

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT SUVA

Miscellaneous Application No. /2021

BETWEEN : Fiji Independent Commission Against Corruption
Prosecution/Applicant

AND : Simione Rokomalo Rasova. – Criminal Case No. MACD 28/2021;
Accused/Respondent

AND : Ratu Suliano Matanitobua,- Criminal Case No. MACD 29/2021;
Accused/Respondent

AND : Nikolau Nawaikula,- Criminal Case No. MACD 30/2021;
Accused/Respondent

AND : Peceli Waqairatu Vosanibola,- Criminal Case No. MACD31/2021;
Accused/Respondent

AND : Salote Vuibureta Radrodoro,- Criminal Case No. MACD 32/2021;
Accused/Respondent

AND : Vijendra Prakash - Criminal Case No. MACD 33/2021;
Accused/Respondent

AND : Adi Litia Qionibaravi - Criminal Case No. MACD 37 /2021;
Accused/Respondent

Appearances

For the Prosecution/Applicant : Mr. R. Aslam and Mr. J. Work (*FICAC*)

For Accused/Respondent : Mr.S.R Valenitabua - (*Ratumaiale & Associates*)
Mr. A.Reddy - (*Reddy & Nandan Lawyers*)
Mr. T.Tuitoga - (*Haniff Tuitoga Legal Pacific*)

Date of Ruling : 6th December 2021 @12.15pm

RULING

1. In this matter Prosecution has chosen to lay two charges against all the accused persons.

2. A summary of the charges against all the accused persons are listed herein as follows:
 - a. Count 1: *False Information to Public Servant* contrary to Section 201(a) of the ***Crimes Act 2009***; and
 - b. Counts 2: *Obtaining Financial Advantage* contrary to section 326 (1) of the ***Crimes Act 2009***.
3. The accused persons are charged individually as represented by the differing case numbers assigned however for the purposes of this ruling, this court has adopted that one ruling shall be deemed proper as the matter for adjudication is similar for all.
4. By matter, this court is referring to prosecution filing an application¹ against all the accused persons seeking that this matter be transferred to the High Court. The application is filed² pursuant to the ***Magistrates Court Act***, Section 191 of the ***Crimes Act 2009*** and the inherent jurisdiction of the ***High Court***.

Basis for Application

5. Garnering from the Affidavit filed in support of the Motion filed against all accused persons, the basis of the Application is three-fold, which is;
 - i. The nature and seriousness of the case (*the volume of disclosures and expected length of a trial requires a court with a lesser volume of work to adjudicate on the matter*);
 - ii. The novel legal issue to be decided on and applied in Fiji (*the adjudication on the term 'Residence' was the novel issue*); and
 - iii. The public interest factor (*Six (6) of the accused were currently members of parliament, whilst one (1) was a member of parliament when charged however has since resigned*).
6. It was Prosecution's submission in light of the above grounds that the Anti-Corruption Division of the High Court was the most appropriate court as a result.
7. Counsels for the accused persons disagreed with the reasoning given by Prosecution stating the following:

¹ Notice of Motion and Affidavit issued on 19th February 2021.

² As highlighted in the Notice of Motion

- I. That the incumbent court was the most appropriate court by way of experience and the application by prosecution implied that the incumbent court was incompetent to handle such matters;
 - II. That the term ‘Residence’ has already been defined in numerous decisions³ of the High Court and Family Court (Adoption matters) as such there was no novelty in the said term;
 - III. That the application of the term ‘public interest’ was not reserved to office holders whom are charged with an offence (like the accused persons) but was a blanket term applied to all persons charged with an offence; and
 - IV. That the charged offences were summary offences and as per Section 4(1)(c) of the *Criminal Procedure Act 2009* the offences are to be tried by the Magistrate’s Court.
8. Apart from the above submissions a matter which sparked a lot of debate was the incorporation of Prosecutions submission that the incumbent court should consider Section 188 (2) of the *Criminal Procedure Act 2009* even though the same was not specified in their motion.
 9. All counsels for the Accused persons raised strong objections to such submissions on the basis that they felt ‘ambushed’ by such a submission, when there was no notice of reliance on the same from Prosecution via their Notice of motion.
 10. As such, this court shall firstly discuss whether this court should direct its mind to consider Section 188 (2) of the *Criminal Procedure Act 2009* when the same was not identified as a provision to be relied upon by Prosecution in their notice of Motion.

Section 188(2) of the Criminal Procedure Act 2009 – A Discussion

11. It shall not be out of place to regurgitate the above-stated provisions. It is as follows:

“Power to stop summary trial and transfer to High Court

188. — (1) ...

(2) Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the magistrate shall —

(a) hear and consider the reasons for the application;

³ Chand v Hussein[2009]FJHC 286 and In re S(an Infant)[1997]FJHC182.

(b) hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and
(c) otherwise determine matters relevant to the grounds for the application –

and may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3 of this Part.”

12. The above-stated provisions reflect how this application has proceeded, that is, Prosecution filed an application via motion and supporting affidavit, responses were filed by the accused persons (via their counsels) and hearing ensued.
13. It now awaits a decision on whether the incumbent court retains the matter/s or transfers the same to the High Court.
14. Be that as it may, the Notice of Motion has not specifically stated that Section 188 (2) of the ***Criminal Procedure Act 2009*** is relied upon as a basis of the application.
15. Does the absence render the submissions on Section 188 (2) of the ***Criminal Procedure Act 2009*** by Prosecution nugatory?
16. Prosecution disagreed citing Order 26 Rule 2 of the ***Magistrates Court Rules 1945*** when supporting the view that their failure to mention Section 188(2) of the ***Criminal Procedure Act 2009*** does not render their submissions invalid.
17. In fact it was their submission that Order 26 Rule 2 (*supra*) highlights that it is only proper for a motion to contain the terms of the Order sought and in their case, they submitted that they had done that. Order 26 Rule 2 (*supra*) of the ***Magistrates Court Rules 1945*** is regurgitated herein-below for context:

“

Motion paper

2. Unless the court shall otherwise order, no motion shall be entertained until the party moving has filed a motion paper distinctly stating the terms of the order sought.”
18. All counsels for the accused persons submitted that they were ambushed by Prosecution as a result and submitted that fairness and procedural integrity required Prosecution to disclose matters they relied upon in their Notice of Motion in order for a considered response to be filed.
19. Answering this dilemma, this court accepts that Section 17 and 46 of the ***Magistrates Court Act 1944*** directs that jurisdiction as well as practice and procedure in terms of criminal proceedings is the ***Criminal Procedure Act 2009***,

the *Magistrate Court Act 1944* or any other Act which is in force at the particular time. Section 17 and 46 are regurgitated herein as follows for ease of reference:

“ *Criminal jurisdiction*

17. In the exercise of their criminal jurisdiction Magistrates shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Act 2009, this Act or any other law for the time being in force.

.....

Practice and procedure

46. The jurisdiction vested in Magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Act 2009 http://www.paclii.org/fj/legis/consol_act/cpc190/, or by such rules and orders of court as may be made pursuant to this Act and the Criminal Procedure Act 2009 http://www.paclii.org/fj/legis/consol_act/cpc190/, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction.”

20. When considering the *Criminal Procedure Act 2009* and instances spelt out clearly where an application is to be made via a motion and affidavit, are very few.
21. They occur at *Section 47 (3)* where an interested party wishes to make an application before the Chief Magistrate to change a venue of proceedings; at *Section 215* where a motion is filed and delivered to the Chief Registrar for quashing an Information; and at *Section 239* in terms of an application to arrest Judgment.
22. In terms of the application at hand, the instances as highlighted at paragraph 21 do not assist this court, as such we turn to consider the *Magistrate Court Act 1944* and its *Rules* bearing in mind the application of Section 17 and 46 of the *Magistrates Court Act 1944* as highlighted at paragraph 19 above-herein.
23. The *Magistrates Court Rules 1945*, specifically Order 26 Rule 2 establishes how a motion should be drafted. As highlighted at paragraph 17 above-herein the only matters which need to be specified are the terms of the order.
24. This court interprets that to mean that it is the result which is being sought in the application. In this instance, the terms of the application as garnered from the motion is very clear and unambiguous, that is, prosecution seeks to have this matter transferred to the High Court.
25. As such not specifying the legal provision which they now rely on apart from the ones mentioned in the motion is not manifestly unfair in the circumstances.

26. It is this court's view that although it is accepted that fairness dictates that matters relied upon by the applying party should be made known to the party that shall respond, the prejudicial effect of the omission of the words '*this application is also made pursuant to Section 188 (2) of the Criminal Procedure Act 2009*' is negated by clear terminology in the terms of the order which precludes any perceived 'ambush'.
27. As a result, the submissions made and relied upon in terms of Section 188 (2) *supra* are accepted as valid submissions wherein this court can direct its mind towards.
28. The effect of such acceptance shall mean that this court now has the freedom to decide whether to transfer the matter or not, in consideration of matters raised by both parties in their Affidavits and submissions (written and oral).
29. In deciding the question of transfer, this court is inclined to first consider the issue of Jurisdiction (that is that the charged offences are summary in nature) which was raised as a ground of objection.

Jurisdiction – Summary Nature of Charged Offences

30. Both parties accept that the charged offences which prosecution now seeks to have transferred to the High Court are summary offences.
31. This is why learned counsels for all accused persons have submitted that this settles the issue because as a summary offence the law mandates the matter be tried solely in the Magistrates Court and the allowance of the application would render the incumbent court's actions as *ultra vires*.
32. By way of agreement this court accepts that the charged offences are summary in nature and therefore as dictated by Section 4(c) of the *Criminal Procedure Act 2009*, the Magistrates Court retains jurisdiction. Section 4 (*supra*) is regurgitated herein-below as follows:

“Offences under the Crimes Act 2009 and extension of jurisdiction

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 Magistrates Court, at the election of the accused person; and
- (c) any summary offence shall be tried by a Magistrates Court.

...

”

33. In *State v Prasad* [2019] FJCA 18; AAU123.2014 (7 March 2019) it was adjudged as follows:

‘[24] It is the ‘offence’ for which an accused is charged with, which determines the jurisdiction of the Court. If it is an indictable offence the jurisdiction lies with the High Court (S.4 (1)(a) of the Criminal Procedure Act while in a summary offence the jurisdiction lies with the Magistrate’s Court. (S.4 (1)(a) of Criminal Procedure Act. The only exception being the investing of extended jurisdiction on the Magistrate’s Court pursuant to section 4(2) of the Criminal Procedure Act in respect of an indictable offence.’

34. This means that all of the charged offences in this matter/s as determined by jurisdiction is the Magistrates Court.

35. In *Batikalou v State* [2015] FJCA 2; AAU31.2011 (2 January 2015) it was stated at paragraph 30 that “...*The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.*”

36. It is determined by considering the above decisions and the wordings of Section 4 (c) *supra* that the classification of the offences are clear and unambiguous.

37. Therefore, there can be no doubt as to the jurisdiction. It is for all intents and purposes the Magistrate Court.

38. Does this mean therefore as submitted by all of the accused persons counsels that any transfer of the matter shall circumvent the application of the law as intended by the legislators?

39. This is answered in the negative on the basis of how Section 4 of the *Criminal Procedure Act 2009* is drafted. Learned counsel for Prosecution alerted the court to the fact that Section 4 is subjected to other provisions in the Act.

40. A cursory look at Section 4 garners an agreement with that submission as the first line in Section 4 states ‘4.—(1) *Subject to the other provisions of this Act*’.

41. Consequently what this shows to this court that although under Section 4 (*supra*) a summary offence is to be tried by the Magistrates Court, this does not exclude any instance which may arise that seeks otherwise as directed by other provisions in the *Criminal Procedure Act 2009*.
42. These instances may arise out of the consideration of Section 188 (2) and 191 of the *Criminal Procedure Act 2009*, which is relied upon by Prosecution to firm their application seeking transfer.
43. What is also very clear is that the determination of such questions is rightfully the Magistrates Court. Therefore, the filing of the chargers for all of the seven (7) accused in the Magistrates Court was properly executed and now the application seeking a transfer of the matter/s pursuant to Section 191 of the *Criminal Procedure Act 2009* (in consideration of matters contained under Section 188 (2) of the *Criminal Procedure Act 2009*) to the High Court is also properly made.
44. In fact the decision of *Madigan J* (as he then was) in *Balaggan v State* [2011] FJHC 376; HAM067.2011 (8 July 2011), where it was adjudged that a transfer via Section 191 of *Criminal Procedure Act 2009* by a Magistrate to the High Court was accepted, is a case in point.
45. The dissenting view however is the decision of *Temo J* in *State v Ravuwai* [2014] FJHC 487; HAC118.2014S (3 July 2014) where a transfer under Section 191 of the *Criminal Procedure Act 2009* was criticised and led to the quashing of the conviction. However, this is distinguished in this case because in the Ravuwai matter (*supra*), the Magistrate whom had transferred the charge to the High Court had not given the election to the accused on where he wanted his matter dealt with, as some of the offences he was charged with were electable offences. In this case that conundrum does not present itself because both offences as charged are summary offences.

46. As such considering the afore-mentioned discussions on the Jurisdiction of the charged offences, this court accepts that the original jurisdiction of the charged offences is the Magistrates Court, however given the wordings of Section 4 (1) of the *Criminal Procedure Act 2009* this court is firm in its view that it is subject to other provisions in the Act including but not exclusive to Section 188 (2) and 191.
47. The effect of such view is that the entrenched position by the accused persons that ‘it is the Magistrates court and nowhere else’, cannot be sustained given the clear and unambiguous wordings of the statute. As a result this court is empowered by statute to consider Section 188 (2) and 191 of the *Criminal Procedure Act 2009* and decide thereafter whether it is proper in the circumstances to transfer this matter/s. Section 188 (2) has been regurgitated above-herein whilst Section 191 is regurgitated verbatim as follows:

“191. A magistrate may transfer any charges or proceedings to the High Court.”

48. Is it proper therefore to transfer the charges against all the persons to High Court? Let us consider this question.

Transfer – Yes or No

49. Answering in the affirmative or otherwise requires this court to consider the three fold issues raised by Prosecution and which were vehemently objected to by the accused persons counsels.
50. They are:
- i. The nature and seriousness of the case;
 - ii. The novel legal issue to be decided on and applied in Fiji; and
 - iii. The public interest factor.
51. In terms of the first two categories, trying to garner information in order to make a finding on whether the offences as charged are serious and that the issues to be decided are novel in nature cannot be comprehensively adjudicated upon via Affidavits or written submissions.

52. These are matters which can only be determined upon a perusal of the disclosure and during trial. Leaving aside the issue of trial considering that these matter/s are at pre-trial stage, this court does not have the benefit of disclosures.
53. At the Magistrate Court level, only the charge is placed in the court file and does not include the disclosures, as opposed to the High Court where the charge (Information) and the disclosures are placed in the court file.
54. Therefore considering the first two issues is a difficult proposition in this court, as opposed to a High Court because determining those questions at this stage of the proceedings in this court's view can only be achieved if the disclosures are considered.
55. Unfortunately, this court does not have the benefit of the same and resultantly there being insufficient information to substantiate Prosecution's claim on the first two issues, that is, *the nature and seriousness of the case* and *the novel legal issue to be decided on and applied in Fiji*, shall render that those grounds cannot be accepted as means to substantiate the activation of Section 191 of the *Criminal Procedure Act 2009*.
56. The third and final ground relied upon is the *public interest factor*.
57. In *Fiji Independent Commission Against Corruption (FICAC) v Buadromo* [2021] FJHC 187; HACDA003.201S (23 March 2021), *Wimalasena J's* appeal Judgment whilst adjudicating as an Anti-Corruption Judge of the High Court and considering whether or not to order a re-trial stated at paragraph 48 the following, "48. Offences relating to corruption have a bigger **public interest** value compared to other offences..."
58. Given the above-stated quote and noting that the accused persons are charged by FICAC in the Anti-Corruption court, qualifies the third ground relied upon by

Prosecution in terms of the application because the charges are offences related to allegations of corruption.

59. Before this court decides whether the above qualification is sufficient to grant the Application, there is a matter which the court must address. It is the issue of *'Prejudice'* and in this instance what prejudice shall result if the application were granted or if the application were not granted.
60. Unfortunately neither party has addressed this important legal issue. There being none forthcoming from the parties, this court has noted that it is not uncommon for summary offences or indictable offences triable summarily or a mixture of both to be dealt with by the High Court. This is especially true when considering cases where FICAC is the prosecuting body.
61. A tabulated representation of the same is listed herein:

CASE NAME	OFFENCE CLASSIFICATION
Fiji Independent Commission Against Corruption v Laqere [2020] FJHC 123; HAC99.2014 (21 February 2020)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
FICAC v Valesu - [2020] FJHC 254; HAC069.2019 (20 March 2020)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
State v Vasu [2019] FJHC 1182; HAC324.2016 (18 December 2019)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
State v Arya [2019] FJHC 451; HAC63.2017 (17 May 2019)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
Fiji Independent Commission Against Corruption v Tuidraki [2018] FJHC 1168; HAC03.2014 (29 November 2018)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
Fiji Independent Commission Against Corruption [FICAC] v Mohammed [2015] FJHC 479; HAC349.2013 (24 June 2015)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
Fiji Independent Commission Against Corruption (FICAC) v Bakani [2014] FJHC 594; HAC026.2009 (15 August 2014)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.

Fiji Independent Commission Against Corruption (FICAC) v Prasad [2018] FJHC 475; HAC (FICAC) 1 of 2014 (3 May 2018)	Accused was charged with a mixture of Indictable Offences triable summarily and summary offences.
FICAC v Shekeb [2018] FJHC 305; HAC331.2016 (20 April 2018)	Accused was charged with a Summary Offence.
Fiji Independent Commission Against Corruption (FICAC) v Naulu [2016] FJHC 933; HAC FICAC 2.2014 (12 October 2016)	Accused was charged with a Summary Offence.
Fiji Independent Commission Against Corruption v Maharaj [2016] FJHC 114; HAC334.2013 (18 February 2016)	Accused was charged with a Summary Offence.

62. Garnering the contents of the table above-herein shows that offences which are summary in nature have been adjudicated by the High Court. The vast number of cases being dealt with (as highlighted in the table) in this manner showcases to this court in the absence of anything to the contrary that it was not considered prejudicial to either Prosecution or the accused persons for offences that were summary in nature to be dealt with in the High Court.
63. As such accepting that the offences being charges related to corruption which bear higher degree of public interest as garnered from the *Buadromo case (supra)* and considering the several cases from the table where summary offences (either as stand-alone offences or charges in addition to indictable offences triable summarily) were adjudicated in the High Court (negates any prejudice) is sufficient for this court to make a finding pursuant to Section 188 (2) of the *Criminal Procedure Act 2009* that these matter/s are proper cases for transfer.
64. As a result pursuant to Section 191 of the *Criminal Procedure Act 2009*, this matter/s is transferred to the High Court with basis on the above-mentioned discussions.
65. All accused persons shall now be required to appear in the Anti-Corruption division of the High Court on 3rd January 2022.