because of its damage to public confidence. His Honour drew out two quotes from the case of *State v Sorovakatini* – stating:

*In the case of **State v Sorovakatini** [2005] FJHC 32: HAC018.2005 (26 September 2007) Winter J consider the offence of official corruption as a serious one. He stated that:*

"It is difficult to prove as it relies on the honesty of the person who is offered the bribe or encouraged to engage in corrupt practices. There are rarely independent witnesses to the event. For these reasons when a case has been successfully proved this Court has a duty to treat the matter seriously. Once detected, tried and proved the need to impose a punitive and deterrent sentence to deter others, becomes crucial".

Still in the **State v Sorovakatini (Supra) Winter J** regards public corruption as a betrayal of public trust and erodes public confidence in the government institutions. He further stated that:

"These are serious crimes, and it is importance that potential offenders and the public at large understand that these crimes will be met with still penalties".[69]

With reference to *Kim Nam Bae v State,* the Court also noted the importance of contrasting the sentences of higher Court cases to determine where a crime fits within a range of similar sentences:

In **Kim Nam Bae v State [1999] FJCA 21; AAU 0015 of 1998**, the Court of Appeal stated that:

"An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must

[69] FICAC v Finiasi [2010] FJHC 354, [26].

> *have regard to sentences imposed by the high Court and the Court of appeal for offences of the type in question to determine the appropriate range of sentence".*[70]

In light of this, the Court embarked on a comparative analysis of cases from the Fijian High Court and Court of Appeal to arrive at a sentence for the crime.[71]

FICAC v Laqere [2018] FJHC 933

Matter Criminal

Jurisdiction High Court of Fiji

Coram Hamza J

Date of Verdict 27 September 2018

Summary Abuse of Office and Obtaining a Financial Advantage x 40 total.

While reflecting on the sentiment in Fiji towards sentencing for offences of public officials, his Honour referred to the judgment of Rajasinghe J in *FICAC v Ana Laqere and Others* where it was stated that:

> "*In view of above sentencing precedents, it appears that the courts of Fiji have considered the level of authority and trust reposed in the position held by the accused, and the level of prejudice caused to the victim in sentencing. If the level of authority and trust, and the prejudice caused are high, the court could go to the higher starting point and vice versa."*[72]

The Court then chose to adopt a table of tariffs that can be used as a guide to sentencing based on harm and culpability:[73]

[70] FICAC v Finiasi [2010] FJHC 354, [28].
[71] Ibid [29]-[33] cf State v Alifereti [2008] FJHC 231; State v Carlos Taylor High Court, Crim Case No: 001 of 1999; Prem Chand v The State [2001] FJHC 130; State v Sorovakatini high Court, Crim Case No:018/07; Isikeli Kini v The State [2004] FJCA 55.
[72] FICAC v Laqere [2018] FJHC 933, [14] quoting FICAC v Laqere and Others [2017] FJHC 337.
[73] Ibid [15].

High Level of Culpability	Medium Level of Culpability	Lesser Level of Culpability	Lesser Level of Culpability
High Level of Harm/ Prejudice with gain	8-12	6-10	4-8
Medium Level of Harm/Prejudice either with medium level gain or without gain	6-10	4-8	2-6
Lesser Level of Harm/ Prejudice either with less gain or without gain	4-8	2-6	1-4

***FICAC v Chand* Criminal Case No. 1081 of 2016**

Matter Criminal

Jurisdiction Magistrate Court at Suva

Coram Chief Magistrate Usaia Ratuvili

Date of Verdict 10 May 2019

Summary Abuse of Office contrary to s 139 of the *Crimes Act No. 44 of 2009.*

The Court noted that the charge under s 139 of the *Crimes Act* is like the charge outlined in s 111 of the *Penal Code* and applied authorities as such. The judgment first notes the decision in *Devo v Fiji Independent Commission Against Corruption* in which the Court of Appeal dealt with the interpretation of 'arbitrary act' in the context of an abuse of process – stating:[74]

> [21] The Court of Appeal dealt with the question of 'arbitrary act' and cited previous precedents where 'arbitrary act' had been interpreted to mean ' as nothing more than the exercise of one's own free will' (Tomasi Kubanavanua v The State (Criminal Appeal No.AAU0008 of 1992 (5 May 1993), as "an autocratic act, an act, a despotic act which is not guided by rules and regulations but by the whims of the accused' (The State v Rokovunisei (HAC 37 of 2010 (26 April 2012).
>
> [22] In relation to whether the act complained was in abuse of authority of office, the Court of Appeal cited the decision of the Supreme Court in Naiveli v The State (CAV001 of 1994 (20 November 1995) where it was held:
>
> *"Central to the commission of an offence under s 111 is the doing or directing to be done of an arbitrary act, in abuse of the authority of" the accused's "office". What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act one or direction given, which is otherwise within the power or authority of an office of the public service, will constitute an abuse of office if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office. No doubt other instances may be given. But it would be unwise for us to attempt an exhaustive definition of what constitutions an abuse of office,*

[74] [2017] FJSC 16.

to use a shorthand description to the statutory expression "abuse of the authority of his office".

[23] The interpretation given in Naiveli's case (supra) is a clear exposition of the aspect of 'abuse of authority' which also reveals the fact that such instances of abuse of authority are very wide, incapable of precise definition and would depend on the particular case in hand.

[24] As regards to whether the act complained of was 'prejudicial to the rights of another person', the Court of Appeal stated as follows:

"[24] This has been described by the Supreme Court I Fiji as an act, which would result in some advantage of favour to oneself, friends, relations, individuals or corporate (Patel v FICAC (CAV 007 of 2011 (26 August 2013) and Qarase (supra). The learned High Court Judge states that when a person is prejudiced, his interest are put at a disadvantage (para 18 of the summing up at pg.138 of RHC). In this case is the rights of the State that in jeopardy.

[25] The charges while specifying the offence under which the appellant was charged with namely, section 111, described the offence with dates that they were committed, the places they were committed in and the acts done. The persons used int eh commission of the crime were the staff employed by the State and the property involved was a government vehicle, namely, the official vehicle and the official driver of the appellant. The acts done were the collection of liquor and alcohol beverages from liquor outlets of the Division of which the appellant had authority and control."[75]

[75] FICAC v Chand [2016] Criminal Case No. 1081 of 2016, [11]-[12].

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Proceeds of Crime Act 1997	
S 69	Money laundering	1. A person (a) Engages directly or indirectly in a transaction[76] that involved money or other property that is proceeds of crime; or (b) receives, possesses conceals, uses, disposes of or brings into Fiji nay money or other property that are proceeds of crime; or (c) converts or transfer money or other property derived directly or indirectly from a serious offence or a foreign serious offence, with the aim of concealing or disguising the illicit origin of that money or other property, or of auding any person involved in the commission of the offence to evade the legal consequences thereof; or (d) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the money or other property derived directly or indirectly from a serious offence or a foreign serious offence; or (e) renders assistances to a person falling without paragraphs (a)-(d) and the person knows, or ought reasonably to know that the money or other property is derived or realise, directly or indirectly, from some form of unlawful activity. 2. The person knows, or ought reasonably to know that the money or other property is revied or realised, directly or indirectly, from some form of unlawful activity.	$120,000 for a natural person or imprisonment for 20 years or both $600,000 if a body corporate

Cases

Prasad v State [2020] FJHC 52

Matter Criminal – Appeal

Jurisdiction High Court of Fiji

Coram Perera J

Date of Verdict 7 February 2020

Summary Money Laundering

The Court outlined s 69(3) of the *Proceeds of Crime Act* and noted that the term 'proceeds of crime' is defined in section 4(1A) of the Act before deciding that the offending conduct was sufficient to satisfy the provision.[77]

[76] Where 'transaction' includes receiving, or making, of a gift under s 69(1).
[77] Prasad v State [2020] FJHC 52, [57]-[65].

State v Prasad [2023] FJCA 230

Matter Criminal

Jurisdiction On appeal from the High Court

Coram Prematilaka RJA

Date of Verdict 24 October 2023

Summary Money Laundering

This appeal clarified some of the statements made by the judge of the lower court. In the context of the lower courts *dicta* regarding the application of sub-sections (a)-(d), it was stated that the distinction between the subsections relied on by the High Court was untenable as money laundering is a stand-alone offence. It is the case that money laundering can be proven regardless of whether there is proof of a predicated offence having been committed.[78] This opinion has been shared in other Fijian cases such as *Saqanavere v State*,[79] where the Court stated:

> *Many jurisdictions seek a predicate offence, the proceeds of which should become the subject of any **money laundering** offences. Under the international definition, a predicate offence means, any criminal offence as a result of which proceeds were generated, that may become the subject of a **money laundering** offence. Seeking of a predicate offence, for the constitution of the offence of **money laundering**, is not a requirement under section 69 (4) of Proceeds of Crimes Act 1997. Establishment of mere acquisition, possession or use of proceeds of crime would constitute the offence. Legislation of Fiji defines predicate offences generically as including all crimes, or all crimes subject to defined penalty threshold*.[80]

The Court goes on to say that it is possible for a person to be charged with money laundering as well as a different serious offence;[81] however, this should be cautioned as other jurisdictions have viewed this cross over of charges as constituting double jeopardy. Ultimately, the Court broadened the view that was adopted by the lower court stating that all three limbs of s 69(3) should be treated separately depending on the facts before the Court.

> *In my view, limbs (a), (b), (c), (d) and (e) of section 69(3) deal with different scenarios of money laundering and an accused could be charged under any of those limbs depending on the availability of material with or without him being charged for a predicate offence relating to proceeds of crime.*[82]

The Court confirmed that the fault element requires evidence of either actual or constructive knowledge of the property being from proceeds of crime.[83]

[78] State v Prasad [2023] FJCA 230, [17].
[79] [2022] FJCA 98.
[80] Ibid [84].
[81] *State v* Prasad [2023] FJCA 230, [17].
[82] Ibid [18].
[83] Ibid [24].

State v Naidu [2018] FJHC 873.

Matter Criminal

Jurisdiction High Court of Fiji

Coram Aluthge J

Date of Verdict 18 September 2018

Summary Money Laundering

After considering other case law on the subject of money laundering sentencing, the Court determined that in Fiji, the tariff for money laundering should range between 5 to 12 years imprisonment.[84]

> *After a review of case law in Fiji, I conclude that the tariff for Money Laundering should range from 5 years to 12 years imprisonment. As in any other case, the final sentence will depend on the aggravating and the mitigating circumstances of each individual case and the appropriate sentence may well fall below or above the set tariff depending on culpability and harm factors.*

State v Hussain [2019] FJHC 1172

Matter Criminal

Jurisdiction High Court of Fiji

Coram Aluthge J

Date of Verdict 25 November 2019

Summary Money Laundering

The Court outlined the elements of a money laundering offence as follows:

a) the accused;
b) used property;
c) that is proceeds of crime;
d) the accused knew, or ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.[85]

In defining the word 'used' in the second element, the Court noted that the Parliament likely did not intend for any use of stolen money to be prosecuted as money laundering.[86] Instead the Court relied on the decision in *Arora v State*[87] where it was stated that:

> *"The prosecution was required to establish beyond reasonable doubt that the petitioner had disposed of the cash.* ***The purpose of disposal is to integrate the proceeds of crime into "clean money"*** *for the benefit of the petitioner and or others"* [emphasis added][88]

[84] *State v Naidu* [2018] FJHC 873, [22].
[85] *State v Hussain* [2019] FJHC 1172, [57].
[86] Ibid [60].
[87] [2017] FJSC Special petition No. CAV33 of 2016 (6 October 2017).
[88] *State v Hussain* [2019] FJHC 1172, [61] citing *Arora v State* [2017] FJSC Special petition No. CAV33 of 2016 (6 October 2017), [25].

Raj v State [2020] FJCA 122; AAU0096.2018 (5 August 2020)

Matter Criminal – Appeal

Jurisdiction Court of Appeal

Coram Prematilaka JA

Date of Verdict 5 August 2020

Summary Money Laundering

The appellant contended that an error of law existed because money laundering requires evidence that the person engaged directly or indirectly in some other transaction involving the proceeds of crime. The appellant argues that the money she dealt with was clean before she dealt with it.[89] In light of this argument, the Court discussed that it is sufficient for an accused to deal with the proceeds of crime after they have been cleaned by another person.[90] The Court also noted in passing that there is a clear fault element in s 69 of the Act that covers both actual and constructive knowledge of property being the proceeds of crime.[91] This decision has also been reflected in similar cases such as *Stephen v State,*[92] where the Court found that:

> *…the prosecution is required to prove that the perpetrator "knew" or ought reasonably "to have known" that the money or other property involved in the crime have been derived or realised directly or indirectly by some unlawful activity*.[93]

State v Kapoor [2016] FJCA 113.

Matter Criminal – Appeal

Jurisdiction Court of Appeal

Coram Calanchini PA, Guneratne JA, Waidyaratne JA

Date of Verdict 30 September 2016

Summary Money Laundering

The Court noted that there were several errors in law from the lower court, namely that the sentencing of money laundering should be predicated on the severity of the ancillary offence, but that this is not necessarily the case.[94]

The Court also discussed the primary purpose of the money laundering provision, above that of the legislative instrument:

> *If I may put it succinctly money laundering is all about converting ill gotten money or property into legitimacy through laundering. That is the physical element in the offence. In order to substantiate the offence of money laundering the prosecution is required to prove that the perpetrator 'knew' or ought reasonable 'to have known' that the money or other*

[89] *Rak v State* [2020] FJCA 122, [23].
[90] Ibid [24].
[91] Ibid [24].
[92] [2016] FJCA 70.
[93] Ibid [60].
[94] *State v Kapoor* [2016] FJCA 133, [29].

property involved in the crime have been derived or realized directly or indirectly by some unlawful activity. The word 'knowledge' connotes the requisite mental element of the crime. In the circumstances it should be noted that both the physical element and the fault element are prerequisites for an offence of money laundering to be complete. Thus, an offence of money laundering stands out as a complete and a separate offence that was created under the Proceeds of Crime Act 1997. The facts available in the instant case qualify the ingredients of the offence of money laundering; Section 69(3) of the Act and ***Stephen v. State*** *FJCA 70; AAU53.2012 (27 May 2016).*[95]

State v Hannan Wang [2019] Criminal Case No. 239 of 2016

Matter Criminal

Jurisdiction High Court of Fiji

Coram Waleen M George (Senior Resident Magistrate)

Date of Verdict 22 February 2019

Summary Money Laundering

The physical elements of money laundering that must be proved beyond reasonable doubt include:

i. engaged directly or indirectly in a transaction;
ii. that transaction involved money or property;
iii. and the money or the property were proceeds of crime.[96]

The Court reiterated the requirements for proceeds of crime as property or benefit that is either:

i. wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;
ii. wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence;
iii. or wholly or partly acquired proceeds of a serious offence or a foreign serious offence: s 3 and s 4(1A) of the Proceeds of Crime Act 1997.[97]

The Court confirmed the meaning of 'serious offence' under s 3 of the *Proceeds of Crime Act 1997* as being an offence with a maximum penalty is death, imprisonment not less than 6 months or a fine not less than $500.[98]

The fault element was described by the Court as 'knowing or ought reasonably to have known that the money or other property was derived or realised, directly to indirectly, from some form of unlawful activity'.[99] This meant that the prosecution can either prove that the defendant:

i. had knowledge i.e. was aware that the money or other property was derived or realised directly or indirectly from some form of unlawful activity;

[95] Ibid [35].
[96] *State v Hannan Wang* [2019] Criminal Case No, 239 of 2016, [12].
[97] Ibid [13].
[98] Ibid [16].
[99] Ibid [17].

ii. or ought to have known i.e. ought to have been aware that the money or other property was derived or realised directly or indirectly from some form of unlawful activity.[100]

The Court of Appeal in Fiji had previously interpreted the term 'knowledge' in the case of *Johnny Albert Stephen v The State*, in which this case relied on, quoting:

[64] There is some authority for the view that in the criminal law "knowledge" includes wilfully shutting one's eyes to the truth. Warner v Metropolitan Police (1969) 2 AC 256 at 279 HC.

[65] The most important matter in determining whether a person had the requisite knowledge is to carefully examine the relevant evidence and to draw an interference based on the exercise.[101]

Considering this interpretation, the Court found that the proof of knowledge can be actual or constructive nature.[102]

Arora v State [2016] FJCA 108; AAU0001.2012 (30 September 2016)

Matter Criminal – Appeal

Jurisdiction High Court of Fiji

Coram Lexcamwasam JA, Waidyaratne JA, Fernando JA

Date of Verdict 30 September 2016

Summary Money Laundering

The Court considered how the term 'proceeds of crime' is interpreted in other case law and how this interpretation fits within the meaning of 'proceeds of crime' in the context of s 3 of the *Proceeds of Crime Act 2007*:

[59] Then the question arises whether the monies obtained are proceeds of crime which is an element of the offence of money laundering.
In this context it is apt to consider a recent judgment in ***Stephen v. The State*** *[2016] FJCA 70; AAU53.2012 (27 May 2016) in which it discussed the phrase "proceeds of crime" in detail. As it was stated in the above judgment "proceeds of crime" is the ill-gotten money or property that gets converted into legitimacy through laundering.*

[60] Proceeds of crime has a definitive legal meaning. To simplify the definition of proceeds of crime in relation to the instant case that needs to be understood by law is whether the monies received by the Appellant after encashment of cheques are totally or partly due to a commission of a serious crime.

[61] A serious crime in the eyes of the law is an offence which is prescribed as punishable by death or imprisonment for a period of one year. (Section 3 of Proceeds of Crime Act, 2007).

[100] Ibid [18].
[101] Ibid [19].
[102] Ibid [20].

Additional Cases:

Dewan v State [2024] FJHC 754; HAA042.2020S (13 December 2024)

Wang v State [2023] FJSC 39; CAV0013.2021 (26 October 2023)

Shyam v The State [2022] FJSC 40; CAV0024.2019 (26 August 2022)

Arora v State [2017] FJSC 24; CAV0033.2016 (6 October 2017)

Proceeds of Crime

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Proceeds of Crime Act 1997	
S 70	Possession of property suspected of being proceeds of crime	1. A person 2. Receives, possesses, conceals, disposes of or brings into Fiji any money, or other property 3. that may reasonably be suspected of being proceeds of crime	$12,000 if a natural person or 2 years prison or both $60,000 if a body corporate

Cases

Director of Public Prosecutions v Prasad [2019] FJHC 155

Matter Civil

Jurisdiction High Court of Fiji

Coram Amaratunga J

Date of Verdict 1 March 2019

Summary Forfeiture and Tainted Property

Section 19E of the Proceeds of Crime Act merely requires that the Director of Public Prosecutions proves on the balance of probabilities that property is tainted property in order to seize the property.

To prove that property is tainted, you must demonstrate that the property is proceeds of crime. In order to show that the property is proceeds of crime, you must demonstrate that the property. used in or in connection with, the commission of the offence.[103]

***Director of Public Prosecutions v Loizos Petridis & Cleanthis Petridis* – Criminal Case No. 1849/2017**

Matter Criminal

Jurisdiction Magistrate Court of Fiji

Coram Resident Magistrate Jeremaia N.L Savou

Date of Verdict 5th October 2021

Summary Possession of property suspected to be proceeds of crime.

Both accused had declared upon entry into Fiji that they did not have in their possession a total currency of FJD$10,000.00 or more. However, when they were arrested a few days after their arrival in Fiji, a total sum of FJD$203,011.00 was found in their possession jointly. Both accused in their caution interview acknowledged that they had in their possession large sums of money prior to entry into Fiji, however they concealed this from the authorities. Investigations also revealed that there were no sources of funding available to them whilst in Fiji.

[103] Director of Public Prosecutions v Prasad [2019] FJHC 155, [22]-[26].

The Court noted as follows:

> *"The manner in which the offence is drafted only requires Prosecution to prove reasonable suspicion. By being in possession of $203,011.00 and failing to declare the same gives rise to the suspicion that the concealed amount is proceeds of crime. Why else would one conceal it?"*[104]

[104] Director of Public Prosecutions v Loizos Petridis & Cleanthis Petridis – Criminal Case No. 1849/2017.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
		Proceeds of Crime Act 1997
S 30	Police may seize other tainted property	1. Where a search warrant has been issued under s 28; 2. A police officer may seize: a) Any property that the police officer believes, on reasonable grounds, to be tainted property[105] or terrorist property in relation to any serious offence;[106] or b) Anything that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence; 3. If the police officer believes, on reasonable grounds, that it is necessary to seize that property or thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence or any other offence.

Cases

Director of Public Prosecutions v Drivationo [2016] FJHC 280; HBM137.2013 (14 April 2016)

Director of Public Prosecutions v Vitukawalu [2016] FJHC 281; HBM138.2013 (14 April 2016)

Director of Public Prosecutions v Lata [2020] FJHC 1071; HBM10.2020 (10 December 2020)

[105] Where 'tainted property' is defined in s 3 to mean in relation to a serious offence or a foreign serious offence –
(a) property used in, or in connection with, the commission of the offence;
(b) property intended to be used in, or in connection with, the commission of the offence;
(c) proceeds of crime.

[106] Where 'serious offence' is defined in s 3 to mean an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 6 months or a fine of not less than $500.

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
	Mutual Assistance in Criminal Matters Act 1997	
S 6(1)	Refusal of assistance	A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General, the assistance would prejudice the national, essential or public interest of Fiji or would result in a manifest unfairness or a denial of human rights.
S 7	Assistance may be provided subject to conditions	Assistance under this Act may be provided to a foreign country subject to conditions as the Attorney-General determines.
S 8(1)	Requests by Fiji	A request for international assistance in a criminal matter that Fiji is authorised to make under this Act, unless otherwise provided, shall be made by the Attorney-General.
S 9(1)	Requests by foreign country	A request by a foreign country for international assistance in a criminal matter may be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.

Cases

Millemarin Investments Ltd v The Director of Public Prosecutions [2023] FJSC 8; CBV 6 of 2022 (28 April 2023)

Matter	Civil Petition
Jurisdiction	Court of Appeal
Coram	The Hon. Mr. Justice Anthony Gates, he Hon. Mr. Justice Brian Keith, the Hon. Mr. Justice Madan Lokur
Date of Verdict	28 April 2023
Summary	This case concerned the seizure of the yacht the *Amadea*, which was berthed at Lautoka in Fiji. The *Amadea* is a 106 metre superyacht. There was no direct evidence about its value or how much it was purchased for, but it was plainly an extremely valuable commodity. There was evidence that its annual running costs are between US$25 and $30 million. The United States claimed that the Amadea was beneficially owned by Suleiman Kerimov, a wealthy Russian citizen, who has been the subject of sanctions by the United States since 2018. A court in the United States ordered its seizure, and the United States' authorities sought Fiji's assistance to enable that order to be complied with. The High Court registered that order, and in due course the *Amadea* sailed to the United States. An appeal against the registration in Fiji of the order was dismissed by the Court of Appeal. The application for leave to appeal which is now before the Supreme Court challenges the legality of that registration. The petitioners, Millemarin Investments Ltd ("Millemarin"), the registered owners of the *Amadea*, claim among other things that Mr Kerimov is not the beneficial owner of the *Amadea*, but that its real beneficial owner is Eduard Khudaynatov, another Russian citizen who is not the subject of sanctions by the United States. The yacht was an asset of Suleiman Kerimov, a wealthy Russian citizen, who was said to have violated sanctions imposed by the United States of America on as part of the response to what was perceived as Russia's unprovoked military invasion of Ukraine and for previous sanction violations. On 13 April 2022, Magistrate Judge G Michael Harvey of the United States District Court for the District of Columbia issued a warrant for the seizure of the *Amadea*. The application to the court had requested that the *Amadea* "be

seized as subject to forfeiture" in the United States. The United States Department of Justice sent an urgent request for assistance to the appropriate authority in Fiji. The request was for effect to be given to the warrant for the seizure of the *Amadea* by detaining it "to prevent its transfer, sale, or other encumbrance or dissipation, as a preliminary step to forfeiture under US law".

The Court considered the relevant articles of the United Nations Convention against Transnational Organized Crime ("the Convention") to which both the United States and Fiji are parties, and the enactment in Fiji which governs how and when Fiji should provide legal assistance to a foreign state, namely the *Mutual Assistance in Criminal Matters Act 1997* ("MACMA"). It was enacted before the promulgation of the Convention, and constituted Fiji's response to the *United Nations Model Treaty on Mutual Assistance in Criminal Matters*, which urged "all states to strengthen further international co-operation and mutual assistance in criminal justice".

Millemarin contended that the warrant issued by the United States District Court was not a "foreign restraining order", and that therefore sections 31(2) and (3) of the MACMA, pursuant to which the registration of the warrant was sought and made, did not apply. That contention depended on the definition of "foreign restraining order" in section 3 of MACMA. It means *"an order, made under the law of a foreign country, restraining a person, or persons, from dealing with property, being an order made in respect of an offence against the law of that foreign country".* The Court found that the warrant amounted to a "foreign restraining order". They held that it was not the function of the courts in Fiji to review the basis on which a foreign restraining order had been made, and it therefore did not address the questions whether there was sufficient evidence that Mr Kerimov was the beneficial owner of the *Amadea* or that the *Amadea* amounted to "tainted property" within the meaning of POCA.

At [50] and [51] Justice Keith, with whom the other judges agreed, held that:

> *"Whether the creation of the power carries with it a corresponding duty to exercise that power will depend on the context in which the power is given. When it comes to an order made by a foreign country to seize property pending an order for its forfeiture, the power given to the High Court of Fiji to register that order is to enable the property to be preserved until the foreign court can determine whether the property should be forfeited. The purpose of giving that power to the High Court would be thwarted if the High Court was able to decline to exercise that power, even if the conditions for the exercise of the power had been satisfied. In these circumstances, I have concluded that the power of the High Court to register a foreign order under section 31(3) of MACMA included a duty to do so once it was satisfied that the conditions for the exercise of the power had been met.*
>
> *[51] For these reasons, it is unnecessary for me to address the final set of grounds of appeal advanced on behalf of Millemarin, namely that on a scrutiny of the evidence, the High Court should have found that the Amadea was not tainted property because Mr Kerimov was not its beneficial owner, and that its true beneficial owner had not been subject to United States' sanctions. However, had I had to address this issue – albeit with the low level of scrutiny which Mr Haniff accepted would have been appropriate – I would have found that there was an issue to be tried on whether the Amadea was indeed tainted property within the meaning*

of section 3 of POCA because there was an issue to be tried on whether Mr Kerimov is its true beneficial owner."

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition Act 2003[107]	
S 3	Extradition offence	An offence is an extradition offence if – 1. It is an offence against a law of the requesting country[108] for which the maximum penalty is death or imprisonment, o other deprivation of liberty, for a period of not less than 12 months; and 2. The conduct that constitutes the offence, if committed in Fiji, would constitute an offence in Fiji for which the maximum penalty is life imprisonment or other term of imprisonment or deprivation of liberty, for a period of not less than 12 months.

Cases

Maharaj v State [2011] FJHC 497; HAA012.2011 (5 September 2011)

Matter Appeal

Jurisdiction High Court of Fiji

Coram HH Daniel Goundar

Date of Verdict 5 September 2011

Summary What is an "extradition country"? The United States of America sought extradition of Aneal Maharaj (the appellant) on fraud related offences. On 5 April 2011, after a hearing, the Magistrates' Court at Suva made an order that the appellant be held in custody until a surrender determination is made by a judge of the High Court pursuant to section 18 of the Extradition Act 2003. The appellant appealed against the custody order pursuant to s18(1)(b)) of the Act. The Court considered the scheme of the *Extradition Act 2003*. The right of appeal provided under the Act is limited. An appeal can only lie against the custody order made by the Magistrate. There is no right of appeal against the Minister's decision to issue authority to proceed because that decision is a ministerial decision and not a judicial decision. Any review of the Minister's decision can only lie with the Civil Division of the High Court and not with the Criminal Division of the High Court. Therefore, the ambit of this appeal was restricted. The only issue that could be taken on appeal is whether the learned Magistrate was correct in law to conclude that the United States of America is an extradition country under the Extradition Act 2003.

The definition of extradition country includes a treaty country (s2). Treaty country is a country listed in Schedule 3 with which Fiji has an extradition treaty (s2). Extradition treaty means a treaty that relates to the surrender of persons accused or convicted of offences, to which the requesting country and Fiji are parties (s2). Further, treaty includes a convention, protocol, or agreement (s2).

Counsel for the appellant pointed out that the names of treaty countries are not specified in Schedule 3. Counsel submits that since the United States of America is not listed in Schedule 3, the United States of America is not an extradition country under the Act. The learned Magistrate accepted the State's submissions that an extradition treaty existed between Fiji and the United States of America by virtue of the instrument, namely, the Treaty of Extradition made by the

[107] Also note the predecessor legislation Extradition Act No.9 of 1972.
[108] Where '**requesting country'** is defined in s 2 to mean a country that is seeking the surrender of a person from Fiji.

United States of America and the United Kingdom on 22 December 1931 and ratified by the United Kingdom by Order in Council on 24 June 1935. Article 2 of that treaty extended its provisions to all imperial dominions overseas, including Fiji. That status continued after Fiji's independence from the United Kingdom by the operation of the Fiji Independence Order. The continued operation of the treaty was formally recognized by the exchange of notes between the United States of America and Fiji and made effective as from 17 August, 1973. The extradition procedures were subsequently codified into the Extradition Act 1977 until that legislation was repealed and replaced with the current Extradition Act 2003.

The 1977 Act used the phrase "treaty state" instead of the phrase "treaty country" as used in the 2003 Act. Like under the new law, the United States of America was not designated as a treaty state under the old law. A similar objection that is being taken in this case was taken under the old law in the case of ***Tota Ram*** *Civil Action No.750 of 1986 (25 August 1986)*. In that case, Sheehan J in an application for a Writ of Habeas Corpus ruled that there existed an extradition treaty between the United States of America and Fiji by virtue of the imperial instrument. ***Tota Ram*** was later applied by Fatiaki J in ***Rutten*** *Miscellaneous Case No. 6 of 1992 (24 August 1992)*.

Counsel for the appellant submitted that the case of ***Tota Ram*** has been superseded by the 2003 Act and since that the new Act has not designated the United States of America as a treaty country, there does not exist a treaty between the United States of America and Fiji. Counsel for the State submitted that although the United States of America is not expressly designated under the new law as a treaty country, the extradition treaty that has existed between the two countries under the old law, and the existence of which has been recognized by the courts in Fiji, has been saved by the 2003 Act. Section 67 is the saving provision of the Extradition Act of 2003.

The Court held (at [26]) that:

> *"Clearly, the extradition treaties that existed before the commencement of the Extradition Act of 2003 remains in force and that they have not been revoked. In my judgment, the learned Magistrate was correct in law to rule that the United States of America is a treaty country and that there exists an extradition treaty between Fiji and the United States of America. I am also of the view that it is not necessary for the Act to provide an exhaustive list of countries, that have entered into extradition agreements with Fiji. Although it would be desirable to have such a list in the legislation, absence of it, however, does not relegate the treaties that exist. If Fiji had intended not to recognize the United States of America as an extradition country, the Extradition Act 2003 would have expressly provided for such exclusion. To read otherwise would defeat the purpose for having extradition laws and Fiji could become a potential haven for fugitives from the United States of America. The grounds of appeal on this issue fail."*

The appeal against the custody order failed and the appeal was dismissed accordingly.

Additional Case/s:

State v Chaudary [2017] FJHC 640; HAM111.2017 (30 August 2017)[109]

[109] State v Chaudary [2017] FJHC 640; HAM111.2017 (30 August 2017)

Kiribati

Elements of Offences and Case Law

Kiribati

The country of Kiribati incorporates the English common law within its legal system due to its history as a British protectorate from 1892. A brief hiatus from colonial status occurred in World War II during Japanese occupation, before its re-establishment as a British protectorate. Throughout the following decades, Kiribati experienced the expansion of Britain's self-governance whilst the development of its own government and legal systems continued. Kiribati gained independence in 1979.

Pursuant to *Laws of Kiribati Act 1990*, section 6(1) states that Kiribati's common law is comprised of English rules and doctrines of equity ("inherited rules") and is applicable depending on circumstances.

Furthermore, section 7(1) states that the applied law of Kiribati comprises of any enactment of the Parliament of the United Kingdom or of any predecessor Parliament, inclusive of statutes of general application in force in England on 1 January 1961.

Additionally, Kiribati continues to refer to the orders of Her/His Majesty in Council and the subsidiary legislations made under any of those enactments or Orders in Council. Thus, Kiribati refers to English common law, and to this day, continues to refer its cases from the Court of Appeal to the Judicial Committee of the Privy Council in the United Kingdom.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
ss21	Frauds and breaches of trust by persons employed in the public service	1. A public servant 2. In the discharge of the duties of their office 3. Commits any fraud or breach of trust affecting the public 4. Whether such fraud or breach of trust would have been criminal or not if committed against a private person	Misdemeanour
ss122	False information to public servant	1. A person 2. Who gives an employee of the public service any information which they know or believes to be false 3. Intending to cause or knowing it to be likely that they will thereby cause such person employed in the public service to either (a) Do or omit anything which sch person employed in the public service ought not to do or omit if the trust state of facts respecting which such information is given were known to him or; (b) to use the lawful power of such person employed in the public service to the injury of annoyance of any person	Misdemeanour and liable for 6 months prison or fine of $100
ss251	Definition of theft	1. A person 2. Without consent of the owner 3. Fraudulently and without a claim of right made in good faith 4. Takes and carries away anything capable of being stolen 5. With intent at the time of such taking to permanently deprive the owner.	See s 254
ss254	General punishment for theft	1. Stealing is simple larceny and a felony punishable with imprisonment for 5 years. 2. A person who commits simple larceny after having been previously convicted of felony, shall be liable to imprisonment for 10 years. 3. Any person who commits the offence of simple larceny, after having been previously convicted of any misdemeanour punishable under the Part of Part XXXV, shall be liable to imprisonment for 7 years.	
ss266(1)	Larceny and embezzlement by clerks or servants	1. A clerk of servant employed in such a capacity 2. Steals any chattel, money or valuable security 3. Belonging to or in the possess of his master or employer or fraudulently embezzles the whole or any part of any chattel, money, or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer	14 years

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
ss266(2)	Larceny and embezzlement by clerks or servants	1. An employee in the public service of Her Majesty 2. Steals any chattel, money or valuable security belonging to or in the possession of Her Majesty or entrusted to or received or taken into possession by such person by virtue of their employment or embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by them by virtue of their employment	14 years
ss266(3)	Larceny and embezzlement by clerks or servants	1. A person appointed to any office or service by or under a council established under the Local Government Ordinance or being appointed to any office or service by or under any other local government council or other public body 2. Fraudulently applies or disposes of any chattel, money or valuable security received by them for or on account of any local government council of other public body or department, for their own use or any use or purpose other than that for which the same was paid, entrusted to, or received by them or fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful direction or instruction which they are required to obey in relation to his office or service.	14 years
ss271(a)	Conversion	1. A person 2. Being entrusted either solely or jointly with any other person with any power of attorney for the sale or transfer of any property 3. Fraudulently sells, transfers or otherwise converts the property or any part therefore to their own use or benefit, or the use or benefit of any person other than the person by whom he was entrusted	7 years
ss271(b)	Conversion	1. A person who is a director, member or officer of any body corporate or public company 2. Fraudulently takes or applies for his own use or benefit, or for ay use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company	7 years
ss271(c)	Conversion	1. A person entrusted either solely or jointly with any other person with any property in order that they may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof, or having either solely or jointly with any other person received any property for or on account of any other person 2. Fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof of any proceeds thereof.	7 years

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
ss299	Fraudulent falsification of accounts	1. Any clerk, officer or servant or any person employed or acting in the capacity of a clerk, officer or servant 2. Wilfully and with intent to defraud 3. Destroys, alters, mutilates any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer or which has been received by them for or on behalf of their employer or 4. Wilfully with intent to defraud makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering any material particular from or in any such book or document or account, is guilty of a misdemeanour	7 years
ss301	False pretences	1. Any person 2. Who by any false pretence[110] with intent to defraud 3. Obtains from any other person any chattel, money or valuable security, or causes or procures any money-to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the se or benefit or on account of himself or any other person or 4. With intent to defraud or injure any other person fraudulently causes or induces any other person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security or to write impress or affix his name or the name of any other person or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security	5 years
ss302	Obtaining credit by false pretences	1. Any person 2. Incurring any debt or liability obtains credit by any false pretence or by means of any other fraud or with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery or transfer of or any charge on his property of with intent to defraud his creditors or any of them conceals, sells or removes any part of their property, after or within 2 months before the date of any unsatisfactory judgment or order for payment of money obtained against him.	1 year

[110] Section 300 defines 'false pretence' as any representation made by words, writing or conduct of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true.

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
ss329(1)	Forgery of certain documents with intent to defraud	1. A person who 2. Forges with intent to defraud[111] 3. Any will, codicil, or other testamentary document, either of a dead or of a living person, or any probate or letters of administration, whether with or without the will annexed; any deed or bond, or any assignment at law or in equity or any deed or bond or any attestation of the execution of any deed or bond; any currency note or bank note, or any endorsement on or assignment of any bank note.	life
ss329(2)	Forgery of certain documents with intent to defraud	1. A person who 2. Forges with intent to defraud (a) any valuable security or assignment thereof or endorsement thereon, or where the valuable security is a bill of exchange, any acceptance thereof; any document of title to lands or any assignment thereof or endorsement thereon; (b) any document of title to goods or any assignment thereof or endorsement thereon; (c) any power of attorney or other authority to transfer any share or interest in any stock, annuity, or public fund of the United Kingdom or any part of Her Majesty's dominions or of any foreign state or country or to transfer any share or interest in the debt of any public body, company or society, British or foreign, or in the capital stock of any such company or society, or to receive any dividend or money payable in respect of such share or interest or any attestation of any such power of attorney or other authority; (d) any entry in any book or register which is evidence of the title of any person to any share or interest hereinbefore mentioned or to any dividend or interest payable in respect thereof; (e) any policy of insurance or any assignment thereof or endorsement thereon; any charter-party or any assignment thereof; (f) any certificate of the Accountant - General or other officer acting in execution of the Income Tax Ordinance. *Cap. 44.*	14 years

[111] Under s 329, an 'intent to defraud' is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had a right to the thing to be obtained by the false document.

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
ss330(1)	Forgery of Certain documents with intent to defraud or deceive	1. A person who forges with intent to defraud or deceive 2. Any document with the stamp or impression of the Great Seal or the United Kingdom, Her Majesty's Privy Seal, and the privy signet of Her Majesty, Her Majesty's Royal Sign Manual, or any other of Her Majesty's official seals, or the public seal of the Gilbert Islands	Life
ss330(2)	Forgery of Certain documents with intent to defraud or deceive	1. A person 2. who forges with intent to defraud or deceive (a) Any register or record of births, baptisms, namings, dedications, marriages, deaths, burials or cremations, which now is, or hereafter may be by law authorised or required to be kept in the Islands, relating to any birth, baptism, naming, dedication, marriage, death, burial or cremation, or any part of any such register, or any certified copy of any such register or of any part thereof; (b) any copy of any register of baptisms, marriages, burials or cremations, directed or required by law to be transmitted to any registrar or other officer; (c) any certified copy of a record purporting to be signed by any officer having charge of any public documents or records in the Islands; (d) any wrapper or label provided by or under the authority of the Accountant-General of the Chief Customs Officer.	14 years
ss330(3)	Forgery of Certain documents with intent to defraud or deceive	1. A person 2. who forges with intent to defraud or deceive (a) Any official document whatsoever of or belonging to any court of justice, or made or issued by any judge, magistrate, officer or clerk of any such court (b) Ay register or book kept under the provisions of any law in or under the authority of any court of justice (c) Any certificate, office copy or certified copy of any such document, register, or book or of any part thereof; (d) Any document which any magistrate is authorised or required by law to make or issue (e) Any document which any person authorised to administer an oath under any law in force in the Gilbert Islands is authorised or required by law to make or issue; (f) Any document made or issued by a head of a Government department or law officer of the Crown, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act; (g) Any document or copy of a document used or intended to be used in evidence in any court of	7 years

Section	Description	Offence Elements	Maximum Penalty
		Penal Code	
		record, or any document which is made evidence by law; (h) Any certificate or consent required by any Ordinance for the celebration of marriage; (i) Any licence for the celebration of marriage which may be given by law; (j) Any register, book, builder's certificate, surveyor's certificate, certificate or registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale, under Part I of the Merchant Shipping Act 1894 of any entry or endorsement required by the said Part of the said Act to be made in or on any of those documents; (k) Any permit, certificate or similar document made or granted by or under the authority of the Collector of Customs or any other officer of Customs; (l) Any certification not previously mentioned.	
s 334	Forgery of other documents with intent to defraud or deceive a misdemeanour	1. A person who 2. Forges with intent to defraud 3. Any document not mentioned under the act or any other ordinance.	Misdemeanour

Cases

Republic v Teraaka [2019] KIHC 80

Matter Criminal

Jurisdiction High Court of Kiribati

Coram Justice Lambourne

Date of Verdict 12 August 2019

Summary False Pretences s301(a) *Penal Code*, Fraudulent Falsification of Accounts s299(1) *Penal Code.*

The Court noted that to convict on the offence of False Pretences under s 301(a) of the *Penal Code*, the following elements would need to be proven to the appropriate standard:

a) the accused:
   i. obtained from another person any chattel, money or valuable security; or
   ii. caused or procured money to be paid, or a chattel or valuable security to be delivered, whether to the accused or another person;
b) the chattel, money or valuable security was obtained (or paid or delivered) by way of a **false pretence**, made by the accused with an intent to defraud.[112]

[112] *Republic v Teraaka* [2019] KIHC 80, [60].

Section 300 of the *Penal Code* provides a definition for the phrase 'false pretence':

> *any representation made by words, writing or conduct of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true.*

Similarly for a convict of falsification of accounts under s 299(1) of the *Penal Code*, the following elements must be demonstrated the appropriate standard:

a) the accused was (or was employed or acting in the capacity of) a clerk, officer or servant;
b) the accused altered a book, paper, writing, valuable security or account belonging to, or in the possession of, her employer;
c) the alteration was made wilfully and with intent to defraud.[113]

As 'intent to defraud' is a feature of both the above crimes, the Court noted the meaning at [63] in reference to *Welham v DPP* [1961] AC 103 as:

> *"Intent to defraud" means an intent to practise a fraud on another person, it being sufficient if anyone may be prejudiced by the fraud. If, therefore, there is an intention to deprive another person of a right or to cause him or her to act in any way to his or her detriment or prejudice or contrary to what would otherwise be his or her duty, an intent to defraud is established even if there is no intention to cause pecuniary or economic loss*.[114]

Republic v Ekebati [2001] KIHC 52

Matter	Criminal
Jurisdiction	High Court of Kiribati
Coram	Chief Justice Millhouse QC
Date of Verdict	1 June 2001
Summary	False Pretences and Fraud

This judgment outlined the elements for false pretences under s 301 of the *Penal Code:*

> *Any person who by any false pretence –*
>
> *(a) with intent to defraud, obtains from any other person any money --------, or causes or procures any money to be paid, ---------- for the use or benefit or on account of himself or any other person ..... is guilty of a misdemeanour, and shall be liable to imprisonment for 5 years.*

The Court took these elements from the legislation and applied them directly to the facts of the case.

[113] Ibid [61].
[114] Ibid [63].

Wong Kam Chung v Republic [2001] KICA 17

Matter	Criminal
Jurisdiction	Kiribati Court of Appeal
Coram	Casey JA, Bisson JA, Tompkins JA
Date of Verdict	5 April 2001
Summary	Attempted False Pretences, Possession of Forged Documents
	This appeal argued the excessiveness of a 5-year sentence for attempted false pretences where an appellant plead guilty at first instance. The Court considered that where an accused pleads guilty to an offence, the Court must consider a reduction to the sentence.

Republic v Ioane [2019] KIHC 2

Matter	Criminal
Jurisdiction	High Court of Kiribati
Coram	Chief Justice Sir Muria
Date of Verdict	13 February 2019
Summary	Forgery and False Pretences
	The Court noted that due consideration needs to be given to the time in which it takes an accused to admit guilty when sentencing.

Ieita v Kamoi [2005] KICA 14

Matter	Civil – Land Appeal
Jurisdiction	Kiribati Court of Appeal (Land Jurisdiction)
Coram	Hardie Boys JA, Tompkins JA, Fisher JA
Date of Verdict	8 August 2005
Summary	Fraud
	An allegation of fraud is serious enough to go beyond a mere probability usually required of civil cases. It requires strong and clear evidence.[115]

[115] *Ieita v Kamoi* [2005] KICA 14, [8].

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1977	
ss85	Official corruption	See below in "Corruption" Table	7 years' imprisonment
ss86	Extortion by public officers	1. A person employed in the public service 2. Takes or accepts from any person for the performance of his duty as such officer, 3. any reward beyond his proper pay and emoluments, or any promise of such reward	3 years' imprisonment

Cases

Republic v Kum Kee [1999] KIHC 32

Matter Criminal – Customs

Jurisdiction High Court of Kiribati

Coram Chief Justice Lussick

Date of Verdict 8 June 1999

Summary Fraudulent Evasion of Import Custom Duties and Bribery

The defendant was alleged to have bribed a customs officer to clear shipments of beer without paying any customs duty. This was in contravention of both s 140(1)(d)(i) of the *Customs Act 1993* and s 134(2)(f) of the *Customs Act 1993*.

The Court noted the elements for an offence of bribery are:

> *In respect of Counts 3 and 4, the prosecution must establish that:*
>
> *(i) the accused offered or promised a reward*
>
> *(ii) to a customs officer*
>
> *(iii) for the purpose of inducing that officer to neglect his duty.*

Teannaki v Tito – judgment [1996] KIHC 3

Matter Elections

Jurisdiction High Court of Kiribati

Coram Chief Justice Lussick

Date of Verdict 8 June 1999

Summary Fraudulent Evasion of Import Custom Duties and Bribery

This case concerned allegations of bribery and corrupt practice under ss 19 through to 37 of the *Election Ordinance.*

The case highlighted the relevant section as s 24 of the *Election Ordinance* which reads:

> *(a) Every person who directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure any money or valuable consideration to or for any elector or to or for any person on behalf of any elector, or to or for any other person, in order to induce such elector to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector having voted or refrained from voting at any election"*

This section requires an analysis of the meaning of 'corruptly' which was considered in reasonable depth in the judgment. The Court noted that if there is evidence that a person gives something to an elector to vote or refrain from voting, the Court is entitled to a *prima facie* inference that it was done with corrupt intent, unless evidence to the contrary is present.[116]

As the *Election Ordinance* does not define 'corruptly' the court relied on *Halsbury's Laws of England* which defines corruptly as:

> *"Corruptly" imports intention; it does not mean wickedly, immorally or dishonestly or anything of that sort, but doing something knowing that it is wrong, and doing it with the object and intention of doing that thing which the statute intended to forbid"*

The Court went on to import the dicta of Blackburn J in the case of *County Norfold (Northern Division) Case, Colman v. Walpole and Lacon*,[117] in which his honour stated:

> *It does not mean corrupt in the sense that you may look upon a man as a knave or a villain, but that it is to be shown that he was meaning to do that thing which the statute forbids.*[118]

It was with this analysis that Lussick CJ concluded that 'corruptly' required consideration of a respondent's state of mind – that being did they perform the act with the purpose of corruptly influencing a person to act in a particular way.

His Honour went on to consider the requisite burden of proof in cases of bribery and corruption, following the previous finding of the Kiribati Court of Appeal in *Teiraoi Tetabea and Rutiano Benetito v. Kawebwenibeia Yee-On and 10 Others*[119] where it made clear that s 37 of the *Election Ordinance* requires that proceedings or election petitions shall follow the same standard of proof as a civil action.

A submission of customary gifts was made before the Court where it was alleged that the act of giving tobacco was in fact a gift of '*Mweaka*'. The Court rejected this assertion based on the definition of '*mweaka'* requiring the gift to be 'formal' – not erroneous. It was noted that a genuine intention to comply with a custom is not an intention to induce electors to vote or refrain from voting. To that extent, Lussick CJ found that although there is an assumption of bribery where an act is committed shortly before polls open, the western laws do not have a parallel situation of custom as Kiribati.

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[116] Teannaki v Tito – judgment [1996] KIHC 3.
[117] (1869) 1 O'M & H 236; 21 LT 264.
[118] Ibid.
[119] (Civil Appeal No. 2 of 1988).

The Court formed the view, consistent with other countries, that it is not necessary that a bribe actually induce a person to act in any particular way – merely that there was intent to influence behaviour, regardless of the outcome.

Inatio v Berina [2020] KIHC 18

Matter Civil

Jurisdiction High Court of Kiribati

Coram Chief Justice Sir Muria

Date of Verdict 31 July 2020

Summary Election Petition for Corrupt Practice

This case was primarily concerned with matters of civil procedure and default of appearance. In the matter, an allegation of corrupt practice was made in connection with an election result that was not substantiate by evidence. It was on this basis that the Court considered the facts. The Court stated that it is a requirement for an election petition to be supported by evidence. The Court would not entertain generalised allegations of 'corrupt and alleged practice' where no evidence to put forward to support the allegation.

Tatireta v Tong [2003] KIHC 1

Matter Civil

Jurisdiction High Court of Kiribati

Coram Williams Ag J

Date of Verdict 15 October 2003

Summary Election Petition

This case describes the custom of *Mweaka* and its relationship with bribery and corruption and the common law history of elections.

The Court noted that the s 24 of the *Election Ordinance* was amended on 29 December 1997 (likely in response to the case of *Teannaki v Tito – judgment* [1996] KIHC 3) to carve out customary gifts from being considered acts of bribery:

> *'Provided further that any person making a customary offering to a Maneaba, referred to in Kiribati as "Mweaka", "Moanei" or "Ririwete", with the sole intention of showing respect for the customs and traditions of Kiribati, shall not be guilty of bribery '.*[120]

For completeness, on 10 October 2002, s 3 of the *Election Ordinance* was further amended to define the meaning of 'mweaka, moanei or ririwete' as:

> *"… in accordance with Kiribati traditions and customs, the giving away or offering of a gift of a block of tobacco containing about 30 sticks of tobacco and not weighing more than*

[120] *Tatireta v Tong* [2003] KIHC 1, [41].

> *500g or its equivalent in cash of not more than $20.00 or such other higher figure as inflation may allow*.'[121]

The Court also described the custom of 'Bubuti' as a source of continuous complaints in the High Court of Kiribati.[122] The practice requires that gifts or 'fines' are paid for hospitality described in a tradition that, when goes unanswered, attracts shame – in turn, encouraging compliance.[123] Citing *Teiraoi v Tamwi,*[124] the Court noted that:

> *"At election time, anywhere, in any country, candidates who are serious about their candidature must get out and about, meet as many people as they can. The best way of doing this is at gatherings. Candidates go to as many as they can. When they do attend they must conform to custom. I doubt if MCs care much about the rules for candidates at election time: for them it is an opportunity to get money or gifts out of visitors."*[125]

> *"This in turn, this places candidates 'between a rock and a hard place' as they are required to provide such gifts and receive such gifts as custom yet are scrutinised for their compliance with the Election Ordinance."*[126]

With regards to intention in the context of providing a gift, the Court adopted the approach of Lussick CJ in *Bwebwenibeia Kararaua v Kataotika Tekee*[127] whereby:

> *If all he intended to do was to comply with custom and/or benefit his constituency then he cannot be guilty of a corrupt or illegal practice. If, on the other hand, his intention was to induce the electors to vote for him then he is guilty of the corrupt practice of bribery* ***and*** *the election must be avoided." I agree with my predecessor. I cannot find that these gifts were made with the intention of influencing the voters: they were made because of custom. The candidates had no choice. Stroud's Judicial Dictionary (4th edition) citing a South Australian case (C v Johnson [1967] SASR 279): "corruptly" means "with wrongful intention". These gifts were not made with wrongful intention: they were not made corruptly*.[128]

At common law, the Court found that an election will not simply be set aside because it was tainted by bribery. In coming to this conclusion, the Court noted that there was no legislation in Kiribati (not even in the *Election* Ordinance)[129] that had yet displaced this common law principle. His honour stated:

> *… at common law an election will not be avoided merely because the election was tainted by bribery* ***associated*** *with the successful candidate unless the winning margin were of an order which satisfied the test that the electorate had not had a fair and free opportunity of electing the candidate which the majority might prefer (see Ipswich Election Petition (1886) a 54 LT (NS) 619.*

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[121] Ibid [42].
[122] Ibid [45].
[123] Ibid [43].
[124] (13 February 2003, unreported),
[125] *Tatireta v Tong* [2003] KIHC 1, [46].
[126] Ibid [46].
[127] Bwebwenibeia Kararaua v Kataotika Tekee (HCCC 34/99).
[128] Bwebwenibeia Kararaua v Kataotika Tekee (HCCC 34/99 at 12).
[129] *Tatireta v Tong* [2003] KIHC 1, [69].

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1977	
s87s 85	Official corruption	1. A person 2. Being employed by the public service, and being charged with the performance of any duty by virtue of such employment corruptly asks for solicits receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or 3. Corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of such act or omission on the part of the person so employed.	7 years' imprisonment
ss88	Officers charged with administration of property of a special character or with special duties	1. A person employed by the public service 2. Charged with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacturing, trade or business of a special character, and having acquired or holding directly or indirectly a private interest in any such property, manufacture, trade or business 3. Discharges any such duties with respect to the property, manufacture, trade or business in which they have such interest or with respect to the conduct of any person in relation thereto.	1 year
ss89	False claims by officials	1. A person employed by the public service, 2. With capacity to furnish returns or statements touching any sum payable or claimed to be payable to himself or to any other person, to touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made to any person 3. Makes a return or statement touching any such matter which is, to their knowledge, false in any material particular	Misdemeanour
ss90	Abuse of office	1. A person employed in the public service 2. Does or directs to be done in abuse of the authority of their office, any arbitrary act prejudicial to the rights of another 3. If the act is done or directed to be done for purposes of gain	Misdemeanour unless it meets (3) In which case it is 3 years

Cases

Tiaeki v Toatu [2020] KIHC 20

Matter	Civil
Jurisdiction	High Court of Kiribati
Coram	Chief Justice Sir Muria
Date of Verdict	1 September 2020
Summary	Election Petition

This case reiterates the findings of the Court in *Inatio v Berina*[130] that:

> *… an allegation of corruption is raised in an election petition, such an allegation must be established, on a higher standard of probability. That entails proving the alleged corrupt practice to the entire satisfaction of the Court*.[131]

In support of this assertion, Muria CJ found that for an allegation of corruption, there must be clear and cogent proof on the evidence before the Court.

In relation to corruption in the context of an election under s 27 of the *Election Act 2019*, the Court outlined the provision as follows:

> *27 (1) No election shall be valid if any corrupt or illegal practice is committed in connection therewith by the candidate elected.*
>
> *(2) Where on an election petition is shown that corrupt or illegal practices or illegal payments committed or made in reference to the election for the purpose of promoting or procuring the election of any person thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the Court may declare his election, if he has been elected, to be void and he shall be incapable of being elected to fill the vacancy for which the election was held.*

In interpreting this provision, Muria CJ made the following remarks:

*The two subsections **must be read together as a whole** in order to show that law provides that the petitioner has to **prove the actus reus** (the actual acts of corrupt or illegal practices), **the mens rea** (the intention or the purposes of acts done) **and the effect** (the extensive prevalence of the acts impacting on the results of the election). The petitioner must do so on the evidence adduced before the Court. It cannot be simply assumed. See Kabaua –v- Nenem [2017] KIHC 14; Civil Case 4 of 2016 (17 March 2017).*

The general principle must be that the winning candidates at a general election are chosen by the will of most of the electors and ought not to be lightly removed from their seats in the House. The petitioner has that heavy burden of proving the alleged corrupt practices brought against them to justify their dethronement.[132]

These findings requiring proof of the *actus reus*, *mens rea* effect are true of most corruption cases.

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[130] [2020] KIHC 18.
[131] Ibid [29]
[132] *Tiaeki v Toatu* [2020] KIHC 20, [14]-[15].

Money Laundering Offences

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
Proceeds of Crime Act 2003 and *Proceeds of Crime (Amendment) Act 2005 (No.5)*			
ss12	Money-laundering	1. A person (a) Engages directly or indirectly in a transaction[133] that involves money, or other property, that is proceeds of crime and the person knows, or ought reasonably to know,[134] to be derived from some form of unlawful activity; (b) Acquires, possess or uses, receives or brings into the Republic money or other property that is proceeds of crime and the person knows or ought reasonably to have known that it is derived directly or indirectly from some form of unlawful activity; (c) Converts or transfers property that is proceeds of crime[135], with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences; (d) Conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property that is proceeds of crime; (e) Renders assistance to another person for any of the above.[136]	$120,000 or 20 years or both if a natural person or $600,000 if a body corporate

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[133] Section 12(1) defines '**transaction'** for the purposes of s 12 as –
opening of an account; any deposit, withdrawal, exchange or transfer of funds in any currency whether in cash or by cheque, payment order or other instrument or by electronic or other non physical means; the use of a safety deposit box or any other form of safe deposit; entering into any fiduciary relationship; any payment made in satisfaction, in whole or in part, of any contractual or other legal obligation; such other transaction as may be prescribed by the Minister of Finance and Economic Development.

[134] Under s 12(4) knowledge, intent or purpose can be inferred from objective factual circumstances.

[135] '**Proceeds of crime**' is defined in s 6(1) of the act to mean: property that is wholly derived or realised, whether directly or indirectly, from the commission of the offence or it is partly derived or realised, whether directly or indirectly, form the commission of the offence; whether the property is situated within or outside the Republic.

[136] It is important to note that by operation of s 6(c), there is no requirement that a person has been convicted of an offence for property to be deemed the proceeds of an offence or an instrument of an offence.

Proceeds of Crime Offences

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
Proceeds of Crime Act 2003 and *Proceeds of Crime (Amendment) Act 2005 (No.5)*			
ss13	Possession of property suspected of being proceeds of crime	1. A person 2. who converts, receives, possesses, conceals, disposes of or brings into Kiribati money, or other property, 3. that may reasonable be suspected of being proceeds of crime.	$12,000 or 2 years or both if a natural person or $60,000 if a body corporate.

Cases

There are cases The offences failure to declare currency exceeding $5,000 when leaving Kiribati: section 115A of the *Proceeds of Crime Act 2003* - Currency reporting when leaving or entering Kiribati. The two cases below highlight some of the issues that arise in these types of cases. It is not unlawful to take cash out of Kiribati; the offence only arises if a person carrying $5000 or more fails to make the required declaration. Suspicions of money laundering may be raised where there is failure to declare international movement of quantities of cash, however in the absence of evidence which might prove how the cash was derived or where it was going and for what purposes, the, offences of "proceeds of crime" or "money laundering" are not likely to be made out. Inability to prove that the cash was tainted property or proceeds of crime also has ramifications for the seizure and detention of the money.

Republic v Jingui James Lu [2019] KIHC 95; Criminal Case 16 of 2019 (4 September 2019)

Matter Sentence

Jurisdiction High Court of Kiribati

Coram Justice Lambourne

Date of Verdict 4 September 2019

Charge/s Fail to Declare Currency – s.115A(2) *Proceeds of Crime Act 2003*

Summary Section 115A(1) of the *Proceeds of Crime Act 2003* (the Act) requires a person leaving or entering Kiribati with an amount of cash (in any currency) exceeding the equivalent of $5000 (or such higher amount as may be prescribed by regulation for this section) to immediately before leaving or entering Kiribati, as the case may be, declare such amount in the prescribed form to an authorised officer stationed at the port of departure or arrival. A person who fails to comply commits an offence punishable by a fine of $12,000 and/or imprisonment for two years.

The offender was at the Bonriki International Airport departing on a flight to Nadi, Fiji. As part of the departure formalities, he was required to complete and submit an immigration departure form. The form is in English. As the offender had limited fluency in English, he sought the assistance of an immigration officer. One of the questions on the form was as follows:

Are you taking out of Kiribati more than $5000.00 in Australia (sic) or foreign currency equivalent? If a person answers the question in the affirmative, they must then complete a border currency declaration form. The offender initialled the form next to the word 'No'. He

signed the form and gave it to the immigration officer. As the offender underwent a security check prior to entering the departure lounge, he was found to have in his possession $19,550 in United States currency. A purse in his bag contained US$5000, US$4550 was interleaved between the pages of a diary, and US$10,000 was inside his jacket pocket. The cash was confiscated and the offender left on the flight to Fiji. The money was later returned to the offender (see civil case below).

In addition to the offence under section 115A(2) of the *Proceeds of Crime Act*, the offender was also charged with giving false information to a public servant (section 122(a) of the *Penal Code*) and knowingly misleading an immigration officer (section 23(1)(d) of the *Immigration Ordinance*). Upon his entering a guilty plea to the *Proceeds of Crime Act* charge, the prosecution withdrew the other charges against the offender.

There was no suggestion that the cash in the offender's possession that day was in any way tainted property or the proceeds of crime. As such, the court took the view that his offending did not warrant a custodial sentence. The offender was convicted and fined $4000. In default of payment of the fine, imprisonment for 1 month. No application was made for an order under Part 3 of the Proceeds of Crime Act. Without such an application the court had no power to make an order for forfeiture or pecuniary penalty order.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
	Proceeds of Crime Act, 2003 (No. 8 of 2003)	
ss 21-100	Part III	Forfeiture Orders, Pecuniary Penalty Orders and Related Matters
ss 21-25	Division 1	General
ss 26-33	Division 2	Forfeiture Orders
ss 34 - 42	Division 3	Pecuniary Penalty Orders

Cases

Lu v Kiribati Police Services [2019] KIHC 73; Civil Case 29 of 2019 (26 July 2019)

Matter Declaration and Orders re: seizure and detention of money

Jurisdiction High Court of Kiribati

Coram The Hon. Chief Justice Sir John Muria

Date of Verdict 14 June 2019

Charge/s Relates to the criminal case above (fail to declare currency)

Summary The applicant was preparing to board the Fiji Airways Flight FJ 230 bound for Nadi. At the Departure Lounge the Aviation Securities found the applicant to have in his possession USD 19,550.00. He had answered "No" to the question on the Immigration Departure Form as to whether he was taking more than A$5,000.00 out of the country. The applicant did not declare that he had USD 19,550.00 which was found on him. The police were called in and seized the USD 19,550.00. The police kept the money. The applicant brought this civil suit to seek a declaration that the ongoing detention of the money was unlawful and for its return.

The applicant was charged with an offence under Section 115A of the *Proceeds of Crime Act 2003* (the Act). Section 117 of the Act places limits on detention of currency. The detention of the seized currency is specifically stated to be an initial period of 24 hours and may be continued for a period not exceeding three months. The continued detention may be further extended but may not exceed two years from the date of the first order. Following the initial seizure and detention of the applicant's money on 17 January 2019, no Order had been sought by the respondent for the continued detention of the applicant's money. The Court held that the continued detention of the US$19,550.00 belonging to the applicant by the respondent without an order was unlawful.

The application succeeded and the following declarations and orders were made:

1. A declaration that the respondent failed to apply within 24 hours to the Court for an Order for the continued detention of the applicant's US$19,550.00 cash following its seizure on 17 January 2019.

2. A declaration that the continued detention of the applicant's US$19,550.00 thereafter without Court Order is in breach of section 117(1) and (2) of the *POC Act* and therefore unlawful.

3. An Order that the applicant's US$19,550.00 be released and returned to him forthwith.

4. The applicant shall be entitled to general damages to be assessed for the continued unlawful detention of his US$19,550.00 until to date.

5. The applicant shall be entitled to his costs of these proceedings, to be taxed, if not agreed.

Republic v Kwok Hou Ng [2019] KIHC 69; Miscellaneous Application 64 of 2019 (16 August 2019)

Matter Application under section 117(3) of the *Proceeds of Crime Act 2003*

Jurisdiction High Court of Kiribati

Coram The Hon. Chief Justice Sir John Muria

Date of Verdict 24 June 2019

Summary There were two applications which were dealt with together. The first application was by the Republic (Applicant) seeking an order to extend the Order made by the Court on 7 June 2018 which ordered the detention of the Telegraphic Transfer (TT) of $878,900.00 and cash deposit of $600,000.00 into Kwok-Hou Ng (respondent) business account No. 571808 in the name: Fair Price at the ANZ Bank (Kiribati). The other application was by Kwok-Hou Ng (Respondent) to discharge or lift the Order made on 7 June 2018 and to have the money ($878,900.00 and $600,000.00) held in the ANZ Bank (Kiribati) paid back to him. Upon application by the Republic for an Order of detention the Court made the following order on 7 June 2018:

> *"The telegraphic transfer of $878,900.76 and the cash deposit of $600,000.00 which are currently seized and kept with the ANZ Bank (Kiribati) for being reasonably believed to invoice the suspicious transactions, are to be continued to be detained with the ANZ Bank (Kiribati) until further orders are made".*

The reason given for seeking extension of the order is basically to allow police further investigation into the activities of the respondent regarding the use of the money in question. According to the evidence received by the Court, contacts were made to the Pacific Transnational Crime Centre in Samoa and the Australian Federal Police (AFP) in Sydney. Enquiries were made as to the authenticity of the recipient company of the funds in Australia. Following the investigation by the AFP, it is said that the recipient company in Australia, Nak Tech Trading, was only registered as a company just two days after the reported suspicious transactions in ANZ Bank (Kiribati).

The Court was not shown any evidence of the existence of Nak Tech Trading and its purported Registration in Australia. The Court expected the prosecution to produce evidence to this effect to support their assertion that investigation was still going and the need to continue detaining the respondent's funds in the bank. That had not been done, and so the Court could only assume that what was stated in the affidavit were mere assertions.

The Republic relied on section 117(3) of the *Proceeds of Crime Act 2003* (the Act) to further extend the Order made on 7 June 2018. Sections 116 and 117 authorise seizure and detention of suspicious currency. The onus was on the Republic to justify the continued detention of the currency. If no reasonable grounds are shown to justify continuing detention of the currency, and as the respondent has applied for its release, the Court is entitled to order the discharge of the Order and release the detained currency to the respondent.

The Court noted that the Republic applied for and was granted the detention Order on 7 June 2018 which was further extended on 27 March 2019. The Court accepted that in a case such as this, investigation is carried out both within and outside the country and can present a challenge to investigating officers but said that there will come a time when the detention of the applicant's

money can no longer be allowed to continue on end. This is why the law puts time limits to the detention of suspected currency.

The Court also pointed out in a case such as this, that there are constitutional parameters to observe when detaining a person's assets pending investigation or trial. These parameters are enshrined in the Constitution of Kiribati to protect persons' rights to their property, as well as to prevent the misuse of power by the State. It is the undoubted duty of the State to control and prevent crime and to curb criminal activities, but that must be done within legally permissible limits as recognised in the Australian case *R –v- N* [2015] QSC 9.

Following the extension granted on 27 March 2019, the Republic filed charges against the respondent: two counts of possession of property suspected of being proceeds of crime contrary to section 13(1) of the Act. In support of the Republic's application for further extension of the detention of the respondent's money, the Republic relied on affidavits from the investigators and from a Ministry of Finance auditor also assisting in the investigation. He deposed to his involvement in analysing the respondent's financial statements as contained in his tax returns for the years 2017 and 2018. He stated that the work on analysing the respondent's financial statements for the two years are yet to be completed. The Court accepted that the evidence showed classical reasons to support seeking orders for the continued detention of seized money by police up to a maximum period of two years. It is essentially to help police carry out their investigation and the law permits it up to a maximum period of two years as provided for in section 117(3) of the Act.

The Court accepted that the detention of the respondent's money has caused adverse financial problems to him and referred to the case of *Commissioner of Police –v- Burgess* [2015] NZHC in which it was recognized that restraining order placed over a person's property may cause inconvenience and disadvantage to those having an interest in the property. However considering the evidence of the Respondent, the Court formed the view that it is far from sufficient to show any justification for the release of his money at this stage, and that on the other hand, the evidence offered by the Applicant provided a strong basis for the further continued detention of the respondent's money.

The Court held that criminal charges having now been filed against the respondent added support to the need to have the restraining order continued and is permitted by section 118(2)(b) of the Act. The Court referred to the case of *Commissioner of Police –v- Malcolm* [2013] NZHC 132 which supports the proposition that a further extension of a restraining order in a case such as the present one, may be necessary until the merits of the case is heard.

In the circumstances of the present case, the honourable Chief Justice was satisfied that there was justification for a further extension of the order made on 7 June 2018 for the continued detention of the respondent's money kept at the ANZ Bank (Kiribati). The Republic's application was granted. The extension of the order made on 7 June 2018 is granted until the merits of the criminal charges brought against the respondent are heard and determined.

See also:

Attorney-General v EF [2019] KIHC 33; Civil Case 23 of 2019 (3 May 2019)

Republic v Takatau [2016] KIHC 7; Criminal Case 13 of 2013 (15 June 2016)

Republic v Yu [2013] KIHC 14; Criminal Case 34-12 (4 March 2013)

Republic v Yu - Judgment [2013] KIHC 13; Criminal Case 34-12 (4 March 2013)

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
	Mutual Assistance in Criminal Matters Act 2003	
The entire Act concerns Mutual Assistance, including the selection of pertinent provisions below.		
s7S 6	Requests by Kiribati for assistance generally	(1) A request for international assistance in a criminal matter that Kiribati is authorised to make under this Act may be made only by the Attorney-General or a person authorised in writing by the Attorney-General. (2) If the Attorney-General, or an authorised person, makes a request for international assistance under this Act, the Attorney-General or authorised person must tell the Minister for Foreign Affairs about the request. (3) A failure to comply with subsection (2) does not make a request invalid.
s8(1)	Request by foreign countries for assistance generally	A request under this Act by a foreign country for international assistance in a criminal matter must be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.
s9	Assistance may be provided subject to conditions	Assistance under this Act may be provided to a foreign country subject to any conditions that the Attorney-General determines.
s10(1)	Refusal of assistance generally	A request by a foreign country for assistance under this Act must be refused if, in the opinion of the Attorney-General: 1. A request relates to an investigation of, or proceeding for, a political offence; or 2. There are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence; or 3. Providing the assistance would contravene a provision of Chapter II of the Constitution; or 4. There are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sec, religion, nationality or political opinions; or 5. Providing the assistance would prejudice the sovereignty, security or national interest of Kiribati; or 6. The request relates to an investigation of, or proceeding for, an offence for which the person concerned has been acquitted or pardoned by a competent tribunal or authority in the foreign country or has undergone the punishment provided by the law of that country.
s11(1)	Refusal of assistance – death penalty	A request by a foreign country for assistance under this Act must be refused if: 1. It relates to an investigation of, or a proceeding for, an offence for which the death penalty may be imposed in the foreign country; and 2. The Attorney-General is not of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

Section	Description	Provisions
s12(1)	Refusal of assistance – Attorney-General's discretion	A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General: 1. The request relates to the prosecution or punishment of a person for an act or omission that would not have constituted an offence against Kiribati law if it had occurred in Kiribati; or 2. The request relates to the prosecution or punishment of a person: i. For an act or omission that occurred, or is alleged to have occurred, outside the foreign country; and ii. If a similar act or omission occurring outside Kiribati in similar circumstances would not have constituted an offence against Kiribati law; or 3. The request relates to the prosecution or punishment of a person for an act or omission if the person responsible could no longer be prosecuted because of lapse of time or any other reason if: i. It had occurred in Kiribati at the same time; and ii. It had constituted an offence against Kiribati law; or 4. Providing the assistance could prejudice an investigation or proceeding for a criminal matter in Kiribati; or 5. The provision of the assistance would, or would be likely to, prejudice the safety of an y person (whether in or outside Kiribati); or 6. The provision of the assistance would result in manifest unfairness or a denial of human rights; or 7. The provision of the assistance would impose an excessive burden on the resources of the Republic; or 8. It is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition Act 2003	
The entire Act concerns Extradition, including the selection of pertinent provisions below.		
s5	Extradition offence	An offence is an extradition offence if – 1. It is an offence against a law of the requesting country[137] for which the maximum penalty is death or imprisonment, o other deprivation of liberty, for a period of not less than 1 year; and 2. The conduct that constitutes the offence, if committed in Kiribati, would constitute an offence (however described) in Kiribati for which the maximum penalty is life imprisonment or other term of imprisonment or deprivation of liberty, for a period of not less than 1 year.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[137] Where '**requesting country'** is defined in s 2 to mean a country that is seeking the surrender of a person from Kiribati.

Nauru

Elements of Offences and Case Law

Nauru

The legal system of Nauru follows the characteristics primarily in relation to the Australian legal system as well as the English common law due to its political history. During the era of exploration by the British colony, the country of Nauru was occupied by several imperial powers such as Germany and Japan. During World War I, Australia seized Nauru, following which the League of Nations granted joint mandate over Nauru to Australia, Great Britain and New Zealand until the occupation of Japan during World War II.

Nauru was made a United Nations (UN) trust territory under the jurisdiction and administration of Australia in 1947, and Nauru gained its independence in 1967. Under section 286 of the *Crimes Act of Nauru 2016*, the provision underlines the nation's position on repealed Australian legislations:

"*any act, matter, thing, decision done or having effect, or proceeding brought under a provision of the repealed Code continues to have effect, subject to this Act."*

The country now refers to the Australian cases for guidance on its jurisdictions, whilst also relating to the English common law for similar reasons of it being the substantial influence and common law of Australia.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2016	
s150	Definition – dishonestly	1. A person is 'dishonest', if: a) Is dishonest according to the standards of ordinary people; and b) Knows he or she is being dishonest by the standards of ordinary people. 2. A person acts 'dishonestly', if: a) Engages in conduct that is dishonest; or b) Engages in conduct with a dishonest intent. 3. The question whether a person is dishonest, or acts dishonestly is one of fact.	N/A
s151	Definition – gain, loss etc	Meaning of 'gain' and 'loss' etc In this Part: 'cause', a loss, means cause a loss to another person. 'gain' means a gain in property (whether temporary or permanent) or a gain by way of the supply of services, and includes keeping what one has. 'loss' means a loss in property (whether temporary or permanent), and includes not getting what one might get. 'obtain', a gain, includes obtain a gain for another person.	N/A
s153	Definition – permanently deprive another person of property	1. A person; 2. Intends to permanently deprive another person of property if; a) The property cannot be returned to the other person in the same conditions; or b) The other is likely to be permanently deprived of the property.	N/A
s154	Theft	1. A person; a) Dishonestly takes or carries away property belonging to another person, or to the defendant and another person, with the intention of permanently depriving the other person of the property[138]; or b) Dishonestly uses or deals with property belonging to another person, or to the defendant and another person, with the intention of permanently depriving the other person of the property.	Value less than $500 – 1 year imprisonment Value between $500-$1000 – 5 years imprisonment Value more than $1000 – 7 years imprisonment

[138] Limitations of subsection (1) as mentioned in s154(2)
(2) For the purposes of subsection (1), taking, carrying away, using or dealing with property does not include obtaining ownership or possession of, or control over, any property with the consent of the person from whom it is obtained, whether or not the consent is obtained by deception.

Section	Description	Offence Elements	Maximum Penalty
s165(1)	Receiving	1. A person commits an offence, if: a) the person receives property; b) the property was obtained as a result of an offence ('unlawfully obtained'); and c) the person: i) knows the property was unlawfully obtained; or ii) is reckless as to whether the property was unlawfully obtained. 2. For subsection (1)(b), property obtained by conduct engaged in outside Nauru is taken to be property unlawfully obtained if the conduct would be an offence against this Act or any other written law, if it happened in Nauru. 3. The act of receiving any property obtained as a result of an offence is complete when the person, either exclusively or jointly with another person, takes possession or control over, or helps in concealing or disposing of, the property. 4. This section does not apply to receiving of property that has previously been unlawfully obtained, even though the receiver knows the property has been previously unlawfully obtained, if: a. the property has been returned to the owner; or b. legal title to the property has been acquired by another person. *Note for subsection (4)* *A defendant has an evidential burden in relation to the matters in subsection (4) see section 26.*	Value less than $500 – 1 year imprisonment Value between $500-$1000 – 5 years imprisonment Value more than $1000 – 7 years imprisonment

Section	Description	Offence Elements	Maximum Penalty
s167	Obtaining property by deception	1. A person; 2. By deception[139]; 3. Dishonestly obtains property belonging to another person, or to the defendant and another person; 4. With the intention of permanently depriving the other person of the property. For the purposes of this section: 1. A person is to be treated as 'obtaining property' if the person obtains ownership, possession or control of it, and 'obtain' includes obtain for another person or enabling oneself or another person to obtain or retain. 2. A person's obtaining of property may be dishonest even if the person is willing to pay for it. 3. A person may be convicted of an offence against this Section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of a number of particular sums of money or items of other property that were obtained over a period of time.	Value less than $500 – 1 year imprisonment Value between $500-$1000 – 5 years imprisonment Value more than $1000 – 7 years imprisonment
s168	Obtaining financial advantage or causing financial disadvantage by deception	1. A person; 2. By deception; 3. Dishonestly obtains a financial advantage from, or causes a financial advantage to; 4. Another person.	Value less than $500 – 1 year imprisonment Value between $500-$1000 – 5 years imprisonment Value more than $1000 – 7 years imprisonment
s172	Interpretation -	In this Division: 'agent' includes the following: (a) (b) (c) (d) a person who acts on behalf of another person with the other person's actual or implied authority (in which case the other person is the principal); a public official (in which case the government, government agency or instrumentality of the Republic for which the official acts is the principal); an employee (in which case the employer is the principal); a legal practitioner acting on behalf of a client (in which case the client is the principal);	

[139] 'Deception' defined under s166:
In this Division:
'deception' means any deception, by words or conduct, as to fact or law, including:
A deception as to the intention of the person using the deception or any other person; or
Conduct by a person that causes a computer system or machine to make a response that the person is not authorised to cause it to do.

Section	Description	Offence Elements	Maximum Penalty
s179	Embezzlement	1. A public official; 2. Commits the following: a) Lawfully permitted or required to deal[140] with property in the name of, or on account of the Republic in exercise of official duties; b) Engages in conduct that deals with the property; i. In the name of, on behalf of, or on account of the Republic; and ii. Before the property comes into the possession of the Republic; and c) Engages in the conduct dishonestly for own benefit or the benefit of another person or entity.	7 years imprisonment
		Criminal Code 1899	
s398	Stealing	1. A person; 2. Steals anything capable of being stolen.	3 years imprisonment with hard labour.
s398.5	Stealing by persons in the public service	1. A person; 2. Employed in the Public Service; 3. The thing stolen is the property of Her Majesty; or 4. Came into the possession of the offender by virtue of employment.	7 years imprisonment with hard labour.
s398.6	Stealing by clerks and servants	1. A clerk or servant; 2. The thing stolen is the property of their employer; or 3. Came into possession of the offender on account of the employer.	7 years imprisonment with hard labour.

Cases

EMP 050 v Republic [2017] NRSC 85; Appeal Case 29 of 2016 (20 October 2017) (paclii.org)

Matter Civil – Appeal

Jurisdiction Supreme Court of Nauru

Coram Crulci J

Date of Verdict 20 October 2017

Summary The appellant was a man from Lakshmipur district in Bangladesh and arrived in Australia by boat to seek protection under the 1951 Refugees Convention and the 1967 Protocol relating to the Status of Refugees. The respondent Secretary did not consider the material elements of his claims of refuge to be credible due to inconsistencies between his application and interviews. He was transferred to Nauru detention centre in 2014. The case connotes fraud within the realm of the actions of the appellant's legal representative at the tribunal hearing and ultimately amounts to negligence.

Decision Trial decision affirmed – appellant does not qualify for refugee status.

[140] 'Deals' defined under s179(2):
2) In this Section:
'deals', with property, includes the following:
Acquires, receives, possesses, uses or disposes of property; or
Carries out a transaction relating to property.

Republic v Dieye [2016] NRDC 1; Criminal Case 154 of 2014 (28 January 2016)

Matter Criminal (Sentence)

Jurisdiction District Court of Nauru

Coram Emma Garo – Resident Magistrate

Date of Verdict 28 January 2016

Summary The offender was convicted of 2 counts of stealing. The charges laid were:

(i) Stealing contrary to section 398 of the Criminal Code 1899 -
Tyrone Deiye did steal AUD$1,280.00 one thousand two hundred and eighty dollars the property of the Republic of Nauru

(ii) Stealing Contrary to section 398 of the Criminal Code 1899 -
Mr. Tyrone Deiye on the 9 day of May 2013 at Nauru did steal AUD$640.00 the property of the Republic of Nauru

The maximum penalty for an offence under s398 of the Criminal Code is 3 years imprisonment. On sentence the prosecution submitted that as the defendant at that time of offending was a person employed in the public service, that he should be sentenced under s 398(v) of the Criminal Code 1899: "stealing by persons in the Public Service". The maximum penalty for an offence under s 398(v) is imprisonment with hard labour for seven years. When considering this submission, the learned Magistrate referred to Article 10(3)(b) of the Constitution of the Republic of Nauru and considered several cases from Papua New Guinea to which the prosecution had drawn the court's attention. Ultimately the learned Magistrate rejected the prosecutor's submission and proceeded to sentence on the basis of a maximum of 3 years imprisonment for each count, stating at [15]:

> *The fact that the defendant was employed in the Public Service at the time he offended is clear on the evidence and is not disputed by the defence. This should have been obvious to the prosecution from the beginning. Had they elected which of the sub-sections either (v) or (vi) of the Criminal Code 1899 as being applicable in the charge preferred against the defendant, the approach they are now submitting that the court should do in terms of the sentencing approach, would have been a consequential outcome for the court to take. The defendant was arraigned, and he took his plea on the basis of section 398 of the Criminal Code 1899. He was tried on and convicted on the basis of section 398 of the Criminal Code 1899. He must therefore in my view be sentenced according to law under section 398 of the Criminal Code 1899. I therefore reject the prosecution submission and will pass sentence on the basis of section 398 of the Criminal Code 1899, the maximum penalty for which is three years imprisonment.*

The learned Magistrate declined to increase the penalty on account of the defendant's plea of not guilty stating at [16]:

> *The maximum penalty for the offence of stealing under section 398 of the Criminal Code 1899 is three years imprisonment. The defendant is a first offender and as such is entitled to be given credit by way of a reduction in sentence. The defendant has served in the Public Service for 22 years. The fact of being found guilty for the two counts will result in loss of employment and entails a big fall for the defendant. I take into account the submission by*

> *Mr. Tangivakatini that the fact that the defendant did not plead guilty should not necessarily mean an increase in sentence. Yes he loses the benefit of a guilty plea, but it does not necessarily mean that his sentence should be increased to more than what in my view should be an appropriate sentence. I accept that submission.*

The learned Magistrate rejected the prosecution's submission that repayment of the money ought not be taken into account as a mitigating factor on sentence – at [17]:

> *The prosecution has asked that this court reject the payment of the monies and not treat the fact of payment of monies to Ms. Catherine Dageago as a mitigating factor. I reject that* submission. The fact of payment of *monies was rejected by the court to exonerate the defendant from criminal responsibility. The court on the other hand despite having rejected the fact of payment to exonerate the defendant from criminal responsibility, can still on the other hand accept it as a mitigating factor. I do so in this case.*

The learned Magistrate had regard to some prior sentencing comparative cases and noted that in all of those cases, immediate custodial sentences were imposed on the defendants:

- *George Tannang v Director of Public Prosecutions* [19] the appellants were employees of Capelle at the time they offended by way of stealing goods from the shop. They were dismissed from their employment. The District Court imposed as a sentence of 6 months imprisonment. On appeal, the Supreme Court reduced the term of imprisonment to 2 months. In this case the court noted that the total values of goods stolen were not known and the instant dismissals from employment are severe. But the court said, "The court must regard the offence as serious. People who steal must know that they are likely to go to jail if brought before a court".
- *Bruce Diema v The Republic*[20] appellant was sentenced along with 2 of his co-accused's for stealing petrol. On appeal, the Supreme Court reduced sentence to 1 month imprisonment because of his good character.
- *Jolyn Botelanga* [21] the defendant was charged with 12 counts of forgery, uttering and the amount involved was $78,644.00. None of the monies were repaid. The defendant was sentenced to 2 years imprisonment. His Lordship said " People must be deterred from doing these kind of things by knowing that when they are caught they will go to jail".

Decision Count 1: 3 months imprisonment. Count 2: 6 months imprisonment. Sentences to be served concurrently. The total term of 9 months imprisonment was suspended for 18 months on the basis that reparation had been made.

Republic v Gadeanang [2021] NRDC 7; Criminal Case 8 of 2020 (27 April 2021)

Matter Criminal

Jurisdiction District Court of Nauru

Coram Penijamini R Lomaloma – Resident Magistrate

Date of Verdict 27 April 2021

Summary The accused was alleged to have stolen a pig belonging to the complainant and to have killed the pig for his own interests and gain alongside other counts of obstructing a public official, damaging property and escaping from custody.

The Magistrate stated that in certain cases of stealing/theft, the gross sum may be specified pursuant to s93(j):

"Where a person is charged with stealing, it shall be sufficient to specify the gross amount of property alleged to have been stolen and the dates between which the stealing is alleged to have been committed without specifying particular times or exact dates."

The Magistrate analysed the facts of the case to the following elements of theft/stealing:

1. A person [the defendant];
2. Dishonestly takes or carries away property belonging to another;
3. With the intention of permanently depriving the other person of the property.

Regarding the third element of intention to permanently deprive, the court ruled on the basis that the pig was never returned or found, thus providing reason to infer that the defendant intended to permanently deprive the owner of his pig.

In considering the guilt of the accused, the Magistrate referred to circumstantial evidence as per *Shepherd v The Queen* (1990) by Dawson J:

> *The inference of the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused.*
>
> *It may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity, and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.*

Decision Guilty of theft.

R v Gamboa [2018] NRSC 59; Criminal Case 34 of 2017 (3 October 2018)

Matter Criminal – Appeal

Jurisdiction Supreme Court of Nauru

Coram Rapi Vaai J

Date of Verdict 3 October 2018

Summary Ramon Gamboa (respondent) was charged for seven counts of obtaining financial advantage or causing financial disadvantage by deception during his time as a financial controller of Capelle and Partner – a commercial enterprise operating inter alia a supermarket. His responsibilities were inclusive of topping up ATM machine with cash, whereby he took amounts between $5000 and $9700, $1750 and $14650 over seven occasions by falsifying the recorded entries.

The total amounts dishonestly taken totalled $53,100 and upon discovery, the respondent pled guilty and promised to reimburse $33,885-68.

The Republic appealed the Magistrate's judgment on nine grounds for the following three categories:

1. The applicability and relevance of the one transaction rule;
2. The adoption of three years as the starting point of sentencing; and

The relevance of the consideration which reduced the final sentence to eighteen months.

The court considered the Magistrate's choice to adopt the one transaction rule in determining the punishment for the offence. The Magistrate's consideration of the following were affirmed by the Supreme Court as a viable and reasonable judgment:

1. Aggravating and mitigating factors;
2. Culpability of the respondent;
3. Seriousness of the offending;
4. Harm and loss caused or likely to cause;
5. Pre-meditation of the offence;
6. The degree to which the person has shown contrition for the offence by taking action to make reparation;
7. The degree to which the person co-operated in the investigation of the offence;
8. The prospects of rehabilitation.

Additionally, the Magistrate based his reasoning on the totality principles surrounding sentencing pursuant to the application of s279(2) of the *Crimes Act 2016*:

> *"…take into account the probable effect that any sentence or other order under consideration would have on any of the person's family or dependents".*

The court refers to *Senda v Republic*[141] whereby Thomas CJ reduced the defendant's sentencing from 2 years to 12 months imprisonments on the grounds that he was a foreigner in Nauru and his subsequent sentencing would be more onerous on him given his family's restrictions in visitation.

The one transaction rule from *Ruane v The Queen*, is a sentencing principle to assist Judges in the proper exercise of their discretion, whereby:

> *"Even when offences may be characterized as arising from one transaction, the Judge is not obligated to apply concurrent sentences if it results in a sentence which is manifestly inadequate."*
>
> *"The judgment must be made to balance the principle that one transaction generally attracts concurrent sentences with the principle that the overall criminal conduct must be appropriately recognized and that distinct acts may in the circumstances attract distinct penalties."*[142]

Wells J in *Attorney General v Tichy* acknowledges that the rule is uncertain in application at [93]:

> "*There consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."*

Decision — Appeal dismissed and appellant to pay costs of $1000 – court ruled that the end sentence of 18 months was in line and within the range of the crimes committed alongside consideration of its aggravating and mitigating factors.

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[141] (1975) NRSC 7.
[142] R v White

Republic v Botelanga [2010] NRSC 17; Criminal Case 2 of 2010 (18 May 2010)

Matter Criminal

Jurisdiction Supreme Court of Nauru

Coram Chief Justice Robin Millhouse QC

Date of Verdict 18 May 2010

Summary Jolyn Botelanga, over twelve occasions, forged Department of Finance payment vouchers, uttered them and took the money for herself. The amounts of each occasion were between $4321 and $8653, with the total being $78644.

The court considered the following as the elements of forgery satisfied by the prosecution against Jolyn:

1. Jolyn was employed in the Department of Finance as a cheque writer;
2. She made out a false payment voucher, printed a cheque for the amount and presented it to the Directorate of Payments for cash;
3. It was a course of conduct followed and acted on the temptation of the opportunity.

Upon analysis, these elements would translate to the following as elements of forgery:

1. A person;
2. Employed by the Government or within a branch of its administration;
3. Acted under false pretences;
4. With the intention to defraud for their own or others gain.

Decision Imprisonment for two years and three months.

Republic of Nauru v Kepae [2019] NRDC 2; Criminal Case 91 of 2017 (2 May 2019)

Matter Criminal

Jurisdiction District Court of Nauru

Coram Resident Magistrate Penijamini R Lomaloma

Date of Verdict 2 May 2019

Summary Nicholson Kepae broke into a house with several other boys and stole a mobile phone and other items including cash. He was recognized and later identified during investigation by witnesses – he was 15 years and 7 months of age at the time of offending.

He was charged with count 1 of burglary and count 2 of stealing. The court considered the following factors in sentencing:

1. Seriousness of the offending;
2. Mitigation factors (age, first time offender, cooperation during investigation, pleaded guilty, remorseful, good character);
3. Sentencing of young offenders;
4. Delay.

Regarding delay of proceedings, the court highlighted its effects on the fairness of the trial as per the discussions by Rothman J at 125 in *R v Robertson*:

> *"A delay in investigation and prosecution of an offence may, when lengthy, lead to a degree of leniency being extended: R v Todd[143]. Delay is a factor to the extent that it affects fairness because, for example, of changed circumstances, additional suspense or anxiety, significant periods on conditional liberty, inexplicable delay by the prosecuting authority, and the like: see R v Khamas[144]."*

Decision Sentence: 1 year probation for count 1 of burglary and 1 year probation for count 2 of stealing.

R v Olsson [2019] NRSC 7; Criminal Case 17 of 2018 (25 April 2019)

Matter Criminal

Jurisdiction Supreme Court of Nauru

Coram Justice Mohammed Shafiullah Khan

Date of Verdict 25 April 2019

Summary Olsson Israel Olsson and Kakson Timothy entered the OD-Niuaiwo Hotel's casino at night without any right to do so, with the intent to commit theft of property from said Hotel. The court considered the particulars of the offence as per the following facts as proof beyond reasonable doubt:

1. Olsson and Timothy;
2. Dishonestly took an Acer Laptop and cash;
3. Belonging to OD-N Aiwo Hotel;
4. With the intention to permanently deprive the proprietors of the Hotel of said property by selling the laptop and not returning other property.

In translation, these would be noted as the elements of theft:

1. A person;
2. Dishonestly takes something;
3. Belonging to another person;
4. With the intention to permanently deprive the owner.

The court also considers the totality principle regarding the sentencing of the accused as per *Mill v The Queen*:

> *"The effect of a totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'… it must look at the totality of the criminal behaviour and ask itself what is the appropriate sentences for all the offences."*

Decision Olsson to serve five years of imprisonment and Timothy to serve five years imprisonment.

Chen v Akaiy [2019] NRSC 49; Civil Suit 12 of 2017 (18 October 2019)

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[143] [1982] 2 NSWLR 517 (CCA).
[144] (1999) A Crim R 499.

Matter Civil

Jurisdiction Supreme Court of Nauru

Coram Judge Rapi Vaai

Date of Verdict 18 October 2019

Summary The case concerns the use of and ownership of land (Portion 54) which was inherited and owned by the mother Etoe and her five children. The granddaughter of one of her children is the first plaintiff and intending to build a home on the land, obtained written consents of at least 75% of land owners including the remaining original two children.

The defendant is the son of one of the original five children and lives on the land conducting business of container exports. He claims that the land was gifted to him by his mother and that the plaintiff has no right over the land.

Defendant claims that the written consents were obtained by fraud and misrepresentation.

In consideration of the land's written consent forms being derived through forgery and misrepresentation by the plaintiff, the defendant's allegations involved the required proof of the following:

1. Jenna Chen (first plaintiff) deceived or misrepresented landowners;
2. That she wanted to build a home, when in fact it was a business she intended to build; and
3. Forged the signatures of two land owners.

The issue to be determined was whether the plaintiff fraudulently gained the consent of some of the landowners who signed the consent for her to build her house on Portion 54.

The court refers to the explanation of "to deceive and to defraud" by Buckley LJ in *Re London and Globe Finance Corp*:

> *"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believe to be false.*
>
> *To defraud is to deprive by deceit, it is deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."*

The court further relied on the elaboration of this explanation by Lord Goddard in *R v Wines* as the locus classicus of the subject:

1. Fraud and dishonesty must be distinctly alleged and distinctly proven;
2. Must be stated with confidence that the evidence tendered by the defendant to prove dishonesty is totally unreliable and insufficient to amount to an averment or to infer dishonesty;

The ones who are supposedly misrepresented, defrauded or forged out of must investigate the allegation of fraud and forgery.

Decision The plaintiff did not commit fraud or misrepresentation and the defendant and anyone in contact with him is ordered to refrain from interfering with the first plaintiff's construction of property on Portion 54.

Hiram v Solomon [2011] NRSC 25; Civil Case 14 of 2011 (28 November 2011)

Matter Civil

Jurisdiction Supreme Court of Nauru

Coram Chief Justice Eames

Date of Verdict 28 November 2011

Summary The plaintiff (Iba Hiram) contested the rights of his late daughter's (Blueneldi) husband (Solomon) to the house MQ29, which was leased out to HK Logistics, wherein the plaintiff seeks damages in the form of rent paid by HK Logistics. The plaintiff alleges that the landowners consent form agreeing to the ownership of MQ29 upon renovations by the daughter and her husband Solomon were forged of her signatures by the conduct of her late daughter.

The court reiterated the onus of proof on the plaintiff to prove to the court that the forgery of the signatures on the consent agreements and related documents. The plaintiff had to prove the following contentions in relation to the forgery and fraudulent conduct allegations by her late daughter:

1. Copied her signature onto the property consent agreement form;
2. Without her consent;
3. With the intention to defraud or deceive;

For her own or other's interests or benefit.

Decision The Plaintiff's claims were dismissed and was declared that when Blueneldi Hiram entered a lease agreement with HK Logistics, she did so as the owner of the house MQ29, not as an agent of her mother Iba Harim.

Republic v Roe [1977] NRDC 11; Criminal Case 60 of 1977 (15 March 1977)

Matter Criminal

Jurisdiction District Court of Nauru

Coram Resident Magistrate – R. L. De Silva

Date of Verdict 15 March 1977

Summary Richard (accused) checks in at the Meneng Hotel as a paying guest and checked out without paying his bill of $468.60. He was charged the following:

By false pretence or wilfully promise or partly a false pretence and partly by a wilfully false promise and with intent to defraud obtaining credit, contrary to section 427(2) of the Criminal Code 1899 of Queensland.

The Court considered there to be three elements in constructing the charge of false pretences with the intent to defraud obtaining credit:

1. There must be an incurring of a debt or a liability;
2. There must be the obtaining of credit;
3. There must be fraud.

Decision Found guilty of obtaining credit from the management of the Meneng Hotel under false pretences and was convicted.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2016	
s173 (1)	Bribery	1. A person; 2. Dishonestly provides, or offers promises to provide a benefit; 3. To an agent or another person; 4. With the intention that the agent will provide a favour.	7 years imprisonment
s173 (2)		1. An agent; 2. Dishonestly asks for, or receives or agrees to receive a benefit; 3. For the agent or another person; 4. With the intention of providing a favour.	
s174 (1)	Giving or receiving other corrupting benefits	1. A person; 2. Dishonestly provides, or offers or promises to provide a benefit; 3. To an agent or another person; 4. The receipt or expectation of the receipt of the benefit would influence the agent to provide a favour.	5 years imprisonment
s174 (2)		1. An agent; 2. Dishonestly asks for, or receives or agrees to receive a benefit; 3. For the agent or another person; 4. The receipt or expectation of the receipt of the benefit would influence the agent to provide a favour.	
s175	Bribery of a foreign public official	1. A person; 2. Dishonestly provides, or offers or promises to provide a benefit; 3. With the intention to: a) to influence a foreign public official in relation to any act or omission of that official in the official's official capacity, whether or not the act or omission is within the scope of the official's authority; or b) to obtain or retain business, or to obtain an improper advantage in the conduct of business.	7 years imprisonment
s176	Bribery outside of Nauru of foreign public official	1. A person; 2. Does something outside of Nauru; 3. Which in Nauru is an offence against section 175.	7 years imprisonment

Cases

Adeang v Gioura [1977] NRSC 1; [1969-1982] NLR (A) 99 (19 May 1977)

Matter	Miscellaneous
Jurisdiction	Supreme Court of Nauru
Coram	Chief Justice Thompson
Date of Verdict	19 May 1977
Summary	Ubenide G – a police inspector – was a candidate in an election and in the constituency as a senior police officer, visited the polling places and interfered with the polling processes to favour the outcomes for himself. He checked the polling clerk's roll of electors, ascertained which electors had not voted, escorted them to the polling places in a police car, in the duration of which he had instructed them to vote for him. He received sufficient votes to be elected as a member of the Parliament. The court undertook the determination of questions of law regarding whether the electoral offence by application of the rules of fair conduct. The respondent's actions were constituting to one that falls within the definition of bribery; however, it would not be sufficient to warrant a criminal prosecution under the legislative provision. While the defendant's conduct may have amounted to bribery in one instance, the Court found that the most accurate way to define the conduct was as improper and unfair. Upon analysis, the case was not relevant to the offence of bribery.
Decision	Order for a fresh count for votes by the Returning Officer and for the respondent's names to be struck out of all ballot papers.

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2016	
s178 (1)	Abuse of public office	1. A public official; a) Exercises any influence in their capacity as a public official; or b) Engages in any conduct in the exercise of their functions as a public official; or c) Uses any information obtained in their capacity as a public official; and 2. With the intention of: a) Dishonestly obtaining a benefit for themselves or another person; or b) Dishonestly causing a detriment to another person.	7 years imprisonment
s178 (2)		1. A person; 2. Ceased to be a public official in a particular capacity; 3. Uses any information obtained in their capacity as a public official; and 4. With the intention of: a) Dishonestly obtaining a benefit for themselves or another person; or b) Dishonestly causing a detriment to another person.	
s179	Embezzlement	See "Fraud" table above	7 years imprisonment
s183	Unwarranted demand on public official	A person commits an offence, if: a) the person makes an unwarranted demand with a threat of a public official; b) the demand is directly or indirectly related to: i) the official's capacity as a public official; or ii) the influence the official has as a public official; and c) the person makes the demand with the intention of: i) obtaining a gain or causing a loss; or ii) influencing the exercise of the officials public duties	12 years imprisonment

Cases

Republic v Ngai Sau-Chun [1978] NRDC 2; Criminal Case 192 of 1978 (1 January 1978)

Matter Criminal

Jurisdiction District Court of Nauru

Coram Resident Magistrate – R. L. De Silva

Date of Verdict 1 January 1978

Summary Madam Ngai (accused) caught in the act of selling a packet of cigarettes to a customer and giving a constable $40 to induce him not to report the incident. She was charged for the following:

1. Official corruption under s87(2) of the *Criminal Code Act 1899* of Queensland (Adopted).
2. Trading without a licence.

In determining whether the accused had committed official corruption against the state of Nauru, the following elements were to be satisfied beyond reasonable doubt:

1. The accused;
2. Gave $40 to the constable;
3. With the intention of inducing the constable to not report the crime;
4. Under corrupt capacity.

These issues could be translated to the following:

1. A person;
2. Provides or offers pecuniary benefit to a public official;

With the intention to induce a benefit or interest of their own or for another.

Decision — Found guilty and convicted of both counts for official corruption to induce a constable to not report the crime and for trading without a license.

Republic v Batsiua - Sentence [2019] NRSC 48; Criminal Case 12 of 2017, Criminal Case 08 of 2018 (11 December 2019)

Matter — Criminal

Jurisdiction — Supreme Court of Nauru

Coram — Justice D. V. Fatiaki

Date of Verdict — 11 December 2019

Summary — Five parliamentarians filed legal actions in the Supreme Court of Nauru (unsuccessfully) to challenge their suspension from Parliament.

Later, the supporters of the parliamentarian led a riot in front of the Parliament building to protest in support of the suspended MPs.

Decision — Guilty verdicts were given to the defendants for counts 2-11.

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
Anti-Money Laundering and Targeted Financial Sanctions Act 2023			
s4	Definition – Money Laundering	1. To deal or dealing with property with the knowledge that it is criminal property.	
s9	Offence of money laundering	1. A person; 2. Shall not engage in money laundering.	20 years imprisonment; $500,000 fine If a body corporate, $2,500,000 fine
s10	Offence of dealing with property reasonably suspected to be criminal property	1. A person; 2. Shall not deal with property; 3. Reasonable to suspect it is criminal property[145].	5 years imprisonment; $60,000 fine If a body corporate, $300,000 fine.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[145] Conditions of reasonable suspicion of criminal property under s10(3):
(3) Without limiting subsection (1), it is reasonable to suspect that property is criminal property where:
dealing with the property involves a number of transactions that are conducted to avoid reporting obligations under this Act or any other written law;
dealing with the property involves using one or more accounts maintained in false names;
the value of the property involved is grossly disproportionate to the person's lawful income and expenditure over a reasonable period of time within which the conduct occurs;
dealing with the property involves a transaction to which reporting obligations attach under Section 59 or 62 or which exceeds the threshold for the reporting obligation under this Act;
dealing with the property involves an importation or exportation which is required by law to be reported.

Proceeds of Crime

Offence Element Table Offences

No legislation or sections identified.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Provisions Tables

Summary Table: Proceeds of Crime, Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
	Proceeds of Crime Act 2004	
s2	Objectives of the Act	1. To deprive persons of the proceeds of, and benefits derived from the commission of serious offences; and 2. Provide for the forfeiture of property used in, in connection with, or for facilitating, the commission of serious offences; and 3. To enable law enforcement authorities to trace those proceeds, benefits and property.
s3	Definition – Proceeds	1. Property into which any property derived or realised directly from a serious offence; 2. Later successively converted, transformed or intermingled, as well as income, capital or other economic gains; 3. Derived or realized from such property at any time since the commission of the offence; 4. Whether the property is situated in Nauru or elsewhere.
s11	Application for forfeiture order or pecuniary penalty order on conviction	1. A person convicted of a serious offence; 2. Secretary for Justice may apply to the Court; 3. A forfeiture order against tainted property; 4. A pecuniary order against the person for benefits derived by the person from the commission of the offence.
s15	Application for forfeiture order if person had absconded	1. Secretary for Justice may apply to the Court for a forfeiture order for any tainted property; 2. Within 6 months after the person absconds: a) An information has been laid alleging that a person committed the offence; and b) A warrant for the person's arrest is issued for that information; and c) The person absconds, if: i. Reasonable attempts to arrest the person under a warrant have been unsuccessful during the 6 months starting on the day the warrant is issued.
s23	Payment instead of forfeiture order	1. Court is satisfied; 2. A forfeiture order should be made against the property of a person; 3. But that property cannot be made subject to that order, in particular: a) cannot, with the exercise of due diligence, be found; or b) has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred to avoid the forfeiture of the property; or c) is located outside Nauru; or d) has been mingled with other property that cannot be divided without difficulty, the Court may, instead of ordering the property, part or interest to be forfeited, order the person to pay to the State an amount equal to the value of the property, part or interest.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
Mutual Assistance in Criminal Matters Act 2004		
The entire Act concerns Mutual Assistance, including the selected provisions below.		
s2	Objectives of the Act	1. To regulate the provision by the Republic of Nauru of international assistance in criminal matters when a request is made by a foreign country for the following: a) Taking evidence or the production of a document or other article, for a proceeding in the foreign country; b) The issue of a search warrant and seizure of any thing relevant to a proceeding or investigation in the foreign country; c) Forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country; d) Restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country.
s7	Requests by foreign countries for assistance generally	1. Request by a foreign country for international assistance in a criminal matter may be made to the Minister; 2. Made in writing or by e-mail and must include the following: a) Name of authority concerned with the criminal matter to which the request relates; b) Description of nature of the matter and statement setting out the summary of relevant facts and laws; c) Description of purpose of request and nature of assistant being sought; d) Any information that may assist in giving effect to the request. 3. Failure to comply to request requirements is not grounds for refusing request, but the Minister is not obliged to consider the request until requirements are complied with; 4. If foreign country makes a request to the Court for international assistance in a criminal matter: a) Court must refer the request to the Minister.
s10	Requests by Nauru for assistance with evidence	1. Minister may request the appropriate authority of a foreign country to arrange, for a proceeding or investigation in a criminal matter in Nauru, for: a) Evidence required from the foreign country under their law; or b) Document or other article in the foreign country to be produced under the law of that country. 2. The Minister may also request an opportunity for the person giving evidence, or producing the document or other article, to be examined or cross-examined, through a video or internet link, from Nauru by: a) Party to the proceeding, or the party's legal representative; or b) Person being investigated, or the person's legal representative.

s11	Requests by foreign countries for assistance with evidence	1. Upon request from the foreign country, the Minister may authorise: a) Taking of evidence; and b) Transmission of evidence to the requesting foreign country. 2. If the requesting country asks that a document or other article in Nauru be produced for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Minister may authorise: a) Production of document or articles; and b) Transmission to the requesting country.
s12	Taking evidence	1. Upon Minister's authorisation under s11(1), a Judge may take on oath, the evidence of each witness in the matter; and 2. Comply with the following: a) Evidence be in writing and certify that the Judge took the evidence; and b) Send the evidence and certificate to the Minister. 3. Evidence may be taken in the presence or absence of the person to whom the proceeding in the requesting country relates or in the presence r absence of their legal representative; 4. Certificated issued by a Judge must state whether, when the evidence was taken, any of the following persons were present: a) The person to whom the proceeding in the requesting country relates or their legal representative; b) Any other person giving evidence or their legal representative.
s14	Conduct of proceedings	1. Judge conducting a proceeding under ss11, 12, 13 may permit the following to have legal representation: a) The person to whom the proceeding in the requesting country relates; b) Any other person giving evidence or producing a document or other article at the proceeding before the Judge or Justice; c) The relevant authority of the requesting country. 2. If the requesting country noted, the Judge may permit examination or cross-examination, through a video or internet link from the country, of any person giving evidence or producing or other article at the proceeding by: a) Any person to whom the proceeding in the requesting country relates or by that person's legal representative; or b) The legal representative of the relevant authority of the requesting country.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition of Fugitive Offenders Act 1973	
The entire Act concerns Extradition, including the selected provisions below.		
s3	Persons liable to be returned	1. Person found in Nauru accused of a relevant offence in any foreign country designated under this Act; or 2. Is alleged to be unlawfully at large after conviction of such an offence in any such country; 3. May be arrested and returned to that country.[146]
s4	Designated countries	1. Cabinet may, by order published in the Gazette: a) Designate for the purposes of this Act any foreign country as a designated country; b) Direct that this Act shall have effect regarding return of persons to, or returned from, any designated country subject to such exceptions, adaptation, or modifications as may be specified in the order; 2. Any territory for the external relations of which any foreign country is responsible may be treated as part of the country, or if the Government of that country requests, as a separate foreign country; 3. No order shall be made in respect of any foreign country unless that country has made, or agreed to make, substantially similar provision for the arrest in that country and the return to Nauru of persons who are accused of relevant offences.[147]

[146] Under subsection (2), the following is to be noted:

Save as is from time to time provided by any written law relating to the control of the entry into, or the residence in, Nauru of persons who are not Nauruans or to the expulsion from Nauru of undesirable persons, no person shall be arrested in Nauru and returned to any foreign country otherwise than in accordance with provisions of this Act:

Provided that nothing in this Act shall render unlawful the arrest of any person, not being a Nauruan citizen, on a ship of a foreign country on the high seas within the territorial waters of Nauru for an offence committed on that ship and his removal from Nauru on that ship otherwise than in accordance with the provisions of this Act, if such arrest and removal are otherwise lawful.

[147] *Provided that, notwithstanding that the provision made, or agreed to be made, by any foreign country for the return of offenders to Nauru does not relate to all the relevant offences prescribed in the Schedule to this Act, an order may be made in respect of that country if such provision relates to some of those offences and the Cabinet considers it reasonable in all the circumstances to make the order and, where any such order is made, it may provide that this Part of this Act is to apply to the return of offenders to that country as though one or more of the offences prescribed in the said Schedule, to be specified in the order, were not so prescribed.*

s5	Relevant offences	1. An offence of which a person is accused or has been convicted in a designated country is a relevant offence if: a) The offence falls within any of the descriptions set out in the Schedule to this Act and is punishable under the law with imprisonment for a term of 12 months or any greater punishment; and b) The act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Nauru if it took place within Nauru or, in the case of an extra-territorial offence, in corresponding circumstances outside Nauru. 2. The law of a designated country falls within a description set out in the said Schedule, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded; 3. Descriptions in the Schedule include in each offences of attempting or, conspiring to commit, of assisting, counselling or procuring the commission of, or being an accessory before or after the fact to, the offences therein described, and of impending the apprehension or prosecution of persons guilty of those offences.[148]
s6	General restrictions on return	1. Person shall not be returned to a designated country, or committed to or kept in custody for the purposes of such return, if it appears to the Minister, to the District Court in the committal proceedings or the Supreme Court on an application for habeas corpus or for the review of the committal order: a) The offence is of a political character; b) Request of return is made for the purpose of prosecuting and punishing on account of race, religion, nationality, or political opinions; or c) Upon return, be prejudiced at trial or punished, detained, or restricted in personal liberty by reason of race, religion, nationality or political opinions. 2. Person shall not be returned or be kept in custody if: a) It appears as aforesaid that if charged with that offence in Nauru, the accused would be entitled to be discharged under any rule of law relating to previous acquittal or conviction. 3. Person shall not be returned or kept in custody unless, provision is made by the law of that country or by arrangement for securing the accused will not, until first been restored or had the opportunity of returning to Nauru, be dealt with in that country for or in respect of any offence committed before return.[149] 4. Any such arranged mentioned above requires a certificate issued by or under the authority of the Minster confirming the existence of an arrangement with any country and stating its term shall be conclusive evidence of the matters contained in the certificate.

[148] References in this section to the law of any country includes references to the law of any part of that country.
[149] Other than for the following:
The offence in respect of which his return under this Act is requested;
Any lesser offence proved by the facts proved before the District Court in the committal proceedings; or
Any other offence being a relevant offence in respect of which the minister may consent to his being so dealt with.

s7	Authority to proceed	1. Person shall not be dealt with except in pursuance of an order of the Minister, to proceed on behalf of the Government of the designated country in which the person to be returned is convicted or accused; 2. The following must be included: a) An arrest warrant for the accused in the requesting country; b) For a person convicted person, a certificate of conviction an sentence in the requesting country, and a statement of the amount, if any, of that sentence which has been served, alongside particulars of the facts and law upon which they were accused or convicted, and evidence sufficient to justify the issue of a warrant for their arrest under s8. 3. Upon request, Minister may issue an authority to proceed unless it appears to hire that an order for the return could not be lawfully made, or would not be in accordance with provisions of this Act.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Palau

Elements of Offences and Case Law

Palau

The legal system of Palau refers its common law to the rules and principles of the United States of America due to its historical ties and the development of the nation post-independence. Historically, like other Pacific countries and islands, Palau was under Spanish colonisation, followed by Japanese occupation during World War II, whereby after the war, Palau was made part of the United Nations Trust Territory under the jurisdiction of the United States of America.

In 1994, Palau gained independence and created the Constitution and the Palau National Code. Section 8 of Palau's Constitution requires that members of the judiciary be "admitted to practice law before the highest court of a state or country in which he is admitted to practice for at least five (5) years preceding his appointment". Due to limited opportunities in Palau to meet the requirements of the Constitution, it continues to rely on externally trained legal professionals to make up their judiciary, most of whom are from American backgrounds.

Importantly, section 303 of the Palau National Code states that "judges and justices shall adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule". This underlines Palau's continued links to the American legal system and legislature to navigate its own legal system following post-independence.

Judges are provided with the discretion to determine the most suitable and applicable law and principle dependent on the circumstances of the case at hand. However, the combination of Palau's history, geopolitical relationships, and the makeup of its legal systems are heavily influenced by the American common law.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 2600	Theft	1. A person (a) Obtains or exerts unauthorised control over property with intent to deprive the other person of the property; or (b) Obtains, or exerts control over, the property of another by deception with intent to deprive the other of the property; or (c) Obtains, or exerts control over, the property of another that the person knows to have been lost of mislaid or to have been delivered under a mistake as to the nature or amount of the property the identity of the recipient, or other facts, and, with the intent to deprive the owner of the property, the person fails to take reasonable measures to discover and notify the owner; or (d) Intentionally obtains services, known by the person to be available only for compensation, by deception, false token, or other means to avoid payment for the service. When compensation for services is ordinarily paid immediately upon the rending of them, absconding without payment or offer to pay is prima facie evidence that the services were obtained by deception; or (e) Having control over the disposition of services of another to which a person is not entitled, the person intentionally diverts those services to the person's own benefit or to the benefit of a person not entitled; or (f) Failure to make required disposition of funds.	See ss2601s 2601-2604
s 2601	Theft in the first degree	1. A person commits the offense of theft in the first degree if the person commits theft of property or services, the value of which exceeds twenty thousand dollars ($20,000); 2. Theft in the first degree is a class B felony.	
s 2602	Theft in the second degree	1. A person commits the offense of theft in the second degree if the person commits theft: (a) Of a property from the person of another; (b) Of property of services the value of which exceeds three hundred dollars ($300). … 2. Theft in the second degree is a class C felony	
s 2603	Theft in the third degree	1. A person commits the offense of theft in the third degree if the person commits theft of property or services the value of which exceeds one hundred dollars ($100) 2. Theft in the third degree is a misdemeanour.	

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 2604	Theft in the fourth degree	1. A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of one hundred dollars ($100). 2. Theft in the fourth degree is a petty misdemeanour.	
s 2605	Defences: unawareness of ownership; claim of right; household belongings; co-interest not a defence	1. It is a defence to a prosecution for theft that the defendant: (a) Was unaware that the property or service was that of another; or (b) Reasonably believed that the defendant was entitled to the property or services under a claim of right or that the defendant was authorized, by the owner or by law, to obtain or exert control as the defendant did.	
s 2614(a)	Theft of Government property in the first degree	1. A person 2. Intentionally or knowingly embezzles, steals, purloins, converts, sells, conveys or disposes of any money, funds or thing of value of the national government of the Republic, its political subdivisions, state or municipal governments, or of any ministry bureau or agency thereof; 3. or whoever receives, conceals, or retains the same with intent to convert it to their use of gain, knowing it to have been embezzled, stolen, purloined or converted.	See s 2614(b)
s 2614(b)	Theft of Government property in the first degree	1. Theft of government property is a class C felony if the value of the government property is three hundred dollars ($300) or less. 2. Theft of government property is a class B felony if the value of the government property is more than three hundred dollars ($300) but less than twenty thousand dollars ($20,000). 3. Theft of government property is a class A felony if the value of the government property is twenty thousand dollars ($20,000) or more.	
s 2615	Theft of government property in the second degree	1. A person 2. Without proper authority 3. Intentionally or knowingly possesses or removes from its location any property of any kind, wherever situated, of the government of the Republic, its political subdivisions, states or municipal governments.	Misdemeanour

Cases

Elidchedong v Maui [2023] PWSC 2

Matter	Civil – Appeal
Jurisdiction	Supreme Court of the Republic of Palau (Appellate Division)
Coram	Chief Justice Ngiraklsong, Associate Justice Salii, Associate Justice Foster
Date of Verdict	4 January 2023
Summary	Fraud of Land Title

In the civil context, the Court noted that fraud has a very specific and narrow meaning requiring proof that a 'defendant intentionally misrepresented or conceal a material fact to a person'.[150] Secondly, a victim must establish that the defendant intended that the victim would rely on the false statement of material fact or omission.[151] Third a victim must establish that they reasonably relied on the misrepresentation; however, if they knew this statement was false or it was obviously false, the defendant has an absolute defence. Finally, the victim must show that, because of their reliance on the misrepresentation or omission, the victim was actually damaged and suffered harm.[152]

Ngeluk v Republic of Palau [2023] PWSC 26

Matter	Civil – Appeal
Jurisdiction	Supreme Court of the Republic of Palau (Appellate Division)
Coram	Chief Justice Ngiraklsong, Associate Justice Rechucher, Associate Justice Isaacs
Date of Verdict	21 July 2022
Summary	Theft of Government Property

The Court noted the relevant elements of the office as:

> *"intentionally or knowingly embezzl[ing], steal[ing], [or] . . . convey[ing] . . . any . . . thing of value of the national government . . . or of any ministry, bureau or agency thereof."*

Additionally, the Court described that a person acts intentionally when it is their conscious object to engage in such conduct, and knowingly when they are aware of the nature of their conduct.[153]

This was evident in this case where the accused was not forthcoming about items that were in their possession which was circumstantial evidence sufficient to demonstrate that there was intent to deprive persons of the government property.[154]

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[150] *Elidchedong v Maui* [2023] PWSC 2 citing *Beches v Sumor* (2010) 17 ROP 266, 272; *Obichang* 16 ROP at 213.
[151] Ibid citing *Beches Sumor* (2010) 17 ROP 266, 273.
[152] *Elidchedong v Maui* [2023] PWSC 2 citing *Lebelak* 13 ROP at 154; *Obichang* 16 ROP 212-14.
[153] Ngeluk v Republic of Palau [2023] PWSC 26, [8] citing Tulop v Republic of Palau [2021] PWSC 9, 33.
[154] Ibid [11].

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 4100(a)(1)	Bribery	1. A person 2. Confers or offers or agreed to confer, directly or indirectly,[155] 3. any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in the public servant's official capacity	Class B felony
s 4100(a)(2)	Bribery	1. A public servant[156] 2. Solicits, accepts, or agrees to accept, directly or indirectly, 3. any pecuniary benefit with intent that the person's vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.	Class B felony

Cases

***Republic of Palau v Yi* [2018] Criminal Case No. 18-223**

Matter Criminal

Jurisdiction Supreme Court of Palau

Coram Justice Oldiais Ngiraikelau

Date of Verdict 31 December 2018

Summary Bribery of a police officer.

This case concerned the bribery of a police officer contrary to s 4101 of the *Penal Code* after having been caught speeding to ignore the driving violation. Relevant elements of the offence that were proven to demonstrate guilt were that the defendant attempted to confer a pecuniary benefit upon a public servant in order to influence their exercise of discretion.

***Republic of Palau v Miah* [2018] Criminal Case No. 17-181**

Matter Criminal

Jurisdiction Supreme Court of Palau

Coram Associate Justice Lourdes F. Materne

Date of Verdict 15 January 2018

Summary Plea settlement.

This case was settled by a plea negotiation. Before reaching agreement, the prosecution submitted that the elements of the offence for a charge of bribery under s 4101 of the *Penal Code* were that the accused offered, agreed or conferred, directly or indirectly, a pecuniary benefit upon a public servant, the intent to influence their discretion.

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[155] It is a defence under s4100(b) for the conferral or agreement to confer a pecuniary benefit to be as a result of extortion or coercion.
[156] Under s4100(d), 'public servant' is taken to mean any person occupying a position as defined in 17 PNC section 3800, as well as persons who have been elected, appointed, or designated to become a public servant although not yet occupying that position.

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 3917	Misconduct in public office	1. A person being in public office 2. Does any illegal acts under the colour of office, or who wilfully neglects to perform the duties of their office as provided by law	Class B felony

Cases

Gibbons v Republic of Palau [2023] PWSC 27

Matter Criminal – Appeal

Jurisdiction Supreme Court of the Republic of Palau (Appellate Division)

Coram Chief Justice Ngiraklsong, Associate Justice Isaacs, Associate Justice Castro

Date of Verdict 15 December 2023

Summary Misconduct in Public Office

The Court discerned the relevant elements of misconduct in public office as follows:

Under the Penal Code, a public official commits misconduct **in** public office when he:

1) "does any illegal act under the color of office" or

2) "willfully neglects to perform the duties of his . . . office as provided by law." 17 PNC s 3918.

The first clause of the statute entails three elements: 1) status as a public official, 2) an illegal act, and 3) committing such act under the color of office. Uehara v. Republic of Palau, 17 ROP 167, 177 (2010); Kotaro v. Republic of Palau, 7 ROP Intrm. 57, 60 (1998).[157]

It is a prerequisite of demonstrating misconduct that there is in fact proof of an 'illegal act'.[158] In this case, the prosecution merely asserted that a procurement law of Palau was breached but could not go as far as to actually demonstrate what specific law was breached.

***Republic of Palau v Rechelulk* [2015] Criminal Case No. 14-176**

Matter Criminal

Jurisdiction Supreme Court of Palau

Coram Associate Justice R. Ashby Pate

Date of Verdict 23 February 2015

Summary Misconduct of Public Office

[157] Gibbons v Republic of Palau [2023] PWSC 27, [8].
[158] Ibid [14].

The prosecution put forward the following elements to demonstrate that the accused had committed misconduct in public office. The accused having:

- under the colour of office
- wilfully neglected to perform the duties of their office as provided by law
- by accepting a bribe to perform fundings under Palau law contrary to their intended purpose.

Republic of Palau v Clifton Soalablai and Margie Ngirmidol **Criminal Case No. 19-066 (4 June 2019)**

Matter Criminal

Jurisdiction Supreme

Coram Justice Oldiais Ngiraikelau

Date of Verdict 4 June 2019

Summary Money laundering

This case is referred to in the context of money laundering below. The ultimate result of the prosecution case was a plea agreement between the parties. The prosecution in its pleadings outlined the elements for theft of government property in the context of the case as:

> *'intentionally or knowingly embezzling, stealing, purloining, converting, conveying, o disposing of money, funds, or thing of value to the national government of the Republic, or when the accused received, concealed, or retained the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined or converted, by intentionally changing the deposit of a government check drawn on the national bank …'*

Similar arguments were brought forward in regard to the charge of misconduct in public office, requiring evidence of:

> *'the Defendant, being a public official, committed an illegal act under the color of office, or wilfully neglected to perform the duties of his office as provided by law, when [the accused], an police officer and employee of the national government, intentionally altered the deposit of a government check drawn on the National Treasury of Palau …'*

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 3301	Money laundering	1. A person 2. Knowingly, suspecting or having reasonable grounds to suspect that property is the proceeds of crime (a) Acquires, possesses or uses such property (b) Conceals or disguises the true nature, source, location, disposition, movement, ownership or any rights with respect to such property (c) Converts, transfers or engages in a transaction of such property, or (d) Enters into or becomes concerned in an arrangement with the intention to facilitate, by whatever means, the acquisition, retention, use of control of such property	Twice the amount laundered, twice the value of the benefit derived by the commission of the offense or $500,000 (whichever is greater). Class A felony
		Money Laundering and Proceeds of Crime Act 2001	
s 3	Definition of money laundering (strictly for the purposes of this Act)	1. The conversion or transfer of property for the purpose of concealing or disguising the illegal origin of such property or 2. The concealment of disguise of the illegal nature, source, location, disposition, movement, or ownership of property or 3. The acquisition, possession, or control of property by any person who knows that the property constitutes the proceeds of crime as defined herein.	See s 29
s 29	Money laundering penalties	1. Any natural person convicted of violating section 3 as a principal shall be fined not less than US $5,000.00, nor more than double the amount laundered or attempted to be laundered, whichever is greater, or imprisoned for not more than ten years, or both. Any natural person convicted for being an accessory to a violation of section 3 shall be punished pursuant to 17 PNC 103. Any natural person convicted of attempting to violate section 3 shall be punished pursuant to 17 PNC 104. Any natural person found guilty of aiding and abetting a violation of section 3 shall be punished pursuant to 17 PNC 102. Any natural person found guilty of conspiracy to violate section 3 shall be punished pursuant to 17 PNC 901.	

Cases

Gideon v Republic of Palau [2013] PWSC 17

Matter Criminal – Appeal

Jurisdiction Supreme Court of the Republic of Palau (Appellate Division)

Coram Associate Justice Salii, Associate Justice Materne, Associate Justice Ashby Pate

Date of Verdict 21 May 2013

Summary Money Laundering

The initial proceeding found that there was in fact money laundering as stolen money was used to make purchases. The Court provided a reasonable summary of the primary judgment as follows:

> **Money laundering is** defined as *"the conversion or transfer of property for the purpose of concealing or disguising the illegal origin of such property or assisting any person who is involved in the commission of a predicate offense to evade the legal consequences of his or her actions."* 17 PNC s 3802(a).
>
> *"Knowledge, intent, or purpose is required as an element of the offense of money* ***laundering and*** *may be inferred from objective factual circumstances."* 17 PNC s 3802(b).

The Trial Division found that Gideon "transferred property (money to his wife, his brother, Bank Pacific, Surangel's) for the purpose of concealing the illegal origin of that money." We reluctantly disagree.

The Appeal Court noted that to accept this definition of money laundering, any use of stolen money would count as money laundering which is not the intended purpose of the provision.

Simply using stolen money to purchase things does not amount to attempting to conceal the illegal origins of the money.

***Republic of Palau v Eudora Lucio* Criminal Case No 16-167 (20 December 2016)**

Matter Criminal

Jurisdiction Supreme Court of Palau

Coram Justice Oldiais Ngiraikelau

Date of Verdict 20 December 2016

Summary Money laundering – plea agreement.

Although it was the case that the parties to this proceeding reach a plea agreement, the prosecutions pleadings are useful for understanding the elements in which the prosecution must prove on a charge of money laundering. The pleadings stated that an accused must:

> *'… knowing, suspecting or having reasonable grounds to suspect that property, namely, monies collected by the Bureau of Customs and Border Protection (and its predecessor governmental entity) at Palau International Airport in satisfaction of the departure tax and*

green fee levied on departing passengers, was the proceeds of a crime, namely, theft of government property,

- *Acquired, possessed or used such property;*
- *Concealed or disguised the true nature, source, location disposition, movement, ownership or any rights with respect to such property; or*
- *Converted, transferred or engaged in a transaction of such property; or*
- *Entered into or became concerned in an arrangement with the intention to facilitate, by whatever means, the acquisition, retention, use or control of such property …'*

Proceeds of Crime

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code of the Republic of Palau	
s 3916	Securing the proceeds of an offense	1. A person 2. With intent to assist another in profiting or benefiting from the commission of a crime 3. Aids a person in securing the proceeds of the crime	Class C felony is they assisted in a class A or B felony or murder of any degree. Otherwise it is a misdemeanour

Cases

There are no cases available on PacLII or the Court website for proceeds of crime related cases. The case referred to below was provided by Palau on request of the document.

Republic of Palau v Clifton Soalablai and Margie Ngirmidol **Criminal Case No. 19-066 (4 June 2019)**

Matter Criminal

Jurisdiction Supreme Court of Palau

Coram Justice Oldiais Ngiraikelau

Date of Verdict 4 June 2019

Summary Theft of government property, money laundering, and misconduct in public office.

This case considered three charges including theft of government property, money laundering, and misconduct in public office. The allegations brought by the Special Prosecutor in regard to the charge of money laundering outlined the requirements for the accused to have

> *'… knowingly, suspecting, or having reasonable grounds to suspect that money or funds belonging to the Republic of Palau were the proceeds of crime after said money or funds were stolen and deposited into the accused account by acquiring, possessing or using such property, or converting, transferring, or engaging in a transaction of such property.'*

The accused subsequently entered into a plea agreement with the prosecution.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
		PNCA Chapter 33 Money Laundering Act
ss 32	Confiscation	In the event of a conviction for actual or attempted money laundering, an order shall be issued by the Supreme Court for the confiscation of the property forming the subject of the offense, including income and other benefits obtained therefrom, against any person to whom they may belong, if it can be established that the owner was not a bona fide purchaser for value or did not acquire the property in return for the provision of services corresponding to its value or the owner did not acquire the property on any other legitimate grounds. If the government can establish beyond a reasonable doubt the connection between such evidence and the offense, an order may additionally be issued for the confiscation of the property of the convicted offender to the enrichment obtained by him or her during a period of three years preceding his or her conviction. The confiscation order shall specify the property with particularity and contain the necessary details to identify and locate it.
ss 33	Confiscation or property of criminal organizations	In the event the Supreme Court has determined beyond a reasonable doubt, property over which a criminal organization has power of disposal, that property shall be confiscated if there is a judicial determination beyond a reasonable doubt of a connection between that property and an offense under section 3.
		Penal Code of the Republic of Palau
s 704	Property subject to forfeiture	The following is subject to forfeiture: 1. Property described in a statute authorising forfeiture; 2. Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity; 3. Any firearm that is subject to forfeiture under any section of the PNC or that is visibly carried during, or used in furtherance of the commission, attempt to commit, on conspiracy to commit a covered offense, or any firearm found in proximity to contraband or to instrumentalities of an offence; 4. Contraband shall be seized and summarily forfeited to the Republic of Palau without regard to the procedures set forth in this chapter; 5. Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense; 6. Any property derived from any proceeds that were obtained directly or indirectly from the commission of a covered offense; 7. Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise that has been established, participated in, operated, controlled, or conducted in order to commit a covered offense; 8. All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
		Criminal Procedure – Title 18
The entire Subchapter II entitled "Mutual Assistance" (ss 1311-1322) is relevant, including selected provisions below.		
s1311(a)	Authority to make and act on mutual legal assistance requests	Consistent with the Palau Constitution, the Attorney General may make requests on behalf of the Republic to the appropriate authority of a foreign state for mutual legal assistance in any investigation commenced or proceeding instituted in the Republic, relating to any serious offense. The Attorney General shall make all such requests through the Minister of State of the Republic, submitting the name of the foreign state to which a request is being made, the nature of the request, and the nature of the criminal matter.
s1313	Mutual legal assistance requests by the Republic	The requests which the Attorney General is authorized to make are that the foreign state: 1. Have evidence taken, or documents or other articles produced; 2. Obtain and execute search warrants or other lawful instruments authorising a search for, and seizure of, relevant evidence; 3. Locate or restrain any property believed to be the proceeds of crime located in the foreign state; 4. Confiscate any property which is the subject of a confiscation order made under the Money Laundering and Proceeds of Crime Act of 2001; 5. Transmit to the Republic any such confiscated property or any proceeds realised therefrom, or any such evidence, documents, articles or things; 6. Transfer in custody to the Republic a person who consents to assist the Republic in the relevant investigation or proceedings; 7. Provide any other form of assistance that involved or is likely to involve the exercise of a coercive power over a person or property; or 8. Permit the presence of nominated persons during the execution of any request made under this chapter.
s1315	Foreign requests for an evidence-gathering order or a search warrant	An authorized person of the foreign state may apply to the Supreme Court for a search warrant or an evidence-gathering order. The Supreme Court may issue an evidence-gathering order or a search warrant where there is probable cause to believe that: 1. a serious offense has been or may have been committed against the laws of the foreign state; i. evidence relating to that offense may: A. be found in a building, receptacle or place in the Republic; or B. be able to be given by a person believed to be in the Republic; ii. in the case of an application for a search warrant, it would not, in all the circumstances, be more appropriate to grant an evidence-gathering order.
s1316	Foreign requests for consensual transfer of detained persons	Where the Attorney General approves a request of a foreign state to have a person who is detained in the Republic by virtue of a sentence or court order transferred to a foreign state to give evidence or assist in an investigation or proceeding in that state relating to a serious offense, an authorized person may apply to the Supreme Court for a transfer order. The Supreme Court may order the transfer of a detained person if after any documents filed or information given establishes that the detained person consents to the transfer.

Section	Description	Provisions
s1317(a)	Detention of persons transferred to the Republic	The Attorney General may by written notice authorize: 1. the temporary detention in the Republic of a person in detention in a foreign state who is to be transferred to the Republic pursuant to a request under section 1313(f), for such period as may be specified in the notice; and 2. the return of the person to the custody of the foreign state when his or her presence is no longer required.
s1319	Foreign requests for Republic restraining orders	Where a foreign state requests the Attorney General to obtain a restraining order against property, except clan, lineage, or family land, or any interest held by a legitimate bona fide purchaser or owner without notice of an illegal interest in the property; and where criminal proceedings have begun in the foreign state in respect of a serious offense; and there is probable cause to believe that the property relating to the offense or belonging to the defendant or the defendant's co-conspirators is located in the Republic; the Attorney General may apply to the Supreme Court for a restraining order.
s1321	Foreign requests for the location of proceeds of crime	Where a foreign state requests the Attorney General to assist in locating property believed to be the proceeds of a serious crime, the Attorney General may authorize any application of the Money Laundering and Proceeds of Crime Act of 2001, for the purpose of acquiring the information sought by the foreign state.
s1322	Sharing confiscated property with foreign states	The Attorney General may enter into an arrangement with the competent authorities of a foreign state, in respect of money laundering and proceeds of crime, for the reciprocal sharing with that state of such part of any property realized in the foreign state as a result of action taken by the Attorney General or in the Republic as a result of action taken in the Republic.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
		Extradition and Transfer Act 2001
The entire Act concerns Extradition, including the selection of pertinent provisions below.		
s 5(a)	Extraditable offenses	An extraditable offense which occurred in the requesting country and is or would be a criminal offense under the laws of both the requesting country and the Republic or the receiving country and the transferring country, or their pollical subdivisions, punishable by imprisonment or other deprivation or liberty for over one year.
s 6	Extradition objections	An extradition objection arises automatically where: 1. the offense is a political offense; 2. substantial grounds suggest that the prosecution or punishment is due to race, religion, nationality, political opinion or affiliation, gender, or status, or that the proceedings are prejudiced because of any of these factors; 3. the offense arises under a foreign state's military law but is not a criminal offense in the Republic; 4. the person has been convicted of the offense in the Republic and has not escaped or breached any condition of release; 5. the person is immune from prosecution or punishment due to lapse of time, amnesty, or any other reason under the requesting country's laws; 6. the person has been acquitted, pardoned, or duly punished for the offenses, in the Republic or the foreign state; 7. judgment was entered in the person's absence, and the requesting country's law does not entitle the person to raise any defences upon his or her return; 8. a prosecution for the offense is pending in the Republic; 9. the offense was not committed in the requesting country and the Republic has no jurisdiction over that offense committed in similar circumstances outside of the Republic; 10. the offense was committed, even partially, within the Republic, and the Attorney General confirms that prosecution will be instituted; 11. the offense is punishable by death, and there are insufficient assurances that the death penalty will not be imposed or carried out; 12. the person is likely to be tried or sentenced by a court not authorized by law; 13. the person is likely to be subjected to torture or cruel and inhumane treatment or punishment, including inhumane prison conditions. Conditions in countries that have acceded to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment adopted on December 10, 1984, or the International Covenant on Civil and Political Rights, adopted on December 16, 1966, are presumed humane, but can be rebutted by clear and convincing evidence. 14. If the requesting government is either authoritarian in nature or non-democratic in form, no citizen of Palau or person of Palauan ancestry shall be extradited to that country. 15. If the offense is punishable by death, no citizen of Palau or person of Palauan ancestry shall be extradited to that country

Section	Description	Provisions
s 7	Obligation to extradite	1. When surrender of a person who is not a Palauan citizen or national or of Palauan ancestry is sought for an extraditable offense and where the requirements of this Act have been satisfied and no valid and legally sustainable extradition objections preclude surrender, the Republic as an obligation to extradite the person. 2. Neither the Republic nor any extradition country shall be bound to extradite its own citizens or national, but may grant extradition if, in the discretion of the court, after notice to the party sought to be extradited and a hearing, extradition is deemed proper, If the requested government denies extradition solely on the basis of citizenship or nationality, it shall submit the case to its competent authorities for purposes of prosecution.
s 9	Extradition requests	1. Requests shall be made in writing, in the English language, and be accompanied by the necessary supporting documents. 2. Upon receipt of the extradition request, the Minister of Justice or his or her designee shall notify the President, review and consider the request, determine whether the request meets this Act's requirements, and promptly communicate the determination to the requesting country, providing a written statement of any deficiencies in the request.

Cases

In the Matter of the Extradition of Andy Lee **[SP 05-003]**

Matter Extradition

Jurisdiction Supreme Court of the Republic of Palau

Coram Associate Justice Larry W. Miller

Date of Verdict 29 March 2005

Charge/s Alien Smuggling and Conspiracy to Commit Alien Smuggling (people smuggling)

Summary The United States had made a request for extradition of Andy Lee to face charges on indictment of Alien Smuggling and Conspiracy to Commit Alien Smuggling in the United States District Court at Guam. The Supreme Court in Palau found that the defendant was extraditable and there was no legally sustainable ground to deny the application for extradition and surrender pursuant to section 22 of the *Extradition and Transfer Act 2001*, RPPL 6-5 (the Act).

The defendant was detained in custody as he was a citizen of the Republic of China (Taiwan) with no ties to the Republic of Palau, and he was alleged to have operated a people smuggling scheme. Lee was committed to the custody of the Director of the Bureau of Public Safety pending his transfer to the United States.

In the Matter of the Extradition of Pasquana Ginn **[CA 04-029]**[159]

Matter Extradition

Jurisdiction Supreme Court of the Republic of Palau

Coram Chief Justice Arthur Ngiraklsong

Date of Verdict 28 January 2004

Charge/s Money Laundering Conspiracy

Summary The extradition treaty in force between the Republic of Palau and the United States, the *Agreement on Extradition, Mutual Assistance in Law Enforcement Matters and Penal Sanctions Concluded Pursuant to Section 175 of the Compact of Free Association* (the Compact), was signed in Palau on 10 January 1986. The treaty provides for the extradition and transfer of fugitives of justice between Signatory Governments.

Pursuant to the treaty, the Government of the United States lodged a formal request by Diplomatic Note sent to the Ministry of the State of the Republic of Palau via the United States Embassy in Koror, for the provisional arrest, detention and extradition of Mrs Paquana Ginn from Palau to the United States of America. A Magistrate Judge issued a warrant of arrest in the US District Court on 25 September 2003. Mrs Pasquana Ginn had been charged with money laundering conspiracy in violation of federal law. The maximum penalty for the offence in the United States was said to be a term of 20 years imprisonment and a fine of not more than $500,000, or twice the value of the funds involved, or both. That offence was an "extraditable offense" as provided for in Articles II (1) and by Items 1, 14 and 26 of the schedule of offenses annexed to the treaty.

Mrs Ginn and her husband Jep Benjamin Ginn ran two businesses in the United States. It was alleged that Mr and Mrs Ginn participated in a money laundering conspiracy that resulted in income tax evasion. It was alleged that Mrs Ginn aided her husband by funnelling money to other countries such as the Republic of the Philippines, and that she did this for the purpose of tax evasion. They had not reported any taxable income for the years 1998-2000. In support of the Request for Provisional Arrest and Extradition, the US authorities provided information that indicated electronic transfers of a total of USD $657,000 out of the US over about 18 months, and a further USD $124,500 in total of cheques drawn by the couple in approximately 6 months. There was also evidence of large cash transfers and "structuring" to avoid triggering currency transaction reporting requirements. Mrs Ginn was in the jurisdiction in Koror, Palau.

The Supreme Court of Palau issued a Provisional Arrest Warrant for Mrs Ginn on 28 January 2004 and she was arrested and remanded in custody. She applied for bail pending the extradition hearing. The parties disagreed as to whether Mrs Ginn was entitled to bail. Legal representatives for Mrs Ginn argued that the wording of the provision does not mean that a person arrested or detained must necessarily be confined to prison:

> *"The proceedings against the persons arrested or detained shall be terminated and that person discharged upon expiration of forty-five days, unless otherwise agreed, from the date of arrest or detention pursuant to such application if the request for extradition referred to in Article Vi of Title Two of this Agreement is not received by the requested Government."*

[159] Unreported but may be provided upon request to the Republic of Palau.

The Attorney-General (acting for Republic on behalf of the United States) responded that the learned counsel for Mrs Ginn had misconstrued the Attorney-General's position on bail. The position was not that bail was not possible because that Article VI of the Compact requires the detention of a person arrested for criminal extradition purposes and that they are not eligible for release on bail for a minimum of 45 days. The position was that, as per the Palau Constitution Article IV, section seven, "bail may not be unreasonably excessive nor denied those accused and detained before trial." The Constitutional position is that bail cannot be unreasonably excessive or unreasonably denied. In this case the Attorney-General argued that bail ought to be denied as there is good reason – the defendant had a strong reason to flee to escape extradition to the United States.

On 30 January 2004, the learned Chief Justice, "without deciding the legal issues", determined that the defendant, who had just returned to Palau from the State of Virginia, should be detained without bail pending extradition hearing.

On 12 February 2004 the defendant filed an Affidavit of Waiver of Extradition, asking the Court to expedite her extradition in custody to the United States of America, consenting to be extradited without undergoing formal proceedings, and agreeing to be released into the custody of the United States Marshalls. The Court issued a Release Order on the same day, releasing the defendant into the custody of the United States' State Marshals.

Elements of Offences and Case Law

Papua New Guinea

Papua New Guinea became a British colony in 1888 and was placed under the authority of the Commonwealth of Australia in 1902 until its independence in 1975.

The laws of Papua New Guinea consist of the Constitution, the Organic Laws, the Acts of the Parliament, Emergency Regulations, the provincial laws, laws made under or adopted by or under the Constitution or any of those laws, including subordinate legislation, and the underlying law, and none other: s 9, Constitution.

The underlying law is the customary law and the common law in force in England immediately prior to independence. The common law shall not be applied unless it is consistent with the Constitution and any other written law, is applicable and appropriate to the circumstance of the country, and consistent with the customary law: s 4(3), Underlying Law Act, 2000.

Papua New Guinea's Criminal Code Act, 1975 was modelled on that of Queensland at the time and has since been amended. There is a large body of case law which has developed the criminal law, practice and procedure of Papua New Guinea. Consideration may be given to persuasive authorities from other common law jurisdictions, in particular England and Australia, on novel issues. The Criminal Practice Rules, 2022 govern practice and procedure in the National Court. The Rules make special provision for fraud and corruption cases. The Rules may be found online together with other resources, including the Judgment Writing Handbook.

Division 2 of the Constitution contains Division III.2, the Leadership Code, which outlines the duties and responsibilities of all "leaders" as defined under the Code in both their public and private lives, and for which failure to comply constitutes misconduct in office. The Code is not a criminal code and is governed by its own practice, procedure and penalties.

The following tables of offences are not exhaustive.

Refer to the offence provision itself and any related case law when identifying the elements of offences.

Fraud

Offence Table

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 372(1)	Stealing	1. A person 2. Steals any thing* (fraudulently takes or converts the thing for his or another person's use with intent to permanently deprive the owner or person of the thing or deal with it in a way that it cannot be returned in the same condition– see s364 and s365 for full definitions) 3. Capable of being stolen**. *s365 defines "stealing" including "convert/conversion" **s364 defines "things capable of being stolen" Further definitions and explanatory details are contained in ss366 to 371.	Simpliciter = 3 years. Multiple maximum penalties applicable depending on the circumstances as per s372(2) to s 372(12) ranging from 7 years to life imprisonment. Relevantly per s372(6): If the offender is a person employed in the Public Service, and the thing stolen– (a) is the property of the State; or (b) came into the possession of the offender by virtue of his employment, he is liable to imprisonment for a term not exceeding seven years. (1A) 50 years without remission and without parole for monies exceeding K1 million but less than K10 million. (1B) Life imprisonment for money exceeding K10 million.
S 373	Concealing registers	1. A person 2. Conceals or takes from its place of deposit: (a) a register that is authorized or required by law to be kept for– (i) authenticating or recording the title to any property; or (ii) recording births, baptisms, marriages, deaths or burials; OR (b) a copy of any part of any such register that is required by law to be sent to any public officer 3. With intent to defraud.	14 years imprisonment.

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 383A	Misappropriation of Property	1. A person 2. Dishonestly applies to his own use or to the use of another person (a) Property* belonging to another OR (b) Property belonging to him which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person. *"Property" is defined in s383A(3)(a): property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property. Further explanatory details concerning liability are contained in s383A(3)(b)-(d).	5 years imprisonment or 10 years imprisonment in the circumstances set out in s383A(2) or (1A) (a) 50 years without remission and without parole, if the property is of a value of K1 million or more but less than K10 million and (b) life imprisonment if the property is of value of K10 million or more.
S 404	Obtaining goods or credit by false pretence or wilfully false promise	1. A person 2. By false pretence[160] or wilfully false promise,[161] or partly by a false pretence and partly by a wilfully false promise, 3. With intent to defraud 4. Obtains from any other person any chattel, money or valuable security or induces any other person to deliver to any person any chattel, money or valuable security.	5 years
S 405	Obtaining execution of valuable security by false pretence or wilfully false promise	1. A person 2. By false pretence or wilfully false promise, or partly by a false pretence and partly by a wilfully false promise and 3. With intent to defraud 4. Induces a person to execute, make, accept, endorse, alter or destroy the whole or party of a valuable security or to write, impress or affix a name or seal on or to a paper or parchment in order that it may be afterwards make or converted into or used or dealt with as a valuable security.	3 years

[160] Where 'false pretence' is defined in s 403(1) to mean a person that makes a false representation by words or otherwise of a matter of fact, past or present that is false in fact, knowing it to be false, or not believing it is true.

[161] Where 'wilfully false promise' is defined in s 403(2) to mean a promise made by words or otherwise to do or omit to do anything by a person who at the time of making the promise does not intend to perform it or does not believe they will be able to perform it.

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 406	Cheating	1. A person 2. By means of any fraudulent trick or device (a) Obtains from any other person any thing capable of being stolen OR (b) induces any other person to i. deliver to any person any thing capable of being stolen ii. pay or deliver to any person any money or goods, or any greater sum of money or greater quantity of goods that he would have paid or delivered but for the trick or device.	2 Years
S 407	Conspiracy to defraud	1. A person 2. Conspires with another person (a) By deceit or fraudulent means to affect the market price of any thing publicly sold OR (b) to defraud the public or any person OR (c) to extort property from any person.	7 Years
S 408	Frauds on Sale or Mortgage of Property	1. A seller or mortgager of any property, or the lawyer or agent of the seller or mortgager of any property 2. With intent to induce the purchaser or mortgagee to accept the title offered or produced to him 3. With intent to defraud: (a) conceals from the purchaser or mortgagee an instrument material to the title, or an incumbrance OR (b) falsifies a pedigree on which the title depends.	2 Years

Section	Description	Offence	Maximum Penalty
		Cybercrime Code Act 2016	
S 12 (1)	Electronic Fraud	1. A person 2. Intentionally and without lawful excuse or justification or in excess of lawful excuse or justification, 3. Inputs, alters, deletes, or supresses electronic data; Or otherwise interferes with the functioning of an electronic system or device, 4. For the purpose of deceiving or depriving another person of their property, and 5. For their own gain or the gain of another person	Natural person, K100,000.00 Or, 25 Years Or, Both Body Corporate[162], K100,000.00
S 12 (2)	Electronic Fraud	1. A person, 2. Without lawful excuse or justification or in excess of lawful excuse or justification, 3. Conspires with another person, to commit or attempts to commit an offence under s12(1)	Natural person, K25,000.00 Or, 15 Years Or, Both Body Corporate, K500,000.00
S 13 (1)	Electronic Forgery	1. A person, 2. Intentionally and without lawful excuse or justification or in excess of lawful excuse or justification 3. Inputs, alters, deletes, or supresses electronic data; Or otherwise interferes with the functioning of an electronic system or device, 4. For the purpose of creating or generating inauthentic data 5. That it may be considered or acted upon for lawful purposes as if it were authentic 6. Regardless of whether the data is directly readable or intelligible.	Natural person, K100,000.00 Or, 25 Years Or, Both Body Corporate, K100,000.00
S 13 (2)	Electronic Forgery	1. A person, 2. Intentionally and without lawful excuse or justification or in excess of lawful excuse or justification, 3. Conspires with another person, to commit or attempts to commit an offence under s13(1).	Natural person, K15,000.00 Or, 15 Years Or, Both Body Corporate, K500,000.00

[162] Where **'Body Corporate'** has the meaning given in s2. Interpretation, to mean "a company whether incorporated or unincorporated and includes government or public bodies, as well as terrorist groups or organisations".

Section	Description	Offence	Maximum Penalty
		Cybercrime Code Act 2016	
S 15	Identity Theft	1. A person, 2. Intentionally and without lawful excuse or justification or in excess of a lawful excuse of justification, uses an electronic system or device, to: 3. Access, or manipulate, or possess, or use, or transfer, 4. A means of identification of another person without the authorisation of that other person.	Natural person, K15,000.00 Or, 10 Years Or, Both Body Corporate, K100,000.00
		Securities Commission Act 2015	
S 63 (b)	Destruction, concealment, mutilation and alteration of records.	1. A person 2. Sends or attempts to send or conspires with any other person to remove from his premises or send out of the country 3. Any record or account in his possession that is required to be produced under this Part 4. With intent to defraud any person OR With intent to prevent, delay or obstruct the carrying out of an examination, audit or investigation, or the exercise of any power under this Act	K10 million fine or 10 years in prison or both.

Bribery

Offence Table

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 87	Official corruption	1. A person (a) being– (i) employed in the Public Service, or the holder of any public office; and (ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice), corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; OR (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office.	7 years and fine at the discretion of the court.
S 97A	Corruptly procuring withdrawal of tenders	1. A person (a) With intent to obtain a contract from, or provide a service to, a public body offers a gratification to another person, to induce that person to refrain from making a tender or withdraw or alter a tender; OR (b) Solicits or accepts a gratification as an inducement or reward for refraining from making a tender or withdrawing or altering a tender made for such contract.	7 years or a fine at the discretion of court or both.

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 97B	Bribery of member of public service	1. A person 2. Offers to a person employed in the Public Service, or being employed in the Public Service, 3. Solicits or accepts a gratification as an inducement or reward for: (a) the person employed in the Public Service voting or abstaining from voting at any meeting in favour of or against any measure; OR (b) the person employed in the Public Service performing or abstaining from performing or aiding in procuring or hindering the performance of an official act; OR (c) the person employed in the Public Service aiding in procuring or preventing the passing of any vote or granting of any contract in favour of any person; OR (d) the person employed in the Public Service showing or refraining from showing any favour or disfavour in his capacity as a person employed in the Public Service.	7 years or a fine at the discretion of court or both.
S 119(2)	Judicial Corruption	1. A person who (a) being a holder of a judicial office corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of anything done or omitted to be done, or to be done or omitted to be done, by him in his judicial capacity or corruptly, OR (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for any person holding a judicial office, or to, on, or for any other person, any property or benefit on account of any such act or omission on the part of a person holding the judicial office.	14 years and a fine at the discretion of the court, or where the case is an offence against an arbitrator or umpire, a maximum of 7 years.

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 120	Official corruption not judicial but relating to offences	1. A person (i) Being a justice not acting judicially, or being a person employed in the Public Service in any capacity not judicial for the prosecution or detention or punishment of offenders, (ii) Corruptly asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit for himself or another person, on account of anything done or omitted to be done, or to be done, by them, with a view to: (a) corrupt or improper interference with the due administration of justice; or (b) the procurement or facilitation of the commission of an offence; or c) the protection of an offender or intending offender from detection or punishment; OR 2. Corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for any person, any property or benefit on account of any such act or omission on the part of the justice or other person so employed.	14 years and a fine at the discretion of the court

Section	Description	Offence	Maximum Penalty
		Organic Law on the Duties and Responsibilities of Leadership	
S 11	Acceptance etc of bribes	1. A person to whom this law applies or an associate of said person 2. Corruptly asks for, receives or obtains, or agrees or attempts to receive or obtain, 3. Any property, benefit or favour of any kind for themselves or any other person in consideration of their actions as a public official being influenced in any matter, or on account of them having acted as a public official in any matter (whether generally or in a particular case).	

Section	Description	Offence	Maximum Penalty
		Public Health Act	
S 12	Bribery, obstruction etc.	1. A person a. gives, offers or procures to be given to an officer or person a bribe, recompense or reward to induce him in any way to neglect or not to perform his duty under this Act; OR b. makes a collusive agreement with an officer or person to neglect or not to perform his duty under this Act; OR c. By threats, demands or promises, attempts improperly to influence a person in the performance of his duty under this Act; OR d. assaults, intimidates or by force molests or obstructs a person in the [person's] performance of his duty under this Act.	A fine of K5,000.00 or imprisonment for 3 years or both.[163]

Section	Description	Offence	Maximum Penalty
		Liquor (Licensing) Act 1963	
S 115 (b)	Bribery, Etc., Of Inspector or Police	1. A licensee, or the holder of a permit, or an applicant for a licence or permit, 2. Bribes or attempts to bribe an Inspector or a member of the Police Force.	A fine of K500.00.
		Customs Act 1951	
S 154 (a)	Bribery Of Officers, Undue Influence, etc.	1. A person 2. Gives or 3. Procures to be given, or offers or promises to give or procure to be given, any bribe, recompense or reward 4. To an officer 5. To induce him to neglect his duty	Imprisonment for 5 years.
		Excise Act 1956	
S 73 (a)	Bribery Of Officers, Undue Influence, etc.	1. A person 2. Gives or procures to be given, or 3. Offers or promises to give or procure to be given, any bribe, recompense or reward 4. To an officer 5. To induce him to neglect his duty	Imprisonment for 5 years.
		Food Sanitation Act 1991	
S 40 (c)	Obstruction, bribery, etc	1. A person 2. Gives, procures, offers or promises a bribe, recompense or reward 3. To influence an inspector or an analyst 4. In the exercise of his powers or the discharge of his duties under this Act	A fine of K2,000.00 or imprisonment for 6 months

[163] Penalty was increased by enactment of section 3 of the *Public Health (Amendment) Act 2000.*

Corruption

Offence Table

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 87 (1)	Official corruption	1. A person (a) being– (i) employed in the Public Service, or the holder of any public office; and (ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice), corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; OR (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office.	7 years and a fine at the discretion of the Court.
S 88	Extortion by public officers	1. A person 2. Employed in the Public Service 3. Takes or accepts from any person, any reward beyond their proper pay and emoluments, or any promise of such a reward 4. For the performance of their duty as an officer of the Public Service.	3 years
S 91	False claims by officials	1. A person 2. Employed in the Public Service in such a capacity as to require them or to enable them to furnish returns or statements touching: (a) any remuneration payable or claimed to be payable to themselves or to any other person, OR (b) any other matter required by law to be certified for the purpose of any payment of money or delivery of goods to be made to any person 3. Makes a return of statement touching any such matter 4. The return of statement being, to their knowledge, false in any material particular.	3 years

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 92	Abuse of office	1. A person 2. Employed in the Public Service 3. Does, or directs, any arbitrary act prejudicial to the rights of another 4. In abuse of the authority of their office.	3 years where the act is done for gain; otherwise, 2 years.
S 93	Corruption of valuator	1. A person 2. Who is duly appointed under any law to be a valuator for determining the compensation to be paid to any person for land compulsorily taken from him under any law, or for injury done to any land under any law (a) Acts as valuator while he has, to his knowledge, an interest in the land in question OR (b) executes unfaithfully, dishonestly, or with partiality, the duty of making a valuation of the land or of the extent of the injury	3 years
S 94	False certificates by public officers	1. A person 2. Who is being authorized or required by law to give any certificate touching any matter by virtue of which the rights of any person may be prejudicially affected, 3. Gives a certificate that is, to his knowledge, false in any material particular.	3 years
S 95(1)	Administering extra-judicial oaths	1. A person 2. Administers an oath or takes a solemn declaration, an affirmation or an affidavit 3. Concerning any matter with respect to which he has not by law authority to do so EXCEPT FOR 4. An oath, declaration, affirmation, or affidavit, administered or taken (a) before a justice in any matter relating to (i) the preservation of the peace or the punishment of offences; or (ii) inquiries respecting sudden death; or (b) in proceedings before the Parliament or a Committee of the Parliament; or (c) for some purpose that is lawful under the laws of another country; or (d) for the purpose of giving validity to an instrument that is intended to be used in another country.	1 year

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 96	False assumption of authority	1. A person who a) i. is not being a magistrate or justice ii. assumes to act as a magistrate or justice OR b) i. without authority ii. assumes to act as a person having authority by law to administer an oath or take a solemn declaration, an affirmation or an affidavit, or to do any other act of a public nature that can only be done by persons authorized by law to do so OR c) represents himself to be a person authorized by law to sign a document testifying i. to the contents of any register or record kept by lawful authority; or ii. testifying to any fact or event 2. Not being authorized 3. Knowing that he is not authorized.	3 years
S 97	Personating public officers	1. A person 2. Personates any person employed in the Public Service 3. On an occasion when the latter is required to do any act or attend in any place by virtue of his employment OR 1. A person 2. Falsely represents himself to be a person employed in the Public Service, 3. Assumes to do any act or to attend in any place for the purpose of doing any act by virtue of that employment.	3 years

Section	Description	Offence	Maximum Penalty
		Organic Law on the Duties and Responsibilities of Leadership	
Various	Misconduct in public office	This is an Organic Law made under Division III.2, the Leadership Code of the Constitution, which governs the duties and responsibility of leaders and misconduct in office. Section 11. Acceptance, etc., of bribes: "A person to whom this Law applies who, or any of whose associates, corruptly asks for, receives or obtains, or agrees or attempts to receive or obtain, any property, benefit or favour of any kind for himself or any other person in consideration of his actions as a public official being influenced in any matter, or on account of his having acted as a public official in any manner (whether generally or in a particular case) is guilty of misconduct in office."	Various

Money Laundering

Offence Table

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 508B(1)	Crime of Money Laundering	1. A person 2. Deals with property that is criminal property 3. Knowing or having reasonably ought to know that the property is criminal property.	If a natural person, a fine not exceeding K500,000 and 25 years or both. If a body corporate, a fine not exceeding K1,000,000.
S 508B(3)		"deals with property" includes one or more of the following: 1. conceals property; 2. disguises property; 3. converts property; 4. transfers property; 5. removes property from Papua New Guinea; 6. brings property into Papua New Guinea; 7. receives property; 8. acquires property; 9. uses property; 10. possesses property; 11. consenting to or enabling any of the actions referred to above.	
S 508B(4)		"conceals or disguises property" includes concealing or disguising: 1. nature; 2. source; 3. location; 4. disposition; 5. movement; 6. ownership; 7. or any rights with respect to it.	
S 508C	Crime of dealing with property reasonably suspected to be criminal property	1. A person 2. Deals with property[164] 3. In circumstances where it is reasonable to suspect that the property is criminal property.[165] Section 508A defines "criminal property": property that is in whole or in part and whether directly or indirectly, derived from, obtained or used in connection with criminal conduct and includes any interest, dividends or other income on or value accruing from or generated by such property, regardless of who carried out the criminal conduct or who benefited from it.	If a natural person, K100,000 or imprisonment for a term not exceeding 3 years or both. If a body corporate a fine not exceeding K200,000.

[164] '**deals with property'** is given meaning with sub-section (2) of the section.

[165] Where '**criminal property'** is defined in s 508A to mean property that is, in whole or in part and whether directly or indirectly, derived from, obtained or used in connection with criminal conduct and includes any interest, dividends or other income on or value accruing from or generated by such property, regardless of who carried out the criminal conduct or who benefited from it.

Section	Description	Offence	Maximum Penalty
		Proceeds of Crime Act 2005	
S 34	Money Laundering	1. A person (a) Engages, directly or indirectly, in a transaction that involves money, or other property, OR (b) Receives, possesses, disposes of or brings into Papua New Guinea money, or other property OR (c) Conceals or disguises the source, existence, nature, location or control of money, or other property 2. Knowing, or having ought reasonably to have known, that the money or property was the proceeds of crime.	If a natural person, a fine of K100,000 or imprisonment for 20 years, or both. If a body corporate, a fine of K500,000.
s35	Possession of Property Suspected of Being Proceeds of Crime	1. A person who receives, possesses, conceals, disposes of or brings into Papua New Guinea money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence. 2. It is a defence to a prosecution under Subsection (1) that the person charged had no reasonable grounds for suspecting that the property mentioned in the charge was derived or realised, directly or indirectly, from some form of unlawful activity. 3. A person is not liable to be convicted of an offence against both section and this section because of the same act or omission.	Penalty: If the offender is a natural person –a fine of K10, 000.00 or imprisonment for 2 years, or both; If the offender is a body corporate –a fine of K50, 000.00

Section	Description	Offence	Maximum Penalty
		Anti-Money Laundering and Counter Terrorist Financing Act 2015	
S 36(1)	Failure to Comply with Due Diligence Requirements	1. A person 2. Intentionally[166] engages in conduct that contravenes a requirement of this Division.	A fine not exceeding K500,000 or imprisonment for a term not exceeding five years or both for a natural person; or K1,000,000 for a body corporate.

[166] Under s 36(2), intention can be inferred from objective factual circumstances.

Section	Description	Offence	Maximum Penalty
S 36(3)	Failure to Comply with Due Diligence Requirements	1. A person 2. Recklessly engages in conduct that contravenes a requirement of this Division.	A fine not exceeding K250,000 or imprisonment for a term not exceeding 3 years or both; or K500,000 for a body corporate.
S 37(1)	Offence of opening or operating anonymous accounts and accounts in false names	1. A person 2. Intentionally[167] operates an anonymous account or an account in a false name.	A fine not exceeding K500,000 or imprisonment for a term not exceeding five years or both for a natural person; or K1,000,000 for a body corporate.
S 37(3)	Failure to Comply with Due Diligence Requirements	1. A person 2. Recklessly engages in conduct that contravenes a requirement of this Division.	A fine not exceeding K250,000 or imprisonment for a term not exceeding 3 years or both; or K500,000 for a body corporate.
S 38(1)	Offence of establishing or continuing a business relationship involving a shell bank	1. A person 2. Intentionally[168] establishes or takes steps to establish a shell bank in PNG OR 3. Enters into or continues a business relationship with a shell bank or a correspondent financial institution in a foreign country that permits its accounts to be used by a shell bank OR 4. Allows an occasional transaction to be conducted through it by a shell bank or a correspondent financial institution in a foreign country that permits its accounts to be used by a shell bank.	A fine not exceeding K500,000 or imprisonment for a term not exceeding five years or both for a natural person; or K1,000,000 for a body corporate.

[167] Under s 37(2), intention can be inferred from objective factual circumstances.
[168] Under s 38(2), intention can be inferred from objective factual circumstances.

Section	Description	Offence	Maximum Penalty
S 38(3)	Offence of establishing or continuing a business relationship involving a shell bank	1. A person 2. Recklessly establishes or takes steps to establish a shell bank in PNG OR 3. Enters into or continues a business relationship with a shell bank or a correspondent financial institution in a foreign country that permits its accounts to be used by a shell bank OR 4. Allows an occasional transaction to be conducted through it by a shell bank or a correspondent financial institution in a foreign country that permits its accounts to be used by a shell bank.	A fine not exceeding K250,000 or imprisonment for a term not exceeding 3 years or both; or K500,000 for a body corporate.

Proceeds of Crime

Offence Table

Section	Description	Offence	Maximum Penalty
		Criminal Code	
S 508B(1)	Crime of Money Laundering	1. A person 2. Deals with property that is criminal property 3. Knowing or having reasonably ought to know that the property is criminal property.	If a natural person, a fine not exceeding K500,000 and 25 years or both If a body corporate, a fine not exceeding K1,000,000.
S 508B(3)		"deals with property" includes one or more of the following: 1. conceals property; 2. disguises property; 3. converts property; 4. transfers property; 5. removes property from Papua New Guinea; 6. brings property into Papua New Guinea; 7. receives property; 8. acquires property; 9. uses property; 10. possesses property; 11. consenting to or enabling any of the actions referred to above.	
S 508B(4)		"conceals or disguises property" includes concealing or disguising: 1. nature; 2. source; 3. location; 4. disposition; 5. movement; 6. ownership; 7. or any rights with respect to it.	
S 508C	Crime of dealing with property reasonably suspected to be criminal property	1. A person 2. Deals with property[169] 3. In circumstances where it is reasonable to suspect that the property is criminal property.[170] Section 508A defines "criminal property": property that is in whole or in part and whether directly or indirectly, derived from, obtained or used in connection with criminal conduct and includes any interest, dividends or other income on or value accruing from or generated by such property, regardless of who carried out the criminal conduct or who benefited from it.	If a natural person, K100,000 or imprisonment for a term not exceeding 3 years or both. If a body corporate a fine not exceeding K200,000.

[169] '**deals with property**' is given meaning with sub-section (2) of the section.

[170] Where '**criminal property**' is defined in s 508A to mean property that is, in whole or in part and whether directly or indirectly, derived from, obtained or used in connection with criminal conduct and includes any interest, dividends or other income on or value accruing from or generated by such property, regardless of who carried out the criminal conduct or who benefited from it.

Section	Description	Offence	Maximum Penalty
		Proceeds of Crime Act 2005	
S 34	Money Laundering	1. A person (a) Engages, directly or indirectly, in a transaction that involves money, or other property, OR (b) Receives, possesses, disposes of or brings into Papua New Guinea money, or other property OR (c) Conceals or disguises the source, existence, nature, location or control of money, or other property 2. Knowing, or having ought reasonably to have known, that the money or property was the proceeds of crime.	If a natural person, a fine of K100,000 or imprisonment for 20 years, or both. If a body corporate, a fine of K500,000.
S 35	Possession of property suspected of being proceeds of crime	1. A person 2. Receives, possesses, conceals, disposes of or brings into Papua New Guinea money, or other property, 3. That may reasonably be suspected of being proceeds of crime.	If a natural person, fine of K10,000 or imprisonment for 2 years or both. If the body corporate, fine of K50,000.

Provisions Tables

Summary Table: Proceeds of Crime, Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
	Proceeds of Crime Act 2005	
Entire Act	An Act to – (a) to provide for measures against money laundering; and (b) to provide for the forfeiture of property used in connection with the commission of offences; and (c) to deprive persons of the proceeds of, and benefits derived from, the commission of offences; and (d) for related purposes	Part 1 – Preliminary Part 2 – Measures to Combat Money Laundering Part 3 – The Confiscation Scheme: Division 1 - Restraining orders (ss38 – 57) Division 2 – Forfeiture orders (ss 58 – 83) Division 3 – Pecuniary Penalty orders (ss – 112) Part 4 – Facilitating Investigations and preserving property Division 5 - Production orders and other information gathering powers Division 6 - Monitoring orders Part 5 – Disclosure of Information held by government department Part 6 – Property under the control of the Commissioner of Police Part 7 – Miscellaneous

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
	Mutual Assistance in Criminal Matters Act 2005	
Entire Act	An act to – (a) to regulate the provision by Papua New Guinea of international assistance in criminal matters when a request is made by a foreign country; and (b) to regulate the provision by Papua New Guinea of international assistance in criminal matters when a request is made by a foreign country for the making of arrangements for a person who is in Papua New Guinea to travel to the foreign country to give evidence in a proceeding or to give assistance in relation to an investigation; and (c) to facilitate the obtaining by Papua New Guinea of international assistance in criminal matters, and (d) for related purposes.	Part 1 – Preliminary Part 2 – Requests by PNG for assistance Part 3 – Assistance with Taking Evidence and Production of Documents of [sic] other articles Part 4 – Assistance for Search and Seizure Part 5 – Arrangements for Persons to Give Evidence or Investigations etc.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition Act 2005	
Entire Act	An act relating to extradition and for related purposes	Part 1 – Preliminary Part 2 – Extradition from Papua New Guinea to Other Countries Part 3 - Extradition from Papua New Guinea to Countries Other Than Forum Countries Part 4 – Search, Seizure and Transit Part 5 – Extradition to Papua New Guinea Part 6 - Miscellaneous

Republic of Marshall Islands

Elements of Offences and Case Law

Republic of Marshall Islands

The Republic of Marshall Islands bases its legal system to the United States of America and the English common law due to its history surrounding colonisation and geopolitical proximity. Due to the conflicting interests of Spanish, Russian, English and Japanese explorers and governments, the USA obtained administration to the islands from Japan in World War II. Following this, the Marshall Islands were made a part of the United Nations Trust Territory of the Pacific Islands, under the jurisdiction of the United States in 1947.

The Republic of Marshall Islands was formed after the signing of the Compact of Free Association with the United States, by which the judicial systems had adopted the US law for specific categories of law as Marshallese common law.

As for the influence of the English common law, due to being within the geopolitical interests of Britain and its colonies during the time of exploration, English common law has also been adopted into the judicial system of the Republic of Marshall Islands. The Republic of Marshall Islands also honours the customary laws of its people alongside the traditional courts surrounding land cases.

Under the Constitution of the Republic of the Marshall Islands, section 3 of article 1 states that a court shall look to the decisions of the courts of other countries which has similar constitutions to that of the Republic of the Marshall Islands. Thus, the influence of the United States over the Marshallese Constitution reasons for its reference as a common law jurisdiction alongside English common law.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Marshall Islands Revised Code 2014	
s223.0	Definitions	Relevant for construction	
s223.3	Theft[171] by deception	1. A person; 2. Intentionally obtains or exercises control over property of another; 3. By deception; 4. With the intent to deprive the person of the property; 5. A person deceives[172] intentionally if they: a) Create or reinforce a false impression, including that of aw, value, intention or other state of mind[173]; or b) Prevents another from acquiring information which is pertinent to the disposition of the property; or c) Fais to correct false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship; or d) Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which the person transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.
s223.4	Theft by extortion	1. A person; 2. Intentionally obtains property with the intent to deprive another of the property; 3. By direct or indirect threat to: a) Inflict bodily injury on anyone or commit any other criminal offence; or b) Take or withhold action as an official, or cause an official to take or withhold action; or c) Inflict any harm which would not benefit the actor, but which is calculated to materially harm another person.	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.

[171] Classification of crime – s223.1
Third-degree felony if the amount involved exceeds $500, o if the property stolen is a firearm, automobile, or other motor-propelled vehicle, or if the actor is a public servant actin in the course of his or her duties, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
Otherwise, theft is a misdemeanour, except if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the actor proves by a preponderance of the evidence that the amount involved was less than $50, in which the offence is a petty misdemeanour.
[172] The term "deceive" does not include falsity as to matters having a no pecuniary significance, or exaggerated commendation of wares or services unlikely to deceive ordinary persons in the group addressed.
[173] Deception as to a person's intention to perform a promise shall not be inferred from the fact alone that the person did not subsequently perform the promise.

Section	Description	Offence Elements	Maximum Penalty
s224.1	Forgery[174]	1. A person; 2. With intent to defraud, deceive, or injure anyone, or with knowledge that they are facilitating a fraud or injury to be perpetrated by anyone; 3. Does the following: a) Alters any writing of another without that person's authority; or b) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or c) Utters any writing which the actor knows to be forged in a manner specified in paragraphs (a) or (b).	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.
s240.7	Embezzlement, misappropriation, and diversion by public servants	1. A public servant; 2. Commits an act of embezzlement, misappropriation, or other diversion of property, funds, securities or any other item of value entrusted to the public servant; 3. For the public servant's benefit or the benefit of any other person.	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.
s240.8	Illicit enrichment	1. Any current or former public servant or elected public official; 2. Maintains a standard of living above that which is commensurate with their present or past official salary and enrichments; or 3. Is in control of pecuniary[175] resources or property disproportionate to their present or past official salary and enrichments, unless they give satisfactory explanation to the court regarding maintenance of such standard of living or how it is under their control; 4. Is guilty of a felony of the second degree.	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.

[174] Classification of crime – s224.1
Forgery is a second-degree felony if in involves money, securities, postage, and other instruments issued by the government.
Forgery is a third-degree felony if it involves drug prescriptions, will, deed, contract, and other commercial or legal instruments.
Otherwise, forgery is a misdemeanour.
[175] Definition of pecuniary benefit – s240.0
The benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain, but excluding economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

Cases

Republic of Marshall Islands v Mantiera [2011] MHHC 4; Criminal Case 2011-013 (13 April 2011)

Matter	Criminal
Jurisdiction	High Court of the Republic of the Marshall Islands
Coram	Associate Justice James H Plasman
Date of Verdict	13 April 2011
Summary	Defendant charged with five counts of grand larceny, and one each of forgery, concealment, removal or alternation of record or process, possession or removal of government property and conspiracy. The Judge relied mainly on the standard of proof required for establishing good cause regarding the evidence pieces submitted into exhibition by the prosecution for the case.
Decision	Good cause found for arraignments for counts on grand larceny and forgery.

Air Marshall Islands Inc. v Dornier [2002] MHSC 9; Case 2002-12 (24 December 2002)

Matter	Civil
Jurisdiction	Supreme Court Republic of the Marshall Islands
Coram	Goodwin Acting Associate Judge
Date of Verdict	24 December 2002
Summary	Fairchild Dornier appealed a default judgment in favour of Air Marshall Islands for approximately $4.2M, whilst AMI cross-appeals for punitive damages. The case surrounds contractual obligations and fraud under the understanding of negligent misrepresentation of agreements of a contractual nature.
Decision	Agreed with the Court's decision to deny the motion to compel arbitration, enter default judgments, and restated that the AMI were not entitled to punitive damages as it is not the appropriate remedy on the record before the court.

Stanley v Stanley [2002] MHSC 4; 2 MILR 194 (5 June 2002)

Matter	Civil – Appeal
Jurisdiction	Supreme Court of the Republic of the Marshall Islands
Coram	Fields CJ, Goodwin and Kurren JJ
Date of Verdict	5 June 2002
Summary	Michelle Stanley filed for divorce from Curtis Stanley, Michelle obtained authorization from the High Court to serve Curtis by publication after multiple failed attempts to serve Curtis. Curtis failed to appear at the divorce proceeding and default judgment was entered against him, awarding Michelle with all marital assets, including contra of the couple's company ad custody of their two children.

Curtis moved to High Cour to set aside the default judgment on the ground of fraud, misrepresentation, and other misconduct by Michelle, which was refused, thus the appeal.

MIRCP Rule 48(a)(3)

The moving party must demonstrate misconduct, like fraud and misrepresentation, by clear and convincing evidence, and must than show that the misconduct foreclosed full and fair preparation or presentation of his case.

Decision Appeal dismissed.

Yandal Investments Pty Ltd v White Rivers Gold Ltd [2011] MHHC 5; Civil Action 2010-158 (19 May 2011)

Matter Civil

Jurisdiction High Court of the Republic of the Marshall Islands

Coram James H Plasman – Associate Justice

Date of Verdict 19 May 2011

Summary Harry Mason was a director of White River Golds Limited – a non-resident domestic corporation in the Marshall Islands – and had signed a share certificate issued for the plaintiffs. Stocks were not issued by the company and following a court order in 2010, the issued shares were determined as void.

The Plaintiffs asserted fraud and negligence in the issuance of share certificates by Harry Mason and WRG.

The case primarily focused on whether there is personal jurisdiction for the fraudulent actions committed by the defendant Harry Mason.

Under s251(n) of the *Judiciary Act,* the Marshall Islands requires the following regarding cases of fraud:

> *"a person who commits an act of commission or omission of deceit, fraud, or misrepresentation which is intended to affect and does affect persons in the Republic."*

This requirement determines the jurisdictional powers of the Marshallese courts over fraud cases. As the plaintiffs in the case were not residents of the Marshall Islands, the allegations of fraud against Harry Mason were dismissed.

James AJ notes that the facts alleged in the complaint may support a claim of fraud, however, the order does not go into detail constituting legal analysis.

The case provides evidence of references to the Australian jurisdiction regarding fraud cases surrounding contracts.

Decision Dismissal of Harry Mason's case based on lack of personal jurisdiction.

Air Marshall Islands v Dornier (2) [2002] MHSC 6; 2 MILR 211 (24 December 2002)

Matter Civil

Jurisdiction Supreme Court Republic of the Marshall Islands

Coram Fields CJ, Goodwin and Kurren AJJ

Date of Verdict 24 December 2002

Summary Air Marshall Islands (AMI) signed a contract for purchase of two aircrafts manufactured by Dornier Luftfahrt (appellant). The terms of the agreement stated that it "shall come into force upon its signature" on the conditions of effectiveness of the following:

1. Dornier's receipt of the pre-delivery payment;
2. AMI board approval;
3. Written approval by the Cabinet of the RMI.

These conditions were not fulfilled; thus the AMI considered the agreement as null and void, whilst Dornier considered it as suspended. AMI consulted Dornier for another aircraft immediately after and reserved an aircraft with a down payment of $1.6M. Additionally, prior to the down payment, AMI had secured a letter agreement from Dornier (Refund Agreement) stating that "in case of non-availability of… financing until delivery of the aircraft" – allowing for the refund of $1.6M to AMI.

AMI did not obtain financing, and Dornier did not refund the $1.6M. AMI filed to the High Court for fraud and duress regarding the payments to Dornier, and negligent misrepresentation of the Refund Agreement.

The concept of fraud in this case relates to contractual obligations rather than the criminal jurisdiction of fraud.

Punitive damages – s162 of the Civil Procedure Act:

Where a defendant has been found liable because of fraud, or deceit, or misrepresentation, the court shall add to the judgment, as punitive damages, an amount equal to three (3) times the actual amount of damages found by the tier of facts.

Decision Judgment affirmed - $2.1M to be paid by AMI to Dornier and losses related to the collateral sale in the exchange of events throughout the litigation.

Judgment affirmed - $1.6M in damages by Dornier to AMI for breach of contract.

MYJAC Fdtn, Panama v. Arce and Alfaro, SCT Civil 17-06 (30/07/18)

Matter Civil

Jurisdiction Supreme Court Republic of the Marshall Islands

Coram Seeborg – Acting Associate Justice

Date of Verdict 30 July 2018

Summary Myjac Foundation is a private interest foundation domiciled in Panama and in 2011, retained a lawyer to arrange the incorporation of two Marshall Islands corporations (Oceanus and Chronos) which held property and real estate in Poland. Both defendants are Costa Rican

citizens and residents and are the respective sole shareholder, director, and secretary for the incorporated entities.

Nogacki submitted counterfeit declarations of incumbency for both Oceanus and Chronos to the Marshall Islands Registrar of Corporations to name Nogacki as the director of each of the corporations.

Myjac was unable request a re-issuance of a new and corrected Certificates of Incumbency, whilst Nogacki used the false Certificates to gain control over the two corporations and transferred property in Poland (value of approximately $20M EUR) to a foundation he controlled.

Both defendants were served a notice in English, which the defendants submitted to the High Court as a defective service process due to not adhering to service requirements of notice in the native language of the defendant.

This case references the understanding of personal service requirements for proceedings in the court alongside the subsequent defective service of process.

Decision — High Court order affirmed – denial of motion to set aside default judgment against the defendants for reasons that they court had personal jurisdiction over the defendants and the subsequent ruling alongside proper service of the originating proceeding and documents through publication in English where native language of defendants is unknown to the plaintiff.

Default judgment upheld in favour of Myjac Foundation for the following declarations:

1. Nogacki was never appointed as a director or officer of Oceanus or Chronos;
2. Myjac has been the sole shareholder in both companies since May 23, 2011.

Highland Floating Rate Opportunities Fund, et al. v. Dryships Inc., et al., SCT Civil 18-10 (09/09/19)

Matter — Civil

Jurisdiction — Supreme Court Republic of the Marshall Islands

Coram — Cadra CJ, Seaborg and Seabright AJJ

Date of Verdict — 09 September 2019

Summary — Highland (appellants) were creditors of a RMI company Ocean Rig UDW (‘UDW’) and accused UDW’s CEO of orchestrating a series of transactions from 2015-16 that siphoned money away from the company while it was in financial distress, thus depleting the assets available to creditors.

Highland seeks to recover damages from various entities that were party to the fraudulent transactions.

This case covered notions of fraud within fraudulent transactions. Note: the previous judgment of the case from the High Court is not available on the public domain.

Decision High Court order affirmed – dismissed the appellant's complaint with prejudice on two grounds:

1. Highland was barred from pursuing the action due to failure to comply with a legally binding no-action clause.
2. Highland is no longer a creditor and lacks standing to pursue claims for fraudulent conveyance.

High Court also found for partial dismissal for the following:

1. Claims for 'constructive' fraudulent conveyance;
2. The claim for aiding and abetting fraudulent conveyance;

All claims against Economous and Kandylidis.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Marshall Islands Revised Code 2014	
s240.0	Definition	Required for construction	
s240.1 (1)	Bribery in official matters	1. A public servant; 2. In Marshall Islands or elsewhere; 3. Without lawful or reasonable excuse; 4. Directly or indirectly solicits, accepts, or agrees to accept from another person; 5. Any benefit as an inducement to, or a reward for, or on account of that public servant's: a) Decision, opinion, recommendation, vote or other exercise of discretion in their position as a public servant; b) Performing or abstaining from performing, or having performed or abstained from performing, any act in their capacity as a public servant; c) Expediting, delaying, hindering or preventing, or having expedited, delayed, hindered, or prevented, the performance of an act, whether by that public servant or another with their capacity; d) Assisting, favouring, hindering, or delaying, or having assisted, favoured, hindered, or delayed, any person in the transaction of any business with a public body; e) Using their real or supposed influence to obtain or attempt to obtain an undue advantage or benefit for that person or a third person from a public body; f) Giving assistance or using influence in, or having given assistance or used influence in the promotion, execution or procuring of any contract with a public body and/or any sub-contract for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance; or g) Giving assistance or using influence in, or having given assistance or used influence in the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as described in subsection above; h) Refraining or having refrained from bidding at any action conduct by or on behalf of any public body.	

Section	Description	Offence Elements	Maximum Penalty
s240.1 (2)		1. A person; 2. Whether in Marshall Islands or elsewhere; 3. Without lawful authority or reasonable excuse; 4. Directly or indirectly promises, offers, confers or agrees to confer upon a public servant; 5. Any benefit as an inducement to, or a reward for, or on account of that public servant's: a) Same conditions as s240.1 (1).	
s240.1 (3)		1. A person, including a public servant; 2. Whether in Marshall Islands or elsewhere; 3. Directly or indirectly promises, offers, confers or agrees to confer; 4. A benefit upon a foreign public official or an official of an international organization as an inducement to, or a reward for, on account of: a) Obtaining or retaining business or other undue benefit in international business; b) Taking action or refraining from acting in a manner that breaches an official duty.	
s240.1 (4)	Not guilty verdict	1. A public servant other than prescribed officer; 2. Solicits or accepts an advantage; 3. With the permission of the public body of which they are an employee; 4. Complies with subsection (5); 5. Neither the public servant nor the offeror shall be guilty of bribery.	
s240.1 (5)	Not guilty verdict – conditions	1. Permission shall be in writing, and: a) Be given before the advantage is offered, solicited or accepted; or b) Where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance, and for such permission to be effective, the public body shall, before giving such permission, have regard to the circumstances in which it is sought.	
s240.1 (6)	Defence	1. No defence to prosecution that: a) A public servant was not qualified to act in the act in the desired way, whether because the public service had not yet assumed office, or lacked jurisdiction, or for any other reason; b) Their doing or forbearing to do, or having done or forborne to do, any act and they: - Did not actually have the power, right or opportunity so to do or forbear; - Accepted the advantage without intending to do so or forbear; - Did not in fact so do or forbear.	

Section	Description	Offence Elements	Maximum Penalty
s242.5 (1)	Compounding	1. A person; 2. Accepts or agrees to accept any pecuniary benefit; 3. In consideration of refraining from reporting to law enforcement authorities; 4. The commission or suspected commission of any offence or information relating to an offence.	
s242.5 (2)	Defence	1. Defence to prosecution: a) Pecuniary benefit did not exceed an amount which the actor believed to be due as restation or indemnification for harm caused by the offence.	

Cases

Stanley v Stanley [2002] MHSC 4; 2 MILR 194 (5 June 2002)

Matter Civil – Appeal

Jurisdiction Supreme Court of the Republic of the Marshall Islands

Coram Fields CJ, Goodwin and Kurren JJ

Date of Verdict 5 June 2002

Summary Michelle Stanley filed for divorce from Curtis Stanley, Michelle obtained authorisation from the High Court to serve Curtis by publication after multiple failed attempts to serve Curtis.

Curtis failed to appear at the divorce proceeding and default judgment was entered against him, awarding Michelle with all marital assets, including contra of the couple's company ad custody of their two children.

Curtis moved to High Cour to set aside the default judgment on the ground of fraud, misrepresentation, and other misconduct by Michelle, which was refused, thus the appeal.

MIRCP Rule 48(a)(3)

The moving party must demonstrate misconduct, like fraud and misrepresentation, by clear and convincing evidence, and must than show that the misconduct foreclosed full and fair preparation or presentation of his case.

Decision Appeal dismissed.

***Republic of the Marshall Islands v Burton McKay et al* (Criminal Case no. 2022-01423)**

Matter Sentencing

Jurisdiction The High Court of the Republic of the Marshall Islands

Coram Hon. Chief Justice Carl B. Ingram

Date of Verdict 22 December 2022

Charge/s Bribery in Official Matters & Misconduct in Public Office

Summary This case involved three offenders. Burton McKay and Bilton Ralpho were at the time of the offending employees of the Immigration Division of the Ministry of Justice. Burton McKay was an Immigration Controller III. He organised for Bilton to prepare a visa application form and Burton McKay signed it. The visa was for a Ms Fefei Peng, a national of the People's Republic of China. This was done at the request of the Meiyu Huang. Meiyu Huang was the co-owner of AAA Wholesale. They proceeded to preliminary hearing and entered pleas of not guilty on arraignment, however before trial, each of the three changed their plea to one of guilty – following plea agreements with the prosecution.

Sentences

Name	Offence*	Short Particulars	Max. Penalty	Sentence Imposed
Burton McKay	Bribery in Official Matters s240.1(1)	On 22 September 2021 at Majuro Atoll Burton McKay did accept $1,000 from Meiyu Huang after agreeing to expedite and facilitate the obtaining of a visa for Ms Feifei Peng.	10 years imprisonment and / or fine up to $20,000	10 years imprisonment released immediately on probation for 1o years with conditions and $20,000 fine of which $13,000 is suspended.
Bilton Ralpho	Misconduct in Public Office s240.6(1)	On 21 September 2021 at Majuro Atoll Bilton Ralpho did process, prepare or expedite the G1 Visa for Ms Feifei Peng without authorisation of the Director of Immigration	10 years imprisonment and / or fine up to $20,000	5 years imprisonment released immediately on probation for 5 years with conditions and $10,000 fine of which $5,000 is suspended.
Meiyu Huang	Bribery in Official Matters s240.1(2)	On 22 September 2021 at Majuro Atoll Meiyu Huang did offer or give $1,000 to Burton McKay in return for the Visa issued to Ms Feifei Peng in order to secure a work permit from Labor Division.	10 years imprisonment and / or fine up to $20,000	10 years imprisonment released immediately on probation for 1o years with conditions and $10,000 fine of which $2,500 is suspended.

**Criminal Code 2011* [31 MIRC 1]

In all three cases the Court's stated that its purpose in giving the sentence was:

1. to discourage the defendant from ever committing bribery in official matters again;
2. to discourage other residents of the Republic from committing bribery in official matters;
3. to confirm that the commission of bribery in official matters is not acceptable in the Republic;
4. to encourage the defendant to change [his/her] behaviour; and
5. to vindicate the public's rights.

Republic of the Marshall Islands v Lowell Alik **(Criminal Case No. 2022-00117)**

Matter	Sentencing
Jurisdiction	The High Court of the Republic of the Marshall Islands
Coram	Associate Justice Witten T. Philippo
Charge/s	Misconduct in Public Office – 1 x s240.6(1) *Criminal Code 2011* [31 MIRC 1]
Date of Verdict	21 November 2022
Summary	Between June 2013 and June 2014 while employed as a General Manager of the Marshall Islands Environmental Authority ("Authority"), the defendant knowingly did the following unlawful acts: a. on June 21, 2013 he did use the funds of $600 the Authority allocated for the purchase of a laptop for his own use; b. on November 29, 2013, he did use the Authority's laptop for his own personal use; c. on December 11, 2013, he took ownership of the Authority's 18,000 BTU GREE Air Conditioner for my own personal use; d. during the period of November 2013 and March 2014, he contracted with his partner to charge $1,140.00 for catering services to the Authority without declaring a conflict of interest; e. during June 2014, he received from the Authority $1720.00 in travel allowance for a trip and kept the allowance despite the trip fully funded by a third party foreign donor.
Sentence	The offence is punishable by a maximum fine of $20,000 and/or imprisonment for 10 years. On 17 March 2022, on the joint recommendations of counsel, the Court sentenced the defendant to six months imprisonment and to a fine of $5,000 which was suspended and the defendant placed on probation for a period of six months on the condition that he pays $3,150 restitution to the Authority on or before Thursday, September 22, 2022. Upon fulfillment of his probationary period without incident and his payment in full of restitution to the Authority the defendant would be able to request the Court to vacate his conviction. On November 18, 2022, the defendant moved the Court to vacate his judgment of conviction. In as much as the plea agreement called for the 'suspended imposition of sentence" the Court erroneously imposed sentence on defendant when it should have suspended the imposition of sentence. The Court ordered that its March 17, 2022 Judgment of Conviction and Sentence be corrected by vacating that portion of the judgment which imposes sentence on the defendant for a period of 6 month imprisonment and a fine of $5,000; and, that portion which suspended the imposition of sentence on the defendant for a period of 6 months under the condition that he pay the full amount of restitution in the amount of $3,150 to remain in effect. It was further ordered that the defendant's motion to vacate his conviction be granted based on his completion of his probationary period without incident and has timely paid for restitution to MIEPA. The defendant's conviction was vacated and he is deemed not have been convicted of the crime for any purpose.

Republic of the Marshall Islands v Genesis Island Enterprise **(Criminal Case No. 2014-101)**

Matter Sentencing
Jurisdiction The High Court of the Republic of the Marshall Islands
Coram Hon. Chief Justice Carl B. Ingram
Date of Verdict 19 December 2014
Charge/s Bribery in Official Matters
Summary This case involved the payment of "incentives" to government employees (Hospital staff) by the defendant company Genesis, who supplied medical equipment. The defendant entered a plea of guilty to all 13 counts against it following a plea agreement.

The scheme involved purchases under the Healthcare Revenue Fund and purchases processed through the Ministry of Finance for medical supplies, laboratory supplies, and medical equipment such as the Mammography machine, Infant Incubator, Oxygen Generator (OGM) Spare parts, etc. for Majuro and Ebeye Hospital. Francis Silk, the key hospital administration official involved in the procurement and purchases process within the Ministry of Health had an agreement with local vendor Genesis Island Enterprise RMI, to have many of the large purchases or contracts awarded to them and in return the official received "incentives".

Whenever Finance staff raised concerns about correct procurement processes not being followed, Francis Silk would often respond saying that it was an urgent need or an emergency with people's lives at stake. It appeared that many people had suspicions about this scheme for several years, but it was not until an ex-Genesis employee came forward with information to the police that investigation and prosecution took place. The vendor was providing inflated prices and paying a percentage to the government employees as "incentives".

On the plea, the defendant Genesis Island Enterprises, RMI, admitted that they did agree to pay money to one, Francis Silk, to assist and steer Majuro Hospital business to Genesis Island Enterprises, RMI, in its bid to purchase health equipment and medical supplies from them.

Sentences

Counts	Offences	Short Particulars	Max. Penalty	Sentence Imposed
1 - 4	Bribery in Official Matters s240.1(2)(e) and (j) *Criminal Code 2011* [31 MIRC 1]	Directly or indirectly promised, offered, conferred or agreed to confer upon a public servant any benefit as an inducement to, or a reward for, or on account of that public servant's: giving assistance or using influence in, or having given assistance or used influence in the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract.	10 years or a maximum fine of $100,000 (each count).	$100,000 fine each count – payable by end of that day ($400,000 total) NB: the learned sentencing judge noted that counsel for the offender had handed a bank cheque payable to the RMI Secretary of Finance in the amount of $400,000 in open court.
5 - 13				Sentencing is suspended on condition of timely payment of $400,000 in fines for Counts 1-4 and the offender does not engage in business with the Government of the Republic of the Marshall Islands for 10 years from date of order.

The learned sentencing judge stated that the Court's purpose in giving this sentence was:

1. to discourage the defendant from ever committing bribery again;
2. to discourage other residents of the Republic from committing bribery;
3. to confirm that the commission of bribery is not acceptable in the Republic;
4. to encourage the defendant to change its behaviour; and
5. to vindicate the victim's rights.

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Marshall Islands Revised Code 2014	
s240.2 (1)	Influencing official matters by threat	1. A person; a) Threatens unlawful harm to any other person with intent to influence a public servant's decision, opinion, recommendation, vote or other exercise of discretion as a public servant; or b) Threatens harm to any public servant with intent to influence the public servant's decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding; or c) Threatens harm to any public servant with intent to influence the public servant to violate their known legal duty.	Prohibited from taking or continuing employment, temporarily or permanently, paid or unpaid, in any public body for up to 10 years.
s240.2 (2)	Defence	1. No defence to prosecution that: a) Public servant; b) Whom the person sought to influence; c) Was not qualified to act in the desired way; d) Because they had not yet assumed office, or lacked jurisdiction, or for any other reason.	
s240.3 (1)	Unlawful compensation for past official action	1. A person; 2. Solicits, accepts or agrees to accept any benefit; 3. Without lawful authority or reasonable excuse; 4. As compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favourable to another; or 5. For having otherwise exercised a discretion in the other's favour, or for having violated their duty.	
s240.3 (2)		1. A person; 2. Offers, confers or agrees to confer compensation; 3. Acceptance of which is prohibited.	
s240.5 (1)	Gifts to public servants by persons subject to their jurisdiction	1. Public servants who are regulatory and law enforcement officials; 2. Solicit, accept or agree to accept any benefit; 3. Without lawful authority or reasonable excuse; 4. From a person known to be subject to such regulation, inspection, investigation or custody; or 5. Against whom such litigation is known to be pending or contemplated.	
s240.5 (2)		1. Public servants who are concerned with government contracts and pecuniary transactions; 2. Solicit, accept or agree to accept any benefit; 3. Without lawful authority or reasonable excuse; 4. From a person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.	

Section	Description	Offence Elements	Maximum Penalty
s240.5 (3)		1. Public servant who are judicial and administrative officials; 2. Solicit, accept or agree to accept any benefit; 3. Without lawful authority or reasonable excuse; 4. From a person known to be interested in or likely to become interested in any matter before such public servant or a tribunal with which the public servant is associated.	
s240.5 (4)		1. Public servant who is a legislative official; 2. Solicit, accept or agree to accept any benefit; 3. Without lawful authority or reasonable excuse; 4. From any person known to be interested in a bill, transaction or proceedings, pending or contemplated, before the Nitijela or any committee or agency thereof.	
s240.5 (5)	Exceptions	1. Fees prescribed by law to be received by public servant, or any other benefit for which the public servant gives legitimate consideration or to which he or she is otherwise legally entitled; or 2. Gifts or other benefits conferred on account of kinship or other personal relationship, independent of the official status of the public servant; or 3. Trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.	
s240.5 (6)	Offering benefits	1. A person; 2. Knowing confer, or offer, or agree to confer; 3. Any benefit prohibited.	
s240.6	Misconduct in public office	1. A public servant; 2. Knowingly does an unlawful act; a) Under the colour of the office; b) Is guilty of second-degree felony; or 3. Recklessly; a) Neglects to perform legal duties; b) Is guilty of third-degree felony.	
s240.7	Embezzlement, misappropriation, and diversion by public servants	1. A public servant; 2. Commits an act of embezzlement, misappropriation, or other diversion of property, funds, securities or any other item of value entrusted to the public servant; 3. For the public servant's benefit or the benefit of any other person.	

Section	Description	Offence Elements	Maximum Penalty
s240.8	Illicit enrichment	1. Any current or former public servant or elected public official; 2. Maintains a standard of living above that which is commensurate with their present or past official salary and enrichments; or 3. Is in control of pecuniary[176] resources or property disproportionate to their present or past official salary and enrichments, unless they give satisfactory explanation to the court regarding maintenance of such standard of living or how it is under their control; 4. Is guilty of a felony of the second degree.	

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[176] Definition of pecuniary benefit – s240.0
The benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain, but excluding economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Marshall Islands Revised Code 2014	
s242.4	Aiding consummation of crime	1. A person; 2. Intentionally aids another; 3. To accomplish in an unlawful object of a crime; 4. Example a) Safeguarding proceeds of the crime or converting the proceeds into negotiable funds177.	N/A
		Banking Act 1987	
s166	Money laundering offences and penalties	1. A person; 2. Acquires, possesses or uses property, knowing or having reason to believe that the property is the proceeds of crime; or 3. Knowing or having reason to believe that such property is the proceeds of crime, renders assistance to another person for: a) The conversion or transfer of property, with the aim of concealing or disguising the illicit origin of that property, to evade the legal consequences thereof; and b) Concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property. 4. Attempts, facilitates, conspires, or aids and abets any other person to commit an offence of money laundering.	20 years imprisonment; $2,000,000 fine For a body corporate, five times such a fine or double the amount of money involved in the offence scheme, whichever is greater.

Cases

***Republic of Marshall Islands v Yan Tong (Easy Life Company)* 2011-052**

Matter Criminal

Jurisdiction High Court of the Republic of Marshall Islands

Coram Chief Justice Carl B. Ingram

Date of Verdict 18 April 2012

Summary Yan Tong conducted a business in the RMI under the name of Easy Life Company, wherein she was charged with two counts of money-laundering, two counts of cheating/fraud, and seven counts of non-citizen doing business in the RMI without first obtaining a foreign investment business license.

[177] The offence is a felony of the third degree if the principal offence was a felony of the first or second degree. Otherwise it is a misdemeanour.

Yan Tong had cashed out government cheques which were payable to the College of the Marshall Islands and deposited money into the company savings account. The value of the cheques is between $4000 and $7000 in each individual occasion.

There were no verbal or written confirmation of authorisation from the College of Marshall Islands to carry out these actions.

Money-laundering is inclusive of the actions wherein a person attempts to:

> *Conceal or disguise the true nature, origin, or ownership of the property, and furthermore use the proceeds of crime to enhance her personal and business use.*

Cheating surrounding money-laundering is described as:

> *The unlawful obtaining of property or money by false pretence, knowing the pretences to be false, and with the intent thereby to permanently defraud the owner.*

Decision All charges dismissed without prejudice under foregoing stipulation and good cause.

Republic of Marshall Islands v Chun-Jung Lin (Home Special Supply and Special Supply Inc.) **2011-053**

Matter Criminal

Jurisdiction High Court of the Republic of Marshall Islands

Coram Chief Justice Carl B. Ingram

Date of Verdict 18 April 2012

Summary Chun-Jung Lin was a co-accused with Yan Tong for the charges of money-laundering, cheating, conspiracy and conducting business in RMI as a non-citizen without the required operating licenses.

Chun-Jung Lin (aka Ben Lin) was found to have cashed government cheques and deposited the withdrawn amount to third parties amounting to tips between $1000 and $2500.

Defined money-laundering as:

> *Unlawfully acquiring, possessing, or using property, knowing or having reason to believe that the property is the proceeds of crime*.

Discussed the offence of fraud under the factor of conspiracy to defraud as the following:

> *One or more persons conspire, either to commit a crime against the Republic, or to defraud the Republic ad proceeded to do an act to effect the object of the Conspiracy.*

Decision All charges dismissed without prejudice under foregoing stipulation and good cause.

Republic of Marshall Islands v Jae Guk Lee (R&L) **2012-002**

Matter Criminal

Jurisdiction High Court of the Republic of Marshall Islands

Coram Associate Justice James Plasman

Date of Verdict 13 July 2012

Summary

In a series of events following Candi-Leon's transactions of monies to the defendant, he was charged with conspiracy against the Republic of Marshall Islands and money-laundering of cheques payable to the College of Marshall Islands.

This case is a continuation of a third-party inclusion from the above-mentioned cases, wherein Candi-Leon was a third party which received a tip of cash which was withdrawn from the government cheque by Chun-Jung Lin (2015-053).

Additionally, there were prosecutorial misconduct associated with his giving of testimony, which included his statement being wrongfully taken as part of the government investigation. He provided his statement without the presence of legal counsel, in absence of a translator/interpreter and was not read his rights by the investigating official surrounding the giving of the statement.

Decision

The case was dismissed on the following basis:

1. Defendant was never a part of the conspiracy ring that was formed to defraud the government.
2. Defendant accepted monies on through Ms. Candi Leon without knowledge that the monies were part of the proceeds of a crime.

Defendant returned all the monies received from the proceeds of crime to the treasury in the amount of $2500.

Proceeds of Crime

Offence Element Table Offences

No legislation or sections identified.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Provisions Tables

Summary Table: Proceeds of Crime, Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions	Maximum Penalty
		Banking Act 1987	
s171	Seizure and detention of suspicious imports or exports of currency	1. Commissioner or Attorney-General; 2. May seize or detain; 3. Anu currency imported or exported from the RMI, if: a) Reasonable grounds of suspecting that it is: i. property derived from a serious offense; or ii. intended by any person for use in the commission of a serious offense.	Detained for under 24 hours after seizure. With judge orders, continued detention allowed for three months from the date of seizure.
s172	Application for confiscation order	1. Commissioner or Attorney-General may; 2. Apply to the High Court; 3. Not later than six months after a person's conviction of a serious offence; 4. A confiscation order against tainted property in respect of the offence.	N/A
s176	Payment instead of a confiscation order	1. High Court satisfied; 2. Confiscation order be made in respect of the property of a person convicted of a serious offence; 3. But the property cannot be made subject to such an order, in particular; a) Cannot, on the exercise of due diligence be located; b) has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the confiscation of the property; c) is located outside of the Marshall Islands; d) has been substantially diminished in value or rendered worthless; or e) has been commingled with other property that cannot be divided without difficulty the High Court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to the Marshall Islands an amount equal to the value of the property, part or interest.	Amount equal to the value of the property, part or interest.

Section	Description	Provisions	Maximum Penalty
s177	Application for procedure for enforcing fines	1. Under section 176; 2. The High Court may order; 3. Fine shall be treated as if it were imposed upon them in respect of a conviction for a serious offence.	20 years imprisonment[178]; $2,000,000 fine. If a corporate, five times such a fine or double the amount of money involved in the offence scheme, whichever is greater.
		Marshall Islands Revised Code 2014	
s211 (1)	Gift	1. A gift: a) Was made by a defendant charged with or convicted of a serious offence, at any time after the commission of the offence to which the proceedings relate[179], the High Court considers it appropriate, after consideration of all relevant circumstances, to take the gift into account; or b) Was made by a defendant charged with or convicted of a serious offence and was a gift of property; i. Received by the defendant in connection with the commission of a serious offence committed by the defendant or by another person; or ii. Which (in whole or in part, directly or indirectly) represented (when in the defendant's hands) property received by the defendant in connection with the commission of a serious offence by the defendant or another person.	N/A
s211 (2)		1. The Court must consider: a) A defendant transfers property to another, directly or indirectly, for a consideration the value of which is significantly less than the value of the property transferred by the defendant; 2. Court shall apply section 208, taking into account the difference between the value of the gift and the consideration, if any, provided to the defendant by the recipient.	
s212	Deriving benefit	1. Reference to a benefit; 2. Derived or obtained by or otherwise accruing to a person; 3. Includes that of a third party at the first person's request or direction.	N/A

[178] Conditions: as mentioned in s177(1)(b)
(b) direct that the term of imprisonment imposed pursuant to subsection (a) be served consecutively to any other form of imprisonment imposed on that person, or that the person is then serving.
[179] Or where more than one offence was committed, at any time after commission of the earliest of the offences to which the proceedings relate.

Section	Description	Provisions	Maximum Penalty
s213 (1)	Benefitting from the proceeds of crime	1. A person; 2. Benefits from a crime if; 3. At any time; 4. Received any payment or other reward in connection with, or derived any pecuniary advantage from; 5. The commission of a serious offence; 6. Whether committed by that person or someone else.	N/A
s213 (2)		1. Proceeds of a crime are: a) Any payments or other rewards received by the person at any time in connection with the offence; and/or b) Any pecuniary advantage derived by the person at any time from the commission of the offence; c) The value of a person's proceeds of a serious offence is the aggregate of the values of all payments, rewards or pecuniary advantages received by that person in connection with, or derived by the person from, the commission of the offence.	
s214	Restitution of restrained property	1. An investigation has begun against a person for a serious offence; 2. Property was restrained under this Chapter relating to that offence; 3. The following occurs: a) The person is not charged in the RMI with the serious offence; b) The person is charged with a serious offence in the RMI, but not convicted of that offence; c) A conviction for that serious offence in the RMI is quashed or reversed and no subsequent complaint is filed within a reasonable time thereafter. 4. The High Court shall order restitution of the restrained property together with any interest, if any, which has actually accrued, if such property is held in a financial institution.	N/A

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
	Mutual Assistance in Criminal Matters Act 2002	
The entire Act concerns Mutual Assistance, including the selected provisions below.		
s 405	Authority of the RMI to make requests for mutual legal assistance	1. A request for international assistance in a criminal matter; 2. Authorised to be made by the RMI; 3. Shall be made by the Attorney General.
s 406	Mutual legal assistance requests by the RMI	1. Attorney General may, pursuant to the authorisation granted under s406; 2. May request the appropriate authority of a foreign country to: a) Have evidence taken, or documents or other articles produced in evidence in the foreign country; b) Obtain and execute search warrants or other lawful instruments authorising a search for things believed to be located in that foreign country, which may be relevant to investigations or proceedings in the RMI, and if found, seize them; c) Locate or restrain any property believed to be the proceeds of crime located in the foreign country; d) Confiscate any property believed to be located in the foreign country, which is the subject of a confiscation order made under any law in place in the RMI for the purpose of preventing money laundering or realising proceeds of crime; e) Transmit to the RMI any such confiscated property or any proceeds realised therefrom, or any such evidence, documents, articles or things; f) Transfer in custody to the RMI a person detained in the foreign country who consents to assist the RMI in the relevant investigation or proceedings; g) Provide any other form of assistance in any investigation commenced or proceeding instituted in the RMI that involves or is likely to involve the exercise of a coercive power over a person or property believed to be in the foreign country; or h) Permit the presence of nominated persons during the execution of any request made under this Chapter.
s 410	Foreign requests for evidence gathering order or a search warrant	1. Attorney General grants a request by a foreign State to obtain evidence in the RMI, an authorised person may apply to the High Court for: a) A search warrant; or b) Evidence-gathering order. 2. The High Court, upon application made under subsection (1), may issue an evidence gathering order or a search warrant under this subsection, where it is satisfied that there is probable cause to believe that: a) A serious offence has been or may have been committed against the laws of the foreign State; b) Evidence relating to the offence may: i. Be found in a building, receptacle or place in the RMI; or ii. Be able to be given by a person believed to be in the RMI; c) In the case of an application for a search warrant, it would not, in all the circumstances, be more appropriate to grant an evidence-gathering order. 3. A statement contained in the foreign request to the effect that a serious offence has been or may have been committed against the law of the foreign State is prima facie evidence of that fact.

		4. An evidence gathering order: a) Shall provide for the manner in which the evidence is to be obtained in order to give proper effect to the foreign request, unless such manner is prohibited under the law of the RMI, and in particular, may require any person named therein to: i. Make a record from data or make a copy of a record; ii. Attend court to give evidence on oath or otherwise until excused; iii. Produce to the High Court or to any person designated by the Court, any thing, including any document, or copy thereof; or b) May include such terms and conditions, as the High Court considers desirable, including those relating to the interests of the person named therein or of third parties. 5. A person named in an evidence gathering order may refuse to answer a question or to produce a document or thing where the refusal is based on: a) A law currently in force in the RMI; b) A privilege recognised by a law in force in the foreign country that made the request; or c) A law currently in force in the foreign country that would render the answering of that question or the production of that document or thing by that person in the person's own jurisdiction an offence. 6. Where a person refuses to answer a question or to produce a document or thing pursuant to subsection (5)(b) or (c); a) The High Court shall report the matter to the Attorney General; b) Who shall notify the foreign country and request the foreign country to provide a written statement on whether the person's refusal was well-founded under the law of the foreign country. 7. Any written statement received by the Attorney General from the foreign country in response to a request under subsection (6) shall be admissible in the evidence-gathering proceedings, and for the purposes of this section be determinative of whether the persons refusal is well-founded under foreign law. 8. A person who, without reasonable excuse, refuses to comply with a lawful order of the High Court made under this section; a) Or who having refused pursuant to subsection (5), continues to refuse notwithstanding the admission into evidence of a statement under subsection (7) to the effect that the refusal not well-founded; b) Commits a contempt of court and may be punished accordingly. 9. A search warrant shall be in the usual form in which a search warrant is issued in the RMI, varied to the extent necessary to suit the case. 10. No document or thing seized or ordered to be sent to a foreign State shall be sent until the Attorney General is satisfied that the foreign State has agreed to comply with any terms or conditions in respect of the sending abroad of the document or thing. 11. The High Court shall be authorised to adopt, recognised, and enforce foreign court orders certified under seal, which orders shall be presumed to be valid in the absence of any evidence to the contrary.

s 411	Foreign requests for consensual transfer of detained persons	1. Where Attorney General approved a request of a foreign State to have a person, who is detained in custody in the RMI by virtue of a sentence or order of a court, transferred to a foreign State to give evidence or assist in investigation or proceeding in that State relating to a serious offence, an authorised person may apply to the High Court for a transfer order; 2. High Court may make a transfer order where it is satisfied, having considered any documents filed or information given in support of the application, that the detained person consents to the transfer; 3. A transfer order made under subsection (2) shall: a) Set out the name of the detained person and their current place of confinement; b) Order the person who has custody of the detained person to deliver the detained person into the custody of a person who is designated in the order or who is a member of the class of persons so designated; c) Order the person who is to take custody, to take the detained person to the foreign country and, on return to the RMI, to return that person to a place of confinement in the RMI specified in the order, or to such other place of confinement as the Attorney General may subsequently notify the foreign country. d) State the reasons for the transfer; e) Fix the period of time at or before the expiration of which the detained person must be returned, unless varied for the purposes of the request by the Attorney General. 4. The time spent in custody by a person pursuant to a transfer order shall count toward any sentence required to be served by that person, so long as the person remains in such custody and is of good behaviour.
s 412	Detention of persons transferred to the RMI	1. Attorney General may by written notice, authorise: a) The temporary detention in the RMI of a person in detention in a foreign country who is to be transferred from that State to the RMI pursuant to a request under s407(6). For such period as may be specified in the notice; b) The return of the person to the custody of the foreign country when their presence is no longer required. 2. A person in respect of whom a notice is issued under subsection (1) shall so long as the notice is in force: a) Be permitted to enter and remain in the RMI for the purposes of the request, and be required to leave the RMI when no longer required for those purposes, notwithstanding any RMI law to the contrary; b) While in custody in the RMI for the purposes of the request, be deemed to be in the lawful custody. 3. Attorney General may, at any time, vary a notice issued under subsection (1) where: a) The foreign country requests the release of the person from custody; b) Either immediately or on a specific date; c) Shall direct that the person be released from custody accordingly; d) Provided that the Attorney General may require the immediate departure of that person from the RMI if such departure is determined to be in the best interest of the nation. 4. Any person who escapes from lawful custody while in the RMI pursuant to a request under s407(6) may be arrested without warrant by any authorise person and returned to the custody authorised under subsection (1)(a).

		5. Where a foreign country has requested that a person be detained in the RMI in the course of transit between the foreign country and a third country; a) The Attorney General grants the request; b) The provisions of this section shall apply with necessary changes in points of detail in relation to that person. 6. No Court in the RMI has jurisdiction to entertain any application by or on behalf of any person in the RMI pursuant to a request under s407(6) relating to release from custody or continued presence in the RMI after their presence is no longer required for the purpose of the request.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Criminal Extradition Act	
The entire Act concerns Extradition, including the selected provisions below.		
s 204	Form of request	1. Extradition requests must be writing that the accused was present in the requesting foreign country at the time of the commission of the alleged crime and that thereafter has fled from such foreign country; 2. Requests must include: a) A copy of an indictment found; b) A copy of an information supported by an affidavit filed in the foreign country having jurisdiction of the crime; c) A copy of an affidavit made before a magistrate in such foreign country together with a copy of any warrant which was issued thereon; or d) A copy of a judgment of conviction or of a sentence imposed in execution thereof together with a statement by the executive authority of the requesting state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. 3. The indictment, information or affidavit made before the magistrate must substantially charge the person requested with having committed a crime under the law of the requesting foreign country and the copy must be authenticated by the executive authority making the request, which shall be prima facie evidence of its truth.
s 205	Official investigation of request for extradition	1. Request shall be made upon the Cabinet; 2. By the executive authority of a foreign country; 3. For the surrender of a person charged with or convicted of a crime; 4. The Cabinet may call upon the Attorney General or any prosecuting officer in the Republic to investigate or assist in investigating the request and to report to it the situation and circumstances of the person so requested, and whether he ought to be surrendered.
s 206	Extradition of person	1. Where a person is to be returned to the Republic and they are imprisoned or held under criminal proceedings pending against them in a foreign country; 2. Cabinet may agree with the executive authority of said country for the extradition of such person; 3. Before the conclusion of such proceedings or his term of sentence in such foreign country; 4. Upon condition that such person be returned to the foreign country at the expense of the Republic as soon as the prosecution in the Republic is terminated.
s 207	Extradition of persons who have left requesting foreign country involuntarily	1. Cabinet may surrender, on request of the executive authority of any foreign country; 2. Any person in the Republic who is charged; 3. In the manner provided in s225, with having violated the laws of the foreign country whose executive authority is making the request; 4. Event though such person left the requesting country involuntarily.

s 208	Extradition of persons not present in requesting foreign country at time of commission of crime	1. Cabinet may surrender, on request of the executive authority of any foreign country; 2. Any person in the Republic charged in such state; 3. In the manner provided in s204, with committing an act in the Republic or in a third state; 4. Intentionally resulting in a crime in the foreign country whose executive authority is making the request; 5. The provisions not otherwise inconsistent, shall apply to such cases mentioned above, even though the accused was not in that foreign country at the time of the commission of the crime and has not fled therefrom.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Elements of Offences and Case Law

Samoa

The Samoan legal system refers to English common law alongside its customary laws through the complex nature of its history and geographical placement within the Pacific. Samoa's history with colonialism began in 1899 under the establishment of the Samoan colony of the German Empire until 1914 when New Zealand forces entered and occupied Samoa. From 1920, Samoa was under a League of Nations mandate conferred on the British Crown administered by New Zealand colonial administration until 1962, when it gained independence.

Post-independence, Samoa has maintained a balance of traditions and customary law alongside the legislature of the country to resolve its issues. In turn, common law is a significant part of the legal system, exemplified through the establishment of common law courts. Christian principles and Samoan custom and tradition are the foundations upon which the Independent State of Samoa was declared as evident from the Preamble of the Samoan Constitution.

Article 114 of the *Constitution of the Independent State of Samoa 1960* outlines the transitional rules surrounding existing laws from the British and New Zealand joint administration, wherein "the existing law shall, until repealed by Act, continue in force on and after Independence Day".[180]

Samoa's common law consists of the decisions, rules and principles made by the formal courts of Samoa, alongside the comprehension of the English common law.

[180] The inclusion of these provisions continue to be a source of debate in Samoa regarding the application of English law in recent cases of *Okesene v Rossi* [2010] WSCC 92; *The Speaker of the Legislative Assembly v Malielegaoi* [2024] WSCA 1.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2013	
s 161(1)(a)	Theft or stealing	1. dishonestly take any property 2. with intent[181] to deprive any owner permanently of that property or of any interest in that property	See s 165.
s 161(1)(b)	Theft or stealing	1. dishonestly, using or dealing with any property 2. with intent[182] to deprive any owner permanently of that property or of any interest in that property 3. after obtaining possession of, or control over, the property in whatever manner.	See s 165.
s 162	Theft by person in a special relationship	1. any person who has received or is in possession of, or has control over, any property; 2. on terms or in circumstances that require the person to: i. account to any other person for the property, or for any proceeds arising from the property; or ii. deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.[183] 3. who fails to account to the other person as so required or deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements regardless of whether the person was required to deliver over the identical property received or in the person's possession or control.	See s 165.
s 165	Punishment for theft	1. in the case of theft by person in special relationship under section 162, to imprisonment for a term not exceeding 10 years; or 2. if the value of the property stolen exceeds $1,000, to imprisonment for a term not exceeding 7 years; or 3. if the value of the property stolen exceeds $500 but does not exceed $1,000, to imprisonment for a term not exceeding 2 years; or 4. if the value of the stolen property does not exceed $500, to imprisonment for a term not exceeding 1 year; or 5. if the property stolen by a clerk or servant which is owned by his or her employer or is in the possession of his or her employer, to imprisonment for a term not exceeding 10 years; or 6. if the property stolen is property in the possession of the offender as a clerk or servant, or as an officer or employee of the Government of Samoa or of any local authority or public body, or as a constable, to imprisonment for a term not exceeding 10 years.	

[181] **'Intent to deprive any owner permanently of property'** is defined in s 161(2) as including an intent to deal with property in such a way that it cannot be returned to the original owner in the same condition as when it was taken, or in such a way that the original owner will be permanently deprived of the property or any interest in the property.
[182] See above.
[183] Section 162(4) states that it is a question of law whether circumstances required the person to account or to act in accordance with any requirement.

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2013	
s 166	Ineffectual defences to charge of theft	1. without limiting the definition of "theft", a person is deemed guilty of theft despite the fact: (a) that at the time of the theft the person was in lawful possession of the property stolen; or (b) that the person had himself or herself a lawful interest in the property stolen, whether as a partner, co-owner, bailee, bailor, mortgagee, mortgagor, or otherwise; or (c) that the person was a trustee of the property stolen; or (d) that the property stolen was vested in him or her as an executor or administrator.	
s 172(1)	Obtaining by deception or causing loss by deception	1. A person 2. Uses deception to do any of the following.[184] (a) Whether directly or indirectly, obtain possession or ownership or control over any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or (b) Incur debt, liability or obtain credit; or (c) Induces of causes any other person to delivery, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pensionary advantage; or (d) Cause loss to any other person.	See s 173

Cases

Deception

Section 172 of the *Crimes Act 2013* prohibits obtaining property or causing loss by deception:

> **172. Obtaining by deception or causing loss by deception**
>
> A person commits the offence of obtaining by deception or causing loss by deception who, by any deception:
>
> > obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
> >
> > in incurring any debt or liability, obtains credit; or
> >
> > induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
> >
> > causes loss to any other person.

[184] Here 'deception' is defined in s 172(2) of the Crimes Act 2013::
In this section, "deception" means:
(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
(i) knows that it is false in a material particular; or
(ii) is reckless as to whether it is false in a material particular; or
(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
(c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

In this section, "deception" means:

a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

knows that it is false in a material particular; or

is reckless as to whether it is false in a material particular; or

an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

a fraudulent device, trick, or stratagem used with intent to deceive any person.

The meaning of deception is defined in sub-s 172(2):

(2) In this section, "deception" means:

(a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

(i) knows that it is false in a material particular; or

(ii) is reckless as to whether it is false in a material particular; or

(b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

(c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

The Supreme Court of Samoa outlined the elements of s 172 of the *Crimes Act 2013*, with reference to analogous legislation in New Zealand under s 240 of the *Crimes Act 1961* (NZ). The Court identified the following elements from s 172 that the prosecution must prove beyond reasonable doubt:

1. The accused must have made a representation that is materially false.
2. The representation must have been made with an intent to deceive another person.
3. The accused must have known of the falsity of the representation or was reckless whether the statement was true or false.
4. The false representation must have given rise to one or more of the situations to which s 172(1)(a)-(d) refers.[185]

A similar sentiment was echoed in the District Court of Samoa's judgment in *Police v Malu* [2015] WSDC 2 that same year, where the Court explained the meaning of s 172 with reference to analogous legislation and case law from New Zealand. Tuatagaloa DCJ noted the distinction between the offences outlined in sub-s (1)(a)-(c) and sub-s 1(d) as follows:

21. Section 172 of the Act differs significantly from its predecessor offence of obtaining credit by fraud (section 96) in the Crimes Ordinance 1961. Section 172 is similar if not the same as section 240 of the New Zealand Crimes Act 1961. Because the Samoa Crimes Act 2013 is fairly recent compared to New Zealand and this is

[185] *Police v Gianno* [2015] WSSC 198, [7]

the first time that someone has been charged under section 172 before the District Courts the New Zealand authorities will greatly assist.

22. The leading authority of R v Morley [2009] NZCA 618, [2010] 2NZLR 608 (referred to in Adams on Criminal Law at CA240.01) held at [15]-[16] that:

> *"Section 240 creates two different kinds of offences. First, in subs (1)(a), (1)(b) and (1)(c) there are three similar offences involving the obtaining of property, credit or the execution etc of a document. These first three offences require proof of a defined outcome, that is, the defendant must either obtained ownership, possession or control of something of value. Secondly, subs (1)(d) is a significantly different offence of causing loss by deception. That is, the victim must suffer loss."*

23. The learned authors of Adams on Criminal Law at [CA240.01] state:

> *"The important element is that the defendant must have practiced a deception. The requirement brings into play subs (2) which provide three different forms of deception in subs (2)(a), (2)(b) and (2)(c) all of which require an intention to deceive."*

24. The learned authors went on to say at [CA240.02] that R v Morley [2009] NZCA 618 as to the element of deception in section 240(1)(d) held that:

> *"...while an intention to deceive is needed, there was no requirement that the defendant had deliberately intended to cause the loss. However, some more than trivial loss must be reasonably foreseeable. If the loss arising from a deliberate deception is unexpected and not reasonably foreseeable, the offence is not committed. In this regard therefore subs (1)(d) is an offence of negligence."*

Neither of the above two cases refer to the methods of deception that are outlined in s 172(2)(b)-(c) which pertaining to a failure to disclose with intent to deceive and a fraudulent device or trick use with intent to deceive.

Theft

Sections 160-166 relate to theft, stealing, punishment, and defences.

The elements of theft that need to be established the Supreme Court of Samoa in *Police v Tavui* [2013] WSSC 6 set it out as follows:[186]

Section 161 of the *Crimes Act 2013* relevantly provides:

> ***"161. Theft or stealing**-(1) Theft or stealing is the act of:*
>
> *(a) dishonestly taking any property with intent to deprive any owner permanently of that property or of any interest in that property ...*
>
> *Section 165 provides for the penalty.*
>
> *To sustain the theft **charges**, the prosecution must satisfy the Court beyond reasonable doubt of the following ingredients:*
>
> *(i) There must be a taking by the accused;*
>
> *(ii) The taking was done fraudulently or dishonestly; and*
>
> *(iii) There was an intention on the part of the accused to deprive the owner permanently of the item that was taken (see Police v. Tavui [2013] WSSC 2013 (22 February 2013)).*

[186] This case pre-dates the Crimes Act 2013 but talks to the previous provision of theft and stealing.

Theft as a servant

In the case of *Police v Tavui,*[187] the Court considered the application of ss 85 and 86(1)(g) of the *Crimes Ordinance 1961* (analogous to the *Crimes Act*) as it relates to theft by a servant.

The Court formed the view that in the context of theft, 'fraudulently' and 'dishonestly' mean the same thing. This neatly fits into the principle that it is for a jury, without direction from the judge, to determine what is considered dishonest having regard to the 'standard of ordinary decent people'.[188]

The elements were supported and further broken down in more recent case law such as *Police v Galuega,* where the Court identified the elements required to be proved beyond a reasonable doubt relating to theft under s 161 as it related to the case:

- The accused dishonestly took property;
- Belonging to his or her employer;
- Without the employer's consent;
- With intention to permanently deprive the employer of that property.[189]

In identifying an intention to permanently deprive the owner, the Court can rely on mere words and actions of an accused at the time of trial and the events leading up to the trial.[190] Such actions can include lying, covering up illegal acts, concealment or obfuscating of the truth, and uncredible testimony.

[187] [2013] WSSC 6.
[188] *Police v Tavui* [2013] WSSC 2013 citing *R v Feely* [1973] QB 530, 537-538.
[189] *Police v Galuega* [2020] WSSC 94, [6].
[190] Ibid [18].

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2013	
s134(1)	Bribery of judicial officer	1. A person 2. corruptly[191] gives or offers or agrees to give 3. any bribe[192] to any person with intent to influence any judicial officer[193] in respect of any act or omission by a judicial officer in his or her judicial capacity.	7 years
s134(2)	Bribery of judicial officer	1. A person 2. Corruptly gives or offers or agrees to give 3. Any bribe to any other person within intent to influence any judicial officer or any Registrar or Assistant Registrar or any court in respect of any act or omission by him or her in his official[194] capacity, not being an act, or omission to which subsection (1) applies.	7 years
s135(1)	Corruption and bribery of a Minister of the Government of Samoa	1. A Minister, Associate Minister or Chief Executive Officer of the Government of Samoa 2. corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, 3. any bribe for himself or any other person 4. in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a Minister, Associate Minister or Chief Executive Officer.	14 years
s135(2)		1. A person 2. corruptly gives or offers or agrees to give 3. any bribe to any person with intent to influence any Minister, Associate Minister or Chief Executive Officer of the Government of Samoa 4. in respect of any act or omission by him or her in his or her capacity as a Minister, Associate Minister or Chief Executive Officer.	7 years
s136(1)	Corruption and bribery of member of Parliament	1. A Member of Parliament 2. corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, 3. any bribe for himself or herself or any other person 4. in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a Member of Parliament.	7 years

[191] '**corruptly**' is defined in s 132 of the Crimes Act 2013 for Part 11. "corruptly" means a person acts corruptly in relation to any bribe where he or she knows or is reckless to the fact that the bribe is intended to influence the person bribed to act or omit to act in breach of any oath of office, or otherwise than in accordance with his or her legal obligations or duties in relation to any public office.

[192] '**bribe**' is defined in s 132 of the Crimes Act 2013 for Part 11. "bribe" means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect

[193] '**judicial officer'** has a fixed meaning under s 132. 'judicial officer' means a Judge of any court, or a District Court Judge, Coroner, Faamasino Fesosoani, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath.

[194] '**official'** has a very specific meaning under s 132 of the Crimes Act 2013. 'official' means any person in the service of the Government of Samoa (whether that service is honorary or not, and whether it is within or outside Samoa), or any member or employee of any local authority or public body.

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2013	
s136(2)		1. A person 2. corruptly gives or offers or agrees to give 3. any bribe to any person 4. with intent to influence any Member of Parliament in respect of any act or omission by him or her in his or her capacity as a Member of Parliament.	7 years
s137(1)	Corruption and bribery of law enforcement officer	1. A law enforcement officer[195] 2. corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, 3. any bribe for himself or herself or any other person 4. in respect of any act done or omitted, or to be done or omitted, by him or her in his official capacity.	7 years
s137(2)		1. A person 2. corruptly gives or offers or agrees to give 3. any bribe to any person 4. with intent to influence any law enforcement officer in respect of any act or omission by the law enforcement officer in his or her official capacity.	7 years
s138(1)	Corruption and bribery of official	1. An official whether within Samoa or another country, 2. corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, 3. any bribe for himself or herself or any other person 4. in respect of any act done or omitted, or to be done or omitted, by the official in his or her official capacity.	7 years
s138(2)		1. A person 2. corruptly gives or offers or agrees to give 3. any bribe to any person 4. with intent to influence any official in respect of any act or omission by the official in his or her official capacity.	7 years
s150	Bribery in Samoa of foreign public official	1. a person 2. corruptly gives or offers or agrees to give a bribe to a person 3. with intent to influence a foreign public official 4. in respect of any act or omission by that official in his or her official capacity, whether or not the act or omission is within the scope of the official's authority, in order to (a) obtain or retain business; or (b) obtain any improper advantage in the conduct of business.	7 years
s151	Bribery outside Samoa of foreign public official	1. a person who is either; (a) a citizen of Samoa; or (b) ordinarily resides in Samoa; or (c) a body corporate incorporated in Samoa; or (d) a corporation sole incorporated in Samoa. 2. Commits an act described in s 150 outside of Samoa that would otherwise be a crime within Samoa.	7 years

[195] '**law enforcement officer'** is defined under s 132 of the Crimes Act 2013. 'law enforcement officer' means any constable, or any person employed in the detection or prosecution or punishment of offenders;

Cases

Bribery cases under predecessor legislation - Official Corruption - s.35 *Crimes Ordinance 1961* (repealed by the enactment of the *Crimes Act 2013* which came into force on 1 May 2013)[196]

The Police v Iupeli Utuvai* aka *Mulimuli Utuvai

Matter Verdict after trial

Jurisdiction District Court of Samoa

Coram HH Judge Nelson

Date of Verdict 12 September 2006

Charge/s 3 x counts of Official Corruption, s.35(b) *Crimes Ordinance 1961*

Summary The defendant was a schoolteacher charged with burglary and theft charges which were before the District Court. He was also charged with sexual assault which was before the Supreme Court. The defendant approached the District Court judge's associate and gave her an envelope which he said was for one of the District Court judges.

He wanted to go in and see the judge to deliver the correspondence, but the associate insisted that she would deliver it to the judge. The defendant was not happy but he eventually agreed, on condition she not open the envelope. The envelope was quite thick. Before he left the defendant gave the associate $10 for her lunch. The associate refused to accept it but he threw the ten tala ($10) note inside the office and it fell onto the floor. The Registrar saw this and became suspicious, so he opened the envelope in front of the associate. It contained a bundle of $100 notes totalling $1,000. It also contained a note to the judge in which the person was seeking a "fesoasoani" [help/aid] from the judge and enclosing a "tupe faatauvaa" [simple money] of $1,000 for the judge's "taumafataga" [dinner/meal]. When delivering verdict the judge said: *"…I am satisfied that such a large sum accompanied by such words…could only have been intended to be an attempt to bribe the unbribable.*" They closed it up with the $10 and gave it to the judge.

The defendant was also charged with bribery of a Supreme Court judge for the purpose of assisting in the defendant's case on the same day. The evidence to support this charge was from the Chief Censor who was working as a court officer of the District Court at that time. He said the defendant approached him outside a courtroom and told him that he had a letter for the Supreme Court justice. There was no evidence as to what was in the letter or whether the letter went to the justices' office or the justice in question. The defendant told the witness that he had just delivered a letter for one of the District Court judges.

The defendant was found guilty of one count – that he did corruptly offer a District Court judge the sum of $1,000 as a bribe to assist him in his court cases before the District Court. The court was not satisfied in relation to the $10 lunch money that it was a bribe or that there was any corrupt intent, describing it as more of a "gratuitous tip". The defendant was acquitted of that charge. The defendant was also acquitted of the charge concerning the attempt to offer a Supreme Court judge an unspecified sum of money for the purpose of assisting in the defendant's case. The evidence was found to be "grossly insufficient" and held there was no case to answer.

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[196] PJIP is grateful to his Honour Justice Vui Clarence Nelson for providing the Working Group with unreported cases and for sharing his paper entitled *Corruption in Samoa: A Country Perspective*, first delivered at the Fraud & Corruption Workshop at the United Nations Asia & Far East Institute for Prevention of Crime (UNAFEI) in Tokyo, Japan in 2005.

The Police v Iupeli Utuvai Mulimuli Utuvai

Matter	Sentence
Jurisdiction	District Court of Samoa
Coram	HH Judge Nelson
Date of Verdict	10 October 2006
Charge/s	1 x Official Corruption s.35(b) *Crimes Ordinance 1961*
Summary	Total effective sentence of 2 ½ years' imprisonment.

For sentence for one count – on 27 June 2005 he did corruptly offer a District Court judge the sum of $1,000 as a bribe to assist him in his court cases before the District Court. Maximum Penalty is 5 years imprisonment. Sentence after trial. First time offender, previous good character, well-educated young man who had a bright future ahead of him. Teacher at various secondary schools – judge found he was "obviously well versed in matters of what is right and wrong and what is improper". He "attempted to bribe the unbribable".

The judge accepted he was desperate and made a serious error of judgement. The fact he tried to bribe a judicial officer makes this charge "*one of the most serious that can come before the courts. It is a cornerstone of the system of the system of administration of justice in this or indeed any country that there is belief in the honesty and integrity of its judges…[t]he sentence the court pronounces must reflect not only the seriousness of the offence but must reflect that any attempt to try and bribe judicial officials will be met with nothing but the full force of the law. There can only be one sentence for such and offence Iupeli and that is a sentence of imprisonment.*"

Learned sentencing judge referred to a previous case in the District Court involving a police officer who was convicted of taking a large sum of money from a defendant who was before the criminal courts. That offender received a sentence of three years imprisonment after deductions or mitigating factors from a starting point of 4 years.

The judge said the present offending is no less serious and is arguably more serious because it involves a judge and imputation on the character of a judge. Starting Point 4 years imprisonment. Reduced by 6 months for being first time offender of previous good character. Further 6-month deduction for other mitigating factors. Directed that the money ($1,000) which the offender offered to donate to the community service program of the Probation Office be so applied.

In consideration of that donation a further 6 months was deducted. The balance of sentence is 2.5 years imprisonment. A further year deducted to reflect time spent in custody awaiting trial. Final sentence of 18 months imprisonment to serve.

Police v FE[197]

Official Corruption, s.35 *Crimes Ordinance 1961*

This case concerned the prosecution of a Senior Sergeant of the Criminal Investigation of the Police Service and his team for Official Corruption under s.35 of the *Crimes Ordinance 1961*. The Senior Sergeant and his team accepted a substantial bribe from a person suspected of drug-related crimes to facilitate the suspect's release

[197] This case summary is based on that of his Honour Justice Vui Clarence Nelson contained in his paper entitled *Corruption in Samoa: A Country Perspective*, 2005.

from police custody prior to trial. The Sergeant's team were given immunity from prosecution in exchange for testifying against their leader, who had kept most of the bribe money for himself. Most of the team subsequently resigned from the police force and exited law enforcement. The prosecution was successful and the offender was sentenced to 3 years imprisonment, which had been reduced from 4 years for various mitigating factors. The drug suspect was never located although a warrant for his arrest was issued after he failed to appear at court for trial. It is notable that the Samoa Police Service themselves initiated the investigation and brought the charges.

Crimes Act 2013

Bribery is considered in various forms under ss 134-138 of the *Crimes Act 2013;* however, the core elements of each offence are similar in nature.

Case examples for s 137 of the *Crimes Act 2013* have been considered on two occasions in defended trials in the District Court of Samoa: *Police v Laulu* [2020] WSDC 12 (20 May 2020) and *Police v Van Dung* [2019] WSDC 13 (01 November 2019).

Section 137 of the *Crimes Act 2013* specifically relates to corruption and bribery of law enforcement officers.

> **137. Corruption and bribery of law enforcement officer**
>
> (1) A law enforcement officer is liable to imprisonment for a term not exceeding seven (7) years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, to be done or omitted, by him or her in his official capacity.
>
> (2) A person is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any law enforcement officer in respect of any act or omission by the law enforcement officer in his or her official capacity.

***Police v Van Dung* [2019] WSDC**

In *Police v Van Dung* [2019] WSDC, in the context of an individual bribing a law enforcement officer, the District Court of Samoa interpreted s 137(2) to mean that the prosecution must prove that the accused believed that the payment of monies was done because it would influence a law enforcement officer to do or omit to do an act in his official capacity as a police officer (at [3]).

The learned trial judge referred to the definition of "corruptly" in section 132 of the *Crimes Act 2013* (refer to footnote 182), and to the term "bribe" as being "... any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect; ...". The trial judge found (at [47]-[49]) that the wording was similar to section 104 of the *Crimes Act 1961* of New Zealand, and he had regard to the case of *Field v R* SC3/2011; [2011] NZSC 129, being a judgment delivered by Justice William Young, who at paragraph 18 stated that:

> *"The word "bribe" customarily denotes a payment (or other benefit) which is provided (or offered) in order to influence the behaviour of a public official or agent in a way that is contrary to recognized rules of probity".*

The learned trial judge again referred to the judgment of Justice Young in *Field v R* SC3/2011; [2011] NZSC 129 to give guidance on the meaning of the word reckless as it applies to a bribe:

> *49. The fact that "corruptly" is generally defined in the Act may undoubtedly suggest that "knowledge or recklessness" applies generally to "any bribe" as defined. This is especially so when the definition or interpretation provisions of the Act in section 132 does not elaborate on the application of the definition of the term "corruptly" to Part 11 of the Act. However, that is not the case. The construction of the definition*

referring to "any bribe" as "intended to influence the person bribed" as worded in section 132 of the Act is clearly attributed and limited to the knowledge or recklessness of that of the giver and not the receiver. This approach is also consistent with the view of Justice Young in Field that the legal requirement burdening charges under section 103(1) CANZ1961 (the equivalent of section 137(1) of the Act) strongly suggests that "legislature did not see liability as depending on such an intention being present".

50. In saying that, it does not follow that the definition of "corruptly" in section 132 of the Act deprives "corruptly" in section 137(1) of effect. The section establishes that the defendant knew or must have known that the money he received was provided in connection with the alleged assistance he gave meaning he knowingly engaged in conduct which the legislature regards as corrupt.

Although 'corruptly' is defined within the *Crimes Act 2013,* the District Court of Samoa further explained the context of the term – stating:

51. S103(2) is the equivalent offending provision to section 104(2) of the NZCA1961 as to acts of corruption and bribery relating to law enforcement officers and in turn the latter the equivalent of section 137(2) of the Act. In paragraph 66, Justice Young went on to define in context the extent of the term "corruption" to mean:

"In part it (section 103(1)) captures the requirement for a defendant to have acted knowingly. In the present case, this requirement required the Crown to establish that the appellant knew that the services he received were provided in connection with the immigration assistance he gave, meaning that he knowingly engaged in conduct which the legislature regards as corrupt."

52. There is a more significant distinction between section 104(2) of the NZCA1961 and section 137(2) of the Act. The term "corruptly" is defined in the Samoan Act where it is not in the New Zealand legislation:

> *"... a person acts corruptly in relation to any bribe where he or she knows or is reckless to the fact that the bribe is intended to influence the person bribed to act or omit to act in breach of any oath of office, or otherwise than in accordance with his or her legal obligations or duties in relation to any public office; ...".*

The Court later expressly stated that knowledge of the connection between the bribe and the influence of behaviour is a necessary element.[198]

***Police v Laulu* [2020] WSDC 12**

The District Court of Samoa considered the inverse provision of section 137 in the context of a law enforcement officer taking a bribe. The same element of knowledge was noted by the Court in the case of *Police v Laulu* [2020] WSDC 12. The Court held that:

5. For a conviction under this charge to be made, the prosecution must prove that the defendant had acted "corruptly" where he must have known or believed that the alleged monies paid to him was done because he had provided or it was anticipated that he would provide assistance in his capacity as a Police Officer for Mr Tran Van Dung (the giver of the alleged bribe) to have access to his wife or relative in Police custody.

The Court observed the necessary elements that are required in demonstrating that a bribe occurred on the part of an official within the meaning of section 137 of the *Crimes Act 2013*:

[198] *Police v Van Dung* [2019] WSDC 13, [54].

6. The relevant elements therefore that the Prosecution must prove in support of the charge are:

i. That the defendant must be an "official" within the definition prescribed under section 132 of the Act;

ii. That the defendant accepted or obtained, or agreed or offered to accept or attempted to obtain, any bribe (as defined under section 132 of the Act) for himself or any other person;

iii. That the conduct in ii. above must have been carried out "corruptly" as defined in section 132 of the Act; and

iv. That the corrupt conduct in ii. above must have been done in respect of any act done by him in his official capacity.

Corruption

Offence Element Table

Section	Description	Elements	Maximum Penalty
		Crimes Act 2013	
s147	Corrupt use of official information	1. An official whether within Samoa or elsewhere, 2. Corruptly uses or discloses any information, acquired by him or her in his official capacity, 3. To obtain directly or indirectly, an advantage or a pecuniary gain for himself or herself or any other person.	7 years

Cases

"Corruptly"

The Court in its sentencing remarks in the case of *Police v Feepo*[199] stated that the words 'corruptly accepts or obtains any bribe' in the context of the then s 35 of the *Crimes Ordinance* imports the mental element of corrupt intent.[200] To this extent, the Court then made reference to the meaning of 'corrupt' in the Oxford dictionary merely to compare the actions of the accused to as being actions that were 'dishonest' and 'untrustworthy'.[201]

In in the sentencing remarks of Nelson J in *Police v Feepo,* his Honour outlines s 35 offence of official corruption as either:

> *(a) The holder of any office, whether judicial or otherwise, in the service of the Independent State of Samoa, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself, herself or any other person any bribe, that is to say, any money or valuable consideration whatever, on account of anything done or to be afterwards done by that person in an official capacity; or*
>
> *(b) Corruptly gives or offers to any person holding any such office or to any other person any such bribe as aforesaid on account of any such act.*[202]

In the context of official corruption of a police officer, the District Court of Samoa considered the weight to be given to different parts of the defendant's behaviour in an alleged bribe. Schuster DCJ in the sentencing remarks of *R v Van Dung* stated that although the amount of money in a bribe may be small, it is the specific intent or reckless intent to corruptly give the bribe that is the primary consideration of the Court.[203]

This was with reference to the accused deliberate and intentional actions to bribe an officer.[204]

In sentencing the accused in R v Van Dung, the Court did accept that a de minimis defence does exist when there are vitiating factors to the offence such as a guilty plea, the size of the bribe and the circumstances of the accused.[205]

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[199] [2011] WSSC 123.
[200] Ibid.
[201] *Police v Feepo* [2011] WSSC 123.
[202] Ibid.
[203] *Police v Van Dung* [2019] WSDC 14, [8].
[204] Ibid [9].

[205] *Police v Van Dung* [2019] WSDC 14, [15].

Sentencing

Police v Ah Tran Thi [2020] WSDC 1 (27 January 2020)

Police v Maiava [2017] WSSC 39 (4 April 2017)

Police v Feepo [2011] WSSC 123 (25 July 2011)

Police v Tausili [2015] WSSC 70 (14 July 2015)

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes Act 2013	
s152A	Money laundering offence	1. a person (a) engages in a transaction that involved property knowing or having reason to believe that the property is the proceeds of crime;[206] or (b) acquires, possesses, uses, receives or brings into Samoa property, knowing or having reason to believe that the property is derived directly or indirectly form the proceeds of crime;[207] or (c) converts or transfers property derived directly or indirectly from the proceeds of crime; or (d) converts or transfers property derived directly or indirectly from the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or of aiding a person involved in the commission of the offence to evade the legal consequences thereof; or (e) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly from the proceeds of crime; or (f) renders assistance to any other person for any of the above.	See s 152C
s152C	Money laundering penalties	1. a person found guilty under s 152A is liable on conviction for a fine not exceeding 1,000 penalty units, or to imprisonment for a period not exceeding 15 years, or to both. 2. A body of persons, whether corporate or unincorporated that is found guilty of an offence under s 152Ais liable on conviction to a fine not exceeding 10,000 penalty units.	
		Proceeds of Crime Act 2007	
s11	Money Laundering Offences	1. a person (a) engages in a transaction that involved property knowing or having reason to believe that the property is the proceeds of crime;[208] or (b) acquires, possesses, uses, receives or brings into Samoa property, knowing or having reason to believe that the property is derived directly or indirectly form the proceeds of crime; or (c) converts or transfers property derived directly or indirectly from the proceeds of crime; or (d) converts or transfers property derived directly or indirectly from the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or of aiding a	See s 13

[206] Under s 152A(4), 'proceeds of crime' does not require a Court to have found a person guilty of an offence prior to the charge of money laundering under s 152A.
[207] Under s 152A(2) knowledge can be inferred from objective factual circumstances.
[208] 'Proceeds of crime' is defined separately to the *Crimes Act 2013* under s 6 of the *Proceeds of Crime Act 2007.*

Section	Description	Offence Elements	Maximum Penalty
		person involved in the commission of the offence to evade the legal consequences thereof; or (e) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly from the proceeds of crime; or renders assistance to any other person for any of the above.	
s12	Offence committed by a body of persons	1. If an offence under s 11 is committed by a body of persons, whether corporate or unincorporated, a person, who at the time of the commission of the offence, acted in an official capacity for or on behalf of such body of persons, whether as a director, manager, secretary or other similar officer, or was purporting to act in such capacity, shall be guilty of that offence, unless the person adduces evidence to show that the offence was committed without the person's knowledge, consent or connivance.	See s 13
s13	Penalties	A person guilty under either ss 11-12 is liable on conviction to a fine not exceeding 1,000 penalty units or to imprisonment for a period not exceeding 7 years, or both.	
The Money Laundering Prevention Act 2007			
s26	False or Misleading Statements		

Cases

Attorney General v Pacific International Development Bank of American Samoa [2000] WSSC 48

Matter Criminal

Jurisdiction Supreme Court of Samoa

Coram Chief Justice Sapolu

Date of Verdict 6 October 2000

Summary Money laundering

The Court in this case noted that there is no requirement that an accused be charged with money laundering within Samoa for a freezing order to be made against them. It is sufficient that a foreign country has asked for the assistance of the Attorney-General.

The Court noted the vast definition that is given to the term Money Laundering in s 2(1) as:

> Receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into Samoa any property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime.

As possession is not defined within the Act, the common law guided the Court in finding that possession encompasses not only physical possession, but also legal possession which is much wider. With reference to Professor Goode's Commercial Law (1995) 2nd ed at pp 46-47, the Court found that possession is indivisible and can only be held or transferred in its entirety; however, the Court concluded that as possession was not argued that findings would be left for a future case.

In terms of 'control' the Court noted that there was no challenge to the meaning and the Court was satisfied that a bank account being controlled by someone was sufficient.

Finally, before commenting on the submissions of the case, the Court noted the legislative framework that makes up the meaning of 'proceeds of crime'. It was stated that s 2 defines proceeds of crime to mean the proceeds of an 'unlawful activity'. Unlawful activity is defined in s 2 to mean any activity which under law is a crime punishable by death or imprisonment for a maximum period of not less than 5 years. Where an offence is under the 5 years, the Court suggests that a charge of theft would work best noting the 7-year maximum penalty.

Proceeds of Crime

Offence Element Table

Conduct including the possession of and dealing with the proceeds of crime are within the "money laundering" offences.

Cases

Although almost identical, there are differences in the wording of the two separate money laundering offence creating provisions under sections 152A of the *Crimes Act 2013* and sections 11 – 13 of the *Proceeds of Crime Act 2007*. Section 11(c) of the *Proceeds of Crime Act 2007* appears to be separated into two distinct subsections in the *Crimes Act 2013* (sec on 152A (c) and (d). The significant difference however is in terms of penalty.

It is unclear whether the legislature intended there to be two separate money laundering provisions. In this context, section 11(1)(a) and 11(1)(b) of the *Proceeds of Crime Act 2007* create exactly the same offences as are in sections 152A(1)(a) and 152(1)(b) of the *Crimes Act 2013,* yet different penalties apply. They are also prosecuted before different courts – *Proceeds of Crime Act 2007* offences come within the jurisdiction of the District Court and *Crimes Act* offences are heard before the before Supreme Court.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
		Proceeds of Crime Act 2007
ss 14 - 18	Part 3	Confiscation Division 1 - General
ss 19 - 27	Part 3	Confiscation Division 2 – Forfeiture Orders
ss 28 - 36	Part 3	Confiscation Division 3 – Pecuniary Penalty Orders
ss 37 - 45	Part 4	Facilitating Investigations and Preserving Property Division 1 – Powers of search and seizure
ss 46 - 57	Part 4	Facilitating Investigations and Preserving Property Division 2 – Restraining Orders
Ss 58 - 65	Part 4	Facilitating Investigations and Preserving Property Division 3 – Foreign Restraining Orders

Cases

The case of *Attorney General v Taino*[209] provides a useful basis for understanding forfeiture orders under the *Proceeds of Crime Act 2007* in Samoa. The Court describes s 14(1)(a) of the Act as requiring the offence to be a "serious offence" which requires further clarification of the meaning of an "unlawful activity".[210] Section 2 of the Act helpfully defines both of these requirements. A serious offence is:

> (a) against a law of Samoa that would constitute unlawful activity; or
>
> (b) against the law of a foreign State that, if the relevant act or omission had occurred in Samoa, would be an offence that would constitute unlawful activity against any laws of Samoa;

Where unlawful activity is further defined as:

an act or omission that constitutes an offence and that is punishable, under the laws of Samoa, for a maximum period of not less than 12 months.

The interpretation of "tainted property" was also considered within the case as being either the proceeds of crime or an instrument. The Court does not go on to describe the application of instrument under s 2 of the Act as it did not pertain to the case but did consider the meaning of proceeds of crime.[211] Section 6 of the Act defines the meaning of proceeds of crime as:

"Any property wholly or partly derived or realised, whether directly or indirectly from a serious offence …, whether situated within or outside of Samoa …[212]

The Court noted that this definition requires that there must be a connection between the property claimed to be the proceeds of a crime and a serious offence and that any property that is not realised by virtue of a serious offence does not qualify.[213]

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[209] [2015] WSSC 21.
[210] Ibid [16].
[211] Attorney General v Taino [2015] WSSC 21, [18].
[212] Ibid [19].
[213] Ibid [21].

The previous year, the Supreme Court of Samoa in *Attorney General v Fiti*[214] described the legislative framework for the proceeds of crime legislation, with reference to the case law and legislation in New Zealand, to assist in interpreting the purpose of forfeiture orders:

> 18. The policy of a Proceeds of Crime legislation was stated in relation to the Proceeds of Crime Act 1991 (NZ) in R v Dunsmuir [1996] 2 NZLR 1 where McKay J, in delivering the judgment of the New Zealand Court of Appeal, said at pp. 6-7:

"Where a forfeiture order is made in respect of property representing the proceeds of crime, it merely takes from the criminal his ill-gotten gains. There can be no complaint as to that. A forfeiture order in respect of property used for the commission of a crime goes further. It is an additional penalty provided by Parliament as a deterrent. The criminal is sentenced for his crime, and in addition any of his property used to commit or facilitate the crime is liable to forfeiture. If this is Draconian that appears to be the intention of the legislation. Innocent third parties who have an interest in the property are protected under ss17 and 18. The offender who puts his property at risk by using it for criminal purposes must face the consequences".

> 19. Even though the definition of "tainted property" under our Proceeds of Crime Act 2007 is not identical to the definition of "tainted property" under the Proceeds of Crime Act 1991 (NZ), they are very similar. Both definitions provide for two kinds of "tainted property" which are the proceeds of crime and property used in the commission of a serious offence. The passage just cited from R v Dunsmuir [1996] 2 NZLR 1 reflects those two kinds of tainted property. In R v Elliot [2010] NZHC 1409, Heath J said para [40]:

'"In R v Dunsmuir [1996] 2 NZLR 1, the Court of Appeal drew a distinction between the two types of 'tainted property', saying that a forfeiture order in respect of the proceeds of crime 'merely takes from the criminal his [or her] ill-gotten gains', while such an order in respect of property used for the commission of a crime went further and ought to be regarded as 'an additional penalty provided by Parliament as a deterrent"'.[215]

A forfeiture order or pecuniary penalty under the *Proceeds of Crimes Act 2007* does not necessarily need to relate to a money laundering offence. The property needs to be "tainted property" involved in a "serious offence" or "terrorist act" as defined in s2 of the *Proceeds of Crime Act 2007*. See also for example: *Attorney General v Faisauvale* [2011] WSSC 56 (24 June 2011); *Attorney General v Filipaina* [2012] WSCA 1 (31 May 2012); and *NPO v Tulua* [2016] WSSC 46 (15 March 2016.

In considering the requirement to issue a forfeiture order, the Supreme Court of Samoa, again with reference to New South Wales and New Zealand case law, found the following factors to be relevant:

> (a) The crucial provisions of the Act for the purposes of this part of the proceedings are the definition of "tainted property" and s.19(4).
>
> …
>
> b) In terms of hardship to any person if an order is made, the making of a forfeiture order will inevitably result in hardship to someone. But not any such hardship would be enough. The hardship would have to be "undue hardship" even though the word "undue" is not used in s.19(4) (c) to qualify the word "hardship". In this connexion, I refer to the two cases cited by counsel for the applicant on the meaning to be given to the word "hardship" in s.19(4)(b) of the Act. The first is the judgment of the New South Wales Court of Criminal Appeal in R v Haded (1989) CCC (NSW) 304 where McInerney J, in relation to the Crimes (Confiscation of Profits) Act 1985 (NSW), said at p.309:

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[214] [2014] WSSC 63.
[215] Ibid [18]-[19].

"The Court must consider in the exercise of its discretion two matters: the use that is ordinarily or intended to be made of the property and, secondly, any hardship that may reasonably be likely to arise following the forfeiture of that property. It must be pointed out, of course, there would always be hardship stemming from the Act itself, but, in my view, that is not the hardship about which the Act speaks and to which a Court is entitled to have regard".

1. The second case cited by counsel for the applicant in this connection is the judgment of the New Zealand Court of Appeal in Lyall v Solicitor General [1997] 2 NZ 641, where Blanchard J, in delivering the judgment of the Court, said at p.646:

"There will always be some hardship to an offender and sometimes to a third party when a forfeiture order is made. It stems from the operation of the Act and is disregarded: R v Haded (1989) 16 NSWLR 476. Section 15(2) refers to undue hardship. Here there can be no undue hardship to anyone other than Black in the making of the forfeiture order because the other interests (those of Lyall and the mortgagee) are able to be addressed under ss.17 and 18".

34. The above passage from Lyall v Solicitor General [1997] NZCA 73; [1997] 2 NZLR 641, 646 was cited with approval in the subsequent judgment of the New Zealand Court of Appeal in Monk v R [2013] NZCA 564, para [53].
35. Undue hardship means a level of hardship above that ordinarily contemplated: see, for example, Solicitor General v Wikitera [2010] NZHC 908, para [33]. The factors to be taken into account when considering the question of undue hardship are set out in several judgments of New Zealand High Court. It will suffice for present purposes to refer to Solicitor General v Barker and Atlas Property Investment Ltd [2009] NZHC 686 where Dobson J said at para [30]:

"The following non-exclusive factors to be addressed when considering the issue of hardship were listed in Taylor v Attorney of South Australia (1991) 55 SASR 462 (SC SA) at 474, and adopted in Solicitor General v Sanders (1994) 2 HRNZ 24:

"(i) The value of the property to be forfeited;

"(ii) In the case of drug offending, the value of the drugs or the size of the crop;

"(iii) Whether the property was acquired with the proceeds of the offending;

"(iv) The extent of the offender's interest in the property;

"(v) The utility of the property to the offender;

"(vi) The length of ownership;

"(vii) The extent to which the property is connected with the commission of the offence;

"(viii) The fact that forfeiture is intended as a deterrent; and

"(ix) The likely consequences of the forfeiture order on both the offender and third parties.[216]

[216] *Attorney General v Fiti* [2014] WSSC 63, [29], [32]-[35].

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
Mutual Assistance in Criminal Matters 2007		
The entire Act is relevant to Mutual Assistance, including the provisions below.		
s6	Application of this Part	A request for assistance under this Part mat be made to any foreign State in relation to a serious offence.
s7	Requests to be made by Attorney-General	A request by Samoa for assistance under this Part shall be made by or through the Attorney-General.
s8	Assistance in locating or identifying persons	Where the Attorney-General is satisfied that there are reasonable grounds for believing that there is, in any foreign State, a person who: 1. is or might be concerned in, or affected by any criminal matter in Samoa; or 2. could give or provide evidence or assistance relevant to any criminal matter in Samoa, the Attorney-General may request a foreign State to assist in locating that person or if the person's identity is unknown, in identifying and locating that person.
s9	Assistance in obtaining evidence	Where the Attorney-General is satisfied that there are reasonable grounds for believing any evidence or document or other article would be relevant to any criminal matter in Samoa, the Attorney-General may request a foreign Sate to arrange for: 1. such evidence to be taken in the foreign State; and/or 2. the production of such document or other article to be sent to the Attorney-General.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition Act 1974	
The entire Act is relevant to Extradition, including the provisions below.		
s4	Person liable to extradition	Subject to the provision of this Act, a person found in Western Samoa who is accused of an extradition offence an extradition country or who is alleged to be unlawfully at large after conviction of an extradition offence in an extradition country may be arrested and returned to that extradition country as provided by this Act.
s6	General restrictions on extradition	A person shall not be extradited under this Act to an extradition country or committed to or kept in custody for the purposes of such extradition if it appears to the Minister, or to the Court of committal or the Supreme Court on an application for *habeas corpus* or for review of the order of committal: 1. that the offence of which that person is accused or was convicted is an offence of a political character; 2. that the offence of which the person is accused or was convicted is an offence under the military law, but not under the ordinary criminal law, of the requesting country; 3. that the request for extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, ethnic identity, nationality or political opinions; or 4. that he might, if extradited, be prejudiced at this trial or punished, detained or restricted in his personal liberty by reason of his race, religion, ethnic identity, nationality or political opinions.

Cases

Whilst the following cases were conducted under Australian law they relate to extradition to Samoa.

Pauga v Samoa [2022] FCA 1097

Matter Extradition

Jurisdiction Federal Court of Australia

Coram Colvin J

Date of Verdict 16 September 2022

Summary These proceedings concerned the Australian *Evidence Act 1988* (Cth) and involved the extradition of a Samoan national from Australia to Samoa. The judgment contains a consideration of authorities concerning extradition.

On 9 July 2021 a Queensland magistrate acting administratively under the *Extradition Act 1988* (Cth) (the Act), determined that Mr Talalelei Pauga was eligible for surrender to the Independent State of Samoa and ordered that he be committed to prison to await surrender. Section 21 of the Act provides that in such a circumstance, a person the subject of the order may apply to the Federal Court for a review of the order. The Court may by judicial order confirm the order of the magistrate or quash the order. Section 19(2) provides that a person is only eligible for surrender if the matters listed in that provision pertain. The first of those is that 'the supporting documents in relation to the offence [that is, the offence in relation to which the person is sought to be extradited] have been produced to the magistrate'. The term 'supporting documents' is defined

in s 19(3). It describes various documents as being 'duly authenticated'. Before the learned magistrate, Samoa tendered a bundle of documents that were certified by Ms Moliei Simi-Vaai as Registrar of the Supreme Court of Samoa and a copy of that bundle. Having inspected the original and the copy, the magistrate returned the original to counsel and retained the copy. The contentions advanced for Mr Pauga on the final hearing of the statutory review application concerned whether the documents in the Bundle had been 'duly authenticated' for the purposes of s 19 of the Act. The Court concluded that the documents were duly authenticated and dismissed the application.

Pauga v Chief Executive of Queensland Corrective Services (No 6) [2022] FCA 1096

Matter Extradition

Jurisdiction Federal Court of Australia

Coram Colvin J

Date of Verdict 11 July 2022

Summary Following a request from the Independent State of Samoa a warrant for the arrest of Mr Talalelei Pauga was issued by a Queensland magistrate under s 12 of the *Extradition Act 1988* (Cth) (the Act). Mr Pauga was alleged to have been part of a conspiracy to murder former Samoan Prime Minister Tuilaepa Sailele Malielegaoi. In this case Mr Pauga claimed that his detention was unlawful based on alleged failures to conform to the requirements of the Act by various Queensland magistrates. The claims made concern the way in which Mr Pauga was purportedly remanded as well as the conduct of an extradition hearing on 8 and 9 July 2021 concerning whether Mr Pauga was eligible for surrender under the Act.

Mr Pauga claimed that:

(a) he was not remanded as required by the Extradition Act;

(b) the magistrates involved purported to exercise judicial power when the only authority they had was administrative power as personae designata;

(c) some of the documents that have provided the basis for the detention of Mr Pauga were issued by court officers and not by the decision of any magistrate acting administratively;

(d) there was a failure to accord procedural fairness in relation to the conduct of the July Hearing; and

(e) the form of the Warrant of Committal does not conform to the requirements of the Extradition Act.

In short, it was claimed that actions have been taken that are beyond the statutory authority conferred by the Extradition Act and, in consequence, the ongoing detention of Mr Pauga lacked lawful justification. The Federal Court allowed the application on the sole basis that Mr Pauga was not afforded procedural fairness at the July Extradition Hearing because of the pre-emptory refusal of his application to adduce oral evidence. All other claims and contentions were not upheld. The Warrant of Committal was set aside and the matter remitted for determination according to law. Mr Pauga was remanded in custody by order of this Court until the supervision of his remand is resumed by a Queensland magistrate.

Mr Pauga was eventually extradited to Samoa to face trial.

New Zealand Crown Law Office v Leiataua [2020] WSDC 8

Matter Extradition

Jurisdiction District Court of Samoa

Coram Judge Atoa Saaga

Date of Verdict 18 March 2020

Charge/s

- Nine (9) counts of sexual violation by rape pursuant to Section 128 (1)(a) and 128B of the *Crimes Act 1961*. Maximum penalty is twenty years (20) imprisonment for each count.
- Three counts of indecent act on a young person pursuant to s.134(3) of the *Crimes Act 1961*. The maximum penalty is seven years (7) imprisonment for each count.
- One count of indecent assault pursuant to Section 135 of the *Crimes Act 1961*. Maximum penalty is seven (7) years imprisonment.
- One count of assault on a child pursuant to Section 194(a) of the *Crimes Act 1961*. Maximum penalty is two (2) years imprisonment.
- Twelve (12) counts of sexual violation by unlawful sexual connection pursuant to Sections 128(1)(b) and 128B of the *Crimes Act 1961*; Maximum penalty is twenty (20) years imprisonment.
- Six (6) counts of indecent act on a child pursuant to Section 132(3) of the *Crimes Act 1961*. Maximum penalty is ten (10) years imprisonment.

Summary The Defendant had been charged with multiple child sex offences in New Zealand:

These offences were "extraditable" offences under Section 2 of the *Extradition Act 1974* (the Act) because the offences against the law of the extradition country (New Zealand) were offences for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months and were constituted by an act or omission that would constitute an offence against the law of Samoa if it took place within Samoa.

New Zealand is an "extradition country" for Samoa under Section 2 of the Act because it is a Commonwealth country that is designated by Order under section 3, together with the dependencies (if any) of that country or a foreign country with which an extradition treaty is in force. The *Western Samoa Extradition (Designated Commonwealth Countries) Order 1981* designated New Zealand as a Commonwealth Country for the purposes of the Act.

The request made to Samoa on behalf of New Zealand included the Warrant of Arrest, Particulars of the Respondent, Particulars of the Facts and Law under which the Respondent was charged, and Evidence for the purposes of Section 9(4)(a) of the Act, including sworn affidavits from the alleged victims and the investigating police officers. The affidavits and other documents had been duly authenticated and certified by the relevant authorities and were deemed admissible in accordance with Section 13 of the Act.

The judge was satisfied on the evidence that the offences were extradition offences and that they would constitute offences in Samo, with compelling evidence before the Court to warrant a trial in the Supreme Court of Samoa if the offences were committed within the jurisdiction of Samoa. The judge found that the general restrictions on extradition provided on Section 6 of the Act were not present or applicable in this case, such as the charges being of a political nature, or based on racial, religious, ethnicity, nationality or political motivations for the prosecution et cetera.

Leiataua v New Zealand Crown Law Office [2020] WSDC 7 (18 March 2020)

Matter	Bail Application -
Jurisdiction	District Court of Samoa
Coram	Judge Atoa Saaga
Date of Verdict	18 March 2020
Charges/s	Child sex abuse (see *New Zealand Crown Law Office v Leiataua* [2020] WSDC 8
Summary	The Applicant was committed to custody on 28 February 2020 pursuant to an order made by the District Court for him to be detained pending extradition, pursuant to s.9(4) *Extradition Act 1974* (the Act) and ordered that he not be extradited until after the expiration of 15 days from the date of order of committal: s.10(2) of the Act. The Applicant subsequently filed a bail application in the District Court pursuant to s.9(2) of the Act. Section 9(2) of the Act relates to the jurisdiction and powers of the Court of Committal. The learned District Court judge held that once the Court of Committal had exercised its powers of committal under s.9(2) of the Act, which it had, the matter was no longer within the jurisdiction of that Court. The judge found that the proper venue for a review of the order of committal or redress of the state of his personal liberty, was the Supreme Court. The Court had advised the Applicant at the time of his committal and remand that the Supreme Court was the appropriate venue should he wish to seek any redress. Bail was refused.

Solomon Islands

Elements of Offences and Case Law

Solomon Islands

The legal system of Solomon Islands is largely influenced by English common law. Declared as a British protectorate in 1893, the colonial government held power in Solomon Islands, with a brief interruption during World War II, until independence in 1978.

Section 16 of the *Interpretation and General Provisions Act* of Solomon Islands defines "common law" as meaning "so much of the common law, including the doctrines of equity of England as effect for the time being in Solomon Islands". Schedule 3 of the Solomon Islands Constitution further provides that the "principles and rules of common law shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of Solomon Islands". This underlines the understanding that the laws and principles which existed immediately prior to independence continue to exist as common law of Solomon Islands unless expressly stated otherwise by an Act.

Additionally, the judiciary of Solomon Islands is encouraged to refer to English, Australian and New Zealand cases and law reports in judgments, however, they are not bound by the decisions of foreign courts.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 129	Fraud and breaches of trust by persons employed in the public service	1. A person employed by the public service 2. While discharging their duties 3. Commits any fraud or breach of trust affecting the public whether such fraud or breach or trust would have been criminal or not if committed against a private person	Misdemeanour (2 years and/or a fine – see s41 Penal Code)
S 130	False information to public servant	1. a person 2. who gives an employee of the public service 3. any information which they know or believe to be false 4. intending to cause, or knowing it to be likely that they will cause such person employed by the public service to do or omit anything which such person employed by the public service ought not to do or omit if the true state of facts respecting which such information is given were known to them or to use the lawful power of such person employed in the public service to the injury or annoyance of any person.	6 months or $100 fine.
S 258(1)	Definition of theft	1. A person 2. Without consent of the owner 3. Fraudulently and without a claim of right made in good faith 4. Takes[217] and carries away anything capable of being stolen 5. With intent, at the time of such taking, to permanently deprive the owner	See s 261
S 258(1)	Definition of theft	1. A person 2. with lawful possession as bailee or part owner 3. fraudulently converts the same to their own use or the use of any person other than the owner	See s 261
S 261	General punishment for theft	1. Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years. 2. Any person who commits the offence of simple larceny after having been previously convicted of felony, shall be liable to imprisonment for ten years. 3. Any person who commits the offence of simple larceny, after having been previously convicted of any misdemeanour punishable under this Part or under Part XXXV of this Code, shall be liable to imprisonment for seven years.	

[217] Under s 258(2), '**takes**' is taken to include obtaining possession –
by any trick;
by intimidation;
under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
by finding, where at the time of finding the finder believes that the owner can be discovered by taking reasonable steps.

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 273(a)	Larceny and embezzlement by clerks or servants	1. A clerk or servant or person employed in the clerks or servants capacity 2. Steals any chattel, money or valuable security belonging to it in the possession of their master or employer or fraudulently embezzled the whole o any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer	14 years
S 273(b)	Larceny and embezzlement by clerks or servants	1. A employee of the public services of Her Majesty 2. Steals any chattel, money, valuable security belonging to or in the possession of Her Majesty or entrusted to or received or taken into possession by such person by virtue of his employment or embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by them by virtue of their employment.	14 years
S 273(c)	Larceny and embezzlement by clerks or servants	1. A person appointed to any office or service by or under a Town Council or other local government council or other public body 2. Fraudulently applies or disposes of any chattel, money or valuable security received by them for or on account of any Town Council or other local government council or other public body or department, for their own use of any use or purpose other than that for which the same was paid, entrusted to, or received by them; or fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid.	14 years
S 306	Fraudulent falsification of accounts	1. A clerk, officer or servant or any person employed at such capacity 2. Wilfully and with intent to defraud[218] 3. Destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or which has been received by him for or on behalf of his employer, or who wilfully and with intent to defraud makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering any material particular from or in any such book or document or account	7 years
S 308	False pretences	1. A person 2. By any false pretence[219] with intent to defraud 3. Obtains from any other person any chattel, money or valuable security, or causes or procures any money to be	5 years

[218] Under s 306(2), it is sufficient to allege a general intent to defraud without naming any particular person intended to be defrauded.
[219] 'False pretences' is defined in s 307 to mean any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true.

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
		paid, or any chattel or valuable security to be delivered to themselves or to any other person for the use of benefit or on account of themselves or any other person or 4. With intent to defraud or injure any other person fraudulently causes or induces any other person (a) to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security; or (b) to write, impress, or affix their name or the name of any other person or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security.	
S 309	Obtaining credit by false pretences	1. A person (a) Incurring any debt or liability obtains credit by any false pretence or by means of any other fraud; or (b) With intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery or transfer of or any charge on their property; or (c) With intent to defraud their creditors or any of them, conceals, sells or removes any part of heir property, after or within two months before the date of any unsatisfied judgment or order for payment or money obtained against them.	1 year
S 336(1)	Forgery of certain documents with intent to defraud	1. A person who 2. Forges with intent to defraud[220] 3. Any will, codicil, or other testamentary document, either of a dead or of a living person, or any probate or letters of administration, whether with or without the will annexed; any deed or bond, or any assignment at law or in equity or any deed or bond or any attestation of the execution of any deed or bond; any currency note or bank note, or any endorsement on or assignment of any bank note.	life

[220] Under s 335, an 'intent to defraud' is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defraud thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defraud in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 336(2)	Forgery of certain documents with intent to defraud	1. A person who 2. Forges with intent to defraud (a) any valuable security or assignment thereof or endorsement thereon, or where the valuable security is a bill of exchange, any acceptance thereof; any document of title to lands or any assignment thereof or endorsement thereon; (b) any document of title to goods or any assignment thereof or endorsement thereon; (c) any power of attorney or other authority to transfer any share or interest in any stock, annuity, or public fund of the Solomon Islands or any part of Her Majesty's dominions or of any foreign state or country or to transfer any share or interest in the debt of any public body, company or society, British or foreign, or in the capital stock of any such company or society, or to receive any dividend or money payable in respect of such share or interest or any attestation of any such power of attorney or other authority; (d) any entry in any book or register which is evidence of the title of any person to any share or interest hereinbefore mentioned or to any dividend or interest payable in respect thereof; (e) any policy of insurance or any assignment thereof or endorsement thereon; any charter-party or any assignment thereof; (f) any certificate of the Accountant- General or other officer acting in execution of the Income Tax Act. *Cap. 123.*	14 years
S 337(1)	Forgery of Certain documents with intent to defraud or deceive	1. A person 2. who forges with intent to defraud or deceive 3. Any document with the stamp or impression of the Great Seal or the United Kingdom, Her Majesty's Privy Seal, and the privy signet of Her Majesty, Her Majesty's Royal Sign Manual, or any other of Her Majesty's official seals, or the National Seal of Solomon Islands	Life

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 337(2)	Forgery of Certain documents with intent to defraud or deceive	1. A person 2. who forges with intent to defraud or deceive (a) Any register or record of births, baptisms, naming, dedications, marriages, deaths, burials or cremations, which now is, or hereafter may be by law authorised or required to be kept in the Islands, relating to any birth, baptism, naming, dedication, marriage, death, burial or cremation, or any part of any such register, or any certified copy of any such register or of any part thereof; (b) any copy of any register of baptisms, marriages, burials or cremations, directed or required by law to be transmitted to any registrar or other officer; (c) any certified copy of a record purporting to be signed by any officer having charge of any public documents or records in the Islands; (d) any wrapper or label provided by or under the authority of the Chief Accountant or the Comptroller of Customs and Excise.	14 years
S 337(3)	Forgery of Certain documents with intent to defraud or deceive	1. A person 2. who forges with intent to defraud or deceive (a) Any official document whatsoever of or belonging to any court of justice, or made or issued by any judge, magistrate, officer or clerk of any such court (b) Ay register or book kept under the provisions of any law in or under the authority of any court of justice (c) Any certificate, office copy or certified copy of any such document, register, or book or of any part thereof; (d) Any document which any magistrate is authorised or required by law to make or issue (e) Any document which any person authorised to administer an oath under any law in force in the Gilbert Islands is authorised or required by law to make or issue; (f) Any document made or issued by a head of a Government department or law officer of the Crown, or any document upon which, b the law or usage at the time in force, any court of justice or any officer might act; (g) Any document or copy of a document used or intended to be used in evidence in any court of record, or any document which is made evidence by law; (h) Any certificate or consent required by any Ordinance for the celebration of marriage; (i) Any licence for the celebration of marriage which may be given by law; (j) Any register, book, builder's certificate, surveyor's certificate, certificate or registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale, under Part I of the *Merchant Shipping Act 1894* of	7 years

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
		any entry or endorsement required by the said Part of the said Act to be made in or on any of those documents; (k) Any permit, certificate or similar document made or granted by or under the authority of the Comptroller of Customs and Excise or any other officer of Customs and Excise; (l) Any certification not previously mentioned.	
S 341	Forgery of other documents with intent to defraud or deceive a misdemeanour	1. Forgery of any document or public document that is not mentioned under this Act if committed with intent to defraud is a misdemeanour. 2. Forgery of any passport is a misdemeanour	Misdemeanour

Cases

Reef Pacific Trading Ltd v Price Waterhouse [1999] SBHC 72

Matter Civil

Jurisdiction High Court of Solomon Islands

Coram Justice Kabui

Date of Verdict 26 July 1999

Summary Breach of Duty, Negligence, Fraud and other related matters.

As a matter of civil procedure, an allegation of fraud is so serious that it must be specifically pleaded within a Statement of Claim. The High Court of Solomon Islands supported this with reference to the Federal Court of Australia case of *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169.

The High Court of Solomon Islands also found, with reference to the English decision in *Derry v Peek*[221] the elements of fraud in the civil context as follows:

A person commits fraud if that person makes a statement to be acted on by others which is false and is known by that person who makes it to be false or is made by that person recklessly or without care paying no attention to its truthfulness.

The definition has since been adopted in the Solomon Islands with domestic cases confirming the definition.[222]

[221] (1889) 14 App. Cas. 337, 350, 374.

[222] See generally Robert Victor Emery and John Sullivan v Taisol Investment Corporation (SI) Limited, Toshio Hashimoto and David Hayward (Civil Case No. 301 and 119 of 1993 (unreported); Island Construction Management Limited v Air Transport Limited (Civil Case No. 144/96 (unreported); and Mbaeroko Timbers Company Limited v Island Construction Management Limited and National Bank of Solomon Islands Limited (Civil Case Nos. 100 and 231 of 1997) (unreported).

Notwithstanding these findings, civil fraud is distinctly different to the criminal counterpart – including a different standard of proof required depending on the severity of the claim.[223]

Trading Company (Solomons) Ltd v PKR Pacific Sales Ltd [1981] SBHC 13

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Chief Justice Daly
Date of Verdict	31 July 1981
Summary	Land and Land Title

In the civil context, and specifically in relation to land title registration and transfer, the Court commented that fraud may be established by a deliberate and dishonest trick. Although this is not strictly the same as the criminal context in other jurisdictions, it bears a lot of practical similarity.

Malefo v Malefo [2017] SBHC 156

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Faukona PJ
Date of Verdict	5 September 2017
Summary	Fraud

In the civil context, the Court commented on the evolving definition of fraud and what is most appropriately adopted in Solomon Islands. In *Tikani v Motui*, the Court adopted the definition of fraud in *Derry v Peek* which stated:

> Fraud is proved when it is shown that a false representative has been made known, or without belief in its truth, or recklessly, careless whether it be true or false.[224]

This definition has been accepted in Solomon Islands on various other occasions included that of Civil Case No. 301 of 1993 and Civil Case No. 119 of 1993. Additionally, the definition of fraud by Lord Denning in *Barclays Bank Ltd v Cola* which has subsequently been adopted in Solomon Islands in *R v Simi Pita* states that:

> Fraud in ordinary speech means the using of false representation to obtain an unjust advantage.[225]

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[223] *Reef Pacific Trading Ltd v Price Waterhouse* [1999] SBHC 72; HC-CC 164 of 1994 (26 July 1999) quoting *Reifek v McElroy* (1965) 112 CLR 517.

[224] *Malefo v Malefo* [2017] SBHC 156, [50].

[225] Ibid [52].

The Court considered the application of the definition of fraud in *Namiha Sawmilling Co. Ltd v Waione Timber Co. Ltd* which stated:

The act must be dishonest and dishonesty must not be assumed solely by reason of knowledge or an unregistered interest.[226]

Manepora'a v Aonima [2011] SBHC 79

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Faukona J
Date of Verdict	1 September 2011
Summary	Fraud - Decision on Application for Declaratory Orders

This case again, supports the definition of fraud in *Derry v Peek* as "common law fraud requires proof that some false representation has been made knowingly, i.e, in the knowledge that it was untrue or at least, with reckless indifference to its truth or falsehood."[227] This definition was again supported in the case of *Takani v Motui* [2002] SBHC 10 in addition to discussions of the meaning of fraud in *Assets Co. Ltd v Mere Roihi & Others* as being '*actual fraud, dishonesty of some sort*.'[228]

Among other interpretations, the Court concludes that:

Fraud may take an almost infinite variety of forms. It embraces a wide concept of fraud from dishonesty, false representation or misrepresentation, concealment of its truth, false representation through a statement of conduct, actual fraud etc.[229]

Toritelia v The Queen [1987] SBCA 2

Matter	Criminal
Jurisdiction	Court of Appeal of Solomon Islands
Coram	Sir John White P, Kapi and Connolly JJA
Date of Verdict	30 March 1987
Summary	Embezzlement contrary to s 266(a)(ii) of the *Penal Code*.

The accused took money from their employer without consent to purchase and attend an overseas course. When the course was cancelled, the accused informed their employer and repaid only part of the money that was initially taken. The Magistrates Court found that the intention to repay the money was a sufficient defence to having embezzled money from an employer. The Chief Justice held that this was not a defence at law. The case came before the Court of Appeal of Solomon Islands.

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[226] Ibid [54].
[227] *Manepora'a v Aonima* [2011] SBHC 79, [16].
[228] *Asset Co. Ltd v Mere Roihi & Others* [1905] AC 176, 210.
[229] *Manepora'a v Aonima* [2011] SBHC 79, [22].

Sir John White P set out the relevant elements of the offence early in his remarks as:

"Any person who -

(a) being a clerk or servant or person employed in the capacity of a clerk or servant

....

(ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer;

.....

is guilty of a felony, and shall be liable to imprisonment for fourteen years".

This case was in the context of embezzlement. This case talks comprehensively about the meaning of, and the development of, the meaning of fraud within the United Kingdom, New Zealand and Australia:

In my view it is clear that the principles which "have been applied for many years" in defining and interpreting the adverb "fraudulently" must be applied in the present case. The only reservation which needs to be made is similar to the reservation of the New Zealand Court of Appeal in ***Williams*** *that because of the uncertainty at appellate level the tests may be reconsidered in the House of Lords or in other jurisdictions where there is a right of appeal to a higher Court.*[230]

With reference to Australia, the Solomon Islands Court of Appeal found:

In ***Glenister*** *the decision of the High Court of Australia in* ***Balcombe v. de Simoni*** *[1972] HCA 9; (1972) 126 CLR 576 was referred to. In that case the following words from a direction given in* ***Re Hyams*** *[1979] 2 NSWR 834 were approved:*

"In such cases (where an act is charged as having been done 'fraudulently') the word 'fraudulently' is intended to apply to the accused's state of mind and has a meaning usually equivalent to 'dishonestly' in relation to the particular thing done by the accused so far as it affects or may affect the person who is the 'victim' of the 'fraud'".

"We conclude that the mental element described as 'fraudulent' in a charge under s.173 is equivalent to dishonesty. It will be sufficient if the trial judge instructs the jury that the Crown must prove that the accused acted dishonestly. It is unnecessary for him to go further and define dishonesty. It is enough if he informs the jury that, in deciding whether an application (of property) was or was not dishonest they should apply the current standards of ordinary decent people: ***R. v. Feely****, (supra)."*

This sentiment was reflected earlier in the judgment of Sir John White P where, in reference to *R v Feely* and the English common law more broadly, his Honour stated:

"We do not agree that judges should define what 'dishonestly' means. This word is in common use whereas the word 'fraudulently' which was used in s.1 (1) of the Larceny Act 1916 had acquired as a result of case law a special meaning".

[230] This statement was made in reference to the case law that has been produced out of New Zealand, the United Kingdom and Australia and its State jurisdictions.

A distinction was drawn between the two words, "dishonestly" being described as "an ordinary word of the English language which "is not a question of law". Accordingly, it was held in **Feely** that the jury should have been left to decide, without any definition of "dishonestly", whether the alleged taking of money had been dishonest.

Accordingly, it is appropriate to instruct a jury with regards to the meaning of dishonesty that they must find in favour of the two-stage test:

> *"The conclusion at which the Court arrived, having reviewed the authorities, was that there were two aspects to dishonesty, the objective and the subjective, and accordingly the tribunal of fact, in determining the issue of dishonesty, would have to go through a two stage process before it could make a finding against the defendant".*

It was held that the state of mind, not the conduct of the accused, was subjective, but the standard of honesty to be applied was that of reasonable and honest men (objective test) and not that of the accused. Accordingly, a jury must be directed that they should first consider whether the accused had acted dishonestly by the standards of ordinary and decent people and if so, the jury will then consider whether the accused himself must have realised that what he was doing was by those standards dishonest.

The judgment also raises an important point in relation to defences for an act of theft. While considering the judgments of *R v Cockburn* [1968] 1 WLR 281 and *R v Williams* [2953] 1 All E.R. 1068, it is possible for a person with an honest claim of right to have intended to repay an amount that was purported to be stolen where there are reasonable grounds for believing such a claim to have a defence.[231]

[231] *Toritelia v The Queen* [1987] SBCA 2.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 92	Extortion by public officer	1. A person employed by the public service 2. Takes or accepts from any person for the performance of their duty as such officer 3. Any reward beyond their proper pay and emoluments, or any promise of such reward	3 years
S 93	Public officers receiving property to show favour	1. A person employed in the public service 2. Receives any property or benefit of any kind for himself or any other person, on the understanding, express or implied, that he shall favour the person lying the property or conferring the benefit, or any one in whom that person is interested in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service.	Misdemeanour (2 years and/or a fine – see s41 Penal Code)
S 122	Bribe or attempt to bribe	1. A person 2. Who bribes or attempts to bribe or makes any promise to any other person with either of the following two intents (a) to obstruct, defeat or pervert the course of justice in the court; or (b) to dissuade any person from doing their duty in connection with the course of justice in the court.	Misdemeanour (2 years and/or a fine – see s41 Penal Code)

Cases

The available Solomon Islands bribery cases relate to electoral petitions as opposed to criminal proceedings.

Qora v Kologeto [2020] SBHC 8

Matter Civil

Jurisdiction High Court of Solomon Islands

Coram Keniapisia PJ

Date of Verdict 26 February 2020

Summary Bribery in an Election

This case adopts a very similar standard of proof to other nations where the Court recognises that an election petition sits above the civil 'balance of probabilities' and below the criminal 'beyond

reasonable doubt' requiring a 'clear and cogent proof of the allegation to the Court's entire satisfaction' from the evidence provided.[232]

The elements of bribery were established with reference to Palmer CJ in *Temahua* as:

Requiring a promise, offer or benefit from the Respondent (first element) and that the promise, offer or benefit from the Respondent was given with the intention to influence the beneficiary receivers/electors (second element).[233]

This finding was also reflected in the same year in *Sasako v Sofu*[234] and *Aqarao v Philip.*[235]

To establish the element of intent required of the second element of the offence, after acknowledging the limitations of judges in making findings of *mens rea*, the Court was guided by precedent, stating:

> 80. Evidence I have surrounding all the allegations came from secondary sources (witnesses) not primary sources (Respondent himself). I am however guided by precedent in this jurisdiction. And the cases are saying that the Respondent's intention is to be assessed by the court, on the facts that surrounds the giving. The Ha'apio case cited by counsel Afeau relevantly states:

"...The intention of a person charged with bribery must be gathered from his actions...I cannot go into any intention of the Respondent, I must be governed by what he said and what he did and by the inferences I ought to draw therefrom ...you cannot allow a man to say, I did not intend to do that which amounted to bribery , if when you look at all the things which he did, there is only one conclusion to draw and that is that he has done that which he said he did not intend to do..." (Underlined – my emphasis).

"...Before subjecting a candidate to a penalty of disqualification, the judge should feel well assured, beyond all possibility of mistake, that the offence charged is established. If there is an honest conflict of testimony as to the offence charged, or if acts or language are reasonably susceptible of two interpretations, one innocent and the other culpable, the judge is to take care not to adopt the culpable interpretation, unless after the most careful consideration, he is convinced that in view of all the circumstances, it is the only one which the evidence warrants his adopting as the true one..." (Underlined my emphasis).

> 81. The above are supported by another case cited by counsel Kwaiga, which relevantly stated:

"... corruptly, there does not mean wickedly or immorally or dishonestly or anything of that sort, but which the object and intention of doing that which the legislation plainly means to forbid... and in all cases where there is evidence... it is a question of fact for the judge whether the intention is made out by the evidence, which in every individual case must stand upon its own grounds." (Underlined – my emphasis).

"Corrupt means doing the thing which legislature forbids. The question whether the intention was to influence the voter must depend upon the circumstances..." (Underlined my emphasis).

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[232] *Qora v Kologeto* [2020] SBHC 8, [8]-[9].
[233] Ibid [77].
[234] [2020] SBHC 7, [13]-[15], [41], [57].
[235] [2020] SBHC 22, [5]-[6].

82. Clearly whether the intention was to influence the vote must depend upon the circumstances and manner in which the gift was given or the time when it was done and the nature of the gift. Each case must be treated on each own merit or circumstances. For it is rare to have two identical cases. So let me turn to look at the circumstances that surrounds the remaining bribery allegations (giving) and apply the law. And from the facts, evidence and in view of all the circumstances of this case, whether Respondent's giving out of monies to communities were made with intention to do that which legislation forbids (i.e. bribe voters). And whether from the facts, evidence and in view of all circumstances in this case, the only conclusion or the only interpretation the Court can draw is Respondent had intention to bribe voters?

Inoke v Tran [2012] SBHC 49

Matter Civil

Jurisdiction High Court of Solomon Islands

Coram Chetwynd J

Date of Verdict 18 April 2012

Summary Bribery in an Election

This judgment described the considerations that must be given to whether a charitable gift amounts to bribery. In making this finding, the Court identified a precedent case in Samoa where it was considered that the time between the gift and the election was a primary consideration.[236] Despite this finding, the Court also acknowledged that the authorities are not entirely consistent and that the United Kingdom adopts a stricter view that is also recognised in New Zealand:

> *"It would be sufficient for the purpose of establishing the intent required for **bribery** and treating in terms of the Act, if one of the motives which accompanied the presentation of money or food was to induce electors to vote for the respondent: see the judgment of Donne CJ in the High Court of Cook Islands in Re Mitiaro Election Petition [1979] 1 NZLR S1. at s.12"*[237]

Ultimately, Chetwynd J followed his previous judgment in *Ha'apio* which stated:

> *"The intention of a person charged with **bribery** must be gathered from his acts. Mellor J in Launceston (1874) 2 O'M & H 133 said: 'I cannot go into any intention of the respondent, I must be governed by what he said and what he did, and by the inferences I ought to draw therefrom. And this was followed in Kingston-upon-Hull (1911) 6 O'M & H 389, per Buchnill J: You cannot allow a man to say, I did not intend to do that which amounted to **bribery** if when you look at all the things which he did there is only one conclusion to draw and that is that he has done that which he said he did not intend to do*."[238]

[236] *Inoke v Tran* [2012] SBHC 49, [13] citing *Vui v Ah Chong* [2006] WSSC 52.
[237] Ibid [14].
[238] Ibid [14].

Lusibaea v Filualea [2020] SBHC 28

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Higgins PJ
Date of Verdict	17 April 2020
Summary	Bribery in an Election

This case acknowledged that, absent a legislative provision that encompasses electoral bribery, the common law has long recognised election bribery as an offence:

Bribery to procure election to office was an offence at common law, as noted in Halsbury 4thed.,. par 767. If so proven, a guilty candidate might be expelled from Parliament for procuring an office by bribery. It rendered the election voidable.

That power was vested in the House of Commons. By virtue of s.108 (5) of the Act that power devolves onto the High Court. To exercise that power is not to usurp Parliament but to support it. This is not a case of general bribery which may vitiate the election though no particular candidate or agent was responsible for it. (See Halsbury par 767),

This common law bribery offence does not consider expenses to convey voters to a polling place as bribery.[239]

Airahui v Kenilorea [2020] SBHC 14

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Bird PJ
Date of Verdict	23 March 2020
Summary	Bribery in an Election

In addition to the other principles discussed above, this case noted that merely finding that a person committed election bribery under s 126 of the *Electoral Act 2018* (which repealed the *National Parliament (Electoral Provisions) Act*) it does not mandate that the election be invalidated by virtue of s 9.[240]

Efona v Fugui [2020] SBHC 6

Matter	Civil
Jurisdiction	High Court of Solomon Islands
Coram	Faukona PJ
Date of Verdict	14 February 2020

[239] *Lusibaea v Filualea* [2020] SBHC 28.
[240] *Airahui v Kenilorea* [2020] SBHC 14, [50].

Summary Bribery in an Election

This judgment outlines the difference between an election petition in terms of specific bribery as opposed to general bribery. The judgment cited the judgment in *Ha'apio v Kenianisua* where it was stated that the standard of proof required for specific bribery is that there is proof only of a single corrupt practice.[241] This is opposed to the requirement for general bribery which was referred to as:

16. *In an attempt to fortify the legal aspects of S.66(1) and (2) I shall refer to the case of Fono V Fiulaua, where His Lordship Justice Goldsborough stated, that S.66(1) does not suffer the qualification found in S.66(2) of the repealed Act. In fact there is no conjunctive expression between the two. Subsection (1) speaks of what is described as "specific corruption", as opposed to sub-section (2) which speaks of "general corruption." Subsection (1) is self-confine and need not rely on subsection (2) to import its meaning.*

17. *What his Lordship attempted to verify is that, any proven allegation of corrupt act or illegal practice (**bribery** as part) done by supporters or ordinary supporters of the winning candidate, not an agent or campaign manager, the number of people bribed, unduly influenced in order to vote for the winning candidate, or abstain from voting or vote in another way, must amount to a total number that will off-set the majority of votes that secured the winning candidate. Should the counted numbers fall short of the majority votes, that cannot be taken as reasonably supposed to have affected the result of the election. Simply the result stood as it is, conceivably subsection (2) of S.66 is advocating what the law term as "general corruption". And "specific corruption" in S.66 (1) is alluded to in paragraph 13 and 14 above.*

[241] *Efona v Fugui* [2020] SBHC 6, [12].

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code 1963	
S 91(1)	Official corruption	1. A person employed as a public servant 2. Being charged with performance of any duty by virtue of such employment 3. Corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain 4. Any property or benefit of any kind for themselves or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done by them in the discharge of the duties of their office.	7 years
S 91(2)	Official corruption	1. A person 2. Corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon, or for any other person 3. Any property or benefit of any kind on account of any such act or omission on the part of the person so employed.	7 years
S 93	Public officers receiving property to show favour	1. A person employed by the public service 2. Receives any property or benefit of any kind for themselves or any other person 3. On the understanding, express or implied, that they shall favour the person – lying the property or conferring the benefit, or any one in whom that person is interested in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom they are interested, and any person employed in the public service	6 months
S 95	False claims by officials	1. A person employed by the public service 2. In such a capacity as to require them to furnish returns or statements touching any sum payable or claimed to be payable to themselves or to any other person, or touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made to any person, 3. Makes a return or statement touching such matter which is to their knowledge false in any material particular	Misdemeanour (2 years and/or a fine – see s41 Penal Code)
S 96	Abuse of office	1. A person employed by the public service 2. Does or directs to be done in abuse of the authority of their office any arbitrary act prejudicial to the rights of another. 3. If this act is done or directed for the purpose of gain, punishment is three years imprisonment	Misdemeanour (2 years and/or a fine – see s41 Penal Code) or 3 years depending on (3)

Cases

Regina v Kaliuae [2010] SBHC 25

Matter Criminal

Jurisdiction High Court of Solomon Islands

Coram Naigolevu J

Date of Verdict 8 June 2010

Summary Official Corruption

The judgment considered multiple interpretations of the elements of an offence under s 91 of the *Penal Code* to be. It is unclear in the judgment which of the two positions put forward by counsel was adopted by the Court. The most detailed and support position comes from counsel for the first accused which outlines the elements with reference to Carters Criminal Law of Queensland which is 'almost identical' to s 91 of the *Penal Code*. This outlines the elements as:

(1) being employed in the Public Service or being the holder of any public office being charged by virtue of such employment or office with the performance of any duty, not being a duty totally of the administration of justice.
corruptly
(2) asks for, receives, or obtained, or agrees or attempts to receive or obtain
(3) any property or benefit of any kind
(4) for himself or any other person
(5) on account of anything already done or omitted to be done, or to be afterward done or omitted to be done
(6) by the person in the discharge of the duties of the person's offence.[242]

The Court later described the assessment of official corruption in detail:

> *30. The court consider the elements of the offence of Official* ***Corruption*** *is clearly the accused being employed in the Public Service, and charged by virtue of such, employment with the performance of any duty, "**corruptly asks for**", **"receives"**, or "**obtain**" or* ***agree or attempts to receive*** *or obtain* ***any property*** *or benefit* ***of any kind for himself or*** *"**another person**", on account of anything* ***already done*** *or omitted to be done or* ***to be done although done*** *or omitted to be done, by the person in the discharge of the duties or the persons office.*
>
> *31. The crown case essentially is that the two accused had obtained a benefit for the 25 Chinese Nationals Citizenship. The offence is clearly the obtaining of the "**benefit**" for the Chinese Nationals, the benefit being the Citizenship Certificate. The court consider the critical word is the "**obtaining of a benefit**".*
>
> *32. The court is of the view the issue to be considered is "**the benefit**", and more importantly was the benefit obtained. The Collins English Dictionary defined obtain to mean "**to gain possession off,** "**acquire**" or "**get**". The Oxford English dictionary makes it even clearer by defining it and "take or be given something". The critical element that*

[242] *Regina v Kaliuae* [2010] SBHC 25, [14].

*must be fulfilled is clearly the **"obtaining" and "receiving of a benefit**" in order to fulfill this essential element.*

*33. The court is fortified by the principle of law enunciated by Fatiaki J, in the case of STATE-v-Aisake, where His Lordship quoted Jesuratnam J in the case of STATE-v-Humphrey Chang, where in dismissing the charge of Official **Corruption** and upholding a submission of "no case to answer, in the trial in the High Court of Fiji said at P2 of his ruling.*

"An examination of S.106(a) reveals that there are two parts or elements in the definition of the offence. The first part deals with the obtaining of property or "benefit from" some person and the second part sets out the quid pro quo or "consideration" on account of which the property or "benefit is obtained". When these two elements are proved the corrupt act is made out."

"From the foregoing it is clear that before an accused can be called upon to make a defence to a charge of Official Corruption it is incumbent on the prosecution to produce credible evidence to show not only that the accused "received" some property or "benefit" but also that the "benefit" or "property was received" 'on account of' or in consideration for something done by the accused in the discharge of his duties". Underlining mine.

It is clear that some property or "benefit" "must be received" by the beneficiary before the element is complete.

Regina v Musuota [1997] SBHC 9

Matter	Criminal
Jurisdiction	High Court of Solomon Islands
Coram	Lungole-Awich J
Date of Verdict	14 March 1997
Summary	Acceptance of benefits contrary to section 14(1)(c) of the *Leadership Code (Further Provisions Act)*

In determining whether an official was guilty of official misconduct by way of using office for personal benefit, the Court took a simplistic approach to applying the offence provision which can be seen below:

> *8. (1) Any leader who directly or indirectly asks for or accepts, on behalf of himself or any associate of his, any benefit in relation to any action in the course of his official duties (whether such action has already been taken, is continuing or is to be taken in the future) or by reason of his official position, is guilty of misconduct in office:*

The section requires that it be proved that the accused accepted the benefit. And must have been in relation to any action in the course of his official duty. In this case the duty of the accused were in the portfolio of the Minister for Post and Communication. What is the action in the course of his duty of Post and Communication for which he accepted the benefit? Accused accepted the benefit either so that he resigns or upon resigning, and not in relation to action in the course of his official duty. That part of the offence has not been proved. Accused is found not guilty of the offence of **Misconduct in Office** (Use of Office for Personal Benefit) prohibited under Section 8(1) of the Leadership Code (Further Provisions) Act. He is acquitted on count No 2.

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Money Laundering and Proceeds of Crime Act 2002	
S 17	Money-laundering offence	1. A person (a) Acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts omissions (i) in Solomon Islands which constitute an offence against any law of Solomon Islands punishable by imprisonment for not less than 12 months; or (ii) outside Solomon Islands which, had they occurred in Solomon Islands, would have constituted an offence against the law of Solomon Islands arid punishment by imprisonment for not less than 12 months (b) Renders assistance to another person for (i) the conversion or transfer of property derived directly or indirectly from those acts of omissions, with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof; or (ii) concealing of disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly from those acts or omissions	Natural person - $150,000 or 10 years or both Body Corporate - $200,000
S 18	Related offences	1. A person 2. opens or operates an account with a financial institution or a cash dealer 3. Under a false name.	Natural person - $100,000 or 10 years or both Body Corporate - $200,000.

Cases

Regina v Davies [2011] SBCA 8

Matter Criminal – Appeal

Jurisdiction Solomon Islands Court of Appeal

Coram Auld P, McPherson CBE JA, Williams JA

Date of Verdict 9 May 2011

Summary Money Laundering

The court found in this case that it was “double jeopardy” to prosecute for both obtaining by false pretences and money laundering as the offence of money laundering requires proof that there was a false pretence.

Proceeds of Crime

Offence Element Table Offences

No proceeds of crime offences identified in this legislation. Some relevant confiscation provisions are identified in the table below.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provisions
	Money Laundering and Proceeds of Crime Act 2002	
ss 28 - 40	Part III Confiscation	Division 1 – Confiscation and Pecuniary Penalty Orders
ss 41 - 48	Part III Confiscation	Division 2 – Pecuniary Penalty Orders
ss 49 - 54	Part III Confiscation	Division 3 – Control of Property
ss 55 - 64	Part III Confiscation	Division 4 – Restraining Orders
ss 65 - 69	Part III Confiscation	Division 5 – Realisation of property
ss 70 - 79	Part III Confiscation	Division 6 – Production Orders and Other Information Gathering Powers
	Penal Code 1963	
s 43	Forfeiture	When any person is convicted of an offence under any of the following sections, namely sections 91, 92, 93 , 117, 118 and 374, the court may, in addition to or in lieu of any penalty which may be imposed, order the forfeiture to Her Majesty of any property which has passed in connection with the commission of the offence or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property; and any property or sum so forfeited shall be dealt with in such manner as the court may direct. Payment of any sum so ordered to be forfeited may be enforced in the same manner and subject to the same incidents as in the case of the payment of a fine.

Cases

Regina v Idris [2009] SBHC 61; HCSI-CC 334 of 2008 (25 November 2009)

Matter Application for Confiscation Order

Jurisdiction The High Court of the Solomon Islands

Coram Justice IRD Cameron, Puisne Judge

Date of Verdict 25 November 2009

Summary The first defendant was sentenced in the Magistrate Court to 4 years' imprisonment on a variety of offences. He appealed to the High Court against the sentence which appeal was partially successful. He was re-sentenced on 3 July 2008, but his overall term of imprisonment remained at 4 years. The second defendant, the wife of the first defendant, received a lesser term of imprisonment, and returned to South Africa.

The defendants entered Solomon Islands on 10 August 2007, armed with false passports, stolen travellers cheques, and a considerable amount of cash in various foreign currencies. They made a false declaration to Customs on entry, failing to disclose possession of the travellers cheques and the foreign currencies. They then set about cashing these travellers cheques into Solomon Islands dollars at various financial institutions, using false passports in names which corresponded with the names on the travellers cheques. With part of the Solomon dollars so acquired they bought American dollars, British pounds and New Zealand dollars.

They were arrested on 17 August 2007, following the execution of a search warrant at their then address at the Quality Inn Motel, Honiara. Police seized a quantity of cash in various currencies, a number of false passports and some counterfeit dollars. It is these items that were the subject of the application for confiscation.

In relation to the travellers cheques, the first defendant admitted to Police that he had 'an idea' they were stolen. As it is accepted that the original signatures on the travellers cheques are not those of the defendants, the High Court justice had no hesitation in finding that those travellers cheques were stolen. They remain the property of the financial institutions which issued them. The Court directed that they be returned to those financial institutions.

As to the passports, the first defendant admitted that they were false. The Court directed that they be returned to the respective Governments which issued them.

As to the counterfeit dollars which were seized, the Court directed that they be destroyed by the Police.

As to cash, the facts established that US$7,250, GBP$1,800 and NZD$3,390 were acquired by the defendants using Solomon Islands dollars derived from cashing stolen travellers cheques. As such, those moneys were "derived as a result of the commission of the offence" within the meaning of section 33 (2)(b) of the Money Laundering and Proceeds of Crime Act 2002, and the Court directed their confiscation in favour of the Solomon Islands Government under section 33(1) of that Act.

Of the Solomon Islands dollars obtained by cashing stolen travellers cheques, the Court inferred that an amount of SBD$44,576.07, which was not located by Police, was used to pay part of the defendants' accommodation costs at the Quality Inn Motel and for their other expenses. The Court ordered under section 38 of that Act that the equivalent of such sum be paid by the defendants to the Solomon Islands Government from the cash seized.

Regarding the balance of the foreign currencies held by the Police, the Court noted that the defendants' failure to declare possession of the cash when entering Solomon Islands was an offence under section 24 of the Exchange Control Act, for which the penalty includes a power to forfeit such foreign currency (section 26(2)). The Court also noted that having it in their possession may have constituted an offence under section 17(1)(a)(ii) of the Money Laundering and Proceeds of Crime Act 2002. When asked about his possession of the cash in his second interview with the Police the first defendant stated that he had no comment, from which the Court found that it can be inferred the defendants made no claim to legitimate ownership and possession of the funds. It also appeared to the Court from that interview that at least some of those funds may have been stolen from a house burglary in Port Elizabeth, South Africa.

Finally, the Court inferred from the statement of facts that possession of the foreign currency was at least in part for the purposes of meeting the defendants everyday expenses while conducting their criminal spree in Solomon Islands, as the defendants had no bank accounts in this country or any other source of funds. In this way those funds were connected with the criminal offending.

The Court was satisfied that for the reasons expressed that the balance of the cash in foreign currencies was sufficiently connected to the offending to be regarded as tainted property, and ordered its confiscation to the Solomon Islands Government under section 33(1) of the Act accordingly.

It was further directed to the extent that those financial institutions in Solomon Islands which were involved suffered a direct loss as a result of the offending, that they be reimbursed from the funds so confiscated on a pro rata basis.

Director of Public Prosecution v Bobongi [2024] SBHC 176; HCSI-CRC 343 of 2018 (1 February 2024)

Matter Application for Confiscation and Pecuniary Penalty Orders

Jurisdiction The High Court of the Solomon Islands

Coram Hon. Justice Leonard R Maina, Puisne Judge

Date of Verdict 1 February 2024

Summary This was an application for confiscation and pecuniary orders by the Director of Public Prosecution (DPP) under section 28 (1) (a) and (b) of the Money Laundering and Proceed of Crime Act. The Defendant Mr. Philip Bobongi, who was an employee of the Central Bank of Solomon Islands when he committed the offences, was convicted on 2 counts of Larceny and Embezzlement and 37 counts of Money Laundering. He was sentenced to a total of 9 years imprisonment.

There was money and property recovered or related to the offences, of which the DPP sought confiscation and pecuniary penalty orders to the state and Central Bank of Solomon Islands. The property was a Makita Saw (blade and plane), television screen, a Laptop computer, 4 boxes of nails, a distilled water cooler, BBQ store, 2 ton Isuzu and a Toyota Corolla vehicle. The funds were $180, 742.47 held in the BSP bank under account no. 01-114218-8001 in the name of defendant and $104, 354.88 with BSP bank account no. 01-251253-8001 in the name of the defendant's wife Ethel Bobongi, and a sum of $200,000.00 cash in custody of the High Court Registry. The Court found that the defendant was convicted of a "serious crime" for the purposes of section 28 (1)(a) &(b) of the Money Laundering and Proceed of Crime Act, enabling the DPP to apply for conviction-based confiscation orders.

The Court found that the property was tainted property and/or derived from the commission of the offences and the confiscation and pecuniary penalty orders sought were granted. The properties and the sum of money in the ANZ bank to be confiscated and or retrieved to the Government of Solomon Islands. The Registrar of High Court was to sell the two vehicles, and the sum $200,000.00 cash in custody of Registrar of High Court at the High Court Registry was to be returned to the Central Bank of Solomon Islands.

Summary Table: Mutual Assistance Provisions

Section	Description	Provisions
Mutual Assistance in Criminal Matters Act 2002		
The entire Act concerns Mutual Assistance, including the selected provisions below.		
S 4(1)	Authority to make and act on mutual assistance	The Attorney-General may make requests on behalf of Solomon Islands to the appropriate authority of a foreign State for mutual legal assistance in any investigation commenced or proceedings instituted in Solomon Islands relating to any serious offence.
S 4(2)		The Attorney-General may, in respect of any request from a foreign State for mutual assistance in any investigation commenced or proceeding instituted in that State relating to a serious offence – 1. grant a request, in whole or in part, on such terms and conditions as he thinks fit;

Section	Description	Provisions
		2. refused the request, in whole or in part, on the ground that to grant the request would be likely to prejudice the sovereignty, security or other essential public interest of Solomon Islands; or 3. after consulting with the competent authority of the foreign state, postpone the request, in whole or in part, on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in Solomon Islands.
S 6	Mutual legal assistance request by Solomon Islands	The request which the Attorney-General is authorised to make under section 4 are that the foreign State – 1. have evidence taken, or documents or other articles produced in evidence in the foreign State; 2. obtain and execute search warrants or other lawful instruments authorising a search for things believed to be located in that foreign State, which may be relevant to investigations or proceedings in Solomon Islands, and if found, seize them; 3. locate or restrain any property believed to be the proceeds of crime located in the foreign State; 4. confiscate any property believed to be located in the foreign State, which is the subject of a confiscation order made under the Money Laundering and Proceeds of Crime Act 2002; 5. transmit to Solomon Islands any such confiscated property or any proceeds realised therefrom or any such evidence, documents, articles or things; 6. transfer in custody to Solomon Islands a person detained in the foreign State who consents to assist Solomon Islands in the relevant investigation or proceedings; 7. provide any other form of assistance in any investigation commenced or proceeding instituted in Solomon Islands, that involves or is likely to involve the exercise of a coercive power over a person or property believed to be in the foreign State; or 8. permit the presence of nominated persons during the execution of any request made under this Act.
S 8	Foreign requests for an evidence-gathering order or search warrant	Notwithstanding anything contained in any law for the time being in force, where the Attorney-General grants a request by a foreign State to obtain evidence in Solomon Islands, an authorised person may apply to the High Court for – 1. a search warrant; or 2. an evidence-gathering order.
S 9	Foreign requests for consensual transfer of detained persons	Where the Attorney-General approves a request of a foreign State to have a person, who is detained in custody in Solomon Islands by virtue of a sentence or order of court, transferred to a foreign State to give evidence or assist in an investigation or proceeding in that State relating to a serious offence, an authorised person may apply to the High Court for a transfer order.

Section	Description	Provisions
S 12(1)	Foreign requests for Solomon Islands Restraining Orders	Where a foreign State pursuant to criminal proceedings commenced in that State in respect of a serious offence, requests the Attorney-General to obtain the issue of a restraining order against property some or all of which is believed to be located in Solomon Islands, and there are reasonable grounds to believe that the property is located in Solomon Islands, the Attorney-General may apply to the High Court for a restraining order under subsection (2).
S 12(2)		Where the Attorney-General makes an application to the High Court under subsection (1), the Court may make a restraining order in respect of the property, and the Money Laundering and Proceeds of Crime Act 2002, and this Act shall apply in relation to the application and to any restraining order made as a result, as if the serious offence which is the subject of the order had been committed in Solomon Islands.
S 14	Foreign requests for the location of proceeds of crime	Where a foreign State requests the Attorney-General to assist in locating property believed to be the proceeds of a serious crime committed in that State, the Attorney-General may authorise the making of any application under section 70, 75 or 77 of the Money Laundering and Proceeds of Crime Act 2002, for the purpose of acquiring the information sought by the foreign State.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
		Extradition Act 2010
The entire Act concerns Extradition, including the selected provisions below.		
S 4	Extradition offence	An offence is an extradition offence if – 1. It is an offence against a law of the requesting country for which the maximum penalty is for a period of imprisonment of not less than twelve months and 2. The conduct that constitutes the offence, is committed in Solomon Islands, would constituted an offence in Solomon Islands for which the maximum penalty is a term of imprisonment or deprivation of liberty, for a period of not less than twelve months.
S 5	Extradition offence	A person shall not be extradited under this Act to any extradition country, or be committed to or kept in custody for the purpose of such extradition if it appears to the Minister or a court upon an application made to the Minister or court that - 1. the extradition offence is regarded as a political offence; 2. there are substantial grounds for believing that extradition of the person is sought for the purpose of prosecuting or punishing the person because of his or her race, religion, nationality, political opinions, sex or status, or for a political offence in the requesting country; 3. on extradition, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; 4. the offence for which extradition is requested is an offence under the military law but the offence is also not an offence under the civilian laws of the requesting country; 5. final judgment or order has been given and enforced against the person in Solomon Islands, or in a third country, for the offence for which extradition is requested; 6. under the law of the requesting country or Solomon Islands, the person has become immune from prosecution or punishment because of lapse of time, amnesty or any other reason; 7. the person has already been acquitted or pardoned in the requesting country or Solomon Islands, or punished under the law of that country or Solomon Islands, for the offence or another offence constituted by the same conduct as the extradition offence; or 8. the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Tokelau

Elements of Offences and Case Law

Tokelau

The Tokelau legal system is heavily based on the English common law despite being a non-self-governing territory of New Zealand with the New Zealand High Court sitting as Tokelau's High Court within its governing power. Tokelau was a British protectorate in 1877, with Britain passing the administration of Tokelau to New Zealand in 1926. Thus, the English common law and governing systems have an influence over Tokelau in addition to New Zealand's adherence to the English common law within its own legal system. Tokelau is also known for following its customary laws which are native to the atolls of Atafu, Nukunonu, and Fakaofo.

Pursuant to the *Tokelau Act 1948*, section 4B states that the common law of England, inclusive of the principles and rules of equity, shall be in force in Tokelau. There are two exceptions noted under section 4B subsection (1)(a) and (b), whereby the common law is inapplicable in the case of exclusion by other enactment in force in Tokelau as legislative material or is inapplicable to the circumstances of Tokelau as a territory.

Section 5A states that every court which has jurisdiction in Tokelau shall, within the limits of its jurisdiction, concurrently administer principles of English common law and equity. In the case that there is a conflict between English common law and equity with reference to the same matter, the rules of equity shall prevail.

Disclaimers:

Pursuant to the application of the *New Zealand Law Rules 2004,* the general rules of New Zealand are seen to be the law of Tokelau in force in respect to certain subject areas. Due to the limited number of relevant reported cases in this specific jurisdiction the English common law and related cases are referred to as part of its analysis for the purpose of this Handbook.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes, Procedure and Evidence Rules 2003	
S 27	Theft	1. A person; 2. Dishonestly takes, or converts to the use of any other person, or misappropriating or disposing of, or dealing in any other manner; 3. With anything capable of being stolen[243]; 4. With the intention: a) to deprive the owner, or a person having a special property or interest in it, permanently of the thing; or b) to part with it under a condition as to its return which the person parting with it may be unable to perform; or c) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of the taking or conversion. 5. Or does the following: a) Holds, receives, or obtains anything capable of being stolen subject to an obligation to deal with it in a certain manner. And who fraudulently or dishonestly deals with it in any other manner or fails to deal with it in accordance with that obligation; b) by means of fraud or false pretence dishonestly obtains for himself or herself or for any other person, whether directly or through the medium of any contract procured by the fraud or false pretence, anything capable of being stolen commits theft of that thing; c) destroys, cancels, conceals, or obliterates in whole or in part a document for any fraudulent or dishonest purpose commits theft of the document; d) fraudulently abstracts or uses electricity commits theft.	N/A
S 31	Fraud	1. A person; 2. By deceit or falsehood or other fraudulent means; 3. Defrauds the public or any person ascertained or unascertained; 4. Causes or induces a person to execute, make, accept, endorse, or destroy the whole or any part of a valuable security, commits an offence; or 5. Incurs a debt or liability to obtain a credit by fraud.	N/A

[243] Definition under s27(2) and (3):
(2) Anything which is the property of any person, and is movable, is capable of being stolen.
(3) Anything which is the property of any person and is capable of being made movable is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

Section	Description	Offence Elements	Maximum Penalty
S 32	Forgery	1. A person; 2. Makes a false document[244]; 3. With intent to defraud or deceive any person; 4. Ascertained or unascertained.	N/A
S 73 (1)	Abuse of office	1. A public officer; 2. Acting under pretence of authority; 3. Fails to account for money duly levied.	N/A

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

[244] Definition of 'false document' under s32(2):
In this rule, "false document" means a document –
of which the whole or any material part purports to be made by a person who did not make it or authorise its making; or
of which the whole or any material part purports to be made on behalf of a person who did not authorise its making; or
in which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time, date or place of its making, where material, or any number or distinguishing mark identifying the document, where either is material, is falsely stated; or
of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or
which is made in the name of an existing person either personally or by the authority of that person, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
Crimes, Procedure and Evidence Rules 2003			
S 72 (1)	Official corruption	1. A public officer; 2. Corruptly; 3. Accepts or agrees to accept; or 4. Obtains a bribe in respect of any act done or to be done by that person in an official capacity; or 5. Uses information gained in official capacity to obtain a person advantage or to another person.	
S 72 (2)		1. A person; 2. Corruptly; 3. Gives; or 4. Offers a bribe to another; 5. With the intent to influence that other person in respect of any act done or to be done by that person in an official capacity.	

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Crimes, Procedure and Evidence Rules 2003	
72(1)	Official corruption	1. A public officer; 2. Corruptly; 3. Accepts or agrees to accept; or 4. Obtains a bribe in respect of any act done or to be done by that person in an official capacity; or 5. Uses information gained in official capacity to obtain a person advantage or to another person.	-
72(2)		1. A person; 2. Corruptly; 3. Gives; or 4. Offers a bribe to another; 5. With the intent to influence that other person in respect of any act done or to be done by that person in an official capacity.	
73	Abuse of office	1. A public officer; a) Acting under pretence of authority; b) Fails to account for money duly levied. 2. A public officer; a) Employed to execute an order of court; b) By neglect or omission misses executing the order.	-

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Money Laundering

Offence Element Table Offences

No legislation or sections identified.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Proceeds of Crime

Offence Element Table Offences

No legislation or sections identified.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Provisions Tables

Summary Table: Proceeds of Crime, Criminal Assets Restraint, Confiscation, and Forfeiture

Section	Description	Provisions
	Police Rules 1989	
S 11	Return of property in possession of police	1. Property; 2. Came into possession of any police officer; 3. No longer required for any purpose relating to the detection, investigation or prosecution of any offence; 4. Shall be returned to the person entitled to the possession of the property.
S 13	Unclaimed property may be sold or destroyed	1. Property coming into the possession of any police officer; 2. Unclaimed after being held for not less than 3 months; 3. Under direction of Commissioner; 4. Be sold or destroyed.
S 14	Proceeds of sale to be paid to the village	1. Proceeds of every sale pursuant to s13 shall be paid to the appropriate village; 2. Any money coming into the possession of a police officer and is unclaimed for not less than 3 months, shall be paid to the appropriate village.
	Customs Rules 1991	
S 21	Forfeiture of goods	1. The following goods shall be forfeited: a. Prohibited imports or imports requiring import permits; b. All goods exported or attempted to be exported without the required export permit. 2. Constables may seize any goods mentioned above and use reasonable force necessary for the purpose of effecting the seizure. 3. Taken to a place of security as the Tokelau Administration directs. 4. Constables making such seizure must make and preserve a written record of the details of seizure and disposal of goods.
S 22	Disposal of forfeited goods	1. All goods forfeited under (1) of s21 shall become the property of: a. The village of the Island where the goods are seized; or b. The village of the island nearest to where goods are seized within the territorial sea of Tokelau.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Mutual Assistance Provisions

No legislation or sections identified.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Extradition Provisions

Section	Description	Provisions
	Extradition Rules 2005	
The entire Act concerns Extradition, including the selected provisions below.		
S 4	Request to surrender	1. Extradition request shall be made to the Court in writing and be accompanied by: (a) A charge supported by affidavit, or an authenticated copy of an affidavit made before a judge of the extradition country; and (b) An authenticated copy of a warrant of arrest; and (c) An accurate statement of the offence or offences for which extradition is requested, including the time and place of their commission, their legal descriptions and a reference to the relevant legal provisions; and (d) A copy of the relevant enactments, or, where this is not possible, a statement of the relevant law; and (e) As accurate a description as possible of the extraditable person, together with any other information which will help to establish that person's identity and nationality; and (f) A statement that the requirements of rule 15(1) will be fulfilled; or (g) A request for consent according to rule 15(2).
S 5	Endorsement of extradition country's arrest warrant	1. Court may make an endorsement on the warrant authorising the execution of the warrant in Tokelau where: (a) A request for surrender is made in the form provided in rule 4; and (b) The Court is informed by affidavit that the person for whose arrest the warrant is in force is, or is suspected of being, in or on their way to Tokelau; and (c) There are reasonable grounds to believe that the person is liable under rule 7 to be surrendered to the country requesting the surrender. 2. A warrant endorsed under paragraph (1) is sufficient authority for a constable to execute the warrant in accordance with these Rules.
S 15	Person extradited not to be tried for other offences	1. A person; 2. Who has been extradited; 3. Shall not be proceeded against, sentenced, or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his or her surrender other than that for which he or she was extradited; 4. Nor shall they be for any other reason restricted in their personal freedom, except when Tokelau consents.
S 16	Request by Tokelau	1. Director of the Tokelau Public Service; 2. Is responsible for extradition matters (or the person authorised by the law of an extradition country) may make a request to the relevant authority of an extradition country for the surrender of a person who is accused or has been convicted of an extradition offence; 3. Against the law of Tokelau; and 4. Is suspected of being in that country or on their way to that country.[245]

[245] Under paragraph (2), any person surrendered pursuant to a request under paragraph (1) may be brought to Tokelau and delivered to the proper authorities to be dealt with according to law.

S 17	Person surrendered not to be tried for other offences	1. A person; 2. Who is surrendered by an extradition country; 3. Shall not, until they have left or has had an opportunity of leaving Tokelau; (a) Be proceeded against, sentenced, or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his or her surrender other than that for which they were extradited, nor shall they be for any other reason be restricted in their person freedom; (b) Be detained in Tokelau for the purpose of being surrendered to another country with the purpose of being proceeded against, sentenced, or detained with a view to the carrying out of a sentence or detention order.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Tonga

Elements of Offences and Case Law

Tonga

The Kingdom of Tonga bases its legal system within the factor of English common law. Following Tonga's independence from the United Kingdom in 1970, mechanisms have since been established to transition to the complimentary usage of Tongan legislature and case law in conjunction with English common law.

Pursuant to the *Civil Law Act* section 3, it is provided that "subject to the words written in any Act, the Tongan Courts should apply the common law of England and the rules of equity in force in England". This procedural notion is applicable to criminal law proceedings as well, despite being a civil code.

Furthermore, section 4(b) of the *Civil Law Act* states that English common law can only be applied to the extent that no other Tongan Act or Ordinance is in force, or the circumstances of the Kingdom and of its inhabitants' permit, and subject to such qualifications as local circumstances render necessary.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Laws of Tonga Chapter 18 (Criminal Offences)	
S 53	Fraudulent conversion by government servant	1. Any person employed as or acting in the capacity of a Government servant 2. fraudulently converts to his own use or to the use or benefit of any other person or in any manner fraudulently disposes of any money, valuable security or thing of any description whatever or any part thereof 3. which has been entrusted to or received by him by virtue of his employment as a Government servant	10 years
S 54	False receipt: issue of, by government servant	1. a government servant 2. wilfully gives to any person a receipt for an amount of money or property different from the amount actually paid over or delivery to such government servant.	5 years
S 143	Definition of theft	1. dishonest taking of something listed in s 144 2. with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing such interest 3. without any 'colour of right' 4. to deprive the owner permanently of such thing, or to deprive any other person permanently of any lawful interest possessed by him in such thing.	See s 145
S 144	Things capable of being stolen	1. Every animate thing which is the property of any person is capable of being stolen. 2. Every inanimate thing which is the property of any person is capable of being stolen. Provided that – (a) It is moveable; or (b) It is capable of being made moveable and has been made moveable even though it has been made moveable only in order to steal it.	
S 145	Punishment for theft	1. if the value of the thing stolen does not exceed $500 to imprisonment for any period not exceeding 2 years; 2. if the value of the thing stolen exceeds $500 to imprisonment for any period not exceeding 7 years.	

Section	Description	Offence Elements	Maximum Penalty
		Laws of Tonga Chapter 18 (Criminal Offences)	
S 148	Receiving	1. A person 2. receives any property 3. knowing or believing it to have been stolen or obtained in any way whatsoever under circumstances which amount to a criminal offence OR receives any mail bag or any postal packet or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof amounts to an offence under the Post Office Act or this Act, 4. knowing or believing the same to have been unlawfully stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post.	See s145
S 158	Embezzlement	1. Every person employed as or acting in the capacity of a clerk or servant 2. who shall fraudulently convert to his own use or benefit or to the use or benefit of any other person any money, valuable security or property of any description whatever or any part thereof 3. which was delivered to or received by him on behalf of his master or employer.[246]	7 years
S 162	Fraudulent conversion of property	1. A person (a) having had delivered to him anything capable of being stolen on loan or on hire or in order that he may do any work upon such thing; or (b) being entrusted with anything capable of being stolen in order that he may retain the same in safe custody or apply, pay or deliver for any purpose or to any person such thing or any part thereof or any proceeds thereof; or (c) having received for or on account of any other person anything capable of being stolen, 2. fraudulently converts to his own use or benefit or to the use or benefit of any other person such thing or any part thereof or any proceeds thereof.	7 years
S 163	Fraudulent conversion by trustee	1. A person 2. who as a trustee, executor, administrator, co-owner or member of a partnership 3. has or acquires a lawful interest in any money, goods, valuable security or other thing capable of being stolen, 4. fraudulently converts such money, goods, security or other thing or any part thereof or proceeds thereof to his own use or benefit or to the use or benefit of any person not beneficially entitled thereto.	7 years
S 164	Obtaining by false pretences	1. Every person who 2. by any false pretence	See s 145

[246] This section does not apply to persons in the public service of the Kingdom.

Section	Description	Offence Elements	Maximum Penalty
		Laws of Tonga Chapter 18 (Criminal Offences)	
		3. obtains for himself or for any other person any money, valuable security or other thing whatever	
S 166	Obtaining credit by false pretences	1. Every person 2. who in incurring any debt or liability obtains credit 3. by means of any false pretence or any fraud	1 years

Cases

Fraudulent Conversion

R v Latu [2019] TOSC 16

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Lord Chief Justice Paulsen

Date of Verdict 11 March 2019

Summary Falsification of accounts s 159(b) *Criminal Offences Act.*

This case concerned the fraudulent conversion by a Government Servant contrary to s 53(1) of the *Criminal Offence Act.* While working as a Senior Accounting Officer at the Ministry of Finance and National Planning, Mr Latu converted to his own use $1,200 entrusted to him by virtue of his position within Government.

The elements of the offence that were accepted by the Court by the Prosecution were that:

(a) That Mr. Latu;
(b) Whilst employed as a Government Servant;
(c) Did fraudulently convert to his own use $1,200; which
(d) Was entrusted to him by virtue of his employment as a Government Servant.[247]

In the context of fraudulent conversion more broadly, these elements can be interpreted as:

(a) A person
(b) Whilst employed as a Government Servant
(c) Fraudulently convert valuable consideration
(d) Entrusted to that person by virtue of their position in Government.

The Court went on to discuss the meaning of 'entrusted'. It was noted that as a Government employee, a fiduciary duty is owed simply by virtue of their employment.[248] No consideration must be given to whether the money was delivered to another person within Government before it was taken by an accused.[249]

In forming this view, the Court referred to the English case of *Rex v Grubb* [1915] 2 K.B. 683:

[247] *R v Latu* [2019] TOSC 16 [44].
[248] Ibid [47].
[249] Ibid [47].

> *… a person may be entrusted with property, or may receive it, for or on account of another person, within the meaning of [the Larceny Act 1901] notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him.*[250]

Rex v Leone [2013] TOSC 28

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Chief Justice M. Scott

Date of Verdict 13 September 2013

Summary Fraudulent Conversion s 53(1) *Criminal Offence Act.*

This case concerned the fraudulent conversion of petrol following lawful possession of the petrol. By virtue of the accused position as a Police officer, he took petrol that was in his lawful possession for police purposes back to his residency and store it there. The only question for the Court was whether it could be proved beyond a reasonable doubt whether the accused fraudulently converted the diesel to his own use during the time in which it was stored at their residency.

In determining whether the petrol was in fact fraudulently converted while stored at their residency, the Court gave great weight to the truthfulness and likelihood of the accused testimony in conjunction with witness testimony.

In coming to use this test, the Court considered the application of *R v Smythe*,[251] quoting the extract cited therein from Cross on Evidence (5th ed. 1979) at p. 49:

> *if someone is found in possession of goods soon after they have been missed and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonesty handling the goods, knowing or believing them to have been stolen …* [252]

This statement guided the Court to the view that in finding that a person had dishonestly converted to their own use – a use that is inconsistent with the purpose for which they lawfully possessed it – goods in circumstances which suggest conversion, an explanation is required for a judge or jury to determine whether the explanation could be true (likewise, causing doubt preventing a guilty verdict).[253]

R v Nusi [2008] TongaLawRp 31

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Justice Shuster

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[250] *Rex v Grubb* [1915] 2 K.B. 683, 689.
[251] (1981) 72 Cr. App R 8, 11.
[252] *Rex v Leone* [2013] TOSC 28, [14].
[253] Ibid [15].

Date of Verdict 16 July 2008

Summary Fraudulent Conversion of Property s 162 *Criminal Offences Act.*

This case concerned the fraudulent conversion of a motor vehicle by failing to provide the proceeds of the sale of the car to the complainant. The Court considered the mental element of fraudulent and found that it was equivalent to dishonesty. It was held that the accused was guilt for not having provided the proceeds of sale to the complainant.

This considered the application of s 162 of the *Criminal Offences Act* relating to the fraudulent conversion of property. The Court outlined the offences of the crime as follows:

(a) Any person who;
(b) Fraudulently;
(c) Converts to his own use, and, or benefit;
(d) Property and or;
(e) Proceeds belonging to another and
(f) Which were entrusted to him/her;
(g) Commits an offence.

The Court went on to consider the interpretation of cases involving dishonesty in other Commonwealth jurisdictions and applied them to Tonga. The following summary was set out by Shuster J:

• 'R v Glenister (1980) 2 NSW LR 559 at 603-605 extensively covers the meaning of the work "fraudulently." The Court of Appeal of NSW in that case said at p 607: "We conclude that the mental element described as fraudulent ... is equivalent to dishonesty. It will be sufficient ... that the Crown must prove that the accused acted dishonestly. It is unnecessary for him (the trial judge) to go further and define honesty. It is enough that he informs the jury (himself) that in deciding whether an application was or was not dishonest, they should apply the current standards of ordinary decent people." The court cited R v Feely (1973) 1 QB 530.

• R v Smart [1983] VR 265 at 295 (a decision of the Supreme Court). In determining whether the prosecution has proved the defendant was acting dishonestly (it) must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. 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 defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in way which he knows ordinary people consider to be dishonest, even if he asserts or he genuinely believes that he is morally justified in acting as he did. Per Lord Lane in R v Ghosh.

• R v Barrick [1986] 7 Cr AR [s]. For allegations which concern Breach of Trust cases, It is trite law that a servant or agent owes a high duty of care to his employer to carry out his duties properly; and more important honestly. The higher up the scale one goes in a company, or organization, the higher the degree of responsibility is imputed in him by law; because without that trust; the business world and all organs of a government would be in chaos.

• R v Ghosh [1982] 2 All ER 689. Is the well-known test for Dishonesty, which states; "it is dishonest for a defendant to act in a way which he knows ordinary people consider to be; dishonest; even if he himself asserts, or genuinely believes he is morally justified in acting as he did."

• R v Gomez [1993] 1 All ER 1. Authority for the well-established test of; appropriation and or, misappropriation of property. This is a Leading House of Lords' case which all legal practitioners should read, understand and apply in cases such as this.

• Machent v Quinn [1970] 2 All ER 255 DC. It is not necessary to prove all the articles or values mentioned in the indictment to have been stolen, if it is proved that the defendant stole any one of them. See R v Parker 53 Cr App R 289 CA per Donaldson at page 229 it is submitted that the jury must be agreed on which particular item, or value was stolen.

• Cooper v Stable; R v Smith. Corrupt is doing an act which the law forbids.'

R v Pongi [2000] TOLawRp 29

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Justice Ford

Date of Verdict 16 August 2000

Summary Fraudulent Conversion as a Government Servant s 53 *Criminal Offences Act.*

This case concerned the fraudulent conversion of tickets to a rugby game from an employee of the Government Printing Department. The accused was alleged to have taken surplus tickets owned by the Tonga Rugby Union, of which he had no colour of right to, and abused the trust that was placed on him by virtue of his employment.

The Court was only asked the question of whether the accused was in fact entrusted with the tickets – the same challenge that was posed in the case of *R v Latu*.[254] The Court came to the same conclusion that it was immaterial whether the accused was physically entrusted with the tickets and accepted the Prosecutions submission that the accused obtained access by virtue of his employment as a Government servant and abuse the trust that was placed on him.[255]

False Pretences

Lavulavu v R [2022] TOCA 22; AC 17 of 2021 (10 October 2022)

Matter Criminal

Jurisdiction Court of Appeal

Coram Hansen J, de Jersey J, Harrison J, and Heath J

Date of Verdict 10 October 2022

Summary The convictions were overturned on appeal and the case remitted for retrial (retrial pending as at time of finalisation of this Handbook).

After trial the appellants were convicted of three joint charges of obtaining money by false pretences contrary to s164 of the *Criminal Offences Act* and both were sentenced to six years

[254] See generally *R v Latu* [2019] TOSC 16.
[255] *R v Pongi* [2000] TOLawRp 29.

imprisonment. Both appealed against conviction and sentence. The bases of the conviction appeals were that the learned trial judge:

a. erred in his analysis of the elements of the offence.
b. erred in holding that the principles of agency could be invoked for the purpose of proving the offences.
c. erred in finding there was evidence sufficient to establish guilt.
d. was biased &/or the conduct of the trial was unfair.

The Court of Appeal upheld the appeal on 3 of the 4 grounds. The only ground that failed was (c) – insufficiency of evidence.

- **Ground (a) - erred in analysis of the elements of the offence.**

The Court of Appeal held that for the offence in section 164 of the *Criminal Offences Act* to be made out, not only does a false representation need to have been made, but it needs to be proved that the person knew it was false and had the intention to act on it to obtain a benefit:

> *[28] The Judge correctly identified the need for the Crown to prove that a representation had been made that was false to the knowledge of the representor and that, as a result of the representation, a benefit in the form of the grants was obtained. Where we part company from the Judge on this issue, is in his requiring, in addition, that the conduct was dishonest.*
>
> *[29] We agree with the appellants that there is no need to add a further generalized requirement of dishonesty. Knowledge of the falsity of the representation of course imports dishonesty. However, in our view there is a further element of the offence that the Crown must prove.*
>
> *[30] That derives from the requirement that the representor obtain a benefit for himself or another. For this purpose, principle requires an intention that the representation cause or induce the representee to confer a benefit on the representor or another person. This avoids any possibility of the representor being criminally liable for an unintended consequence of the false representation. The mens rea of the offences is, accordingly, knowledge of the falsity of the representation (the false pretense)* ***and*** *an intention that the representation should be acted on to secure a benefit (the obtaining). Knowledge of the falsity of the representation by itself does not constitute the mens rea of the offence. The representor must also know or intend that the representation will be acted on.*
>
> *[31] The Judge erred in omitting this element of the offence from his analysis and substituting a generalized requirement for dishonesty. This ground of appeal accordingly succeeds.*

- **Ground (b) - erred in holding principles of agency could be invoked.**

The trial judge invoked the principles of agency to establish that Mr Lavulavu had made the representations. He found that Mrs Lavulavu had acted as his agent, and, in effect, made the representation on his behalf as well as in her own right. He also relied on agency to establish that the Lavulavu's were guilty of count 3 as he made no finding that it was signed by Mrs Lavulavu.

In opening its case, the Crown did not rely on the principles of agency - the Crown case at trial was that both Mr and Mrs Lavulavu were principal offenders. The Crown did not seek to distinguish between the legal basis of their roles. However, at an early stage of the trial the Judge made it clear that, in his view, the doctrine of agency should be invoked to establish that the appellants or either of them made a false representation. So, he said, even though Mrs Lavulavu may not have signed the 2015 application and Mr Lavulavu had signed none of the applications, they may be shown to have made the representations.

The Court of Appeal had no issue with the proposition that it is not essential that an accused make the false representation in order to prove the offence. That could arise if the accused acts jointly with the representor as the Crown contends occurred in this case. Alternatively, and more commonly, the Court said guilt is established by the accused person's role as an accessory: [34]. However, by reference to the relevant provisions on which secondary liability may arise, being section 8 of the *Criminal Offences Act,* (abetment of crime and punishment of abettor), the question would relevantly be whether Mr Lavulavu encouraged or procured the commission of the offences or did any act for the purpose of facilitating the commission of the offences. The Court noted that the trial judge appeared to recognize that Mr Lavulavu's culpability should be analysed in that way (aid, abet, counsel or procure) but then reverted to his earlier stated view that the issue could be determined by reference to the law of agency. Given that no authority was cited to support the proper use of law of agency principles in Tonga, and the absence of statutory provision on the same, there law of agency had no proper application:

> *[36]…The rules of agency with their particular requirements relating to knowledge and authority have no place in a case such as this. We see no reason why the evidence should not be analysed in the usual way by considering whether the elements of the offence have been established, if necessary by reference to the statutory provisions for establishing guilt as a party.*

- **Ground (c) - erred in finding evidence sufficient to establish guilt.**

This ground of appeal was not made out. The Court of Appeal found that there was sufficient evidence to support convictions on a correct application of relevant legal principles, and that a retrial must accordingly follow: [83].

- **Ground (d) - biased &/or the conduct of the trial was unfair.**

The Court found that the trial judge was overly interventionist and was acting not as an umpire of the contest, but effectively as a second prosecutor: [75] and

> *[72] Having regard to these principles and to the aspects of the trial earlier set out, we are left in no doubt that the appellants are fully justified in feeling that they did not have a fair trial and that a fair minded observer would agree with them.*
>
> *[82] Cumulatively, the irregularities we have referred to resulted in a trial that went badly awry. In what we assume to have been a well-intentioned attempt to expedite the trial, the Judge persistently and, in some cases, egregiously exceeded his proper function. It was*

understandable that the appellants should feel the Judge was not acting impartially and inevitable that a fair minded observer would share that view.

R v Lavulavu [2021] TOSC 92[256]

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Justice Cooper

Date of Verdict 4 July 2021

Summary Obtaining Money by False Pretences s 164 *Criminal Offences Act.*

This case concerned dishonest reporting of students attending a school for the purpose of profiting from government grants.

The Court outlined the elements of the offence as:

i. That a defendant made a statement. This can be directly or through the agency of another, that is to say, on his or her behalf.
ii. It was in fact false to some degree, arguable more than just de minimis though any falsity can be enough.
iii. Either defendant knew it was or may be untrue.
iv. It caused the payment from the Ministry.
v. The conduct was dishonest.[257]

The Court focused on three elements; namely, that the statements were false, that they knew they were or may be untrue and that it was dishonest.[258]

In considering whether a statement is false, the Court noted that the false claim must directly cause property to be obtained.[259] The defendant is entitled to introduce evidence to affirm a fact that is alleged to be false and where this cannot be done, there is an entitlement to uphold a conviction.[260]

To understand the meaning of *knowledge of dishonesty* as it relates to the truthfulness of a statement, the Court considered the modified test in *Ghosh* that was outlined as follows:

(a) What was the defendant's actual state of knowledge or belief as to the facts; and
(b) Was his conduct dishonest by the standards of ordinary people.[261]

R v Makahununiu [2004] TongaLawRp 67

Matter Criminal

Jurisdiction Supreme Court of Tonga

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[256] [2021] TOSC 92. Later twice appeal on grounds not relating to findings of false pretences. See generally *R v Lavulavu* [2023] TOSC 45; *Lavulavu v R* [2023] TOCA 21.
[257] *R v Lavulavu* [2021] TOSC 92, [1059].
[258] Ibid [1069].
[259] Ibid [1104].
[260] Ibid [1127].
[261] Ibid [1140].

Coram Chief Justice Ward

Date of Verdict 26 May 2004

Summary Theft s 143(a) *Criminal Offences Act.*

This case sets out the position on false pretences:

> *The prosecution must prove that the false pretence operated on the mind of the person deceived and induced that passing of the property. It is normally necessary to prove it by direct evidence from the person deceived R v Laverty [1970] 54 Cr App R 495; R v Tirado [1974] 59 Cr App R 80. It is only in the most obvious cases that this does not need direct evidence; R v Lambie [1981] 3 WLR 88*.

Rex v To'a [2012] TOSC 75

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Justice Cato

Date of Verdict 20 July 2012

Summary Obtaining Property by False Pretences s 164 *Criminal Offences Act.*

In relation to s 164 of the *Criminal Offences Act,* the Court in this case found that, absent a meaning of 'false pretences' in the legislation, it could be defined as:

> *… a representation made by words or otherwise of a matter of fac, and which the person knows to be false or does not believe to be true …* [262]

The Court also noted the elements that needed to be proven in the context of the case as:

1. That the accused.
2. On or about the dates set out in the indictment.
3. Made a false representation.
4. And as a consequence, obtained for himself a benefit.

This case may place different weight on the elements of the offences in comparison to *R v Lavulavu.*[263]

[262] *R v To'a* [2012] TOSC 75.
[263] *R v Lavulavu* [2021] TOSC 92.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Laws of Tonga Chapter 18 (Criminal Offences)	
S 50	Acceptance of bribe by government servant	1. Every person employed as or acting in the capacity of a Government servant 2. demands or accepts any money or valuable consideration of any description whatever 3. as an inducement to do or abstain from doing any act in the execution of his duty as such Government servant or as an inducement for showing favour or disfavour to any person.	3 years
S 51	Bribery of government servant	1. Every person 2. who shall give or offer any money or valuable consideration of any description whatever 3. to any person in the service of the Government 4. as an inducement to do or abstain from doing any act in the execution of his duty as a Government servant or as an inducement to show favour or disfavour to any person	3 years
		Electoral Act 1989	
S 21	Bribery	1. a person 2. directly or indirectly, by himself or by any other person on his behalf – (a) gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting; or (b) corruptly does any act as aforesaid on account of any elector having voted or refrained from voting; or (c) gives any money or valuable gift as aforesaid to or for any person in order to induce that person corruptly to procure, or to try to procure, the return of any person at an election or the vote of any elector; or (d) in consequence of any such gift as aforesaid, procures, or engages, promises or tries to procure, the return of any person at any election or the vote of any elector; or (e) advances or pays or causes to be paid any money to or to the use of any other person with the intent that money or any part thereof shall be expended in bribery at any election; or (f) knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election; or (g) receives before or after an election, or agrees or contracts for any money or valuable gift for himself or any other person for voting or agreeing to vote or refraining or agreeing to refrain from voting or inducing any other person to so vote or refrain from voting.[264]	$5,000 or 3-years imprisonment or both.

[264] Under s 21(3), where a gift is given in the absence of any return consideration within 3 months of an election, is assumed to have been given for the purposes of a bribe, unless evidence can be adduced to the contrary.

Cases

Tu'ivakano v Police Commissioner [2021] TOSC 170[265]

Matter	Civil
Jurisdiction	Supreme Court of Tonga
Coram	Lord Chief Justice Whitten QC
Date of Verdict	28 October 2021
Summary	Bribery, Money Laundering, Perury, Making False Statement for the Purpose of Obtaining a Passport, Possession of a Firearm and Ammunition without a Licence. The Court, in reference to *Coudrat v Revenue and Customs Commissioner*,[266] stated that when proving guilty knowledge in fraud or related crimes, circumstantial evidence is often used to draw inferences from because of the absence of direct evidence of a person's state of mind.[267]

Fasi v Pohiva [1990] TOLawRp 23

Matter	Civil
Jurisdiction	Supreme Court of Tonga
Coram	Chief Justice Martin
Date of Verdict	11 May 1990
Summary	Bribery This case relates to s 21 of the *Electoral Act 1989.* The Court found that where a gift is given to a legal entity (i.e person, business, government department etc), it does not matter that there is no identifiable recipient. It is the case that a gift can be given to the government as a whole and still be capable of influencing behaviour of a specific person.[268] The test that was used by Martin CJ was whether, by a candidate giving a gift, it was done with the 'predominant intention', at the time the gift was made, to persuade people to vote for them.[269] Martin CJ's judgment was upheld in its entirety by the Court of Appeals of Tonga.[270]

Piukala v Saulala [2022] TOSC 50

Matter	Civil
Jurisdiction	Supreme Court of Tonga
Coram	Lord Chief Justice Whitten QC

[265] Unfortunately, the proceeding case from 2020, the prosecution plead *nolle prosequi* to all counts of bribery by a government servant and money laundering.[265] This is despite the fact that the present case at [3] states the plaintiff was sentences on the bribery and money laundering charges to two years imprisonment.
[266] [2005] All ER 398, [46].
[267] Tu'ivakano v Police Commissioner [2021] TOSC 170, [182].
[268] *Fasi v Pohiva* [1990] TOLawRp 23.
[269] Ibid.
[270] *Fasi v Pohiva (No. 2)* [1990] TOLawRp 34.

Date of Verdict 2 May 2022

Summary Bribery

This case concerned four counts of bribery in connection with an election to influence voting in exchange for goods. Helpfully, Whitten LCJ comprehensively breaks down the legal principles identified in *Latu v Lavulavu*[271] (discussed below) at [31]:

(a) Any person who, directly or indirectly, by himself or by any other person on his behalf, gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting, commits the offence of bribery (s 21(1)(a)).

(b) Giving money or a valuable gift includes giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift (s 21(2)).

(c) The words "in order to induce any elector to vote or refrain from voting" in section 21(1)(a) are directed to actions taken to influence an elector or electors in the exercise of their voting rights. It is not necessary to prove that such actions did in fact produce any effect on the election.

(d) Any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved (s 21(3)).

(e) The legal onus of proving his challenge is on the petitioner. To discharge that onus, the petitioner bears the evidentiary burden of proving that a gift was made, and that it was made for the purpose of influencing the vote. Any gift made beyond three months prior to the election is presumed 'innocent' until the petitioner proves otherwise. However, once a petitioner establishes that a gift was made within three months prior to the election, the rebuttable presumption created by the deeming provision in s 21(3) has the effect of satisfying the petitioner's burden of proving the second element: that the gift was made for the purpose of influencing the vote. The burden of proof then shifts to the Respondent to establish the contrary, that is, that the gift was 'innocent'.

(f) It is reasonable to presume that in enacting sections 21(3) and 24 (limits on permitted election expenses), Parliament was aware of, and considered, any recognised Tongan customs involving the giving of gifts whether by way of assistance to family members, refreshments or as part of recognized rituals or ceremonies. That Parliament nonetheless saw fit to provide that gifts given within three months of an election are deemed to be bribes unless the contrary is proven is a clear reflection of the following cautions cited by Paulsen LCJ in *Latu v Lavulavu* at [42]

"What is said in general terms by the Respondent is the cash and other items were handed out in accordance with custom and/or to close family members or supporters. The implication seems to be if 'gifts' are handed out for reasons of custom or to family members or supporters they cannot in any circumstances be said to be corruptly given. I do not accept that. The, admittedly obiter, comments of Ward CJ in *Haomae v. Bartlett* [1988-1989] SILR 35*,* seem to have been forgotten*:*

'In an election, any candidate will be subject to customary pressures to make gifts which he will feel he is obliged to observe. However, the giving of money is always likely to be

[271] *Latu v Lavulavu* [2016] TOSC 5.

misconstrued. In this case the sum was not large but, in the context of an old village man who had little other access to cash, its effect could be substantial. No hard and fast rule can be read into the provisions of section 70 but any candidate would be wise to try and avoid any gifts of money during an election campaign and, in all cases where the circumstances of the giving themselves do not do so, he should make it clear that the gift is made in custom and ensure it is appropriate in scale to such gifts.'"

(g) The standard of proof is the civil standard or the balance of probabilities. The standard has been described as a 'flexible test' by which a court will be satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability: In re H (Minors) [1996] AC 563 at 586. If the evidence is such that the Court considers that the fact in issue is more probable than not, the burden is discharged. But if the probabilities are equal, it is not. In *Latu v Lavulavu*, it was submitted that 'given the gravity of allegations of bribery, and the very serious consequences that flow from such a finding, the proof required, although on the balance of probabilities, is to a higher level than in the ordinary civil case'. Paulsen LCJ explained that '[t]his does not mean that the standard of proof is any different than in other civil cases. The standard of proof does not fluctuate, rather the quality of the evidence required to meet what is a fixed standard may differ in cogency depending on what is at stake'. Where section 21(3) has been invoked, the ordinary civil standard of proof, on the balance of probabilities, applies.

(h) As it will rarely be acknowledged by a Respondent that he/she gave a payment or valuable gift to buy votes, the existence of such intention will usually only be gathered from acts viewed against all the circumstances of the case. The Court cannot go into any intention of the Respondent nor be dictated by what the Respondent says he/she intended. The determination must be governed by what the Respondent said and did, and by inferences that ought to be draw therefrom.

(i) The closer that a gift is made to an election, the stronger must be the inference that it is intended to influence the vote of an elector: *Latu v Lavulavu* at [69].

(j) A candidate for election may make a payment or valuable gift for mixed motives. He may, for instance, make a gift for charitable purposes. There is nothing wrong with that. But he may also make a gift to buy votes. That is bribery. There is no requirement that a wrong motive must be the dominant one. It will be sufficient for the purposes of section 21(1)(a) if one significant motive was to influence the vote.

(k) In an election context, a person may become a candidate's agent by either actual appointment or employment or by recognition and acceptance of their actions by the candidate. In determining whether agency is established all the circumstances should be considered. Personal intimacy is evidence of agency. In the case of a candidate's wife, where she concerns herself in her husband's election, she is ipso facto regarded as his agent and is taken to have acted on his behalf.

(l) If an elected candidate is convicted of bribery, whether before or after the relevant election, the Court shall declare the election of that representative to be void, and if/she he has already taken his/her seat in the Legislative Assembly, he/she shall be unseated by the Assembly (ss 21(5) and 32(1)).

(m) If any one of several allegations of bribery is proved, it will result in the automatic avoidance of the Respondent's election and the Court will not be concerned to weigh the relative importance of the conduct or allow any excuse.

Latu v Lavulavu [2016] TOSC 5

Matter Civil

Jurisdiction Supreme Court of Tonga

Coram Chief Justice Paulsen

Date of Verdict 29 January 2016

Summary Bribery

Mr Lavulavu was accused of bribery on three occasions listed between [20]-[22]. Dr Latu alleged that Mr Lavulavu gave cash payments to two individuals and one company amounting to TOP$200. Additionally, Dr Latu alleged that Mr Lavulavu used TOP$4,000 of prize money at a social gathering as a tactic to promote his election campaign as a bribe in breach of s 21(1)(a) of the *Electoral Act 1989.* Finally, Dr Latu alleged that by donating coral rocks to pave 47 roads was done to induce voters and was therefore a bribe. The Court in *Piukala v Saulala* aptly summarised the preceeding dicta of Paulsen LCJ in *Latu v Lavulavu* (see above) in finding that Mr Lavulavu had committed bribery on all three occasions.

S 21(1)(a) of the *Electoral Act 1989* requires proof of two elements – namely:

(i) Every person commits the offence of bribery who, directly or indirectly, by himself or by any other person on his behalf;

(ii) Gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting.[272]

The Court also relevantly noted the interpretive provisions of s 21(2)-(3) in ascertaining what is considered giving money or valuable gifts:

(2) In this section, a reference to giving money or valuable gift includes a reference to giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift.

(3) For the purposes of this section, any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person (except a person named in section 24(3)) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved.[273]

The Court highlighted that there is no requirement for the conduct to have actually caused any effect on an election.[274] Additionally, it is not necessary that the dominant purpose of a gift be for bribery. Where a gift acts as charity and can also be adduced to influence voting, it is sufficient to be considered a bribe.[275]

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[272] Ibid [24].
[273] *Latu v Lavulavu* [2016] TOSC 5 [25].
[274] Ibid [27] citing *Scott v Martin* (1988) 14 NSWLR 663, 670.
[275] Ibid [28] citing *Director of Public Prosecutions v Luft* [1977] AC 962, 983.

R v Alalea [2020] TOSC 10

Matter	Criminal
Jurisdiction	Supreme Court of Tonga
Coram	Lord Chief Justice Whitten
Date of Verdict	13 March 2020
Summary	Bribe a Police Officer s 165(1) *Tonga Police Act.*

This case concerned the sentencing of Bribery charges as it relates to offering of bribes to law enforcement contrary to s 165(1) of the *Tonga Police Act* and refers to similar cases with circumstances in Australia and New Zealand to assist in sentencing.

Corruption

Offence Element Table

There are no unique corruption offences other than those covered within the above bribery charges.

Cases

Fusitu'a v Ta'ofi [1996] TOLawRp 24

Matter	Civil
Jurisdiction	Supreme Court of Tonga
Coram	Chief Justice Hampton
Date of Verdict	22 April 1996
Summary	Bribery and Corruption

This case concerned the unsuccessful candidate alleging bribery and corruption against the successful candidate for the district of Niuatoputapu and Niual'o'ou to the Legislative Assembly. The allegations were brought under s 33 of the *Electoral Act 1989* alleging a breach of duty by failing to provide voting cubicles and not replacing a named assistant returning officer and not removing the same officer from the voting area during the actual voting.

With reference to Martin CJ in *Fasi v Pohiva,*[276] the Court relied on the principle of demonstrating 'widespread and general malpractice' when dealing with s 33 of the *Electoral Act 1989*.[277] Hampton CJ stated that:

S 35(a) provides that I "shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities". I comment: a wise and sensible provision and very necessary in such an area as an election petition where the smallest of actions tend to be, or can tend to be, put under the most powerful magnification.

Rotomould (Pacific) Ltd v Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communications [2020] TOSC 114.

It was noted with reference to the case law in Australia and New Zealand that where a statutory body engages in tendering where there is a basis of claim for fraud, corruption, bad faith or anything analogous, they are open to judicial review.[278]

R v Alalea [2020] TOSC 10

Matter	Criminal
Jurisdiction	Supreme Court of Tonga
Coram	Lord Chief Justice Whitten
Date of Verdict	13 March 2020

[276] *Fasi v Pohiva* [1990] Tonga LR 79, 88.
[277] *Fusitu'a v Ta'ofi* [1996] TOLawRp 24.
[278] *Rotomould (Pacific) Ltd v Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communications* [2020] TOSC 114, [23]-[34].

Summary Bribe a Police Officer s 165(1) *Tonga Police Act.*

The Court noted that due to the lack of comparative sentencing in Tonga, the neighbouring jurisdictions with similar statutory provisions is helpful. The reference to cases from neighbouring jurisdictions was not in regard to the elements of any offence, but rather the sentencing of crimes.

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Money Laundering and Proceeds of Crime Act 2000	
S 17	Money laundering offences	1. A person 2. acquires, possesses or uses property 3. knowing or having reasonable grounds to believe or suspect that it is derived directly or indirectly from the commission of a serious offence;[279] (a) by the conversion or transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence; or (b) concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly by the commission of a serious offence.	Natural person - $500,000 or 10 years or both Body Corporate - $1,000,000
S 18	Related offences	1. A person 2. opens or operates an account with a financial institution or a cash dealer in a false name or an anonymous account.	Natural person - $20,000 or 2 years or both Body Corporate - $100,000

Cases

Bin Huang v Police [2020] TOSC 28

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Lord Chief Justice Whitten

Date of Verdict 2 June 2020

Summary Mere Chance Illegal Gambling s 83 *Criminal Offences Act.*

The Court noted that the standard of proof in money laundering cases in in fact at the civil standard of the balance of probabilities. In coming to this conclusion, the Court relied on the equivalent Queensland provision of s 8 of the *Criminal Proceeds Confiscation Act 2002* (Qld) and *Xi Yun Qian v Kingdom of Tonga.*[280]

[279] Where 'serious offence' is defined under s 2 of the *Money Laundering and Proceeds of Crime Act 2000* to mean an offence against a provision of –
any law of Tonga for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or more severe penalty;
a law of a foreign state, in relation to acts or omissions which, had they occurred in Tonga, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months, or mere severe penalty, including an offence of a purely fiscal character.

[280] *Bin Huang v Police* [2020] TOSC 28, [35] citing *Xi Yun Qian v Kingdom of Tonga* [2020] TOSC 16.

The Court referenced Paulsen LCJ in the case of *Rex v Potemani*[281] discussing the meaning of money laundering as:

> *… a process by which criminals disguise the original source, ownership and control of the proceeds of criminal activity. They do this by taking the proceeds of a crime, called a predicate offence, and laundering the money in various ways to make it appear to have been obtained legitimately. A predicate offence then in this context is the crime that produces the property (usually cash) that is to be laundered. In section 17(1)(b)(i) the term "a serious offence" refers to the predicate offence. What constitutes a "serious offence" is defined in section 2 of the Money Laundering and Proceeds of Crimes Act 2000 …*

It must be noted that Tonga has previously recognised that an abuse of process can occur where the prosecution attempts to hear the same case through both criminal and civil means where the matter has already been determined in a criminal proceeding.[282]

In this case, the Court discussed the interaction between the offence provision of s 17 of the Act and s 19 that taken cash outside of Tonga without declaring the amount can amount to money laundering. In this case, the applicants were playing a game of mere chance, which does not on its own attract the operation of the money laundering act because a game of mere chance is not a serious offence for the purposes of the money laundering act.[283]

Attorney General v Xi Yun Qian [2019] TOCA 20

Matter	Criminal
Jurisdiction	Court of Appeal
Coram	Whitten P, Handley J, Blanchard J, White J
Date of Verdict	6 September 2019
Summary	Failure to Declare Carrying Currency over TOP $10,000 s 97 *Customs and Excise Management Act.*

The Court found that the *Money Laundering and Proceeds of Crime Act* relating to false declarations of cash had been impliedly repealed by s 97 of the *Customs and Excise Management Act*. Although the two pieces of legislation share the same offence, they attach different punishments which creates a conflict of law. The crux of this case is not about money laundering in the specific sense of the term, but rather about the false declarations that are captured by the money laundering legislation.

[281] [2015] TOSC 33.
[282] *Tu'ivai v Kingdom of* Tonga [2009] TOCA 30 citing *Rogers v The Queen* (1994) 181 CLR 251.
[283] *Bin Huang v Police* [2020] TOSC 28, [169]-[172].

Rex v Potemani [2015] TOSC 33

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Lord Chief Justice Paulsen

Date of Verdict 18 May 2015

Summary Receiving s 148(1), (5) Criminal Offences Act, Money Laundering s 17(1)(a), (b)(i) Money Laundering and Proceeds of Crime Act 2000.

The court broke down the elements to be proven for a "receiving" charge which was proceeded by extension of a money laundering charge. In the context of receiving, the Court was referred to New Zealand authority on the term 'knowing' in the context of receiving property the subject of a criminal offence. Although the Court was satisfied without analysis of *R v Crooks*[284] that there was an actual belief on the part of the accused.[285]

The Court noted the elements for proving the offence of money laundering were:

(a) acquires, possesses or uses property knowing or having reasonable grounds to believe or suspect that it is derived directly or indirectly from the commission of a serious offence;
(b) by:
    a. the conversion of transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence.

This case called for a need to amend the *Criminal Offences Act* because the electronic transfer of money between two people, under Tongan law, was not considered a serious offence. It was stated that the credit of one's account and the debit of another is not a transfer or taking of property.[286]

[284] [1981] 2 NZLR 53.
[285] *Rex v Potemani* [2015] TOSC 33, [23].
[286] *Rex v Potemani* [2015] TOSC 33, [33].

Proceeds of Crime

There is no specific offence for Proceeds of Crime; however, there are many forfeiture provisions within the *Money Laundering and Proceeds of Crime Act 2000*.

Cases

Xi Juan Qian v Kingdom of Tonga [2020] TOSC 16

Matter Civil

Jurisdiction Supreme Court of Tonga

Coram Lord Chief Justice Whitten

Date of Verdict 13 May 2020

Summary Forfeiture s 19G(5) Money Laundering and Proceeds of Crime Act 2000.

For seizures of cash under ss 19C-19D of the money laundering legislation, a Customs officer has to be satisfied on reasonable grounds when the cash was seized that the cash was recoverable cash, intended for use in unlawful conduct or undeclared cash intended for use in unlawful conduct.[287] Notwithstanding this situation, the prosecution failed in this case to demonstrate that the money used to acquire goods was derived directly or indirectly from a serious offence.[288]

Bin Huang v Police [2020] TOSC 28

Matter Criminal

Jurisdiction Supreme Court of Tonga

Coram Lord Chief Justice Whitten QC

Date of Verdict 2 June 2020

Summary Forfeiture under s 19Gof the Money Laundering and Proceeds of Crime Act.

In cases of forfeiture, the Court relied on the equivalent legislation in s 8 of the Queensland's *Criminal Proceeds Confiscation Act 2002* where it is expressly stated that proceeds for confiscations are civil, not criminal, and attract the use of the balance of probabilities as the appropriate standard of proof.[289]

For cash to be detained, it must be suspected on reasonable grounds to be either 'recoverable cash' or 'intended by any person for use in unlawful conduct'.[290]

After much consideration and statutory interpretation, the Court arrived at the conclusion that, in the absence of a definition of 'recoverable cash', the apt way to interpret the term is as meaning 'proceeds of crime'.[291] As was the case in the *Qian* appeal and *Police v Felipe,* the Court noted previous interpretations that arrived to a similar conclusion, quoting:

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[287] *Xi Juan Qian v Kingdom of Tonga* [2020] TOSC 16, [46].
[288] *Rex v Potemani* [2015] TOSC 33, [36].
[289] *Bin Huang v Police* [2020] TOSC 28, [38].
[290] Ibid [117].
[291] Ibid [131]-[142].

[18] … There is no definition in the Money Laundering Act of the phrase 'recoverable cash'. In Police v Felipe (CR132 of 2019) Cato ACJ treated it as equivalent to "proceeds of crime" (as defined). At least arguably it is cash which is proceeds of crime or tainted property (as defined) recoverable under another provision of the Money Laundering Act … "

It was also further stated in support of this finding that a purposive approach to interpreting 'recoverable money' as equivalent to 'proceeds of crime' supports the use of the term in the act as a whole and linking it to the primary offence of money laundering within the act.[292]

When determining whether cash is in fact intended by a person for use in unlawful conduct, the Court relied on the factors for adducing opinion evidence that were outlined in the case of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No. 3)*.[293] These considerations were used by the Court to understand whether a belief that money was to be used for an unlawful purpose was reasonable. The test requires an assessment of whether the opinion evidence:

(a) relevant or of sufficient probative value (the relevance rule);

(b) based on specialised knowledge, training or experience (the expertise rule);

(c) propounded wholly or substantially on facts assumed or observed that have been, or will be, proved (the factual basis rules);

(d) propounded wholly or substantially on that specialised knowledge (the expertise basis rule); and

(e) based on a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge (the statement of reasoning rule).[294]

[292] *Bin Huang v Police* [2020] TOSC 28,[142].
[293] [2012] VSC 99.
[294] Ibid [154] citing *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No. 3)* [2012] VSC 99, [98].

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Section	Description	Provision
	Money Laundering and Proceeds of Crime Act 2000	
ss 1-10	Part I Preliminary	Including Short Title & Interpretation eg: "proceeds of crime" means any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;
ss 11- 27	Part II Money Laundering	Including Money Laundering Offences: s17 and Related Offences: s18 see above in Money Laundering Table) and Seizure and detention of suspicious imports or exports or cash: s19.
ss 28-40	Part III Confiscation	Division 1 – Confiscation and Pecuniary Penalty Orders Including Application for confiscation order or pecuniary penalty order: s28 and Confiscation Order on Conviction: s34
ss 41-48	Part III Confiscation	Division 2 – Pecuniary Penalty Orders Including Pecuniary Penalty Order on Conviction: s41 and Lifting the Corporate Veil: s46
ss 49-56	Part III Confiscation	Division 3 – Control of Property Including Powers to search for and seize tainted property: s49 and Search for and Seizure of tainted property in relation to foreign offences: s56.
ss 57-66	Part III Confiscation	Division 4 – Restraining Orders Including Application for Restraining Order: s57 and Contravention of Restraining Order: s63.
ss 67-71	Part III Confiscation	Division 5 – Realisation of property Including Application of proceeds of realisation and other sums: s68.
Ss 72-80	Part III Confiscation	Division 6 – Production orders and other Information Gathering Powers Including Production Orders: s72 and Monitoring Orders: s78.

Cases

No cases could be found on PacLII or any other related Government related sites for cases or judgments.

Summary Table: Mutual Assistance Provisions

Section	Description	Provision
	Mutual Assistance in Criminal Matters Act 2000	
The entire Act concerns Mutual Assistance, including the selected provisions below.		
S 4(1)	Authority to make and act on mutual assistance requests	The Attorney General may make requests on behalf of Tonga to a foreign State for mutual assistance in any investigation commenced or proceeding instituted in Tonga, relating to any serious offence.
S 4(2)		The Attorney General may, in respect of any request from a foreign State for mutual assistance in any investigation commenced or proceeding instituted in that State relating to a serious offence: 1. grant the request, in whole or in part, on such terms and conditions as he thinks fit; 2. refuse the request, in whole or in part, on the ground that to grant the request would be likely to prejudice the sovereignty, security of Tonga or would otherwise be against the public interest; or 3. after consulting with the appropriate authority of the foreign State, postpone the request, in whole or in part on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in Tonga.
S 6	Mutual legal assistance requests by Tonga	The requests which the Attorney-General is authorised to make under section 4 are that the foreign State: 1. have evidence taken, or documents or other articles produced in evidence in the foreign State; 2. obtain and execute search warrants or other lawful instruments authorising a search for things believed to be located in that foreign State; 3. seize anything found during a search under paragraph (b); 4. confiscate or restrain any property believed to be located in the foreign State, which is the subject of a confiscation order made under the Money Laundering and Proceeds of Crime Act 2000; 5. transmit to Tonga any such confiscated property or any proceeds realised therefrom, or any such evidence, documents, articles or things; 6. transfer in custody to Tonga a person detained in the foreign State who consents to assist Tonga I the relevant investigation or proceedings; 7. provide any other form of assistance in any investigation commenced or proceeding instituted in Tonga, that involved or is likely to involve the exercise of a coercive power over a person or property believed to be in the foreign State; and 8. permit the presence of nominated persons during the execution of any request made under this Act.
S 8	Foreign requests for an evidence gathering order or a search warrant	Notwithstanding anything contained in any other law for the time being in force, where the Attorney General grants a request by a foreign State to obtain evidence in Tonga, an authorised officer may apply to the Supreme Court for: 1. a search warrant; or 2. an evidence-gathering order
S 9(1)	Foreign requests for consensual transfer of detained person	Where the Attorney General approves a request of a foreign State to have a person, who is detained in custody in Tonga by virtue of a sentence or order of a court, transferred to a foreign State to give evidence or assist in an investigation or proceeding in that State relating to a serious offence, an authorised officer may apply to the Supreme Court for a transfer order

Section	Description	Provision
S 12(1)	Foreign requests for Tongan restraining orders	Where a foreign State requests the Attorney General to obtain the issue of a restraining order against property some or all of which is believed to be located in Tonga and – 1. criminal proceedings have begun in the foreign State in respect of a serious offence; 2. the person against whom the order is sought has been convicted; or 3. there are reasonable grounds to believe that the property is located in Tonga; then the Attorney General may apply to the Supreme Court for a restraining order under subsection (2).
S 14	Foreign requests for the location of proceeds of crime	Where a foreign State requests the Attorney General to assist in locating property believed to be the proceeds of a serious crime committed in that State, the Attorney-General may authorise the making of any application under section 71, 76 or 78 of the Money Laundering and Proceeds of Crime Act 2000, for the purpose of acquiring the information sought by the foreign State.

Cases

Tu'ivai v Lokotui [2005] TongaLawRp 6; [2005] Tonga LR 178 (9 February 2005); *Tu'ivai v Lokotui* [2005] TOSC 46; CV 741 2004 (9 February 2005)

Matter Judicial Review

Jurisdiction Supreme Court

Coram Webster CJ

Judgment 9 February 2005

Summary This case highlights a common issue with the timeframes involved in Mutual Assistance Requests and responses and the issues that can arise in such proceedings.

The Plaintiff sought judicial review of a Magistrate's decision to grant the prosecution more time to obtain evidence at the Preliminary Inquiry (committal proceedings) stage of a prosecution. The basis for the prosecution's application for an adjournment was that a request for evidence via the *Mutual Assistance in Criminal Matters Act* to Fiji was on foot and more time was required. The Plaintiff argued that it was unfair and an abuse of process that the Magistrate granted the adjournment, and the delay caused prejudiced him and the prosecution should have completed its investigation before laying charges. He sought relief in the form of the dismissal of the charges. The appeal Court sympathised with the Plaintiff but refused the application:

> *"[i]n all the circumstances I understand his feelings and I do not criticise him for bringing this application. I hope that some of the guidelines which I have set out above, particularly in relation to the inherent powers of Magistrates in respect of adjournments and potential abuses of process, may be of use in this and other cases.*

The Court noted that the prosecution is entitled to procedural fairness and (time to prepare its case) and that the circumstances of this case did not amount to such blatant injustice that it could be said that the Defendant had been unreasonable to allow the adjournment. The nature of these alleged offences was that they started in a different jurisdiction, but were allegedly completed in Tonga, so that there were difficulties obtaining evidence and a request had been made factors into account, despite what may have amounted to a promise by the prosecutor at an earlier hearing; and it would have been unreasonable for him not to have done so and to punish the prosecution for the delays.

Summary Table: Extradition Provisions

Section	Description	Provision
	Extradition Act 1972	
The entire Act concerns Extradition, including the selected provisions below.		
S 3	Persons liable to be returned	Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence[295] in any other country being a country designated in terms of section 4 of this Act or who is alleged to be unlawfully at large after conviction of such an offence in any such country may be arrested and returned to that country as provided by this Act.
S 6	General restrictions on return	A person shall not be returned under this Act to a designated country or committed to or kept in custody for the purposes of such return, if it appears to the Prime Minister, to the court of committal or to the Supreme Court on an application for *habeas corpus* — 1. that the offence of which that person is accused or was convicted is an offence of a political character; 2. that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or 3. that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

Cases

Bloomfield v R [2020] TOCA 6; AC 4 of 2020 (2 September 2020)

Matter Extradition

Jurisdiction Supreme Court

Coram Hon. Justice Niu

Date of Verdict 9 June 2020

Summary The accused Mr Bloomfield was charged by Fijian police with one count of general dishonesty, one count of theft and an arrest warrant was issued. Mr Bloomfield was residing in Tonga at the time. The Government of the Republic of Fiji requested the Prime Minister of Tonga that the accused be returned to Fiji to be tried. Upon the receipt of that request and particulars, the Prime Minister issued an authority to proceed to the Chief Magistrate in Tonga. By authority of warrants issued by the Chief Magistrate, the accused was arrested a search was made of the house of the accused and items which were the subject of one of the charges in Fiji were found and taken.

It was alleged in the general dishonesty charge that Mr Bloomfield fraudulently converted a total of $161,506.66 Fijian dollars, and he was alleged to have stolen properties worth a total of $17,757.77 Fijian dollars. The offences were allegedly committed against his employer whilst he was holding a position of trust as head of Oceania Customs Organisation.

In accordance with the provisions of the Tongan *Extradition Act*, the application of the Government of the Republic of Fiji was heard before the Magistrate Court and on 17 February

[295] Where '**relevant offence'** is defined in s 5 to mean an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.

2020, the Principal Magistrate decided that the accused be returned to Fiji for trial on only one of the two charges with which he has been charged in Fiji, namely, the charge of theft. He held that the charge of general dishonestly cannot be proceeded with because the alleged offence was committed during a period in which the accused was accorded diplomatic immunity by the Government of the Republic of Fiji. He accordingly ordered the return of the accused to Fiji for trial in respect of the theft charge only.

The accused made an application writ of habeas corpus to stop his return to Fiji, claiming that the Magistrate's Court was wrong to have made the order for his return for trial on the theft charge on the ground that the charge of theft was alleged to have occurred between 1st December 2011 and 31st January 2014, just as the general dishonesty charge alleges, the same period during which the diplomatic immunity was held by the Magistrate to have applied in respect of the general dishonesty charge (and extradition refused).

The Crown, who represented the Prime Minister who approved the request of the Government of the Republic of Fiji, appealed against the decision of the Magistrate's Court that the accused be returned to Fiji for trial on only the theft charge upon the ground that the issue of diplomatic immunity ought to have been left to be decided by the trial court in Fiji, because all that the Magistrate was required to be satisfied of was whether or not there was sufficient evidence to commit the accused for trial on the charge of general dishonesty, and there was sufficient evidence for the same, as he said so in his ruling and there was no other consideration required by the Act to stop the return of the accused.

The Court dismissed the application of the accused for habeas corpus and upheld the appeal of the Crown and ordered that the accused is committed to be returned to Fiji to be tried on both the two offences of which he has been charged.

This case involves analysis and application of the requirements of the *Extradition Act* for the return of an accused to another country, namely:

(i) that the offences with which the accused is charged are relevant offences for the purpose of extradition under the Act;

(ii) that a record of the case, that is, the summary of the evidence of the accused having committed the two offences, as required by the Act, have been produced to the Magistrate Court.

(iii) the Magistrate Court has properly found that that record of the case satisfied him of both offences as corresponding to the theft and fraudulent conversion in Tonga, and that the Court held "that the evidence in the record was there sufficient evidence for the case to go to trial if the offence was committed in our jurisdiction".

(iv) there is no provision in the Act to prohibit the return of the accused to Fiji for trial.

(v) contrary to the requirements of the Act, the Magistrate's Court has gone on to consider and uphold a defence raised by the accused of diplomatic immunity under the *Diplomatic Privileges and Immunities Act of Fiji*, in breach of the Act.

(vi) Whereas a court of committal in Tonga had been required to afford to an accused person the right to cross-examine witnesses and call evidence and give evidence in the committal proceedings, that had ceased when the *Magistrate's Court Act* was amended in 2012, and only required that the prosecution only provides a summary of the evidence of each witness for the prosecution, and the Magistrate only has to decide whether on those

evidence, there is a sufficient case to commit the accused to the Supreme Court for trial. Accordingly, she submitted that the Magistrate erred in allowing the defence to produce the documents of diplomatic immunity and in upholding the accused's defence thereon to the charge of general dishonesty.

(vii) The Act also allows offences, other than murder and much more serious offences, as well, although all extraditions would necessarily result in financial hardship, family upheaval and emotional distress, because it is in the public interest that offenders of all crimes listed the Act are brought to justice, irrespective where the offence occurred.

Additional Case:

Rex v Bloomfield [2020] TOSC 33; AM 2 of 2020 (9 June 2020)

Elements of Offences and Case Law

Vanuatu

The Republic of Vanuatu gained independence on 30 July 1980. Formerly the New Hebrides, the Condominium was jointly administered by France and Britain from 1906 until 30 July 1980. Each of the administering countries made laws for its own nationals and optants and together they made laws for indigenous populations, and for all other residents with British law, French law and Joint Regulations. The legal system is now a combined common law system, incorporating British, French and customary law. Since Independence the law of Vanuatu comprises:

- The *Constitution of the Republic of Vanuatu* – the supreme law;
- Every Act of Parliament, Ordinance and all subsidiary legislation made under an Ordinance or Act;
- Joint Regulations in existence on 30 July 1980 - which continue in force until repealed by the Vanuatu Parliament: s. 95(1) *Constitution*;
- British and French laws in existence on 30 July 1980 - including Acts of Parliament, subsidiary legislation and English common law and equity, which continue in force until repealed by the Vanuatu Parliament: s. 95(2) *Constitution;*
- Customary laws of Vanuatu: s. 95(3) *Constitution*; and
- Common law of Vanuatu.

Fraud

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Penal Code Act [CAP 135][296]	
S 122	Theft defined	1. A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof; 2. A person shall also be guilty of theft of any such thing notwithstanding that he has lawful physical control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner. For the purpose of subsection (1) – (a) the word "takes" includes obtaining physical control – (i) by any trick or by intimidation; (ii) under a mistake on the part of the owner with knowledge on the part of the taker that physical control has been so obtained; (iii) by finding, whether or not at the time of finding the finder believes that the owner can be discovered by taking reasonable steps; (b) the words "carried away" include the removal of anything from the place which it occupies but in the case of a thing attached, only if it has been completely detached; (c) the word "owner" includes any part-owner or person having physical control of, or a special property or interest in, anything capable of being stolen.	N/A
S 123	Misappropriation defined[297]	A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).	N/A
S 124	Obtaining property by false pretences defined	Every person obtains property by false pretences who, by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true with intent to defraud, either directly or indirectly, obtains possession of or title to anything capable of being stolen or procures anything capable of being to be delivered to any person other than himself.	N/A

[296] NB: this link is to the 2006 consolidated version available on PacLII. Please refer to all subsequent amendments to the Act in the sessional legislation for updates.

[297] See: *Public Prosecutor v Alatoa* [1999] VUMC 1; Criminal Case 109 of 1999 (18 November 1999). "Converts" means any unauthorised act that deprives an owner of personal property without his or her consent. *Coulon v Public Prosecutor* CR1 of 1989.

Section	Description	Offence Elements	Maximum Penalty
S 125(a)	Theft	1. A person 2. Causes a loss to another person 3. By way of theft[298] • Took and carried away • Fraudulently and without a claim of right made in good faith[299] • Anything capable of being stolen OR • if, a person being a bailee or part owner thereof anything capable of being stolen • fraudulently converts the same to his own use or the use of any person other than the owner 4. Without the consent of the owner 5. With intent to permanently to deprive the owner	12 years' imprisonment
S 125(b)	Misappropriation	1. A person 2. Causes a loss to another person 3. By way of misappropriation:[300] • Destroys, wastes or converts • Property capable of being taken • Which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption)	12 years' imprisonment
S 125(c)	False Pretences[301]	1. A person 2. Causes a loss to another person AND[302] 3. Obtains property: • obtains possession of or title to anything capable of being stolen or procures anything capable of being to be delivered to any person other than himself 4. By false pretences: • By making any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, • Which the person making it knows to be false, or does not believe to be true • With intent to defraud, either directly or indirectly.	12 years' imprisonment

[298] Section 122 of the *Penal Code* defines "theft".

[299] "Claim of right" in terms of the definition of "theft' in s122 of the *Penal Code Act* was considered by the Court of Appeal in *Mass v Public Prosecutor* [2016] VUCA 11; Criminal Appeal 15-8 (15 April 2016) at [14], [16] and [17]. In that case the Court said that since there was a claim of right made in good faith in terms of ownership of the property alleged to have been stolen by the appellant, the prosecution would have been aware they needed to disprove the claim of right made in good faith to the property [14]. It was not for the appellant (defendant) to prove absolute ownership, but for the prosecution to prove the defendant did not have a good faith claim to ownership of the property. The claim of right may turn out to be wrong but "claim of right" is still available if the assertion is made in good faith [16]. There was sufficient evidentiary basis in that case such that it was for the prosecution to establish Mr Mass did not own the property or have a good faith claim of right to it [32].

[300] Section 123 of the *Penal Code* defines "misappropriation".

[301] See: *Public Prosecutor v Swanson* [1997] VUSC 37

[302] NB: the offence provision in s125(c) reads "cause a loss" but the definition of false pretences in s124 reads "obtain property". The offence elements have been drafted to reflect both requirements.

Section	Description	Offence Elements	Maximum Penalty
S 126	Offences resembling theft	1. A person 2. Without lawful authority (a) appropriated any generated energy OR (b) used any property of another person whether or not the accused intended to deprive that person permanently of it OR (c) took or misappropriated his own property of which there was an outstanding debt due by him on that property.	8 years' imprisonment
S 127	Obtaining Credit Fraudulently	1. A person 2. Incurred a debt or liability 3. In the course of that transaction the person obtained credit 4. By means of any false pretence or any other fraud (with intent to defraud).	Imprisonment for 1 year
S 128	Fraud by Trustee	1. A person 2. Being a trustee of any property 3. Destroys the property OR Converts the property to any use not authorised by the trust 4. With intent to defraud.	7 years' imprisonment
S 129	False Statement by Promoter[303]	1. A person 2. Being a promoter, director, manager, or officer of any company or body corporate, either existing or intended to be formed 3. Makes, circulates or publish, or concur in making, circulating or publishing, any prospectus, statement or account 4. Knowing the same to be false in any material particular (a) with intent to induce persons, ascertained or not, to become shareholders, members or investors; OR (b) with intent to deceive or defraud the members, shareholders, or creditors of the company or body corporate, or any of them, whether ascertained or not; or OR (c) with intent to induce any person or persons, whether ascertained or not, to entrust or advance any property to the company or body corporate or to enter into any security for its benefit.	10 years' imprisonment

[303] See: *Public Prosecutor v Swanson* [1997] VUSC 37

Section	Description	Offence Elements	Maximum Penalty
S 130	False Accounting	1. A person 2. Being: (a) a public officer with responsibility for public accounts; OR (b) a director or officer or member of any company or body corporate; OR (c) an officer or clerk or servant of any employer whatever 3. With intent to defraud does: (i) destroy, mutilate, alter or falsify, any book, account, valuable security, or document belonging to the company or body corporate, or concur in so doing; (ii) make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, account, valuable security, or document; (iii) make any transfer of any interest in any stock, debenture, or debt in the name of any person other than the owner of that interest; or (iv) in any manner falsify wilfully any such accounts as aforesaid.	10 years' imprisonment
S 130A	Valueless cheques	1. A person 2. Obtains any chattel, money or valuable security 3. By passing any cheque that is not paid on presentation (Commits an offence) UNLESS 4. He or she proves (despite that there may have been some funds to the credit of the account on which the cheque was drawn at the time it was passed) – (a) that he or she had reasonable grounds for believing that that cheque would be paid in full on presentation; and (b) that he or she had no intent to defraud.	2 years' imprisonment
S 130B(1)	Obtaining money, etc by deception	1. A person 2. By any deception[304] 3. Dishonestly[305] obtained for himself or herself or another 4. Any money or valuable thing or any financial advantage of any kind.[306]	12 years' imprisonment

[304] Section of the 130B(2) *Penal Code* defines "deception".

Section	Description	Offence Elements	Maximum Penalty
S 130C	Obtaining money, etc by false or misleading statements	1. A person 2. With intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, 3. Makes or publish, or concur in making or publishing, any statement (whether or not in writing) – (a) which he or she **knows** to be false or misleading in a material particular; OR (b) which is false or misleading in a material particular and is made with **reckless** disregard as to whether it is true or is false or misleading in a material particular.	12 years' imprisonment
S 131	Receiving property dishonestly obtained	1. A person 2. Receives anything obtained by any offence, or by any act wherever committed which, if committed within the Republic would constitute an offence 3. Knowing that thing to have been dishonestly obtained.[307]	1 year imprisonment +/- fine of VT5,000[308]
S 132	Demanding money etc with menaces	No person shall by menaces or threats of violence, injury, accusation or other detriment whatever, whether by the person uttering the menace or threat or by another person, and whether to the person to whom the menace or threat is uttered or to another person obtain or attempt to obtain payment of any money or delivery of any property or other benefit from any person.	15 years' imprisonment

Cases

Convert / Conversion

Public Prosecutor v Kalkoa [1973] VUNHJC 5; Criminal (A) 11 of 1973 (8 May 1973)

Matter Judgment

Jurisdiction Joint Court of the New Hebrides

Coram L. Cazendres, French Judge, D.R. Davis, British Judge & E. Buteri, Registrar

Date of Verdict 8 May 1973

Charge/s 4 x Fraudulent conversion, contrary to s 22 *Schedule the Native Criminal Code*

Summary On the question of law relating to the interpretation of this section, the Public Prosecutor submitted that the taking by a person to his own use of the property of another person entrusted to his care or given for a particular or limited use was *ipso facto* fraudulent conversion within the meaning of the section and that it was not necessary to prove in addition that the person to whom the property had been entrusted when taking the property had any intent to defraud, though he

[307] "*Dishonestly*" is not defined in the Penal Code. *Swanson v Public Prosecutor* [1998] VUCA 9 described "dishonest" as "not innocent".

[308] Penalty is set out in the *Interpretation Act*: *[w]here an Act of Parliament omits to prescribe a penalty for an offence created by the Act or for a contravention of a provision of the Act the penalty shall be a fine of VT5,000 or imprisonment for 1 year or both*.

conceded that such an intent was an essential ingredient of the offence of fraudulent conversion in British law under section 20 of the *Larceny Act 1916*.

The Native Advocate for his part submitted that an intent to defraud was an essential ingredient of the offence of fraudulent conversion under section 22 of the Schedule to the *Native Criminal Code* and he submitted that there was no evidence of any such intent on the part of the accused in relation to the transactions the subject of the charges.

On deliberation, the Joint Court held, on the principles of both English and French law, that an intent to defraud was an essential ingredient of the offence of fraudulent conversion prescribed in section 22 of the Schedule to the Native Criminal Code. While it appeared to the Court that the accused had shown an extraordinary degree of negligence in dealing with money entrusted to his care for an officer of the British Service of approximately fourteen years' standing at the time the alleged offences were committed, the Joint Court was not satisfied on the evidence adduced before it that the accused in retaining the sum of $38 delivered to him by Alick Lui for almost a year - even in taking $8 of that sum to his own use - and in retaining the sum of $74 delivered to him by Pakoa Toara for a similar period, had had any intent to defraud. The Court accordingly found the accused not guilty and acquitted him.

Public Prosecutor v Willie [2017] VUSC 140; Criminal Case 2803 of 2016 (21 September 2017)

Matter	Judgmenton Verdict
Jurisdiction	Supreme Court
Coram	SakSak J
Date	21 September 2017
Charge/s	Misappropriation contrary to s 125 (b) of the Penal Code Act [CAP 135]
Summary	The three accused were on the Board of Directors of NISCOL Company and were charged with signing cheques and authorising payments for three vehicles and registering the vehicles in their own names. The Court said the elements to be proven by the prosecution for the charge of misappropriation are-

1. That the defendants destroyed, wasted or converted VT $10,828,000 for their own use.
2. The said amount of money was entrusted to them for custody, return and accounting, and
3. That they had no authority to so destroy, waste or convert the money for their own use.

The Court found that the prosecution did not produce any evidence showing the defendants destroyed or wasted VT $10,828,000. The evidence showed the defendants were entrusted with the money for custody, return and accounting. The first and second element as far as conversion goes were proven, however the third element of there being no authority to so act, was not proven by the prosecution. The Court held that clearly the defendants had the Boards' approval. They bought the vehicles to use both for official duties and also for private use as their privileges and entitlements under their respective contracts dated 19th July 2012. The VT $10,828,000 was therefore converted or invested on vehicles. The defendants therefore hold them on trust to be returned to NISCOL as company assets. In that sense, the defendant's actions did not amount to misappropriation. The court acquitted the defendants.

Coulon v Public Prosecutor [1989] VUCA 2; Criminal Appeal Case 01 of 1989 (4 April 1989)

Matter	Judgmenton Appeal
Jurisdiction	Court of Appeal
Coram	Amet J, Martin J, & Goldsbrough J
Date of Verdict	4 April 1989
Charge/s	11 x Misappropriation contrary to s125 of the *Penal Code Act 1981*
Summary	Appeal against conviction dismissed. The Appellant was the accountant for Vulcan, a body set up to administer land in Port Vila for the benefit of the custom owners. She was responsible for all bookkeeping and payment of salaries. She was an experienced accountant. The two people authorised to sign cheques would sign bunches of blank cheques and give them to the Appellant to pay the wages etc. Over a period of time, she wrote out 11 cheques to herself and completed the stub of the cheques in amounts much lower than the actual cheque. She admitted she drew the money and spent it on herself and her family. Her defence was that she did not do so dishonestly, because she intended to pay the money back and she had been given permission to draw advances on salary. The Court of Appeal said that even a genuine intention to repay is not a defence to a charge of misappropriation: *"if money is misappropriated today with the intention and ability to repay it tomorrow, the offence is still committed as soon as the money is taken. The intention to repay is only relevant as to sentence."* Having considered the evidence the Court of Appeal was left in no doubt that the Appellant had acted dishonestly, and the appeal against conviction was dismissed. The Appellant's sentence of 4 years imprisonment (global) was confirmed. She had been dealing with public money and had abused her position.

Property

"Property" generally includes money, all other property real or personal and other intangible property. Intangible property: (incapable of being touched) A bank account which could either be in credit or overdrawn within the agreed limit. The Court of Appeal stated in Uyor v Public Prosecutor [2018] VUCA 41; Criminal Appeal Case 1721 of 2018 (20 July 2018) at [19] that:

> *…The limitation on the meaning of the word "property" in respect of an offence of theft is not applicable to an allegation of obtaining money or a valuable thing by deception.*

Title to land a "valuable thing"

The Court of Appeal considered whether the title to land was a "valuable thing" for the purposes of section 130B of the *Penal Code* in Uyor v Public Prosecutor [2018] VUCA 41; Criminal Appeal Case 1721 of 2018 (20 July 2018). The case was an appeal from a Magistrate's Court decision to the Supreme Court, which was subsequently appealed to the Court of Appeal. One ground of the appeal to the Supreme Court was from the finding in the Magistrate's Court that land was not a "valuable thing" for the purposes of a section 130B *Penal Code* offence. On appeal the Supreme Court judge held that there was no question that the title to land was a valuable thing and therefore the section could be invoked. The Court of Appeal agreed with what the Supreme Court judge had stated on the issue at [18] and [19]:

18. The primary judge stated as follows:

> *"6. The learned Chief Magistrate ruled that the term "valuable thing" as it is used in section 130B of the Penal Code does not include land. I can only assume he was considering the analogous authorities that deal with the definition of what is capable of being stolen – and land is most probably outside that concept.*
>
> *7. However, the real question here did not involve land, it involved the title to land – a quite different matter altogether.*
>
> *8. There can be no dispute that a title to land is a valuable thing. Indeed, Mr Kapalu had to accept as much when I challenged him as to this.*
>
> *9. Mr Kapalu attempted to argue that my proposition was correct only if the holder of the title is the genuine owner; but of course a stolen title may still be transacted for value as if genuine."*

19. When the findings of the Senior Magistrate are reviewed and investigated, as they were before the Supreme Court Judge, we have no doubt that the Judge was correct when he found that the prosecution was not about land but about a title to land which in law is a quite different concept and is, unquestionably, a valuable thing. The limitation on the meaning of the word "property" in respect of an offence of theft is not applicable to an allegation of obtaining money or a valuable thing by deception.

20. Equally the fact that there had already been a case relating to the land which is involved in this case does not constitute the present case an abuse of process. The onus and standard of proof are different and it is no legal impediment to the Court's consideration of the criminal allegation…

… 22. We respectfully agree and have nothing useful to add.

Misappropriation or Theft?

Public Prosecutor v Edmond [2011] VUSC 330; Criminal Case 97 of 2009 (14 October 2011)

Matter	Verdicts and Reasons for Verdicts
Jurisdiction	Supreme Court of Vanuatu
Coram	Spear J
Date of Verdict	14 October 2011
Charge/s	30 x Theft or Misappropriation contrary to s 125 *Penal Code Act*
Summary	The accused was a bank teller at the Lakatoro branch of the National Bank of Vanuatu. The general prosecution case was that the accused took money from bank customers for his own financial advantage. The trial judge made the following comments concerning the charges preferred: *[13] Despite the distinction in respect of the two types of charges employed, there is really little difference in the case against the accused in each respect. Theft would be an appropriate charge if cash was physically taken with the intention to permanently deprive the owner of those particular bank notes. More so, however, misappropriation applies to either the conversion of customer's cash or the use of funds in customer's accounts given the position of trust that the accused was in by virtue of his position as a bank officer.* *[14] At the conclusion of the prosecution case, I raised with Mr Stephens whether he had any objection to the counts being determined on the basis that they were all for misappropriation given the absurdity of trying to determine whether individual bank notes were taken and the same notes returned. The nature of the case, as it unfolded, pointed clearly to the appropriate offending being misappropriation. Mr Stephens felt able to object only on the basis that it was "too late" for any of the theft charges to be amended to misappropriation charges. When pressed, however, he*

conceded that such an approach would cause his client no prejudice at all. In particular, Mr Stephens confirmed the accused would not have altered the way in which the defence had been run if the charges were all for misappropriation from the outset. The accused was offered the opportunity to have any prosecution witness recalled but he indicated that he did not require the recall of any witnesses. Furthermore, and notwithstanding that the accused had elected not to call evidence, the opportunity was again given to him to call evidence in view of the alteration to the charges but he declined to take up that opportunity.

[15] This turn of events simply recognises the absurdity of a charge of causing loss by theft being defeated because of a possibility that it was loss by misappropriation or false pretences. Furthermore, the real case against the accused, acknowledged by his accused right from the outset, was whether there was sufficient evidence of dishonest dealing by the accused with bank customer's funds.

[16] Accordingly, in respect of each of the counts, they are approached on the basis that they are each for the misappropriation of funds. Section 123 defines misappropriation in these terms:

> ***Misappropriation defined***
> *A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).*

[17] This approach is consistent with the offence section (s 125) which places theft, misappropriation and false pretences as the alternative bases for the offence. Those three offences are clearly treated as just being different species of dishonest offending causing loss. It would make a mockery of the criminal justice system if a charge say of causing loss by theft under s 125 could be defeated on the basis that it was possible that it was instead a case of causing loss by misappropriation or false pretences.

[18] What must surely govern such an approach is whether any such change might conceivably cause prejudice to an accused in respect of his defence. Mr Stephens candidly acknowledges that the issue of prejudice does not arise here.

Dishonest / Dishonestly

"Dishonest" or "dishonestly" is not defined in the *Penal Code*. Its meaning will likely turn on the facts of individual cases, but it has been described as "not innocent" by the Court of Appeal in *Swanson v Public Prosecutor* [1998] VUCA 9 which held that a finding by the first instance judge of the Appellant's subjective dishonesty based on all of the circumstances was entirely appropriate.

Deception

Section 130B(2) of the *Penal Code* defines deception: (whether deliberate or reckless) by words or conduct as to fact or as to law, including: (a) a deception as to the present intentions of the person using the deception or of any other person; and (b) an act or thing done or omitted to be done with the intention of causing – (i) a computer system; or (ii) a machine that is designed to operate by means of payment or identification, to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

Family Farm Development Ltd v Nicholls Ltd [2014] VUSC 93

Matter	Judgment
Jurisdiction	Supreme Court of Vanuatu
Coram	Harrop J
Date of Verdict	29 July 2014
Charge/s	Application to strike out claim for abuse of process
Summary	This case is within the civil jurisdiction of the Supreme Court of Vanuatu. This case, like many other jurisdictions, notes that allegations of fraud must be clearly made out and conduct said to constitute a fraud clearly identified.[309] This requires clear evidence in support of the allegation. Otherwise, a fraud should not be alleged.

Public Prosecutor v Mahinko [2011] VUSC 303

Matter	Judgment
Jurisdiction	Supreme Court of Vanuatu
Coram	Lunabek CJ
Date of Verdict	21 November 2011
Charge/s	Obtaining property by false pretences contrary to s 125(c) of the Penal Code Act
Summary	This case included offences of false pretences to obtain property, contrary to s 125(c) of the Penal Code Act. The offence of false pretences is covered under s 124 of the Penal Code and requires that the prosecution demonstrate: *1. That the (sic) obtains property or possession of or title to anything capable of being stolen (sic) either directly or indirectly by a false pretence;* *2. That by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present;* *3. That the representation is false in fact.* *4. That the Defendant knew the representation to be false, or does not believe to be true;* *5. That the Defendant intended to defraud the complainant (sic).*[310]

Passports issued to the Family of Jian Peng Chen [1998] VUOM 3

Matter	Ombudsman's Report
Jurisdiction	Office of the Ombudsmen
Coram	Ombudsmen of the Republic of Vanuatu

[309] *Family Farm Development Ltd v Nicholls Ltd* [2014] VUSC 93, [66].
[310] *Public Prosecutor v Mahinko* [2011] VUSC 303. The passage was modified to omit the specifics to the case in order to show the relevant elements in general.

Date of Verdict 6 February 1998

Charge/s s 12 of the Citizenship Act for applying for naturalisation

Summary This case noted that the interpretation of 'dishonestly obtain property' extends to the person who is procuring property as opposed to just the person who receives property. The Ombudsman stated that:

> *It should be noted that the wording of dishonestly obtaining property allows for not only the person who receives the property but those who 'procure' it to also be charged (refer bolded portion of s 124 of the Penal Code set out above at 5.28 'or procures anything capable of being delivered to any person other than himself').*[311]

Public Prosecutor v Faenolave [2003] VUSC 128

Matter Judgment on Verdict

Jurisdiction Supreme Court of Vanuatu

Coram Saksak J

Date of Verdict 19 May 2003

Charge/s Faenolave: False Pretence under section 125(c) Penal Code, Theft under section 125(a) Penal Code x 2 counts; and Misappropriation under section 125(b) Penal Code x 2 counts. Maseng: 3 counts of Aiding and abetting misappropriation under sections 30 and 125(b) x 2 counts; and Receiving property dishonestly under section 131 Penal Code. Maliu: 1 count of aiding and abetting misappropriation under sections 30 and 125(b) Penal Code.

Summary This case adopts a literal interpretation of s 124 and s 125(c) of the Penal Code and applies the statute directly to the facts of the case in making its findings. The judgment does not break down the elements of the offence beyond the provision in its entirety. There are no findings of law outside of the fact that the Judge was satisfied beyond a reasonable doubt that the accused had met the elements of the offence – namely the definition of false pretence contained in s 124.

Public Prosecutor v Weties [2008] VUSC 6

Matter Judgment

Jurisdiction Supreme Court of Vanuatu

Coram Tuohy J

Date of Verdict 11 March 2008

Charge/s Forgery of documents

Summary False pretences must be specifically pleaded. You cannot find someone guilty of obtaining by false pretences merely because they are charge or convicted with theft because they are not the same offence.[312]

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[311] *Passports issued to the Family of Jian Peng Chen* [1998] VUOM 3, [8.38].
[312] *Public Prosecutor v Weties* [2008] VUSC 6, [46].

Public Prosecutor v Swanson [1997] VUSC 37

Matter	Judgment
Jurisdiction	Supreme Court of Vanuatu
Coram	Mr Justice Vincent Lunabek, Acting Chief Justice
Date of Verdict	1 October 1997
Charge/s	Attempted Obtaining of Property by False Pretences, contrary to s 125(c) and s 28 of the *Penal Code Act* [CAP 135]. Fraudulently attempting to induce a person to invest money, contrary to s 11 of the *Prevention of Fraud (Investments) Act* [CAP 70] Dealing in securities without a Dealers licence, contrary to Section 2 of the *Prevention of Fraud (Investment) Act* [CAP 70]. Forgery, contrary to s 140 of the Penal Code Act [CAP 135]. Uttering Forged Documents, contrary to Section 141(a) of the Penal Code Act [CAP 135]. False statement by promoter, contrary to Section 129(c) of the Penal Code Act [CAP 135].
Summary	This case was the biggest investigation of fraud within Vanuatu at the time and it outlined elements of the offence for obtaining property by false pretences as: *Before the Defendant Peter Harold Swanson can be found guilty of charge, the Prosecution must prove to the required standard the following elements:* *1. That the accused attempted to cause loss to the Government of the Republic of Vanuatu;* *2. That the Accused attempt by one or more false pretences;* *3 That the Accused knew to be false or did not believe that they were true;* *4. That the Accused did obtain possession of the ten (10) bank guarantees.*

Swanson v Public Prosecutor [1998] VUCA 9; Criminal Appeal Case 06 & 11 of 1997 (26 June 1998)

Matter	Conviction Appeal Judgment
Jurisdiction	Court of Appeal
Coram	von Doussa J, Barker J, Fatiaki J and Marum J
Date of Verdict	26 June 1998
Charge/s	See Above: *Public Prosecutor v Swanson* [1997] VUSC 37
Summary	The Court of Appeal confirmed the convictions in all but Counts 6 and 7 (the forgery offences) which were quashed. *We reject any suggestion that because of the reference in section 95(2) of the Constitution to the Court is bound to follow English law existing at the date of independence. Vanuatu as a common law country which has the benefit of drawing on the wisdom and jurisprudence from a whole range of common law countries in the search for precedent appropriate to Vanuatu conditions. The common law is constantly developing and any suggestion that it ossified as at the date of independence must be rejected.*

Barrett & Sinclair v McCormack [1999] VUCA 11; Civil Appeal Case 09 of 1998 (7 October 1999)

Matter	Appeal Judgment
Jurisdiction	Court of Appeal
Coram	Lunabek ACJ; Robertson J; von Doussa J & Fatiaki J
Date of Verdict	7 October 1999
Charge/s	Alleged knowing assistance in a dishonest and fraudulent activity by a trustee – claimed sum of USD $135,000 together with interest and costs
Summary	The appellants (partners in an accounting firm in Port Vila) assisted Mr Kennedy, a client, in the receipt and banking of funds and transfer of funds as directed in writing by Mr Kennedy, in the name of McCullen & Suarez Inc. The appellants were involved administratively in obtaining telephone connections, post office box numbers, an office area, and dealing with requirements for work permits. From time to time they completed fund summaries in respect of receipts and payments. Mr McCormack made three payments totalling USD $135,000 to McCullen & Suarez Ltd in Vanuatu to purchase shares in Mexigulf Sealand Inc. As it transpired the promotion of shares in Mexigulf Sealand was a scam which was revealed by the authorities in Vanuatu shortly after the payments were made, and Mr McCormack lost the purchase price. McCullen & Suarez Inc In September 1994 prosecutions were successfully brought against certain persons who had acted as salesmen in the scheme. They were convicted and imprisoned for having contravened the *Prevention of Frauds (Investment) Act* and the *Penal Code*: Criminal Case No 37, *Public Prosecutor v Narendra Singh & Ors* (1994). Mr McCormack subsequently commenced these proceedings against the appellants. Regarding dishonesty in the common law context, the case referred to the United Kingdom's view in *Royal Brunei Airlines SDN BHD* with regards to a breach of trust. *We are told that in the Court below, and certainly in this Court, the position of the respondent is that the appellants are liable solely on the basis of objective dishonesty as discussed in Royal Brunei Airlines SDN BHD v Philip Tan Kok Ming [1995] UKPC 4; (1995) 2 AC 378, an approach consistent with that adopted in Agip (Africa) Ltd v Jackson (1991) Ch 547 and Cowan de Groot Properties Ltd v Eagle Trust Plc (1992) 4 All ER 700.* *At its very point of essence as the Privy Council made clear in Royal Brunei, carelessness, imprudence, negligence, unconscionability, are all insufficient. Dishonesty is required before a person providing assistance is liable in respect of a breach of trust.*

De Gaillande v ANZ Bank (Vanuatu) Ltd [2008] VUSC 61

Matter	Judgment
Jurisdiction	Supreme Court of Vanuatu
Coram	Tuohy J
Date of Verdict	1 August 2008
Charge/s	The Claimant was summarily dismissed from her employment as a senior officer of the defendant ("*the Bank").* She claimed the dismissal was unjustified and unlawful and she seeks damages and

payments of various entitlements. The Bank denies any liability. It says that it was entitled to summarily dismiss the claimant because she was guilty of serious misconduct.

Summary The term dishonesty takes into consideration whether the accused themselves had an honest belief that what they were doing was legal.

Dishonesty is a subjective concept. It is a question of whether the claimant herself believed that what she did was honest. However, often that question cannot be decided without considering the legality of what was done. Perceptions of legality underlie the assessment of dishonesty.[313]

Uyor v Public Prosecutor [2018] VUCA 41

Matter Appeal Judgment

Jurisdiction Court of Appeal

Coram Robertson J, Mansfield J, Fatiaki J & Chetwynd J

Date of Verdict 20 July 2018

Charge/s Forgery contrary to ss 139 and 140 of the *Penal Code* [CAP. 135] and Obtaining a valuable thing by deception contrary to s 130B of the *Penal Code*.

Summary This was an application for leave to appeal and if that is granted a substantive appeal against a decision delivered in the Supreme Court on the 8th June 2018 when the Court directed that the matter be returned to the Magistrate's Court for the preliminary investigation to be completed – no prima facie case. Underling the decision of the Magistrate was the premise that in terms of Section 130 of the *Penal Code Act* "a valuable thing" does not include land. The Court in this case made the finding that land title is in fact a valuable thing, despite being intangible property. This is to be distinguished from land as a physical piece of property that is not capable of being stolen.

Public Prosecutor v Edmond [2011] VUSC 330.

Matter Verdict and reasons for verdict

Jurisdiction Supreme Court of Vanuatu

Coram Spear J

Date of Verdict 14 October 2011

Charge/s Theft or misappropriation under s 125 of the *Penal Code Act*

Summary In the context of the offence under s 125, theft, misappropriation and false pretences are all alternative bases for dishonest offending causing loss. The Court noted that it would be a 'mockery' of the justice system if a charge of theft under s 125 could be defeated merely because the act was misappropriation or false pretences. On this basis, multiple charges can be brought forward under s 125 using theft, misappropriation or false pretences as alternatives to prove a dishonesty offence of causing a loss.

[313] *De Gaillande v ANZ Bank (Vanuatu) Ltd* [2008] VUSC 61, [52].

Rory v Public Prosecutor [2020] VUCA 41

Matter Appeal Judgment

Jurisdiction Court of Appeal

Coram Lunabek CJ, Robertson J, Mansfield J, Aru J, Andrée Wiltens J, Trief J

Date of Verdict 17 July 2020

Charge/s 20 counts of obtaining money by deception, and a further 20 counts of money-laundering relating to the same funds - contrary to s 130B of the *Penal Code Act* and Money Laundering under s 11 of the *Proceeds of Crime Act*.

Summary Appeal against conviction and sentence

The first ground of appeal against conviction was that the charges in relation to obtaining money by deception were insufficient, did not fully set out the deception involved; and that as a result Mr Rory did not fully understand the charges against him. The Court held that despite the brevity of the particulars of the charges, the essential ingredients were encapsulated. It is inconceivable, having regard to the material available to Mr Rory prior to the trial commencing, that Mr Rory was unaware of the full extent of the prosecution allegations against him. If there was an issue of this kind, it was incumbent on Mr Rory's counsel to raise the matter before the trial commenced.

The second ground of appeal was that the primary judge did not distinguish between the elements of dishonesty and deception, and that he therefore erred in not ensuring that the element of deception was established beyond reasonable doubt in respect of each of the 20 relevant charges. This ground centred on the primary judge's statement of the elements the prosecution was required to prove in relation to the obtaining money by deception charges and that the primary judge had omitted an essential element, namely that of deception. The appellant maintained that the primary judge had conflated that aspect with the element of dishonesty, and that accordingly the convictions could not stand as one of the essential elements of the charge had not been found to be proved beyond reasonable doubt.

The Court did not accept that the primary judge should also have listed deception as one of the essential ingredients of the charge in this case because that element was acknowledged – accordingly, it did not need to be formally proved by the prosecution. The situation was akin to a rape trial focussing solely on the issue of consent, as the other legal ingredients are accepted. Further, the Court held that it would have been highly improbable for the primary judge to have overlooked the aspect of deception given the prosecution's final submissions. This comprised a typed 47-page document, with pages 10 through 26 dealing specifically with the evidence the prosecution pointed to as evidencing Mr Rory's deceptive conduct. The conviction appeal was dismissed.

The appeal against sentence was allowed. The sentence of 8 years imprisonment on all charges concurrently is set aside and Mr Rory was instead sentenced to 6 years imprisonment on all charges concurrently.

***Public Prosecutor v Rory* [2019] Criminal Case No. 18/1922**[314]

Matter Judgment as to Verdict

Jurisdiction Supreme Court of Vanuatu

Coram Saksak J

Date of Verdict 1 April 2019

Charge/s 20 x Obtaining money by deception contrary to s 130B of the *Penal Code Act* and 20 x Money Laundering under s 11 of the *Proceeds of Crime Act.*

Summary The accused was in a position of authority within the Prime Minister's Office. They were responsible for disbursing aid money provided by the EU to priority projects of the Vanuatu Government. On 20 occasions the accused arranged for portions of the EU aid money to be transferred to a bank account of an unregistered business owned by the accused. The accused then withdrew the total amount, being VT 14.9 million for personal use.

The Court stated that if charged with obtaining money by deception and money laundering, it is a natural consequence of failing to establish the obtaining money by deception charge that the money laundering charge must fail.

The Court set out the offence elements for obtaining money by deception as follows:

> *The elements the prosecution has to prove beyond reasonable doubt are that the accused was dishonest in obtaining funds, that he obtained funds for himself or any other person, that what he obtained dishonestly were moneys or an object of value and of financial advantage. These are the elements of the offence of obtaining money by deception* [emphasis added]**.**

Likewise, the Court set out the elements required to prove a money laundering charge as follows:

> *As for money laundering the prosecution must prove there was a transaction showing the accused received moneys that he engaged in directly or indirectly and that the accused knew or ought to have reasonable, know the moneys he was receiving were proceeds of crime.*[240]

In making a finding that the accused was in 'dishonest' in their dealings, the Court was able to rely solely on the evidence produced by witnesses and the facts of the case, meaning that dishonesty is a question of fact.

In making the finding on the money laundering charge, the Court noted the elements as outlined in ss 5 and 11 of the *Proceeds of Crime Act* and applied the facts to find the facts fell 'neatly into the definition'.

Public Prosecutor v Rory [2019] VUSC 81

Matter Sentence

Jurisdiction Supreme Court of Vanuatu

Coram Saksak J

[314] Unavailable on PacLII. Please contact the Office of the Public Prosecutor Vanuatu to request a copy.

Date of Verdict 5 July 2019

Charge/s 20 x Obtaining money by deception contrary to s 130B of the *Penal Code Act* and 20 x Money Laundering under s 11 of the *Proceeds of Crime Act.*

Summary The offender was convicted and sentenced to 8 years imprisonment on all 40 counts of money laundering and obtaining money by deception (concurrent). This was reduced on appeal in *Rory v Public Prosecutor* [2020] VUCA 41 (see above) to 6 years imprisonment.

[4] These moneys were entrusted to you in your official capacity as Principal Aid Negotiator and Aid Co-ordinator at the Department of Strategic Planning and Policy (DSPPAC). These were aid moneys from the European Union in response to the Government's request to assist in the recovery projects after cyclone Pam and other priority projects.

[5] You abused your position of trust and swindled more than VT 14 million of aid money over a period of one year into your company account and misused them for your personal benefit. The offences were repeated 39 times. There was a degree of planning on your part. And VT 14 million is forever lost.

Public Prosecutor v Loughmani [2024] VUCA 38; Criminal Appeal Case 1303 of 2024 (16 August 2024)

Matter Appeal

Jurisdiction Court of Appeal

Coram Hon Chief Justice V. Lunabek, Hon Judge J. Mansfield, Hon Judge R Young, Hon Judge D. Aru, Hon Judge V. Trief, and Hon Judge E. Goldsborough

Date of Verdict 16 August 2024

Charge/s 2 x Forgery s 140 *Penal Code* & 1 x Obtain Money by Deception s 130B *Penal Code*

Summary Appeal against acquittal and inadequacy of sentence. Appeal against conviction. The Prosecutor's appeal against the acquittals on counts one and two were allowed and Mr Loughmani was convicted on both counts. The question of sentencing on those counts were referred back to the trial judge in the Supreme Court and so the appeal against sentence was dismissed. The appeal against conviction on count three was dismissed.

See above for summary of the facts and evidence.

The Public Prosecutor's appeal with respect to the two forgery counts was based on the proposition that the evidence accepted by the judge as proven in count three, in fact established the Public Prosecutor's case in the forgery counts, and in any event the trial evidence established that Mr Loughmani was guilty as a principal or as a party to the forgery offending.

Forgery

The Court of Appeal agreed that the judge's assessment of the evidence undertaken when considering count three in fact also established the elements of the crime of forgery in counts one and two. Further, they were satisfied on their analysis of the evidence that the prosecution evidence called at trial, which they accepted, that it established the forgery counts. Mr Loughmani forged or was a party to the forgery of the relevant visa cards and therefore that Mr Loughmani was wrongly acquitted of the two forgery counts.

The Court found that:

- how Mr Loughmani or another obtained access to the stamps and cards used to complete the forged documents is not essential to the proof of forgery. Mr Loughmani possessed the forged visas and provided them to Ms Malas to be used by the foreign nationals.
- Mr Loughmani did not have an alibi for the offending in that he was overseas between 2017 and 2020, when much of the offending occurred. No alibi notice was given before trial to the Public Prosecutor, Mr Loughmani did not give evidence connecting the timing of the alleged offences with any claimed absences overseas, and the only substantive evidence produced at trial relating to Mr Loughmani's absences, was a chart prepared by the Public Prosecutor which showed that between 2017 and 2020, Mr Loughmani was out of the country from time to time. The chart showed that for most of that time he was resident in Vanuatu.
- the prosecution did not have to prove where the money obtained from the deception went. Although the prosecution relied upon Mr Loughmani's bank account information and other financial evidence, which showed deposits of money outside of Mr Loughmani's income to support the claim that he kept the application fees dishonestly, the prosecution was not obliged to prove where every Vatu of the VT 17 million deception went.
- the fact there was evidence that others were involved in the criminal offending. Counsel referred to Ms Zhe's statement that she had given VT 300,000 to a female immigration officer. The Court of Appeal found that whether that statement is or is not true, it is not relevant to these proceedings. Whether another immigration officer may or may not have been taking money unlawfully, did not affect Mr Loughmani's liability.
- the fact that there was not always evidence of telephone contact between Ms Zhe and Ms Malas immediately prior to each and every arranged handover of applications and money between Ms Zhe to Ms Malas was not an issue. What was important was that there were very frequent calls, in total 173, between 2018 and 2021, between Ms Zhe and Ms Malas. This evidence supported the prosecution case that there was in fact a close relationship between Ms Zhe and Ms Malas, which had denied by Mr Loughmani.

The Court was satisfied that:

- the visas were false documents
- that when Mr Loughmani gave the visas to Ms Malas for the use of the 55 foreign nationals, knew they were false.
- that he gave the documents to Ms Malas so that the applicants could use the visas as genuine
- that Mr Loughmani either personally or by instructions to another made the false visas (Section 139(1) *Penal Code*)
- that the visas were not authorised by the Director of Immigration (s 139(3)).
- the trial judge essentially ignored what was overwhelming evidence that pointed to Mr Loughmani as either the person who forged the documents, or as a party to the forgery.

- that either Mr Loughmani did so or he arranged another to do so. As to the latter in terms of Section 30 of the Penal Code Mr Loughmani would be guilty as someone who had "*aided counselled or procured*" the forgery.

Obtaining by Deception

The Court found as relevant to count three, that Mr Loughmani received the money given to him by Ms Malas with the applications for residential visas, and that he dishonestly kept those application fees when they should have been accounted to for the Government. These actions were therefore established the crime as charged, obtaining money by deception (section 130(B)(1) of the *Penal Code*). The Court accepted that there is no clear evidence why the judge reduced the amount obtained from the deception from VT 17,436,400 to Vt 16,362, 800. The only information before the court about the amount of the money received was the evidence from Ms Malas. The Court accepted that evidence of Ms Malas however for the purpose of sentencing noted that it did not seem to be significant. The appeal against conviction with respect to count three was dismissed.

Public Prosecutor v Loughmani [2024] VUSC 131

Matter	Sentence
Jurisdiction	Supreme Court of Vanuatu
Coram	Saksak J
Date of Verdict	24 May 2024
Charge(s)	Obtaining money by deception 1 x representative s 130B *Penal Code Act* CAP 135.
Summary	The Offender was found guilty after trial. He held a senior position as Border Control Officer at the Immigration Department at the time of offending. Between 17 January 2017 and 31 December 2021, the Offender obtained money paid by 55 Chinese nationals through two agents for the purpose of facilitating the processing of their resident visa applications in the amount of VT 16,362,800.
Decision	Maximum Penalty: 12 years imprisonment

Aggravating Features:

- Serious offence
- Abuse of the trust placed upon you in the unauthorized actions
- Deliberate actions involved a degree of planning
- Course of conduct extended over a period of 4 years and it
- Involved a large amount of money
- Loss to the revenue of the State and the 55 Chinese nationals
- Displayed little or no remorse whatsoever
- No acceptance of responsibility and culpability.

The Court noted that the appropriate punishment to be imposed should be a sentence of imprisonment to be consistent with previous Court cases involving the same offences.

The Court found there was a mitigating circumstance which reduced the Offender's culpability, being that the 55 foreign nationals and their 2 intermediaries took advantage of the Offender's position at their own choosing, instead of going directly to the Immigration Department, to lodge

their Visa applications with appropriate fees. From the facts also a number of the foreign nationals benefitted from their visa cards, yet they saw fit to lodge complaints, resulting in charges laid against you.

Starting Sentence: 7 years imprisonment

Deductions for Mitigating Factors:

- 2 years for the delay in processing and prosecuting your case which includes, the laying of different charges initially and amending them twice with the case being dismissed, appealed and remitted for rehearing and the impacts, physical and mentally by yourself and your family members and relatives.
- further reduction of 2 years for character and personal history and factors relating to your family, years of service to the State and the community and your health and previous clean record.

End Sentence: 3 years imprisonment with no suspension.

An application by prosecution for an order for compensation pursuant to section 40(1)(b) of the *Penal Code Act* was refused.[315]

***Public Prosecutor v Esrome Loughmani* Case No.22/96 SCCRML**

Matter	Verdict after Trial
Jurisdiction	Supreme Court of Vanuatu
Coram	Saksak J
Date of Verdict	18 April 2024
Charge/s	2 x Forgery s 140 *Penal Code* & 1 x Obtain Money by Deception s 130B *Penal Code*
Summary	The defendant was a Border Control and Customs Official (not a Visa officer) at the time of the alleged offending. The prosecution case was he abused his position and created forged residential visa cards for Chinese Nationals, in return for financial gain. Charge 1: Between 1 January 2017 and 31 December 2019 he made additions and insertions on residency visa cards for 40 Chinese nationals, knowing the insertions and additions were false, with intent that they be used or acted upon as genuine, or that some person be induced by the belief they were genuine. Charge 2: Between 1 January 2020 and 31 December 2021 he made additions and insertions on residency visa cards for 15 Chinese nationals, knowing the insertions and additions were false, with intent that they be used or acted upon as genuine, or that some person be induced by the belief they were genuine. Charge 3: Between 1 January 2017 and 31 December 2021 he did obtain for himself dishonestly, by deception, money in the total sum of VT 17,436,400 which was paid to him in relation to residency visa applications of 55 Chinese nationals, which he had forged.

[312] Section 40(1)(b) *Penal Code* provides that on sentence, a court must consider and may impose a sentence of compensation in monetary terms or otherwise if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer: (b) loss of or damage to property.

The elements of the offences were set out by the Court as follows:

Forgery:

1. The defendant made the 55 false or fake visa cards
2. That he did it knowing they were false
3. That he did it with intent that they be used or acted upon as genuine or without the jurisdiction of Vanuatu
4. That he made material additions and insertions.

Obtain by Deception:

1. The defendant obtained moneys by deception
2. He did so dishonestly
3. He gained financial advantage from the moneys received.

Outcome:

Forgery: The defendant was acquitted of the 2 x Forgery charges. The court found that there was an absence of evidence that "despite the volume of evidence produced, none of it pointed directly to the defendant to show that the signatures on the 55 visa cards were the defendant's signatures of that he had signed the cards knowing they were false and forged, or that he made alterations in the cards and that he did them with intent to be used or acted upon as genuine" at [17]. The learned trial judge found that there was a reasonable doubt that it was the defendant who had made the additions and insertions on the visa cards, and that therefore the circumstantial case must fail, referring to the test set out in *Boihlan v Public Prosecutor* [2022] VUCA 6. This was in the context of there being multiple other individuals involved in the enterprise.

Obtain by Deception: The defendant was found guilty of this charge as the learned trial judge was satisfied to the requisite standard that the defendant had received money from the Chinese nationals, via an intermediary who worked at the Department of Immigration. The money received by the defendant for the visas to be processed was never received by the official cashier in the Department, and the money was far in excess of his salary. The learned judge relied in part on the fact that the visas were issued, money paid, but no money received by the government Treasury, as evidence of dishonesty on the defendant's part [33]. The court found that the quantum of the money obtained was VT 16,362,800 not VT 17,436,400 as charged.

Bribery

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Customs Act [CAP 257][316]	
S 59(1)	Bribery and Collusion	1. A person (a) Offers or gives (directly or indirectly) to the Director or a person appointed by the Director OR (b) proposes or enters into any agreement with the Director or a person appointed by the Director 2. In order to induce him or her to do, or abstain from doing, permit or conceal any act intended to defraud the Government, or is otherwise unlawful under this Act or any other law.	10 years imprisonment +/- VT 5 million fine
S 59(2)	Bribery and Collusion	1. The Director or a Customs officer or a person appointed by the Director to assist Customs (a) asks for or takes, whether directly or indirectly, any payment or reward, whether in money or otherwise, that is not a payment or reward he or she is lawfully entitled to receive; OR (b) proposes or enters into any agreement, to do, or refrain from doing, permit or conceal any act to defraud or attempt to defraud the Government, or which is otherwise unlawful under this Act or any other law.	10 years imprisonment +/- VT 5 million fine
		Value Added Tax Act [CAP 247][317]	
S 51(1)(r)	"Bribery"	1. A person (i) offers or gives, whether directly or indirectly to the Director or an officer of the Department or person appointed by the Director to assist the Department, any payment or reward whether in money or otherwise; OR (ii) proposes to enter or enters into any agreement with the Director, officer or person so appointed by the Director; 2. To induce him or her to do, abstain from doing, to permit or conceal any act intended to defraud the Government or otherwise unlawful under this Act or any other law.	10 years imprisonment +/- VT 10 million fine[318]

[316] NB: this link is to the Act as Consolidated in 2006. Please refer to the sessional legislation for all subsequent amendments.
[317] NB: this link is to the Act as Consolidated in 2006. Please refer to the sessional legislation for all subsequent amendments.
[318] As per section 51(7) *Value Added Tax Act.*

Section	Description	Offence Elements	Maximum Penalty
		Penal Code[319]	
S 73(1)	Corruption and bribery of officials	1. A public officer[320] 2. Within the Republic or elsewhere[321] 3. Corruptly[322] accepts, obtains, or agrees or offers to accept or attempts to obtain 4. Any bribe[323] 5. For himself or any other person 6. In respect of any act done or omitted or to be done or omitted by him in his official capacity.	10 years' Imprisonment
S 73(2)	Corruption and bribery of officials	1. A person 2. Corruptly[324] gives or offers or agrees to give any bribe[325] to any person 3. With intent to influence any public officer in respect of any act or omission by him in his official capacity.	10 years' Imprisonment
		Leadership Code Act [CAP 240]	
S 23	Bribery	See "Corruption" below	

Cases – Customs Act [CAP 257]

Public Prosecutor v Zheng Quan Cai [2002] VUSC 81; Criminal Case 022 of 2002 (12 September 2002)

Matter Judgment (Verdict after Trial) and Sentencing

Jurisdiction Supreme Court of Vanuatu

Coram Justice R.J Coventry

Date of Verdict 12 September 2002

Charge/s 1 x s 59(1) *Customs Act* No.15 of 1999 – Bribing a Customs Officer – Max. Pen.

Summary Mr Zheng Quan Cai (the Offender) was found guilty and convicted after trial of one offence of bribing a Customs Officer. The Offender was required to give his passport and those of his family to a Customs Officer in the course of a tax investigation. The Offender begged the Customs Officer not to "spoil him" and to "help him" and he handed over the passports along with an envelope and said "*please don't tell anyone about what I have just offered you. This is only between you and me*." The Customs Officer did not open the envelope but realising it likely contained cash he

[319] NB: this link is to the 2006 consolidated version. Please refer to subsequent amendments in the sessional legislation for updates.

[320] Definition of *"public officer"* is *"any person in the official service of the Republic (whether that service is honorary or not and whether it is within or outside the Republic) any member or employee of any local authority or public body and includes every police officer and judicial officer"* - section 73(3) *Penal Code*.

[321] See sections 1 – 5 of the *Penal Code* for territorial jurisdiction.

[322] "Corruptly": see *Public Prosecutor v Tabimasmas* [2021] VUCA 14; Criminal Appeal Case 3532 of 2020 (19 February 2021) at [22]: *"[t]he effect of this is that "corruptly" is to be given its ordinary meaning. The breadth of circumstances that could apply show that it is unproductive to try to burden a word in common usage with restrictive meanings and rules. As the Supreme Court said of the Court of Appeals statement in Field set out at [16] above it is a comment. But it can also be a helpful comment in assessing the improper behaviour to see if it has been carried out "corruptly"* and at [24]: "*the correct test in Vanuatu must be to construe the word "corruptly" in its ordinary meaning."*

[323] "Bribe" means "*any money, valuable consideration, office or employment, or any benefit, whether direct or indirect*" - section 73(3) *Penal Code*.

[324] "Corruptly": supra.

[325] "Bribe": supra.

drove immediately to the home of the Director of Customs and Revenue to report it. The envelope contained cash in the amount of VT 500,000 total.

Decision The Offender was sentenced to 6 months imprisonment (suspended for 2 years), a fine of VT 1.5 million, and the VT 500,000 used in the commission of the offence forfeited to the Government, and prosecution costs of VT 130,000. The court said:

> *"Anyone who bribes or attempts to bribe a customs officer or public officer must expect prison. Bribery and corruption cannot be accepted in any shape or form. This offence comes at the lower end of the scale…"*

Cases – Value Added Tax [CAP 247]

Public Prosecutor v Chen Jian Lin [2013] VUSC 189; Criminal Case 61 of 2013 (22 October 2013)

Matter Sentencing

Jurisdiction Supreme Court of Vanuatu

Coram Justice D.V Fatiaki

Date of Verdict 22 October 2013

Charge/s 1 x s 51(1)(r)(i) *Value Added Tax Act* - Max. Penalty 10 years +/- VT 1 million fine.

Summary A customer who purchased some items worth VT 15,000 from Yao Supermarket noticed that the cashier did not enter the transaction into the register. The customer was married to the manager of the Audit Unit of the VAT section of the Department of Customs and Inland Revenue (hereafter the Audit Officer). The Audit Officer arrived at the Yao Supermarket and confirmed that the cashier had not entered the purchase. The Offender approached the customer's wife while she was speaking with the cashier and offered the wife a VT 5,000 note, which she refused. The transaction was entered into the till and the customer's wife warned the cashier that they would be penalised tomorrow for the breach. As the wife was reversing her car, the Offender approached her and again offered her the VT 5,000 note, which she again refused. The Offender dropped the note into her car and said "*sorry sorry … no come tomorrow*".

Decision 3 years imprisonment, reduced by 12 months for mitigating factors, 8 months reduced for early guilty plea = 16 months imprisonment (suspended for 2 years) and VT 100,000 fine (default = 400 hours community service) and the VT 5,000 is forfeited.

The court stated:

> [14] "*The offence of bribery of public officials has been likened to a cancer eating away at the fabric of society and the economy. It is an offence which is difficult to detect and preys on human weakness. More often than not, the offender is motivated by greed and illicit profit*."
>
> [15] *"A person who offers a bribe to a public official disrespects not only the official concerned but also the law that is being enforced for the public good. If such practices become widespread the law itself will be brought into disrepute through non-enforcement and government will be denied much-needed revenue."*
>
> [16] *"This Court is mindful that the public interest demands that public officials perform their duties with scrupulous honesty and integrity and that anything and anyone that seeks to*

pervert or divert public officials from diligently performing their duty must be deterred and condemned in the strongest possible terms." …

[18] *"Bribery is a serious offence. It is difficult to establish as it relies on the honesty and integrity of the person who is offered the bribe. It is rarely committed openly or witnessed by independent observers. Whatsmore* [sic] *bribery is commonly perceived as a "victim-less" crime causing injury to no-one. For those reasons, when a case has been successfully proved the Court has a duty to treat it seriously by imposing a deterrent penalty." …*

[20] *"I am satisfied that in all cases involving the bribery of public officials the overriding sentencing consideration must be punishment and deterrence. The court has a duty to send a strong and consistent message that bribery will not be tolerated and anyone caught offering a bribe to a public official can expect a prison sentence whatever the nature and value of the bribe offered."*

Cases – Penal Code Act [CAP 135]

Application for Permanent Stay of Proceedings

Tabimasmas v Public Prosecutor [2020] VUSC 114; Criminal Case 681 of 2020 (15 June 2020)

Matter Ruling on Application for Permanent Stay of Proceedings

Jurisdiction Supreme Court of Vanuatu

Coram Justice G. A Wiltens

Date of Verdict 15 June 2020

Defendants Charlot Salwai Tabimasmas

Tomker Nedvunie

Matai Seremiah

Seule Simeon

Jerome Ludvaune

Charge/s

No.	Section	Short Particulars
1.	ss 73(2) and 30 *Penal Code* Corruption and bribery of officials - Complicity	Corruptly give bribe to Kudvaune with intention of influencing Ludvaune's no confidence vote, with Seremiah facilitating this
2.	ss 73(2) and 30 *Penal Code* Corruption and bribery of officials - Complicity	Tabimasmas corruptly giving a bribe to Nedvunie, namely offering and later appointing Nedvunie to be Parliamentary Secretary in the Ministry of Fisheries with the intention of influencing Nedvunie's no confidence vote, and with Seremaiah facilitating this.
3.	ss 73(2) and 28 *Penal Code* Corruption and bribery of officials - Attempt	Simeon attempted to corruptly give a bribe to Albert William (an MP) with the intention of causing Albert William to withdraw as a no confidence vote signatory and to vote against the no confidence motion.

No.	Section	Short Particulars
4.	s 73(1) *Penal Code* Corruption and bribery of officials	Ludvaune corruptly accepting a bribe, namely the position of Minister for Health, offered by Tabimasmas and facilitated by Seremaiah with the intention of causing Ludvaune to withdraw as a no confidence vote signatory and vote against the no confidence motion.
5.	s 73(1) *Penal Code* Corruption and bribery of officials	Nedvunie corruptly accepting a bribe, namely the position of Parliamentary Secretary in the Ministry of Fisheries, offered by Tabimasmas and facilitated by Seremaiah with the intention of causing Nedvunie to withdraw as a no confidence vote signatory and vote against the no confidence motion.
6.	s 23 *Leadership Code* and s30 *Penal Code* Bribery - Complicity	Tabimasmas corruptly offering a benefit to Ludvaune, namely the position of Minister for Health, facilitated by Seremaiah, in exchange for Ludvaune's vote against the no confidence motion.
7.	s 23 *Leadership Code* Bribery	Tabimasmas corruptly offering a benefit to Nedvunie, namely the position of Parliamentary Secretary in the Ministry of Fisheries, facilitated by Seremaiah, in exchange for Nedvunie's vote against the no confidence motion.
8.	s 23 *Leadership Code* Bribery	Ludvaune corruptly receiving a benefit, namely the position of Minister for Health, offered by Tabimasmas and facilitated by Seremaiah in exchange for Ludvaune's withdrawal of his no confidence vote signature and his vote against the no confidence motion.
9.	s 23 *Leadership Code* Bribery	Nedvunie corruptly receiving a benefit, namely the position of Parliamentary Secretary in the Ministry of Fisheries, offered by Tabimasmas and facilitated by Seremaiah, in exchange for Nedvunie's withdrawal of his no confidence vote signature and his vote against the no confidence motion.
10.	s 23 *Leadership* Code and s28 *Penal Code* Bribery - Attempt	Simeon attempted to corruptly give a benefit to Albert William (an MP) with the intention of causing Albert William to withdraw as a no confidence vote signatory and to vote against the no confidence motion.
11.	s 24 *Leadership Code* Conflict of Interest	Tabimasmas benefitted from acting in a conflict of interest situation, namely appointing Ludvaune as Minister for Health in exchange for Ludvaune's withdrawal of his no confidence motion signature and his vote against the no confidence motion in order to preserve Tabimasmas' position as Prime Minister.
12.	s 24 *Leadership Code* Conflict of Interest	Tabimasmas benefitted from acting in a conflict of interest situation, namely appointing Nedvunie as Parliamentary Secretary in the Ministry of Fisheries in exchange for Nedvunie's withdrawal of his no confidence motion signature and his vote against the no confidence motion in order to preserve Tabimasmas' position as Prime Minister.
13.	s 75 *Penal Code* Perjury	Tabimasmas, on 23 April 2019 at Port Vila made an assertion on oath in a judicial proceeding which he knew to be false, intending that the assertion mislead.

Summary

The defendants were all sitting Members of Parliament at the time of the alleged offences. The prosecution case was that Tabimasmas, with the assistance of Seremaiah, avoided a no confidence vote in Parliament going against him and his Government by persuading Ludvaune and Nedvunie to withdraw their names from the no confidence motion and voting against the no confidence motion. Simeon is alleged to have participated in the endeavour by attempting to do much the same with another MP, Albert William.

The prosecution case was that the persuasion referred to above was done by way of the offer of (i) a bribe or (ii) a benefit, both acts being contrary to the criminal law. This explains the

duplication of the allegations laid as contrary to differing legislation. The allegations comprise not just the offers by Tabimasmas facilitated by Seremaiah, as well as the acts by Simeon, but also the acceptances by Ludvaune and Nedvunie. The conduct is also alleged to involve Tabimasmas acting in a manner to achieve a benefit for himself when in a position of conflict as a leader – that benefit being said to be his continuation in the position of Prime Minister and leader of the Government. The final charge is an allegation of perjury – to knowingly relate a falsehood, with the intention that the falsehood be accepted. Although this charge is of a different nature to the others, the alleged falsehood relates in part to the appointment of Parliamentary Secretaries.

The defendants applied to permanently stay the criminal prosecution at the preliminary inquiry stage in the Magistrate's Court. The purpose of a preliminary inquiry is to ascertain whether there is sufficient evidence to establish a *prima facie* case. If a *prima facie* case is not established, the accused must be discharged. If a *prima facie* case is established, the case will be committed to the Supreme Court. This application for stay amounts to an attempt to prevent all of these steps from occurring and to end the case before it has properly begun. The effect of that would be that the public would be left in a position of not knowing the full extent of the allegations, nor the evidence that related to them. The Courts would be prevented from making an assessment of the merits of the matter; the process would be simply ended, with all the defendants no longer being the subject of a criminal prosecution. The Supreme Court has jurisdiction in the right circumstances to make the orders sought, but it is a remedy that is only rarely granted by the Court.

The basis of the application was as follows:

- Alleged unfair conduct / misconduct/ delay: Disregard of Parliamentary privilege, political motives of prosecution witnesses, delay in commencement of prosecution
- Alleged unavailability of evidence: no formal Ombudsman's Report
- Insufficient particulars of charges.

The application for permanent stay on basis of abuse of process was dismissed as the court found that none of the grounds advanced were established on the balance of probabilities.

Evidentiary Ruling

Public Prosecutor v Bayer [2017] VUSC 36; Criminal Case 73 of 2015 (25 April 2017)

Matter	Ruling on "No Case to Answer" Application – s 164(1) *Criminal Procedure Code*
Jurisdiction	Supreme Court of Vanuatu
Coram	Justice J.P Geoghegan
Date of Verdict	25 April 2017
Charge/s	1 x s 23 & s20(1)(a) *Leadership Code* – Bribery - with s 30 *Penal Code* (Complicity) 1 x s 73(2) *Penal Code* (Corruption and Bribery) with s 30 *Penal Code* (Complicity)
Summary	It was alleged that Mr Bayer who was a Director of a company known as Pacific International Trust Company Ltd (PITCO) aided or procured an offence of bribery or corruption of a number of Members of Parliament. It was alleged that between October 21st and October 30th 2014, Mr Bayer procured the transfer of $500,0000 US dollars through PITCO bank accounts and that that sum was then transferred by him into the personal bank account of Mr Moana Carcasses Kalosil

who in turn distributed that money among 14 Members of Parliament for the purpose of influencing their voting on a vote of no confidence against the Government.

It was alleged by the Public Prosecutor that in order to cloak the alleged illicit payment in commercial credibility, Mr Bayer used the mechanisms of a sale and purchase agreement for shares in a bank known as European Bank Ltd ("European Bank") and an option agreement between one Marie Louise Milne and PITCO for the securing of an option for the purchase of lease title number 12/1031/017. The court applied the test set out in *Public Prosecutor v Benard* and *Public Prosecutor v Koroka*: could the accused be convicted on the basis of the evidence presented by the prosecution.

Verdict / Judgment

Public Prosecutor v Pipite [2018] VUSC 154; Criminal Case 1005 of 2017 (6 August 2018)

Matter Verdict after Trial (retrial)

Jurisdiction Supreme Court of Vanuatu

Coram Justice G. A Wiltens

Date of Verdict 6 August 2018

Defendants

Defendant	Plea	Outcome
Marcellino Pipite	Guilty	Guilty
1) Paul Telukluk	Not Guilty	Guilty
Silas Yatan	Guilty	Guilty
Tony Nari	Guilty	Guilty
John Amos	Guilty	Guilty
2) Arnold Prasad	Not Guilty	Guilty
Tony Wright	Not Guilty	*Nolle Prosequi*
3) Sebastien Harry	Not Guilty	Guilty
Thomas Laken	Guilty	Guilty
Jonas James	Guilty	Guilty
4) Jean Yves Chabod	Not Guilty	Guilty
Wilson Iauma	Not Guilty	*Nolle Prosequi*

Charge/s Conspiracy to prevent and defeat the course of justice – s 79 *Penal Code*

Summary Also see summary below re: *Public Prosecutor v Pipite* [2016] VUSC 100; Criminal Case 138 of 2016 (23 August 2016).

Pipite, Yatan, Nari, Amos, Laken and James pleaded guilty on arraignment. The prosecution of Tony Wright was discontinued. The remaining defendants pleaded not guilty. The prosecution of Wilson Iauma was discontinued. Chabod). The remaining 4 defendants proceeded to trial (Telukluk, Prasad, Harry and the Prosecution case was on and throughout 10 October 2015 at Mangoes Resort, the Ministry of Infrastructure and Public Utilities ("MIPU") and elsewhere, together with others, conspired to prevent and defeat the course of justice.

The particulars pleaded adverted to the defendants, by various activities including signing letters of request for pardon, to have jointly or severally assented to, devised, contrived or assisted in

the issuance of pardons to the named defendants and others, which pardons were to be issued by Marcellino Pipite, the Acting President of Vanuatu, who had been convicted together with the defendants in the same bribery case. The particulars further pleaded that these acts were done to defeat the pending proceedings in the bribery case and its final outcome, against the defendants and others, in which convictions for bribery and corruption of public officials had been entered on 9 October 2015.

This was a retrial after the convictions of the defendants were quashed on appeal by the Court of Appeal. In relation to establishing the necessary knowledge or belief held by each co-conspirator of the breach of duty and conflict of interest held by a leader, the learned trial judge noted at [29] that: *"*[*t*]*he Court of Appeal in Pipite and Others v PP Criminal Appeal Case No. 17/583 put it this way:*

> *"20. The essence of the alleged offence is that the conspiracy involved the application for a Presidential pardon to be made very quickly to Pipite as Acting President and to be decided by him before the President returned on 11 October 2015.*
>
> *21. It is accepted by the Public Prosecutor that it was necessary to prove that the alleged conspirators knew of those facts, and understood or expected that Pipite as Acting President would be likely to grant a pardon to each of the applicants for a pardon, and that each of the alleged conspirators knew or understood that Pipite as Acting President, in the particular circumstances, would have a clear conflict of interest and would be acting unlawfully in granting the Pardon and in that context agreed that the request to Pipite as the Acting President for a pardon would be made.*
>
> *22. There can be no doubt that Pipite as Acting President was in breach of the duties placed upon him by Article 66 of the Constitution. Article 66(1)(a) obliged Pipite to conduct himself so as not to place himself in a position in which he had or could have had a conflict of interest, or in which the fair exercise of his public duties (as Acting President and as Speaker) might be compromised. Section 24 of the Leadership Code Act [Cap 240] provides a definition of "conflict of interest". It is not necessary to refer to that Act in detail."*

Then at [52] the trial judge referred again to the Court of Appeal decision:

> *"23. Under art 66(i)(a) of the Constitution, Mr Pipite had the duty to conduct himself so as not to place himself in a position in which he had or could have had a conflict of interest, or in which the fair exercise of his public duties might be compromised. Moreover, his duties as a leader required him under s13(1)(a) of the Leadership Code to "comply with and observe the law".*

The Court found that the prosecution proved beyond reasonable doubt that there was an agreement between at least 2 or more persons to do an act which constituted a criminal offence. Namely, preventing and/or defeating the course of justice, and that each of these 4 defendants was a knowing party to that agreement, who intended, and whose acts tended, to prevent and/or pervert the course of justice. They were accordingly found guilty as charged and convicted.

Public Prosecutor v Pipite [2016] VUSC 100; Criminal Case 138 of 2016 (23 August 2016)

Matter Verdict after Trial (convictions subsequently quashed in Court of Appeal)

Jurisdiction Supreme Court of Vanuatu

Coram Justice Chetwynd

Date of Verdict 16 August 2016

Defendants

Defendant	Plea	Outcome
Marcellino Pipite	Not Guilty	Guilty
Paul Telukluk	Not Guilty	Guilty
Silas Yatan	Not Guilty	Guilty
Tony Nari	Not Guilty	Guilty
John Amos	Not Guilty	Guilty
Arnold Prasad	Not Guilty	Guilty
Tony Wright	Not Guilty	Guilty
Sebastien Harry	Not Guilty	Guilty
Thomas Laken	Not Guilty	Guilty
Jonas James	Not Guilty	Guilty
Jean Yves Chabod	Not Guilty	Guilty
Wilson Iauma	Not Guilty	Guilty

Charge/s Conspiracy to prevent and defeat the course of justice – s 79(a) *Penal Code*

Summary The day following their conviction for bribery, one of the convicted Members of Parliament, the Speaker of Parliament who was then Acting President of Vanuatu, purported to use the presidential powers of pardon under the Constitution to pardon himself and the 13 other politicians found guilty, claiming it was in the interests of maintaining peace and unity in Vanuatu. The President arrived back in Vanuatu the next day, and several days later revoked the pardon. The defendants pleaded not guilty to the charge against them of conspiracy to defeat, obstruct or prevent the course of justice. The learned trial judge found all of the defendants guilty in that they all, between the time of conviction on 9th October 2015 and 11th October 2015, asked for or arranged pardons to be granted with the intention that they escaped any sanction of the Court. The learned trial judge accepted that some defendants were probably drawn into the conspiracy reluctantly, but that aspect is a matter for mitigation and can be dealt with at the time of sentencing. In relation to the charges, there were two conspiracies alleged, but the judge said at [22] that "*it is clear from the evidence that there was one continuing conspiracy. There was only one conspiracy even though the different conspirators were involved at different places and at different times. It is right therefore that the defendants should only be convicted of one offence.*"

These convictions were quashed on appeal and the matters remitted for retrial – see *Pipite v Public Prosecutor* [2017] VUCA 13; Criminal Appeal Case 583 of 2017 (7 April 2017)

Public Prosecutor v Kalosil - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015)

Matter Verdict after Trial

Jurisdiction Supreme Court of Vanuatu

Coram Justice Mary Sey

Date of Verdict 9 October 2015

Defendants

Defendant	Plea	Outcome
Moana Carcasses Kalosil	Not Guilty	Guilty
Silas Rouard Yatan	Not Guilty	Guilty
Paul Barthelemy Telukluk	Not Guilty	Guilty
Tony Nari	Not Guilty	Guilty
Serge Vohor	Not Guilty	Guilty
John Amos	Not Guilty	Guilty
Arnold Prasad	Not Guilty	Guilty
Steven Kalsakau	Not Guilty	Guilty
Anthony Wright	Not Guilty	Guilty
Sebastian Harty	Not Guilty	Guilty
Thomas Laken	Not Guilty	Guilty
Marcellino Pipite	Not Guilty	Guilty
Jonas James	Not Guilty	Guilty
Jean Yves Chabod	Not Guilty	Guilty
Willy Jimmy Tapangararua	Not Guilty	Guilty
Robert Bohn	Not Guilty	Guilty

Charge/s Corruption and Bribery of Officials s 73 (1) *Penal Code*
Corruption and Bribery of Officials s 73 (2) *Penal Code*
Bribery s 23 *Leadership Code*
Acceptance of Loans s 21 of the *Leadership Code*
The judgment contains a table of all charges against the defendants at [2]. The 16 accused persons were Members of Parliament and Leaders of the Republic of Vanuatu who were individually charged with corruption and bribery offences and breaches of the Leadership Code and tried jointly.

Constitutional challenge to the Leadership Code charges: Prior to the trial, the charges under the *Leadership Code* were challenged by the defendants in a constitutional petition. Conviction of an offence under the *Leadership Code* can result in not only dismissal from office but disqualification from standing for election for 10 years. In contrast, under the *Penal Code*, convicted MPs only cease being members of parliament for offences if sentenced to more than two years imprisonment. The defendant's contended that the *Leadership Code* requires the Ombudsman to investigate and then, if he or she considers that the Act has been breached, to send a copy of the report of the investigation to the Public Prosecutor and to the police if the complaint involves criminal misconduct. They claimed the constitution requires those under investigation be given an opportunity to reply to adverse findings before the Ombudsman's report is sent to the Public Prosecutor, which did not occur in this case. The Ombudsman contended that the constitutional right was satisfied by the defendants' rights to respond to the allegations during the prosecution

or court hearing. The day before the trial, Justice Fatiaki found that the defendants' rights had been infringed and therefore declared the ombudsman's special preliminary report invalid (*Nari v Republic of Vanuatu* [2015] VUSC 132). Based on Justice Fatiaki's ruling, the trial judge, Justice Sey, declined to hear the charges under the *Leadership Code*. The trial proceeded in relation to the *Penal Code* charges only.

Summary 16 government MPs faced trial for bribery and corruption offences under the *Penal Code Act*. Five of the defendants were ministers of parliament (MP), two others held Cabinet rank, and all formed part of the government. One MP (Finance Minister Willie Jimmy) pleaded guilty, and the 15 others went to trial. All the defendants except one, Robert Bohn, elected not to give evidence in their defence, and all except Robert Bohn were convicted. Evidence was given by prosecution witnesses that as MPs they had been approached by either Moana Carcasses or his associate and offered bribes to support a motion of no confidence against the government. Banking records of payments made to the MPs made by Carcasses was compelling evidence. These payments were ostensibly for the MPs to 'develop further their communities' but the judge found that they were in fact corrupt payments made to influence the MPs to vote in favour of the motion of no confidence. The Court found that individual payments of VT 1,000,000 were "corruptly made" by Moana Carcasses Kalosil to the other 14 convicted persons in October 2014, and "corruptly accepted" by them as an inducement to secure their support in the motion of no-confidence. This ousted the then Prime Minister Natu Natuman and brought the Government of Sato Kilman to power, with Moana Carcasses Kalosil as Deputy Prime Minister. The Court found as an established fact that Tony Nari corruptly gave VT 500,0000,000 to John Tessi with intent to influence as a public official in his official capacity.

Sentence

Public Prosecutor v Pipite [2018] VUSC 95; Criminal Case 1005 of 2017 (13 June 2018)

Matter Sentence

Jurisdiction Supreme Court of Vanuatu

Coram Justice G. A Wiltens

Date of Verdict 13 June 2018

Defendants As above *Public Prosecutor v Pipite* [2018] VUSC 154; Criminal Case 1005 of 2017 (6 August 2018) (Retrial)

Charge/s Conspiracy to prevent and defeat the course of justice – s 79 *Penal Code*

Summary NB: The Court of Appeal resentenced all but Pipite: *Pipite v Public Prosecutor* [2018] VUCA 53; Criminal Appeal Case 1652 and 2222 of 2018 (16 November 2018)

Each defendant will serve an end sentence of 3 years 10 months imprisonment. The learned sentencing judge saw little to differentiate between the offending at [37]: *"These defendants are to be sentenced for entering into a criminal conspiracy. They all wanted for themselves a pardon to negative the criminal convictions each was waiting to be sentenced for. They all steps, of various kinds to ensure the agreement was carried out. It's on that basis that they must be sentenced."* The learned sentencing judge stated at [38] that the defence counsel submissions "*aimed at discharges without conviction are incredibly naive, wholly misconceived, and quite concerning in providing hope where none should exist. Were the Court to consider such a ludicrously lenient and inappropriate sentence the judiciary would deserve the undoubted opprobrium that would follow*"

and at [39] that "[*p*]*ersonal circumstances can really only have limited mitigatory effect when the Court considers this type of serious offending…"* In declining to suspend any part of the sentences, the learned sentencing judge stated at [43] that *"…there are numerous compelling reasons which militate against suspension: …the extremely serious nature of the offending involved, especially given their positions in the community…to suspend the sentences would be to send entirely the wrong message to the community. Not only must the conduct be denounced, there must be a serious deterrent message sent, so that the gravity of this offending is well recognised by all*."

Public Prosecutor v Pipite [2016] VUSC 133; Criminal Case 138 of 2016 (29 September 2016)

Matter Sentencing (convictions and sentences subsequently quashed on appeal)

Jurisdiction Supreme Court of Vanuatu

Coram Justice Chetwynd

Date of Verdict 29 September 2016

Charge Conspiracy to prevent and defeat the course of justice – s 79(a) *Penal Code*

Defendants As per *Public Prosecutor v Pipite* [2016] VUSC 100; Criminal Case 138 of 2016 (23 August 2016) and below

Summary NB: Starting Point and End Sentence were the same.

NB: Convictions and sentences were quashed on appeal.

Offender	Role	End Sentence
Marcellino Pipite	Lynchpin	4 years' imprisonment
Paul Telukluk	Peripheral	2 years' and 3 months
Silas Yatan	Enthusiastic supporter	2 years' and 6 months
Tony Nari	Prime mover	3 years' imprisonment
John Amos	Not a principal	2 years' and 3 months
Arnold Prasad	Willing participant	2 years' and 3 months
Tony Wright	Peripheral	2 years' and 3 months
Sebastien Harry	Willing participant	2 years' and 3 months
Thomas Laken	Prime mover	3 years' imprisonment
Jonas James	On the margins	2 years' imprisonment
Jean Yves Chabod	Peripheral	2 years' and 3 months
Wilson Iauma	Lawyer	2 years' - suspended

*Public Prosecutor v Kalosi*l - Sentence [2015] VUSC 149; Criminal Case 73 of 2015 (22 October 2015)

Matter Sentence

Jurisdiction Supreme Court of Vanuatu

Coram Justice Mary Sey

Date of Verdict 22 October 2015

Charge/s 32 counts x Corruption and Bribery of Officials, ss 73(1) and 73(2) *Penal Code*

The judgment contains a Summary Table of offences for sentence at [5].

Summary See above *Public Prosecutor v Kalosil* - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015)

Decision NB: Starting Point (SP), Aggravating/Mitigation (A/M), End Sentence (ES).

NB: No mention of any criminal assets / proceeds of crime orders on sentence.

Offender	SP	A/M	ES
Moana Carcasses Kalosil	4 years	+1 & -1	4 years concurrent
Silas Yatan Rouard	3 years	+1 & -1	3 years
Paul Barthelemy Telukluk	3 years	+1 & -1	3 years
Tony Nari	4 years	+1/2 & - 1	3 ½ years concurrent
Serge Vohor	3 years	+1 & -1	3 years
John Amos	3 years	+1 & -1	3 years
Arnold Prasad	3 years	+1 & -1	3 years
Steven Kalsakau	3 years	+1 & -1	3 years
Anthony Wright	3 years	+1 & -1	3 years
Sebastian Harry	3 years	+1 & -1	3 years
Thomas Laken	3 years	+1 & -1	3 years
Marcellino Pipite	3 years	+1 & -1	3 years
Jonas James	3 years	+1 & -1	3 years
Jean Yves Chabod	3 years	+1 & -1	3 years
Willy Jimmy Tapangararua	3 years	+1 & -28mth	20 mth suspended

As there was no direct precedent in Vanuatu at the time, the learned sentencing Judge had regard to two Vanuatu cases for some general guidance from the remarks on sentence: *Public Prosecutor v Zheng Quan Cai* [2002] VUSC 81 and *Public Prosecutor v Chen Jian Lin* [2013] VUSC 189. The learned sentencing judge stated at [28]: *"I am satisfied that in all cases involving the bribery of public officials the overriding sentencing consideration must be punishment and deterrence. The court has a duty to send a strong and consistent message that bribery will be tolerated and anyone caught offering a bribe to a public official can expect a prison sentence whatever the nature and value of the bribe offered."*

The learned sentencing judge sought guidance from overseas cases in order to arrive at the appropriate sentences, including Singapore, Fiji, the United Kingdom, Hong Kong and New Zealand, including a reference at [38] to the Sentencing Notes of Rodney Hansen J. in the New Zealand case of *The Queen v Phillip Hans Field* (Auckland Registry CRI 2007-092-18132) where His Lordship said at paragraphs [44] and [45]:

> *"[44] The third and important factor is to denounce your conduct [s 7(1)(e)]. This is a particularly important purpose in sentencing on both categories of offending. Bribery and corruption and attempts to pervert the course of justice threaten institutions that are at the foundation of our democracy. One is Parliament and the other is our system of justice. The public should be able to have complete trust and confidence in the integrity and proper functioning of these institutions. Any actions which tend to undermine them – particularly when they are perpetrated by those whose duty it is to uphold them – are deserving of particular condemnation.*

> *[45] For much the same reasons, deterrence is a highly relevant goal in sentencing on these offences. I accept there is no risk of your reoffending but a high priority must be placed on the need for general deterrence and for issuing a message that conduct of this kind is intolerable in our society."*

At [45] the learned sentencing Judge stated:

> *"I remind myself that you are the first in Vanuatu to be prosecuted for this offence in your capacity as Members of Parliament at the time of the offending. You were given power and authority. With power and authority comes an obligation of trust. You betrayed that trust and, in the course of doing that, you undermined the very institution that it was your duty to uphold. For that reason, as I have previously said, a fitting custodial sentence is required that fully reflects the need for denunciation and deterrence. Furthermore, where an offence involves a breach of trust, the Court regards it as a significant aggravating factor. Generally, persons who occupy a position of trust or authority can expect to be treated severely by the criminal law…"*

Public Prosecutor v Tabimasmas [2021] VUCA 14; Criminal Appeal Case 3532 of 2020 (19 February 2021)

Matter Judgment on Appeal (against No Case to Answer Ruling)

Jurisdiction Court of Appeal of Vanuatu

Coram Hon. Chief Justice Vincent Lunabek, Hon. Justice J. Mansfield, Hon. Justice J. W. Hansen, Hon. Justice O. A. Saksak, Hon. Justice D. Aru

Date of Verdict 19 February 2021

Summary This was a prosecutor's appeal against a decision of the Supreme Court trial judge that there was no case to answer after the conclusion of the prosecution case. At the conclusion of the trial on a Friday the Judge ruled that there was a case to answer on each charge. After considering the matter further over the weekend, the trial Judge issued a minute in which he set forward the ingredients of the various charges, with which no issue had been taken. In relation to the charges under s 73 *Penal Code* and s 23 *Leadership Code*, one of the essential ingredients was the term "**corruptly**". The Judge sought submissions from prosecution and defence as to whether all the ingredients required had been established. The learned trial judge also sought submissions on a statement in *Field v R* that: *"[a] bribe is corruptly accepted if in accepting the bribe the particular Member [of Parliament] is knowingly outside the recognised bounds of his or her duties."*[1] The Judge invited counsel to address these issues and having heard submissions, ruled that the prosecution had failed to establish a case to answer in relation to Counts 1-10 (the corruption charges) as *corruption* had not been established. The respondents were found not guilty and acquitted of those charges.

The Public Prosecutor appealed on grounds that the learned trial Judge had:

- erred in law and fact when he ruled the prosecution had failed to establish the matters needed;
- erred in law and fact when he overlooked and/or failed to take into consideration all relevant evidence pertaining to the elements;
- erred in law and fact when deciding the prosecution had not established the element of corruption.

The Court of Appeal dismissed the appeal on the basis that it was satisfied that whether one applied the formulation relied upon by the trial Judge, that urged by the appellant, or simply applying the common meaning of "corruptly", as the authorities reviewed by the Supreme Court in *Field* suggest, the outcome would be the same in this case [24].

The Court also held that the doctrine of reasonable hypothesis is relevant in this case as it was quite satisfied the first instance Judge was correct in concluding that the prosecution had failed to lead any direct or circumstantial evidence to show the actions were done "corruptly". There being nothing in relation to the circumstantial evidence to suggest that the non-corrupt motive of the stability of government was not rationally available to the decider of fact, no reasonable tribunal could convict on (referring to *R v Baden-Clay* [2016] HCA 35) [27] – [29].

Regarding the meaning of "**corruptly**" the test in Vanuatu must be to construe the word "corruptly" in its ordinary meaning: [24]. The Court held that the respondents did not act corruptly in terms of the relevant legislation and the law does not forbid the political manoeuvring that went on here. The Court stated that to apply the appellant's approach to its logical conclusion would mean that offers of position during coalition discussions and agreements would be caught as corrupt and be criminal offending, and did not accept it was the intention of the legislature to turn political manoeuvring into criminal behaviour [24].

At trial the Public Prosecutor had agreed that the analysis the judge used in Field was a correct statement of the law in Vanuatu and that it had application to the present case. On appeal the appellant Public Prosecutor took the position that the subsequent Supreme Court decision in *Field* meant that the statement of law relied on by the Judge, and previously accepted by him, could no longer stand. He also submitted that the statement at [64] of the Court of Appeal decision in *Field* is too broad and has no application in Vanuatu. He submitted because the Vanuatu legislation is different from the New Zealand legislation, to apply the test prescribed by the Judge from *Field* was to add something into Vanuatu law that does not exist.

The Court of Appeal agreed that there are differences between the two sets of legislation, the New Zealand legislation being considered in *Field* is aimed specifically at Members of Parliament and the Vanuatu legislation being expressed more broadly and extends to all public officials [19]. However, the Court also found there were also great deal of similarity between the relevant sections and that while the Supreme Court in *Field* the Court was focussed on a somewhat narrow point that focussed on "gratuities" after the event, there are statements that are helpful given the careful review of similar legislation in England, Canada and New Zealand and the authorities [20].

[1] *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [64].

Pipite v Public Prosecutor [2017] VUCA 13; Criminal Appeal Case 583 of 2017 (7 April 2017)

Matter	Judgment on Appeal against conviction and sentence
Jurisdiction	Court of Appeal of Vanuatu
Coram	Hon. Chief Justice Vincent Lunabek, Hon. Justice Ronald Young, Hon. Justice John Mansfield, Hon. Justice Dudley Aru, and Hon. Justice Paul Geoghegan
Date of Verdict	7 April 2017
Summary	This was appeal against conviction and sentence against 11 of the 12 persons convicted of conspiring to pervert the course of justice by seeking and obtaining Presidential pardoning – see

Public Prosecutor v Pipite [2016] VUSC 100; Criminal Case 138 of 2016 (23 August 2016). The Court of Appeal set aside the convictions because the trial judge did not consider whether all the elements of the offence were made out in relation to each individual appellant.

Conspiracy offences. The Court of Appeal said there was no issue with the general analysis of the elements of the offence, that it is common ground that any agreement of the alleged conspirators (who need not all have the same degree of involvement or the same degree of knowledge) must be shared by each conspirator to act in a certain way, and that the proposed action agreed upon must have the consequence of perverting the course of justice, and that the intention of each of the conspirators was in fact to pervert the course of justice. The analysis of the trial judge at [2] – [6] of his reasons was not challenged. It is not necessary for each of the alleged conspirators to have been involved to the same extent, or for the full period while the unlawful agreement was conceived and completed. The offence is the unlawful agreement itself [39]. The Court of appeal stated that commonly, but not routinely, the acts of the several alleged conspirators will be evidence both of the fact of the unlawful combination, and of the participation of each of the alleged conspirators in that unlawful combination [74]. In this matter, the course of the evidence proceeded on that basis, leaving the trial judge with the task of siphoning the evidence to determine whether the unlawful combination existed and to determine whether each of the alleged conspirators participated in it. That was an onerous task which led to a general description of the evidence and findings which do not indicate how each of the alleged conspirators was or became a participant in the unlawful combination. [75]. The Court that the trial judge's approach that the offence charged would be made out simply by agreeing to apply for a pardon before being sentenced on the bribery charge was erroneous. The offence is complete by the agreement, but the elements of the agreement must be those which involved the commission of the crime of attempting to pervert the course of justice: [78].

Kalosil v Public Prosecutor [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015)

Matter	Judgment on Appeal against Conviction and Sentence
Jurisdiction	Court of Appeal of Vanuatu
Coram	Hon. Chief Justice Vincent Lunabek, Hon. Justice John von Doussa, Hon. Justice Raynor Asher, and Hon. Justice Stephen Harrop
Date of Verdict	20 November 2015
Summary	This was an appeal by 14 Members of the Parliament of Vanuatu against convictions (and sentence) in the Supreme Court for bribery. On 18 November 2014 there was a no confidence motion filed in Parliament against the then Prime Minister of Vanuatu Mr Joe Natuman. If the motion passed, a coalition that would feature a former Prime Minister, Mr Moana Carcasses Kalosil, the Leader of Opposition, could form an alternative Government. The notice of motion was signed by a number of Members of Parliament including the 14 appellants. Nineteen days earlier on 30 October 2014 the same 14 Members of Parliament had each been paid VT 1,000,000 on the instruction of Mr Kalosil, and some had received other payments. The 14 appellants were each charged with bribery and corruption. Following a trial, Sey J found that the payments were bribes and found them all guilty. After the trial they were all sentenced to various terms of imprisonment. They all appealed both conviction and sentence. The Court of Appeal dismissed all of the appeals against conviction and sentence. Regarding the **convictions** the Court of Appeal held regarding the substantive grounds of appeal (as opposed to the procedural grounds) at [42] and [44]:

> *"[42] We were told by counsel for the appellants that at the end of the trial counsel were confident that the prosecution had failed entirely to establish guilt on any of the charges beyond reasonable doubt. It was submitted that the prosecution evidence was full of conflicts and that it was not shown that there was any discernible benefit required from the appellants for the advances. It was submitted that the Judge had failed to properly appreciate that the monies received were loans, and plainly commercial loans at that….*
>
> *[44] The real issue raised by the appellants' submissions is two-fold. First it is submitted that the appellants gave and received genuine commercial loans, and there can be no complaint about that. Second they submit that it was not proven that there was anything corrupt in the giving or receipt of the money, in the sense of an intention or understanding to benefit Mr Kalosil or his party. It was contended that there was at the very least a reasonable possibility that they received a genuine loan enabling them to pass on money to their constituents, nothing more.*
>
> *[48] This conclusion means that we agree entirely with Sey J's reference to the "degree of improbability" of the payments being for the purpose stated, and her description of the arrangements as a "pretext".*
>
> *[66] In our view the evidence showing that the advances were corrupt bribes in breach of s 73 of the Penal Code Act was very strong. On the evidence Sey J was fully justified to find the charges proven beyond reasonable doubt."*

In relation to **silence** of an accused:

> *"[70] While guilt must not be inferred from silence, we have no doubt that a Judge can draw inferences from the failure of an accused to exercise the right to give evidence, when there are proven facts which on an objective examination and in the absence of an explanation are supportive of guilt. If an explanation is required and should be in the accused's knowledge, the failure to provide that explanation cannot be ignored. The absence of evidence does not prove guilt, but it can be considered as part of a reasoning process in establishing whether an element is proven. This principle is known in New Zealand as the Trompert principle from the leading case of Trompert v Police [1985] 1 NZLR 357 (CA). As we have outlined, the facts of the loan, the ae and the support for the no confidence motion within a short time frame created the inference that the loan was intended to [benefit] the Green Confederation, and was received knowingly on that basis. Any accused could have shown this inference to be wrong by giving an explanation of what happened to show his conduct to be innocent and lacking the element of corruption, but none of the appellants did this…"*

Regarding the **sentences** imposed the Court of Appeal stated at [102]:

> *"In our view all these starting points were in the range, and that of Mr Kalosil right at the bottom of the available range. It must be repeated that bribery is a serious crime. The bribing of Members of Parliament strikes at the heart of democracy and good government, debasing the decision-making processes of Vanuatu's Parliament so that it is not reliable, predictable, or fair. Worse, a practice of bribes weakens the trust of the public in government, and damages the rule of law."*

Regarding the **pre-trial ruling** of Fatiaki J and the subsequent approach taken by Sey J in relation to the Leadership Code offences the Court said this:

> *"[96] The Judgment of Fatiaki J was not binding on Sey J. In our respectful view Fatiaki J should not have made a substantive determination of breach in the case management hearing that was before him. Further, it is our preliminary view that he was in error in treating the Ombudsman inquiry as a prerequisite to the laying of a charge under the Leadership Code Act. The prosecutor may initiate a prosecution for a breach of the Code under s 19 even if there has not been such an enquiry, or if there has been an enquiry and it is defective. The Ombudsman section of the Act does not inhibit the powers of a prosecutor to prosecute, although in the event of a report it places obligations on the prosecution.*
>
> *[97] As a decision of the same court Sey J was bound to pay regard to the 8 October 2015 decision, but she was not bound to follow it. She should have proceeded to determine the Leadership Code Act charges despite the 8 October 2015 decision.*
>
> *[98] She did not do so. To adjourn them was to raise the possibility of double jeopardy. The prosecutor now asks that we dismiss the charges, given that if the appeal was dismissed the prosecutor could proceed under ss 41–42 of the Leadership Code Act seeking an order for dismissal of each of the appellants from office. On our findings it is difficult to see how a Court could regard the conduct as anything other than serious. If the prosecution takes this step, that will be a matter to be heard by a Supreme Court Judge. It follows that we now dismiss those charges by consent."*

P*ipite v Public Prosecuto*r [2018] VUCA 53; Criminal Appeal Case 1652 and 2222 of 2018 (16 November 2018)

Matter Judgment on Appeal (against Guilty Pleas, Convictions and Sentences)

Jurisdiction Court of Appeal of Vanuatu

Coram Hon. Chief Justice Vincent Lunabek, Hon. Justice John von Doussa, Hon. Justice Ronald Young, Hon. Justice Oliver Saksak, Hon. Justice Daniel Fatiaki, and Hon. Justice Dudley Aru

Date of Verdict 16 November 2018

Summary On 9 October 2015 fifteen members of parliament were convicted of corruption and bribery. After conviction but before sentencing one of the appellants, Mr Pipite, then Acting President, purported to pardon himself and the current appellants. Shortly after the President returned from overseas, he rescinded the pardons. Subsequently the appellants were charged with conspiracy to defeat the course of justice arising from Mr Pipite granting them a pardon. At trial in August 2016 all the appellants were convicted. They appealed. This Court set aside the convictions. In May 2017 the appellants were further charged with conspiracy to defeat the course of justice with the pleas and verdicts as identified.

The prosecution's case at trial was that the day after their conviction for bribery some of those convicted met at Mangoes Restaurant. The possibility of a pardon was then raised. The President was overseas and Mr Pipite as Speaker of Parliamant was the Acting President. Later the appellants went to the MIPU Building. At various times during the late morning and early afternoon they signed a request for pardon. Despite some legal and other advice against such a course Mr Pipite as the Acting President signed the pardons.

The trial judge convicted the four appellants who had pleaded not guilty. At the sentencing of the six appellants who pleaded guilty the Judge adopted a start point for all of 5 years imprisonment, deducted 4 months for personal factors for all appellants and 15% for their guilty pleas resulting in a final sentence of 3 years 10 months imprisonment for all six appellants. As to those four appellants who pleaded not guilty but were convicted the Judge also started with 5 years

imprisonment. The appellants were sentenced variously to 4 years 3 months, 4 years 4 months, 4 years 6 months and 4 years 8 months, after varying deductions for personal mitigation was made.

This appeal considered the appeals to set aside Mr Pipite and Mr Yatan's guilty pleas, then the four appeals against conviction, then the sentencing appeals.

The Court of appeal:

- dismissed the appeals against the refusal to suspend the sentences
- allowed the appeals against sentence except for Mr Pipite
- dismissed Mr Pipite and Mr Yatan's appeals against conviction (after Guilty Plea)
- dismissed Mr Telukluk, Mr Prasad, Mr Harry and Mr Chabod's appeals against conviction
- Allowed the appeals against sentence for all appellants except Mr Pipite:

The basis on which the appeals against sentence for all appellants except Mr Pipite were allowed was essentially an unfairness created by "double jeopardy":

> *88. Some appellants submitted that the Judge's start sentence of 5 years imprisonment was too long. Two reasons were advanced. First the 5 year start sentence was higher than the start sentences imposed by the Judge at the first trial. This was unfair given the appellants vulnerability to being resentenced by the second Judge only arose because an appeal on conviction had been allowed.*
>
> *89. The second reason for the submissions is that the Judge was wrong to impose the same start sentence on all the appellants. In doing so the Judge failed to distinguish between the culpability of individual appellants.*
>
> *90. We accept that the appellants vulnerability to an increased sentence from the first trial only arose because of the successful appeal and so there was some unfairness in the increases in sentence given by the second trial Judge.*
>
> *91. At the original sentencing the Judge imposed a start sentence of 4 years imprisonment for Mr Pipite whom he concluded to be the most serious offender. Others with lesser culpability had start sentences of 3 years and those said to be least culpable 2 years and 3 months imprisonment.*
>
> *92. The proposition of unfairness we identified above is however subject to the proposition that wholly excessive or wholly inadequate sentences should not be supported.*
>
> *93. We will return to this issue after we consider the claim that the Judge should have identified individual culpability and therefore differentiated start sentences. The sentencing Judge adopted a common start sentence of 5 years imprisonment for all appellants.*
>
> *94. The respondent accepted that a differentiation approach should have been undertaken by the Judge. We agree. There was different culpability for the offending between appellants on the facts. Individual start sentences should have reflected that responsibility.*
>
> *95. Given our view as to the merits of the above two submissions we propose to undertake a reconsideration of the start sentence of each appellant.*

Resentenced:

(i) Mr Pipite's start sentence 5 years imprisonment less 4 months for personal mitigation less 15% for his guilty plea. Final sentence: 3 years 10 months imprisonment (sentence confirmed).

(ii) Mr. Nari: start sentence 4 years imprisonment less 4 months personal mitigation less 15% for guilty plea. Final sentence: 3 years 1 month imprisonment.

(iii) Mr Yatan: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment.

(iv) Mr Amos: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment.

(v) Mr Laken: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment.

(vi) Mr James: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment.

(vii) Mr Telukluk: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment.

(viii) Mr Prasad: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment.

(ix) Mr Harry: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment.

(x) Mr Chabod: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment.

Corruption

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Leadership Code Act [CAP 240]	
S 19	Breach Leadership Code	1. A leader. 2. Fails to comply with Part 2, 3 or 4 of Code. 3. [Details of relevant Part]	10 years Imprisonment +/- VT 5,000,000 Fine[326]
S 20	Misuse Public Moneys	1. A leader. 2. Uses or agrees to the use of. 3. Any public money. 4. For a purpose other than the purpose for which it may lawfully be used.	10 years Imprisonment +/- VT 5,000,000 Fine
S 21	Acceptance of Loans[327]	a) A leader. b) Accepts a loan[328], advantage or other benefit. c) From a person.	10 years Imprisonment +/- VT 5,000,000 Fine
S 22(1)	Undue Influence	1. A leader. 2. Exercises undue influence over or in any other way brings pressure to bear on a person. 3. The person being: (a) another leader; or (b) any other person holding public office. So as to influence or attempt to influence the person to act in a way that is: (c) in breach of this Code; or (d) improper; or (e) illegal; or (f) against the requirements of the Act under which the person was appointed; or (g) contrary in any other way to the requirement of the person's office or position.	10 years Imprisonment +/- VT 5,000,000 Fine
S 22(2)	Undue Influence	1. A leader. 2. Influences or attempts to influence or exert pressure or threaten or abuse or interfere with persons carrying out statutory functions.	10 years Imprisonment +/- VT 5,000,000 Fine
S 23	Bribery[329]	1. A leader. 2. Corruptly asks for or receives (a) OR Agrees to ask for or obtain (b) OR Corruptly offers (c) 3. Any money, property, or other benefit or advantage of any kind. 4. For himself or herself (d) or another person or body (e). 5. In exchange for his or her acts or omissions as a leader being influenced in any way, either directly or indirectly.	10 years Imprisonment +/- VT 5,000,000 Fine

[326] Subsection 40(1) Leadership Code

[327] Public Prosecutor v Kalosil - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015) at [17].

[328] Other than on commercial terms from a recognised lending institution and only if the leader satisfies the lending institution's usual business criteria or in accordance with the customary practice of a particular place for or during a traditional ceremony.

[329] Public Prosecutor v Kalosil - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015) at [15].

Section	Description	Offence Elements	Maximum Penalty
S 24	Conflict of interest	1. A leader. 2. Having a conflict of interest in a matter. 3. Acts in relation to the matter or arranges for someone else to act in relation to the matter. 4. In such a way that the leader or a member or his or her close family benefits from the action.	10 years Imprisonment +/- VT 5,000,000 Fine
S 25	Hold Public Office	1. A leader. 2. Holds any other public office or position. 3. For which he or she receives a salary, payment or other benefit of any kind whether financial or otherwise, from the government or a statutory body. 4. The other office or position conflicts with or interferes in any way with the ability of the leader to fulfil his or her principal tasks and duties as a leader.	VT 2,000,000 Fine[330]
S 26	Interest in Government Contracts	1. A leader. 2. Has or seeks a beneficial interest in a contract. 3. Other than on a transparent arms-length commercial basis. 4. The interest in the contract is not achieved in accordance with any law enacted for that purpose. 5. The interest is not subject to a legitimate tender process where one of the parties to the contract is: (a) the Government; or (b) a statutory body; or (c) a company or other body corporate wholly or partly owned by the Government.	10 years Imprisonment +/- VT 5,000,000 Fine
S 27(1)	Other Offences	1. A leader. 2. Is convicted by a court of an offence under the Penal Code [CAP 135] and that is listed in subsection 27(2) Leadership Code.	Liable to dismissal (s41) and disqualification (s42)[331] (+/- any other punishment)
S 28	Failure to Obey Law	1. A leader 2. Acting in his or her capacity as a leader fails to abide by an enactment that imposes on the leader a duty, obligation, or responsibility.	VT 2,000,000 Fine[332]
S 29	Specific Provisions	1. A leader 2. Fails to abide by the provisions of an Act that provides for (a) the public service; or (b) public finance or economic management; or (c) expenditure review committee or audit functions; or (d) government contracts or tenders.	VT 2,000,000 Fine[333]

[330] Subsection 40(3) Leadership Code
[331] Subsection 27(1)(b) Leadership Code
[332] Subsection 40(3) Leadership Code
[333] Subsection 40(3) Leadership Code

Section	Description	Offence Elements	Maximum Penalty
S 30(1)	Offences by other persons	1. A person other than a leader 2. Takes part in conduct that is a breach of this Code; or 3. Obtains a benefit, directly or indirectly, from an act or omission that is a breach of this Code.	10 years Imprisonment +/- VT 5,000,000 Fine[334] Potential recovery order[335]
S 30(2)	Offences by other persons	1. A person other than a leader 2. Exercises undue influence over or in any other way bring pressure to bear on a leader, so as to influence, or attempt to influence, the leader to act in a way that is in breach of this Code.	10 years Imprisonment +/- VT 5,000,000 Fine[336] Potential recovery order[337]
S 31 & 32		These are not breach/offence provisions	N/A
S 33(a)	Failure to File Annual Return	1. A leader 2. Fails to file an annual return as required by s.31 and 3. Is warned by the Clerk in writing of this failure and 4. Fails to file the return within a further 14 days.	VT 2,000,000 Fine and up to VT 20,000 a day for each day or part day the leader remains in breach[338]
S 33(b)	File False Annual Return	1. A leader 2. Files an annual return as required by s.31 3. Knowing that it is false in a material particular	VT 2,000,000 Fine and up to VT 20,000 a day for each day or part day the leader remains in breach[339]

Cases

Disqualification Orders

Public Prosecutor v Kalosil [2015] VUSC 173; Criminal Case 762 of 2015 (7 December 2015)

Matter Judgment on Application (for dismissal and disqualification)

Jurisdiction Supreme Court of Vanuatu

Coram Chetwynd J

Date of Verdict 7 December 2015

Summary Following the conviction of Moana Carcasses Kalosil and 14 other Members of Parliament, of Bribery and Corruption offences under section 73 of the *Penal Code*, the Public Prosecutor sought orders to invoke sections 41 and 42 of the *Leadership Code Act* (the Act). Section 41 of the Act provides for the court's discretion to order the dismissal from office of a Leader where they have been convicted of a breach of the Act if the court regards the breach as serious. Section 42 of the Act relates to the disqualification from future office for 10 years of any leader who is dismissed from office under section 41.

The Defendants resisted the Public Prosecutor's application on various grounds – one was that the individual representing the Public Prosecutor lacked authority to appear as his appointment

[334] Subsection 30(3) Leadership Code
[335] Subsection 30(4) Leadership Code
[336] Subsection 30(3) Leadership Code
[337] Subsection 30(4) Leadership Code
[338] Subsection 40(2) Leadership Code
[339] Subsection 40(2) Leadership Code

had come to an end. The Court rejected this contention. The Defendants all raised the issue of jurisdiction – they contended that a conviction under the Act was required before sections 41 and 42 could be invoked, and that this had not occurred. The Defendants had been convicted of offences under the *Penal Code*. They also contended that the Defendants were no longer "leaders" due to the automatic vacation of their seat after 30 days of being sentenced to imprisonment for a term not less than 2 years, pursuant to the operation of section 3(1) of the Members of Parliament (Vacation of Seats) Act [Cap 174].

The Court rejected these arguments and found that there was no doubt that the Defendants were Leaders. Section 27(1) of the Act provides that a leader who is convicted of an offence under the Penal Code as listed under subsection 27(2) of the Act is in breach of the Act and is liable to be dealt with under sections 41 and 42 of the Act. Corruption and bribery of officials is listed as a prescribed offence under s 27(2) of the Act. The Court was satisfied that the breaches were serious and confirmed the orders dismissing all of the Defendants from office and disqualifying them from standing for election or being appointed a leader for 10 years. The Court also confirmed the order that the Defendants ceased to be leaders and were not entitled to any payments or allowances in connection with having been dismissed. Payments of such allowances that had already been paid were ordered to be repaid forthwith.

Appeals

Stephen v Public Prosecutor [2023] VUCA 25; Criminal Appeal Case 1357 of 2022 (19 May 2023)

Matter Appeal against sentence (late filing of annual returns)

Jurisdiction Court of Appeal

Coram Hon. Chief Justice Lunabek, Hon. Justice J Mansfield, Hon. Justice R Young, Hon. Justice O Saksak, Hon. Justice VM Trief, Hon. Justice E Goldsbrough

Date of Verdict 19 May 2023

Summary Twelve men who were categorised as leaders under the *Leadership Code Act* (the Act) were prosecuted for failing to file annual returns as required for the year ending 1 March 2021. Three of the twelve, Sarlo Stephen, Jose Kombey and Jean Ialoulou, who all pleaded guilty to the charge, appealed their sentences. They had been convicted and fined. They contended that the learned sentencing judge had failed or had not adequately taken into account their personal circumstances when sentencing nor given them appropriate discounts for their early guilty plea. They claimed that this was not in line with the sentencing guideline set by the Court of Appeal in *Public Prosecutor v Andy* [2011] VUCA 14 and *Jimmy v Public Prosecutor* [2020] VUCA 40.

The Court of Appeal allowed the appeals and found that the learned sentencing judge had erred by failing to take into account the facts of the offending relevant to each of the appellants and their personal circumstances when deciding on an appropriate sentence. The global approach taken to sentencing did not fairly reflect the culpability of the three appellants or how their personal circumstances might mitigate the penalty. The judge also failed to consider the submissions that no conviction ought to be recorded under section 55 of the *Penal Code*. The three appellants were resentenced. Each was discharged without conviction and the fines were reduced.

Public Prosecutor v Tabimasmas [2021] VUCA 14; Criminal Appeal Case 3532 of 2020 (19 February 2021)

See above under Penal Code Bribery Offences.

Kalosil v Public Prosecutor [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015)

See above under *Penal Code* Bribery Offences.

Sentencing

Public Prosecutor v Saimon [2021] VUSC 316; Criminal Case 3232 of 2021 (30 November 2021)

Matter Sentence (Breach Leadership Code)

Jurisdiction Supreme Court of Vanuatu

Coram Justice O. Saksak

Date of Verdict 30 November 2021

Summary The Defendant was sentenced for one count of failure to stop at the request of Police, contrary to section 19 of the *Road Traffic Control Act* [Cap 29], and one count of failure to comply with and observe the law, being a breach of the *Leadership Code* under section 19 of that Act. The Defendant was a Member of Parliament, a senior politician and had previously held the position of Speaker of Parliament. He was driving the government vehicle under the influence of alcohol at 3am and ran over the islets at a turnoff. He refused to pull over when requested to do so by police and he sped away, with the police giving chase. The Defendant accepted responsibility for his actions and pleaded guilty. He was a 67 year old man with high blood pressure, diabetes, a wife who is in a wheelchair. He had a long history of good work, and the Prime Minister provided a character reference. He apologised to the public for his action and performed a custom reconciliation. The Court convicted the Defendant and sentenced him to a fine of VT 10,000 for the failure to stop at police request, and for the breach of the Leadership Code he was sentenced to a fine of VT 700,000. Failure to pay would result in imprisonment for 6 months. In addition, 100 hours of community service work was ordered to be undertaken within 12 months of sentence. The sentencing Court stated that the Defendant's actions had shown disrespect or the law and the Police and the legal system, for which he was directly involved as a legislator, being a Member of Parliament [11]. His actions brought disrepute to himself and his family, the Church, the Government for which he is a party, and the Legislature or the House of Parliament as a Member [13].

Public Prosecutor v Asang [2021] VUSC 187; Criminal Case 1609 of 2021 (11 August 2021)

Matter Sentence (breach Leadership Code)

Jurisdiction Supreme Court of Vanuatu

Coram Justice V.M Trief

Date of Verdict 11 August 2021

Summary The Offender was a Member of Parliament and Third Deputy Speaker of Parliament at the time of the offending. The Defendant pleaded guilty to two charges of domestic violence and one count of breaching the *Leadership Code* by failing to comply with the law. The Offender had assaulted his wife to the head with a glass perfume bottle and to the body with a wooden broomstick to the point where the stick broke into pieces. The assaults occurred over two consecutive days and in front of the children. The learned sentencing judge found that the domestic violence offences were serious as it involved actual physical violence with a weapon and took place over two days.

The Court stated that the Defendant's fall from grace is punishment in itself but that as a leader, he had a responsibility to lead by example to solve disputes through dialogue, not violence [29] and that the sentence imposed is to deter offending by sending a message to the community that the law prohibits domestic violence and that leaders have a duty to comply with and observe the law. The sentence imposed was 9 months imprisonment for the domestic violence offences and 12 months imprisonment for the breach of the *Leadership Code*. Taking into account the Offender's personal circumstances, the sentences were suspended for 2 years. In addition, the Offender was ordered to perform 50 hours of community service.

Public Prosecutor v Leingkon [2021] VUSC 175; Criminal Case 733 of 2021 (27 July 2021)

Matter Sentence (breach of Leadership Code)

Jurisdiction Supreme Court of Vanuatu

Coram Justice G.A. Andree Wiltens

Date of Verdict 27 July 2021

Summary The Offender pleaded guilty to three charges: Doing an Act that endangered the safety of an aircraft passenger, Intentionally Boarding an aircraft while intoxicated, and breaching the *Leadership Code* by failing to comply with and observe the law. The Offender was the Minister for Climate Change at the time of the offending. He boarded a 6-seater Unity Airlines flight from Santo to Port Vila in an inebriated state and proceeded to disrupt and cause distraction to the pilot and the passengers. When the pilot was directed by the control tower to return to Santo and offload the Offender, he refused to disembark for at least 30 minutes until security officers persuaded him to comply. The learned sentencing judge said that the Offender must be held accountable for his disorderly and reprehensible conduct which has demeaned his office, called into question his integrity, and diminished respect and confidence in the Government which he represents, however the Court did not consider that imprisonment was the appropriate end sentence, but that a heavy fine and community service was more appropriate [33]. The sentence imposed for the breach of *Leadership Code* must act as a deterrent to the Offender and other Leaders. The sentence imposed for the breach of Leadership Code was 120 hours of Community Work. The sentence for endangering safety of an aircraft was VT 250,000 and for intentionally boarding an aircraft while intoxicated was VT 50,000.

Public Prosecutor v Tabimasmas [2021] VUSC 11; Criminal Case 487 of 2020 (3 February 2021)

Matter Sentence (perjury)

Jurisdiction Supreme Court of Vanuatu

Coram Justice G.A. Andree Wiltens

Date of Verdict 3 February 2021

Summary The Offender was found guilty after trial for one count of perjury. In early 2019 a constitutional case was filed in the Supreme Court challenging the validity of the position of Parliamentary Secretary. The challenge was brought by 16 Opposition Members of Parliament and the Offender, amongst others, was listed as a Respondent to the case. The Offender was the Prime Minister at the time of the offending. It was alleged that the establishment of the position of Parliamentary Secretary was contrary to the Constitution of the Republic of Vanuatu. In the course of the litigation, written evidence was produced to the Court in the form of sworn statements, including

a sworn statement by the Offender. The sworn statement contained a number of assertions, most relevantly was the assertion that certain steps were taken, including the establishment of the position of Parliamentary Secretary was done "with the approval of the Council of Ministers". The Court found that the Offender was anxious that the Court uphold the legality of the position of Parliamentary Secretary and that his sworn statement was tendered to the Court to attempt to persuade the Court to find that the position had been lawfully created. The learned sentencing (and trial) judge found that given the Offender admitted in evidence that none of his appointments or variations of terms had gone before the Council of Ministers, the sworn statement cannot have been correct. The court found that the Offender provided untrue information to the court in the constitutional case, intending to mislead the court. On sentence the Court considered that the conduct could properly be seen as an isolated error of judgment, although a very serious error. The sentence imposed after aggravating and mitigating factors had been taken into account was 2 yeas and 3 months imprisonment. The starting point was 4 years imprisonment. The Court suspended the sentence for 2 years, taking into account the factors provided for in section 55 of the *Penal Code*.

Public Prosecutor v Pipite [2018] VUSC 95; Criminal Case 1005 of 2017 (13 June 2018)

See above under *Penal Code* Bribery Offences

Public Prosecutor v Kalosil - Sentence [2015] VUSC 149; Criminal Case 73 of 2015 (22 October 2015)

See above under *Penal Code* Bribery Offences

Verdicts

Public Prosecutor v Tabimasmas [2020] VUSC 300; Criminal Case 487 of 2020 (16 December 2020)

Matter Verdict after Trial

Jurisdiction Supreme Court of Vanuatu

Coram Justice G.A Andree Wiltens

Date of Verdict 16 December 2020

Summary In early 2019 a constitutional case was filed in the Supreme Court challenging the validity of the position of Parliamentary Secretary. The challenge was brought by 16 Opposition Members of Parliament and the Offender, amongst others, was listed as a Respondent to the case. The Offender was the Prime Minister at the time of the offending. It was alleged that the establishment of the position of Parliamentary Secretary was contrary to the Constitution of the Republic of Vanuatu. In the course of the litigation, written evidence was produced to the Court in the form of sworn statements, including a sworn statement by the Offender. The sworn statement contained a number of assertions, most relevantly was the assertion that certain steps were taken, including the establishment of the position of Parliamentary Secretary was done "with the approval of the Council of Ministers". The Court found that the Offender was anxious that the Court uphold the legality of the position of Parliamentary Secretary and that his sworn statement was tendered to the Court to attempt to persuade the Court to find that the position had been lawfully created. The learned sentencing (and trial) judge found that given the Offender admitted in evidence that none of his appointments or variations of terms had gone before the Council of Ministers, the sworn statement cannot have been correct. The court found that the Offender provided untrue information to the court in the constitutional case, intending to mislead the court. The Court set out the elements of the offence of perjury at [10].

Public Prosecutor v Pipite [2018] VUSC 154; Criminal Case 1005 of 2017 (6 August 2018)

See above under *Penal Code* Bribery Offences

Public Prosecutor v Kalosil - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015)

See above under *Penal Code* Bribery Offences

Stay Application

Tabimasmas v Public Prosecutor [2020] VUSC 114; Criminal Case 681 of 2020 (15 June 2020)

See above under *Penal Code* Bribery Offences.

Money Laundering

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Proceeds of Crime Act [CAP 284][340]	
S 11(2)	Money Laundering	1. A person: a. acquires, possesses, receives or uses property, or engages directly or indirectly in an arrangement that involves property, that the person knows or ought reasonably to know to be proceeds of crime; or b. converts or transfers property that the person knows or ought reasonably to know to be proceeds of crime; or c. conceals or disguises the true nature, source, location, disposition, movement, ownership of or rights with respect to property that the person knows or ought reasonably to know to be proceeds of crime; or d. removes property from Vanuatu, or brings property into Vanuatu, that the person knows or ought reasonably to know to be proceeds of crime.	s11(1)(a): if the person is a natural person - a fine not exceeding VT 50 million or imprisonment not exceeding 25 years, or both; or s11(1)(b): if the person is a body corporate - a fine not exceeding VT 250 million.
S 11(3) & S 11(4)	Explanatory	1. If a person has committed an offence that generates proceeds of crime, nothing in this Act prevents the person from being convicted of a money laundering offence in respect of those proceeds of crime under subsection (1).[341] 2. Nothing in this Act requires a person to be convicted of an offence that generates proceeds of crime before the person can be convicted of a money laundering offence in respect of those proceeds of crime under subsection (1).	N/A
S 11(7)	Attempt, conspire, incite, aid abet, counsel, procure, joint commission	1. A person: (a) attempts, conspires or incites to commit the offence of money laundering; or (b) aids, abets, counsels or procures the commission of money laundering; or (c) in agreement with another, takes part in the commission of money laundering.	s11(7)(a): if the person is a natural person - a fine not exceeding VT 50 million or imprisonment not exceeding 25 years, or both; or s11(7) (b): if the person is a body corporate - a fine not exceeding VT 250 million.

[340] NB: this link is to the 2006 consolidated version available on PacLII. Please refer to all subsequent amendments to the Act in the sessional legislation for updates.

[341] NB: Despite s11(3) in a somewhat contradictory way s12(3) reads: *"A person is not liable to be convicted of an offence against both section 11 and this section because of one act or omission."*

Cases

Appeals against Sentence

Somon v Public Prosecutor [2022] VUCA 28; Criminal Appeal Case 1653 of 2022 (19 August 2022)

Matter	Appeal against Sentence
Jurisdiction	Court of Appeal
Coram	Hon. Justice John Mansfield, Hon. Justice Mark O'Regan, Hon. Justice Oliver Saksak, Hon. Justice Dudley Aru, Hon. Justice Viran M Trief, Hon. Justice Edwin Goldsbrough
Date of Verdict	19 August 2022
Charge/s	2 x trafficking in persons - s102(b) *Penal Code* [CAP 135] 2 x slavery - s102(a) *Penal Code* [CAP 135] **2 x money laundering - s11(3)(a) of the *Proceeds of Crime Act* [CAP284]** 2 x threats to kill - s115 *Penal Code* [CAP 135] 2 x intentional assault - s107(b) *Penal Code* [CAP 135] 1 x employing non-citizens without work permits -s6(1) *Labour Work Permits Act* [CAP 187].
Summary	The appellant Sekdah Somon was sentenced on 22 June 2022 to 14 years imprisonment and VT 60,000 fine. On the charge of trafficking and slavery a starting point of 11 years was uplifted to 14 years imprisonment as the end sentence. On the charge of money laundering a starting point of 9 years was uplifted to 11 years imprisonment as the end sentence. On the charge of intentional assault, a starting point of 6 months was uplifted to 18 months imprisonment as the end sentence. On the charge of threats to kill a starting point of 4 years was reduced to 3 years imprisonment as the end sentence and on the charge of employing non-citizens without work permits a starting point of 3 months was uplifted to 3 months imprisonment and VT 60,000 fine as the end sentence. The appellant advanced his appeal on two main grounds stating that the primary judge: (a) imposed an excessive uplift by considering irrelevant matters resulting in a manifestly excessive end sentence; and (b) failed to give proper weight to the mitigating factors. The appeal was dismissed. At [13] the Court of Appeal stated: *"…In our view, a starting point of 14 years imprisonment would not have been excessive, given the aggravating factors relating to the overall offending. It was open to the primary judge to come to the view that while 11 years may have been an appropriate starting point for the slavery and people trafficking offences if those were the only charges the appellant faced,* ***it was appropriate to increase that to 14 years given the appellant's culpability included the money laundering counts****, the assaults and threats to kill. The sentence for slavery and people trafficking was to be the lead sentence for all the offending. As the lead sentence, it would in practical terms define the actual term of imprisonment the appellant would face."*

Sumbe v Public Prosecutor [2018] VUCA 56; Criminal Appeal Case 2112 of 2018 (16 November 2018)

Matter	Appeal against Sentence
Jurisdiction	Court of Appeal
Coram	Hon Chief Justice Vincent Lunabek, Hon. Justice John von Doussa, Hon. Justice Ronald Young, Hon. Justice Daniel Fatiaki, Hon. Justice Dudley Aru, Hon. Justice Gustaf Andrée Wiltens
Date of Verdict	16 November 2018
Charge/s	15 x money laundering – s 11 *Proceeds of Crime Act* [CAP 284]

Summary

Charles Sumbe pleaded guilty and was sentenced to 2 years' imprisonment. The appellant appealed against his sentence on the ground that it was "manifestly excessive". In January 2016 the appellant befriended John Garrick Ross (Ross) on Facebook. Ross claimed to be a businessman and offered the appellant the opportunity to be his company representative in Vanuatu to receive and remit company funds as directed for a 7% commission. The appellant agreed and provided details of his personal vatu bank account which he maintained at the ANZ Bank at Luganville, Santo. Over a period of 4 days in early February 2016 various amounts totalling VT 397,500 were credited to the appellant's account. Unbeknown to the appellant these amounts were all sourced from the savings account of another ANZ customer. On 4 February 2016 the appellant opened a new US Dollar account with ANZ at the direction of Ross and almost immediately received three (3) equal deposits of USD $3,000 into the account. These USD deposits were also sourced from a fellow USD account holder at ANZ. On 4 separate occasions, on the instructions of Ross, the appellant withdrew a total of VT 370,000 from his Vatu account. He also made one withdrawal of $4,500 from his USD account. On 4 February 2016 the appellant twice unsuccessfully attempted to remit the sum of VT 218,184.74 through Western Union to a Diallo Amadou in Malaysia. On 9 February 2016 the appellant transferred VT 500,000 to a local Bred Bank account as nominated and instructed by Ross. Complaints were lodged with the police in mid-February 2016. The appellant was eventually interviewed under caution, in January 2017. The appellant frankly admitted his involvement in receiving, withdrawing and transferring various sums of money that he ought reasonably to have known were the proceeds of crime.

The Court of Appeal was satisfied that the appellant's offending falls within *"the simplest version"* of the offence with the lowest degree of culpability not only in the respect of the amounts involved, but also, in the duration of the offending and the appellant's lack of success in remitting the funds overseas. In setting the starting point in the present case, the primary Judge recorded "*...the seriousness of the offence together with its aggravating features and standing back and looking at the totality of the case."* But no reference was made to the specific actions of the appellant and their effect in the context of the charge/s and the maximum sentence for the offence. The maximum penalty for an offence of money-laundering is: *"....a fine of 10 million vatu or imprisonment for 10 years, or both"*. The legislature clearly envisages the possibility of a *"fine"* only, being imposed for a conviction of money-laundering. The Court of Appeal accepted that the appellant's specific actions in voluntarily providing a local bank account for the transfer of the illegally sourced local funds and then by in his attempted remittance of the said funds, are less culpable than that of the person(s) who actually hacked into the ANZ Banks customer database and illegally accessed the victim's bank accounts. However, the Court was equally satisfied that the appellant's role was pivotal to the fraudulent scheme. The Court was also satisfied that the primary Judge incorrectly assessed the appellant's culpability but did not find the end sentence of two years imprisonment was manifestly excessive. The appellant was given a very generous

deduction of 2 years, or 40% of his start sentence for his personal circumstances before his plea of guilty was considered - more than could be justified. The Court was satisfied that a final sentence of 2 years imprisonment was within the range. The Court of Appeal found that the Judge erred in his assessment of the seriousness of the appellant's offending and failed to adequately acknowledge his personal mitigation factors, and in light of those considerations and the lengthy delay between the commission of the offence and eventual sentencing of the appellant coupled with the fact that he has not reoffended since his conviction in March 2018, they were satisfied that the appellant's sentence should be suspended for a period of 2 years. In addition, the appellant was sentenced to pay compensation in the sum of VT 96,000 to a victim at the agreed fortnightly rate of VT 7,000 until the said sum is fully repaid.

Sentencing

Public Prosecutor v Bahor [2023] VUSC 220; Criminal Case 954 of 2022 (23 June 2023)

Public Prosecutor v Vatoko [2022] VUSC 118; Criminal Case 3733 of 2021 (18 July 2022)

Public Prosecutor v Garae [2018] VUSC 227; Criminal Case 1407 of 2018 (19 October 2018)

Public Prosecutor v Bani [2018] VUSC 90; Criminal Case 1276 of 2018 (8 June 2018)

Verdicts

Public Prosecutor v Nishai [2018] VUSC 33; Criminal Case 2595 of 2017 (16 March 2018)

Public Prosecutor v Somon [2021] VUSC 299; Criminal Case 404 of 2019 (2 November 2021)

Proceeds of Crime

Offence Element Table

Section	Description	Offence Elements	Maximum Penalty
		Proceeds of Crime Act [CAP 284][342]	
12(1)	Proceeds of Crime	1. A person 2. Receives, receives, possesses, conceals, disposes of or brings into Vanuatu money, or other property 3. That [property] may reasonably be suspected of being proceeds of crime NB: s12(2) It is a defence to a charge of contravening subsection (1) that the person charged had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity. NB: s12(3) A person is not liable to be convicted of an offence against both section 11 and this section because of one act or omission.	(a) if the offender is a natural person – a fine of VT 10 million or imprisonment for 10 years, or both; or (b) if the offender is a body corporate – a fine of VT 50 million.

[342] NB: this link is to the 2006 consolidated version available on PacLII. Please refer to all subsequent amendments to the Act in the sessional legislation for updates.

Cases

Public Prosecutor v Bice [2011] VUSC 278; Criminal Case 79 of 2011 (23 September 2011)

Matter Verdict after Trial

Jurisdiction Supreme Court of Vanuatu

Coram Justice D. V. Fatiaki

Date of Verdict *23 September 2011*

Charge/s 1 x possess dangerous drug (cannabis) – s 2(62) *Dangerous Drugs Act* [CAP 12]

1 x sell dangerous drug (cannabis) – s 2(62) *Dangerous Drugs Act* [CAP 12]

1 x possess proceeds of crime – s 12 *Proceeds of Crime Act* [CAP 284]

Summary On 11 May 2011 a search warrant was executed by a team of police officers at a premises where the first defendant occupied a small natangura house in the compound. On arrival at the scene a group of youths were rounded up inside the compound. Amongst them was the third defendant Aitip Bice. The group of youths was searched and police found dried cannabis leaves in his pocket. The search moved to the first defendant's house and when it began the first and second defendants were still inside. They too were arrested and escorted outside and then to the police station whilst the search of the house was continued by several police officers. Police found marijuana packets and bags. There was a book and paper with lots of names on the list names of people and the quantity of packets each had and the amount of money due to each. Police located over VT 100,000 in cash.

The learned trial judge set out the elements of the possess proceeds of crime offence at [18]:

(a) The first and second defendants had money in their possession

(b) The money was derived from the commission of a "serious offence"

(c) The serious offence is one for which the maximum penalty is at least 12 months imprisonment; and

(d) The first and second defendants knew or reasonably suspected that the money was the proceeds of crime.

The learned trial judge noted at [19] that the third ingredient or element of the offence i.e. (c) above, does not need to be proved by evidence as it is established by the penalty prescribed in the *Dangerous Drugs Act* for an offence of Selling Cannabis is punishable by a fine not exceeding VT 100 million or to a term of imprisonment not exceeding 20 years or to both such fine and imprisonment. In other words, it is a matter of law. The property was VT 108,754 cash which was located at one of the co-accused's house and he had admitted to police that it was the proceeds of the cannabis selling business. They were convicted of the proceeds of crime offence. The Court exercised its power under section 58ZC of the *Penal Code* [CAP. 135] to order the confiscation of the money seized from the first defendant's house totalling approximately VT 100,704 as representing the illegal *"... proceeds of the offence (of selling cannabis)"* and directed that after the expiration of 14 days, the money shall be forfeited to the State and be paid into the General Revenue by the Chief Registrar at [56].

Public Prosecutor v Evans [2014] VUCA 38; Criminal Appeal Case 32 of 2014 (14 November 2014)

See below under *Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions*.

Provisions Tables

Summary Table: Proceeds of Crime Restraint, Confiscation, and Forfeiture Provisions

Sections	Description	Provisions
	Proceeds of Crime Act [CAP 284][343]	
ss15 - 19	Division 1 - General	15. Application for forfeiture order or pecuniary penalty order on conviction 16. Notice of application 17. Amendment of application 18. Procedure on application 19. Application for forfeiture order if person has absconded or died
ss20 - 27	Division 2 – Forfeiture orders	20. Forfeiture order on conviction 21. Effect of forfeiture order 21A. Voidable transfers 22. Protection of third parties 23. Forfeiture order where person has absconded 24. Discharge of forfeiture order on appeal or quashing of conviction 25. Payment instead of forfeiture order 26. Enforcement of order for payment instead of forfeiture 27. Registered foreign forfeiture orders
ss28 - 36	Division 3 – Pecuniary penalty orders	28. Pecuniary penalty order on conviction 29. Rules for determining benefit and assessing value 30. Statements about benefits from committing serious offences 31. Amount to be recovered under pecuniary penalty order 32. Working out how much is realisable 33. Variation of pecuniary penalty orders 34. Court may lift corporate veil 35. Enforcement of pecuniary penalty orders 36. Amounts paid for registered foreign pecuniary penalty orders
s50 - 60	Division 3 – Restraining orders	50. Application for restraining order 51. Notice of application for restraining order 52. Restraining orders 53. Undertakings by State 54. Service of restraining order 55. Ancillary orders and further orders 56. Administrator to satisfy pecuniary penalty order 57. Registration of restraining order 58. Contravention of restraining order 59. Court may revoke restraining order 60. When restraining order ceases to be in force

[343] NB: this link is to the 2006 consolidated version available on PacLII. Please refer to all subsequent amendments to the Act in the sessional legislation for updates.

Sections	Description	Provisions
ss61 - 71	Division 4 – Interim restraining orders for foreign offences	61. Application of this Division 62. Definition for the Division – defendant 63. Application for interim restraining order 64. Notice of application for interim restraining order 65. Interim restraining orders 66. Undertakings by State 67. Service of interim restraining order 68. Ancillary orders and further orders 69. Registration of interim restraining order 70. Contravention of interim restraining order 71. When interim restraining order ceases to be in force
ss72 - 79	Division 5 – Foreign restraining orders	72. Application of Division 5 73. Registered foreign restraining orders – Court may direct Administrator to take custody and control of property 74. Registered foreign restraining orders – undertakings 75. Service of restraining order 76. Administrator to satisfy pecuniary penalty order 77. Registration of registered foreign restraining order 78. Contravention of registered foreign restraining orders 79. Registered foreign restraining orders – when order ceases to be in force
ss79A - 82	PART 5 – SUSPICIOUS CURRENCY MOVEMENTS	79A. Currency reporting at the border 79B. Detention of seized currency 79C. Release of detained currency 80. Seizure and detention of suspicious imports or exports of currency 81. Detention of seized currency 82. Release of detained currency
ss82A – 82G	PART 5A – PRODUCTION ORDERS	82A. Application for a production order 82B. Evidential value of documents produced or information obtained 82C. Failure to comply with a production order 82D. Production orders in relation to foreign serious offences 82E. Power to search for and seize documents relevant to locating property 82F. Search warrant for documents relevant to locating property 82G. Search warrant in relation to foreign offences
ss82H – 82J	PART 5B – MONITORING ORDERS	82H. Application for a monitoring order 82I. Failure to comply with a monitoring order 82J. Non-disclosure of monitoring orders
	Penal Code[344]	
S 58ZC	Confiscation of Property	(1) On conviction of any person for a criminal offence, the court may order the confiscation of any property of the offender which was used as a means of committing the offence or which represents the proceeds of the offence. (2) Subsection (1) applies to any ship, boat, aircraft or motor vehicle used by the offender to travel to or away from the place where the offence was committed.

[344] NB: this link is to the 2006 consolidated version. Please refer to subsequent amendments in the sessional legislation for updates.

Cases

Public Prosecutor v Evans [2014] VUCA 38; Criminal Appeal Case 32 of 2014 (14 November 2014)

Matter Appeal

Jurisdiction Court of Appeal

Coram Hon. Chief Justice Vincent Lunabek, Hon. Justice Bruce Robertson, Hon. Justice Oliver Saksak. Hon. Justice Daniel Fatiaki, Hon. Justice John Mansfield, Hon. Justice Dudley Aru, Hon. Justice Stephen Harrop

Date of Verdict 14 November 2014

Charge/s Proceeds of Crime – s 20(1) *Serious Offence (Confiscation of Proceeds) Act 1989*

Summary This was an appeal in respect of three decisions dealt with in a combined judgment of Spear J. on 6th May 2014. The case has a long history in the courts of Vanuatu and other jurisdictions. Between February and April 1999, a total sum of USD $7,527,900 was transferred to the account of the Third Appellant Benford Limited (Benford) with the Fourth Appellant European Bank Limited (European Bank) at Port Vila. The money in question was alleged immediately to be part of the proceeds of the criminal activities of Kenneth Taves and his wife and associates in the United States of America. Dr. Kenneth Taves, a citizen of the USA committed a substantial fraud. Having obtained details of about nine hundred thousand credit cards he took small payments from those cards each month. This money was paid into different corporate accounts which he controlled. It is said that the total amount involved was in the vicinity of USD $47,500,000. He was sentenced to 12 years imprisonment. Some of the funds he had obtained via the fraud had been transferred into bank accounts in Vanuatu (USD $7,500,000). These cases concern the restraint of and the application for forfeiture of those funds in Vanuatu, as well as prosecution in Vanuatu of Benford Ltd, being a body corporate registered and incorporated in the Republic of Vanuatu, for dealing with the proceeds of crime under the now-repealed *Serious Offence (Confiscation of Proceeds) Act 1989.*

Benford pleaded guilty to the charge and was fined VT 25,000,000. It was contended in the Court of Appeal that the charge to which the plea of guilty was entered was a charge of possession of "tainted property" which was an ongoing offence from 1999 down to the present time. The relevance of this was that if the offending took place after the *Proceeds of Crime Act* [CAP. 208] came into force (which was on 3 February 2003) the Court could have considered making a confiscation order. It was argued that there was a continuing offence so long as the possession existed. The argument advanced was unsuccessful in the Supreme Court and the Court of Appeal agreed with the Supreme Court. The particulars of the offence cannot be ignored. They are essential in informing what is alleged and must be answered. The particulars must be considered and assessed in determining what Benford pleaded guilty to. Benford did not plead guilty to some vague, non-identified, untimed and general offence of possession of property suspected of being proceeds of crime. Benford pleaded guilty to the offence as particularized in the document. The offence of which Benford was convicted occurred prior to 2003 and that the *Proceeds of Crime (Confiscation of Proceeds) Act* could not apply. We agree with Spear J. that the transitional provisions do not alter the position. There was a more muted argument advanced by the Attorney-General regarding the possibility of forfeiture under section 15(1)(a) of the *Proceeds of Crime Act 2002* (“tainted property”). The Court of Appeal agreed with the first instant judge that this was not in the circumstances an available alternative. The Court adopt the reasoning of the trial judge that what must have been intended to be caught by these various provisions does not

arise in the circumstances of this case, and in the exercise of discretion no order would have been made in any event. The money under consideration was unquestionably funds illegitimately siphoned by Dr. Taves and his associates from innocent victims. The Court found that in the circumstances it makes no sense for the Republic of Vanuatu to acquire these funds at the expense of those who had been unlawfully swindled. Taking this money would do nothing to deter people like Dr. Taves who may use this country to try and hide stolen property. The Court of Appeal was satisfied that the appeals in respect of the failure to make orders for forfeiture and confiscation are unsustainable.

See also *Evans v European Bank Ltd [2014] VUSC 23; Civil Case 85 of 1999 (6 May 2014)*

Summary Table: Mutual Assistance Provisions

Mutual Assistance in Criminal Matters Act [CAP 285][345]	
	The entire Act relates to Mutual Assistance, including: The objects of this Act are: (a) to regulate the provision by Vanuatu of international assistance in criminal matters when a request is made by a foreign country for any of the following: (i) the taking of evidence, or the production of a document or other article, for a proceeding in the foreign country; (ii) the issue of a search warrant and seizure of any thing relevant to a proceeding or investigation in the foreign country; (iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country; (iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country; and (b) to facilitate Vanuatu providing international assistance in criminal matters when a request is made by a foreign country to make arrangements for a person who is in Vanuatu to travel to the foreign country: (i) to give evidence in a proceeding; or (ii) to give assistance for an investigation; and (c) to facilitate Vanuatu obtaining similar international assistance in criminal matters.

Cases

PKF Chartered Accountants v Supreme Court [2008] VUCA 32; [2009] 3 LRC 254 (25 July 2008)

Matter Stated Case – Judicial Review – Challenge to Validity of Search Warrants

Jurisdiction Court of Appeal

Coram Hon. von Doussa, Saksak, Tuohy and O'Regan JJ

Date of Verdict 25 July 2008

Charge/s Australian investigation into tax fraud, money laundering & proceeds of crime

Summary Vanuatu received a request from Australia for assistance in relation to three investigations. The investigations involved offences under Australian Commonwealth statutes for offences including defrauding the Commonwealth, obtaining a financial advantage from a Commonwealth entity by deception, dealing in proceeds of crime and money laundering. Those under investigation (the applicants), were the partners of PKF Chartered Accountants: Andrew Neill, Robert Agius, Kelly Fawcett-Mourges and the International Finance Trust Co Ltd. The Supreme Court of Vanuatu granted search warrants in Vanuatu pursuant to the requests for assistance from Australian authorities pursuant to the *Mutual Assistance in Criminal Matters Act 2002*. The applicants applied to the Court of Appeal for judicial review of the decision of the respondent Supreme Court granting search warrants. The facts set out in the judgment of the court. The conduct to which

[345] NB: This link is to the 2006 Consolidation. Please refer to the sessional legislation for all amendments Mutual Assistance in Criminal Matters (Amendment) Act 2001, Mutual Assistance in Criminal Matters (Amendment) Act 2005, Mutual Assistance in Criminal Matters (Amendment) Act 2012, Mutual Assistance in Criminal Matters (Amendment) Act 2014, Mutual Assistance in Criminal Matters (Amendment) Act 2017, Mutual Assistance in Criminal Matters Act 1989, Mutual Assistance in Criminal Matters Act 2002

the Australian investigations relate was described in the sworn statements which were filed in support of the applications for a search warrants. The alleged conduct is not the same in all cases but in general terms it can be described as the dishonest claiming of tax deductions in tax returns filed with the Australian tax authorities. The connection with Vanuatu was said to be the involvement of certain present or past residents of Vanuatu in promoting the schemes and the use of nominee companies and bank accounts in Vanuatu for some aspects of the operation of the schemes. The question to be decided was: is any or are all of the search warrants issued by the Supreme Court on 25 April 2008 under section 20 of the *Mutual Assistance in Criminal Matters Act 2002* (the Act) invalid? The Court of Appeal held that the search warrants granted by the Supreme Court were valid and the application was dismissed.

This case tested the scope of the power conferred by section 20 of the *Mutual Assistance in Criminal Matters Act 2002* (the Act). The Court considered the meaning of "serious offence" for the purpose of the Act, including the nature of the proceeds of crime offences in the *Penal Code* (Vanuatu) in comparison with the Australian money laundering offences in the *Proceeds of Crime Act* (Australia) and the "double criminality" rule. The Court considered the threshold matters to be met in section 20 of the Act in order that a warrant be valid and the degree of detail that is required in the description of the relevant offences to fulfil requirements. The Court held that in the overall statutory context and the complexity of the offences, setting out the text of the offences under investigation in Australia and the names of those under investigation was sufficient to comply with s 20(3)(a) of the Act.

See also *Partners of PKF Chartered Accountants v Supreme Court of the Republic of Vanuatu; Batty v Supreme Court of the Republic of Vanuatu; Moores Rowland (a Firm) v Attorney General [2008] VUCA 15; Civil Appeal Case 15, 16 and 17 of 2008 (25 July 2008)*

In re Mutual Assistance in Criminal Matters Act 14 of 2002 [2008] VUSC 91; Civil Case 68-08 (10 July 2008)

Summary Table: Extradition Provisions

Extradition Act [2002][346]	
	The entire Act concerns Extradition. The purposes of this Act are to: (a) codify the law relating to the extradition of persons from Vanuatu; (b) facilitate the making of requests for extradition by Vanuatu to other countries; (c) enable Vanuatu to carry out its obligations under extradition treaties.

[346] NB: This link is to the 2006 Consolidation. Please refer to the sessional legislation for all amendments: Extradition (Amendment) Act 2017, Extradition Act 1988, Extradition Act 2002

Case Law

United Kingdom

Case Law Summary

Fraud

R v Scott [1974] UKHL 4; [1975] AC 819

This case concerned the appellant making an agreement with employees of cinema owners that, in return for payment, the employees of the cinemas would temporarily abstract cinematographic films without the employer's consent. This was done for the purpose of enabling the appellant to make and distribute copies of the films on a commercial scale— such abstraction, copying and distribution being conducted without the knowledge and consent of the owners of the copyright in, or of distribution rights of, such films. The appellant was charged and convicted with the common law offence of conspiracy to defraud. He unsuccessfully appealed to the Court of Appeal and then sought to appeal further to the House of Lords, arguing that the offence was not established as there was no proof of deceit. In unanimously dismissing the appeal and preserving the conviction, the House of Lords made an influential determination as to the meaning of the term 'to defraud' in the offence:

> *"To defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.*[347]

After reviewing a number of cases and the statutory offences relating to theft and fraud, the Court determined that deceit is not a necessary element in the offence of conspiracy to defraud.

In reaching that conclusion, the Court rejected[348] the appellant's submission regarding the often-cited description of fraud provided by Buckley J in *In re London and Globe Finance Corporation Ltd,*[349] insofar as that submission characterised his Honour's statement an exhaustive definition of the meaning of 'defraud'. Buckley J's description was as follows*:*

> *To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.*[350]

In this case, Viscount Dilhorne cited with approval the definition of fraud in *Stephen, History of the Criminal Law of England* (1883), as an indication that deceit is not always required (where mere secrecy, for instance, can be sufficient):[351]

> *…whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.*

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[347] *R v Scott* [1975] AC 819, 839 (Viscount Dilhorne).
[348] Ibid 836.
[349] [1903] 1 Ch 728.
[350] Ibid 732.
[351] *R v Scott* [1975] AC 819, 836.

R v Withers [1974] QB 414

In this case, the four appellants were appealing their convictions, wherein the indictments were two counts of alleged conspiracy to effect a public mischief by unlawfully obtaining private and confidential information from officials of certain banks, building societies and government departments by making false representations of their authority and place of employment. The appellants contended that the counts did not disclose an offence known to the law, and misconstrued the offence of conspiracy to effect a public mischief.

The Court of Appeal applied the principles in *Welham v Director of Public Prosecutions,*[352] which found that:[353]

> *To deceive a person responsible for a public duty into doing something which he would not have done but for the deceit is to defraud him.*

The Court determined that the expression 'public duty' extends to the duty owed by a bank or its officers to its customers, and that owed by civil servants and government officials to the public. The Court thus dismissed the appeal, determining that the offence had been rightly described as a conspiracy to effect a public mischief:[354]

> *Where there is an agreement to use dishonest means to induce public officers or the officials of banks to act in breach of their duties, not on one or two occasions, but in many instances over a period of years, we are satisfied that this can constitute a conspiracy to effect a public mischief by defrauding the public.*

Additionally, the Court elucidated a number of useful principles of law relevant to charges of conspiracy to effect a public mischief:

1) That the acts relied on to prove a conspiracy to effect a public mischief need not be themselves unlawful, as in criminal or tortious and, therefore, the judge had rightly directed the jury to go straight to considering whether the defendants had agreed to do deceitful acts which caused injury to the community.[355]
2) That a conspiracy to effect a public mischief was not confined to a conspiracy which had the object or effect of being prejudicial to the state but included one that affected the community or general public.[356]
3) The question whether the defendants' acts caused injury to the community was a question of fact and degree and, where questions of fact and degree are involved, the issue should be left to the jury subject to a ruling by the judge whether acts of the type in question are capable of constituting a public mischief.[357]
4) *'If breaches of confidence are brought about by lies it is irrelevant that somebody may thereby have acquired useful information'*[358] and the jury should not be called upon to balance the advantages and disadvantages of the information being divulged.

[352] [1961] AC 103.
[353] *R v Withers* [1974] QB 414, 420-1.
[354] Ibid 421.
[355] Ibid 422, citing *R v Kamara* [1974] AC 104, 126.
[356] Ibid 422, citing *R v Kamara* [1974] AC 104, 129.
[357] Ibid 422-3, citing *R v Foy* [1972] Crim. LR 504.
[358] Ibid 424.

IPE Marble Arch Ltd v Moran [2024] EWHC 1375 (KB)

This case consisted of an application for leave of the High Court to prefer a voluntary bill of indictment against the respondent, following a decision of the Crown Court to dismiss the charges against him. The charges were brought as a private prosecution by a property development company, against the respondent who was a long leaseholder of one of the apartments on the property proposed for development, and who was using various means to oppose the development. The respondent formed a company alongside other leaseholders to take over the management of the building and restrain the property development in question, and also formed a residents association through which objections were raised.

The applicant, as private prosecutor, alleged that the respondent repeatedly used false identities in emails and other communications for the purpose of conveying that the objections raised in those communications came from multiple sources, not just the respondent. In doing so, it was alleged that he committed forgery and fraud by false representation.

The offence of forgery is defined in s 1 of the *Forgery and Counterfeiting Act 1981* (UK):

> *A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.*

The *Fraud Act 2006* (UK) defines fraud by false representation under s 2 as the following:

> *1) A person is in breach of this section if he-*
> *a) Dishonestly makes a false representation, and*
> *b) Intends, by making the representation –*
> *i. To make a gain for himself or another, or*
> *ii. To cause loss to another or to expose another to a risk of loss.*
> *2) A representation is false if –*
> *a) It is untrue or misleading, and*
> *b) The person making it knows that it is, or might be, untrue; or misleading.*
> *3) 'representation' means any representation as to fact or law, including a representation as to the state of mind of –*
> *a) The person making the representation, or*
> *b) Any other person.*
> *4) A representation may be express or implied.*
> *5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).*

The Court found no error in the following statement made by the trial judge, which was considered to reflect that both offences involve an intention to bring about a gain or cause loss in financial or property terms, by way of the falsity:[359]

> *Though the conceptual mischiefs that each statute was designed to prevent differ in their definitions, each enactment contemplated a material gain to the offender and/or – at least – a material loss to an identifiable victim, whether in terms or money or other realisable property.*

[359] IPE Marble Arch Ltd v Moran [2024] EWHC 1375, [52]-[53].

Overall, the High Court determined that there was no substantive error of law in the Crown Court's decision to dismiss the charges, so the leave application was dismissed. The prosecution failed to particularise how the use of false identities in the emails was intended to cause a loss or induce any particular cause of action, and the respondent could not have been properly convicted as the case stood. 'The mere fact that the defendant sent emails in false names, or in the name of a neighbour, did not "get the prosecution across the line".'[360]

R v Grubb [1915] 2 KB 683

In this case, the Court of Criminal Appeal heard an appeal against a conviction of a director of a company for the fraudulent conversion of cheques contrary to s 1 of the *Larceny Act 1901* (UK), as it then stood. The Court stated the following:[361]

> *… a person may be entrusted with property, or may receive it for or on account of another person, within the meaning of* [s 1 of the *Larceny Act 1901*]*, notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him…*

Furthermore, Lord Reading CJ stated the following regarding the contention that the cheques in question were received by the company and not the appellant (at 690):

> *A company has no mind and cannot have an intention; if the person directing and controlling the affairs of the company and by whose instructions the property has passed into the possession of the company and has been converted intended to convert it fraudulently, he would be guilty of an offence whether the property was fraudulently converted to the use or benefit of the company or to his own use or benefit.*
>
> *If he did the acts with an intent to defraud, it would not be an answer to prove that he did them as the agent or servant of another person whether a company or an individual. Moreover, if the company was used by his directions as the instrument to enable him in the name of the company to become possessed of the property and by means of the company to convert it fraudulently to his own use or benefit, he would be guilty of an offence under this statute.*

R v Ghosh [1982] QB 1053

The case of *R v Ghosh* involved a hospital consultant – the accused – who claimed fees were payable to him for surgical operations he did not perform, or those that were covered by the National Health Service. The accused denied that he was dishonest, stating his belief that the sums he claimed were legitimately payable to him. In determining the appeal against conviction, the Court of Appeal was required to determine the meaning of dishonesty and the appropriate direction to be given to the jury, and it concluded that dishonesty must be assessed based on both objective and subjective standards, hence the development of the dishonesty test.

The test for dishonesty established by *R v Ghosh* was as follows:[362]

> *It is dishonest for a defendant 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 as he did.*

The objective limb of the test required, first, that the jury considers whether, in accordance with the ordinary standards of reasonable and honest people, the defendant's conduct was dishonest. If it was not dishonest by those standards, the prosecution would fail. The subjective limb, secondly, required the jury to determine the

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[360] Ibid [34].
[361] *R v Grubb* [1915] 2 KB 683, 689 (Lord Reading CJ).
[362] *R v Ghosh* [1982] QB 1053, 1064.

presence of dishonesty based on whether the defendant must have realised their conduct was dishonest by those objective standards.

Whilst the test as laid down in *R v Ghosh* had influenced the development of the test for dishonesty in Australia and a number of the Pacific Island Nations, in the UK it has since been disapproved and modified. In *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391, the UK Supreme Court revisited the test, and determined that it was misconstrued in its reliance on the accused's subjective realisation or perception of what ordinary people would consider to be dishonest— because it permits the accused to be acquitted where their perception of the standards of ordinary people is genuinely warped.[363] Thus, the Court determined that the test as originally propounded 'does not correctly represent the law', and clarified the test of dishonesty, which now applies in the UK, as follows:[364]

> *When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an 417 additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*

This clarified test was subsequently confirmed by the Court of Appeal in *R v Barton*[365] to be the test for dishonesty now applicable to all criminal cases in the UK.

R v Ames [2023] EWCA Crim 1463; [2024] 1 WLR 1860

The appellant in this case was convicted of two counts of fraud by abuse of position under s 4(1) of the *Fraud Act 2006* (UK), deriving from his actions as a shadow director of a company in lying to and misleading investors who were induced to invest in a business model that was doomed to failure. The appellant sought to appeal against the conviction on the ground that the judge misdirected the jury, because, as the appellant contended, s 4(1)(c)(i) and (ii) of the Act contained two separate legal ingredients of the offence which demanded a direction that the jury must be unanimous on at least one of them for a guilty verdict.

The Court of Appeal dismissed the appeal, stating that the true construction of the offence contrary to s 4 of the *Fraud Act 2006* had only three elements:[366]

1) That a person occupied a position in which he was expected to safeguard, or not to act against, the financial interests of another person (section 4(1)(a));
2) That the person dishonestly abused that position (section 4(1)(b));
3) That the person intended, by means of the abuse of that position, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss (section 4(1)(c)).

[363] [2018] AC 391, [57]-[61] (Lord Hughes JSC).
[364] Ibid [74] (Lord Hughes JSC).
[365] [2021] QB 685, [1], [105] (Lord Burnett of Maldon CJ).
[366] *R v Ames* [2024] 1 WLR 1860, [43].

The Court thus concluded that section 4(1)(c) really just requires an intent to have a financial impact, whether by gain or loss or both, being merely different ways in which the jury could reach that conclusion on the presence of intent:[367]

> *This inclusive interpretation is entirely consistent with common sense. Those who commit fraud will often, if not usually, intend both to make a gain (for someone) and/or to cause loss to another (or expose another to a risk of loss). Far from being mutually exclusive alternatives, those elements are generally co-occurring and overlapping aspects of most frauds. Subject to any special features that a case may present, proof of either element ought to be sufficient to satisfy the ingredient of intent.*

[367] Ibid [48].

Bribery

R v J (P) [2013] EWCA Crim 2287; [2014] 1 WLR 1857

In this case, the defendants were charged with conspiring to commit an offence contrary to section 1 of the *Prevention of Corruption Act 1906* (UK), being to corruptly give to agents of the tax authorities of a state in the Commonwealth a substantial sum of money to induce favourable tax calculations for the defendant's company. The primary judge held that it was necessary for the prosecution to prove, as a necessary ingredient of the offence, that the agents of the tax authorities had not had the consent of the tax authorities, as their employer or principal, to receive the sum of money or other consideration or in other words that the word 'corruptly' denotes that the money was received in secrecy.

Upon appeal, the Court of Appeal reviewed the history of UK legislation on bribery offences (including the *Prevention of Corruption Act* which had since been repealed) that was consolidated into the *Bribery Act 2010* (UK). The question before the Court was whether, under the repealed Act, as a separate element the prosecution had to prove that corrupt payments were made to an agent without the knowledge and consent of their principal.

Considering the bribery offences as they were in the historic legislation, the Court considered that:[368]

> *... in most cases it will generally be sufficient for the prosecution to prove the making of the payment for the prohibited purpose to the agent (or the receipt of such a payment by the agent) in circumstances where the jury can properly infer it was corrupt. Thus in the case of a commercial agent where the making of the payment for the prohibited purpose is proved, the question of whether the principal knew and gave his informed consent after full disclosure will not ordinarily arise, unless it is part of the defence case. When the consent of the principal is alleged and there is a sufficient evidential basis for it, then it will be an issue for the jury to consider when deciding whether the prosecution has proved payment was made corruptly. In cases where the principal or agent are overseas, more complex issues may arise (as may be the case in R v D) but what the prosecution has to prove remains the same. It has to prove that the payment for the prohibited purpose was made corruptly.*

Accordingly, the Court allowed the appeal and held that the offence did not require, and the word 'corruptly' did not imply, that the payment made for the prohibited purpose must have been paid or received secretly.

Further cases of relevant authority:

R v Chapman [2015] EWCA Crim 539; [2015] QB 883

R v Majeed (Mazhar) [2012] EWCA Crim 1186; [2013] 1 WLR 1041

368 *R v J (P)* [2014] 1 WLR 1857, [32].

Corruption

R v Reynolds [2017] EWCA Crim 1455; [2017] 4 WLR 33

On 28 March 2014, the respondents were convicted in the Crown Court of Leicester of a number of offences arising from corruption in public sector contracting, including conspiracy to commit fraud by abuse of position, to steal, and to convert criminal property. The facts involved employees of a local council using their positions to order, at an inflated price, products required by the council from a company in which the employees (and their partners) had a direct interest. The Crown Court made a confiscation order allowing retrieval from the respondents of, only, the amount of money which the council was overcharged in excess of the proper value of the goods (rather than the total profits obtained by the respondents i.e. the full value of the goods, minus supply costs)— being £87,500. The prosecution then appealed this assessment of the confiscation order arguing it did not go far enough.

The Court of Appeal usefully canvassed the principles underlying the *Proceeds of Crime Act 2002* (UK) and its purposes of punishment and deterrence within the requirements of proportionality.[369] The Court noted that in cases where the benefit obtained by the defendant has been wholly restored to the victim of the crime, or in analogous cases, the making of a confiscation order might be disproportionate and must be assessed on a case-by-case basis, quoting a statement of the Supreme Court from *R v Waya* that in such cases:[370]

> *…the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration.*

The Court also considered the decision in *R v Sale*,[371] which involved offences of corruption and fraud, arising from a defendant who gave gifts to a rail agency employee to induce them to arrange for high value contracts to go to the company of which the defendant was the managing director and sole shareholder. In an appeal against a confiscation order, the defendant in that case argued that the benefit to them should not be assessed as the total sum paid to the company under the contracts (£1.9m), but rather only the profit, being that sum minus the costs of supplying the services (resulting in an amount of only 10% of the contract price). In *Sale*, the Court determined, considering the decision in *Waya*:[372]

> *…the defendant had obtained contracts for his company by corrupt means on a continuing basis so that every contract obtained was tainted by it. Moreover, in a case of this nature it is wholly unrealistic to regard Network Rail as the only victim of the crime. Corruption of this nature clearly impacts on others. The company obtained contracts with a client with whom it had no previous business relationship. Existing contractors with Network Rail were cheated out of the tendering process. The substantial market in Network Rail contracts of this type was distorted, with the company gaining a market share to the detriment of others. Tendering costs were avoided.*
>
> …

[369] R v Reynolds [2017] 4 WLR 33, [45]-[47].
[370] [2013] 1 AC 294, [34].
[371] [2014] 1 WLR 663.
[372] Ibid [52], [57].

> *…A proportionate confiscation order would need to reflect those additional pecuniary advantages and, it seems to us, that an order for profit gained under these contracts, together with the value of pecuniary advantage obtained, would represent a proportionate order which would avoid double counting….*

In *Sale,* the appropriate confiscation order was thus the amount of profits only (approx. 10% of contract price), and would have included in addition an amount covering pecuniary advantages such as distortion to the market and avoidance of tendering costs, except such an assessment was not provided on the facts in that case.

In the present case, applying these considerations, the Court of Appeal determined that the vice of the respondents was not only in over-charging for an otherwise quality provision of goods; the entirety of the transactions were tainted by the betrayal by the council employee of his position of trust by instrumentalising a conflict of interest that resulted in the earning of secret profits.[373] Thus, the lower court's ruling on the confiscation order (valued at £87,500) was set aside, and instead the appropriate order was assessed in the amount of £253,421.79, being the amount of profit earned by the respondents (the contract price, minus expenses), minus also a figure for tax already paid to avoid disproportionate double-counting.

[373] R v Reynolds [2017] 4 WLR 33, [59].

Money-Laundering

R v Cooper & Ors [2023] EWCA Crim 945; [2024] 1 WLR 1433

In this case, the first defendant was convicted of cheating the public revenue and transferring of proceeds of crime. The second defendant was convicted of possession of drugs with the intent to supply and the possessing of proceeds of the crime. The third defendant was convicted of offences connected with fraud and the transferring of the tainted property which represented the proceeds of the crime. The appellants in each case sought to appeal against their sentences arguing that the sentences imposed in respect of the dealings with the proceeds of crime should have been concurrent with those of the substantive offences. In dismissing the appeals, the Court considered the principles relating to offences charged under the *Proceeds of Crime Act 2002* (UK) heard alongside principal offences:[374]

> *…there is a broad spectrum of cases involving the combination of 2002 Act offences and other underlying, primary, offending. At one end of the spectrum, the 2002 Act offence does not involve any additional culpability or harm and does not aggravate the seriousness of the primary offence. At the other end, the offending contrary to the 2002 Act is markedly distinct from the primary offending and involves significant additional culpability and harm, aggravating the primary offence to an extent that would not otherwise be reflected in the sentence for that offence if considered in isolation.*
>
> *…*
>
> *It is thus important, in each case, to identify whether the 2002 Act offence involves additional culpability and/or harm, and, if so, the extent…*

Some of the examples of additional culpability or harm the Court considered in its judgment included where the offence with respect to the proceeds of crime:[375]

1) *Takes place over a different period from the primary offending;*
2) *Involves additional or different criminal property, beyond the proceeds of the primary offending;*
3) *Makes it more difficult to detect the primary offending;*
4) *Involves dealing with the proceeds of the primary offending in a way which increases the risk that victims will not recover their losses, or that confiscation proceedings will be frustrated;*
5) *Creates additional victims. This may arise where the proceeds of the primary offending are used to make further transactions which are then thrown into question, resulting in loss to the innocent parties to those transactions: Randhawa at [20];*
6) *Involves additional planning or sophistication, extending the culpability that might otherwise attach to the primary offending*
7) *Assists in the continuation of offending...*

R v Porter [2023] EWCA Crim 1485

In this case the appellants appealed against a money laundering conviction pursuant to s 328(1) of the *Proceeds of Crime Act 2002* (UK), where the money was obtained by evading duty payable on alcohol imports. That section of the Act reads:

> *A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.*

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[374] *R v Cooper & Ors* [2024] 1 WLR 1433, [10].
[375] Ibid [11].

The prosecution's case had been that they must prove the following elements in relation to the charge:

1) *That the cash conveyed is criminal property (the prosecution case being that the cash is payment for duty evaded alcohol);*
2) *That each of the defendants became involved or concerned in an arrangement concerning the above criminal property;*
3) *That they did so knowing or suspecting that the money was criminal property.*

The trial judge relied on the following quote from the Court of Appeal in *R v Anwoir*[376] regarding the methods by which the prosecution is able to prove that the property in question is tainted or is derived from criminal conduct:

1) *By showing that [it] derived from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful;*
2) *By evidence of the circumstances in which the properties handled are such as to give rise to the irresistible inference that it can only be derived from crime.*

The definition of criminal property was a point of contention within the case, wherein the trial judge relied on the following definition of 'criminal conduct' and 'criminal property' pursuant to s 340 of the *Proceeds of Crime Act 2002*:[377]

1) *Criminal conduct is conduct which –*
   a. *Constitutes an offence in any party of the United Kingdom, or*
   b. *Would constitute an offence in any part of the United Kingdom if it occurred there.*
2) *Property is criminal property if –*
   a. *It constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and*
   b. *The alleged offender knows or suspects that it constitutes or represents such a benefit.*

The trial judge also applied *R v GH*[378] in explaining the need for money laundering offences to be made out separate to other criminal conduct, holding that:

> *"Criminal property" in s.328 means property that already has the quality of being criminal property by reason of criminal conduct distinct from the conduct alleged to constitute the actus reus of the money laundering offence itself so that the offences in ss.327 to 329 are predicated on the commission of another offence that has yielded proceeds that then become the subject of a money laundering offence.*[379]

The Court of Appeal ultimately agreed that the trial judge's summary of the law and applicable principles was accurate, and the appeal was dismissed.

R v Tahmasebi [2024] EWCA Crim 222

This case concerned the appellant who was convicted of four offences consisting of one count each of converting criminal property, being concerned in the use or control of criminal property, possession of criminal property, and possession of a class A drug with the intention to supply. The appellant had been convicted and

[376] [2009] 1 WLR 980, [21].
[377] *R v Porter* [2023] EWCA Crim 1485, [15].
[378] [2015] UKSC 24, [2015] 1 WLR 2126.
[379] *R v Porter* [2023] EWCA Crim 1485, [15].

was sentenced to four years imprisonment for the first count, with concurrent sentences for the second and third counts, in addition to six years imprisonment for the drug possession count.

In considering the appeal case that the total 10 years of imprisonment was a manifestly harsh and excessive sentence, the Court of Appeal approved the decision in *R v Cooper*, concluding that:[380]

> *The key task when sentencing for a criminal property offence at the same time as another offence is to identify whether the criminal property offence involves additional culpability and/or harm relative to the other offence and, if so, the extent of that additional culpability and/or harm.*

Applying this to the present case and dismissing the appeal, the Court held that:[381]

> *The principal criminal property offence with which we are concerned today, reflected on count 1, involved numerous deposits that must have been the proceeds of serious drug dealing. It concerns criminal activity that involved additional planning and sophistication, extending the culpability attached to the drugs offence. It involved dealing with the proceeds of drug dealing in a way that increases the risk that confiscation proceedings will be frustrated and clearly also involved additional or different criminal property beyond the proceeds of the instant drug offence and over a different time period. In other words, this criminal property offending was quite clearly separate from the drugs offence.*

R v Gross [2024] EWCA Crim 21; [2024] Crim LR 399

This case concerned an appeal against conviction of the appellant of entering into an arrangement to use or control criminal property, and acquiring criminal property, contrary to ss 328 and 329 of the *Proceeds of Crime Act 2002* (UK), respectively. The criminal property in question was the proceeds of the unlawful sale of prescription-only and counterfeit medicines, the proceeds of which was paid to companies owned by the appellant.

The Court referred to the statement from *Anwoir* (quoted in *Porter* above) regarding the means by which the prosecution can prove that property is 'criminal property'. It then noted that there is no requirement upon the prosecution to prove a specific predicate offence, however, fairness requires that particulars be given regarding the nature of the criminal activity that has generated the monies being laundered, where possible.[382]

The Court of Appeal dismissed the appeal which took issue with a direction by the trial judge to the jury, finding that it was sufficient for the jury to be satisfied that the appellant knew or suspected that the criminal property was criminal property— it was not necessary that they were satisfied he knew or suspected it to derive from the sale of prescription only or counterfeit medicines, in particular.

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[380] R v Tahmasebi [2024] EWCA Crim 222, [25].
[381] Ibid [26].
[382] R v Gross [2024] Crim LR 399, [16], referring to *DPP v Bholah on appeal from the Supreme Court of Mauritius* [2011] UKPC 44, [34].

Proceeds of Crime

R v Cooper & Ors [2023] EWCA Crim 945; [2024] 1 WLR 1433

Refer to the summary of this case above under '*Money Laundering*'. The decision provides useful principles and examples to illustrate how the court should approach sentencing when dealing with a combination of primary offences and offences charged with respect to the proceeds of crime itself.

Director of the Serious Fraud Office v Jiang [2023] EWHC 1810

This case considered the application of ss 304 to 309 of the *Proceeds of Crime Act 2002* (UK) (**POCA**) and the circumstances in which a recovery order can be made pursuant to s 266 of that Act in civil proceedings, to recover property that has been obtained through unlawful conduct. Turner J made the order requested to recover the house bought by the respondent's father using funds derived from his corrupt business, and the rental income earnt through that property. His Honour affirmed that recoverable property, which has been obtained by the defendant or a third party through unlawful conduct, may be followed into (and recovered from) the hands of a person to whom they dispose of that property.

R v Andrewes [2022] UKSC 24; [2022] 1 WLR 3878

This case concerned the making of a confiscation order wherein the defendant obtained a senior employment position as chief executive officer at a hospice, and two remunerated offices of two trusts, by making false statements as to his educational qualifications and relevant experience. He was employed in the CEO role for over 10 years, and earned a substantial salary across each role, with his total benefit calculated at £643,602.91. The defendant pleaded guilty to obtaining pecuniary advantage by deception and fraud by false representation. The Exeter Crown Court sentenced the appellant to two years' imprisonment and made a confiscation order for the defendant to pay £96,737.24, being the available amount and thus the maximum amount recoverable from him. The trial judge considered that this amount is not disproportionate, as it is around 15% of the total benefit obtained.

On appeal before the Court of Appeal, the confiscation order was quashed as disproportionate on the basis that the defendant gave full value for his remuneration by performing his required duties, such that confiscating any benefit would amount to double recovery. The Crown then appealed to the Supreme Court.

The Court referred to the following relevant provisions of the POCA:[383]

> *Where a person has been convicted of an offence in the Crown Court (or is committed to the Crown Court for sentence) and the prosecution asks for a confiscation order to be considered, or the court believes that it is appropriate to do so, section 6(4) and (5) of POCA apply. By those subsections:*
>
> *Subsection 4— the court must proceed as follows:*
>
> *a) it must decide whether the defendant has a criminal lifestyle;*
> *b) if it decides that he has a criminal lifestyle it must decide whether he has benefitted from his general criminal conduct;*

[383] *R v Andrewes* [2022] 1 WLR 3878, [16].

> *c) if it decides that he does not have a criminal lifestyle, it must decide whether he has benefitted from his particular criminal conduct.*
>
> *Subsection 5:*
>
> *If the Court decides under subsection 4(b) or (c) that the defendant has benefitted from the conduct referred to it must –*
>
> *a) decide the recoverable amount, and*
> *b) make an order (a confiscation order) requiring him to pay that amount.*
>
> *Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.*

The Court rejected the trial judge's bare reasoning that a confiscation order of 15% of the total benefit would be appropriate, without further justification, and turned to case authority including *Sale, Reynolds*, and *Waya* to elucidate a principled approach. The Court then determined that in the present case, where the services performed by the defendant were performed lawfully, despite the positions being obtained through fraud, it would be disproportionate to require the repayment of the total earnings of the defendant— such would be double disgorgement, and an impermissible penalty. However, the Court also rejected the defendant's position and the Court of Appeal's decision that any confiscation order would be disproportionate merely because the defendant performed valuable services in exchange for his salary.

The Court arrived at a middle ground applicable in cases relating to the performance of services:[384]

> *In our view, the answer in principle is that, at this stage in the analysis, where one is considering proportionality, the relevant benefit from the fraud that it is proportionate to disgorge is not the full net earnings but rather the difference between the higher earnings that Mr Andrewes has obtained and the lower earnings that he would have obtained had he not used fraud and hence had not been offered the particular job. This is to take away the "profit" made by the fraud (analogously to the reasoning adopted in R v Sale). This approach provides a principled "middle way" (or "halfway house") between the take all or take nothing approaches to confiscation in cv fraud cases.*
>
> *…*
>
> *In many and perhaps most situations of cv fraud, it will be appropriate, as a pragmatic approximation of the relevant profit, simply to take the difference between the fraudster's initial salary in the new job obtained by fraud and the fraudster's salary in his or her prior job.*
>
> *…*
>
> *However, the middle way we are adopting would not, at least as a general rule, be appropriate where the performance of the services constitutes a criminal offence. This is because, as explained in para 42 above, the employee or office-holder in that situation has not provided restoration by performing valuable services. In at least most cases, performance of those services has no value that the law should recognise as valid. In that situation confiscation of the full net earnings would not be disproportionate. That is, the take all approach is a proportionate approach in that situation and there is no justification for taking the middle way leading to a lower confiscation order.*

[384] Ibid [45], [48], [53].

National Crime Agency v Feyziyev & Ors [2024] EWHC 501

The appellant (NCA) sought and was granted a without notice application for a Property Freezing Order (PFO), which prohibited the respondents from dealing with their property barred by the PFO, including 22 leasehold properties in London, rental income from them, and a bank account in Liechtenstein. The first respondent was an Azerbaijani parliamentarian and entrepreneur whose income source included companies embroiled in alleged corruption and money laundering operations. In considering the respondent's application to discharge the PFO, the High Court referred to the legal framework for the making of a PFO:[385]

> *Part 5 of the Proceeds of Crime Act 2002 ("POCA 2002") concerns the civil recovery of the proceeds of unlawful conduct and has the purpose of enabling the enforcement authority to recover in civil proceedings property which is or represents property obtained through unlawful conduct, conferring interim powers which are exercisable whether or not any proceedings have been brought for an offence in connection with the property. A PFO is one such interim measure which does not require a final determination that a recovery order must be made (NCA v Davies[2016] EWHC 899 (Admin)).*
>
> *POCA 2002 s245A provides:*
>
> *1) Where the enforcement authority may take proceedings for a recovery order in the High Court, the authority may apply to the court for a property freezing order (whether before or after starting the proceedings);*
> *2) A property freezing order is an order that –*
> *a. Specifies or describes the property to which it applies, and*
> *b. Subject to any exclusions (see section 245C(1)(b) and (2)), prohibits any person to whose property the order applies from in any way dealing with the property.*
> *3) An application for a property freezing order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any of the property.*
>
> *POCA 2002 s394 provides for 'recoverable property':*
>
> *1) Property obtained through unlawful conduct is recoverable property; but*
> *2) If property obtained through unlawful conduct has been disposed of (since it was so obtained), it is recoverable property only if it is held by a person into whose hands it may be followed;*
> *3) Recoverable property obtained through unlawful conduct may be followed into the hands of a person obtaining it on a disposal by –*
> *a. The person who through the conduct obtained the property, or*
> *b. A person into whose hands it may (by virtue of this subsection) be followed.*
>
> *POCA 2002 s242 provides:*
>
> *1) A person obtained property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct;*
> *2) In deciding whether any property was obtained through unlawful conduct –*
> *a. It is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct;*

[385] National Crime Agency v Feyziyev & Ors [2024] EWHC 501, [6].

b. *It is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which have been unlawful conduct.*

In the context of the statutory framework, the Court summarised the applicable principles in determining whether to make, and whether to discharge, a PFO:[386]

> *Part 5 of POCA 2002 provides a mechanism for the civil recovery of property without proof of commission of a criminal offence by any specified individual, let alone the Respondents themselves … A PFO may only be made if there is a "good arguable case" that the property identified is or includes recoverable property.*
>
> *…*
>
> *Nevertheless, for the PFO to continue, there must be a good arguable case of a risk that dissipation could lead to the frustration of any recovery order. I accept and apply Haddon-Cave LJ's summary of the principles set out by Popplewell J in Fundo Soberano de Angola (above): the risk that must be established is of unjustified dissipation; the risk must be real; it must be established by solid evidence; a good arguable case of dishonesty will not be sufficient unless it points to the conclusion that the assets may be dissipated; the use of offshore structures is relevant but not determinative; each case will be fact specific.*

The Court concluded that the NCA had established a good arguable case that the properties owned by the respondents (or held on trust for them) in the UK were recoverable property, which was at a real risk of dissipation by the respondents, and so it ordered the continuation of the PFO. In reaching this conclusion, the Court rejected the respondents' reliance on the fact that even if some of the first respondent's income was obtained through unlawful means, he had other legitimate income sources which were greater than the value of the properties, such that they were not necessarily tainted:[387]

> *However, the fact that the First Respondent may have enjoyed legitimate sources of substantial income and funds is not in itself an answer to the evidence that he has also enjoyed the benefit of funds obtained through unlawful means. There is sufficient evidence at this stage to link him to Avromed Seychelles, and to what appear to be money laundering operations that involved that company and the ABLV bank in Latvia. The movements of tainted money were rapid and substantial and came into his accounts before being used to acquire the PFO Properties.*

R v Miller [2022] EWCA Crim 1589; [2023] 4 WLR 6

This case concerned a confiscation order, wherein the defendant was convicted of fraudulent evasion of Value Added Tax and the cheating of public revenue by submitting false invoices claiming tax repayments, and withholding tax deductions from employees, of three companies of which the defendant was a director and shareholder. At the lower court, the defence counsel opted not to argue the question of whether the corporate veil could be pierced with respect to the amount of benefit to the defendant, as he thought it was unarguable, and so on the defendant's instruction consented to a confiscation order of £5,470,258.

The defendant then appealed against the confiscation order arguing the benefit obtained by the companies could not be attributed to him, citing that the case below was unfair on the basis of incorrect legal advice. The order was ultimately remitted for reconsideration by the lower court, but the relevant discussion of general

[386] Ibid [11], [22].
[387] Ibid [60].

application revolved around the proper assessment of the amount of the defendant's benefit, as a company director and shareholder.

The Court refers to Lord Bingham's normal principle from *Jennings v Crown Prosecution Service*:[388]

> *It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.*
>
> …
>
> *In the ordinary way acts done in the name of and on behalf of a limited company are treated in law as the acts of the company, not of the individuals who do them. That is the veil which incorporation confers. But here the acts done by the appellant and his associate Mr Phillips in the name of the company have led to the conviction of one and a plea of guilty by the other. Thus the veil of incorporation has been not so much pierced as rudely torn away. The crux of the appellant's case, moreover, is that the prime mover in the company was Mr Phillips, not himself, a case which can only be explored by examining the internal management of the company, an examination inconsistent with the treatment of the relevant acts as those of the company.*

After the Court reviewed recent authorities on the concept of separate legal personality of companies, it referred to distinguishing features which define the proper attribution of benefit in such cases:[389]

> *On the information that is available to us, it was certainly arguable that the sums paid to, or withheld by, the companies as a consequence of the frauds were not a proper measure of the benefit to Mr Miller. A final determination requires consideration of all the facts of the case which, for the reasons we have explained, we do not have. However, there were features of the case which, on a proper understanding of the applicable principles, could contribute to the argument on behalf of Mr Miller. First, the proceeds of the frauds were paid to, or retained by, the companies and not to Mr Miller. Second, the companies could not be described as a "sham" or merely a device to facilitate the frauds. They had real business; and they had real employees, as is demonstrated by the fact that the PAYE and NI deducted over the relevant period amounted to nearly £5,000,000. While it is true that the companies collapsed after the balloon went up, that does not derogate from the main point that the companies were "real" concerns carrying on legitimate business while also defrauding the Revenue. Third, although Mr Miller was the director of the companies with control of and responsibility for their financial affairs, that alone does not subvert the principle of separate legal personality, as properly understood…*

[388] [2008] UKHL 29; [2008] 1 AC 1046, [13], [16].
[389] R v Miller [2023] 4 WLR 6, [92].

New Zealand

Case Law Summary

Fraud

R v Williams [1985] 1 NZLR 294

This case was heard in the Court of Appeal Wellington regarding an appeal against conviction and sentence on the grounds of unreasonableness of the verdict arrived at, and misdirection of the jury at trial. Mr Williams was the director of two companies which the Court had previously ordered be wound up. Mr Williams was subsequently charged with theft by fraudulently omitting to account for money received and fraudulently misapplying moneys during his time as director of the two companies.

In order to determine the correctness of the trial judge's jury direction, the Court was required to determine the meaning of 'fraudulently' in the context of theft charges in ss 222, 224 of the *Crimes Act 1961* (NZ).

The Court referred to the English case of *R v Ghosh*[390] which interpreted the meaning of the word 'dishonestly' under the English *Theft Act 1969* (UK) and found that its meaning is a question for the jury that is to be determined by reference to the standards of ordinary, decent people, and whether the accused must have known that their conduct was dishonest by those standards.[391] The *Ghosh* test was accordingly both objective and subjective.

The Court of Appeal did not follow the English approach in *Ghosh*; instead, it applied the earlier New Zealand decision in the case of *R v Coombridge,*[392] where the Court noted that the meaning of 'fraudulently' requires a person to act deliberately and with knowledge that he is acting in breach of his legal obligation. This purely subjective test was thus endorsed by the Court of Appeal in *R v Williams:*

> ***That is how the test has been applied in this country for many years**, and it is the test which must be applied here unless and until a Full Court decides otherwise.*
>
> *In cases under s 222 and s 224 of the Crimes Act 1961 where it is alleged that an accused acted fraudulently, **it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation**. But if, that being established, the accused sets up a claim of honest belief that he was justified in departing from his strict obligations, even for some purpose of his own, then his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct, though legally wrong, might nevertheless be regarded as honest. The failure of the prosecution, in the face of that evidence, to prove that he did not have such a belief, must result in an acquittal* [emphasis added].[393]

Accordingly, even though the trial judge made reference to *Ghosh* when directing the jury, by illustration, his Honour nonetheless made clear to the jury that it was a subjective test that they had to apply, and so the appeal ground as to misdirection failed. The Court also referred, in dismissing the appeal as to sentence, to the trial judge's finding that even though Mr Williams did not have a fraudulent intent initially, his conduct became fraudulent when he failed to correct his course.[394]

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[390] [1982] 2 All ER 689.
[391] [1985] 1 NZLR 294, 307.
[392] [1976] 2 NZLR 381, 387.
[393] *R v Williams* [1985] 1 NZLR 294, 308.
[394] Ibid 310.

Bribery

Field v The Queen [2010] NZCA 556; [2011] 1 NZLR 784

This case concerned an appeal to the Court of Appeal Wellington against the conviction of Mr Field of accepting a bribe as a member of Parliament contrary to s 103 of the *Crimes Act 1961* (NZ), and attempting to pervert the course of justice under s 117. Mr Field was a member of Parliament and Minister of the Crown who accepted free and low-cost labour on his personal properties from Thai people to whom he provided immigration assistance, amounting to over $10,000 in value. This conduct resulted in the Ingram Inquiry into ministerial wrongdoing. During the Ingram Inquiry, Mr Field continually attempted to deceive the investigators to deflect any possible consequences. Following the parliamentary inquiry, further police investigations were conducted into the criminality of Mr Field's conduct and charges were laid. Following a trial by jury, he was convicted. The appeal concerned the submission that the incorrect test for bribery and corruption was applied – as well as other issues of procedure and evidence.

Although this case is concerned with a point of law specific to s 103 of the New Zealand Crimes Act and the nexus between parliamentary members and bribery, the Court still made useful findings on the meaning of both 'bribe' and 'corruptly' in the context of criminal law generally.

In the case, Mr Field was charged against s 103 of the *Crimes Act*, which reads:

> *Corruption and bribery of member of Parliament — (1) Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his capacity as a member of Parliament.*

The Court noted that 'bribe' is defined in s 99 of the *Crimes Act* in a value-neutral way synonymous with gift or gratuity—to mean "*any money, valuable consideration, office or employment, or any other benefit, whether direct or indirect*".[395] This definition shares similarities with the legislative framework in a number of the Pacific Island Nations. The Court also noted that in applying the offence in s 103 someone must first meet the *actus reus* of 'taking a benefit' before the mental element of 'corruptness' becomes relevant.[396] Yet, the offence cannot be made out without this mental element, where liability under it requires a 'blameworthy state of mind'.[397] The Court also referred to the trial judge's description that bribery requires an intent to influence.[398]

Previous cases in New Zealand had considered the meaning of 'corruptly'– a few examples of which are discussed in the case of *Field*:[399]

> ***R v McDonald*****:** *the degree of deliberate criminal intent to accept the benefit in order to be influenced in the performance* [of] *official functions.*[400]
> ***Broom v Police*****:** *Acting dishonestly and with an intention to act in a manner which is morally wicked or depraved.*[401]

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[395] *Field v The Queen* [2011] 1 NZLR 784, 797 [45].
[396] Ibid 797 [48].
[397] Ibid 798 [50].
[398] Ibid 798-9 [53].
[399] Ibid 799 [53].
[400] [1993] 3 NZLR 354, 357.
[401] [1994] 1 NZLR 680, 688.

> ***Hall v District Court at Wellington*****:** *acting with an improper motivation i.e acting dishonestly for a purpose which is outside the realms of* [an] *official's usual powers and is morally unacceptable.*[402]

Ultimately, the Court in *Field* found that the appropriate interpretation of the term 'corruptly' in s 103 is that corruption is conduct conducive to a breach of duty; it means not simply 'dishonestly', endorsing the United Kingdom case of *Cooper v Slade:*[403]

> *First, there is a line of authorities dating back to the decision of the House of Lords in Cooper v Slade. In that case the majority held that "corruptly" meant "purposely doing an act which the law forbids as tending to corrupt". Professor Smith has suggested that such an interpretation leaves the word "corruptly", "devoid of any functional significance". In Broom v Police, Tipping J voiced the similar criticism that that definition, as adopted in R v Wellburn, was "open to the dual criticism of being both unhelpful and potentially circular".*
>
> *…*
>
> *We take the view, although it is not completely free of difficulty, that the first line of reasoning is the more appropriate for s 103.*
>
> *First, corruption is not in essence an offence of dishonesty or fraud and should not be treated as such. Dishonesty and fraud involve the unlawful infliction of loss or at least the risk of loss. In our view, corruption is conduct conducive to a breach of duty; it may or may not involve dishonesty or fraud. We note that, consistent with this analysis, Willes J in Cooper v Slade stated expressly his judgment that "corruptly" "means not dishonestly" for the purposes of the statute there in play.*[404]

Although criticism exists for the definition outlined in *Slade v Cooper,* the Court considered that as a matter of general principle:

> *the sounder basis on which to put the offence relating to a member of Parliament is to recognise that it catches the corrupt acceptance of a "bribe" in connection with the performance of that member's duties as a parliamentarian. A bribe is corruptly accepted if in accepting the bribe the particular member is knowingly outside the recognised bounds of his or her duties.*[405]

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[402] CP256/98, 25 September 1998.
[403] (1858) 10 ER 1488, 1499 (Willes J).
[404] *Field v R* [2011] 1 NZLR 784, 800 [55], [57]-[58].
[405] Ibid 802 [64].

Corruption

R v Nua [2001] 3 NZLR 483

This case was heard in the Court of Appeal Wellington, with the appellant seeking a reduced sentence on the grounds of excessiveness. Mr Nua was a public servant in the New Zealand Customs Service for 12 years. Mr Nua was tasked with inspecting imported cars for odometer tampering and due to his experience was unsupervised in his duties. Mr Nua was approached by a car importer and entered into an agreement to allow for cars with tampered odometers to be allowed into New Zealand without GST being paid. This resulted in a total loss of $293,000 in unpaid GST. Mr Nua was paid cash in return, given two of the imported vehicles, and had a number of overseas holidays paid for, with his benefits totalling between $150,000 and $200,000 NZD. Mr Nua was charged with 1 count of corruption and 30 counts of fraudulently using documents, to which he plead guilty, being sentenced concurrently to four years' imprisonment. The Court of Appeal dismissed the appeal and declined to adjust the sentence, noting that the case was serious, the sentence was not inconsistent with prior decisions, and overwhelmingly there was a need for 'unmistakable deterrence' against corruption.[406]

Burgess v Field [2007] NZHC 1944; [2007] 3 NZLR 832

This decision arose from the same factual background as *Field v The Queen*, and was a precursor of the prosecution that led to the convictions that were there the subject of appeal. In accordance with the procedural requirements of s 103(3) of the *Crimes Act 1961* (NZ), in order to prosecute the charges of corruption and bribery of a member of Parliament, leave must first be sought from a High Court Judge. This case was the first time— in 46 years— where the provision had been invoked since it was enacted, and the Court was not aware of comparable provisions in other Commonwealth countries, so the judgment sought to define the applicable criteria.

Randerson J surveyed the legislative history that has guided the requirement for High Court Judge approval for prosecution. At the outset, it was noted that the requirement took its inspiration from the equivalent provisions in Canada. Making reference also to then-proposed corruption laws in the UK, his Honour noted the suggestion that 'Members of Parliament as public figures may be vulnerable to frivolous or vexatious private prosecutions for corruption'.[407] In this outline of the legislative history, it was noted that Australia does not have any prerequisites to prosecution.[408]

Randerson J considered that in considering whether to grant leave for prosecution under s 203, although the High Court's discretion is unfettered, the Court should consider the seriousness of the allegation and whether there was public interest in the prosecution,[409] but there is no need for a clear *prima facie* case to be established, as that would set the threshold too high.[410] His Honour ultimately granted leave to prosecute.

[406] *R v Nua* [2001] 3 NZLR 483, 488 [19]-[20].
[407] *Burgess v Field* [2007] 3 NZLR 832, [16], [18], [38], [45].
[408] Ibid [19].
[409] Ibid [55].
[410] Ibid [48].

Money Laundering

R v Allison [2005] NZCA 204; [2006] 1 NZLR 721

The Court accepted in this case that there was no requirement for the Crown to prove the elements of a separate, antecedent serious offence in order to find an accused guilty of a money laundering offence in s 257A(2) of the *Crimes Act 1961* (NZ) (as it then stood, prior to its repeal).

Instead, they were only required to prove, beyond reasonable doubt, that all or part of the property that is the subject of a money laundering transaction is the proceeds of a serious offence and that the accused knew or believed that to be so.[411] It is not necessary to demonstrate that the property was the proceeds of a specific, provable serious offence, nor that the accused was involved in the serious offending.[412] It is possible to prove the fact that the property is the proceeds of a serious offence by way of an inference, supported by the available evidence.[413]

Milosevic v The King [2022] NZCA 479

This case concerned a police operation that targeted a crime syndicate known as the 'Mongrel Mob'. They were a group responsible for a business selling methamphetamine and cannabis. It was alleged that $510,000 NZD was laundered by the accused. On appeal against conviction, the New Zealand Court of Appeal was required to answer questions of law to do with the conduct of the trial judge said to result in a miscarriage of justice.

The money laundering offences were largely based on evidence of the accused's financial records analysed by an accountant, Ms Clay, who concluded that there was an unexplained gap of $510,000 NZD of unrecorded expenses. The Crown case at trial alleged that this entire amount, the source of which could not be explained, must have been proceeds of the drug offending, but the Court of Appeal determined that the evidence did not support this conclusion because much of those funds came from transactions predating the drug dealing.[414]

The accused had sought a severance of the money laundering charges on the basis that they were laid by the Crown late in the process, and they were not given an adequate opportunity to challenge the evidence relating to their financial records. The trial judge disagreed:[415]

> *[76] The Crown case against all defendants is that they are involved in drug dealing. Drug dealing produces money. For the four defendants now the subject of money laundering charges there was always going to be evidence of their financial situation.*
>
> *[77] In defending the money laundering charges Ms Tawera and Ms Raki would need to confront that evidence.*

The trial judge also hinted at available challenges that can be utilised by a defendant in a money laundering trial, including proof that the proceeds did not derive from a crime, or that there was no relevant criminal mental element underlying the dealings with the money – stating:[416]

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[411] *R v Allison* [2006] 1 NZLR 721, 728 [28].
[412] Ibid.
[413] Ibid.
[414] *Milosevic v The King* [2022] NZCA 479, [109]-[111].
[415] Ibid [119].
[416] Ibid [120].

> *[86] The response to the elements of a charge of money laundering can be a challenge as to whether a given defendant dealt with property, whether it was the proceeds of crime or as to mens rea involving belief or recklessness.*
>
> *[87] All of those challenges were open to Mr [F] Milosevic on the intended evidence of Detective Shallcrass regardless of whether the formal elements of a money laundering charge were at issue in the trial. ...*

Accordingly, the trial judge suggested that, in response to evidence of unexplained profits or sources of cash that are alleged to be the proceeds of crime, it is the duty of the defence, in challenging that evidence, to demonstrate the legitimacy of earnings as they are the party with the convenience of possessing the information:[417]

> *[97] Furthermore, no expert can address the elements of money laundering. That is for the defendants who are in the best position to provide an innocent explanation for what is said to be an unexplained cash source. Only they know where the funds came from.*

The Court of Appeal agreed that a failure of the defence to cross-examine and challenge the Crown's evidence, generally speaking, would be to their own detriment.[418] However, in this case the Court found that the convictions on the money laundering charges ought to be quashed. This was because the Court disagreed with the trial judge's decision not to order severance of the charges, and his Honour's failure to adequately direct the jury to correct the deficiencies in the Crown's evidence as to the source of the unexplained funds and when they were acquired.[419]

[417] Ibid [125].
[418] Ibid [121].
[419] Ibid [149]-[150], [153].

Proceeds of Crime

Milosevic v The King [2022] NZCA 479

In the same case referenced above, the Court also made observations about criminal asset forfeiture in comparison to civil forfeiture:[420]

> *In* Wu v Commissioner of Police*, this Court explained the types of forfeiture orders that may be made under* [the New Zealand Criminal Proceeds (Recovery)] *Act:*
>
> > *To eliminate the chance of profiting from criminal activity, the Act provides two main types of civil orders forfeiting respectively tainted assets and property more generally. The first, an assets forfeiture order, must be made by the High Court where it is satisfied on the balance of probabilities that the assets in question are tainted. Assets are tainted where they have been acquired or derived wholly or in part from significant criminal activity. The owner of those assets need not have been responsible for, or even aware of, that activity. The second, a profit forfeiture order, must be made where the High Court is similarly satisfied the owner of the assets in question has knowingly benefited from significant criminal activity, even though those assets are not themselves tainted. ...*
>
> *So the standard of proof for forfeiture is the (civil) balance of probabilities. For the regime's provisions for without and with notice restraining orders, the standard is the lower requirement of being satisfied on "reasonable grounds". We also note the owner of assets to be forfeited as "tainted" need not be aware of the taint. Nor does there need to have been a conviction for the relevant significant criminal activity. It is in that context that the evidence provided by Detective Shallcrass and Ms Clay on the money laundering charges was originally prepared.*
>
> *But in a criminal trial the context is importantly different to that of civil forfeiture proceedings.*
>
> *Not only is satisfaction of the elements of the charges required to meet the criminal standard of proof beyond reasonable doubt, but also the Crown must establish to that same standard the funds being laundered were the proceeds "of an offence" and the defendants knew that as alleged here, or as is also possible, were reckless as to that possibility. We note for completeness, however, that the "offence" from which the proceeds are said to have derived need not have resulted in a charge or a conviction.*

[420] Ibid [102]-[105].

Australia

Case Law Summary

Fraud

R v Cushion **[1997] QCA 380;** (1997) 150 ALR 45

This case concerned the falsification of a search warrant by a police officer in connection with a drug offence. Although it was later revealed that a search warrant was in fact not necessary for the search, on being requested to provide one, the officer sought to falsify and lie about the facts pertaining to the procurement of the warrant. This was in contravention of s 72 of the *Crimes Act 1914* (Cth) (**Commonwealth Crimes Act**), as it was then in force. The Court was asked to interpret the meaning of the word 'fraudulently' in s 72 of the Commonwealth Crimes Act, and determine whether it requires that an intention to defraud, or to intentionally deprive of property interests, be proved.

Although s 72 has since been repealed,[421] that section was framed in similar terms to the provisions related to official fraudulent conduct currently within the legislation of Pacific Island Nations. The relevant section of the Commonwealth Crimes Act read as follows:

> *72. Any person who, being a Commonwealth officer, fraudulently and in breach of his duty:*
>
> *(a) makes any false entry in any book, record or document;*
>
> *(b) omits to make any entry in any book, record or document;*
>
> *(c) by act or omission falsifies any book, record or document;*
>
> *(d) destroys or damages any book, record or document;*
>
> *(e) furnishes any false return of any property; or*
>
> *(f) omits to furnish any return of any property;*
>
> *shall be guilty of an indictable offence.*
>
> *Penalty: Imprisonment for 7 years.*

R v Cushion is supporting authority for the position that 'fraudulently', in this context, means simply 'dishonestly'.[422]

> *The word "fraudulently" is, unfortunately, another word that is capable of more than one meaning or shade of meaning depending on the context in which it is used. In Jackson v R (1976) 134 CLR 42 at 45; 9 ALR 65 at 66, Barwick CJ said that s 441 dealt with "the making of false entries by a servant in the master's books of account with intent to defraud, that is to say fraudulently". Mr Long seized on this as establishing the equivalence of the two expressions. However, if "fraudulently" has the broader meaning of the two, it may not serve his interest to rely on authority showing that "intent to defraud" has an equally broad meaning. He also referred to R v Kastratovic (1985) 19 A Crim R 28 at 30-1, 38, where the judgments of King CJ and White J show a disposition to equate "fraudulently", with "intent to defraud", as having, as King CJ stated it (at 31), "the intention to produce a consequence which is in some sense detrimental to a lawful right, interest, opportunity or advantage of the person to be defrauded". That is itself perhaps wide enough to encompass the respondent's intent in the present case.*

[421] Repealed by section 154 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).
[422] *R v Cushion* (1997) 150 ALR 45, 105 (Williams J).

> *On the other hand, there is a good deal of authority to show that "fraudulently" in legislation creating statutory offences is often used to mean no more than "dishonestly", and that it is not, or not necessarily, confined in meaning to depriving someone of a right or advantage.*
>
> *…*
>
> *Probably, however, the strongest authority in favour of Mr Weinberg's submission is the decision in R v Glenister [1980] 2 NSWLR 597, where the Court of Criminal Appeal had occasion to consider the meaning of "fraudulently" in a charge under s 173 of the Crimes Act 1900 (NSW) against a company director of fraudulently applying property of the company to a use or purpose other than the use or purpose of that company. The court, comprising Moffit P, Glass JA and Nagle CJ at CL, having first undertaken a review of the use of the ingredient "fraudulently" in statutory offences in the past, concluded (at 604) that "the course of judicial decision in the hundred years or so since these new statutory offences were created has assigned to the term `fraudulently' a meaning interchangeable with `dishonesty'".*[423]

Ultimately, the Court used this finding to determine that the term 'fraudulently' in s 72 did not require proof of 'intent to defraud'.[424] The Court also held that the term 'fraudulent' does not imply or require an adverse effect on property rights.[425]

This case postponed any findings on the meaning of dishonesty and the adoption of the UK authority *R v Ghosh* because that issue of interpretation was then under consideration by the High Court of Australia in *Peters v The Queen.*[426]

Peters v The Queen [1998] HCA 7; **(1998) 192 CLR 493**

In *Peters v The Queen,* the question for determination by the High Court of Australia concerned jury directions given during trial relating to the crime of conspiracy to defraud under ss 86(1)(e) and 86A of the Commonwealth Crimes Act (which have since been repealed).[427] In order to determine the correctness of the directions given, the Court was required to determine whether dishonesty was an element of the applicable offence, and if so which test for dishonesty was applicable. Toohey, Gaudron, McHugh and Gummow JJ determined that whilst it is not a required element of the offence of conspiracy to defraud to prove that the accused knew they were acting dishonestly, dishonesty is relevant to describe the means used to defraud, with Kirby J in dissent contending that it is in fact a separate element of the offence.

This case considered the application of different tests for dishonesty adopted in the UK case of *R v Ghosh* and Victorian case of *R v Salvo* [1980] VR 401– the latter being a subjective test only, but the former being both objective and subjective. It is important to note that Pacific Island judiciaries have to different extents considered the application of the *R v Ghosh* 'ordinary decent people' test. The High Court noted that the test in *R v Ghosh* was guided in part by the proposition in *R v Feely*, that 'dishonestly' is a word that can be interpreted in its ordinary meaning and accordingly can be interpreted by a jury without direction from a judge. The High Court *noted*, however, that Fullagar J in *R v Salvo* described the interpretation of 'dishonestly' in *R v Feely* as "unworkable".[428] Kirby J also canvassed a number of difficulties in applying the *R v Ghosh* 'ordinary decent people' test.

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[423]Ibid 102-3 (McPherson JA).
[424] Ibid 103.
[425] Ibid 104, 105 (Williams J)
[426] Ibid 104 (McPherson JA).
[427] The offence of conspiracy to defraud, in different language, is now found in s 135.4 of the *Criminal Code Act 1995* (Cth).
[428] *R v Salvo* [1980] VR 401, 439.

Because of its finding that the offence of conspiracy to defraud does not include a separate element of dishonesty, the Court did not provide a clear finding as to which test of dishonesty is preferable. However, the majority judgment of Toohey and Gaudron JJ (with whom Kirby J concurred for the purpose of determining the matter, albeit in disagreement as to the dishonesty test)[429] suggested that the question of dishonesty is to be determined by applying the standards of ordinary, decent people, supporting the test adopted in *R v Ghosh.* Notwithstanding this finding, the test in *R v Ghosh* has been continuously scrutinised (and has since been disapproved and modified in the UK) and as stated by Kirby J, it has the ability to be futile and misleading.[430]

With specific reference to the interpretation of the word 'fraud' and its corresponding adverbs, Kirby J noted that "fraud" and "dishonesty" may be used interchangeably.[431] Although this case goes into significant depth and discussion of the case law and literature that guides the interpretation of dishonesty and fraud, it also stands as an example of divisiveness in this area of law.

Director of Public Prosecutions (CTH) Reference No 1 of 1996 [1998] 3 VR 217

This case concerned the acts of a post office employee fraudulently misappropriating property, in the form of money orders, belonging to a public authority under the Commonwealth contrary to s 71 of the *Commonwealth Crimes Act*. That section has since been repealed, but the Court's reasoning may still be useful by application to offences in similar terms.

The Victorian Supreme Court was asked to consider the following three questions in connection with s 71 of the *Commonwealth Crimes Act*:

i. *whether the offences of stealing, fraudulent misappropriation and fraudulent conversion are three separate, mutually exclusive offences dealing with transactions which are fundamentally different from each other;*
ii. *whether the offence of fraudulent misappropriation was equivalent to the statutory offence of embezzlement which existed at the time s 71 was enacted in 1914;*
iii. *whether an offence of fraudulent misappropriation is open only in circumstances where an accused obtains possession of the property on behalf of the Commonwealth from a person other than the Commonwealth.*

The relevant section, when it was in force, read:

> *(1) Any person who steals or fraudulently misappropriates or fraudulently converts to his own use any property belonging to the Commonwealth, or to any public authority under the Commonwealth, shall be guilty of an offence.*
>
> *(2) Any property which comes into the possession of any Commonwealth officer by reason of the fact that he is a Commonwealth officer shall, for the purposes of this Act, be deemed to be the property of the Commonwealth, or, if the officer is employed in the service of a public authority under the Commonwealth, of that authority, notwithstanding that the officer was not authorized to receive it.*

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[429] *Peters v The Queen* (1998) 192 CLR 493, [137]-[138], [140], [145] (Kirby J).
[430] Ibid [125].
[431] Ibid [114] (Kirby J) citing *R v Scott* [1975] AC 819, 839; *R v Glenister* [1980] 2 NSWLR 597, 604-5; *R v Lawrence* [1997] 1 VR 459, 466; cf *Balcombe v DeSimoni* (1972) 126 CLR 576, 583-4, 588, 594-5.

> *(3) A person who receives property belonging to the Commonwealth or to a public authority under the Commonwealth knowing the property to have been stolen or obtained in circumstances that amount to an offence against a law of the Commonwealth shall be guilty of an offence.*

Subsection (2) operates to elaborate on the meaning of 'belonging to the Commonwealth', where the Court noted that this subsection was inserted into the offence in response to the opinion of the High Court of Australia in *R v O'Donoghue* (1917) 23 CLR 9 which stated:

> *… property did not come into the possession of a Commonwealth officer "by virtue of his employment" within the meaning of this section unless he had authority as an officer to receive it.*[432]

This language bears similarity to various provisions of Pacific Island Nations that require property to be misappropriated 'by virtue of employment' as an official.

The Court arrived at the view that the offences of stealing and fraudulent misrepresentation under s 71 were separate offences involving fundamentally different transactions. As a result, where conduct constitutes stealing (or larcenous taking at common law), it could not be considered fraudulent misrepresentation.[433] The Court was also in agreement on the factual question that servants of the Commonwealth such as the respondent have custody, rather than possession, of Commonwealth property they deal with in the course of their duties.[434] Beyond that, the Court's reasoning as to the exact scope of the offence of fraudulent misrepresentation, and the willingness to answer the questions of reference, differed.

Brooking JA, with whom Vincent AJA agreed, declined to give a clear opinion about the questions raised by the reference, beyond the finding of mutual exclusivity of the offences. As such, their Honours did not conclude the question whether fraudulent misrepresentation covers only Commonwealth property in the possession of the accused, or also that which the accused holds in their custody; nor the question as to whether the offence is equivalent to embezzlement. However, Brooking JA appeared to favour a narrow interpretation of 'fraudulently misappropriates'.

On the other hand, Winneke P determined that the offence of fraudulent misappropriation in s 71 was not confined to circumstances where legal possession of Commonwealth property had been acquired: it also extended to situations like the case under consideration where Commonwealth property (like the money orders) was in the custody of an employee or official, but not in their exclusive possession when it was misappropriated.[435] In general, his Honour favoured a broader interpretation of 'fraudulently misappropriates', covering the 'dishonest misapplication of property entrusted to an accused and/or for which he was obliged to account', beyond that which would constitute stealing.[436]

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[432] *Director of Public Prosecutions (CTH) Reference No 1 of 1996* [1998] 3 VR 217, 230-1.
[433] Ibid 228 (Winneke P), 238-9 (Brooking JA).
[434] Ibid 225 (Winneke P), 239 (Brooking JA).
[435] Ibid 223-4, 225-6 (Winneke P).
[436] Ibid 228 (Winneke P).

Hughes v The Queen **[2021] NSWCCA 238; (2021) 291 A Crim R 252**

This case considered the meaning of 'deception' in the offence of fraud within s 192E of the New South Wales *Crimes Act 1900* (NSW).

The relevant section bears similarity to many like provisions over many jurisdictions:

> ***Fraud***
>
> *(1) A person who, by any deception, dishonestly:*
>
> *(a)obtains property belonging to another, or*
>
> *(b)obtains any financial advantage or causes any financial disadvantage,*
>
> *is guilty of the offence of fraud.*
>
> *Maximum penalty: Imprisonment for 10 years.*
>
> *(2) A person's obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property.*
>
> *(3) A person may be convicted of the offence of fraud involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.*
>
> *(4) A conviction for the offence of fraud is an alternative verdict to a charge for the offence of larceny, or any offence that includes larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for the offence of fraud.*

The applicant in this case was the practice manager at a medical centre, who had, over a more than 6-year period, transferred funds from the medical centre account to her personal bank accounts, and made incorrect entries in the centre's record-keeping system to conceal these transactions. In seeking an appeal against her sentence for fraud by obtaining financial advantage, the applicant submitted that there was no evidence that other staff members reviewed the record entries as against other financial records, such that there was no material to ground a finding that the centre was deceived, specifically, by the making of those entries.

When interpreting the meaning of 'deception', the New South Wales Court of Criminal Appeal rejected the applicant's submission and stated that:

> *There is no requirement that the operative deception be proved by direct evidence. Nor is there a requirement that the deception operated on the mind of a natural person: see National Commercial Banking Corporation of Australia Ltd v Batty (1986) 160 CLR 251; [1986] HCA 21.*[437]

[437] *Hughes v R* (2021) 291 A Crim R 252, [48].

Bribery

R v Allen (1992) 27 NSWLR 398

This case before the New South Wales Court of Criminal Appeal involved an appeal against the conviction of a senior police officer of five counts of bribery towards a junior police officer, who was in charge of the Licensing Branch that supervised licensed premises (e.g. restaurants, bars, entertainment venues). The appellant was said to have paid the bribes upon the influence of a third person who had a vested interest in licensed businesses in the area, with a view to dissuade the junior officer's vigorous enforcement of licensing requirements, although that outcome was not explicitly expressed to the junior officer when the money was given.

This case briefly delves into a comparison of various interpretations of the common law offence for bribery, with a number of references made to case law outlining common elements of intent and influence.

Reference was made to two South African cases, the first being *R v Sacks,* which stated:

> *Under our common law, therefore, the crime of bribery includes the making of a gift to an official in order to influence him to do something in conflict with his duty.*[438]

In the second South African case referred to, *S v Deal Enterprises (Pty) Ltd* [1978] 3 SA 302 at 308, Nicholas J explained that:

> *The mental element of the crime of bribery has been described as 'a corrupt purpose', or 'a corrupt intent' …*
>
> *The existence of a corrupt intent is something to be inferred from the facts of each particular case, and must depend upon many circumstances, involving, for example, the time and the place; the position respectively of the giver and the recipient; whether the gift is of a moderate or an immoderate amount; and whether it is given openly or secretly, underhandedly or clandestinely.*[439]

In *Allen*, the appellant gave no instructions with each payment to suggest a corrupt favour, but insisted they be taken despite the junior officer's reluctance. The junior officer, unnerved by the pressure he felt was being exerted, reported the bribes. The Court considered that 'an evil intent on the part of the recipient is not a necessary element in the crime of bribery'.[440] It also rejected the appellant's submission that for the offence to be made out there must be a sufficiently specific improper purpose for the bribe, which must actually be communicated to the recipient, holding that:

> *In its application to circumstances such as the present, the gravamen of the offence of bribery is the making or offering of a payment with an intent to incline a person in public office to disregard his duty. The occasion for the disregard of duty need not have arisen at the time of the offence, and it need never arise. Nor is it necessary that the particular kind of contemplated breach of duty be specified at the time of the payment or inducement.*[441]

It should be borne in mind, however, that this finding came in the context where the appellant made only a bald denial of having made the payments in a brief unsworn statement, and did not give adequate alternative

[438] *R v Sacks* [1943] AD 413, 423.
[439] *R v Allen* (1992) 27 NSWLR 398, 401.
[440] Ibid 400.
[441] Ibid 401.

innocent explanations for the proven circumstances.[442] Nonetheless, the Court's framing of the offence of bribery in this way has been contested: see *R v Glynn* (1994) 33 NSWLR 139, 144.

R v Dougas; R v Read; R v Linke (No 12) [2022] NSWSC 332

This case was in relation to three individuals who were tried jointly for their involvement in conspiring to influence a foreign public official by providing a benefit in order to obtain business, in contravention of s 70.2 of the Commonwealth *Criminal Code*. The judgment was delivered *ex tempore* and has limited detail other than Adamson J outlining her Honour's directions to the jury based on the prosecution's arguments:

> *Accordingly, I will direct the jury, in relation to s 70.2(1)(a)(i) as follows:*
>
> *"The Crown case is that the conspiratorial agreement was to provide a benefit. You must be satisfied beyond reasonable doubt that there was such an agreement. The following would not, of themselves and without more, amount to an agreement to provide a benefit:*
>
> *(i) causing a benefit to be provided to another person;*
> *(ii) offering to provide or promising to provide a benefit to another person; or*
> *(iii) causing an offer of the provision of a benefit or a promise of the provision of a benefit to be made to another person.*
>
> *Of course, if you consider that any one of (i), (ii) or (iii) is also made out, this does not mean that you cannot find that the agreement was to provide a benefit. However, you cannot find this ingredient of the offence made out unless you are satisfied that the conspiratorial agreement was actually to provide a benefit.*[443]
> …"
>
> *The direction I propose to give to the jury on these matters is as follows:*
>
> *"The Crown case is that the conspiratorial agreement was to provide a benefit 'in order to obtain or retain business'. You must be satisfied beyond reasonable doubt that was the purpose of the agreement. In order to be satisfied of this, you must be satisfied that there was a direct connection between the provision of the benefit and the purpose of obtaining or retaining business.*
>
> *The following examples would not amount to an agreement to provide a benefit in order to obtain or retain business:*
>
> *i. payments for the purpose of ensuring that the tenderer would not be excluded from the tendering process;*
> *ii. payments for the purpose of ensuring the job runs smoothly; or*
> *iii. payments for a visa or tax concession.*
>
> *While the payments in these three examples might have an indirect connection with the obtaining or retaining of business, this is not enough. There must be a direct connection."*[444]

[442] Ibid 399-400.
[443] *R v Dougas; R v Read; R v Linke (No 12)* [2022] NSWSC 332, [10].
[444] Ibid [16].

Corruption

CDPP v Brady [2016] VSC 334; (2016) 346 FLR 1

This case was in the context of charges of conspiring to bribe foreign bank officials, contrary to ss 11.5(1) and 70.2(1) of the Commonwealth *Criminal Code*. Speaking generally, when considering whether a statutory power has been exercised with lawful authority, the Victorian Supreme Court noted that the purpose must be exercised in accordance with the purpose for the power existing, stating:

> *The relevant legal principles are not contentious. A statutory power must be exercised for the purpose for which it was conferred. If the power is exercised for more than one purpose, where one of those purposes is improper, the exercise of the power will be vitiated if the improper purpose was a substantial purpose (in the sense that the decision would not have been made but for the improper purpose).*
>
> *An improper purpose will not lightly be inferred and, by application of the presumption of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power.*[445]

R v Maudsley **[2021] QCA 268**; (2021) 9 QR 587

In Queensland, the offence of misconduct in relation to public office is covered under s 92A of the *Criminal Code Act 1899* (Qld). The position in Queensland on the offence of misconduct in relation to public office is focused very much on the intention of a public official to use a power. The Queensland Court of Appeal noted that the intention is the only thing that separates an exercise of public authority from being corrupt or not – stating:

> *The offence under s 92A requires the proof of an intention. Generally, motive and intention mean different things, and the motive by which a person is induced to form an intention is immaterial so far as regards criminal responsibility: s 23(3) of the Code. Nevertheless, in the context of s 92A, the intention which is required under s 92A refers to a purpose for which the officer acted. It may be accepted that where the officer acted with an improper purpose as described in s 92A, that need not have been the officer's sole purpose for the offence to have been committed. The critical question here is whether an offence is committed in a case where, absent the improper purpose, the officer would still have acted as he did.*[446]
>
> *…*
>
> *The relationship between the required intent and the officer's conduct being one of causation, the preferrable construction is that for an offence to have been committed, the intention or purpose must have been causative in the sense that, but for that intention, the "authority of office" would not have been exercised as it was.*[447]

The primary judge construed s 92A as not requiring that causative link, reasoning that the section on its face does not impose this requirement, and purports to depart from the equivalent common law offence. In overturning the primary judgment, the Court of Appeal considered that the common law can provide useful guidance as to the interpretation of the section. The Court cited with approval a description of the common law offence found in a report by the Crime and Misconduct Commission, whose recommendations influenced the drafting of the statutory offence:

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[445] *Director of Public Prosecutions (Cth) v Brady* (2016) 346 FLR 1, 69 [403]-70 [404].
[446] *R v Maudsley* (2021) 9 QR 587, [27].
[447] Ibid [30].

Its broad nature is best understood by giving examples of the types of conduct caught by the common law offence of misconduct in public office:

1. *Fraud and deceits in office, such as where a public officer conceals a personal interest in a contract to which his/her official duties relate;*
2. *Wilful neglect of duty (nonfeasance), such as where a police officer refuses to enforce the law;*
3. *Wilful misuse of official power (misfeasance), such as where favouritism is displayed in the awarding of contracts or licences to a person;*
4. *Wilful abuse of position or excesses of official authority (malfeasance), such as where a Minister wilfully uses his/her official influence to mislead or suppress an investigation in a matter in which he or she is personally interested; and*
5. *The intentional infliction of harm or injury on a person (oppression), such as where a prison officer permits the assault of a prisoner.*

The essence of the offence is that it is concerned with public officials who act (or omit to act) contrary to the duties of their office in a manner which so injures the public interest that punishment is warranted. While financial gain, dishonesty and corruption are often aspects of the offence, they do not constitute elements of it.[448]

[448] Crime and Misconduct Commission, *Public Duty, Private Interest: Issues in pre-separation conduct and post-separation employment for the Queensland Public Sector*, Report (18 December 2008), 28.

Money Laundering

Milne v The Queen [2014] HCA 4; (2014) 252 CLR 149

In this case the High Court of Australia discussed the construction of s 400.3 of the Commonwealth *Criminal Code.*[449] The context was related to shares being sold by a private company with the intention of not declaring the capital gain of the sale with the tax office, to avoid those profits being taxed unfavourably. The shares were thus alleged to be an 'instrument of crime' used to facilitate the commission of an offence of obtaining financial advantage by deception, when the capital gain from their sale was not ultimately declared in tax returns.

The Court identified that the appeal turned on whether s 400.3 of the Code and the definition of 'instrument of crime' in s 400.1 properly applied to the conduct alleged by the Crown.[450] The Court rejected an extended interpretation of the meaning of the words 'use' and 'facilitate' in the Code, and ultimately found that the disposal of the shares could not properly be characterised as their 'use' as an instrument of crime within the language of the Code. The Crown case therefore failed, and a verdict of acquittal was ordered to be entered in lieu of the indictment made by the lower court.

The Court noted that the offence of money laundering is broken down into physical and fault elements which must each be present in order to bring a successful case:

> *The offence created by s 400.3(1) of the Code may be resolved into physical and fault elements within the meaning of Divs 4 and 5 of Pt 2.2 of the Code. Section 400.3(1)(a) defines a physical element of the offence, namely dealing with money or other property. As a physical element which is conduct, it attracts a fault element of intention pursuant to s 5.6(1). A second physical element, defined by s 400.3(1)(c), is that the value of the money or other property is $1,000,000 or more (an element of circumstance). As an element of circumstance it attracts, by operation of s 5.6(2), a fault element of recklessness. Section 400.3(1)(b)(ii) defines an element of intention. Whether it can or should be characterised as a fault element or otherwise need not be explored for the purposes of this appeal.*[451]

The Court determined that s 400.3(1)(b)(ii) requires an instrumental connection between the intended use of property said to be an instrument of crime, and the commission or facilitation of the commission of an offence. It held, in effect, that the conduct in disposing of the shares was too far removed from the ultimate alleged commission of the offence, being the deception in the later tax return. The Court interpreted the meaning of 'used' in the context of the statute – stating:

> *For property to become an instrument of crime within the meaning of s 400.3(1) it must be "used". An ordinary meaning of the verb "use" is "[t]o make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose". That is the relevant ordinary meaning for the definition of "become an instrument of crime" which involves the "use" of property to serve a purpose, namely the "commission of an offence" or "to facilitate the commission of an offence". The relevant ordinary meaning of "facilitate" in this case is "[t]o render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process)".*[452]
>
> …

[449] Note that since the decision in *Milne v The Queen*, additional offences have been inserted to the Code which are intended to capture a broader range of money laundering conduct: *Crimes Legislation Amendment (Economic Disruption) Act 2020* (Cth).
[450] *Milne v The Queen* (2014) 252 CLR 149, 161 [28].
[451] Ibid 156-7 [13].
[452] Ibid 163 [33].

> *The definition of "instrument of crime" and the deployment of that term in* s 400.3(1)(b)(ii) *require a temporal separation between the requisite dealing and the intended use of the property. They also require an instrumental connection between the intended use of property and the commission or facilitation of the commission of an offence. Conduct involving property which is no more than a necessary condition of the commission of a subsequent offence does not on that account amount to the use of the property in or to facilitate the commission of that offence. Nor is the instrumental connection demonstrated merely by an intention to take advantage of circumstances arising after and as a result of the requisite dealing. A fortiori, that is the case where that property has been put beyond the reach of the accused by sale to a third party.*
>
> *Section 400.3(1) creates a serious offence. It is punishable by a term of imprisonment of up to twenty-five years. In the end the "broad construction" proffered by the respondent seemed to involve little more than the proposition that, however construed, it fits the facts of this case. As a matter of textual analysis, it does not. Purposive construction does not justify expanding the scope of a criminal offence beyond its textual limits. In this case, those limits are not narrowly defined. The language of s 400.3(1)(b)(ii), and its associated definitions, is capable of application to a range of circumstances which fall within their ordinary meanings. Its construction according to the ordinary meaning of its words is sufficient to provide a broad coverage consistent with its purpose and without resort to "extended" meanings of those words.*[453]

Chen v Director of Public Prosecutions (Cth) [2011] NSWCCA 205; (2011) 83 NSWLR 224

In this case, the New South Wales Court of Criminal Appeal set aside, by majority, the conviction of the appellant of the offence of money laundering contrary to s 400.5(1) of the *Commonwealth Criminal Code.* The judgments contain a number of useful passages relating to the application of the money laundering offence:

> *The drafting of these provisions has a superficial simplicity which is belied by any attempt to apply them. As explained by Simpson J in Ansari v R [2007] NSWCCA 204; 70 NSWLR 89 at [15], in relation to the similarly structured s 400.3:*
>
> > *"The distinguishing feature between the first and second offence in each pair is temporal: the first is an offence where an indictable offence has already been committed, yielding the money or property as proceeds; the second is an offence where an indictable offence is envisaged or contemplated in the future."*[454]

The decision is authority for the proposition that 'dealings' with money that are alleged to be the instrument for the commission of a crime (the physical element in s 400.5(1)(a)) cannot also constitute the crime allegedly thereby intended to be committed (the mental element in s 440.5(1)(b)(ii)). This determination applied the reasoning from an earlier case:

> *Simpson J recorded in Arora v Commonwealth Director of Public Prosecutions [2011] NSWSC 552 at [19], the plaintiff's argument that:*
>
> > *" … sub-para (1)(b)(ii) of s 400.3 … require(s) an intention that the money the subject of the dealing will (that is, in the future) become an instrument of crime. But … when the dealing is completed, the offence of structuring is also completed. There is no scope for a crime to be committed in the future.*

[453] Ibid 164-5 [37]-[38].
[454] *You Qing Chen v Director of Public Prosecutions (Cth)* (2011) 83 NSWLR 224,, 299 [17] (Basten JA).

> *The dealing and the structuring, being, in effect, identical transactions, are necessarily simultaneous."*
>
> *Although her Honour described the argument as "… perhaps, rest[ing] on a firmer foundation … ", she did not explicitly accept it, as it was not necessary for the determination of the issues posed in that case. However, I find the logic of that argument, when applied to the facts proved in this case, persuasive.*
>
> *Because the terms of s 400.3(1)(b)(ii) are identical, except for the sum of money, to the terms of s 400.5(1)(b)(ii), I am satisfied that the argument as summarised by her Honour, is entirely apposite in this appeal.*[455]

The decision also stands as authority (with Basten JA and Garling J agreeing) that the prosecution must identify a particular indictable offence, the commission of which the accused intended to have been conducted or facilitated by way of their dealing with the money or property in question:

> *In an expanded way, s 400.5 requires that the prosecution prove, on the facts of this case:*
>
> (a) *the appellant dealt with money and other property; and*
> (b) *the appellant intended that the money or other property would be used in the commission of, or to facilitate the commission of, an indictable offence; and*
> (c) *the value of the money and other property was $50,000 or more.*
>
> *But s 400.13 of the Criminal Code provides that it is not necessary for the prosecution to establish that there was an intention that a particular offence would be committed, or else that there was an intention that a particular person would commit the offence.*[456]
>
> …
>
> *The effect of s 400.13 of the Code is only to excuse the prosecution from proving a particular offence, that is, an offence particularised by reference to a person, date, time, place, and any other specific fact, matter or circumstance which would need to be particularised either in the indictment or else to enable an accused to prepare a defence to a specific charge.*[457]

Director of Public Prosecutions (Cth) v Ngo [2012] NSWSC 1521; (2012) 272 FLR 246

In this case, Button J of the New South Wales Supreme Court accepted the finding in *Chen*, as to the second proposition outlined above. That is, the prosecutor, in bringing a case against **ss 400.3 to 400.8** of the Code, must identify a particular offence which the accused is alleged to have intended to commit or facilitate by way of their dealings— but it is not necessary that they identify a particular criminal act with all the necessary particulars required for proving that offence. However, her Honour determined that this question, and the application of *Chen*, as regards the offence regarding proceeds of crime in **s 400.9**, remains arguable:

> *It follows that I would accept the concession of the prosecutor before me that Chen v Director of Public Prosecutions (Cth) is authority for the proposition that, with regard to the offences contained in ss 400.3 to 400.8, a particular offence must be identified, but not a particular criminal act. In the application for costs, it is clear from the judgment that her Honour was persuaded that that proposition in Chen v Director of Public Prosecutions (Cth) is binding with regard to the offence in s 400.9(1A). It was conceded before her*

[455] Ibid 242-3 [83]-[85] (Garling J).
[456] Ibid 243 [93]-[94] (Garling J).
[457] Ibid 244 [99] (Garling J).

> *Honour that the prosecutor could never point to an offence with such particularity. That was the simple basis, as I interpret the judgment of her Honour, upon which her Honour ordered costs. Her Honour found that it was not reasonable to commence the prosecution when there was no evidence available at any stage of an essential element of the offence.*
>
> *…*
>
> *The true meaning of the phrase "proceeds of crime" in s 400.9(1A)(b) is not easy to discern. Nor is the effect of the majority judgments in* Chen v Director of Public Prosecutions (Cth) *on that question. However, I do not consider that, in order to determine this appeal, I must determine that question. That is because of my view about the question of the approach of her Honour to the question of whether costs should be granted. I turn to consider that aspect.* [458]

Director of Public Prosecutions (Cth) v Cheng [2015] NSWDC 326; (2015) 21 DCLR(NSW) 318

This case involved similar circumstances to *Chen* above, with the accused remitting over $1 million AUD to overseas bank accounts, across a number of transactions, by means of a driver's licence issued under a false name. He was accused of thereby contravening s 400.3 of the Commonwealth *Criminal Code*, where the money dealt with was an instrument of crime being used in the commission of 'commencing to receive a designated service (i.e. remittal of money) using a false customer name', in contravention of the offence in s 140(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). In declining to direct a not guilty verdict, Norrish J considered that the offence was arguable, and distinguished the facts of *Milne v The Queen*:

> *From the judgment of the High Court, particularly focusing upon the Court's findings at [37]-[38], I have concluded, taking into account the submissions of the accused's counsel concerning legislative purpose, that an offence pursuant to s 140(1) AML Act is a relevant "indictable offence" for the purposes of s 400.3 of the code. In the context of the "facts" of this case the "possession of the money" in respect of each incident is relevantly capable of establishing an "instrument of crime", in that handing over of the money by the accused on each of the 11 occasions particularised is capable of establishing a relevant "use" in the commission of, or "use to facilitate" the commission of, an offence against "a law of the Commonwealth", to wit s 140(1) AML Act. For the purposes of the conclusions I have reached I accept the Crown's analysis of s 400 of the Code and its relationship with s 140 AML Act, as well as the Crown's analysis of the structure of that later Act as it informs the character of the offence created under s 140 of that Act.* [459]
>
> *Given the character of each transaction there is both the "temporal separation" (which has not been seriously challenged) and the "instrumental connection" which are required as a matter of law to constitute the offence. The situation is not analogous to the situation in Milne because the "use" of "the property" there was not necessarily connected to the criminal offence that would permit it at law to be portrayed as "an instrument of crime". It was a condition precedent to the commission of the relevant crime, but the impugned transaction was not of itself, a "use" in the commission of a crime or a "use to facilitate a crime". Here, the possession of the money was integral to the commission of the crime. The intended use of the money was "instrumentally connected" to the commission of or the facilitation of the commission of the offence.* [460]

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[458] *Director of Public Prosecutions (Cth) v Ngo* (2012) 272 FLR 246, 255 [38], [41].
[459] Director of Public Prosecutions (Cth) v Cheng (2015) 21 DCLR(NSW) 318, 333 [98].
[460] Ibid [99].

Proceeds of Crime

Commissioner of the Australian Federal Police v Omar [2021] NSWSC 366; (2021) 288 A Crim R 483

Beech-Jones J in his judgment outlined the relevant preconditions for obtaining a **s 47** forfeiture order under the *Proceeds of Crime Act 2002* (Cth), being an order of the Court that certain property be forfeited to the Commonwealth. Such an order can cover property even if it is not strictly the proceeds of crime (for which a **s 49** order would be sought):

> *The first precondition to the making of a forfeiture order under s 47 is that the Commissioner, being the "responsible authority", applied for the order. That condition has clearly been complied with. The second condition is that "the restraining order" has been in force for at least six months, that being the "restraining order under section 18 that covers the property" that is the subject of the application for the forfeiture order (s 47*(1)(a)*). In this case, restraining orders were made over the property in the Schedule on 8 August 2016 by Fagan J. (The relevant order number made by His Honour in respect of a particular item of property is set out in the right-hand column of the Schedule.) It follows that the second condition has been complied with.*[461]

In addition to the prerequisite administrative steps, his Honour stated that there exists a third condition necessary for the Court to be satisfied that the person to whom the restraining order relates engaged in a serious offence:

> *There remains the third condition namely whether "the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more serious offences". As will become evident, this is the substantive issue raised by this application. In his judgment of 8 August 2016, Fagan J was satisfied there were reasonable grounds to suspect that each of the first to sixth defendants had committed serious offences.*[462]

His Honour noted that the Commissioner bears the onus to prove, only on the balance of probabilities, these requisite conditions in order to obtain the forfeiture order. In assessing the matter, his Honour had consideration of the 'nature of the cause of action, the subject matter of the proceedings, and the gravity of the allegations' brought against the defendants.[463]

Re Commissioner of the Australian Federal Police [2014] NSWSC 900

This judgment concerned applications for restraining orders and forfeiture of money in two Citigroup bank accounts. Davies J simply outlined that s 49 of the *Proceeds of Crime Act 2002* (Cth) allows for an order to be made for property, which is the proceeds of crime, to be forfeited to the Commonwealth where the relevant conditions are met.

In this case, the relevant conditions included that a request was made by the responsible authority, which in this case was the Commissioner of the AFP; that a restraining order in respect of the property had been in place for six months; and that the court be satisfied that the authority has taken reasonable steps to identify and notify those with an interest in the property to be forfeited. The Court was satisfied of these bases, and ordered that property be forfeited accordingly. The Court also noted that the requirement in s 49(1)(c) of the Act, that the property to be forfeited derives from indictable offences or is associated with them, need not be satisfied if no application has been made for the property to be excluded under Div 3 of Pt 2-1 of the Act— which was the case.

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[461] *Commissioner of the Australian Federal Police v Omar* (2021) 288 A Crim R 483, 486 [7].
[462] Ibid [8].
[463] Ibid 467 [10] citing the *Evidence Act 1995* (Cth) s 140(2) and *Briginshaw v Briginshaw* (1938) 60 CLR 336.