IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 57 of 2018 [Suva MC Criminal Case No: C/F 872 of 2018]

BETWEEN: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION [FICAC]**

APPELLANT

AND: **SITIVENI LIGAMAMADA RABUKA**

RESPONDENT

Coram: Gates CJ

Counsel: Mr. R. Aslam with Mr. S. Savumiramira for Appellant
Mr. F. Vosarogo with Mr. K. Vuetaki and Ms L. Tabuya for Respondent

Date of Hearing: 8th November 2018

Date of Judgment: 12th November 2018

JUDGMENT

Introduction

[1] This appeal concerns duties of financial disclosure (at pre-election stage) imposed on office-holders of registered political parties.

[2] On 26th October 2018, before a Resident Magistrate sitting at Suva, Mr. Rabuka, the Respondent, was acquitted of a single count charge of Providing False Declaration of assets, income and liabilities, contrary to sections 24(1A) and 24(5) of the Political Parties (Registration, Conduct, Funding, and Disclosures) Act [No. 4 of 2013]. He had pleaded not guilty and after trial had been acquitted.

[3] A timely petition of appeal was filed by the prosecution in the registry of the High Court on 26th October 2018. This was amended within the appeal period on 30th October 2018. The amendment had been foreshadowed by Petitioner's counsel at court on the first mention of this case.

Need to expedite Electoral Cases

[4] At the first call on 30th October 2018 I had said the court would expedite the hearing of this appeal for two reasons.

[5] First the Electoral Act 2014 specifically demands a prompt decision by the court on charges for election related offences. Section 18A states:

> "18A. A court must promptly make a decision with respect to a charge filed for an election related offence under this Act, the Electoral (Registration of Voters) Act 2012 and the Political Parties (Registration, Conduct, Funding and Disclosures) Act 2013. [s.18A insrt Act 5 of 2017 s 4, opn 17 Feb 2017]"

[6] When there is an application to the Court of Disputed Returns to inquire into the rightfulness of a member occupying a seat in Parliament and seeking a declaration as to whether the seat has become vacant, such

decision has to be delivered by the court within 21 days [Constitution sections 63(1) and 63(5)]. The validity of elections also must be determined within 21 days.

[7] These provisions are adopted in many jurisdictions because of the need for certainty and for a swift conclusion of the issues as to the validity of elections.

[8] In the instant case the consequences of a conviction are severe. The penalty provision for a conviction under sections 24(1A) and 24(5) provides for a fine not exceeding $50,000 or for a term of imprisonment to be imposed not exceeding 10 years or to both.

[9] Section 56(2) of the Constitution provides that a person may be a candidate for election to Parliament only if the person –

> ……………………………
> ……………………………
>
> "(g) has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and
>
> (h) has not been found guilty of any offence under a law relating to elections, registration of political parties or registration of voters."

[10] Even if convicted of a lesser offence under the election laws generally, a person so convicted would appear to suffer a life time penalty of disqualification from standing for Parliament.

A conviction for the charge under consideration – sections 24(1A) and 24(5) – besides the imposition of a sentence of substance, would also carry a life disqualification from standing for Parliament.

[11] The Electoral Act 2014 repeats those provisions of the Constitution at Section 23(4).

[12] Unfortunately this case comes to the High Court at a time when the Writ for the General Elections has already been issued. Indeed some pre-poll voting has commenced and other voters will cast their vote at polling booths on Wednesday 14th November 2018.

[13] In this case, with the above time constraints, the courts can grant access to a litigant only as far as to the High Court. Appeal is possible beyond to the Court of Appeal and the Supreme Court. But those two courts would be unlikely to provide access prior to the impending Election.

[14] This appeal was set down therefore for 1st call with less than the usual notice. The Respondent was served with the Petition of Appeal and Notice of Hearing (first call) on 29th October 2018 (affidavit of service not specifying time) at Vuinadi Village, Cakaudrove. His solicitors were served on the same day at 3.42pm. The 1st mention was fixed for 3.30pm the following day Tuesday 30th October 2018.

[15] The Respondent himself was attending to his business away from Suva. He was served on 29th October 2018 at approximately 6.17pm to appear in court the next day at 3.30pm.

[16] Adverse comment was made of FICAC for assisting with service on the Respondent away on Vanua Levu. But it was necessary to move fast with the process to allow the parties the maximum time within the limited window for preparation, a hearing, and a decision on the appeal. No criticism should properly be levelled against that Commission for its assistance to the Court in serving the Respondent.

[17] In the result it is to the Respondent's credit that he returned to Suva in time for the 1st call of the case, and to instruct his counsel. Commendable too that both legal teams produced reasoned arguments, submissions and authorities to assist the court for the hearing on 8th November 2018, 9 days later. The constraint of time was far from ideal.

[18] The court was mindful that if the Magistrates Court instead of acquitting Mr. Rabuka had convicted him, his counsel would have asked the High Court, quite properly, to grant his or her client access for an urgent appeal so that a decision could be made prior to Election Day with the same constraints. The court must do its best and be even-handed.

[19] In future, election related cases brought through the Magistrates Court, should proceed with greater speed and case management control. Magistrates must bear in mind either party may wish to take the Magistrate's decision upon appeal. The exhortation made to the courts for expedition means full disclosures need to be made early on, and counsel engaged who are available for court trial dates. Where time is short, an election case cannot be put off for 3 months to suit Senior Counsel's diary. The right to counsel of choice is for a choice to be made from amongst counsel who are available to do the case on the trial dates.

[20] Mr. Vosarogo urged a narrower interpretation of section 18A as to what extent the courts were to make a prompt decision in these cases. He limited it to the court of first instance, the trial court.

[21] The heading above section 18A in the Electoral Act reads:

"Court to finalise decisions"

[22] I note 'decision' is expressed in the plural and that the verb "finalise" has been used. The statute envisages more than one decision for an election related offence. "Finalise" suggests "bring to a conclusion." This would tend to bring in "appeals" as well. All along the line, the courts are directed to come to a swift finality. If the ultimate result were still pending the matter would not have been brought to a conclusion or have reached finality. I find the appellate courts are subject to the same statutory exhortation as the court of trial for election related offences.

[23] The second reason for striving for expedition is in following the philosophy of a line of Indian Supreme Court decisions, culminating in **Public Interest Foundation v Union of India** [2018] INSC 822 25th September 2018. Those cases covered a wider field than necessarily election matters, extending to political corruption, which is not the gravity of allegation here. Various reports were referred to including the **World Bank Review Vol. 5 2014** and the **Law Commission of India – Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Persons [No. 239] March 2012**; and **Law**

Commission of India Report on Electoral Disqualifications [No. 244] February 2014.

[24] The **Public Interest Foundation** case upholds the principle that criminal trials involving public officials or persons in political life need to be proceeded with expeditiously. The case was concerned with electoral disqualifications. That said, persons in public life are not to be hounded or harassed. These cases are concerned with delays where it might be felt the matter is not proceeding to trial, or that special treatment was being accorded to the Accused. Ultimately the aim must be for equality of treatment, a protection afforded by section 26 of the Fiji Constitution, see too **Batiratu** [2012] FJHC 864; HAR001.2012 (13 February 2012), where it was said:

> "[33] Celebrity status may involve many facets. The person in question might be rich, famous, notorious, highly popular, a foreign dignitary, prominent in politics, an aristocrat or member of a royal household, or a star of film, television or the sporting world. It is essential that the courts treat such persons no differently from the ordinary person in the street. Before the law no more can be expected of them than from others. They do not come to the courts with a handicap nor with an edge on others. They are not to be penalised for their fame, nor given greater leniency for their importance and standing in the community."

Appealing an Acquittal: Is the Sanction of the Deputy Commissioner required?

[25] Counsel for FICAC flagged the issue of the sanction of the Deputy Commissioner of FICAC. Section 246(2) of the Criminal Procedure Act under the Heading **"Part XV – Appeals from the Magistrates Courts"** provides that "no appeal shall lie against an order of acquittal except by,

or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption."

[26] In this case the Deputy Commissioner has filed no separate sanction document. This is no doubt because of the Court of Appeal decision in **FICAC v Apolosi Pio Sekitoga** [2013] FJCA 127 AAU061.2012 (5th December 2013). The court held that the requirement for written sanction to appeal against an acquittal only applied to persons or institutions other than the DPP or FICAC.

[27] Goundar JA said [para 16]:

> "…… The rationale for the written sanction is to prevent frivolous or vexatious appeals against acquittals. To impute the requirement for sanction in an appeal by the DPP or FICAC is indeed absurd."

and at para 17:

> "If FICAC or the DPP files an appeal against acquittal by the Magistrates' Court in compliance with their statutory right, then there is a presumption that the official decision to prosecute an appeal is made in a principled manner. In those circumstances, there is no logic in requiring a written sanction to validate your own appeal. Written sanction is only required if an appeal against acquittal is brought in the High Court by a person or institution other than FICAC or the DPP. Based on these reasons, we hold that the High Court erred in law in dismissing FICAC's appeal for want of written sanction."

Electoral Offences – Civil or Criminal Jurisdiction

[28] Electoral offences are properly classified as criminal. Though Electoral Legislation has long been regarded as a special jurisdiction, the heavy penalties and disqualification provided in the legislation mean that the charge brought, indeed both limbs of section 24(5), is not an administrative or quasi-civil matter. Rather it can be regarded as "quasi-criminal" or indeed a straightforward "criminal" charge: **Engel and Others v Netherlands** European Court of Human Rights No. 5100/71 8th June 1976; **Surinder Singh v Hardial Singh & Ors** [1984] INSC 201.

[29] It follows that the provisions of the Criminal Procedure Act apply to the conduct of these proceedings, so far as it is applicable.

[30] The onus of proof lies upon the prosecution to prove its case to the standard beyond reasonable doubt: **Surinder Singh** (supra)

The Facts

[31] Certain obligations of financial disclosure are placed upon office holders or registered officers of registered political parties. On 29th December 2017 the Respondent visited the Office of the Supervisor of Elections and lodged a declaration document providing details to the Registrar of his financial circumstances as required under section 24(1A). The last part of the required details provided was incomplete. It lacked specific details of liabilities incurred or which had been discharged during 2017. There were 4 items omitted as set out in the charges. They were:

1. A tax liability with the Fiji Revenue and Customs Services of $316,956-50.

2. Investment and interest income with Raghwan Constructions Ltd. in the sum of $200,000 [investment].

3. and $16,000 [income].

4. and a liability with Raghwan Constructions Ltd. of $120,000.

[32] Several statements and documents were tendered by counsel. In particular the declaration itself of Mr. Rabuka of his Income, Assets, and Liabilities as at 31st December 2017. He completed the following details at the top of page 1:

Position held in political party:	Party Leader
Date of Appointment:	24 June 2016

[33] There was a section headed "Particulars of Liabilities in Fiji or Abroad [Loans, Creditors, Debts, etc]." Mr. Rabuka had filled in the details which did not include the 4 items mentioned in the charge.

[34] On 24th May 2018 Mr. Rabuka was interviewed under caution by the Manager Investigations for FICAC, Mr. Wakanivesi. The interview was video recorded, and at the trial at the defence request, the video was played in full before the court. Its contents and conduct were not in dispute. Mr. Rabuka had been able to speak to his counsel before going ahead with the interview.

[35] In the course of the interview he was asked about the 4 missing items from the Liabilities Column of the declaration. He gave his explanation.

He was at ease in the interview. He had his 3 arch-lever files with him for reference purposes. He was very co-operative with the interviewer.

[36] He admitted these items had not been included in the declaration. At various points in the interview he explained:

> "I think it was an oversight."
>
> "It may be an oversight in my annual returns."
>
> "I see that as an unfortunate accident, I did not delivered (sic), it was not to default anyone. I just did not feel I need to do that …"

[37] Mr. Rabuka said he prepared the declaration himself. He had not received any assistance.

[38] Evidence was led concerning the registration of the political party – SODELPA – and the fact of Mr. Rabuka being the party leader. That evidence and the registration was not accepted by the defence. Counsel asked for these facts or elements of the offence to be formally proved. The Supervisor of Elections, the second prosecution witness, gave his evidence in relation to these two elements of the offence. The Supervisor Elections by virtue of his office is also the Registrar of Political Parties under the Electoral Legislation and for the purposes of the Political Parties (Registration, Conduct, Funding and Disclosures) Act.

[39] Mr. Rabuka elected not to give evidence. That is his right as a suspect or an Accused person and no adverse inference can be drawn from the exercise of that right. His explanation in the video interview addresses

the question of the omission of the required information in the declaration and the likely reasons for the error.

Agreed Facts

[40] Unfortunately though there was consent to certain matters, there were no formal Agreed Facts filed. This case would have benefitted greatly from such a document.

[41] The provision for Agreed Facts is set out in section 135 of the Criminal Procedure Act [the CPD]:

> "135. (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or element of an offence, and such an admission will constitute sufficient proof of that fact or element.
>
> (2) Every admission made under this section must be in writing and signed by the person making the admission or by his or her lawyer, and –
>
> (a) by the prosecutor; and
> (b) by the judge or magistrate.
>
> (3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial."

[42] At an early stage in the Magistrates Court there were moves to obtain pre-trial orders pursuant to sections 289-292 of the CPD. But these were largely aimed at discovering the source of the original complaint. Unfortunately whatever were the discussions between the parties, nothing of significance was agreed until the last minute, on the first day of the trial.

[43] The objectives of the pre-trial procedures are set out in section 289. They are to:

> (a) improve case management in the courts exercising criminal jurisdiction;
>
> (b) apply procedures at an appropriate stage before the trial of a criminal case, which aim to –
>
>> (i) clarify the triable issues in each criminal proceeding;
>>
>> (ii) confirm the charges that are to proceed to trial;
>>
>> (iii) ascertain the intention of the accused person to plead guilty to the charge against him or her, or to any other appropriate charge;
>>
>> (iv) determine the length of the trial, and explore means by which its hearing may be facilitated by the application of any appropriate procedure.
>
> (c) otherwise enhance the efficiency of the courts in determining criminal proceedings in any just manner.

[44] Possible orders are listed in the following section. The clarification of exactly what was disputed in this case was paramount here. It is often forgotten that the Agreed Facts provision can also list legal elements of the charge that are admitted. All too rarely are legal elements which are accepted and agreed actually so specified in the Agreed Facts document. Sometimes of six elements of an offence requiring proof, possibly only two are in dispute. These will constitute the litigation issues to be contested by the parties. They should be clearly set out in the Agreed Facts document.

Appellant's Grounds of Appeal

[45] There were 15 grounds lodged, but I would summarise these to be, that the learned Magistrate -

(i) incorrectly referred to section 27(4) of the Act as relevant to this charge.

(ii) wrongfully disregarded Mr. Mohammed Saneem's evidence (the Supervisor of Elections, and thus the Registrar] as hearsay in testifying as to the fact that both SODELPA was a registered party and that Mr. Rabuka was a registered party leader of the same.

(iii) failed to recognise that the defence raised amounted to an ignorance of law.

(iv) failed to consider the direct and circumstantial evidence proving the fault element and thus the intent of the Respondent.

(v) wrongly accepted that the conduct and co-operation of the Respondent during the investigation established his defence of honest mistake.

(vi) wrongly stating the prosecution had conceded to the good character of the defendant.

(viii) wrongly considering good character in the absence of cogent evidence in support of that conclusion, and accorded good character undue weight.

The Elements of the Offence Requiring Proof

[46] These may be tabulated as follows:

Offence S.24(5)
Legal elements required to be proved.

LIMB 1 – failing to comply

1. Any person

2. who **fails to comply** with the requirements of subsections (1), (1A), (1B), or (2) of section 24 [see obligations below]

3. with intent (query)

OR

LIMB 2 – providing false information

1. Any person

2. who provides any information [see obligations below]

3. that is **FALSE**,

4. with intent.

commits an offence and shall be liable upon conviction to a fine not exceeding **$50,000** or to a term of imprisonment not exceeding **10 years** or both.

Obligations of Office Holders or Registered Officers

[s.24(1A) & s.24 (5)] Political Parties (Registration, Conduct, Funding, and Disclosures) Act 2013

(1) A person who is appointed as **an office holder** or a **registered officer** [see definition in Section 2 of Act]

(2) **After 30 June 2014**

(3) of a **political party registered** under this Act

(4) shall within 30 days of the date of his or her appointment and thereafter, on or **before 31 December** of each year, **provide to the Registrar a Statement**

(5) **containing** the following information in respect of that person and his or her spouse and any children –

…………………………
…………………………

(h) <u>liabilities incurred</u>, or <u>discharged</u> by each of them …. and the amount of each such liability.

[47] I now come on to consider the summarised grounds of appeal and other arguments raised by both counsel in the course of the appeal hearing and submissions.

<u>The Defence suggested in section 27(4)</u>

[48] This matter was not raised by either counsel in the trial. It was raised towards the end of the learned Magistrate's judgment. The Magistrate said "because from the defence case it appears that this section may apply to the defendant."

[49] Section 27 appears to be a General Provision section to deal with others associated with a political party who fail to furnish information required under the Act.

[50] Section 27(4) provides a defence as follows:

> "(4) A person does not commit an offence under subsection (1) or (2) if that person proves to the satisfaction of the court that he or she exercised due diligence to prevent the commission of that act as he or she ought to have exercised, having regard to all the circumstances."

[51] That defence is not repeated in other sections for other classes of bodies or persons who fail to furnish information as required, such as in section 24(1A), relevant to this case. Section 24(1A) only applies to **<u>persons</u>**

<u>appointed after 30 June 2014 as an office holder</u>. Section 27 applies to other persons without the appointment date requirement. The Respondent was not charged under this section, and so the defence does not apply to his case. The Magistrate's finding in this regard is mistaken and must be disregarded.

<u>Was Registrar's oral testimony hearsay and inadmissible?</u>

[52] The short answer is, it is not to be regarded as hearsay or inadmissible. The better question is whether in terms of proof, the evidence was of sufficient quality, and whether it addressed the necessary legal elements and facts requiring proof.

[53] The defence insisted on strict proof of the facts of:

(a) the registration of the political party – namely SODELPA, and of

(b) Mr. Rabuka being the "party leader", and thereby "an office holder" under section 2 of the Act.

[54] First it must be considered whether as "party leader" Mr. Rabuka was "an office holder" and thus required to make an annual declaration of his assets and liabilities. The defence made it clear they required proof that he was the party leader, and secondly disputed that he was included in the meaning of office holder. But it was not for the defence to prove that he was neither.

[55] Section 2 of the Act provides:

> "**office holder** in relation to a political party means any person who is elected or appointed by the members of the political party to hold office in that political party, and shall include the president, vice-president, treasurer, secretary and the registered officer of the political party."

[56] In interpreting the section I note the definition refers first to those persons "elected or appointed by the members." There is then a comma followed by examples of who those persons might be:

> "and shall include the president, vice president, treasurer, secretary, and the registered officer of the political party."

[57] It does not specially list "party leader" as an office holder. However it anticipates other officials being included who may bear different titles. The phrase "and shall include" does not exclude other officials who may qualify as "office holders."

[58] Mr. Vosarogo referred to an amending bill, in fact now already an Act – the Electoral (Amendment) Act 2017 – in which the party list for the nomination of candidates must be lodged in writing and signed by the "President" and the "registered officer" of the political party. Formerly it was to be signed by the "leader" and the "secretary." That is some indication, but not conclusive. Here the task is to interpret a separate stand alone piece of legislation.

[59] The Explanatory Note to the Bill gave as reasons for the change of office holders:

> "This is to align the terms with the terms used in the Political Parties (Registration, Conduct, Funding, and Disclosures) Act 2013."

[60] In interpreting definitions of this kind the *ejusdem generis* rule is often resorted to. Of that rule it was said, "It is not a rule of law, but merely a rule of construction to aid the courts to find out the true intention of the legislature" : **Jage Ram & Oth. v State of Haryana & Ors.** [1971] INSC 68.

[61] The rule had been stated in this way:

> "Where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusdem rule to apply, the specific words must constitute a category, class or genus; if they do constitute such a category, class or genus, then only things which belongs to that category, class or genus fall within the general words …"

[62] Lord Scarman in **Quazi v. Quazi** (1979) 3 All ER 897 had stated:

> "If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis, so be it, the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule like many other rules of statutory interpretation, is a useful servant but a bad master. So a narrow construction on the basis of ejusdem generis rule may have to give way to a broader construction to give effect to the intention of Parliament by adopting a purposive construction."

[63] For a party leader not to come within the category "office holder" would seem odd in view of the importance of such a position in any party. If the party leader is later nominated to be a candidate in the elections he will have to make a similar declaration eg: section 24(2). But as the matter stands with the definition of office holder I find it is sufficiently wide to include "party leader."

[64] But where was the evidence **to prove** that Mr. Rabuka had been elected or appointed by the members as "party leader." He had so described himself in the declaration form when lodging his financial details. This was a preliminary fact to be formally proved. If the prosecution could not prove the matter, he would have no reason to comply with the requirements of section 24(1A). His own description does not prove the matter for the prosecution. They must produce confirmatory evidence to attain proof beyond reasonable doubt. As will be seen further on, this evidence would not have been difficult to obtain – if it existed.

[65] A certified true copy of the amended Constitution of SODELPA had been exhibited. It states on its front page: "Adopted at the Special General Assembly meeting held at the Epworth Hall, on Thursday 10th September 2015.

[66] The Constitution provides for a party structure consisting of:

1. General Assembly
2. Management Board
3. Constituency/Province; and
4. Chapters/Branch.

The day to day operation of the party was to be the responsibility of the Management Board through the General Secretary.

[67] Under the heading "Management Board" it states:

(a) The Management Board shall be the governing body of the Party and shall be constituted as follows:

i) The Party President;

ii) Three (3) Vice-Presidents;

iii) Party Leader;

iv) Parliamentary Leader;

v) Three (3) Parliamentarians appointed by the Parliamentary Caucus and who are members of the Joint Party and Parliamentary Committee;

vi) Twenty Eight (28) representatives of the Constituency Councils as shown at Annex B;

vii) Three (3) Women's Forum representatives:

viii) Three (3) Youth Forum representatives.

(b) The General Secretary shall be the Secretary to the Management Board.

(c) The Board shall meet at least once quarterly. The quorum shall be fifty one percent (51%) of the total number of members of the Board and shall include one of the Vice-Presidents.

[68] On one view all members of the Management Board could come within the definition of "office holders." A narrower view of the directing mind of the party, "the brains" at the heart of its business, might reduce the

office holders down to "President, Vice-President, Party Leader, Parliamentary Leader, Treasurer, Secretary and the registered officer of the Party."

[69] However amongst the exhibits in this case and in the record of the oral testimony I can find no mention of any internal documents of the party evidencing the "election or appointment" of Mr. Rabuka as "Party Leader."

[70] The Registrar is equipped with plenary powers to obtain any information reasonably required. Under section 18(1) the Registrar may issue a written notice to the registered officer of a political party to furnish for inspection by the Registrar, the records required to be maintained under section 17, or such other information as is reasonably required by the Registrar **to ensure compliance with the provisions of the Act**.

[71] By virtue of section 18(2) the Registrar may make copies of or take extracts from any records or other information furnished to the Registrar under this section. The registered officer of the party must comply [section 18(3)], or he or she commits an offence with a $10,000 fine or a term of imprisonment up to 5 years or both as penalties. Under section 26A(1) the Registrar is given all the powers necessary to carry out his functions under this Act.

[72] As I have said earlier, there was no evidence submitted of the office holders of SODELPA appointed or elected under the Amended Constitution of the party, giving rise to a statutory obligation upon Mr. Rabuka to provide to the Registrar his financial details pursuant to section

24(1A). The foundations giving rise to an obligation to provide must be properly proved by evidence.

[73] At Common Law the courts accepted certificates issued by public officials. Sometimes statutes carried special evidentiary sections stating that the certificate of the Registrar shall be accepted for all purposes as proof of the matters covered in the certificate.

[74] By section 15 of the Diplomatic Privileges and Immunities Act the question of whether or not a person or organisation has been accorded any privilege or immunity under the Act is decided by the issuance of a certificate from the Minister. Such certificate under the Act "shall be conclusive evidence of that fact."

[75] A certified copy of any entry in a register or register book signed and sealed by the Registrar or a divisional registrar, as the case may be, shall be received in all courts as evidence of the birth, death or marriage to which the same relates and of the particulars therein recorded without further proof of such matters and every certificate of the Registrar that every register of births, deaths or marriages for any specified period is lost or destroyed shall be received in any court as conclusive evidence of the facts [section 26 Births, Deaths, and Marriages Registration Act].

[76] A certificate of registration given by the Registrar of Companies in respect of any company shall be conclusive evidence that all requirements of the Companies Act in respect of registration and of matters of precedent and incidental thereto have been complied with, that the company is authorised to be registered and duly registered under the Act

and that company has the company name specified in the certificate of registration.

[77] There is no such enabling certificate section in the instant Act in this case. However this need not have deterred the Registrar from issuing an authoritative certificate. It could have put to rest the contentious issues of the registration of SODELPA and of the status of Mr. Rabuka as a relevant office holder.

[78] The certificate could have covered the following facts and been tailored relevantly for this case as follows:

> "I certify that having determined that the SODELPA as a political party should be registered, the said party was registered on the [date of registration inserted ………] as a political party pursuant to section 10 of the Political Parties (Registration, Conduct, Funding, and Disclosures) Act 2013.
>
> I certify that SODELPA was still so registered on 29th December 2017, and that it remains on the register."
>
> 20th May 2018
>
> Signed: Mohammed Saneem
> Registrar of Political Parties

To this certificate should be attached a certified extract or copy of the register showing the relevant entry.

[79] A similar kind of certificate could be devised showing acceptance by the Registrar that the person providing the declaration is accepted by the Registrar for the purpose of complying with section 24(1A) in the office of party leader as an office holder pursuant to section 2. After all it is the

Registrar whose duty it is to ensure there is compliance by the political parties and their office-holders with their obligations under the Act.

[80] There were two other ways in which the information recorded in the Register could be adduced in evidence. The first is under the Public Documents Act 1884. Certified copies of documents in the custody of public officers are made admissible as evidence, and certified copies of documents can be issued on application. Section 2 of the Act provides:

> "2. Whenever any person is entitled to adduce proof in any court of justice or before any person now or hereafter having by law or consent of parties authority to hear, receive and examine evidence of the contents of any book or document in any public office or in the official charge of any public officer, it shall be sufficient if such person produce a copy of such book or document or extract therefrom signed and certified to be correct by the officer to whose custody the original is entrusted, and such copy or extract shall be admissible in evidence in such court or before such person in place of the original, …"

[81] A judge may decide whether any book or document, the original, should be produced. If the judge considers it necessary for the purposes of justice, he or she may specially order its production in a court of law. Generally speaking in the modern world with digital storage few would claim the necessity of producing the original register.

[82] I said there were no provisions within the Act for certificates to be issued. However there is another form of authoritative record available for production in court. Throughout the Act a duty is imposed on the Registrar to publish information furnished. For instance when an application for registration of a political party is lodged the Registrar is

obliged to publish in the Gazette and in the media a notice of the application [section 9(1)]. Once the Registrar has determined the application and decided to register the party he or she must also publish the registration in the Gazette and in the media. Similarly any changes in the registration [section 11(4)] must be so published, and the various financial declarations also must be placed in the Gazette and the media [section 24(4)].

[83] The Magistrate could have been handed a copy of the relevant Gazette with the information so placed by the Registrar.

[84] Section 63 of the Interpretation Act provides:

> "**[INT 63] Gazette to be evidence of matters therein**
> 63. All printed copies of the Gazette, purporting to be printed by the Government Printer, shall be admitted in evidence by all courts and in all legal proceedings whatsoever without any proof being given that such copies were so published and printed and shall be taken and accepted as evidence of the written law, appointments, notices and other publications, therein printed and of the matters and things contained in such written law, appointments, notices and publications respectively."

[85] The requirement to publish information in the Gazette and the media is not only a transparent and open procedure, it is also a means by which the information can be adduced as admissible evidence.

[86] What was the evidence then on these issues available to the court from the testimony of Mr. Saneem, the Registrar? His written statement was tendered by consent. In it he stated "Mr. Sitiveni Rabuka holds the

position of Leader for the Social Democratic Liberal Party (SODELPA)." He says nothing else by way of proof of this fact. Nor was there anything about the registration of SODELPA.

[87] In his evidence in court he said:

"Mr. Aslam: And can you confirm to the court SODELPA, Social Democratic Liberal Party, is a registered political party?

Mr. Saneem: Social Democratic Liberal Party is a registered political party.

Mr. Aslam: And within your course of duty would you know the party leader is?

Mr. Saneem: The party leader for Social Democratic Liberal Party is Mr. Sitiveni Rabuka."

[88] The Registrar did not testify –

(i) as to the date when he determined that SODELPA was accepted for registration.

(ii) that SODELPA was still on the register on 29th December 2017 [the date in the charge alleging the non-compliance or the provision of information that was false].

(iii) and that SODELPA remained on the register at the time of his giving evidence [this last was not strictly relevant to the charge].

[89] Even if the Registrar was to give oral testimony without any other supporting evidence, documentary or otherwise, significantly he failed to confirm SODELPA was registered on the date alleged in the charge. As

such, the quality of evidence on this element of the charge was low, and it is hardly surprising the Magistrate reached his conclusion that SODELPA had not been proved beyond reasonable doubt to be a registered political party, nor Mr. Rabuka an office holder required to make the financial declaration.

<u>Did the prosecution have to prove an intent for either limb of the offence</u>?

[90] Both counsel submitted these two limbs of the offence under section 24(5) required proof of an intent.

[91] The first limb relevantly says:

> "any person who fails to comply with the requirements of subsection (1A) … commits an offence."

[92] The penalties for the lesser offence [Limb 1] are the same as for providing information that is false [Limb 2], a more serious charge where intent is clearly an element to be proved. Though the legislature might have distinguished the two limbs and provided for a lesser penalty on the failing to comply offence, judicial officers can exercise within that band a sentencing discretion to reflect the lesser offence.

[93] No indication of intent is provided within the section. This is to be compared with the Crimes Act offence of Giving False Information to a Public Servant contrary to section 201. That section is worded as follows:

> "201. If a person (the first person) gives to any person employed in the public service any information which **<u>he or</u>**

she knows or believes to be false, and **intending to cause**, or **knowing it to be likely that** the first person will cause the person employed in the public service –

(a) to do or omit anything which such person employed in the public service ought not to do or omit if the true 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 or annoyance of any person –

the first person commits a summary offence.

Penalty – Imprisonment for 5 years." [emphasis added]

[94] It is abundantly clear what the prosecution must prove by way of intent in order to succeed. No such words are included in either limb of section 24(5) however.

[95] Under section 27 a similar offence is set out as follows:

"27 (1) A person who –

(a) fails to furnish particulars or information required to be furnished by a political party or by him or her under this Act;

(b) makes a statement **which he or she knows to be false** or **which he or she has no reason to believe to be true**; or

(c) **recklessly** makes a false statement under this Act,

> commits an offence and shall be liable upon conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 5 years or to both."

This categorisation is much clearer than section 24(5). (a) appears to be a strict liability offence, (b) includes proof of an intent namely **knowledge** of falsity and (c) requires proof of a **reckless** statement.

[96] The failing to comply limb in section 24(5) involves no corrupt intent. It simply alleges a failure to comply simpliciter. This is therefore not one of those cases where there is a requirement for the Accused to prove that he or she had no corrupt intention: **Arnold v. Harris** (1993) 107 DLR (4th) 88.

[97] In **R v Sault Ste Marie (City)** (1978) 85 DLR (3d) 161, 40 CCC (2d) 353, [1978] 2 SCR 1299 Dickson J speaking for the court said the following at pp 181-2:

> "I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man

would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence."

[98] This case has been cited and approved in Fiji courts as well as in New Zealand. In the Court of Appeal, Fiji in **Regina v. Coya (Construction) Pty Ltd** (unreported) Cr. App. No. 73 of 1982, the court approved the approach as in **Sault Ste**. The case concerned the mishandling of explosives at the Monasavu Dam. As an industrial safety matter it was held to be an absolute liability offence, with no defence available.

[99] For strict liability there is no requirement to prove a fault element. The Accused will not be guilty if he or she acted under an honest and reasonable mistake of facts. Although the state of mind of the offender may not be relevant to the determination of guilt, it may be relevant to the question of sentence. Care should be taken on sentence to ensure the penalty imposed does not cause the offender to shoulder unfairly the burden of community education. With new legislation, changing

society's approach to public conduct, the raising of governance standards, it will not at first be necessary to express disapproval by harsh penalties.

[100] Offences that are criminal in nature are more likely to be interpreted according to the general presumption of intent. Regulatory legislation, where offences are created to regulate social or industrial conditions, public safety, safety at sea or in the air, or to protect revenue, are more easily regarded as imposing strict or absolute liability. Increasingly within that group will be regulations governing clean air, pollution, litter, disposal of industrial waste, protection of reefs, fishing zones, forests and wildlife, indeed flora, fauna, and the environment. **R v Cummins** [1979] 3 WWR 593, 3 WCB 255; **State v Hong Kuo Hui and Anor**. HAC40.2004, 2nd May 2005 [where the court found fishing without a licence inside Fiji's waters to be an absolute offence]. Ignorance of the law would not be a defence [section 36 Crimes Act].

[101] Whilst **failing to comply** is likely to be a strict liability regulatory offence, it would seem obvious that the **providing information which is false** is a more straightforward criminal offence requiring proof of both the falsity of the information and the accused's knowledge that it is so false.

[102] The appellant is correct in submitting ignorance of the law, and of the obligation to submit details of his debts, investments and discharged liabilities would not constitute a defence [section 36 Crimes Act]. The defence accepted in that regard at para 57 of the Magistrate's judgment is not therefore accurately expressed.

Duplicity

[103] The charge brought reads as follows:

Statement of Offence

PROVIDING FALSE DECLARATION OF ASSETS, INCOME AND LIABILITIES: Contrary to section 24(1A) and 24(5) of the Political Parties (Registration, Conduct, Funding and Disclosures) Act No. 4 of 2013.

Particulars of the Offence

SITIVENI LIGAMAMADA RABUKA on or about 29 December 2017, at Suva in the Central Division, as the Leader of a registered Political Party namely the Social Democratic Liberal Party (SODELPA), provided a false declaration of assets and liabilities to the Supervisor of Elections by failing to provide information namely, the tax liability with FIJI REVENUE AND CUSTOMS SERVICES in the amount of $316,956.20, the Investment and interest income with RAGHWAN CONSTRUCTIONS LTD in the amount of $200,000 and $16,000 respectively and the liability with said RAGHWAN CONSTRUCTIONS LTD in the amount of $120,000, contrary to sections 24(1A) and 24(5) of the Political Parties (Registration, Conduct, Funding and Disclosures) Act 2013.

[104] The offence in section 24(5) is worded:

> "(5) Any person who fails to comply with the requirements of subsections (1), (1A), (1B) or (2), or provides any information that is false, commits an offence and shall be liable upon conviction to a fine not exceeding $50,000 or to a term of imprisonment not exceeding 10 years or to both."

[105] In the charge as drafted both limbs of section 24(5) are included. It was no surprise therefore that leading defence counsel should protest about its duplicity. Two offences have been merged into one charge, and as can be

seen with significantly two different elements of proof. One is strict and the other requires proof of knowledge of the falsity of the information.

[106] These are not alternative ways of committing the same offence, which would be permissible: **Amos v DPP** [1988] RTR 198. These are two discrete offences, one more serious than the other.

[107] It is an essential of criminal law and procedure for an Accused person to be informed of the charge against him or her [section 14(2)(b) Constitution]. There must be no confusion in the charge.

[108] This is a fundamental protection. Nor is this a case where there is merely a slip in the charge or section numbering where everything else is clear, such as the Statement of Offence and the Particulars of Offence. In such circumstances if the court finds that the Accused and his counsel were able to make their defence without embarrassment or prejudice and they were not misled as to what they had to answer, the defective charge will not be held to be bad in law: **Skipper v. R** [1979] FJC 6; **Shekar and Shankar v. State** Cr. App. AAU0056 of 2004, **Mudaliar v. State** Cr. App. AAU0032.2006.

[109] This confusion could have affected whether or not Mr. Lloyd would decide to call his client as a defence witness. The confusion was there and the defence were understandably prejudiced in the conduct of their case. In these circumstances, and for the breach of the essential constitutional requirement, a fair trial was not obtained. Had a conviction been entered it would have had to be quashed upon appeal.

[110] The learned Magistrate was correct at arriving at his conclusion that the prosecution had failed to prove its case beyond reasonable doubt. It is futile to speculate further.

[111] There was a limited concession on good character by the prosecution, perhaps not as far as the Magistrate had noted. Good character had not been put fully in issue. It was the caution interview that the prosecution relied on to establish knowledge of falsehood. Undoubtedly there was co-operation by a busy person with the investigative agency. The Magistrate wrote:

> "The defendant's conduct is definitely not of someone intending to flout the law. The defendant has maintained throughout his caution interview that he did not think it was necessary and that it was an honest mistake."

There was variance in some answers as to whether inadvertence, old age, led to the mistake or it was mistake as to the requirement to reveal what had been left out, a mistake of law.

[112] The interview for FICAC left many answers unprobed or unclarified. Such interviews should always be conducted on the basis that reliance may have to be made solely on that procedure. The Accused submitted himself voluntarily to being questioned on the reasons for his conduct. He need not have said anything. He did. But further clarifications would have been needed to establish proof beyond reasonable doubt of wrongdoing within the charge.

[113] As I have said the duplicity of the charges was fatal to the prosecution's case and essential elements were not proved. The appeal fails and must be dismissed.

[114] This appeal was a complex matter requiring a great deal of hard work in preparation and because of the time constraints, no doubt all other work would have had to have been put aside. Pursuant to section 254(2) of the CPA there will be an order for $4,000 costs summarily assessed payable to the Respondent within 14 days.

At Suva
12th November 2018

Solicitors:
Office of the Fiji Independent Commission against Corruption for Appellant
Mamlakah Lawyers for Respondent