IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAM 283 OF 2013

BETWEEN	:	KENI DAKUIDREKETI
AND	:	FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION [FICAC]
Counsel	:	Mr. Keene B QC with Mr. Clarke W, and Ms. Cole M for the Applicant
	:	Mr. Blanchflower M (SC), with Ms E. Yang (JC) and Ms. Puleiwai for the State
Date of Ruling	:	25th April 2014

RULING

1. Mr. Keni Dakuidreketi, the applicant had filed this application seeking court's direction to quash the criminal proceedings launched against him by the Fiji Independent Commission Against Corruption (FICAC) in HAC No. 26/2009 on the ground of 'duplicity' of charges. It was contended by the applicant that section 59 (2) of the Criminal Procedure Decree No. 43 of 2009 is a mandatory provision, with the purpose of preventing duplicitous charges being laid against an accused person. The applicant seeks an order pursuant to section 215 (1) of the Criminal Procedure Decree 2009 by quashing all the counts against him or the Information as the counts are defective as alleged and the required amendments cannot be done without causing injustice to him.

2. Section 59 of the Criminal Procedure Decree is as follows:

> .—(1) Any offence may be charged together in the same charge or information if the offences charged are—
>
> *(a)* founded on the same facts or form; or
>
> *(b)* are part of a series of offences of the same or a similar nature.
>
> (2) Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information, and each paragraph shall be called a count.
>
> (3) Where, before trial or at any stage of a trial, the court is of opinion that—
>
> *(a)* an accused person may be prejudiced in his or her defence by reason of being charged with more than one offence in the same charge or information; or
>
> *(b)* for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information –
>
> the court may order a separate trial of any count or counts in the charge or information.

3. The applicant is been charged by the FICAC with the following five counts (5) of 'Abuse of Office' contrary to section 111 of the Penal Code.

Second Count

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence (b)

KENI DAKUIDREKETI between about 31st March 2004 and 21st September 2004, at Suva in the Central Division, while

being employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a loan of $2,000,000.00 FJD to be made by the Vanua Development Corporation Limited to PacificConnex Limited, which was prejudicial to the Native Land Trust Board and indigenous Fijians.

Fourth Count

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence (b)

KENI DAKUIDREKETI between about 16th November 2004 and 29th November 2004, at Suva in the Central Division, while being employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a loan of $900,000.00 FJD to be made by the Vanua Development Corporation Limited to PacificConnex Limited, which was prejudicial to the Native Land Trust Board and indigenous Fijians.

Sixth Count

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence (b)

KENI DAKUIDREKETI between about 28th February 2005 to 28th April 2005, at Suva in the Central Division, while being

employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a Government Grant of $1,000,000.00 FJD disbursed to Vanua Development Corporation Limited through the Native Land Trust Board to be used as security for a loan provided to PacificConnex Limited by Dominion Finance Company Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.

Eighth Count

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence (b)

KENI DAKUIDREKETI between about 27th April 2005 and 3rd July 2007 at Suva in the Central Division, while being employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a Government Grant of $1,000,000.00 FJD disbursed to Vanua Development Corporation Limited through the Native Land Trust Board to be used as security for overdraft and loan facilities provided to PacificConnex Limited, later renamed PacificConnex Investment Limited, by the Australia and New Zealand Banking Group Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.

Tenth Count

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap 17.

Particulars of Offence (b)

KENI DAKUIDREKETI between about 23rd September 2005 and 29th September 2005, at Suva in the Central Division, while being employed in the Public Service as the Director of the Native Land Trust Board and Chairman` of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a loan of $1,000,000.00 FJD to be made by the Vanua Development Corporation Limited to PacificConnex Limited, then renamed PacificConnex Investment Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.

4. The main concern of the applicant is that all of the above counts have been framed in such a way to contain two separate offences of the abuse of two alleged offices being,

   (a) Director of the Native Trust Board; governed by Native Land Trust Act and the Trustee Act and
   (b) Chairman of Vanua Development Corporation Limited; governed by the Companies Act and Articles of Association of the said company.

   He claims that he does not know the particular acts alleged to be the foundation of each offence and even at an overview level, it is clear that different defences would be available to him, if he is to focus on one office at a time.

5. Apart from the above concern, the applicant avers that he will have to face the following difficulties with the existing charges.

(a) Embarrassment in having to defend himself in relation to an indeterminate number of alleged offences occurring on unspecified dates within the time frames of each count;

(b) Loss of opportunity to raise specific and effective defences because the absence of specificity deprives him of his capacity to know how he may answer such charges;

(c) Difficulty in ensuring that any verdict is unanimous as to its factual basis;

(d) Difficulty in ensuring that any verdict is based upon a particular event and not upon an inference drawn from a series of events or a perception of a general nature;

(e) Difficulty in identifying admissible evidence;

(f) Difficulty with subsequent pleas of autrefois acquit or autrefois convict;

(g) Unfairness inherent in requiring the Applicant to defend himself in respect of any occasion on which an offence may have been committed.

6. In responding to the applicant's claims, the Respondent said that any of the charges against the accused are not duplicitous as each charge against the applicant is an offence of "Abuse of Office" alleged to have been committed when he was "employed in the Public Service" and the charges do not allege that the applicant committed two separate offences because he held two offices or positions as the particulars indicate, but amply demonstrate how the applicant was "employed in the public service at the material time".

7. The grievances of the applicant seem to have stemmed out from the decided case authority of S. *v The Queen* (1989).168 CLR 266; 21st Dec. 1989, a decision from the High Court of Australia. The main issue discussed there was the "latent duplicity" of the charges laid down against the accused applicant. Gaudron and McHugh JJ made following comments on the issue of 'duplicity of charges'.

> **"The rule against duplicitous counts in an indictment originated as early as the seventeenth century. See, for example, *Smith v. Mall* (1623) 2 Rolle 263 (81 ER 788); *R.v. Stocker* (1696) 5 Mod 137 (87 ER 568). It may be, as suggested**

by Salhany in "Duplicity – Is the Rule Still Necessary?", (1963) 6 Criminal Law Quarterly 205, at pp 206-207, that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanor and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict. See, generally, *R. v. Sadler* (178) 2 Chit 519; *R. v. Hollond* (1794) 5 TR 607 (101 ER 340), per Lord Kenyon C.J. at p 623 (p 348 of ER). See, as to the need for distinct consideration in relation to penalty, *R. v. Stocker; R. v. Sadler; R. v. Morley* (1827) 1 Y. &J.221 (148 ER 653); *Cotterill v. Lempriere* (1890) 24 QBD 634, per Lord Coleridge C.J.at p 637. See, as to the availability of a plea in bar, *R. v. Robe* (1735) 2 Str 999 (93 ER 993); *Davy v. Baker* (1769) 4 Burr 2471 (98 ER 295); *R. v. Wells;* Ex parte Clifford (1904) 91 LT 98; *R. v. Surrey Justices;* Ex parte Witherick (1932) 1 KB 450."

8. Then the applicant tries to rely on the following remarks of *DPP v Merriman* [1973] AC 584 (HL) by Lord Morris of Borth–y-Gest.

> *"The question arises – what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five. If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise*

are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery C.J., in a case where it was being considered whether an information was bad for duplicity: see Jemmison v Priddle [1972] 1QB 489, 495. I agree respectfully with Lord Widgery C.J., that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend upon the circumstances."

and later in the same Judgment Lord Diplock stated:

"The rule against duplicity ... has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature ... were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them in a single count of an indictment."

9. The crux of the applicant's argument reflects in paragraphs 31, 31 and 33 of his written submissions. For the purpose of convenience; those three paragraphs are reproduced below.

    (31) All the counts have been framed in such a way as to contain on their face two separate offences of the abuse of two alleged offices, being:

        (i) That of Director (sic) of the Native Land Trust Board; and
        (ii) That of Chairman of Vanua Development Corporation Limited.

    (32) Using the *DPP v Merriman* stabbing analogy and applying it to the Applicant's case, the example would read:

        "A stabbing B and C with a knife five times"

(33) The multiple acts involved in "A stabbing B and C with a knife five times" could not be regarded as anything other than two offences (i.e. the stabbing of B and the stabbing of C). It would be neither legitimate nor fair to charge them as one offence in a single count.

10. Even though none of the parties have not cited, one of the leading authorities on the rule against duplicity seems to be *Wilson* (1979) 69 Cri. App R 83 of the English Court of Appeal. The discussed issue in *Wilson* was whether the indictment should have been split to have separate counts of 'theft' allegedly stolen from different departments of two shops. Lord Browne distinguished the term 'true duplicity' and 'quasi duplicity' or 'divergence' in the following terms:

> *"The word duplicity is used in a rather ambiguous sense... First there is a case where it appears on the face of the indictment, or particulars of the indictment, that a count is charging more than one offence. It may sometime be legitimate to look at the depositions in this context (see **Greenfield** [1973] 1 WLR 1151). That has been referred to in the course of the argument as true duplicity. Secondly, there is a case where, although the indictment is good on its face, it appears at the close of the prosecution case that the evidence establishes that more than one offence was committed on the occasion to which a particular count relates. Perhaps that is best described as divergence or departure, but it often seems to be called duplicity... in whatever sense one uses the word duplicity. It is confined to those two situations. But even if a case is not within either the first or the second of those situations, there may be cases where, in the interests of justice, it may be right to make the prosecution split a count or elect on what particular charge they are going to proceed."*

11. Lord Browne incorporated and adopted the important findings of Lord Widgery CJ in the case of *Jemmison v. Priddle* [1972] 1 QB 489) and stated:

> "What is the principle which distinguishes between [cases where one count is appropriate and cases where there should be several counts]? ... one finds that the explanation is given in

somewhat inappropriate language, namely, that the test is whether the acts were all one transaction. That is a phrase hallowed by time, but not, in my judgment, of particular assistance in dealing with a particular problem. I find more assistance from somewhat different language used by Lord Parker CJ in **Ware v Fox** [1967] 1 WLR 379. 'Then Lord Widgery CJ quotes from what Lord Parker CJ had said at p. 381...and went on: 'I think perhaps that the phraseology of Lord Parker is more helpful to me than the phraseology often found in the text books, and I think that what it means is this, that it is legitimate to charge in a single information one activity even though the activity may involve more than one act. One looks at this case [i.e. **Jemmison v Priddle**] and asks oneself what was the activity with which the appellant was being charged. *It was the activity of shooting red deer without a game licence, and although as a nice debating point it might well be contended that each shot was a separate act, indeed that each killing was a separate offence. I find that all these matters, occurring as they must have done within a very few seconds of time and all in the same geographical location are fairly to be described as components of a single activity, and that made it proper for the prosecution in this instance to join them in a single charge." (Emphasis added)*

12. It is clear from the existing legal authorities that the rule against duplicity has to be viewed with the application of common sense and pragmatic considerations on the basis of 'fairness', but not with the artificially construed concept of 'single offence'. A count is not to be ruled out for "duplicity" on the face value of its wordings, even though it is a question of the form or the wordings, but not the underlying evidence of a charge. (*Greenfield* [1973] 1 WLR 1151; Mintern [2004] EWCA Crim 7.) Simply because that several criminal acts do comprise in a single activity or one transaction, such a charge cannot be held bad for duplicity. Even the principles emerged from *Wilson* (supra) show that more than one criminal act, can be included in one count if the alleged acts formulate a single activity. This approach had been confirmed in *Iaquaniello* [2005] EWCA Crim. 2029 as well.

13. As Justice Madigan cited in *Mahendra Pal Chaudhary v. State*, HAM 236 and 239 of 2013, Blackstone's Criminal Practice (2011); page 1548 states that:

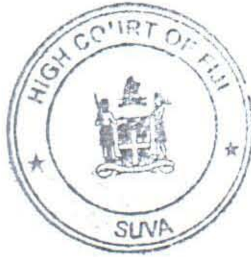
> *"if the particulars of a count can sensibly be interpreted as alleging a single activity, it will not be bad for duplicity, even if a number of distinct criminal acts are implied."*

14. In the light of the above this court is not inclined to accept the argument of the applicant that the charges laid down by the FICAC against him are duplicitous. This court agrees with the learned Senior Counsel for FICAC that each charge reflects one alleged offence, even though it could consist of several distinct acts. Nevertheless, it has to be stated that there is no merit at all when the Senior Counsel for the FICAC said that the charges are accurate simply because the defence in the case of *Laisenia Qarase v. FICAC*; Criminal Case No. HAC 27 of 2009, did not raise the issue of duplicity for the charges formulated on the same structure.

15. Hence, this court concludes that the charges are not duplicitous as alleged by the applicant. This court cannot see any unfairness or prejudice caused to him with the existing charges in his defence. Having considered all these aspects, the application by Mr. Keni Dakuidreketi to quash the criminal proceedings against him in the case of HAC 26 of 2009 on the footing that the charges are bad in law for duplicity, is dismissed. The substantive matter will proceed for trial as scheduled.

16. Finally, it was revealed at the hearing of this motion that the word "Director" in each count against the applicant need to be corrected as "Member". This court recalls the Ruling dated 8th of August 2013, whereby it stated that "No other amendment to the Information will be allowed or entertained". (paragraph 12) That Ruling was delivered in a totally different context, where the prosecution was in the 'habit' of filing Amended Informations on various charges. Therefore the said Ruling was meant to stop any further embarrassment to the defence with any further amendments of that nature. This is something different in context. The applicant is quite privy to the fact that he was a 'Member in Native Land Trust Board' and by now knows very well that he has to transform his defence according to the 'position' of a 'Member' of the said institute.

17. Thus, I see no prejudice caused to the accused by amending the counts against the applicant with the replacement of word 'Member', instead of 'Director' in each count.



Janaka Bandara
Judge

At Suva
Howards Lawyers for the Applicant
Office of the Fiji Independent Commission Against Corruption