

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 324 of 2016

STATE

V

1. IFEREIMI VASU

2. PENIASI KURIVITU KUNATUBA

Counsel: Ms. Francis Puleiwai with Mr. Darren Hickes for the State
Mr. Filimoni Vosarogo with Mr. Joji Cakau for the 1st Accused
Ms. Vani Ravono with Ms. Naomi Raikaci for the 2nd Accused

Dates of Trial : 14-18, 21-25, 29 & 31 October and 1, 4-6, 8, 12-15, 18-20, 22 & 25-28
November and 2 December 2019

Closing Addresses: 3 December 2019

Summing Up: 11 December 2019

Judgment: 18 December 2019

JUDGMENT

[1] As per the Amended Information filed by the Fiji Independent Commission Against Corruption (FICAC), the two Accused are charged with the following offences:

FIRST COUNT

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence (b)

IFEREIMI VASU, between 11th July 2013 and 27th December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ\$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.

SECOND COUNT

Statement of Offence (a)

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence (b)

PENIASI KURIVITU KUNATUBA, between 31st October 2012 and 31st March 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Director Corporate Service and Acting Deputy Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ\$ 60,345.65 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.

- [2] The two accused pleaded not guilty to the charges and the ensuing trial was held over a period of 31 days.
- [3] At the conclusion of the evidence and after the directions given in the Summing Up, by a unanimous decision, the three Assessors found the two accused not guilty of the said two charges.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my Summing Up to the Assessors and also the opinions of the Assessors.
- [5] During my Summing Up I explained to the Assessors the salient provisions of Section 139 of the Crimes Act No. 44 of 2009 (Crimes Act).

[6] The Assessors were directed that in order for the prosecution to prove the First Count, they must establish beyond reasonable doubt that;

- (i) The 1st Accused;
- (ii) During the specified time period (in this case between 11 July 2013 and 27 December 2014);
- (iii) At Suva, in the Central Division;
- (iv) Whilst being employed in the public service as the Commissioner of the Fiji Corrections Service;
- (v) Did arbitrary acts;
- (vi) In abuse of the authority of his office;
- (vii) The acts were done intentionally;
- (viii) Which acts were prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors; and
- (ix) The acts were done for the purpose of gain.

[7] Similarly, the Assessors were directed that in order for the prosecution to prove the Second Count, they must establish beyond reasonable doubt that;

- (i) The 2nd Accused;
- (ii) During the specified time period (in this case between 31 October 2012 and 31 March 2014);
- (iii) At Suva, in the Central Division;
- (iv) Whilst being employed in the public service as the Director Corporate Service and Acting Deputy Commissioner of the Fiji Corrections Service;
- (v) Did arbitrary acts;
- (vi) In abuse of the authority of his office;
- (vii) The acts were done intentionally;
- (viii) Which acts were prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors; and
- (ix) The acts were done for the purpose of gain.

[8] Each of the above individual elements was further elaborated upon in my Summing Up.

[9] In this case, much debate took place with regard to the fault element which the prosecution had to establish so as to prove a charge of Abuse of Office in terms of Section 139 of the Crimes Act.

[10] This Court made a Ruling, on 28 November 2019, that in terms of the provisions of the Crimes Act, the fault element for the offence of Abuse of Office is one of intention.

[11] Learned Counsel for the prosecution submitted that by this Ruling Court would be departing from the rich legal jurisprudence created over the past four decades in this area of the law.

[12] I too am very conscious that I would be departing from the legal jurisprudence created in this area of the law. However, I have very good reason to do so.

[13] The authorities on which the prosecution was relying on were the following:

1. ***Mahendra Motibhai Patel v. Fiji Independent Commission Against Corruption*** [2013] FJSC 7; CAV0007.2011 (26 August 2013);

2. ***Laisenia Qarase v. Fiji Independent Commission Against Corruption*** [2013] FJCA 44; AAU66.2012 (30 May 2013);

3. ***Inoke Balemila Devo v. Fiji Independent Commission Against Corruption*** [2017] FJSC 16; CAV0005.2017 (20 July 2017);

4. ***Keni Dakuidreketi v. Fiji Independent Commission Against Corruption*** [2017] FJCA 117; AAU0099.2014 (14 September 2017); and

5. ***Fiji Independent Commission Against Corruption v. Ana Laqere & Others*** [2017] FJHC 335; HAC56.2014 (4 May 2017).

[14] At the very outset, it must be borne in mind that except for ***Fiji Independent Commission Against Corruption v. Ana Laqere & Others*** (*Supra*), the remaining four cases referred to above concerned Abuse of Office charges in terms of Section 111 of the Penal Code (Chapter 17 the Laws of Fiji).

[15] Section 111 of the Penal Code read as follows:

“Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour.

If the act is done or directed to be done for purpose of gain, he is guilty of a felony, and is liable to imprisonment for three years.”

[16] It has been upheld in the above cases that the main elements of Section 111 of the Penal Code which require proof are the following:

1. That the accused was employed in the public service;

2. That he did an arbitrary act;
3. The act was in abuse of the authority of his office;
4. That was prejudicial to the rights of another; and
5. The act was done for the purpose of gain.

[17] Since the wording of Section 111 of the Penal Code and Section 139 of the Crimes Act are almost identical, I agree that most of the principles laid down in the above case authorities are still applicable in determining the elements of the offence of Abuse of Office, in terms of Section 139 of the Crimes Act.

[18] However, in my view, this would not extend to determining the fault element of the offence.

[19] As to the fault element the prosecution insists that the fault element in such cases remains “in abuse of the authority of his office”, which is ulterior motive and bad faith.

[20] In the Concise Oxford English Dictionary (Twelfth Edition 2011), the term “Abuse” has been defined in the following manner:

Verb - 1. Use to bad effect or for a bad purpose.

2. Treat with cruelty or violence.

3. Address in an insulting and offensive way.

Noun - 1. The improper use of something.

2. Cruel and violent treatment.

3. Insulting and offensive language.

[21] The synonyms (a word or phrase that means exactly or nearly the same as another word or phrase in the same language) for the term Abuse are many. These include misuse, mishandle, misapply, misemploy, mistreat, maltreat, ill-treat, ill-use, exploit, pervert, or take advantage of.

[22] It is clear from the above that the term “Abuse” denotes a physical act and not a mental state.

[23] It is my view, that even in the authorities aforementioned it is not specifically stated that the fault element of the offence is “in abuse of the authority of his office”. In my view, “in abuse of the authority of his office” is a further physical element that the prosecution has to prove. However, I agree that in determining what “in abuse of the

authority of his office” would be, the state of mind of the accused or the fault element could be considered. I emphasize once again that the term “in abuse of the authority of his office” is not *per-se* the mental element or the fault element of the offence, but in determining what “in abuse of the authority of his office” would be, you could consider the state of mind of the Accused.

[24] However, the Crimes Act has now repealed the Penal Code (By way of Section 391 of the Crimes Act).

[25] Chapter II of the Crimes Act sets out the General Principles of Criminal Responsibility. Section 10 of the Crimes Act provides:

“(1) The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of Fiji.

(2) This Chapter contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.”

[26] Section 15 of the Crimes Act makes reference to the physical elements of an offence in the following manner:

“(1) A physical element of an offence may be —

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Decree—

"conduct" means an act, or an omission to perform an act or a state of affairs;

"engage in conduct" means —

(a) do an act; or

(b) omit to perform an act.

[27] Similarly, Section 18 of the Crimes Act makes reference to the fault elements of an offence in the following form:

“(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Sub-section (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.”

[28] Section 23 of the Crimes Act makes provision for situations where an offence does not specify a fault element.

“23. — (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”

[29] It must be emphasized that similar provisions to Section 15, 18 and 23 of the Crimes Act were not found in the now repealed Penal Code.

[30] The Crimes Act has now codified the general principles of criminal responsibility under the Laws of Fiji and has thereby brought in legal certainty.

[31] Therefore, it is my considered view that Section 139 of the Crimes Act does not specifically set out a fault element. There is no dispute that the Section sets out the physical element of the offence to be one of conduct. Therefore, in terms of Section 23 of the Crimes Act where the law creating the offence does not specify a fault element for a physical element that consist only of conduct, intention is said to be the fault element for that physical element.

[32] This is the basis on which I have come to the conclusion that the prosecution must prove beyond reasonable doubt that the arbitrary acts, in abuse of the authority of their office, was done by the two accused intentionally.

[33] In support of their case, the prosecution led the evidence of the following 12 witnesses:

1. Jainan Prasad – Former Senior Procurement Officer at the Ministry of Finance.
2. Abdul Rasheed – Former Senior Accounts Officer at the Fiji Corrections Service.
3. Sakiusa Veiwili - Business Development Manager at Fiji Corrections Service (from December 2013 to July 2014).
4. Ronal Kumar – TMA Clerk at Fiji Corrections Service.
5. Abhi Ram Charan – Former Registrar of Companies.
6. Nandu Naidu – Manager Operations Punjas, Suva Branch.
7. Pene Mario – Business Development Manager at Fiji Corrections Service (from May to December 2013).

8. Iferemi Nakitorotoro – Staff Officer Enterprise at Fiji Corrections Service.
9. Akuila Bulivono Namakadre - Former Deputy Commissioner at Fiji Corrections Service.
10. Iliesa Lutu – Former Deputy Permanent Secretary to the Public Service Commission.
11. Semiti Tikoduadua – Chief Investigator FICAC.
12. Makelesi Tunisau – Financial Investigator FICAC.

[34] By consent of both the prosecution and defence, Prosecution Exhibits **PE 1 to PE 54** was tendered to Court. In addition to the said documents, during the course of the trial the prosecution tendered **PE 55 to PE 57 and PE 60 to PE 66**.

[35] In terms of the provisions of Section 134 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence agreed to tender the following statements of witnesses by consent, but subject to cross examination of the said witnesses:

1. Sakiusa Veiwili - Statement dated 17/08/15 (6 pages);
2. Ronal Kumar – Statement dated 17/08/15 (6 Pages);
3. Abhi Ram Charan – Statement dated 28/07/15 (5 pages)
4. Semiti Tikoduadua – Statement dated 19/03/19 (3 pages); and
5. Makelesi Tunisau – Two (2) Statements dated 20/03/19 (4 pages) and 24/06/19 (5 pages) respectively.

[36] I directed the Assessors that since the prosecution and the defence agreed to tender the above statements of witnesses by consent, in terms of Section 134(1) of the Criminal Procedure Act the said written statements are admissible as evidence to a like extent as oral evidence to the like effect by the person making the statement.

[37] In terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence consented to treat the following facts as “*Agreed Facts*” without placing necessary evidence to prove them:

AGREED FACTS PERTAINING TO THE FIRST ACCUSED

1. **THAT** the 1st Accused person in this matter is Ifereimi Vasu (hereinafter referred to as the 1st accused), 58 years old of Quarters 66, Ratu Sukuna Road, Suva.
2. **THAT** the 1st accused held the position of “Commissioner of Prison and Corrections Service” for the Fiji Corrections Service (hereinafter referred to as the “FCS”) during the time period material to this case.
3. **THAT** the 1st accused was a person employed in the public service within the meaning of section 4(1) of the Crimes Decree No. 44 of 2009 at all times relevant to the information of this case.

AGREED FACTS PERTAINING TO THE SECOND ACCUSED

1. **THAT** the 2nd Accused person in this matter is Peniasi Kurivitu Kunatuba (hereinafter referred to as the 2nd accused), 62 years old of Shri Raman Place, Namadi Heights, Suva.
2. **THAT** the 2nd accused held the position of “Director Corporate Service and Acting Deputy Commissioner” for the Fiji Corrections Service (hereinafter referred to as the “FCS”) during the time period material to this case.
3. **THAT** the 2nd accused was a person employed in the public service within the meaning of section 4(1) of the Crimes Decree No. 44 of 2009 at all times relevant to the information of this case.

FURTHER AGREED FACTS FOR 1ST ACCUSED AND 2ND ACCUSED

Naboro Mart Limited

1. **THAT** the Naboro Mart Limited (hereinafter referred to as “NML”) is a limited liability company incorporated under the Companies Act on the 24th October 2011.
2. **THAT** on the same date, NML was issued with Certificate No. RCBS2011L5529 by the Registrar of Companies then Mr. Abhi Ram Charan.

3. **THAT** the Shareholders and Directors of NML are Mr. Ifereimi Vasu (1st Accused), Mr. Apimeleki Taukei, Akuila Buliivoro aka Akuila Namakadre and Lusiana Lului.
4. **THAT** Lusiana Lului not only was she the Director of NML, she was also appointed as the Secretary for NML on the 12th of October 2011.
5. **THAT** the above mentioned Directors referred to paragraph 3 did not pay any subscription nor are they entitled to Directors fees or paid any remuneration as stated in the Articles of Association.
6. **THAT** Mr Akuila Bulivono Namakadre was the Deputy Commissioner at the Fiji Corrections Service (hereinafter referred to as "FCS") from February 2012 to September 2012 before he went on tour on duty for 1 year.
7. **THAT** on the 20th of September 2012, Mr Namakadre handed over his files and documents before he left on tour on duty. He provided a handover statement.
8. **THAT** the NML was registered for the welfare of the Corrections Officers through the Fiji Corrections Service Welfare (hereinafter referred to as "**FCS Welfare**").
9. **THAT** nature of business of NML is to provide the following:
 - i. To carry out business as general merchants in the retail and wholesale of general merchandise, initially for household food items;
 - ii. To carry on the business of retailing agricultural products and for possible exports later.
 - iii. To carry on the business of operating an internet shop for research purposes;
 - iv. To carry on the business of bill payments for various utilities in conjunction with a commercial bank; and
 - v. To carry on the business of carries by land within the Suva Navua corridor
10. **THAT** the NML belongs to the FCS Welfare.

Small Business Units

11. **THAT** the Small Business Units (hereinafter referred to as “SBU”) was known initially as Prisons Industry when it started in 1996 until 2007.
12. **THAT** the Prison Industry was solely established to rehabilitate the Prisoners and also to ensure food security in all FCS Institutions across Fiji including Naboro.
13. **THAT** the name Prison Industry was change to Enterprise.
14. **THAT** in 2007 when Mr. Iovane Naivalurua was appointed as the FCS Commissioner, he changed the name of the Enterprise to Small Business Unit (hereinafter referred to as “SBU”)
15. **THAT** Mr. Naivalurua and his team negotiated with the government for the funding to be given for SBU to operate the 6 different units.
16. **THAT** the government through the Ministry of Finance (Known then) now Ministry of Economy had provided about FJ\$200,000 to the SBU’s to assist in its operations in 2009.
17. **THAT** the SBU’s consists of 6 units which were all based in Naboro namely:
 - i. Piggery
 - ii. Bakery
 - iii. Joinery
 - iv. Poultry
 - v. Farming
 - vi. Tailor
18. **THAT** the Nasinu prison later on then ran a fish farm unit and the female prison also ran a tailor unit.
19. **THAT** a SBU team was formed, formerly known as Enterprise team through the directive of the Commissioner Mr. Naivalurua to look after the overall function of the SBU’s.
20. **THAT** a Business Development Manager (hereinafter referred to as “BDM”) was appointed to oversee the daily operations of the SBU.
21. **THAT** Mr. Pene Mario was appointed the BDM from 09th of May 2013 – 02nd December 2013 who took over the post from Ms. Salote Panapasa.

22. **THEREAFTER** on the 03rd December 2013, Mr. Sakiusa Veiwili was appointed the BDM assuming the same role from Mr. Pene Mario.
23. **THAT** Mr. Apete Tavo assume the role of the BDM from Mr. Sakiusa Veiwili in August of 2014.
24. **THAT** the TMA clerks were namely Mr. Ronal Kumar and Mr. Junior Bali.
25. **THAT** Mr. Ronald Kumar was based at HQ while Mr. Bali was based in Naboro.
26. **THAT** the Staff Officer at Enterprise (hereinafter referred to as “SOE”) namely Ifereimi Nakitorotoro was also part of the TMA Team who was also appointed by the Commissioner then Mr. Naivalurua to supervise the officers within each unit as to how they carry out their functions.
27. **THAT** Mr. Nakitorotoro was directly reporting to the BDM.
28. **THAT** Anitivasa Radrokai also came in as part of the TMA team as a TMA Clerk under the leadership of Apete Tavo as the BDM.
29. **THAT** the following minutes are agreed to by the Accused but subject to cross examination
30. **THAT** the following minutes were prepared and signed by TMA Clerk Mr. Ronal Kumar.
 - i. PE25 – Minutes dated 30/01/13 addressed to DCS for payment to NML on pending five (5) Purchase Orders (PO) from 2012.
 - ii. PE25 (PO91151 – 004685) Minute dated 31/10/12 addressed to DCS for purchase of Washing Soap.
 - iii. PE32 – Minute dated 10/09/13 addressed to COMCOR for purchase of Bakers Flour.
 - iv. PE33 – Minute dated 25/02/14 addressed to BDM for purchase of rice.
 - v. PE37 - Minute dated 15/03/13 addressed to DCP through BDM for payment to NML
 - vi. PE40 – Minute dated 12/06/13 addressed to DCOMCOR for payment to NML.
 - vii. PE41 – Minute dated 17/06/13 addressed to DCOMCOR for payment to NML

- viii. PE46 – Minute dated 04/09/13 addressed to COMCOR through AO for approval for payment.
 - ix. PE47 - Minute dated 03/10/13 addressed to COMCOR through DCOMCOR and through DCOMCOR and through AO for payment to NML.
31. **THAT** the following minutes were prepared and signed by TMA Clerk Junior Bali.
- i. PE30 – Minute dated 10/07/13 addressed to COMCOR ufs BDM and AO for purchase of 200 bags Bakers Flour.
 - ii. PE31 – Minute dated 07/08/13 addressed to COMCOR for purchase of Bakers Flour and Rice.
 - iii. PE42 – Minute dated 10/07/13 addressed to COMCOR through BDM and AO for (AP) payment to NML.
 - iv. PE43 – Minute dated 10/07/13 addressed to COMCOR through BDM and AO (AP) payment to NML.
 - v. PE44 – Minute dated 31/07/13 addressed to COMCOR FOR (AP) payment to NML for Bran.
 - vi. PE45 – Minute dated 31/10/13 addressed to COMCOR for (AP) payment to NML for Tarpauline.
32. **THAT** the following minutes were prepared by Staff Officer Enterprise (SOE) Ifereimi Nakitorotoro:
- i. PE25 – (PO91151 – 004695) Minute dated 26/10/12 addressed to DCS for plastic wrapper.
 - ii. PE25 – (PO91151 – 004696) Minute dated 01/11/12 addressed to DCS for poultry feeds – Mill mix
 - iii. PE26 – Minute dated 02/04/13 addressed to COMCOR through BDM for Bakery – Bakers Flour and Ingredients.
 - iv. PE27 – Minute dated 04/06/13 addressed to DCOMCOR through BDM for root crops, Veg, Digging Fork.
 - v. PE28 - Minute dated 14/06/13 addressed to COMCOR through BDM for Bakery – Bakers Flour.
 - vi. PE29 - Minute dates 03/05/13 addressed to DCC through BDM for Gumboots – Poultry/ COMM Veg.

- vii. PE38 – Minute dated 19/03/13 addressed to DCC through BDM for Piggery – Mill Mix.
 - viii. PE39 – Minute date 22/03/13 addressed to AO through BDM for Naboro Mini Mart.
33. **THAT** the following minutes were signed by Sakiusa Veiwili in his term as the BDM namely:
- i. PE34 – Minute dated 25/04/14 addressed to COMCOR for the Purchase of Rice for piggery.
 - ii. PE35 – Minute dated 28/05/14 addressed to COMCOR for the Purchase of Piggery Feeds – loose rice.
 - iii. PE48 – Minute dated December 13 addressed to COMCOR through BDM for the payments for items bought from NML.
 - iv. PE54 – Minute dated 22/01/14 addressed to COMCOR through CLO for Purchase of Rice for Piggery.
34. **THAT** the following minutes were signed by Mr. Apete Tavo in his term as the BDM namely:
- i. PE36 – Minute dated 24/08/14 addressed to COMCOR through CLO for the Purchase of 50kg Long Grain Rice for Pig Feed - \$21,000
 - ii. PE50 – Minute dated 04/11/14 addressed to COMCOR through CLO and SAO for the payment to NML LTD - \$4,695.20
35. **THAT** the following minute was prepared and signed by Mr. Anitvasa Radrokai namely:
- i. PE51 – Minute dated 23/12/14 addressed to COMCOR through CLO and BDM for (AP) – Payment to NML LTD – 6,913..93

[38] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as *“Agreed Facts”* and *“Further Agreed Facts”* without placing necessary evidence to prove them that they must therefore, treat all the above facts as proved beyond reasonable doubt.

[39] Both accused exercised their right to remain silent.

[40] The 2nd Accused tendered to Court Defence Exhibits **DE PK 1, DE PK 2 and DE PK 3.**

[41] Based on the agreed facts it has been admitted that the 1st Accused in this case is Ifereimi Vasu; and the 2nd Accused is Peniasi Kurivitu Kunatuba. There is also no

dispute as to the specified time period during which it is alleged the offences were committed or as to the place of offence.

- [42]** In this case it has also been agreed that the 1st and 2nd Accused were persons employed in the public service within the meaning of section 4(1) of the Crimes Act at all times relevant to the information of this case. It has been also agreed that the 1st Accused held the position of “Commissioner of Prison and Corrections Service” for the Fiji Corrections Service (“FCS”) during the time period material to this case. Similarly, it has been agreed that the 2nd Accused held the position of “Director Corporate Service and Acting Deputy Commissioner” for the Fiji Corrections Service (“FCS”) during the time period material to this case.
- [43]** However, the prosecution must prove all the remaining elements of the two charges beyond reasonable doubt.
- [44]** In respect of the 1st Accused, the prosecution case is that he did arbitrary acts, for the purpose of gain, in abuse of the authority of his office, by facilitating and approving the purchasing of goods to the amount of FJ\$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service. The prosecution submits that the said acts were prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.
- [45]** In respect of the 2nd Accused, the prosecution case is that he did arbitrary acts, for the purpose of gain, in abuse of the authority of his office, by facilitating and approving the purchasing of goods to the amount of FJ\$ 60,345.65 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service. The prosecution submits that the said acts were prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.
- [46]** In respect of the 1st Accused, the FJ\$ 131,683.33, is made up of 16 distinct transactions. In respect of the 2nd Accused, the FJ\$ 60,345.65, is made up of 12 distinct transactions.
- [47]** The prosecution must establish beyond reasonable doubt that the 1st Accused did arbitrary acts, for the purpose of gain, in abuse of the authority of his office, by facilitating and approving the purchasing of goods to the amount of FJ\$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service.
- [48]** Similarly, the prosecution must establish beyond reasonable doubt that the 2nd Accused did arbitrary acts, for the purpose of gain, in abuse of the authority of his office, by facilitating and approving the purchasing of goods to the amount of FJ\$

60,345.65 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service.

[49] Facilitation is a very broad term. It may include approval as well. Therefore, it is incumbent on the prosecution to establish that the 1st Accused and 2nd Accused facilitated and approved the purchasing of goods. It is not mere approval that the prosecution has to establish. There is a greater burden cast on the prosecution to prove that the two accused facilitated and approved the purchasing of goods as set out in the two charges.

[50] In determining this matter you have to take into consideration the procurement process that was followed at the FCS, mainly by the Small Business Units (SBU's). Several prosecution witnesses testified to the procurement process or the process that was followed for purchasing of goods, services and works.

[51] Prosecution witness Abdul Rasheed, who served as Accounts Officer and later as Senior Accounts Officer, testified to the procurement procedure followed at the FCS, in particular in respect of the SBU's in the following manner:

“(i) He distinguished between the procedure followed for purchasing of tendered goods or services (goods or services on standard offer contract) and for purchasing of non-tendered goods or services.

(ii) If it were tendered goods or services no competitive quotations were required to be obtained. If it were non-tendered goods or services three competitive written quotations were required to be obtained [verbal quotations could be obtained if the goods or services were less than \$100 (Finance Manual 2011) or were less than \$1000 (Finance Manual 2013) respectively. But must be recorded and certified by the officer receiving them].

(iii) Where there is a need for purchasing of goods or obtaining of services, the need is identified and a Minute (Memo) would be generated seeking approval for the said purchase of goods or services. If the goods or services were on the tendered list then no competitive quotations were required to be obtained. If the goods or services were non-tendered items then three competitive written quotations were required to be obtained and attached to the Minute.

(iv) The Minute would be submitted to the officer having the required procurement limit for approval. Once approved the purchase order would be prepared or raised in the name of the supplier. Invoices would be obtained from the supplier and payment voucher will be prepared in

the name of the supplier. The payment would then be made out to the said supplier.”

- [52] It is an agreed fact that on the 3 December 2013, Sakiusa Veiwili was appointed the Business Development Manager (BDM) of the SBU’s, assuming the same role from Pene Mario. He had served in this capacity until July 2014. He explained the procurement procedure followed by the SBU’s as follows:

“The procurement process is that the daily request or demand by the Team Leaders to be requested daily. This will be done once the Team Leader will see that the stocks have gone down. Once that is done the request is then put forward to us. Once the request is received then we will locate for three quotations. These quotations were normally from the listed tenderers and the companies. Thereafter, the Minute will be done for recommendation to COMCOR for the request. In this I will sign or endorse on the Minute. These were the procurement process already in place before I joined”.

- [53] From the above, it is patently clear that the procurement process commences at the time the need for the purchase of the goods, services or works is identified at the ground level, by the Team Leaders of the relevant SBU’s. For the prosecution to establish that the two accused facilitated this process they would have to establish beyond reasonable doubt that the two accused orchestrated these processes from the very inception.
- [54] As to approval the position taken up by the 1st Accused is that there was no breach or irregularity in him approving the purchasers that are the subject matter of this case. The 1st Accused’s position is that he have no option but to approve some of the requests as they were urgent or since the goods had already been received or consumed or due to the fact that it was the end of the year and the payment had to be made to the supplier.
- [55] The position taken up by the 2nd Accused is that he never approved any of the purchasers that are the subject matter of this case. The 2nd Accused submits that his Minutes to the effect “can we organise please” or “please facilitate” were not formal approvals given by him.
- [56] It is my considered view that the prosecution has failed to establish beyond reasonable doubt that the 1st Accused facilitated the purchasing of goods to the amount of FJ\$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service.
- [57] In a like manner, It is my considered view that the prosecution has failed to establish beyond reasonable doubt that the 2nd Accused facilitated the purchasing of goods to the amount of FJ\$ 60,345.65 from the Naboro Mart Limited contrary to the

Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service.

- [58] It is accepted by all parties that there were many breaches and irregularities in the procurement procedure. However, the two accused alone cannot be held responsible for all those breaches. There were several officers, with pre-defined duties and responsibilities, within the procurement process, who should take equal share of the blame for these breaches and irregularities. Merely by stating that they had been directed by the two accused to submit all requests for purchasers for their approval, would not mitigate or take away the blame from them.
- [59] However, I need not emphasize that a breach of a regulation or directive alone does not necessarily tantamount to a criminal offence.
- [60] In this case the prosecution is relying on the admissions made by the two accused in their Caution Interview Statements. Since the accused are not challenging the admissibility of their Caution Interview Statements, the statements have been tendered to Court by consent of both the prosecution and the defence [PE 63 is the Caution Interview Statement of Ifereimi Vasu; and PE 62 is the Caution Interview Statement of Peniasi Kunatuba]. The two accused admit to making the statements and also submit that the answers given by them in the said statements represent their explanations to the allegations against them.
- [61] I am of the opinion that the statements were made voluntarily by the two accused, and that the answers provided by them are truthful and, as such, sufficient weight could be attached to the said answers given by the two accused.
- [62] For the aforesaid reasons I find that the prosecution has failed to establish beyond reasonable doubt that the two accused did arbitrary acts, in abuse of their authority of office or that the said acts were done intentionally.
- [63] In my view, the Assessor's unanimous opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of both counts.
- [64] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove its case beyond reasonable doubt by adducing credible and reliable evidence satisfying all elements of the offence of Abuse of Office against the 1st Accused and the 2nd Accused.
- [65] In the circumstances, I find the 1st Accused not guilty of the charge of Abuse of Office as charged in Count One. I find the 2nd Accused not guilty of the charge of Abuse of Office as charged in Count Two.
- [66] Accordingly, I acquit the 1st Accused of Count One; and I acquit the 2nd Accused of Count Two.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 18th Day of December 2019

Solicitors for the State:

**Office of the Fiji Independent Commission Against
Corruption (FICAC), Suva.**

Solicitors for the Accused:

**Vosarogo Lawyers, Barristers & Solicitors, Suva for the
1st Accused.**

**Ravono & Raikaci Law, Barristers & Solicitors, Nausori
for the 2nd Accused.**