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]

SUVA CITY COUNCIL

Appellant

CASE NO: HAA. 08 of 2023 **Vs.**
[Suva Magistrate's Court Criminal. Case No. CF. 09 of 2019]

1. **SAVAIRA TINAI LOALOADRAVU**
2. **KALIVATE LOALOADRAVU**

Respondent

Counsel : Mr. T. Duanasali for the Appellant
1st & 2nd Respondents, In Person

Hearing on : 6th November, 2023
Judgment on : 16th April, 2024

APPEAL JUDGMENT

Introduction

1. The Appellant namely Suva City Council is appealing against the sentence of a fine of $100 given to the Respondents namely, i) Savaira Tinai Loaloadravu and ii) Kalivate Loaloadravu by the learned Magistrate on 24 January 2023 having convicted the said Respondents who had pleaded guilty to the following charge:

Statement of Offence

FAILED TO COMPLY WITH NOTICE FROM BUILDING SURVEYOR contrary to Regulations 12(1) and (2), 17(7) and 18 and 137(1) of the Towns (Building) Regulations made pursuant to Public Health Act, Cap 111.

Particulars of Offence

SAVAIRA TINAI LOALOADRAVU & KALIVATE LOALOADRAVU, of 28 Tubou Street, Suva in the Central Division did on the 5th day of April, 2019 having been served with a notice by the Building Surveyor of Suva City Council to pull down and remove the unauthorised structure namely **illegal extension to front and sides of existing building and additional floor level** on Crown Lease No. 2715 being Lot 24 Section 33 Samabula North at 28 Tubou Street, Suva without having plans and specification approved by the Council, failed to comply with such notice.

2. Both Respondents pleaded guilty to the aforesaid charge on 25 February 2021, and immediately thereafter the learned Magistrate noted on the court record at p.11 *'[f]acts as charged. I find you both guilty and I convict you as charged'*, followed by the Respondents mitigation for purposes of sentencing.

3. On 24 January 2023 the learned Magistrate sentenced the Respondents and stated as follows as per the court record at pp.6, 14-15:

    1. *I am limited by the particulars.*
    2. *The particulars of the charge indicate a one of failure to comply. If the Suva City Council want the Court to punish for successive days, they need to particularize this.*
    3. *At sentencing, the Court cannot sentence for uncharged Acts.*
    4. *I fined $100.00 to be paid in 30 days in default 3 days imprisonment for both. If the fine is paid in time, no conviction is to be entered.*

    28 days to appeal.

Review date: 24 February 2023.

4. Magistrate Court case number CF. 9 of 2019 was recalled on 24 February 2023, and the fine of $100 having been fully paid by the Respondents, the learned Magistrate then recorded at p.15 of the court record:

> *Fined fully paid.*
> *Case closed.*

5. Having being dissatisfied with the sentence ordered by the learned Magistrate on 24 January 2023, the Appellant then on 17 February 2023 filed a petition of appeal against sentence based on the following grounds:

1. That the learned Magistrate erred in law when sentencing the accused as she did not consider the Appellant's sentencing submission that was filed on 29th March, 2021.
2. That the sentence imposed by the learned Magistrate is manifestly lenient and contrary to law.
3. That the learned Magistrate erred in law and misconstrued regulation 137(1) of the Towns (Building) Regulations of the Public Health Act 1935, by not imposing the continuing offence fine and further indicated the said regulation has to be properly particularised in the particulars of the offence.
4. That the learned Magistrate erred in law after the sentencing submissions were filed by the adjourning of the case for more than twelve months and allowing time to accused to comply with the requirements of the Public Health Act, 1935.
5. That the learned Magistrate erred in law by not considering amended section 56(2) of the Sentencing and Penalties Act, 2009.

6. This appeal labelled HAA 8 of 2023 was heard on 6 November 2023 and both parties provided written and oral submissions.

7. This is the High Court's judgment on the said appeal from the Magistrate's Court at Suva.

Charge – Duplicity

8. The High Court in exercising appellate jurisdiction has the power under sections 256(2)(a) and (e) of the Criminal Procedure Act 2009 to *'(a) confirm, reverse or vary the decision of the Magistrates Court; or … (e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised'.*

9. In light of the aforesaid appellate power of this Court, and despite the Appellant's petition being only on sentence, I had raised with Counsel for the Appellant Mr. Duanasali during the appeal hearing the issue of whether the pertinent charge is duplicitous in that it contains more than one offence, causing prejudice to the Respondents.

10. For instance, in FICAC v Sitiveni Ligamamada Rabuka [2018] FJHC 1071; HAA57.2018 (12 November 2018), Chief Justice Anthony Gates (as he then was) dismissed FICAC's appeal primarily because the charge of *'Providing false declarations of assets, income and liabilities'* contrary to sections 24(1A) and 24(5) of the Political Parties (Registration, Conduct, Funding and Disclosures) Act No. 4 of 2013 against the Respondent Mr. Rabuka was duplicitous. The learned Chief Justice at paragraphs 105 – 108 stated:

> *[105] In the charge as drafted both limbs of section 24(5) are included. It was no surprise therefore that leading defence counsel should protest about its duplicity. Two offences have been merged into one charge, and as can be seen with significantly two different elements of proof. One is strict and the other requires proof of knowledge of the falsity of the information.*
>
> *[106] These are not alternative ways of committing the same offence, which would be permissible: Amos v DPP [1988] RTR 198. There are two discrete offences, one more serious than the other.*
>
> *[107] It is an essential of criminal law and procedure for an Accused person to be informed of the charge against him or her [section 14(2)(b) Constitution]. There must be no confusion in the charge.*
>
> *[108] This is a fundamental protection. Nor is this a case where there is merely a slip in the charge or section numbering where everything else is clear, such*

as the Statement of Offence and the Particulars of Offence. In such circumstances if the court finds that the Accused and his counsel were able to make their defence without embarrassment or prejudice and they were not misled as to what they had to answer, the defective charge will not be held to be bad in law: Skipper v R [1979] FJC 6; Shekhar and Shankar v State Cr.App.AAU0056 of 2004; Mudaliar v State Cr.App.AAU0032.2006.

11. Furthermore, in Keni Dakuidreketi v FICAC [2014] FJHC 280; HAM283.2013 (25 April 2014), the Applicant Keni Dakuidreketi applied in the High Court seeking that the charges in the Information filed against him by FICAC in High Court criminal case number HAC 26 of 2009 be quashed on the ground of duplicity of charges. However, this particular application was dismissed by Justice Janaka Banadara (as he then was), holding that the charges laid by FICAC were not duplicitous. The learned Judge at paragraphs 10 – 12 of his ruling provided a lucid explanation of the rule against duplicity and how it should be properly applied within the relevant context:

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

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

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

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

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

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

12. The *Statement of Offence* and *Particulars of Offence* of the charge in question reads as follows:

Statement of Offence

FAILED TO COMPLY WITH NOTICE FROM BUILDING SURVEYOR contrary to Regulations 12(1) and (2), 17(7) and 18 and 137(1) of the Towns (Building) Regulations made pursuant to Public Health Act, Cap 111.

Particulars of Offence

SAVAIRA TINAI LOALOADRAVU & KALIVATE LOALOADRAVU, of 28 Tubou Street, Suva in the Central Division did on the 5th day of April, 2019 having been served with a notice by the Building Surveyor of Suva City Council to pull down and remove the unauthorised structure namely **illegal extension to front and sides of existing building and additional floor level** on Crown Lease No. 2715 being Lot 24 Section 33 Samabula North at 28 Tubou Street, Suva without having plans and specification approved by the Council, failed to comply with such notice.

13. As per the *Statement of Offence* of the charge, regulations 12(1), 17(7), 18 and 137(1) of the Towns (Building) Regulations (29 March 1944), a subsidiary legislation to the Public Health Act (Cap.111) (see s.39), respectively state:

Approval

12.-(1) The Council may through its building surveyor approve such plans, elevations, sections and specifications, or specify the alterations which shall be made in the same before granting such approval.

(2) Except as provided in regulation 4, ***no person shall commence the work of erecting a building or commence any work of addition, alterations or repairs to an existing building without such approval****.*

Inspection

17.-(7) If any work to which any provision of these Regulations may apply be begun or done in contravention thereof, the person by whom such work shall be begun or done shall, on notice in writing from the building surveyor remove, alter, or pull down such work to such extent as may be required by the building surveyor within such time as may be specified in a notice given by the building surveyor. ***Any person who fails to comply with any such notice shall be guilty of a continuing offence against these Regulations.***

Contravention of Regulations

18.-(1) In every case where a person who erects a building or executes any work to which these Regulations may apply, receives at any reasonable time

during the progress, or after the erection of such building, or execution of such work, from the Town Clerk notice in writing specifying any matters in respect of which the erection of such building, or the execution of such work, is in contravention of any law or regulations relating to buildings and requiring such person within 7 days to cause anything done contrary to any such law or regulations to be amended, or to do anything which thereby may be required to be done, but which has been omitted to be done, ***such person shall, within the time specified in such notice, comply with the several requirements thereof.***

(2) No permit, permission, certificate or authority, expressed or implied, given by the Board or by the building surveyor or other officer of the Board shall authorise any building to be erected otherwise than in accordance with law.

Penalties

137.-(1) Any person who erects a building in contravention of these Regulations shall be liable to a fine not exceeding $100 and also a daily fine not exceeding $10 per day for any continuation of the offence.

14. The **activity** or **transaction** respectively prescribed under regulations 12, 17 and 18 are, in my view, different from each other and separate, and a person in breach of each regulation can be held liable and be penalised in accordance with regulation 137(1).

15. **Regulation 12** with the heading ***Approval***, prescribes that the person wanting to erect a new building, or add, alter or repair an existing building, must submit the relevant plans, elevations, sections and specifications of the intended works to the appropriate town council, and secure that council's approval including the permit issued under regulation 14. Regulation 12(2) stipulate, *'[e]xcept as provided in regulation 4,* ***no person shall commence the work of erecting a building or commence any work of additions, alterations or repairs to an existing building without such approval****'*. Hence, working without the necessary approval [regulation 12(2)] and permit [regulation 14], read in conjunction with regulation 137(1), constitutes a distinct and separate offence.

16. **Regulation 17** with the heading ***Inspection***, prescribes that a condition of every permit [regulation 14] issued is for the building surveyor to inspect the building being erected,

added, altered or repaired, without any hindrance. **Regulation 17(7)** stipulate, *'[i]f any work to which any provision of these Regulations may apply be begun or done in contravention thereof, the person by whom such work shall be begun or done shall, on notice in writing from the building surveyor remove, alter, or pull down such work to such extent as may be required by the building surveyor within such time as may be specified in a notice given by the building surveyor.* ***Any person who fails to comply with any such notice shall be guilty of a continuing offence against these Regulations****'.* Therefore, failure to comply with the building surveyor's notice issued under regulation 17(7) due to the inspection carried out by the building surveyor, read in conjunction with regulation 137(1), constitutes a distinct and separate offence.

17. **Regulation 18** with the heading ***Contravention of Regulations***, authorises the Town Clerk to issue written notice to the person with the permit to erect a new building, or add, alter or repair an existing building, to remedy the defects and/or omissions within the mandated period highlighted in the said notice. Thus, failure to comply with regulation 18, read in conjunction with regulation 137(1), constitutes a distinct and separate offence.

18. It appears that the Appellant had intended to prosecute the Respondents for violating regulation 17, however, when framing the charge, the Appellant also included additional offences prescribed under regulations 12 and 18, and this in my view renders the charge duplicitous.

19. If the charge is duplicitous, were the Respondents prejudiced when pleading guilty to the charge.

20. I am of the view that the two Respondents, being unrepresented, suffered prejudice in that they would not have been able to discern at the time of their plea as to whether they were being prosecuted for the offence under regulation 12 or regulation 17 or regulation 18. They would have better understood the allegations laid against them provided the charge was separated into relevant counts to reflect the distinct and separate offences prescribed accordingly under regulations 12, 17 and 18, all read in conjunction with regulation 137(1), which approach is consistent with section 59(2) of the Criminal Procedure Act 2009 read in conjunction with sections 58 and 61. If such approach was

followed by the Appellant, the 'continuing offence' would have been particularised to then allow the Appellant to legitimately insist on the relevant fine prescribed under regulation 137(1). On that basis, I therefore concur with the learned Magistrate in refusing to issue the fine for the continuing offence given that the continuing offence was not particularised in the charge. Thus, the Appellant's 1st, 2nd, 3rd and 5th grounds of appeal are dismissed accordingly.

21. The Appellant have cited the case of Suva City Council v Vimla Wati HAA 065 of 2010 (31 May 2011) decided by the learned High Court Judge S. Thurairaja (as he then was); however, I have decided not to follow that particular precedent in light of my decision on the charge in this instant being duplicitous substantiated by the High Court decisions in FICAC v Sitiveni Ligamamada Rabuka [2018] FJHC 1071; HAA57.2018 (12 November 2018) (Gates, CJ) and Keni Dakuidreketi v FICAC [2014] FJHC 280; HAM283.2013 (25 April 2014) (Banadara, J) noted earlier.

22. The Appellant's 4th ground of appeal is without any merit and therefore dismissed.

Conclusion

23. Based on the reasons noted above, the appeal is dismissed principally on the basis that the charge is duplicitous, and that the two Respondents suffered prejudice when pleading guilty to the duplicitous charge.

24. Furthermore, the dismissal of this appeal is to the following effects:

    (a) The **conviction** of the two Respondents entered by the learned Magistrate is hereby quashed.

    (b) The **sentence** ordered by the learned Magistrate is hereby quashed.

    (c) The Appellant Suva City Council is to **reimburse** the sum of F$100 to the Respondents within 30 days from the date of this appeal judgment.

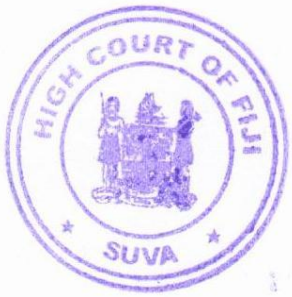
25. If dissatisfied with this appeal judgment, the Appellant may lodge an appeal to the Fiji Court of Appeal within 30 days from the date of this judgment.

Orders of the Court:

(1) The **convictions** of the two Respondents entered by the learned Magistrate are **quashed**.

(2) The **sentence** ordered by the learned Magistrate against the two Respondents is **quashed**.

(3) The Appellant Suva City Council is to **reimburse** the sum of $100 to the Respondents within 30 days from the date of this appeal judgment.



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Hon. Mr. Justice Pita Bulamainaivalu
PUISNE JUDGE

At Suva
16th April 2024

Solicitors
Suva City Council for the Appellant
1st & 2nd Respondents, In Person