IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Criminal Appeal AAU 0067 of 2006

BETWEEN : PENIASI KUNATUBA

APPELLANT

AND : THE STATE

RESPONDENT

Coram : Byrne, AP
Madigan, JA
Fernando, JA

Counsel : I. Fa for the Appellant
: A. Rayawa and Ms S. Puamau for the Respondent

Dates of Hearing: 23rd, 24th March 2010

Date of Judgment: 5th May 2010

JUDGMENT OF THE COURT

INTRODUCTION

[1.0] Between the 25th of September and 14th of November 2006, the appellant stood trial in the High Court at Suva on two counts of abuse of office pursuant to Section 111 of the former Penal Code.

[2.0] Count 1 alleged that the appellant between the 6th of July 2000 and the 13th of August 2001 at Suva, being employed as Permanent Secretary for Agriculture, Fisheries and Forests abused his office by dishonestly implementing an Affirmative Action Farming Assistance Scheme without authority for the purpose of gain for himself and others which allowed payments to Suncourt Hardware, Morris Hedstrom, Asco Motors, Repina Wholesalers and R.C.Manubhai and Company, thereby prejudicing the rights of the Government of Fiji.

[3.0] Count 2 alleged that between the 6th of July 2000 and the 31st of December 2001 at Suva in abuse of his office he did an arbitrary act, namely dishonestly, deliberately and persistently breached the rules and procedures regarding the expenditure of public funds under the Finance Act and for the purpose of gain allowed payment to the same companies.

[4.0] The Penal Code defined the offence of abuse of office in the following words:

> **"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 a misdemeanour".**

[5.0] The trial was conducted before the then Senior Puisne Judge of the High Court. The Prosecutor was the then Assistant Director of Public Prosecutions who is now the Senior Puisne Judge of the High Court. Counsel for the Accused, the present appellant, was an experienced lawyer in Fiji who in 2008 received an award from the Fiji Law Society for being the best lawyer in Fiji for 2007.

[6.0] We mention these names because in submissions to this Court the appellant criticized the conduct of the trial by the Trial Judge for reasons which we shall mention shortly. As will be seen, after considering the submissions of both the appellant and respondent we find no merit in the appellant's submissions.

[7.0] At the conclusion of the trial on the 13th of November 2006, the five Assessors returned opinions of guilty of both counts and that the appellant had committed the first offence for the purpose of gain for himself and others and the second offence for personal financial gain.

[8.0] The learned trial Judge sentenced the appellant to 2 years imprisonment in respect of each offence, the sentences to be served consecutively.

[9.0] The appellant now appeals to this Court both against his conviction and sentence.

[10] **GROUNDS OF APPEAL**

The appellant listed 9 grounds of appeal, the first seven dealing with conviction and the last two dealing with sentence. One ground was abandoned.

[11] **Ground 1** alleged that the learned trial judge erred in law when she failed to give any direction to the assessors on the issue of accomplice in law.

[12] **Ground 2** alleged that the trial judge erred in law when she failed to identify the witnesses who were alleged accomplices in the case and give warnings accordingly.

[13] **Ground 3** alleged that the learned trial judge erred in law when she failed to direct the assessors as to what weight they should give the evidence of one Pita Alifereti who was not called as a prosecution witness.

[14] **Ground 3A**

This alleged that the learned trial judge erred in law when she failed to direct the assessors on how they should treat the material put to the appellant in his police interview which material was not acknowledged as accurate by the appellant and was not supported by evidence called from the source of the material.

Ground 3B

[15] This ground which like Ground 3A was an amended ground alleged that the learned trial judge erred in law when she admitted into evidence portions of the appellant's interview with the Police wherein the appellant was challenged by the interviewing officer as to why certain of those persons interviewed by the officers should lie concerning the relevant events and further, that she erred in law when she failed to give any direction as to how the assessors should deal with that material.

GROUND 4

[16] This alleged that the learned trial judge erred in law and in fact when she failed to give any direction on the unreasonable delay in bringing the case to Court in breach of the Appellant's rights under Article 29 of the Fiji Constitution (since abrogated).

[17] **Ground 5** was not pressed by the appellant so we make no comment on it.

[18] **GROUND 6**

This alleged that the learned trial judge erred in law in failing to draw to the assessors' attention that the actions of which the accused was charged were actions approved by the Government of Fiji.

[19] **GROUND 7** alleged that the prosecution failed to prove the ingredients of both the charges beyond all reasonable doubt.

[20] **GROUND 8** states that the learned judge erred in law when ruling that the sentences in the two counts be made consecutive to one another.

[21] **GROUND 9** alleges that the sentence of 4 years imprisonment was in the circumstances excessive.

[22] We shall comment on these grounds of appeal later, but before doing so it must be observed that the interview between the appellant and the two police officers contained a number of facts which were not in dispute together with the agreed facts in the case. Thus the assessors were entitled to accept those facts as if they had been led in evidence from the witness box.

[23] It was agreed by both prosecution and defence that on the 19th of May 2000 George Speight and a group of men staged a coup on the People's Coalition Government, led by Mr Mahendra Chaudhry. The Prime Minister and other Parliamentarians were held hostage in Parliament. Eventually the Military Forces took over control of the country and appointed an Interim Civilian Government on the 4th of July 2000. On the 28th of July 2000, the President appointed a civilian administration. Both the Interim Civilian Government and the Civilian Administration were led by Mr. Laisenia Qarase as Prime Minister. General Elections were held in August 2001. It was also agreed that the appellant, was appointed as Permanent Secretary of the Ministry of Agriculture, Fisheries and Forests on the 5th of July 2000. Prior to that appointment, he was the Permanent Secretary to the Prime Minister. He joined the Public Service in 1975 as a Fisheries Officer. He holds a Bachelor of Science Degree from the University of The South Pacific and an Associates Masters Degree from the University of Hawaii. In January 2002 he was suspended from the Public Service and in August 2004 he was terminated. Also not in dispute were the amounts of money paid to various suppliers during the time the Affirmative Action's Agriculture Scheme was in force. Altogether, by the end of 2001, over $18 million had been paid out to suppliers under the Scheme either in cash or in commitments.

[24] The background to the scheme is not disputed. After the interim civilian government came into power in 2000, it agreed as a matter of policy to enforce a Blueprint for the advancement of indigenous Fijians and Rotumans. The rationale behind this Blueprint was to bridge economic gaps between the indigenous community and others, and to therefore alleviate the resentment which the interim government considered to be one of the causes of the political instability of 2000.

There was no specific vote given to the Blueprint. Each department or Ministry wishing to implement a Blueprint project would need to ask Cabinet and the Ministry of Finance for funds to implement it.

[25] In the Ministry of Agriculture, in the 2000 Budget there were several votes for different heads but there was none for any Farming Assistance Scheme. However, for many years, where any farming assistance was given under any of its existing votes to farmers, the applicants would be asked to contribute 1/3 of the grant in order to receive 2/3 from the Government. According to Mr. Kotobalavu, the then Chief Executive Officer of the Prime Minister's Office, this was to encourage commitment to the project, and discourage a 'hand-out' mentality. According to Mr Kotobalavu, the Schemes pre-existing 2000 were related to the expiry of the sugarcane farms leases to encourage farmers leaving their farms to re-settle elsewhere to farm, and to assist landowners to farm sugar. There was no specific farming assistance scheme separate from this project. Inspector of Police Nazir Ali in the course of his evidence said that there was a form of Farming Assistance prior to 2000 in the Ministry of Agriculture based on the 1/3 contribution of farmers, but that the Affirmative Action Scheme implemented after 2000 was based on full contribution by the government and was never authorized by Cabinet or the Ministry of Finance.

[26] The appellant in his caution interview made several important statements which the Judge told the assessors they were entitled to accept as the interview was not disputed. The first was that he considered himself to be the Chief Accounting Officer (CAO) of the Ministry in his capacity as Permanent Secretary. The second admission was that the idea to give out free farming implements to Fijian and Rotuman farmers without a 1/3 contribution and on the basis of requests and technical assessments, was his brainchild. At Question 100, he was asked:

> Q: "Is it true that you being the Permanent Secretary formulated and implemented the policy in respect of Affirmative Action Scheme during the year 2000?"
>
> A: Yes."

And at question 105 he was asked: "Who initiated this scheme?

> A: I did".

[27] He said he thought about the scheme when he personally visited the rural farming communities in Muaniweni, Naitasiri. He discussed it with his two deputies and then a paper was presented to the Minister, outlining the on-going programme, its failures and the necessary changes.

[28] At Question 107 of the interview, he was asked: " Was there any Budget for this new scheme?

A : The Ministry was to utilize approved budget for its activities and needed no new Budget."

[29] He said that funds for the scheme were vired or taken from other allocations, that he had no authority to do this but that it was regularized with the Ministry of Finance later. He said that the failure to seek prior approval was an oversight on his part.

[30] He said that in the implementation of the scheme, his Minister, Mr. Apisai Tora would indirectly expect the scheme to assist his political agenda, as did various other government ministers, and that in those cases the assessment processes were not followed but the Ministry trusted the Ministers. He was asked if the Minister's intention was to assist him in the upcoming General Elections.

[31] His answer was: "It was double edged. Whilst support was needed for these the political impression was clear". He said later at Question 229 that political pressure was a major push to implement the Scheme. He was asked whether he was inclined to support the SDL Party, thus his attitude to the scheme, but he said that he was not inclined to any Party or a member of any party.

[32] He said that the scheme lapsed in August or September 2001 because of the Ministry of Finance investigation into abuse of funds. He said that initially there had been no abuse, and that his Principal Accountant had merely juggled funds within votes to meet expenditure requirements which was creative accounting. However when shown examples of payments made to suppliers without quotations or repeated quotations, no delivery dockets confirming supply, open and split LPO's he

agreed that there had been abuse of the scheme. However he said that this was the fault of his staff and that he was in no way responsible.

[33] He also said that in August 2000, he wrote a Cabinet paper for Cabinet endorsement of the Scheme, and submitted it to his Minister, Mr. Tora, for placing before Cabinet. It was suggested to him that the paper was in fact typed by his Secretary in August 2001 and that he had asked his Secretary to change the date on the Memorandum.

[34] He denied this, saying that he had done his part in seeking Cabinet authorization in 2000, when the scheme commenced and that the Minister himself had approved it, and other Ministers and Ministries had requested payments to be made under the scheme, suggesting that it had Government authorization. He agreed that payments made on a daily basis far exceeded the budgetary limits and that he had authorized a large number of Local Purchase Orders (LPO), many of which were issued in breach of Finance Regulations Instructions.

[35] Inspector of Police Raj Kumar continued the interview of the appellant. He referred to a number of documents seized by him in relation to the case. These included all the LPOs, invoices, payment vouchers and delivery dockets and were listed for the assessors in the Exhibit Listing they were given. The trial Judge said they might peruse any document they wished. However, she said, they might think, and this was a matter for them, that the Ministry of Agriculture throughout 2000 and 2001 disregarded every approved procedure she had outlined to them. To what extent the appellant was responsible for this, and whether this was in abuse of his office as Permanent Secretary, was a matter for them to consider in relation to Count 2.

[36] During the cross-examination of Inspector Kumar, he was shown a number of defence exhibits namely, letters written to the Ministry of Agriculture by Ministers, other Departments, the SDL Party, and Church Groups, seeking assistance or expressing appreciation for assistance from the Scheme. Inspector Kumar maintained in his evidence that despite these letters, the Scheme was not a Government approved Scheme and that Cabinet had only been told about it formally in August 2001.

[37] In a report to the Ministry of Agriculture, specifically in relation to the conduct of the appellant, the Auditor-General found that he had failed to ensure that the vote or funds under his control were properly authorized and that Cabinet approval had not been obtained. He failed to properly charge his accounts, and failed to keep a commitment ledger. He failed to ensure that the work of his Ministry was carried out without waste or extravagance, failed to give the Ministry of Finance and the Auditor-General information concerning his accounts, failed to ensure adherence to a system of internal control of expenditure and stores, failed to ensure the safe-keeping of public moneys and public stores and that he had exceeded his authorized limit for procurement of goods and services on 43 occasions contrary to the Ministry of Finance Circular 3/92.

[38] The Ministry's comments were interesting and were as follows:

> ***"It is an exercise in futility to keep harping on the fact that the funds were unauthorized. Fiji was in abnormal circumstances, and this called for abnormal solutions. As the CAO, Mr. Kunatuba was only exercising his best judgment. This is why he had been appointed as the Permanent Secretary of the Ministry. The situation called for vision and calculated risks. As CAO, in his judgment it was best not to keep to the modus operandi of normal times, and it would have been futile to do so. We submit though that the authority to utilize approve funds for the new programme was not sought. He and his management were working on the advice of his support staff."***

[39] In this Court's judgment this comment amounts to an endorsement of the appellant's unauthorized and dishonest action. To praise the appellant for his vision and taking calculated risks despite this being illegal was an extraordinary comment from any responsible Ministry. Clearly, in the light of their opinions, the assessors did not take the same rosy view of the appellant's action as did his Ministry. In the Court's judgment it was the assessors who acted responsibly and the Ministry irresponsibly.

THE DEFENCE CASE

[40] The appellant gave sworn evidence. He said that in July 2000 after some 25 years in the Civil Service, he was appointed Permanent Secretary for Agriculture, Fisheries and Forests under the Interim Caretaker Government. He said that after May 2000, the country was in turmoil and a large number of indigenous Fijians congregated in Parliament. Tension between the races was high. Some people were shot and killed. On the 14th of July 2000, the Secretary to Cabinet sent a copy of a Blueprint to assist indigenous Fijians and Rotumans to all Permanent Secretaries, asking them to actively support and implement the measures proposed.

[41] The appellant denied that he acted arbitrarily in any way in the implementation of the Affirmative Action Farming Assistance Scheme. He said that the Scheme was not new but was a continuation of an on-going scheme already in place before July 2000. All the appellant did was to remove the requirement that applicants should provide 1/3 contributions for the Assistance. He said that this was done with the authority and approval of the Minister for Agriculture, Fisheries and Forests. He said that he had not gained from the Scheme but that the SDL Party and members of the Interim Civilian Government had actually gained in the General Elections. He said that all payments were made in accordance with standard regulations. He said that the dropping of the 1/3 contribution requirement was because the average Fijian villager could not save, leading to a life of idleness and non-productivity. In July 2000, he and his two deputies attended a meeting with the Minister, Mr. Tora and the Assistant Minister, Mrs Rigamoto to discuss the waiver of the 1/3 contribution requirement. The Minister approved with a hand-written note on the paper presented. The appellant and his deputies then agreed to follow normal accounting procedures to implement the Scheme. He said that the paper he presented to the Minister was typed into his Laptop Computer and taken to the Ministers. It was not typed on his Secretary's computer and was not in any Inward and Outward Mail Registers.

[42] He said that before 2000 there were a number of farming projects approved in the Ministry Budget which had been used to grant farming assistance to farmers. After the Coup, the same Votes were used to provide farming assistance but with the 1/3 contribution removed. He said that these allocations required the approval of the Minister for Finance before funds could be used. He said that approval for virements was the responsibility of the Accounts Department at the Ministry. He said that the Minutes and Memo showing the Minister's approval for the Scheme

were missing and he asked his Secretary Mrs Leakai to retype the Minute and put the 2000 date on it. He further said that a number of Government Ministers used the Scheme to assist various persons and groups which were in evidence. This showed that it was an authorized and Government approved Scheme. Furthermore in two documents Exhibits D25 and D26 Mr. Tora himself instructed the appellant to "press-on regardless" with the Scheme. On a trip to Rotuma in July 2000, the Prime Minister accompanied by other Ministers visited Rotuma with $300,000.00 worth of Farming implements which again suggested that the scheme was government approved.

[43] In two speeches which he exhibited, Mr. Tora said that in the absence of Parliament, the Fijian people should take as much benefit as possible from the interim administration.

[44] The appellant said that thousands of people flocked to his Ministry from May to August 2001 seeking assistance under the Scheme. There was a sharp increase in expenditure of the Scheme before the 2001 General Elections and although there was adverse publicity about the scheme, no instructions were given to the Ministry of Agriculture to suspend the Scheme.

[45] He denied receiving money from Suncourt Hardware or any other source for operating the Scheme and that he had paid Suncourt $500 in cash for the Gym Set which he claimed was 'second hand'. He said that the money deposited into his account was for his 'Faith Ministry' and was from anonymous donors.

[46] He said that the persons who had gained from the Scheme were the suppliers, the farmers who were recipients and the SDL Government.

[47] As for the discrepancies in the documents, the failure to supply or to deliver, the repeated use of quotations and fictitious invoices, he said that any breakdown of procedures was motivated by the political crisis and the need to establish normality in the country. He disputed the findings of the Internal Finance Audit and of the Auditor-General and said that to his knowledge all proper procedures and regulations were followed but due to the large volume of assistance requests, the

staff could have made mistakes. He similarly justified the splitting of LPO's by referring to the volume of requests made. He agreed that the Ministry had not always bought the cheapest but said the discrepancies did not take into account technical evaluation of the qualities of goods themselves. He denied that open LPOs were in fact open, because the items to be supplied were specified, and the cost of supply was on the quotations.

[48] He said that there was a Commitment Ledger maintained but due to work pressure, the Ministry had failed to show it to the Auditor-General's team. He said that any abuse of the Scheme was the responsibility of the Accounts Staff in the Ministry and the Suppliers. He said that the Ministry of Finance was fully aware of expenditure incurred in the implementation of the Scheme, as well as the heavy daily expenditure.

[49] He said that he had been made a scapegoat in the entire affair and that the people who gained were those who used the Scheme to win the 2001 Elections. He denied any gain.

[50] He called a number of witnesses including Parliamentarians who had used the Scheme to ask for assistance for members of their Constituencies. One of these witnesses was the Prime Minister, Mr. Laisenia Qarase who said that the scheme as implemented had not been approved by Cabinet and on his trip to Rotuma he had no idea that his boat carried $300,000.00 worth of Farming implements. The Prime Minister said that the purpose behind the scheme included the need to encourage supporters of George Speight to return to their villages. He said that what went wrong was not the scheme itself but the way it was managed by officials of the Ministry of Agriculture. He noted the Auditor-General's Report on this mismanagement and said that the Ministry had not come to Cabinet for clearance until the 14th of August 2001. He said Cabinet refused to approve the recommendations because of the alleged abuse of the Programme.

[51] Also giving evidence for the defence were a number of Korean Businessmen and one from Taiwan who said that they knew the appellant personally since his days as Director of Fisheries, that they supported his initiatives to help the poor and that they had given him large sums of money as cash donations for the poor. They were

unable to say that the deposits in his accounts in 2001 were the same as their donations.

That was the end of the Defence Case.

[52] The Trial Judge then began her summing-up and we say immediately that in our view it was very fair.

[53] On Count 1 she told the assessors that the questions for them were:

1) "Did the Accused implement the scheme or was it in fact implemented by his Minister and subordinates? Was he merely the scapegoat in a political scam? And was it an ongoing scheme, or a new scheme requiring Cabinet approval?

2) If he did implement or initiate it himself, was it an arbitrary act? Did he need Cabinet approval for the scheme and was the obtaining of that approval his responsibility? Did he act unreasonably, despotically?

3) If the Scheme was indeed unauthorized, was his decision to implement it, an abuse of his office?

4) Was his motive for implementing an unauthorized scheme improper? Did he act for improper motives? Such as personal gain? Or political mileage? Or to help certain people such as suppliers in disregard of Government policies and procedures?

5) Did his act of implementing an unauthorized Scheme prejudice the rights of the Government of Fiji to have their Ministries and Departments run in accordance with established practices and without adding to the Government deficit? Or did the Scheme help the Government of Fiji?"

[54] She then stated that a public servant, according to the evidence of several prosecution witnesses, was expected to stand up to political pressure and to resist it, even if it meant complaining about his own Minister to the Secretary to Cabinet. She said that these duties of public servants, and especially of Permanent Secretaries and Chief Executive Officers, were crucial to keep the public service free from political manipulation.

[55] On Count 2 the Judge told the Assessors that the questions for them were:

1) ***"Did, the accused know of the persistent dishonest and deliberate breach of rules and regulations in the expenditure of public funds, under the Scheme? You have heard detailed evidence from his interviews to the police about these breaches and he does not dispute them. Did he realize these breaches, the extent of them, the dishonesty of his staff, the supplies and some recipients only when interviewed by the police? Or must he have known of them because he himself was signing many of the LPO's? In court, in his sworn evidence, he justified many of these breaches, the open LPO's, the lack of quotations and the uneconomic purchases by saying that Fiji was going through a crisis. Does his justification in court suggest that he knew of the breaches?***

2) ***If he knew of these breaches, was his continued implementation of the scheme an arbitrary act, an unreasonable act, an act not guided by rules and regulations but by his own whims and fancies?***

3) ***Finally was his act of implementing the Scheme in breach of all rules and procedures, an act prejudicial to the Government of Fiji? Did it add to Government's deficit thus adding to the burden carried by the taxpayer?"***

In our judgment these were proper questions for the assessors to consider. She concluded her summing up by saying: "The state alleges that the Accused did what he did for himself or for others and you will each be asked if your decision is that the Accused is guilty, whether he acted for gain. Looking at his accounts, the deposits, the times of them, the denominations, his explanations for them, is the only reasonable inference to be drawn by you, that he was being rewarded by suppliers such as Suncourt? And did he assist others to gain from the Scheme such as politicians and suppliers?

[56] Remember that before finding the Accused guilty you must be satisfied of his guilt beyond reasonable doubt. If you have a reasonable doubt about his guilt you must find him not guilty."

That was the evidence and relevant parts of the summing-up. The Court now makes its comments on the Grounds of Appeal.

[57] **COMMENTS ON THE GROUNDS OF APPEAL**

GROUND 1

On this we say that the appellant has failed to mention in his Notice of Appeal or in his submissions the basis on which the learned Judge ought to have given a direction on the issue of an accomplice in law. This ground must therefore fail.

[58] **GROUND 2**

The appellant has failed to identify either in the Notice of Appeal or in his submissions which particular witnesses called at the trial were accomplices. The defence case on these two counts at the trial was not based on the unreliability of evidence of an accomplice. At no stage during the course of the trial was it ever argued or suggested by the defence to any of the witnesses called by the State that they were accomplices.

This ground of appeal must also fail.

[59] **GROUND 3**

This refers to Pita Alifereti. The only evidence regarding Mr Alifereti was given by Rigamoto Nawalu who testified that she prepared quotations for the Ministry of Agriculture Farming Assistance Scheme upon Pita Alifereti's instructions. She further stated that applicants for the scheme often made applications to Pita Alifereti directly. The Judge mentioned this to the assessors in her summing-up.

In any event the appellant has not made submissions on this ground which must also fail.

[60] **GROUND 3A**

No objection was taken nor submissions made by the appellant to the matters alleged in this ground. In our judgment the trial judge was under no duty to give directions to the assessors on evidence which was not challenged by experienced

defence counsel. Nor was any application made by the defence to have portions of the caution interview with the appellant deleted.

[61] **GROUND 3B**

The short answer to this Ground is that the caution interview of the appellant was admitted into evidence without any dispute. The trial judge correctly directed the assessors when she said: "The interview is not in dispute and you may give to it any weight you think fit."

[62] During the trial the appellant through this Counsel did not object to the portions of the caution interview which were highlighted in the submission nor was any application made by the defence to have portions of the interview deleted.

[63] Even during his closing address, defence counsel did not raise the issue of the line of questioning by the interviewing officer of the appellant. Furthermore the appellant chose not to address any of those issues in his testimony in Court. A re-direction was never sought on the summing up by the defence.

For these reasons we dismiss this ground.

[64] **GROUND 4**

There is no merit in this ground. The learned trial judge was not obliged to give any direction to the assessors on unreasonable delay. Any objection claiming a breach of Article 29 of the former Constitution should have been made at the beginning of the trial or even earlier, and it was not.

[65] This ground and the others we have mentioned appear to place a responsibility on the trial judge to enter the arena and take objections even if neither side does so. It is a curious submission which has no basis in law. We therefore reject it.

DUTY OF A TRIAL JUDGE

[66] It is appropriate for this Court to make some general comments on the functions of a trial judge particularly in a criminal trial. These were stated by Dawson J in **Whitehorn v. R. (1983) 152 CLR 657 at 682** :

> ***"A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel."***

[67] If we were to add anything to that statement it would be only this, that the common law model for judicial office requires the judge to be a moderator between the parties – involved only in ensuring evidentiary and procedural requirements are met.

[68] **GROUND 5 and GROUND 6**

Neither of these grounds were pressed by the appellant in his written submissions. However, in his oral argument before this Court, counsel for the appellant directed most of this to the latter ground. He submitted that there was substantial evidence before the court in terms of letters, Cabinet Minutes, and witness testimony that the appellant was not acting arbitrarily or dishonestly.

[69] It was said that the former Prime Minister, Mr. Qarase had endorsed the appellant's actions when he said in Parliament on the 15th of February 2002, reported in Hansard at p.1624 which was in evidence before the Court:

> **(i) "Since these projects are on-going in nature, the Ministry of Agriculture has full authority to incur funds as provided in the Ministry's budget. The Ministry can also vire funds from other allocations in its annual budget to augment these projects but provided it consults and obtains the approval of the Ministry of Finance.**

[70] He continued a few lines later:

> **(ii) "The Scheme was needed to encourage the many hundreds of people who had gathered here in this parliamentary complex to return to their villages. This explains why the majority of the recipients of assistance under the Scheme in the year 2000 came**

from nearby provinces. But the scheme was so successful in encouraging farmers to increase their farming production that it was extended to all provinces and indeed to all rural farmers based on application. As I have said, it is a mistake to refer to it as an affirmative programme for Fijians and Rotumans only. It is open to all farmers in all parts of Fiji."

[71] Later however at p.1625, the Prime Minister said:

"Mr. Speaker, Sir I am not trying to make excuses for the mismanagement of the Farming Assistance Scheme by officials of the Ministry of Agriculture, Fisheries and Forests. But the question that must be asked in this, what did the SVT led Government and the Fiji Labour Party led People's Coalition government do to stop abuses of authority and mismanagement of funds in that Ministry?"

[72] When this Court pointed out to Mr. Fa that the passage on page 1625 which was also in evidence could not by any stretch of the imagination amount to a condoning of the appellant's actions, Mr Fa did not agree. The Court then put it to him that although it could be argued that the government a year later appeared to give retrospective approval of the appellant's action, it was clear on the evidence that no such approval was given when these actions took place in 2001. Mr Fa declined to agree.

The remaining grounds were 6,7,8 and 9.

[73] **GROUND 6**

That the learned trial judge erred in law in failing to draw to the assessors' attention that the actions of which the accused was charged were actions approved by the Government of Fiji.

[74] That the prosecution failed to prove the ingredients of each charge beyond reasonable doubt. Both counts alleged that the appellant did an arbitrary act in that he dishonestly:

(i) Implemented an Affirmative Action Farming Assistance Scheme within the Ministry of Agriculture and without the authorization of the government; and

(ii) deliberately and persistently breached the rules and procedures regarding the expenditure of public funds namely obligations created pursuant to the Finance Act Cap 59.

[75] It is important here also to mention the evidence of the then Minister for Agriculture, Fisheries and Forests, Mr. Apisai Tora who in his evidence stated that:

> **"I would like to say that when I came in as the Minister for Agriculture the assistance to farmers was already in progress. I do not know what scheme was it. Since I was briefed by Peniasi Kunatuba that the scheme was progressing well in the province of Naitasiri. I asked Peniasi Kunatuba about it, about the 1/3 contribution of the farmers and he told me that the farmers could not afford to pay for the 1/3 contribution. Because I was informed by Peniasi Kunatuba that farmers were advised to write application letters and to submit their concerns to Agricultural Officers for assessment. I wish to confirm that I gave no approval for the implementation of this free farming assistance."** **[evidence of Mr. Tora dated 12.10.06 page 11]**

[76] We observe that counsel for the appellant did not cross-examine the witness on this statement. There is abundant evidence that the appellant's actions were not authorized at the time he took them.

Accordingly we dismiss this ground of appeal.

[80] **GROUND 7**

The appellant has failed to identify the specific elements of the offence which the prosecution failed to prove beyond reasonable doubt.

In the well known phrase, the appellant has not condescended to particulars.

[81] **GROUND 8 and GROUND 9**

These two grounds can be taken together.

The Trial Judge accepted the unanimous opinion of the assessors and accordingly convicted the appellant. When sentencing him she said:

> ***"I consider this case to be the most serious abuse of office case in the Fiji Courts thus far. I say this on the basis of the amount of money spent on what was an unauthorized scheme. I also assess its seriousness on the basis of your position of seniority in the public service. The more senior the officer the greater is the breach of trust."***

[82] Then she referred to the aggravating factors of the appellant on Count 1. She said this on page 10 and 11 of the record:

> ***"The aggravating factors are however considerable. As Chief Accounting Officer, and a public servant of some experience, you knew you were implementing a Scheme which required Cabinet approval and Ministry of Finance approval, but failed to take steps to obtain such approval until August 2001. By that time millions of dollars had been spent on the Scheme, with millions more committed. On your own admission, hundreds and thousands of people were rushing to the Ministry headquarters seeking free assistance. Suppliers were supplying goods (if indeed they were all supplied) without technical assessment or proper documentation. The picture presented to the Court was that you implemented a Scheme which led to a chaotic, uncontrolled and disreputable series of transactions from which the credibility of government suffered greatly.***
>
> ***The Minister's consent to the Scheme does not assist you. Politicians will often try to put improper pressure on public servants because they have a political agenda to fulfill. But public servants must resist that pressure and act according to rules, regulations and procedures, and in a politically neutral way. You did not, and in failing to withstand political pressure you failed the public of Fiji. Further you yourself benefited financially from the Scheme. Finally, in the period of political crisis and uncertainty after May 2000, when several institutions of the State were unable to function effectively, there was a greater need for the public service to adhere to procedures, and to jealously guard the public purse from irregular and unauthorized activity."***

[83] This court sees no reason to disagree with those remarks nor with her sentence of the appellant to two years imprisonment on Count 1.

[84] On Count 2 she said that the aggravating factors there were also considerable and listed them as follows:

> ***"The way in which virements were made and the Ministry of Finance misled, the sheer numbers of people who were given assistance without any checks and balances, the daily expenditure of $200,000 or $300,000 when the Scheme was at its peak, the involvement of politicians who used the Scheme to help their own constituencies and communities, and the serious consequences to the government accounting system are some of these aggravating factors.***
>
> ***The fact that the Ministry of Finance and the Public Service Commission failed to properly monitor the activities of the Ministry is not a mitigating factor. Public servants who deal in public funds cannot take advantage of a less than vigilant accounting process, to further their own agenda, financial or political. This is a case of a gross breach of trust."***

[85] Accordingly she made the two sentences consecutive so that the appellant had to serve 4 years imprisonment.

With the Judge's remarks above, this Court also agrees.

[86] **SHOULD THE SENTENCES HAVE BEEN CONSECUTIVE?**

We agree with the Trial Judge that they should have been. In *House v. The King (1936) 55 CLR 499* the appellant was sentenced to a term of 3 months imprisonment for an offence against the Commonwealth Bankruptcy Act. He appealed to the High Court on the ground that the sentence was excessive.

[87] In their joint judgment Dixon, Evatt and McTiernan JJ., quoted remarks made by Lord Alverstone L.C.J in *R v. Sidlow (1908) 1 CR.APP.R 28 at p.29*, Lord Reading, L.C.J in *R v. Wolff (1914) 10 CR.APP.R 107* and Lord Hewart L.C.J in *R v. Dunbar (1928) 21 CR.APP.R 19 at p20.*

[88] Lord Alverstone L.C.J said that it must appear that the Judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts before an Appellate Court would interfere. Lord Reading said the Court will not interfere because its members would have given a lesser sentence but only if the sentence appealed from is manifestly wrong. Lord Hewart said that the Court only interferes in matters of principle and on the grounds of substantial miscarriage of justice. At page 507 Dixon, Evatt and McTiernan JJ., said:

> **" In the circumstances we have stated we do not think that we can say that the sentence, although severe, was unreasonable or clearly unjust, and there is no other ground for saying that it arose from error of fact or of law, or failure to take into account any material consideration, or from giving undue weight to any circumstances or matter."**

[89] This Court adopts these statements on sentence and does not find that the learned trial judge committed any error in making the sentences consecutive. We also agree with her remark on page 12 of the record:

> **"Given the enormity of the consequences of this Scheme, the large amount of money spent on it, your own gain and the gain to politicians who used the scheme for political purposes and the effect of the Scheme on the taxpayers of Fiji, I do not consider the total term of 4 years imprisonment to be wrong in principle, nor excessive in the circumstances."**

[90] **CONCLUSION**

For the reasons we have given this Court considers that the appellant was lawfully convicted and properly sentenced. The Court accordingly dismisses this appeal.

Dated at Suva this 5th day of May 2010.

.....

Hon. Justice John E. Byrne, AP

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Hon. Justice Paul Madigan, JA

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Hon. Justice Priyantha Fernando, JA