**IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT OF FIJI**
**AT SUVA**
**APPELLATE JURISDICITON**

**APPEAL NO.: HACDA 003 of 2021 S**

**BETWEEN:** FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)

***APPELLANT***

**AND:** TIMAIMA SAGALE BUADROMO

***RESPONDENT***

**Counsel:** Mr. S. Savumiramira for the Appellant
Mr. R. Singh and Ms. L. Vuiyasawa for the Respondent

**Date of Hearing:** 20 January & 23 February 2021
**Date of Judgment:** 23 March 2021

## JUDGMENT

1. This is an appeal by the FICAC against an acquittal. On 07 June 2019 the Appellant filed the petition and grounds of appeal against the judgment in Criminal Case No

323 of 2015, delivered on 13 May 2019 by the Suva Magistrate's Court. Later, on 22 January 2020 the Appellant filed an amended petition of appeal.

2. The Respondent was charged for the following counts in the Magistrate's Court;

**COUNT 1**

*Statement of offence*

**ABUSE OF OFFICE** Contrary to Section 111 of the Penal Code

*Particulars of offence*

**TIMAIMA SAGALE BUADROMO** between the 14th December 2007 to 25th January 2010, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts for gain namely approving and accepting allowances in the sum of $560 for the performance of her duties as the Director of the Fiji Museum which were acts prejudicial to the right of the Fiji Museum and the Government of Fiji.

**ALTERNATIVE CHARGE TO COUNT 1**

*Statement of offence*

**EXTORTION** Contrary to Section 117 of the Penal Code

*Particulars of offence (b)*

**TIMAIMA SAGALE BUADROMO** between the period of 14th December 2007 to 25th January 2010, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, accepted rewards in the sum of $560.00 from the Fiji Museum for the performance of her duties as the Director of the Fiji Museum, beyond her proper pay and emoluments.

**COUNT 2**

*Statement of offence (a)*

**ABUSE OF OFFICE** Contrary to Section 39 of the Crimes Decree No, 44 of 2009

*Particulars of offence (b)*

**TIMAIMA SAGALE BUADROMO** between the 22nd November 2010 to 21st June 2014, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts for gain namely approving and accepting allowances in the sum of $1120 for the performance of her duties as the Director of the Fiji Museum which were acts prejudicial to the right of the Fiji Museum and the Government of Fiji.

**ALTERNATIVE CHARGE TO COUNT 2**

*Statement of offence (A)*

**OBTAINING FINANCIAL ADVANTAGE** Contrary to Section 326 (1) of the Crimes Decree No. 44 of 2009

*Particulars of offence (B)*

**TIMAIMA SAGALE BUADROMO** between the 22nd November 2010 to 21st June 2014, at Suva in the Central Division engaged in a conduct namely claiming and approving allowances for herself and as a result of that conduct obtained a financial advantage in the sum of $1120 knowing that she is not eligible to receive the said financial advantage.

**COUNT 3**

*Statement of offence (a)*

**ABUSE OF OFFICE** Contrary to Section 139 OF THE Crimes Decree No. 44 of 2009.

*Particulars of offence (b)*

**TIMAIMA SAGALE BUADROMO** between the 4th November 20111 to 19th May 2014, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts namely servicing and repairing the Fiji Museum vehicle registration DV 828 in the sum of $15, 045.96 at the Carpenters Motors in Nadi and Lautoka without calling for the quotation and in breach of the Fiji Museum Board of Trustees Financial Instructions which were acts prejudicial to the right of the Fiji Museum.

3. The Respondent was initially charged on 11 February 2015. The learned Magistrate had recorded that "Accused to advise the court on next mention date of her election with regards to count no 2 and 3 abuse of office section 139 Criminal Procedure Decree 2009"and adjourned the matter to 16 March 2015. On that date the Prosecution filed amended charges. But there is no mention in the record whether the election was given thereafter.

4. In that backdrop the hearing commenced in the Magistrate's Court on 12 September 2016, and it was concluded on 16 August 2018. Subsequently the judgment was delivered on 13 May 2019 and the Respondent was acquitted of all counts.

5. Being aggrieved by the judgment delivered by the learned Magistrate, the Appellant filed this appeal on the following grounds of appeal;

    1. That the learned Magistrate erred in law and facts by failing to consider important evidence available namely the caution interview of the respondent.
    2. That the learned Magistrate erred in law and facts by failing to consider all evidence available for the elements of the offence objectively.
    3. That the learned Magistrate erred in law and facts in giving undue weight to the evidence of Defence Witness 1 namely Mr. Winston Thompson view that the respondent was entitled to the Verandah Hire Allowance because the Board had approved it in good faith.
    4. That the learned Magistrate erred in law and facts by failing to consider that the Fiji Museum Board is not the appointing authority of the Defendant and thus have no authority in terms of what she is entitled to.
    5. That the learned Magistrate erred in law and facts by not considering the admission of the defendant in her Caution Interview that she introduced the verandah hire allowance and not the Fiji Museum Board.
    6. That the learned Magistrate erred in law and facts by failing to analyze the evidence of Prosecution Witness 1 namely Timaima Vilisoni objectively that the Accused was not entitled to any other allowance except the ones stated in her appointment letter.

7. That the learned Magistrate erred in law and facts by considering facts which are not in evidence as stated in paragraph 101.
8. That the learned Magistrate erred in law and facts by failing to consider that the defendant abused the authority of her office when she had knowledge that she was not entitled for verandah hire allowance as per her appointment letter.
9. That the learned Magistrate erred in law and facts by failing to analyze the evidence of Prosecution Witness 6 namely Mohammed Siraz objectively.
10. That the learned Magistrate erred in law and facts in mistakenly interpreting Prosecution Exhibit 3 that there were no need to obtain 3 quotations in servicing the Fiji Museum Vehicle.
11. That the learned Magistrate erred in law and facts by failing to analyze the evidence of Prosecution Witness 5 Mohammed Khan objectively that there are no difference in the services between Nadi, Lautoka and Suva Carpenters.
12. That the learned Magistrate erred in law and facts by failing to analyze the evidence of Prosecution Witness 2 namely Shalini Pillay objectively.

6. Although the Appellant filed the petition of appeal on 07 June 2019, the proceedings in the High Court prolonged as the parties, mainly the Respondent, complained of various issues and discrepancies in the copy records. Finally, this Court intervened and directed the registry to resolve the issues as it appeared that most of the matters complained of, were not material to the determination of the appeal.

7. Eventually, the appeal was taken up for hearing on 20 January 2021. At the hearing this Court enquired from the parties whether the election was given at the Magistrate's Court, as the 2nd and 3rd counts are indictable offences triable summarily. Since both parties could not confirm the same, the hearing was vacated. The case was adjourned to prepare transcripts of the audio recordings of the proceedings in the Magistrate's Court to verify whether the Respondent had exercised election, though it may not have been recorded in the case record. On 28 January 2021 it was informed by the registry that there are no audio records

available pertaining to that period. Based on the copy records of the Magistrate's Court the parties confirmed that there is no mention of election.

8. This Court subsequently requested both parties to file supplementary submissions on the issue of election.

9. In the meantime, the Anti-Corruption Division of the High Court was established on 15 February 2021, pursuant to Act No 1 of 2021 (Amendment to the High Court Act 1875), and this appeal file was assigned a new case number HACDA 003 / 21 S, under the Anti-Corruption Division of the High Court.

10. On 23 February 2021 the appeal was taken up for hearing and the parties made lengthy submissions on the issue of election, as well as on other grounds of appeal.

11. I have considered the written submissions, oral submissions and the case authorities submitted by both parties. However, I will first deal with the issue of election as it relates to jurisdiction and determination of that matter is crucial to the direction that this case may take.

12. The first count in the amended charge is abuse of office contrary to section 111 of the Penal Code, which is not an electable offence. However, the second and third counts of abuse of office; contrary to section 139 of the Crimes Act, are indictable offences summarily triable.

13. Although the parties did not raise that there is no election by the Respondent in respect of the second and third counts, to be tried in the Magistrate's Court, this Court is of the view that it is a fundamental issue that the Court must look into before considering other grounds of appeal.

14. Part 2 of the Criminal Procedure Act deals with the powers of the Courts and section 4 specifically describes the jurisdiction relating to "indictable offences", "indictable offences triable summarily" and "summary offences".

> Section 4- (1) Subject to the other provisions of this Act-
>
> (a) any indictable offence under the Crimes Act 2009 shall be tried by the High Court;
>
> (b) any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrate Court, at the election of the accused person; and
>
> (c) any summary offence shall be tried by a Magistrates Court.
>
> (2) Notwithstanding the provisions of subsection (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a Magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the Magistrate's jurisdiction.
>
> (3) A Magistrate hearing a case in accordance with an order made under subsection (2) may not impose a sentence in excess of the sentencing powers of the Magistrate as provided under this Act.

15. Upon plain reading of this section, it is comprehensible that the Magistrate's Court derives jurisdiction to try an indictable offence triable summarily from the exercise of election by the accused person. At this point it would be germane to look at the definition of "indictable offences triable summarily" in section 2 of the Criminal Procedure Act as it sheds more light on the issue of election.

> "Indictable offence triable summarily means any offence stated in the Crimes Act 2009 or any other law prescribing offences to be indictable offence triable summarily, and which shall be triable-

(a) In the High Court in accordance with the provisions of this Act; or

(b) At the election of the accused person, in a Magistrates Court in accordance with the provisions of this Act."

16. Further section 35(2)(b)(ii) provides that if the offence is an indictable offence triable summarily and the accused has indicated to the Magistrate's Court that he or she wishes to be tried in the High Court, those cases shall be transferred to the High Court. The Magistrate's court is only entitled to try summary offences under its normal jurisdiction (section 4(1)(c) of the CPA). However indictable offences triable summarily can be tried in the Magistrate's court only when the statutory requirement of election is exercised by an accused. That's one of the ways the Magistrate's court is conferred with jurisdiction to try an offence other than a summary offence. There is another method from where the Magistrate court derives jurisdiction to hear matters other than summary offences. That is when the High court extends its jurisdiction pursuant to section 4(2) of the Criminal Procedure Act. In view of these provisions, it is very clear that the accused has to elect whether he or she wants to be tried in the High Court or in the Magistrate's Court.

17. In this present case the parties do not dispute that the court record does not signify that the Respondent elected the Magistrate's Court, apart from the record by the learned Magistrate; "Accused to advice court on next mention date of her election with regards to count No 2 & 3 abuse of office section 139 Criminal Procedure Decree." Further it appears that after the filing of the amended charge there has not been any mention about election in respect of the second and third counts.

18. There can be found a long line of cases where courts in Fiji have declared that the proceedings are a nullity where the election was not given to an accused. In **Lepani Wainibe v State Criminal Misc. HBM 009.95L** (Unreported) the Magistrate's court referred the case to the High Court for sentence after the accused pleaded guilty. However, no election was given when the plea was taken. The High Court decided

that the Magistrate's court had no jurisdiction to try an electable offence unless the accused gives the court jurisdiction by signifying his consent to be tried in such court. The conviction was quashed, and the case was remitted back to the Magistrate's court. Similarly, in **Simione Natala v State Criminal Appeal HAA 0007 of 1996** (Unreported) the High court decided that the conviction and the sentence are nullities as the election was not given.

19. In the present case, although the Appellant did not raise the failure to give election as a ground of appeal, this Court raised that issue. The effect of procedural errors brought to the attention of the court was discussed in **Josefa Naivalurua Criminal Appeal 46 of 1987** (Unreported) where the appellant only complained that the sentence was harsh and excessive. The court observed that the appellant had elected trial in the Supreme Court and the Magistrate's Court later recorded the guilty plea without any change to the previous election by the appellant. The court noted that;

> "Certainly the Appellant has made no complaint regarding procedure; his only complaint has been to the extent of the sentence imposed on him. But the Magistrate's Court, like this Court, is a Court of record and failure to record that requisite procedures were followed is an immediate indicator that that Court exceeded its jurisdiction. If there was a change of election by the appellant then it was necessary that this fact be recorded, the charge put to him and his plea taken to enable the Magistrate's Court to assume jurisdiction to try that offence".

20. One of the arguments of the Respondent's counsel was that the Respondent elected the Magistrate's Court by her conduct. It was also submitted that being aware that such a right existed the Respondent raised no issue in respect of election.

21. It must be noted that this is contrary to what the Respondent's counsel informed the Court prior to the hearing of the appeal. When the issue of election was raised by this Court, not only the counsel for the Respondent, but even the counsel for the Appellant informed Court that they could not remember whether the election was

given. At that point the Respondent was also present in Court and when the Respondent's counsel was told to verify this issue with the Respondent, the answer of the Counsel was that the Respondent may not recall it as it has been a long time. Through the perusal of the record did only the parties come to know that the learned Magistrate had recorded that the Respondent was to advice the court of her election on the next date and no election was taken afterwards. Therefore, stating that the Respondent knowingly elected the Magistrate's Court for the trial is clearly contrary to what the Court was informed by the Respondent's counsel prior to the hearing of the appeal.

22. Nevertheless, I have considered whether the claim of the Respondent that she chose or acquiesced to the trial in the Magistrate's Court hold any water in view of the legal requirement for election. In this regard the Respondent submitted an authority to support the contention of waiver of the right to election. As such the following paragraph of **Millar v Dickson (Procurator Fiscal, Eligin) and other appeals [2002] 3 ALL ER 1041** is relied upon by the Respondent to advance this argument;

> "In most litigious situations the expression waiver is used to describe voluntary, informed and unequivocal election by a party not to claim right or raise an objection which it is open to the party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression. That the waiver must be voluntary is shown by Deweer v Belgium 91980) 2 EHRR 439, where the applicant's failure to insist on his [or her] right to a fair trial was held not to amount to a valid waiver because it was tainted by constraint (paragraph 54, page 465). In Pfeifer and Plankl v Austria (1992) 14 EHRR 692 there was held to be no waiver where a layman had not been in a position to appreciate completely the implication of a question he had been asked (paragraph 38, page 713). In any event, it cannot meaningfully be said that a party has voluntarily elected not to claim or raise objection. It is apparent from passages already cited from cases decided by the European Court of

Human Rights that a waiver, to be effective, must be unequivocal, which I take to mean clear and unqualified."

23. Regrettably, I must note that this authority has no relevance to the present case. Even if it is assumed that it applies to this case, the purported waiver by no means seems to be voluntary, informed and unequivocal as the parties were not even aware that election was given or not. The issue under consideration is jurisdictional. Jurisdiction cannot be conferred by consent of parties or prerequisites to derive jurisdiction from cannot be waived by a party at its choice. Even if it is not raised by the parties that the election was not put, this Court is bound to take notice of manifest want of jurisdiction. Consent cannot give it. An irregularity may be waived by consent, but not a want of jurisdiction. (See Charles Dennis [1924] 18 Cr. App. R. 39).

24. Also, I cannot agree that election can be signified by passive conduct of the Respondent. The Court must put the election to the accused expressly and the accused's election must be unequivocal and well informed. In **R (Rahmdezfouli) v Crown Court [2014] 1 All ER 567** it was held that proceedings were invalid and a nullity due to the failure to comply with statutory procedure which was designed to confer jurisdiction on the Magistrate's court to try offences which it did not otherwise have. It was further stated that;

> "where a magistrates' court declined or failed to follow the requirements of the section it was acting without jurisdiction every bit as much as if, for instance, it had purported to try a defendant on the charge of homicide. The requirement that the defendant be present in court throughout this procedure, and to explain the effects off the section 'in ordinary language' fortify the view of Wright J that the defendant should be informed of his rights by the court itself and not merely by an advocate acting on his behalf."

25. The counsel for the Respondent further argued this issue during the hearing as follows;

> "If there was no election given at all, no mention of any election available, then the Court would obviously would not have any jurisdiction. Here the Court had jurisdiction because it had given the right to the Respondent. And that is why I initially mentioned that this matter is very unique from all the others because in all the other matters, there is no mention of any election being put to the Accused. In our case, the election was put to the Accused, the Magistrate said, you the Respondent decide what you choose to do. And this is where I respectfully submit that these cases that are put before you do not apply. Yes, it gives us the general principle that what happens if there is no election, but here election was given, the facts of the case show that there was an election provided."

26. According to section 4(1)(b) of the Criminal Procedure Act the requirement is for the accused to elect the court that he or she wished to be tried at. Merely giving the right to election to an accused itself would not suffice for the Magistrate's Court to derive jurisdiction from this statutory provision, unless the accused expressly exercises that right to election. In the present case the learned Magistrate had indicated that the accused was to advise the court on the next mention date of her election. However, as it is admitted by both parties there is no mention of the accused expressly informing the Court of her election thereafter. Therefore, it is crystal clear that vague indication of the requirement to take election would not amount to conformity with the statutory requirement for election.

27. In **R v Kettering Justices [1968] 3 All ER 167** it was held that the court was required to ask an accused personally whether he should be tried summarily or by a jury though the accused's answer to the question might be given by the counsel. The court quashed the conviction as a result of the failure. Also, in **R v Salisbury and Amesbury Justices, Ex p. Greatbactch [1954] 2 All ER 326** the Court commented that;

"It may well be that this applicant, represented as he was by a solicitor, really knew that he had a right to be tried by a jury and that these proceedings are an afterthought following conviction. But even so, that does not absolve a court of summary jurisdiction from complying with the provisions of …….. Those provisions require the magistrates, inter alia, to inform the accused of his right to be tried by a jury, and I think that the conclusion to be drawn from all these affidavits is that was not done here."

28. It is interesting to note that even if the accused had consented to be tried summarily for an indictable offence, in **Kent Justices Ex parte Machin [1952] 2 QB 355** it was decided that the court did not have jurisdiction due to the failure to comply with statutory provisions to explain it to the accused. It was observed in that decision that;

"It is well known that when a man is brought before a court charged with an indictable offence which can, with his consent, be treated summarily, certain information has to be given to him by the clerk of the court. He has to be told of his right to be tried by a jury; he has to be asked if he desires to be tried by a jury or whether he desires the case to be tried summarily;…"

29. Therefore, I cannot agree with the argument of the Respondent's counsel that the learned Magistrate's indication to get the election on a future date, which was never taken, fulfils the requirement to elect the Magistrate Court for the accused to be tried. Giving the right to election as well as actual election by the accused are both fundamental requirements to confer jurisdiction in the Magistrate's Court to try an indictable offence triable summarily.

30. The Respondent's Counsel argued in the written submissions that procedural failure is not fatal and such defect must be read in favour of the Respondent. Further it was submitted that no prejudice or miscarriage of justice is caused to the Respondent. To buttress this argument the test applied in **Ashton & Others v R [2007] 1WLR 181**

was submitted. I have considered the test applied in the said judgment with regard to non-compliance of statutory provisions.

31. In that decision the Court drew a distinction between the situations where a Court acts without jurisdiction (in which case the proceedings will "usually" be invalid) and the situation where there has been a breakdown in the procedures whereby a case progresses through the Courts. (See ARCHBOLD [43rd Ed] Chap. 1-307 at page 111.) Although in Ashton (supra) it was considered that the procedural failure was minor, the House of Lords refused to follow that approach in **R v Clarke and McDaid [2008] 2 Cr. App. R.2**, where an appeal against a conviction was dismissed as there had not been a signed indictment. It was held that where there is no signed indictment, there could be no valid trial. Lord Bingham further commented that;

> "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical…"

32. While deviating from the approach adopted in Ashton, in R v Clarke and McDaid (supra) the court concluded that as a matter of statutory construction, the signing of the bill of indictment was a condition precedent to the existence of a valid indictment and that the existence of a valid indictment is itself a condition precedent to a valid trial on indictment. The matter is one of substantive validity and jurisdiction, in respect of which considerations of prejudice and substantive merits are irrelevant. (See ARCHBOLD [43rd Ed] Chap. 1-309 at page 112.)

33. The Fiji Court of Appeal also followed the House of Lords decision in Clarke (supra) in **Batikalau v State [2015] FJCA 2; AAU31.2011 (2 January 2015)** and declared that the proceedings are null and void as election was not put to an accused for an indictable offence summarily triable.

34. As such, I decline to adopt the test found in Ashton in view of the reasoning laid down in the more recent House of Lords decision, Clarke (supra) and decide that the test set out in Ashton has no applicability to the present case.

35. It was submitted by the counsel for the Respondent that vast majority of authorities where proceedings were declared a nullity involved cases where accused persons were convicted. Although failure to give election has brought to the notice of the appellate courts predominantly in cases where accused persons are convicted, I cannot agree with the contention that want of jurisdiction will matter only when the accused is convicted. It cannot be so. May it be a conviction or an acquittal, if the proceedings were conducted without jurisdiction the proceedings would inevitably result in a nullity.

36. In **Regina v Cardiff Magistrates Court, Ex parte Cardiff City Council CO/603/86 [1987] Lexis 914** the appellant moved for judicial review of a decision of the Magistrate's Court where the defendant was acquitted. The Queen's Bench Divisional Court held that the Magistrate went awry for an offence which was triable either way by failing to comply with a mandatory provision to put the election. The Court held that the proceedings are a nullity and quashed the acquittal.

37. There have been instances where the proceedings were found to be a nullity even without a conviction or an acquittal. In **State v Sami [2020] FJHC 405; HAM107.2020 (4 June 2020)** the High Court ordered a trial *de novo* after deciding that the proceedings were a nullity due to the failure to put the election to the accused in the Magistrate's Court. In that case the accused was charged for one count of bribery of public officials contrary to section 134(1) (a)(i) and (b) of the Crimes Act, which is an indictable offence triable summarily. The trial proceeded in the Magistrate court and when it was due for the judgment the Magistrate realized that no election had been given. Thus, the case was transferred to the High Court and Justice Sharma decided that the election ought to be put to the accused before the trial begins so that the court acquires jurisdiction to hear the matter. Accordingly, the Court ordered a trial *de novo* as no election was given to the accused. His Lordship further remarked;

"The copy record does not show that the accused was given his right of election that is whether he wanted a Magistrate's Court trial or a High Court trial. The right of election imposed by section 4(1)(b) of the Criminal procedure Act is mandatory."

38. In **State v Ravuwai [2014] FJHC 487; HAC118.2014S (3 July 2014)** the accused was charged with a number of counts including a few indictable offences triable summarily. Although no election was given in the Magistrate's Court, the case was transferred to the High Court after some time, pursuant to section 191 of the Criminal Procedure Act on an application by the Prosecutor. The Court held that due to the failure to put the election to the accused the whole proceedings in the Magistrate's Court was a nullity, while observing the following;

"In this case, on the indictable offences triable summarily, the learned Magistrate should have put the election for a Magistrate Court or High Court trial, to the accused, in conformity with the requirements of section 4(1)(b) of the Criminal Procedure Decree 2009. This election should be put to the accused preferably, at first call or soon thereafter. This will enable the Magistrate Court to know which venue or court, the accused prefers to be tried in. If the accused elects a Magistrate Court trial, then the Magistrate Court has jurisdiction to deal with the matter, in the normal way. If a High Court trial is elected, then the accused must be sent to the High Court for trial as soon as practicable."

39. From these authorities that were discussed above, it can be deducted that defects in proceedings or failures to comply with statutory requirements which are jurisdictional in nature, will essentially result in any ensuing proceedings being nullified. A trial, void ab initio, cannot result either in acquittal or conviction and the accused would stand in a position of an untried accused. In a void trial there is neither, conviction, verdict nor judgment. (**Crane v DPP [1921] 2 AC 299**). The failure to give election, in my opinion directs to the center of the jurisdiction of the court. The election must be a well-informed and unequivocal election by the accused

for the Magistrate's Court to assume jurisdiction to try an indictable offence summarily triable.

40. The other issue that this court has to consider is, if the failure to give election renders the proceedings a nullity what the next cause of action should be. Section 256 of the Criminal Procedure Act stipulates powers of the high Court as far as an appeal is concerned. Accordingly, section 256(2)(c) provides, that the High Court may order a new trial as one of the orders that the High Court has power to make in an appeal.

41. If the proceedings were a nullity there cannot be a retrial, but a new trial. Because the accused had never been tried. In **Emberson v State [1996] FJCA 5; AAU002.1996s (30 August 1996)** the State conceded that election was not given to the accused and therefore the proceedings would become a nullity. The Fiji Court of Appeal remarked;

> "The problem is that if as is accepted by the State the proceedings and conviction were a nullity, and we think they were, there could not be retrial. The accused has never been tried."

42. In **State v Benu [2004] FJHC 54; HAA0041J.2003S (5March2004)** Justice Shameem discussed when would the court order a trial *de novo* and the resultant position of the failure to give election to an accused as follows;

> "What kind of errors render the verdict ab initio? Evidently those have the effect of robbing the court of jurisdiction so the trial itself is not a trial. A failure to put the election of court to the accused is one example."

43. Although the proceedings were declared a nullity, it appears the Courts have been reluctant to order new trials in cases where the accused persons have already served a part of their sentence. In Batikalou (supra), a new trial was not ordered, as the appellant had served more than 4 years of his sentence, even though the Court of Appeal declared the entire proceedings null and void. In **Faiz Mohammed v Reg [1963] 9 FLR 98**, the Appellant had been convicted for two offences only triable by

Magistrate's Court with the consent of the appellant. According to the record, the trial proceeded before the lower court without consent having been taken. Trial was thereby rendered a nullity. The Court did not order a *venire de novo* as the Appellant had already served a term of imprisonment.

44. The counsel for the Respondent submitted that the appeal may be dismissed pursuant to section 256(2)(f) of the Criminal Procedure Act which states that the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

45. I am mindful of the ordeal gone through by the Respondent ever since she was charged in the Magistrate's Court on 11 February 2015. There is no contention that the delay in the proceedings in both Courts and the ramifications of the failure to give election may have caused prejudice to the Respondent. The Respondent had been represented from the time she was charged. Yet neither the Respondent's counsel nor the counsel for the Prosecution appreciated the statutory requirement or brought it to the attention of the learned Magistrate. Even if the court fails to get the election from an accused due to an oversight, counsel too, have an ethical duty to remind the court of such statutory requirements as officers of the Court.

46. Be that as it may, this is not a case where a person has been deprived of liberty due to incarceration. A clear distinction has to be drawn between the circumstances of this case and other cases where persons have already served parts of their sentences. Yet I am mindful that it is the duty of the Court to strike a balance between the interest of the accused and the interest of the wider public in determining whether a new trial should be ordered.

47. In **Azamatula v State [2008] FJCA 84**, the Fiji Court of Appeal discussed the following in relation to ordering a retrial;

> As was said by the Privy Council in Au Pui-kuen v Attorney-General of Hong Kong ([1980] AC 351) 'no judge exercising his discretion judicially would

require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also Ting James Henry v HKSAR [2007] HKCFA 71). The overriding consideration in the exercise of the power is the interests of justice (Aminiasi Katonivualiku v. The State (CAV 0001/1999S; 17 April 2003).

In the case of Au Pui-kuen the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Togara v. State (by Majority) [1990] FJCA 6).

48. Offences relating to corruption have a bigger public interest value compared to other offences. The Court has a duty to guarantee a fair trial to all, and in the meantime the Court has to ensure that those who commit serious crimes do not escape punishment merely due to technical blunders. However, the discretionary power of the Court to order a new trial must be exercised sparingly and judiciously through careful exercise of balancing interests. Having regard to all the circumstances in this case I am of the opinion that a new trial is justifiable in this instance.

49. In the present case only the second and third counts are indictable offences summarily triable. Although the first count is not an electable offence, I am of the view that the first count cannot be considered separately given the circumstances of the case. The first count and the second count are brought against the Respondent for allegedly accepting an allowance termed in this case as "verandah hire". Depending on the period relating to the allegations the first count is filed under the old Penal Code and the second count is filed under the Crimes Act. The evidence adduced in the Magistrate's Court commonly relates to both counts and they arise from similar transactions allegedly taken place over a period of time. The proceedings in the Magistrate's Court had not been conducted separately for each count and the Respondent had been tried for all three counts in one single proceeding.

50. In **State v Abraan [2018] FJHC 1009; HAC142.2018 (17 October 2018)** the accused was charged for 20 counts in respect of different offences relating to different complainants. After the accused was convicted for fourteen counts the Magistrate's Court transferred the case to the High Court for sentencing pursuant to section 190(1)(b) of the Criminal Procedure Act. Although none of the parties raised that election had not been put to the accused in respect of two of the counts, the Court upon perusal of the record discovered that the accused had not elected the Magistrate's Court in respect of two indictable offences triable summarily. Those two counts were in respect of two separate incidents relating to two complainants. The High Court declared that the proceedings relating to those two counts a nullity and decided to proceed with the sentencing in respect of the other counts. A trial *de novo* was ordered only in respect of the two counts with indictable offences triable summarily.

51. Although the High Court severed the proceedings and ordered a new trial in respect of two counts in Abraan (supra), I am of the view the same approach cannot be adopted in the present case given the nature of the proceedings. In Abraan, the two counts were in respect of two independent incidents entirely separate from other

counts and in respect of two different complainants. It is my considered opinion that if the proceedings are declared a nullity, the first count in the present case cannot be treated separately, given the nature of the alleged transactions, although it is not an electable offence.

52. In view of the matters discussed above it is my appraised opinion that the learned Magistrate did not have jurisdiction to hear the matter as a result of the failure to put election to the Respondent to choose the Court she wished to be tried. Therefore, I decide that the entire proceedings in the magistrate's Court are a nullity.

53. In those circumstances there is no requirement to consider the merits of the grounds of appeal.

54. Having taken into account the interest of the Respondent, as well as the other considerations I decide to order a new trial, in the interest of justice.

55. In order to ensure a fair trial to the Respondent and to minimize further prejudice caused to the Respondent I order the new trial to be prioritized before a Resident Magistrate of the Anti-Corruption Division and to be concluded as soon as practicable, without any further delay.

**Rangajeeva Wimalasena**
**Judge**

**At Suva**
23 March 2021

**Solicitors**
Office of the Fiji Independent Commission Against Corruption for the Appellant
Munro Leys Solicitors for the Respondent