

## IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

**ALIPATE NAKA**

**Appellant**

**CASE NO: HAA. 34 of 2019**  
[MC, Suva Criminal. Case No. 354 of 2019]

**Vs.**

**STATE**

**Respondent**

**Counsel** : Appellant in person  
Ms. E. Rice for the Respondent

**Hearing on** : 04 December, 2020

**Judgment on** : 18 February, 2021

### JUDGMENT

#### *Introduction*

1. The appellant was charged before the Magistrate Court at Suva with one count of general dishonesty contrary to section 323 of the Crimes Act 2009 ("Crimes Act"), four counts of obtaining a financial advantage contrary to section 326 of the Crimes Act and five counts of abuse of office contrary to section 139 of the Crimes Act. The charges read thus;

#### FIRST COUNT

##### *Statement of Offence (a)*

GENERAL DISHONESTLY - OBTAINING A GAIN: Contrary to section 323 of the Crimes Act of 2009.

*Particulars of Offence (b)*

ALIPATE NAKA, on the 23<sup>rd</sup> day of October, 2018 at Suva in the Central Division, dishonestly obtained \$850.00 by making payment to his Subrails Furniture Centre Account number 154509 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 with the intension of dishonestly obtaining gain.

**SECOND COUNT**

*Statement of Offence (a)*

**ABUSE OF OFFICE:** Contrary to section 139 of the Crimes Act of 2009.

*Particulars of Offence (b)*

ALIPATE NAKA, on the 23<sup>rd</sup> day of October, 2018 at Suva in the Central Division, being a person employed in a public service, as an Accounts Officer did an arbitrary act which he dishonestly obtained \$850.00 by making payment to his Subrails Furniture Centre Account number L54509 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 with the intension of dishonestly obtaining gain, such appropriation being an abuse of authority vested in his office thus prejudicing the rights **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**.

**THIRD COUNT**

*Statement of Offence (a)*

**OBTAINING FINANCIAL ADVANTAGE:** Contrary to section 326 (1) (a) (b) (c) of the Crimes Act of 2009.

*Particulars of Offence (b)*

ALIPATE NAKA, on the 08<sup>th</sup> day of November, 2018 at Suva in the Central Division, electronically transferred \$1,500.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage.

**FOURTH COUNT**

*Statement of Offence (a)*

**ABUSE OF OFFICE:** Contrary to section 139 of the Crimes Act of 2009.

*Particulars of Offence (b)*

ALIPATE NAKA, on the 08<sup>th</sup> day of November, 2018 at Suva in the Central Division, being a person employed in a public service, as an

Accounts Officer did an arbitrary act which he electronically transferred \$1,500.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage, such appropriation being an abuse of authority vested in his office thus prejudicing the rights **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**.

#### FIFTH COUNT

##### *Statement of Offence (a)*

**OBTAINING FINANCIAL ADVANTAGE:** Contrary to section 326 (1) (a) (b) (c) of the Crimes Act of 2009.

##### *Particulars of Offence (b)*

**ALIPATE NAKA**, on the 12<sup>th</sup> day of November, 2018 at Suva in the Central Division, electronically transferred \$950.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage.

#### SIXTH COUNT

##### *Statement of Offence (a)*

**ABUSE OF OFFICE:** Contrary to section 139 of the Crimes Act of 2009.

##### *Particulars of Offence (b)*

**ALIPATE NAKA**, on the 12<sup>th</sup> day of November, 2018 at Suva in the Central Division, being a person employed in a public service, as an Accounts Officer did an arbitrary act which he electronically transferred \$950.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage, such appropriation being an abuse of authority vested in his office thus prejudicing the rights **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**.

## SEVENTH COUNT

### *Statement of Offence (a)*

**OBTAINING FINANCIAL ADVANTAGE:** Contrary to section 326 (1) (a) (b) (c) of the Crimes Act of 2009.

### *Particulars of Offence (b)*

**ALIPATE NAKA**, on the 20<sup>th</sup> day of November, 2018 at Suva in the Central Division, electronically transferred \$850.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage.

## EIGHTH COUNT

### *Statement of Offence (a)*

**ABUSE OF OFFICE:** Contrary to section 139 of the Crimes Act of 2009.

### *Particulars of Offence (b)*

**ALIPATE NAKA**, on the 20<sup>th</sup> day of November, 2018 at Suva in the Central Division, being a person employed in a public service, as an Accounts Officer did an arbitrary act which he electronically transferred \$850.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage, such appropriation being an abuse of authority vested in his office thus prejudicing the rights **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**.

## NINETH COUNT

### *Statement of Offence (a)*

**OBTAINING FINANCIAL ADVANTAGE:** Contrary to section 326 (1) (a) (b) (c) of the Crimes Act of 2009.

### *Particulars of Offence (b)*

**ALIPATE NAKA**, on the 22<sup>nd</sup> day of November, 2018 at Suva in the Central Division, electronically transferred \$500.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial

advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage.

**TENTH COUNT**

*Statement of Offence (a)*

**ABUSE OF OFFICE:** Contrary to section 139 of the Crimes Act of 2009.

*Particulars of Offence (b)*

**ALIPATE NAKA**, on the 22<sup>nd</sup> day of November, 2018 at Suva in the Central Division, being a person employed in a public service, as an Accounts Officer did an arbitrary act which he electronically transferred \$500.00 cash into the Bank of South Pacific account of his wife namely Senicaucau Lolohea account number 10292977 from the Bank of South Pacific account of **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS** account number 704675 as a result obtained financial advantage for himself from **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**, knowingly that he is not eligible to receive that financial advantage, such appropriation being an abuse of authority vested in his office thus prejudicing the rights **MINISTRY OF EMPLOYMENT PRODUCTIVITY & INDUSTRIAL RELATIONS**.

2. The appellant was convicted upon pleading guilty to the above charges on 25/06/19. This was the first occasion his plea was taken where he was first produced before the Magistrate Court in view of the said charges on 07/03/19. The conviction against the appellant was entered on 02/09/19, the same day the appellant was sentenced. Accordingly, 18 months imprisonment was imposed for the charge of general dishonesty, 4 years and 06 months for each count of abuse of office and 03 years and 06 months for each count of obtaining a financial advantage. The sentences were ordered to run concurrently.
3. Being aggrieved by the sentence imposed, the appellant had taken steps to file a timely appeal raising the following grounds of appeal;
  - a) Failed to notice that the Appellant was punished twice with the same facts contribute significantly to harsh sentencing.
  - b) Incomparable facts of the Precedent case.
  - c) Failing to properly assess that factors of culpability and harm.

- d) Failed to deduct full 1/3 discount of Early Plea.
- e) Failed to consider Section 18(2) of sentence and Penalty Decree.
- f) Failed to consider the Principle of parity sentencing.

### **Discussion**

4. In the case of *Kim Nam Bae v The State* [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

*“It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).”*

5. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had, (a) acted upon a wrong principle; (b) allowed extraneous or irrelevant matters to guide or affect him; (c) mistook the facts; or (d) did not take into account some relevant consideration.
6. In brief, the appellant was an accounts officer at the Ministry of Employment Productivity & Industrial Relations. On 23/10/18, the appellant made a payment from the bank account maintained by the Ministry to his own account with Subrails Furniture Centre Limited amounting to \$850. Then on 08/11/18, 12/11/18, 20/11/18 and on 22/11/18 he again from the bank account maintained by the Ministry, transferred \$1500, \$950, \$850 and \$500 respectively to his wife’s account at the BSP Bank. The appellant had admitted that he later withdrew the amounts so transferred. All these were electronic fund transfers.
7. The appellant has been charged with the offence of general dishonesty in relation

to the transaction where he transferred the money to his own account at the Subrails Furniture Centre Limited, and then with the offence of obtaining a financial advantage in relation to the transfers made to his wife's account which he later withdrew. The five abuse of office charges are also framed based on the same five transactions.

*Ground one - 'Appellant was punished twice with the same facts contribute significantly to harsh sentencing'*

8. Even though there is no appeal against conviction, the appellant under the first ground of appeal had canvassed a wide range of grievances which includes the claim that his plea was ambiguous due to the 'incompetent advocacy' and that his right not to be punished twice for the same facts was not protected.
9. This claim prompted me to examine the abuse of office charges and the evidence in the summary of facts in relation to the said charges.
10. I considered it appropriate to commence the discussion with the elements of the offence of abuse of office contrary to section 139 of the Crimes Act 2009. The elements could be identified as follows;
  - a) The accused being a person employed in the public service;
  - b) does an act or directs an act to be done;
  - c) in abuse of the authority of his office;
  - d) that act is an arbitrary act; and
  - e) that act is prejudicial to the rights of another;
11. Upon a careful examination of section 139 of the Crimes Act, it is noted that the offence of abuse of office is constituted when a person employed in public service engages in a particular conduct, under certain circumstances. The conduct could be either the performing of the (arbitrary) act or the directing of an (arbitrary) act to be performed. If it is the latter, it is understood that the (arbitrary) act is to be

performed by a second person and not the accused.

12. Let us for example take a scenario where a particular item needs to be purchased for a particular government department with the value of \$10,000. Let us also assume that the approval of the head of department (by the name of "A") is not required for this particular purchase as the purchasing officer (by the name of "B") has been given the authority to purchase an item up to the value of \$15,000, but there is a procedure that requires three quotations to be called for and to make the purchase based on the lowest quotation.
13. In this background, if B takes steps to purchase the relevant item from one of his friends without calling for quotations, then B in abuse of the authority of his office does an arbitrary act which is prejudicial to the rights of others. It is understood that this transaction is prejudicial to the rights of the vendors who has the capacity to provide this item in addition to the rights of the relevant government department. Here the abuse of the authority is misusing B's authority of office in purchasing items below the value of \$15,000 and the said act is arbitrary because the act was not done according to the designated procedure.
14. Now, if A, the head of the department, directs B to purchase the aforesaid item from one of his (A's) friends, then A in abuse of the authority of his (A's) office directs an arbitrary act to be done which is prejudicial the rights of others. In this situation, it is not relevant whether B actually carries out that directive and makes the relevant purchase or not. In this second scenario, the arbitrariness of the act and the prejudicial nature of the act remains the same. However, it is A's authority of office which was abused to make the relevant directive. Though the making of the directive on the part of A could also be regarded as arbitrary and also prejudicial to the rights of others, what is relevant to the offence of abuse of office per section 139 of the Crimes Act in this scenario is that the act A directs to be done (but not his direction) is arbitrary and that it is prejudicial to the rights of another.
15. Thus, firstly, it could be noted that, arbitrariness and the prejudicial nature should



always be part and parcel of the relevant act itself irrespective of whether the relevant accused is charged for performing the relevant (arbitrary) act or directing someone else to perform an (arbitrary) act to be performed. Secondly, though abuse of the authority of office should be in relation to the (arbitrary) act where the accused is charged for performing the (arbitrary) act, where the accused is charged for directing an (arbitrary) act to be done, the abuse of authority should be in relation to the direction given but not to the performing of the (arbitrary) act in question.

16. Given the above discussion, the following deductions could be made;
  - a) Where it is alleged that the accused himself/ herself did the (arbitrary) act, the said act should be;
    - i. Done in the abuse of the authority of the accused's office;
    - ii. Arbitrary; and
    - iii. Prejudicial to the rights of another.
  - b) Where it is alleged that the accused directed an (arbitrary) act to be done, that direction should have been given in the abuse of the authority of the accused's office, and the said (arbitrary) act should be;
    - i. Arbitrary; and
    - ii. Prejudicial to the rights of another.
17. Therefore, 'arbitrariness' and 'prejudicial nature', though identified as two separate elements of the offence, could be seen as attributes of the act that is referred to in section 139 of the Crimes Act. However, the abuse of the authority of office would become an attribute of the said act when the allegation is that the accused himself/ herself performed the said act. Conversely, where the allegation is that the accused directed the (arbitrary) act to be done, 'abuse of the authority of office' would be an attribute of the direction so given, and not of the relevant (arbitrary) act so directed to be done.

18. An offence consists of physical elements and fault elements [See section 13(1) of the Crimes Act]. Unless the law creating the offence specifically provides that either that offence is a strict/absolute liability offence or strict/absolute liability applies to a particular element of that offence, the existence of all physical elements and also a particular fault element relevant to each of those physical elements must be proved, for an accused to be found guilty of that offence. If the offence is stipulated as a strict/absolute liability offence, no fault elements should be established in respect all the physical elements of that offence and if the law provides that strict/absolute liability applies for a particular element of an offence, no fault element is required to be established in respect of that physical element. [See sections 14, 24 and 25 of the Crimes Act]
19. Thus, it is pertinent to note that, when an offence consists of more than one physical element, unless it is specifically provided, a fault element should be established in respect of every such physical element in order for that offence to be proved. It is a misapprehension that an offence would always have only one fault element.
20. In terms of section 15(1) of the Crimes Act, a physical element may be (a) conduct; or (b) result of a conduct; or (c) a circumstance in which conduct or a result of conduct occurs.
21. In terms of section 23(1) of the Crimes Act, if the law that creates an offence does not specify a fault element for a physical element that consists only of a conduct, then intention is the fault element for that physical element. [For example, in relation to the physical element involving penetration in the offence of rape, intention is the fault element in view of the provisions of section 23(1) of the Crimes Act. The penetration cannot be accidental and the accused should have meant to perform the act of penetration]
22. Moreover, in terms of section 23(2) of the Crimes Act, if the law that creates an offence does not specify a fault element for a physical element that consists of a circumstance or a result, then recklessness is the fault element for that physical

element. Another way to interpret the provisions of section 23(2) of the Crimes Act is, if a particular physical element does not consist only of conduct, then the fault element is recklessness. Moreover, where recklessness is the fault element of a particular physical element, proof of intention, knowledge or recklessness will satisfy that fault element pursuant to section 19(4) of the Crimes Act.

23. It is pertinent to note that the definition provided for the offence of rape under section 207(2) of the Crimes Act also does not specify any fault element for the physical elements of that offence. Admittedly, there are two physical elements in rape. First is the element that involves penetration and the second is the lack of consent of the victim. I have already discussed about the element involving penetration. In relation to the element involving lack of consent, the fault element of that element as developed at common law is;
  - a) The accused either knew or believed that the victim did not consent; or
  - b) The accused was reckless as to whether the victim was consenting or not.
24. The act of penetration in relation to an offence of rape is unquestionably a conduct. However, for that conduct to constitute rape the penetration should be carried out without the consent of the victim. The absence of consent of the victim is a circumstance from the accused's perspective. The accused should be aware of the existence of that circumstance, that he would be performing the act of penetration in the absence of consent of the victim to that act. If the accused was not conscious of the fact that the victim was not consenting or if he had reasonable grounds to believe that the victim was consenting and therefore he believed that the victim was consenting, that accused does not commit the offence of rape.
25. Therefore, it is plain that for the physical element, 'without the consent of the victim', recklessness is the fault element in terms of section 23(2) of the Crimes Act. In terms of section 21(4) of the Crimes Act this fault element could be satisfied with the proof of intention, knowledge or recklessness. It is also noted that the above mental element or the fault element of rape is not an additional element which is not provided for in the Crimes Act, but an element, that is required to be

constructed in view of the provisions of section 23(2) of the Crimes Act.

26. In terms of section 19(2) of Crimes Act a person has intention with respect to a circumstance if that person believes that the said circumstance exists. Accordingly, it is pertinent to note that, identifying belief, knowledge and recklessness as the fault elements of rape as developed at common law is in fact consistent with the provisions of the Crimes Act.
27. Coming back to the offence of abuse of office, it is noted that all five elements alluded to in paragraph 10 above are physical elements and section 139 of the Crimes Act does not specify any fault element for each of those physical elements.
28. There is no issue in dealing with the element that involves the accused's employment in public service.
29. The element that involves doing an act or the directing an act to be done is clearly a conduct and intention is the fault element for this physical element in terms of section 23(1) of the Crimes Act. The doing of the act or the direction given for the act to be done should be a product of the will of the relevant accused and the accused should have meant to engage in that conduct.
30. The next element is 'in abuse of the authority of the office'. This element requires that the act or the directing (of the act to be done) should be carried out, 'in abuse of the authority of the office.
31. Black's Law Dictionary (6<sup>th</sup> edition) provides the following definition for the term "abuse";

*"To make excessive or improper use of a thing, or to employ it in a manner contrary to the natural or legal rules for its use. To make an extravagant or excessive use, as to abuse one's authority."*

32. If the aforementioned first scenario is considered, if **A** did not have the power to

direct **B** to perform the particular transaction, then **A** does not abuse the authority of his office. For example, if **A** was just a friend and not **B**'s superior officer and simply asks **B** as a favour to perform that particular transaction in favour of **A**'s friend, **A** does not abuse the authority of his office. May be it would amount to an abuse of **A**'s friendship with **B**. This element is therefore in fact about misusing the authority bestowed upon an accused by virtue of the office the accused holds in public service. In order to abuse the authority, first there should be a particular authority vested with the accused by virtue of office which is relevant to the act done or the direction made and then, the accused should consciously misuse that authority in doing the act or making the direction in question.

33. This element is established if an irresistible inference could be drawn that the accused had misused the authority of his office, taking into account the relevant authority the accused had in relation to the performing of the act or in giving the direction, and then the nature of the act so done or directed to be done. It should be noted that the only conduct that could be identified in the offence of abuse of office is the performing of the (arbitrary) act or directing the (arbitrary) act to be done. The question whether the accused had abused the authority of the office should be determined based on the authority the accused exercised by virtue of his office at the material time and the nature of act or the direction given as stated above. Thus, this element 'in abuse of the authority of office' does not denote a second conduct that is different from either the (arbitrary) act or the direction given to perform the (arbitrary) act as the case may be. For the reason that this particular element does not fall into the category of physical elements that consist only of conduct, then recklessness should be the fault element in view of the provisions of section 23 of the Crimes Act.
34. Accordingly, in relation to the third element of the offence as alluded to above in paragraph 10, it should be established that the accused misused the authority which is bestowed upon him/her by virtue of his office either knowingly, or believing that he/she was so misusing or being reckless as to whether he/she was

so misusing or not.

35. For example, let us take a third scenario where **B** who wants to put **A** into trouble, places a particular document pertaining to a questionable transaction in between a bundle of documents that requires **A** to endorse as approved by placing **A**'s signature on each document, so much so that approving the relevant transaction would amount to an arbitrary act. Where **A** could reasonably expect the documents presented to him to be in order given the practice of the department and/or given the recent conversation he had with **B**, the granting of such approval for the transaction in question by placing **A**'s signature on the relevant document, despite the fact that it would amount to an arbitrary act, the said conduct of **A** cannot be regarded as an act done in abuse of **A**'s office. **A** may be found negligent and be liable for civil damages if that negligent act resulted in causing a loss to the relevant institution. But **A** was not reckless so that he may be found criminally liable for the offence of abuse of office. This is because **A** was not conscious of the fact that he was misusing the authority of his office when he placed the signature on the document in question.
36. The fourth element alluded to above involves arbitrariness. The word 'arbitrary' is defined in the Black's Law Dictionary as follows;

*"In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; Corneil v. Swisher County, Tex.Civ.App., 78 S.W.2d 1072, 1074.*

*Without fair, solid, and substantial cause; that is, without cause based upon the law, U. S. v. Lotempio, D.C. N.Y., 58 F.2d 358, 359; not governed by any fixed rules or standard. Willful and unreasoning action, without consideration and regard for facts and circumstances presented. In re West Laramie, Wyo., 457 P.2d 498, 502.*

*Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination*

*of principle and one not founded in nature of things. Huey v. Davis, Tex.Civ.App., 556 S.W.2d 860, 865"*

37. The act of **A** of purchasing the relevant item from his friend as discussed in the aforementioned first scenario amounts to an arbitrary act, because there was an established procedure to follow in making that purchase and he decided not to follow that process. That is why the said act becomes an arbitrary act, and act governed by someone's own whims and fancies but not by fixed rules or standards.
  
38. Doing an act the accused was not authorized to do, doing an act without following the applicable procedures, doing an act the accused was properly and/or lawfully instructed not to do would *inter alia* constitute arbitrary acts. It should be noted that disregarding a rule, procedure or a standard is not a *sine qua non* of an arbitrary act. For example, if **A** was a head of a government department who is by virtue of his office vested with the responsibility of dealing with a particular industry say construction, and if **A** using the position he holds requests a particular contractor whose business is regulated by **A**'s department to repair **A**'s house and then does not make the relevant payments to that contractor knowing that the contractor is placed at a difficult position to ask **A** for the money because of the position and the high office **A** holds, that conduct of **A** is clearly an arbitrary act even if there was no rule prohibiting such conduct. In such scenario where **A** had obtained an advantage from the contractor misusing the authority of his office, though the facts may not establish an offence relating to bribery for the reason that the contractor was simply compelled to provide that advantage by **A** and it was not meant to be an inducement or reward for an act or even a general sweetener, **A** has clearly committed the offence of abuse of office.
  
39. Similarly, in a case where the conduct of the accused is directing someone else, but not the commission of the (arbitrary) act himself/ herself, the arbitrary act could be an act which the person so directed is not authorized to do, an act that is to be done without following the proper applicable procedures, an act which that other person had already been properly and/or lawfully instructed (by some other official) not

to do.

40. Understandably, this fourth element cannot be construed as one that consists only of conduct. As discussed above, this offence involves only one conduct and that is either performing the act or directing the act to be done which constitutes the second element of the offence. Arbitrariness is an attribute of act that is performed or directed to be performed. This contention is further strengthened when considering a situation where the accused directs a second person to perform the (arbitrary) act. In this situation, not only that the accused does not perform the (arbitrary) act, it is not necessary to be performed at all. A direction to perform an (arbitrary) act alone is sufficient to establish the offence of abuse of office. Therefore, the fault element of this fourth physical element (which does not consist only of conduct) is also recklessness and this fault element could be satisfied by proving intention, knowledge or recklessness as it is explained in relation to the previous element.
41. In addition to being arbitrary, the act done or directed to be done should also be prejudicial to the rights of another. This element is also not one that consists only of conduct and therefore, recklessness would be the fault element and could be satisfied by proving intention, knowledge or recklessness.
42. All in all, to prove the offence of abuse of office; the intention, knowledge or recklessness on the part of the accused;
  - a) that the relevant act was done or the direction (for the act to be done) was made in abuse of the authority of his/her office,
  - b) that the act was arbitrary, and
  - c) that the act was prejudicial to the rights of anothershould be established.
43. Additionally, in relation to the aggravated form of abuse of office which carries a maximum penalty of 17 years, it should be established that the arbitrary act was



done or the direction for the arbitrary act to be done was given for the purpose of gain. For the reason that gain is a result of a conduct, again, intention, knowledge or recklessness on the part of the accused should be established as the fault element.

44. Now I would turn to the summary of facts filed in relation to the case at hand. They are as follows;

- *Arrested and charged one Alipate Naka (B-1), 37 years Laborer of Lot 30 Matanisiga Kalokalo Crescent, Makoi for 1 count General Dishonesty Obtaining A Gain contrary to section 323 of Crimes Act of 2009, 4 counts of Obtaining Financial Advantage contrary to section 326 (1) (a) (b) (c) of Crimes Act of 2009 and 5 counts of Abuse of Office contrary to section 139 of Crimes Act of 2009.*
- *(B-1) was appointed as Accounts Officer of Ministry of Employment Productivity & Industrial Relations on 31/10/17 for three years which was supposed to expire on 30/10/20. (B-1) also signed Contract of Service with Ministry of Employment Productivity & Industrial Relations on 31/10/17.*
- *On 18/01/19, Harishka Rahendran (A-1), 28 years, clerical Officer of Mandir Street Off Chedwick Road, Nakasi reported at Totogo Police Station that their Accounts Officer misused money from the account of Ministry of Employment Productivity & Industrial Relations on five occasions sometimes between 23/10/18 to 22/11/18.*
- *(A-1) sometimes on 18/12/19 whilst filling documents discovered that on 08/11/19 an Electronic Funds Transfer was done without Payment Voucher. Then (A-1) checked through the system but could not locate the Payment Voucher and she enquired with (B-1) but he stated that he doesn't know anything.*
- *Then (A-1) also discovered that on 23/10/18 payment was made to Subrails Furniture Centre Limited account number 3473123 amounting to \$850.00, 08/11/18 payment was made to the BSP account of Senicaucau Lolohea account number 10292977 amounting to \$1,500.00 on 12/11/18 payment made to BSP account of Senicaucau Lolohea account number 10292977 amounting to \$950.00, on 20/11/18 payment made to BSP account of Senicaucau Lolohea account number 10292977 amounting to \$850.00 and on 20/11/18 payment made to BSP account of Senicaucau Lolohea account number 10292977 amounting to \$500.00 all from the BSP account of Ministry of Employment Productivity & Industrial Relations account number 704675 through Electronic Funds Transfer and Payment Vouchers for all these Payments were missing.*
- *The (A-1) informed this matter to Rajneeta Prasad, (A-1), 30 years Assistant Accounts Officer of Ministry of Employment Productivity & Industrial Relations whereby (A-2) checked with Subrails Furniture Centre Limited and found that the Payment done on 23/10/18 amounting to \$850.00 was made to the personal account of (B-1).*
- *(A-1) & (A-2) referred this matter to Miriama Rosi Raikoti (A-3) 46 years Director Cooperate Services of Ministry of Employment Productivity &*

*Industrial Relations, (A-1) & (A-2) also searched for Senicaucou Lolohea on Facebook and found that (B-1) & one I-taukei ladies photo appears on the profile picture whereby they got suspicious that (B-1) was responsible for these payments.*

- *Then an internal investigation was conducted and it was found that these five Payments were unauthorized and were not supposed to have made.*
- *(A-3) then called (B-1) to discuss this issue whereby he admitted that he had made these 5 unauthorized Payments and the (B-1) was suspended.*
- *Then this matter was reported to Police for investigation and enquiry was conducted with Subrails Furniture Centre Limited Head Office, Lautoka whereby Rajesh Goundar (A-4) 44 years Credit Manager Finance, confirmed that on 23/10/18 Payment of \$850.00 was made to (B-1)'s Subrails Furniture account number 154509, from the account of Ministry of Employment Productivity account number 704675.*
- *Search warrant was executed at Bank of the South Pacific (BSP) and the transaction history of the account of Ministry of Employment Productivity & Industrial Relations account 704675, Subrails Furniture Centre Limited account number 3473123 and account of Senicaucou Lolohea account number 10292977 was obtained.*
- *Then the statement of Senicaucou Lolohea 9A-5) 39 years was recorded whereby she stated that she is legally married to (B-1) and they are staying together. She stated that the BSP account number 10292977 belong to her.*
- *(A-5) also stated that her BSP ATM Card for her account number 10292977 was being used by (B-1) when the Payments were done to her account on 08/11/18, 12/11/18, 20/11/18 & 22/11/18 from the account of Ministry of Employment Productivity & Industrial Relations account 704675.*
- *On 06/02/19 at about 1000hrs, (B-1) voluntarily came to Totogo Police Station for questioning.*
- *(B-1) was later interviewed by DC 3895 Dhiresh Kumar (A-7) Police Officer of Totogo Police Station, where he admitted the allegation and stated he made unauthorized electronic payment to his Subrails Furniture Centre Limited account and electronically transferred money to (A-5) account and later withdrew the money. (B-1) also stated that he had used all the money to buy groceries, liquor and making payments.*
- *(B-1) was formally charged by D/Cpl 3737 Vishant (A-8), 34 years Police Officer of Totogo Police Station for the above offences.*
- *(B-1) will appear in custody on 07/03/19.*

45. Given the above summary of facts, it is clear that the appellant was a person employed in public service, that he had performed an arbitrary act when he made each payment as he had admitted that those payments he made were unauthorized, and that his conduct was prejudicial to the rights of others including the relevant ministry. The facts also clearly establish that the said arbitrary acts were carried out for gain. However, I am unable to find sufficient facts to establish

that the appellant had abused the authority of his office in order to make the relevant transactions. If the appellant did not have the authority to make payments from the relevant account that belongs to the ministry and he simply accessed the computer of the relevant officer who had the said authority and made those transactions, the appellant may not have misused the authority of his office to perform the relevant arbitrary acts. Therefore facts sufficient to establish the five counts of abuse of office is not included in the summary of facts. Probably, the appellant may have misused the authority of the office he held, but it is important for the summary of facts to clearly indicate the manner the appellant had misused or abused the authority of his office.

46. The above infirmity justifies the appellant's assertion that the pleas of guilty that were entered in respect of the five counts of abuse of officer were equivocal. For this reason and being mindful of the provisions of section 247 of the Criminal Procedure Act 2009, I consider this a fit case to invoke the revisionary jurisdiction of this court pursuant to section 260(1) read with section 262(1) of the Criminal Procedure Act to set aside the convictions and the ensuing sentences imposed on the relevant abuse of office charges.
47. In view of the aforesaid decision it is no longer necessary to determine the issue raised on the first ground of appeal in relation to the appellant being punished twice.
48. Based on the written submissions filed by the appellant, I note that the matters raised on rest of the grounds of appeal are essentially in relation to the sentence imposed on the abuse of office charges that I have now decided to set aside. Therefore, it would amount to only an academic exercise if I am to deal with those grounds and I would abstain from engaging in such exercise further.
49. The appellant has not complained specifically in relation the sentences imposed on the first, third, fifth, seventh and ninth counts. The offence the appellant is charged with on the first count is general dishonesty obtaining a gain (section 323 of the

Cries Act). On the third, fifth, seventh and ninth counts he is charged with the offence of obtaining a financial advantage contrary to section 326 of the Crimes Act.

50. Once the sentences imposed on the abuse of office charges are set aside, as per the impugned decision, the remaining sentence to be served would be a term of 03 years and 06 months which is the sentence imposed on each charge under section 326 of the Crimes Act, this being the next highest term of imprisonment. However, the Learned Counsel for the State pointed out to a palpable error in the impugned decision in arriving at that sentence where after deducting 06 months in view of the mitigating factors from the starting point of 03 years, the Learned Magistrate had arrived at a final term of 03 years and 06 months. Thus, the correct term of imprisonment for the Learned Magistrate to have reached was 02 years and 06 months for each count under section 326 of the Crimes Act.
51. The appellant had misappropriated public funds totaling to FJD 4,650. Though he had pleaded guilty, the amount so misappropriated is substantial and there is a serious breach of trust. Although the appellant was a first offender, the weight to be given for that factor becomes significantly lower when it comes to breach of trust by public servants. Even though in my considered view, the term of 02 years and 06 months imprisonment is a relatively lenient sentence given the level of harm and the culpability of the offences committed by the appellant when taken together, for the reason that the appellant was not heard on enhancing the sentence imposed on the relevant charges, I would not disturb that sentence.
52. Accordingly, the term of imprisonment imposed on count 3, count 5, count 7 and count 9 which reads as an imprisonment term of 03 years and 06 months in the impugned decision will be amended to 02 years and 06 months.


**Orders;**

- a) The convictions and the ensuing sentences imposed on counts 02, 04, 06, 08 and 10 by the Learned Magistrate on 02/09/19 in MC Suva, Crim. Case No. 354 of 2019 are hereby set aside pursuant to section 260(1) read with section 262(1) of the

Criminal Procedure Act;

- b) The sentence imposed on counts 01, 03, 05, 07 and 09 by the Learned Magistrate on 02/09/19 in MC Suva, Crim. Case No. 354 of 2019 are hereby affirmed, subject to correcting the error in the calculation by amending the final term imposed on the above counts except for count one, to read as a term of imprisonment of 02 years and 06 months;
- c) The sentences imposed on the said counts should run concurrently; and
- d) The non-parole period for the final term of 02 years and 06 months is hereby fixed at 02 years.



  
Vinsent S. Perera  
JUDGE

**Solicitors;**

**Accused in Person**

**Office of the Director of Public Prosecutions for the State**