

**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION v LAISENIA QARASE (HBC0027 of 2009S)**

5 HIGH COURT — CRIMINAL JURISDICTION

FERNANDO J

1, 3 August 2012

10 **Criminal Law — sentencing — abuse of office for gain — discharge of duty with respect to property in which accused had private interest — high office in public sector — gross breach of trust — aggravating factors — mitigating factors — whether sentence should be suspended — Penal Code ss 3, 17.**

15 The offender was convicted of six counts of abuse of office for gain and three counts of discharge of duty with respect to property in which he had a private interest.

**Held –**

20 The offender held a very high office in the public sector. He breached the trust and confidence placed in him by the government and the public, and deprived the relevant institutions and eligible Fijians of their entitlements. The punishment must reflect that breach of the public confidence. The offender's age and previous good record were considered as grounds for suspending the sentence. However, the gravity of the offence, premeditation and planning and gross breach of public trust are grounds for a custodial sentence, and override the grounds for a suspended sentence. The Court also takes into account the absence of remorse or repentance. This case warrants an immediate custodial sentence.

25 Sentence of 12 months' imprisonment imposed.

**Cases referred to**

30 *FICAC v Farzard Ahmed Khan* HAC82/2010; *FICAC v Oloti Rokovunisei* HAC37B.10; *FICAC v Tevita Peni Mau and Mahendra Patel* HAC089.2010; *Naiveli v State* Criminal Appeal No 2 of 1992(CA); *State v Bola* [2005] FJHC 236; HAC 0029S.2005S; *State v Buatoka* Criminal Case No HAC 005 of 2006; *State v Chand* Criminal Appeal No AAU0027 of 2000S; *State v Kunatuba* Crim. Case No HAC 18 of 2006; *State v Prasad* [2003] FJHC 320; HAC 0009, 2002S, 30 October 2003, followed.

35 *M. Blanchflower with E. Yang and S. Sanmogam* for FICAC.

*T. Draunidalo with S. Waqabitu* for the respondent.

40 [1] **Fernando J.** Laisenia Qarase, you have been convicted of 6 Counts of 'Abuse of Office' for gain punishable under section 111 of the Penal Code Cap 17 and of 3 Counts of 'Discharge of Duty with Respect to Property in which he has a Private Interest' punishable in terms of section 109 of the Penal Code.

45 [2] The facts are that the FHL was established as a limited liability company to be the investment vehicle of the indigenous people in Fiji and to accelerate and broaden their participation in commerce and industries. You were the Financial Advisor of the Fijian Affairs Board (FAB) and Great Council of Chiefs (GCC). You were appointed to Directorship of the Fijian Holdings Limited (FHL) board to represent Class B shares of FHL by the Minister of Fijian Affairs. Fijian Affairs Board being a government entity held Class B shares of FHL. On behalf of the companies Q-Ten Investments Ltd, (Q-Ten), Cicia Plantations Co-operation Society Ltd. (CPCS), and Mavana Investments Ltd. (Mavana), you applied for

allotment of Class A shares of FHL. You also facilitated the approval of the issuance and allotment of Class A shares to the three companies Q-Ten, CPCS and Mavana. It was done in priority to other eligible Provincial and Tikina Councils, FAB and indigenous Fijian people. In doing so, you failed to disclose  
5 your interest and the relationship with the 3 companies to FHL, FAB or GCC.

[3] Your acts were prejudicial to the rights of Provincial and Tikina Councils, FAB and all other indigenous Fijian people.

[4] You also attended and participated at the board meetings of FHL at which the board decided on payment of dividends to those 3 companies in which you  
10 have private interest.

[5] On Counts No 1 – 6 ‘Abuse of Office’ you are convicted of a felony on each count. The maximum punishment prescribed for felony of Abuse of Office is 3 years imprisonment.

15 [6] The courts in Fiji have taken the offences against Administration of Lawful Authority very seriously.

[7] In case of *Naiveli v The State* Criminal Appeal No 2 of 1992(CA) the court said;

20 *“We note that such offences strike at the very roots of the administration of law and order and justice in this country. Such an offence can be committed only by a person who is in a position of authority and trust. If it became a pattern that because of their high position they would not serve a term of imprisonment it could only be to the detriment of the whole country.”*

25 [8] On sentencing the court further said:

*“We wish to make it clear however that people in high office who abuse their power may well in the future be required to serve an immediate prison sentence. This comment should serve as notice to any such people that the courts are not prepared to regard such offences lightly and that they will not suspend sentences just because the consequences for such a person are severe.”*  
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[9] In case of *FICAC v Farzard Ahmed Khan* HAC82/2010, when sentencing the accused who was convicted of forgery and abuse of office following guilty pleas, Goundar J said:

35 *“...Despite your previous good character and other compelling mitigating factors, I give priority to the principle of deterrence. The purpose of your punishment is not only to deter you but others as well from committing this kind of offences.”*

The accused was sentenced to 6 months imprisonment on each count of forgery and abuse of office to be served concurrently.

40 [10] In case of *State v Kunatuba* Crim. Case No HAC 18 of 2006, the accused being Permanent Secretary for Ministry of Agriculture, implemented a scheme without approval from cabinet and finance ministry, deviating from the government accounting regulations caused abuse of office in millions of dollars. He was sentenced to a total sentence of 4 years imprisonment on 2 counts of  
45 abuse of office.

[11] Further, in *State v Prasad* [2003] FJHC 320; HAC 0009, 2002S (30th October 2003) Mr Justice Gates as he then was said:

50 *“The Public interest lies in the deterrence of dishonest practices by employees. Usually in such cases the gravity of the breach of trust needs to be marked by an immediate term of imprisonment no matter how sad the Accused’s story, or how compelling the mitigation in favour.”*

[12] In case of *State v Bola* [2005] FJHC 236; HAC 0029S.2005S (22 August 2005) where the Manager Compliance and Investigations at the Immigration Department personally went to Nausori airport to ensure that a person was not refused entry to Fiji was given community service. The court considered that the  
5 accused did not personally benefit from the transaction and also that the person was to receive visa anyway. And also the court considered that the accused after conducting an investigation was satisfied that the credentials were genuine to recommend his entry.

[13] In case of *FICAC v Olota Rokovunisei* HAC37B.10, where the accused in  
10 abuse of his office as CEO of FNPF authorized a payment to a subordinate officer was sentenced to 12 months imprisonment.

[14] In case of *FICAC v Tevita Peni Mau and Mahendra Patel* HAC089.2010, where the accused was convicted of Abuse of Office which involved the breach  
15 of procurement procedures of Fiji Post was sentenced to 12 months imprisonment.

[15] These series of case show that the offenders of the offence of abuse of office who held high public office were imposed with immediate custodial sentences.

[16] You have held a very high office in the public sector. You were appointed  
20 Financial Advisor to FAB pursuant to the Fijian Affairs Act and Regulations. You were the Financial Advisor to GCC. You were also appointed a Director FHL to represent Class B shares. By virtue of these appointments, the government and the public vested their trust and confidence in you. FHL was established to be the  
25 investment vehicle of the indigenous people of Fiji, and to accelerate and broaden their participation in the commerce and industries. You had a duty to safeguard the FAB and the institutions like Provincial and Tikina Councils and indigenous Fijian people as a whole. Instead you applied for and facilitated the allotment of shares of FHL to three companies which you had personal interest, without  
30 disclosing your interest. This was done in priority to the said Provincial and Tikina Councils and other eligible indigenous Fijian people. You thus received gain by abuse of your office. You continued to gain by receiving dividends from the said FHL shares. You have breached the trust and confidence bestowed in you. You have deprived the said institutions and eligible Fijians of their  
35 entitlements. Your actions are not only illegal but against the moral values. The punishment that you ought to receive must reflect the breach of the public confidence.

#### **Aggravating factors.**

[17] It was a gross breach of trust as mentioned above.  
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[18] After the breach of trust, you continuously received benefits by way of receiving dividends.

#### **Mitigating Factors**

[19] In mitigation I consider all the good things said about you by the three  
45 character witnesses who gave evidence in court. I also consider what is said about you in the affidavit of Ro Teimumu Kepa dated 31st July 2012.

You are 71 years old married with 5 children. Your grown up children are residing overseas. Three of your grand children live with you and your wife while  
50 their parents are temporarily overseas.

It was submitted that your wife has had health issues including a stroke.

In the past you have served on a number of government boards. You were involved in community work.

You are a first offender with a previous good character. I also consider that the offences were committed 20 years ago.

5 Two medical reports were submitted on your health condition. Dr Ami Chandra says that despite regular treatment, your general health status in as far as diabetes and its associated complications is concerned, is worsening. Dr De Asa in his report dated 31/07/12 says that your medical problems are Diabetes Mellitus, Essential Hypertension, Coronary Artery Disease, Chronic Gouty  
10 Arthritis and Fatty Liver. He also has mentioned about the present medication.

[20] For each offence of Abuse of Office in Counts No 1 - 6, I pick 18 months as my starting point. I add 12 months for the aggravating factors and deduct 18 months for the mitigating factors mentioned above. Now your sentence on each  
15 Count 1 – 6 is 12 months imprisonment.

[21] There are no case precedents on the tariffs for the offence of 'Discharge of Duty with Respect to Property in which he has a Private Interest', Counts No 7 - 9.

[22] The maximum penalty prescribed for this offence in section 109 of the  
20 Penal Code is imprisonment for one year. Considering all the factors including the aggravating and mitigating factors mentioned before, on each count of Counts 7 - 9, I sentence you to 6 months imprisonment.

[23] I order that the sentences in Counts No 1 - 9 to run concurrently.

25 [24] Therefore the sentence you have to serve now is 12 months imprisonment.

[25] Now I will consider whether the sentence should be suspended or not. Only in rare cases that the court will suspend a prison term for abuse of office: The *State v Buatoka* Criminal Case No HAC 005 of 2006.

[26] In case of *State v Chand* Criminal Appeal No AAU0027 of 2000S the Fiji  
30 Court of Appeal referred to what was said in case of *R v Petersen* [1994] 2 NZLR 533, on the factors which needs to be weighed in choosing immediate imprisonment or suspended sentence.

*'Thomas at pp 245 – 257 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately.'*

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[27] In the instant case I find your age and previous good record can be considered as grounds for suspending the sentence. However, the gravity of the offence, premeditation and planning and gross breach of public trust are grounds for a custodial sentence. These grounds override the grounds mentioned for a  
5 suspended sentence. When imposing the sentence I also take into account the absence of remorse or repentance by you. This is a case which warrants an immediate custodial sentence as mentioned before.

[28] Therefore your final sentence is 12 months imprisonment.

10 [29] You have 30 days to appeal.

*Sentence imposed.*

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