

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE’S COURT AT NASINU

Criminal File No: MACD 55/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : Tarterani Rigamoto

1st Accused

Sainimeli Tivao

2nd Accused

Penamino Tavo

3rd Accused

Appearances

For the State : Mr. J. Work (**FICAC**)

For the 1st Accused : Mr.M. Fesaitu (**LAC**)

For the 2nd Accused : Ms.Filipe (**LAC**)

For the 3rd Accused : Dealt With

Date of Trial : 21st to 22nd January 2019, 21st to 22nd January 2020 and 6th July 2020

Date of Ruling : 24th February 2022

Ruling

1. The 1st and 2nd accused persons are charged as follows:

Count One

Statement of Offence [a]

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

Particulars of Offence [b]

TARTERANI RIGAMOTO between the 1st of June 2016 and 31st of March 2017 in Rotuma Island, whilst being employed in the public service as the Chairman of the Council of Rotuma in abuse of the uthority of his office did an arbitrary act for the purpose of gain, namely caused the investment of Council of Rotuma with Fijian Holdings Unit Trust to be Security for the REMCOL loan in the sum of \$250,000.00 without the approval of the Council of Rotuma, which is an act prejudicial to the Council of Rotuma.

Count Two

Statement of Offence [a]

GIVING FALSE INFORMATION DERIVED FROM FALSE DOCUMENTS: Contrary to Section 161 (1) of the *Crimes Act 2009*.

Particulars of Offence [b]

TARTERANI RIGAMOTO on or about the 4th of July 2016 in the Rotuma Island, dishonestly gave false information to the Merchant Finance Ltd that the council of Rotuma had unanimously agreed to support REMCOL in their application for financial assistance and to be the guarantor for the REMCOL Loan in the amount of \$250,000.00 which information was derived from the minutes of the 2nd Quarterly Meeting of the Rotuma Council held under the provisions of Rotuma Act on the 30th of June 2016, knowing that the said information is false or misleading, with the intention of obtaining a gain namely the loan from Merchant Finance Ltd.

Count Three

Statement of Offence [a]

AIDING AND ABETTING: Contrary to Section 161 (1) with Section 45 of the *Crimes Act 2009*.

Particulars of Offence [b]

SANIMELI TIVAO on or about the 4th of July 2016 in the Rotuma Island, aided and abetted TARTERANI RIGAMOTO, in commission of the offence stated in count 2 above namely, dishonestly giving False information to the Merchant Finance Ltd that the Council of Rotuma had unanimously agreed to support REMCOL in their application for financial assistance and to be the guarantor of REMCOL Loan in the amount of \$250,000.00 which information was derived from the minutes of the second quarterly meeting of the Rotuma Council, held on the 30th of June 2016 under the provisions of the Rotuma Act knowingly that the said information is false or misleading, with the intention of obtaining a gain namely the Loan from Merchant Finance Limited”

2. All three (3) accused had pled not guilty to the charges and as such the matter proceeded to trial.
3. During the hearing prosecution called eight (8) witnesses and tendered twenty (20) exhibits.
4. Prosecution then closed their case.
5. Upon the close of Prosecution case counsels for the accused made a submission for no case to answer.
6. The court (my predecessor) gave a ruling stating that the first and second accused had a case to answer, whilst the third was acquitted on the basis that there was no case to answer.
7. As such the court (my predecessor) sought a position from the two remaining Accused persons pursuant to Section 179 of the *Criminal Procedure Act 2009*.
8. The first accused chose to remain silent however called three (3) witnesses, whilst the second accused gave evidence.
9. The Accused persons closed their case thereafter.
10. The matter was then adjourned for Judgment by my predecessor in title.

11. Whilst awaiting Judgment the High Court Amendment Act 2021 was enacted and came into force via Gazette on 12th February 2021.
12. This meant that my predecessor in title was seized of Jurisdiction to handle the matter as a consequence.
13. When the court was perusing its record and the amended charges it noted that *count 1* is an indictable offence triable summarily.
14. By virtue of Section 4 (1) (b) of the *Criminal Procedure Act 2009* this meant that the 1st accused had to elect the court which he preferred to have his matter tried in.
15. A perusal of the record from the 18th of October 2018 (the date of the filing of the amended charge) onward does not garner that any such election was given to the 1st accused. In other words the 1st accused did not elect to have his charge dealt with by the Magistrates Court.
16. Recently in *Fiji Independent Commission Against Corruption (FICAC) v Buadromo* [2021] FJHC 187; HACDA003.201S (23 March 2021), *Wimalasena J* as he then was, had ruled that the entire proceedings in the Magistrates Court were a nullity as a result of the election not being put on allegations which were classified indictable offences triable summarily.
17. In *Buadromo's* case (supra) there were multiple counts of which a few were classified as indictable offences triable summarily. The entire proceedings in that matter were deemed as a nullity on the basis that the other counts were related to the counts which were classified indictable offences triable summarily.
18. In this case the charges relayed in the amended charge are related. The evidence led at trial by Prosecution also leads to that conclusion.
19. There is an obvious error in this matter where the 1st accused has not been given an opportunity to elect his court of choice as the law requires.
20. The error is glaringly obvious and the reasons for such an error is unfathomable.
21. As such the court sought the opinion of Prosecution and Defence.

22. Prosecution concurred with the court's observation that no right of election was given to the 1st accused.
23. However, learned counsel for Prosecution submitted that the proper manner to deal with the conundrum is to adopt the position taken in *State v Sami* [2020] FJHC 405; HAM107.2020 (4 June 2020). In fact it was submitted that the court do so via Section 266 of the *Criminal Procedure Act 2009*, that is, case stated.
24. In that matter his Lordship *Sharma J* had ruled that a trial de-novo was proper after the learned Magistrate who had carriage of the matter, realized prior to writing her Judgment that election had not been given. The Magistrate then transferred the matter to the High Court realizing that she had no jurisdiction to handle the matter.
25. Learned Defence counsel sought that this court deliver Judgment.

Discussion

26. This is not an ideal situation for any of the parties including the court.
27. The same is stated on the basis that the entire trial has been completed and out of the three accused charged, one has been acquitted by my predecessor in title at the no case to answer stage.
28. In an earlier ruling in this matter, where the issue before the court was trial de-novo, Prosecution had informed the court that there was no need to have a trial de-novo, whilst Defence stated that there was, this court had ruled inter-alia that a trial de-novo would impact the ruling of my predecessor akin to an appeal.
29. In *Buadromo's* case (supra) discussions at paragraphs 37 to 39 garner the view that when there is a statutory requirement and the same is not adhered to, the proceedings are *void ab initio*.
30. It is a void trial where there is neither, conviction, verdict nor judgment.
31. In this case, the remaining three counts are related and as such the effect of not giving the election on count 1 for the 1st accused transcends to affect counts 2 and count 3 (which is the charge against accused no.2).
32. It is the court's view that the failure to give election to the 1st accused on count 1 renders the same void and as count 2 and count 3 are related to count 1, they are voided as well.

33. Count 4 was dealt with prior to this court's handling of the file and as stated above-herein this court shall not disturb that finding.

34. In summary this are the court's finding:

- Count 1
 - Count 2
 - Count 3
- } Void as a result of election not being afforded to Accused No.1 in count 1.
- Count 4: Acquitted at No Case to Answer stage.

35. Shall the court remedy its finding via a 'case stated' pursuant to Section 266 of the ***Criminal Procedure Act 2009*** in terms of count 1, 2 and 3?

36. Section 266 (1) of the ***Criminal Procedure Act 2009*** qualifies a case stated on the basis that there has been a hearing and determination on a charge where it is identified that there is an error in a point of law or an excess in jurisdiction.

37. In this case, there is an error in a point of law which has caused an excess of jurisdiction. However, although there has been a hearing, there is no determination. Therefore, clearly a case stated cannot be applied.

38. It is not clear from Sami's case (supra) the legal provision which the Magistrate utilized when transferring the matter to the High Court. It is not suggested from the ruling that it was a case stated and this court cannot speculate on the probable provision utilized.

39. As such given the discussions at paragraph 37 and 38, this case is not one where a case stated can be referred.

40. Given that a 'case stated' is not the proper remedy shall the court consider Defence's submission by giving a Judgment.

41. As highlighted at paragraph 29 and 30 above-herein a Judgment cannot be given for a void trial. This court has already adjudged that there is a void trial in terms of the remaining counts, therefore proceeding to Judgment is not an option.

Conclusion

42. Given the above discussions, this court has concluded that as a result of the election not being afforded to the 1st accused on count 1 and noting that count 2 and count 3 are related to count 1, the 1st and 2nd accused's trial has been voided.

43. The 1st and 2nd accused are now described as untried accused, however the proceedings have been nullified.

44. Any party aggrieved has 28 days to appeal the decision of this court, to the High Court.


JEREMAI N.L SAVOU
Resident Magistrate

