IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPEAL NO. CAV0007 OF 2011
[Court of Appeal No. AAU 39 of 2011]

BETWEEN	**:**	**MAHENDRA MOTIBHAI PATEL**
		Petitioner
AND	**:**	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**
		Respondent
Coram	**:**	**Hon. Justice Saleem Marsoof, Justice of the Supreme Court** **Hon. Justice Suresh Chandra, Justice of the Supreme Court** **Hon. Justice William Calanchini, Justice of the Supreme Court**
Counsel	**:**	**Mr H. Nagin for the Petitioner** **Mr V. Perera and Ms T. Waqabaca for the Respondent**
Date of Hearing	**:**	**12 August 2013**
Date of Judgment	**:**	**26 August 2013**

JUDGMENT

Justice Marsoof

1. I have perused the draft judgment of Chandra J and I agree with the reasons and the conclusion reached.

Justice Chandra

2. The Petitioner seeks special leave to appeal to this Court from a judgment of the Court of Appeal delivered on 28th October 2011. The Court of Appeal dismissed the appeal

preferred by the Petitioner who had been convicted on 13th of April 2009 in the High Court after a trial before Goundar J and three Assessors.

3. The Petitioner had been charged with the offence of Abuse of Office contrary to Section 111 of the Penal Code (Cap.17) and on his conviction had been sentenced to 12 months imprisonment.

4. The particulars of the offence as provided by the prosecution were as follows:

> *"Mahendra Motibhai Patel between the 1st day of April 2003 and 29th day of February 2004 at Suva in the Central Division, whilst being employed in the public service as the Chairman of the Board of Directors for Post Fiji Limited, in abuse of authority of that office, did an arbitrary act, namely authorizing the purchase of an External Seiko Clock from "Prouds" a company in which he has a significant financial interest, which act was prejudicial to the rights of Post Fiji Limited and which was done for the purposes of personal gain."*

5. The case for the prosecution was that when the Petitioner was the Chairman of the Board of Fiji Post Limited he had authorized the purchase of a clock for Post Fiji from Prouds where the Petitioner had a significant financial interest.

Post Fiji Limited is a corporation wholly owned by the State. The first accused Peni Mau was appointed as the Chief Operating Officer in 1996 and continued to 2007. The petitioner was appointed as Chairman of Post Fiji in 1999 and continued until after all matters relating to renovation of the Suva General Post office had been completed. In 2002 the Board of Post Fiji had decided to commission building works in order to renovate the ground floor of the General Post Office in Suva. In addition the façade was to be redesigned. The approval for the renovation regarding the façade had been in the second stage during 2003 with the clock as centerpiece. It is after the clock was installed that it had been discovered that it had not been put out to tender and that it had been supplied by

Prouds which is a company wholly owned by Motibhai Limited of which the Petitioner was the Chairman. The Board Paper of 26th March 2003 presented to the Board regarding the renovation of the Post Office had not mentioned about the purchasing of a clock. The purchasing of the clock had been mentioned under Capital Expenditure in the Board Paper of 31st May 2003 as a payment made to Motibhai for purchase of a Seiko Clock for the GPO. Peni Mau and the Petitioner were charged for abuse of office in terms of S.111 of the Penal Code.

6. In the High Court the Assessors while returning a verdict of guilty as regards the first accused returned a unanimous opinion that the Petitioner was not guilty of the charge which was overturned by the learned trial Judge, who proceeded to convict and sentence him.

7. When his appeal to the Court of Appeal, the Bench of which comprised of four Judges including Justice Marshall was taken up, the Respondent made an application for recusal regarding the participation of Justice Marshall on the Bench of the Court of Appeal and that application after consideration was refused.

8. The Court of Appeal dismissed the appeal of the Petitioner where Justice Marshall had written the judgment and the other three Judges had concurred in the said judgment.

9. In the application seeking Special Leave to Appeal the Petitioner set out the following grounds in his petition:

> *"(a) The Court of Appeal judgment was written by Justice William Marshall against whom an application for recusal was made by the Respondent and it is apparent that in an attempt to negative the allegations of bias he has written the judgment in this manner top the prejudice of the Petitioner. Mr Justice*

William Marshall should not have written the judgment of the Court of Appeal in the circumstances.

(b) The Court of Appeal erred in law in not properly addressing the Grounds of Appeal.

(c) The Court of Appeal erred in law in wrongly purporting to over-rule or not follow the recent Supreme Court decision in Leone Lautabui & Ors v The State Criminal Appeal CAV0011, CAV0024 and CAV0025 of 2008.

(d) The Court of Appeal erred in law in holding that there was a fundamental error in the Court of Appeal's approach in Litiwai Setevano v The State (1991) FJCA 3.

(e) The Court of Appeal erred in law in wrongly purporting to review the facts and wrongly making findings on credibility and additional facts.

(f) The Court of Appeal erred in law in not properly applying the principles of Browne v. Dunn to the cross-examination of the Petitioner.

(g) The Court of Appeal erred in law in wrongly holding that there was no complaint at the trial after Mr Marasinghe's cross-examination of the Petitioner.

(h) The Court of Appeal erred in law in wrongly holding that the principles of Browne v Dunn were not followed by Counsel for the Petitioner at the trial when there was no suggestion to that effect from anyone including Counsel from the Respondent.

(i) The Court of Appeal erred in law in not holding that there was no evidence of capable of supporting the finding that the Petitioner authorised the purchase of a clock from Motibhai & Company Limited.

(j) The Court of Appeal erred in law in not holding that there was no evidence that there was arbitrary act and a breach of the rules by the Petitioner and therefore a finding to the contrary was unsafe and unsatisfactory.

(k) The Court of Appeal erred in law in not holding that there was no evidence that the rights of Post of Fiji had been prejudiced.

(l) The Court of Appeal erred in law in not holding that there was no evidence of any personal gain for the Petitioner or that he

had a significant financial interest in the Company from which the clock was purchased.

(m) The Court of Appeal erred in law in relying on evidence of Lute Powell when this was vague and discredited.

(n) The Court of Appeal erred in law in not holding that Section 111 of the Penal Code was void for the absence of legal certainty.

(o) The Court of Appeal erred in law in not holding that the conviction in this case was in any event unsafe and the Petitioner should have been given the benefit of the doubt as all the assessors had rendered a verdict of not guilty.

10. In the written submissions filed on behalf of the Petitioner, grounds (a), (c) and (n) above were relied upon as the grounds on which special leave to appeal should be granted. Written submissions were made on the other grounds of appeal as well.

11. The Respondent took up the objection at the hearing as well as in the written submissions that the Petitioner should be confined to the aforesaid three grounds when considering his application for special leave to appeal.

12. The jurisdiction of the Supreme Court with respect to special leave in relation to criminal matters is provided for in Section 7(2) of the Supreme Court Act 1998.

"S. 7(2) in relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless –

(a) a question of general, legal importance is involved;
(b) a substantial question of principle affecting the administration of criminal justice is involved; or
(c) substantial and grave injustice may otherwise occur."

13. Considering the above provisions, special leave to appeal is not granted as a matter of course and as observed by the Supreme Court in *Aminiasi v The State* (Criminal Appeal No:CAV0001/1999S) at page 3:

> *"It is plain from this provision that the Supreme Court is not a Court of Criminal Appeal or general review nor is there an appeal to the Court as a matter of right and ... the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal ...."*

14. The threshold for granting leave is very high in applications for special leave to appeal to the Supreme Court and it is necessary to consider whether the grounds urged by the Petitioner satisfy the stringent requirements in S.7(2) . This Court confines itself to the three grounds relied upon as grounds of appeal by the Petitioner as a Petitioner seeking special leave to appeal from the Supreme Court should be certain of the grounds that he is relying on especially in view of the fact that the threshold for granting special leave is very high.

Ground (a)

15. The judgment of the Court of Appeal was a four judge decision which was written by Justice Marshall with the other three judges concurring. The complaint of the petitioner is that Justice Marshall should not have written the judgment.

16. As stated above the Respondent had filed an application seeking the recusal of Justice Marshall from sitting on the Panel of Judges in the Court of Appeal. The application for recusal was heard and after consideration a written ruling was delivered refusing the application.

17. Counsel for the Petitioner cited the Privy Council decision in *R v Bow Street Metropolitan Stipendiary Magistrates & Others Ex parte Pinochet* Ugarte No.2 [1999] 1 All ER 577 in support, but did not show as to how the principles enunciated in that case applied to the present case. In that case the House of Lords allowed an application alleging bias on the ground that there was a real danger or reasonable apprehension or suspicion of bias. The House of Lords drew a distinction between pecuniary bias and non pecuniary bias and stated that the same type of consideration should be applied in both situations.

18. Justice Calanchini in *State v. Citizens' Constitutional Forum, Ex parte Attorney General* [2013] FJHC 220; HBC 195.2012 (3 May 2013) considered the position regarding the issue of bias as follows which I wish to adopt for the purposes of this case :

> *"[32] The leading authority in Fiji on the issue of bias is Koya –v- The State (unreported Supreme Court decision CAV 2 of 1997 delivered 26 March 1998). In that decision the Supreme Court discussed two tests that have been developed by the courts to determine whether a judge should disqualify himself on account of bias. The first test is known as the reasonable apprehension of bias test that was applied by the High Court of Australia in Livesey –v- New South Wales Bar Association (1983) 151 CLR 288 and confirmed in Webb –v- The Queen (1994) 181 C.L.R. 41. Under this test a judge should disqualify himself from adjudicating a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in the case. The other test is referred to as the real danger of bias test which had been adopted by the House of Lords in R –v- Gough [1987] AC 646. Although there is some support in the authorities for the proposition that there is not a great deal of difference between the two tests, if it is necessary to identify which test I consider this Court should apply, I consider that the decision in R –v- Gough (supra) should be followed in this jurisdiction. That test was preferred by Fatiaki J (as he then was) in Citizens' Constitutional Forum –*

v- The President [2001] 2 FLR 127. This preference for the test adopted in R –v- Gough (supra) is re-inforced by section 22 of the High Court Act Cap 13.

[33] The real danger of bias test was explained by Lord Goff in R – v- Gough (supra) at 670 in this way:

> *"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or having unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him _ _ _."*

[34] The test was subsequently slightly adjusted by the House of Lords in Porter –v- Magill [2002] 2 WLR 37 at pages 83 – 84. As a result the approach to be taken is that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, that the tribunal was biased.

[35] In my judgment this approach is to be preferred to either a purely subjective test or the reasonable apprehension of bias test. A purely subjective test considers the concerns of a particular litigant and would as a result allow any litigant to

> *successfully challenge any judge assigned to a case whenever that litigant perceived that the judge might be prejudiced.*
>
> *[36] The reasonable apprehension of bias test raises an issue relating to the knowledge to be imputed to the hypothetical member of the public. What kind and what depth of knowledge is to be imputed to the hypothetical member of the public? Does the imputation of such knowledge mean that the hypothetical person with that imputed knowledge is no longer an average or typical adult? The artificial nature of this exercise surely leads to a wide variance in its application by courts. (See: The Australian Judiciary – Enid Campbell and H P Lee, Cambridge University Press 2001 at pages 133 – 136).*

19. The reasons set out in the submissions of the Petitioner are that it would be seen as bias against the Petitioner to appease the Respondent and to negative the allegations made against him (Justice Marshall). The allegation is that Justice Marshall should not have written the judgment and not against his hearing the appeal. When the Respondent made the application for recusal in the Court of Appeal the Petitioner did not take up the matter of recusal and has taken it up only after the judgment was delivered by the Court of Appeal Panel of Judges which included Justice Marshall.

20. In considering the recusal application made by the Respondent before the Court of Appeal the three Judges who delivered the ruling in respect of that application had applied the relevant test relating to bias as set out in *Porter v Magill* (supra) and concluded that the application for recusal should be refused. The Petitioner is not complaining about that ruling.

21. The submissions made by the petitioner are to the effect that the judgment is unusual and that Justice Marshall had gone at great length to make adverse findings of facts against

the Petitioner and has gone beyond the judgment of Justice Goundar. As has been stated in several cases an appeal to the Court of Appeal is one of rehearing and it entitles the Court of Appeal to go into the evidence led before the High Court. If the Court of Appeal had found there were matters which had not been considered by the trial Judge, the Court was entitled to make observations regarding such matters to avoid any miscarriage of justice. If at all, such matters may be used by a Petitioner when appealing against such a judgment. Observations of such matters cannot be taken up to show any bias on the part of any Judge.

22. The Petitioner also submitted that the judgment was clearly to appease Counsel for the Respondent and cited extracts from the judgment to support such submission. A perusal of the said extracts shows that they were comments made by Justice Marshall in the course of his judgment regarding the manner in which Counsel had conducted the case for the prosecution. Such comments made by an Appellate Judge cannot be considered to show bias on the part of such judge.

23. Applying the above principles relating to bias to the present case, the complaint of the Petitioner is that the manner in which the Justice Marshall has given his judgment shows that he has been biased as he was attempting to favour the Respondent to substantiate his position that he was independent and that the manner he had conducted himself in respect of the Petitioner and the events subsequent to the conviction of the Petitioner regarding the steps in the appeal were above board.

24. When the application for recusal was made by the Petitioner before the Court of Appeal Panel of Judges of which Justice Marshall was a member, the Petitioner had no objection and in fact went on to file an affidavit from the Petitioner's wife stating that she had never met Justice Marshall and did not know who Justice Marshall was. Having acted in

that manner, when the judgment of the Court of Appeal went against the Petitioner, he complains that Justice Marshall should not have written the judgment.

25. As has been stated above, the judgment of the Court of Appeal though written by Justice Marshall is a judgment of the Court of Appeal where three others Judges have concurred with the said judgment of Justice Marshall and is not the sole view of Justice Marshall. The allegation of apparent bias in the above circumstances fails as when the totality of the circumstances are considered it cannot be said that there has been a real possibility of bias. Therefore this ground adduced by the Petitioner does not meet the threshold for granting special leave.

Ground (c)

26. This ground is based on the analysis of the cases relating to the manner in which a trial Judge should consider overturning the Assessors' verdict of not guilty as set out in the judgment of Justice Marshall with which the other three Judges of the Court of Appeal agreed.

27. Section 299 of the Criminal Procedure Code (Cap 21) states:

"Delivery of opinions by assessors

299(1) When the case on both sides is closed, the judge shall sum up and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors:
Provided that, notwithstanding the provisions of subsection (1) of section 155, where the judge's summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment, other than the decision of the court which shall be

written down, to be given, nor for any such judgment, if given, to be written down or to follow any of the procedure laid down in section 154 or to contain or include any of the matters prescribed by section 155, except that, when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together, with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection and of section 157.

(3) If the accused person is convicted, the judge shall pass sentence on him according to law."

28. The statutory position therefore where there has been a trial in a High Court with Assessors, is that the trial Judge is not bound by the verdict of the Assessors and if he does not agree with such verdict he must proceed to give a written judgment wherein he has to set out the reasons for differing with such verdict. The summing up and the judgment of the trial Judge together with the reasoning in it is deemed to be the judgment.

29. In the present case as far as the Petitioner was concerned, the Assessors brought in a verdict of not guilty which was overturned by the trial Judge in his reasoned judgment and consequently the Petitioner was convicted and sentenced.

30. An appeal lies to the Court of Appeal from a conviction of the High Court in terms of section 23(1)(a) of the Fiji Court of Appeal Act (Cap.12) which provides:

"23(1) The Court of Appeal –

(a) On any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or

that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

31. In considering an appeal in terms of this section in a criminal appeal it has been the principle that it is a rehearing that occurs when considering such an appeal. What is meant by rehearing is that the case is not commenced de novo all over again in the Court of Appeal. The record is there to tell the Appeal Court of the evidence and the rulings of the presiding judge including his written summing up and all rulings and records the opinions of the assessors as well as the reasoning and verdict of the trial judge.

32. The Petitioner invoked the above provision to challenge the judgment of the High Court and set out 29 grounds of appeal which were considered by the Court of Appeal. The main contention in the appeal on this ground (c) before this Court is that the Court of Appeal was wrong in law in refusing to follow the decision of the Supreme Court in *Leone Lautabui and Two Others v The State* Criminal Appeal CAV0024, CAV0011 and CAV0025of 2008 and that erroneous decision has caused substantial and grave injustice to the Petitioner.

33. It would be necessary to consider the approach of the Court of Appeal as regards the issue of a trial Judge overturning a verdict of the Assessors. In the Court of Appeal judgment this aspect of the law has been dealt with in detail starting from the decision in *Ram Bali v Reginam* 7 Fiji Law Reports 80. The Court of Appeal decision in Ram Bali was approved in the Privy Council (Privy Council Appeal No.18 of 1961 of 6th June (1962). As to what is meant by "the judge's reasons for differing with such majority opinions"? the Court of Appeal in its judgment at para 49 stated thus:

"In my view this means a positive statement of the facts that the presiding judge finds proved beyond reasonable doubt. It is not for the

> *presiding judge to seek out and list all the possible findings which the assessors may have adopted to reach and justify their opinion and then to explain why in each case his view of the appropriate findings of fact on the evidence are different. Some trials involve many elements of the offence and many decisions of fact. In such cases they may be many possible findings of fact on where there is room for disagreement applying the appropriate standard of proof between the judge and assessors. In other cases such as in Ram Bali the difference in finding may be obvious. But even in Ram Bali with its relatively simple facts, Mr. Justice Hammett stated his emphatic findings in accordance with the appropriate standard of proof. He dealt with his belief in the evidence of the identifying witness and the taxi driver and his disbelief of the facts sworn to by Ram Bali's alibi witness."*

34. The principles laid down in *Ram Bali* by the Privy Council were followed by the Court of Appeal in *Narend Prasad v Reginam* (1971) 17 FLR 200 where Narend Prasad was found not guilty by the Assessors, the trial judge differed and convicted him. The Court of Appeal stated that they were satisfied that ample reasons existed for the action of the learned trial judge in differing from the opinion of the assessors, and that proper consideration had been given by him to all the factors involved.

35. A similar view was taken by the Court of Appeal in *Shiu Prasad* (1972) 18 FLR 68 where the Court stated:

> *"……it is true that if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment*."

36. The same principle in Ram Bali had been followed in *Apakuki Saukuru v Reginam* Criminal Appeal No.45 of 1981 but there the Court of Appeal disallowed the trial judge's differing from the opinion of the assessors and restored the assessors' opinion of guilty of manslaughter. The Court of Appeal concluded that the learned judge was not justified in overruling the assessors.

37. Having considered the above cited decisions Justice Marshals summarised the law as follows:

> *"90. I summarise the law as follows. I again elect not to comment on the trial judge's possible decision to acquit after a majority of assessors have tendered an opinion of guilty.*
>
> *(1) After the opinions of "not guilty" are stated the trial judge has to decide whether to convict or acquit. He will review the evidence. He will be aided by his summing up which will have set out evidence tending towards acquittal and tending towards conviction.*
>
> *(2) The situation may be that after evaluation, the trial judge is emphatically of the opinion, based on the witnesses that he believes and the witnesses that he disbelieves and the primary facts that he finds proved beyond reasonable doubt, that he should convict. If so he would fall in his statutory duty if he did not convict. The judge if he did not convict in these circumstance would not be applying the law which his judicial oath requires him to do.*
>
> *(3) The test of "emphatic" conclusion of guilt is also explained by the concept the trial judge being of the view "that to accept their opinions would result in a miscarriage of justice". See Narend Nand (supra) quoted at paragraph 80 above. If the trial judge holds that view he is obliged by the statutory framework and his oath convict.*
>
> *(4) Where it is a matter of which evidence and which witnesses to believe all that is required is the trial judge's subjective opinion that the matters he acts upon and his reasons are "cogent". The trial judge sees the witnesses, the appeal court does not. Se again Narend Prasad (supra) quoted at paragraph 80 above "The evidence is, as he saw it, was so cogent".*
>
> *(5) In respect of witnesses and fact the trial judge's "cogent" belief in his findings, is not challengeable on appeal under the Ram Bali*

doctrine ; it is however challengeable under section 23(1)(a) of the Court of Appeal Act being the general appeal criteria.

(6) Where the trial judge is sure beyond reasonable doubt, he will be of the view that the assessors have delivered an uncovenanted verdict. The trial judge is not required to speculate where the assessors have gone wrong. He has to instead formulate and act upon his own very positive opinions. See Shiu Prasad (supra) cited at paragraph 83:

> *"the assessors gave no reasons as to why they came to their opinions and it is quite beside the point what the Judge may have thought had swayed them one way or another."*

(7) Where the assessors and the trial judge are ad idem on the primary facts and the trial judge has left alternative charges to the assessors leaving them to give their opinion on which mens rea in the accused is applicable, he must defer to their opinion. In this situation if the judge convicts he may not describe his reason(s) as "cogent". But if he does an appeal court, in applying the Ram Bali doctrine, in restoring doctrine, in restoring and effecting the assessors opinion, may objectively decide whether the trial judge's reason is or is not "cogent".

(8) If during the trial and summing up, the trial judge, as is usual, assists and encourages the assessors, that is showing respect to them. He does not have to show respect to opinions which in his view if acted upon would create a miscarriage of justice.

(9) On appeal to an appellate court the only legality for allowing or dismissing an appeal is section 23(1)(a) and the common law Ram Bali doctrine. But if the trial judge has acted in accordance with this summary, the scope for appellate interference under Ram Bali is very limited. It must be a case where the judge and assessors are ad idem on the primary facts and the difference lies in respect of the appropriate inference to draw in respect of mens rea."

38. Justice Marshall thereafter cited the Court of Appeal decision in *Mataiasi Raduva* and *John Hartley v Reginam* Criminal Appeal No.109 of 1095 (judgment on 4th July 1986) as having taken a different view which did not refer to any cases or statutes. Justice Marshall concluded that the decision of the Court of Appeal was per incuriam as the Court of Appeal was bound by the Privy Council decision in Ram Bali.

39. In *Litiwai Setevano v The State* (1991) FJCA 3 the Court of Appeal had considered the decision in *Ram Bali* as well as the decision in *Mataiasi Raduva* and set aside the judgment of the trial judge who had differed with the opinion of the assessors. The Court of Appeal considered the evidence in the case and concluded that there were several errors in the judgment of the trial judge. Justice Marshall considered this decision and concluded that the Court of Appeal decision was per incuriam.

40. Justice Marshall then discussed the decision in *Leone Lautabui and Two Others v The State* (supra) on the basis that the Supreme Court purported to follow *Mataiasi Raduva* and *Litiwai Setevano*. In *Lautabui* the Supreme Court stated that the Court of Appeal too had observed that the judgment of the trial Judge in overturning the verdict of the assessors was sparse which would therefore mean that the Court had not gone beyond the *Ram Bali* principles. In effect *Ram Bali's* case was cited and it would appear as has been submitted by the Petitioner also that the principles in *Ram Bali* were not overruled in *Lautabui* but applied.

41. The resultant position therefore would be that the application of the *Ram Bali* principles in deciding this case was justifiable as the principles in *Ram Bali* and *Lautabui* are the same. The statement in the judgment of Justice Marshall that *Lautabui* is not binding on the Court of Appeal does not set out the correct position in law as regards the effect of Supreme Court decisions. However this statement does not affect the applicable

principles in relation to this issue of a trial judge differing with the opinion of the assessors.

42. It now remains to be considered whether the judgment of the trial Judge in this case in differing with the opinion of the assessors can be challenged on the basis of the principles and *Lautabui* and *Ram Bali*. Justice Marshall in summarizing the law set out the principles extracted mainly from the *Ram Bali* decision which have been stated in paragraph 37 above.

43. Justice Marshall in his judgment has dealt with this issue from paragraphs 150 to 183 dealing with the evidence and the manner in which the trial judge had dealt with them in his summing up and in the judgment. In his summing up the trial judge summarized the evidence of the witnesses for the prosecution as well as the evidence of the two accused. As regards the main prosecution witness Adish Naidu the trial Judge made his observations regarding him by stating that his evidence should be viewed with caution. In his judgment too the trial Judge stated that he was approaching the evidence of Naidu with caution.

44. The facts relating to the charge against the petitioner in the main were elicited in the evidence of Naidu. The learned trial Judge at paragraph [27] of the judgment stated that he accepted the evidence of Naidu that the Petitioner expressed a desire to supply the clock and that he directed Naidu to one Bhupendra Patel of Motibhai & Company Limited. That the petitioner's evidence that he only came to know that the clock had been purchased from Motibhai & Company Limited in June 2003 was implausible.

45. Naidu in his evidence referred to the discussion he had with the Petitioner who had directed him to Mr. Bhupendra Patel. The Petitioner in his evidence denied having had

discussions with Naidu regarding the clock and also not having a discussion in his office in Nadi. The Petitioner in his caution interview chose not to make comments on the vital questions put to him by the officer conducting the interview. His evidence in Court was a complete denial of his being involved in facilitating the procurement of the clock and that he became aware of it only in June 2003. However, in the letter sent by Naidu to Mr. Peni Mau on 30th April 2003 regarding the clock reference is made to a discussion with Mr. Mahendra Patel about the price for the new size of the clock. It is on the basis of this letter that the 1st accused had given instructions to make the purchase order. The reference to the Petitioner in the said letter was not challenged in the High Court and there was no explanation in the evidence of the Petitioner regarding this document which was before June 2003. The trial Judge had made reference to this document in his summing up. In the light of this evidence, the learned trial Judge's conclusion that the petitioner's evidence that he came to know that the clock had been purchased from Motibhai & Company Limited in June 2003 being implausible accords with reason.

46. Apart from the oral evidence there was documentary evidence in the form of correspondence through emails regarding the purchase of the clock between Motibhai & Company Limited and Fiji Post Limited and some emails which were produced by the defence which showed how the matter was being dealt within the administration of Motibhai & Co Limited. It was revealed when submissions were made before this Court that some emails were circulated to the Petitioner too and that they bore his initials. This evidence too showed that the Petitioner was aware of the matters relating to the clock at least after April 2003.The charge against the Petitioner refers to a period between 1st April 2003 and 29th February 2004 and therefore his being aware about the clock is within this period.

47. There was also the evidence of Lute Powell a Director of Fiji Post Limited regarding Board Meetings of Fiji Post Limited. She in her evidence stated that at the Board Meeting of Post Fiji held on 19th June 2003 she had questioned the Petitioner who was the

Chairman about the purchase of the clock and that his response was not heard by her. That she had made a request to the Secretary to record her questioning and the response of the Chairman (Petitioner) which she subsequently found not to be recorded. The learned trial Judge in his summing up referred to the evidence of Lute Powell and also in his judgment that he accepted her evidence. This evidence was also crucial as it brought about a situation which implicated the Petitioner in the authorization and the procurement of the clock which strengthened the case of the prosecution.

48. The events relating to the Board Meeting of 26th June 2003 also brought into question the position regarding declaration of interests by the Petitioner as Chairman of Post Fiji as the clock was purchased from Motibhai and Company where also he was the Chairman. This aspect became necessary in considering the ingredients of the charge of abuse of office against the Petitioner. The petitioner's position was that he had made a general declaration in his company returns and that was sufficient as far as the charge against him was concerned. There was a conflict of interest regarding the purchase of the clock from Motibhai and Company for the purposes of Post Fiji limited and therefore it was necessary that he should have declared his interest regarding the same at the Board Meeting of Post Fiji as was required by Article 86.1 of the Articles of Association of Post Fiji Limited which was a document produced by the prosecution. This too had been considered by the trial Judge in his judgment.

49. As was observed by the Court of Appeal it was surprising that the assessors came up with a majority opinion of guilt in respect of the 1st accused and not guilty in respect of the Petitioner. The 1st accused approved the purchase of the clock by giving the order regarding the purchase of it and was found guilty by the assessors but when it came to the position of the Petitioner they found him not guilty in spite of the items of evidence presented to court by the prosecution both oral and documentary showed the hand of the petitioner in the said transaction which benefited the Petitioner and his company. The trial judge was justified in these circumstances in going by his summing up and then

giving his reasons as to the culpability of the petitioner and thereby finding him guilty. This court sees no reason to counter this position of the trial judge as well as the decision of the Court of Appeal.

50. The trial judge in his summing up explained to the assessors the ingredients of the offence of abuse of office and in his judgment considered the necessary evidence to satisfy the said ingredients and arrived at his conclusion in finding the petitioner guilty and such finding cannot be faulted as it was based on the evidence before the Court.

51. From the foregoing it is clear therefore that the trial judge had given cogent reasons in differing from the opinion of the assessors as required in a case of this nature. The trial judge did not disregard the various grounds on which the evidence of particular witnesses was open to criticism and did accept the evidence of those witnesses to the extent to which he did accept and relied on their evidence and it cannot be said that the said judgment is palpably wrong as contended by the Petitioner.

52. For the above reasons, the ground urged by the Petitioner as ground (c) does not merit consideration as a ground that should be granted special leave.

Ground (n)

53. This ground is based on the submission that Section 111 of the Penal Code is void for absence of legal certainty.

54. In Fiji, Section 111 of the Penal Code (Cap.17) provides as follows:

> "*Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of misdemeanor.*
>
> *If the act is done or directed to be done for purpose of gain, he is guilty of a felony, and is liable to imprisonment for three years."*

55. The main elements in S.111 which require proof are:

(1) That the accused was employed in public service;

(2) That he did an arbitrary act;

(3) The act was in abuse of authority of his office;

(4) The act was prejudicial to the rights of another.

It constitutes a felony where

(5) The act was done for the purpose of gain.

56. The Petitioner has submitted that S.111 is void for uncertainty. S.111 has been applied in several cases in Fiji and this position has not been taken up in those cases. The Petitioner relies on just part of an observation of Bokhary PJ in the case of *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381; [2002] HKFCA 27 to equate the same to the position in Fiji in S.111 and to support his ground of appeal. In the first instance the position in Fiji regarding the offence of abuse of office as set out in S.111 is well established as seen from the cases that have been cited in this judgment. Secondly the dictum of Bockhary PJ quoted by the Petitioner is the submission that had been made by the prosecution in *Shum's* case. In order to convey what Bokhary PJ stated it would be necessary to quote the entire paragraph in that judgment, which is :

> *"3. The prosecution submits that the elements of the common offence of misconduct in public office are such that the offence is committed whenever (i) a public official (ii) in the course of or in relation to his public office; (iii) willfully or intentionally (iv) culpably misconducts himself. If that alone formed its definition, I would regard this offence as unconstitutional for uncertainty. But I have had the advantage – the great advantage as always – of reading in draft the judgment prepared by Sir Anthony Mason NPJ. I have no doubt that the true definition of this offence is as he states it. This means, first, that the conduct must be both willful and intentional rather than merely willful or intentional. Secondly, it means that the conduct must be serious. Accordingly, the offence of misconduct in public office is committed when (i) a public official (ii) in the course of or in relation to his public office, (iii) willfully and intentionally (iv) culpably misconducts himself and the misconduct is serious. I respectfully agree that, so defined, this offence is sufficiently certain to be constitutional."*

Shum's case resulted in the conviction of the officer who was accused of the offence and had the effect of making the offence of abuse of office under the Common Law certain. The Petitioner's submission therefore has no basis.

57. However, since the Petitioner has raised this ground regarding S.111, the manner in which this Section has been applied in Fiji in the cases it has come up can be considered in relation to the ingredients of the offence and as to whether the trial Judge followed the principles established in those cases.

58. As regards the first ingredient, the accused being in public service, there is no dispute as far as the present case is concerned as the Petitioner was appointed as Chairman of Post Fiji Limited and therefore was the holder of a public office.

59. As regards the second ingredient, on the question of an arbitrary act, in *Tomasi Kabunavanua v The State* (1993) FJCA 8, in interpreting S.111 the Court stated the word "arbitrary" indicated nothing more than the exercise of one's own free will. In *Beniamino Naiveli v The State* [1995] FJSC 2 it was stated that:

> *"Central to the commission of any offence under S.111 is the doing or directing to be done an arbitrary act, "in abuse of the authority of" the "accused's office". What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power of authority of an officer of the public service, will constitute an abuse of office, if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office. No doubt other instances may be given,. But it would be*

unwise for us to attempt an exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression "abuse of the authority of his office."

Jesuratnam J in *State v Humphrey Kamsoon Chang* Crim.Case No.8/1991 stated that an "arbitrary act" is an autocratic act, an act not guided by normal procedures but by the "whims and fancies" of the accused.

In *State v Vakaloloma* [1993] FJHC 93 Fatiaki J (as he then was) stated that "the arbitrary" nature of the offending act(s) is a question of fact and inference is undoubtedly coloured by its close association with the alleged abuse of authority by the accused.

In *State v Rokonvunisei* HAC 37B of 2010 the meaning of "arbitrary act" was said to include an unreasonable act, a despotic act which is not guided by rules and regulations but by the whims of the accused.

60. In the present case the learned trial Judge considered this ingredient as a despotic act, an act which is not guided by rules and regulations but by the wishes of the accused. He considered the authorization of the purchase of the clock by the Petitioner as the arbitrary act which deviated from rules that required him to declare his interests in the company from which Post Fiji Limited purchased the clock. In considering whether this ingredient was satisfied the interpretation that was given to it in previous cases had been adopted by the trial judge.

61. As regards the third ingredient, it has to be established that the act committed by the person holding public office was an arbitrary act done in abuse of the authority of his office. This would mean that the act complained of should be done under colour of his office where use is made of such office by the accused. In determining this element, the state of mind of the accused would become relevant. In Naiveli v The State (supra) it was stated that an act done or direction given, which is otherwise within the power or

authority of an officer of the public service, will constitute an abuse of office if it is done or given maliciously with the intention of causing loss or harm to another, or with intention of conferring some advantage of benefit on the office. Therefore giving someone an advantage or favour would come within the ambit of abuse of office.

62. The learned trial Judge considered this ingredient regarding the Petitioner's conduct and stated that he had used his position to have his company supply the clock so that he could personally gain. The Petitioner had a financial interest in the said transaction although it was sought to be made out that his gain was very minimal. The quantum of the gain is not what matters in such situation but as to whether there was any gain for himself and/or others in whom he had an interest. In the present case the gain would certainly have been to the company through which he too would be benefitted.

63. The fourth element is that the act being prejudicial to the rights of another. An act which would result in some advantage or favour to oneself, friends, relations, individuals or corporate would constitute an arbitrary act prejudicial to the rights of another. In relation to this ingredient too the learned trial Judge was of the view that there was no necessity to prove prejudice of a specific right and concluded that the rights of Post Fiji Limited were prejudiced.

64. As far as the ingredient of gain which made this offence a felony the learned trial judge considered the fact that the Petitioner had a sufficient interest in Motibhai & Company and that by the said transaction that he would have gained.

65. Counsel for the Petitioner concluded his submissions by stating that what was alleged against the Petitioner was not a serious matter. The cases which have considered the offence of abuse of office have established that an officer who accepts an office of trust

and confidence concerning the public acts in breach of that trust such officer should be sanctioned in the interests of the public. It is not the degree of seriousness of the conduct that would matter but the conduct itself.

66. For the above reasons the ground of appeal on the basis that S.l11 is uncertain lacks any merit and therefore is not a ground on which the application for special leave can be granted.

67. For the reasons set out above the application of the Petition for special leave to appeal is dismissed as the grounds urged for special leave have not met the threshold for granting of Special Leave in S.7(2) of the Supreme Court Act of 1998.

Justice Calanchini

68. I have had the advantage of reading the draft judgment of Chandra J and also agree with the reasons and the conclusion reached.

Hon. Justice Saleem Marsoof
Justice of the Supreme Court

Hon. Justice Suresh Chandra
Justice of the Supreme Court

Hon. Justice William Calanchini
Justice of the Supreme Court