

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 324 of 2016**

**STATE**

**V**

**1. IFEREIMI VASU**

**2. PENIASI KURIVITU KUNATUBA**

**Counsel** : Ms. Francis Puleiwai with Mr. Darren Hickes for the State  
Mr. Filimoni Vosarogo with Mr. Joji Cakau for the 1<sup>st</sup> Accused  
Ms. Vani Ravono with Ms. Naomi Raikaci for the 2<sup>nd</sup> Accused

**Date of Hearing** : 28 November 2019

**Date of Ruling** : 28 November 2019

## **RULING**

[1] As per the Amended Information filed by the Fiji Independent Commission Against Corruption (FICAC), the two Accused are charged with the following offences:

### **FIRST COUNT**

#### ***Statement of Offence (a)***

**ABUSE OF OFFICE:** Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

***Particulars of the Offence (b)***

**IFEREIMI VASU**, between 11<sup>th</sup> July 2013 and 27<sup>th</sup> December 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ\$ 131,683.33 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.

**SECOND COUNT**

***Statement of Offence (a)***

**ABUSE OF OFFICE:** Contrary to Section 139 of the Crimes Decree No. 44 of 2009.

***Particulars of the Offence (b)***

**PENIASI KURIVITU KUNATUBA**, between 31<sup>st</sup> October 2012 and 31<sup>st</sup> March 2014, at Suva, in the Central Division, whilst being employed in the Public Service as the Director Corporate Service and Acting Deputy Commissioner Fiji Corrections Service, in abuse of the authority of his office, did arbitrary acts for the purpose of gain, namely facilitating and approving the purchasing of goods to the amount of FJ\$ 60,345.65 from the Naboro Mart Limited contrary to the Procurement Regulations 2010 of the Financial Management Act 2004 and the Finance Manual of the Fiji Corrections Service, which were acts prejudicial to the rights of the Fiji Government, Fiji Corrections Service and the Approved Government Contractors.

**[2]** Trial in this matter commenced on 14 October 2019 and has proceeded for 28 days. During the trial the prosecution led the evidence of the following 12 witnesses:

1. Jainan Prasad – Former Senior Procurement Officer at the Ministry of Finance.
2. Abdul Rasheed – Former Senior Accounts Officer at the Fiji Corrections Service.
3. Sakiusa Veiwili - Business Development Manager at Fiji Corrections Service (from December 2013 to July 2014).

4. Ronal Kumar – TMA Clerk at Fiji Corrections Service.
5. Abhi Ram Charan – Former Registrar of Companies.
6. Nandu Naidu – Manager Operations Punjas, Suva Branch.
7. Pene Mario – Business Development Manager at Fiji Corrections Service (from May to December 2013).
8. Iferemi Nakitorotoro – Staff Officer Enterprise at Fiji Corrections Service.
9. Akuila Bulivono Namakadre - Former Deputy Commissioner at Fiji Corrections Service.
10. Iliesa Lutu – Former Deputy Permanent Secretary to the Public Service Commission.
11. Semiti Tikoduadua – Chief Investigator FICAC.
12. Makelesi Tunisau – Financial Investigator FICAC.

**[3]** On 27 November 2019, the prosecution closed its case.

**[4]** At this stage the Counsel for the 1<sup>st</sup> Accused, Mr. Vosarogo, sought clarification from Court as to the elements of the offence of Abuse of Office, as defined in Section 139 of the Crimes Act 44 of 2009 (Crimes Act). He submitted to Court that the stance his client would take, at the stage when Court calls for his defence would be dependent on the said clarification.

**[5]** Mr. Vosarogo's main concern was as to the fault element in such cases of Abuse of Office. He submitted that Section 139 of the Crimes Act does not specify a fault element and that in such a situation Section 23 of the Crimes Act would be applicable.

**[6]** Accordingly, both parties moved to file written submissions on this issue. Written submissions were filed by FICAC and by Mr. Vosarogo, on behalf of both Accused. The matter was taken up for hearing this morning.

**[7]** Section 139 of the Crimes Act defines the offence of Abuse of Office in the following manner:

*“A person commits an indictable offence which is triable summarily if, being employed in the public service, the person does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another.*

*Penalty—10 years imprisonment*

*If the act is done or directed to be done for gain – Penalty -17 years imprisonment.”*

[8] The State in their written submissions has made reference to the following cases where the elements of the offence of Abuse of Office were explained:

1. ***Mahendra Motibhai Patel v. Fiji Independent Commission Against Corruption*** [2013] FJSC 7; CAV0007.2011 (26 August 2013);

2. ***Laisenia Qarase v. Fiji Independent Commission Against Corruption*** [2013] FJCA 44; AAU66.2012 (30 May 2013);

3. ***Inoke Balemila Devo v. Fiji Independent Commission Against Corruption*** [2017] FJSC 16; CAV0005.2017 (20 July 2017);

4. ***Keni Dakuidreketi v. Fiji Independent Commission Against Corruption*** [2017] FJCA 117; AAU0099.2014 (14 September 2017); and

5. ***Fiji Independent Commission Against Corruption v. Ana Laqere & Others*** [2017] FJHC 335; HAC56.2014 (4 May 2017).

[9] At the very outset, it must be borne in mind that the first four cases referred to above concerned Abuse of Office Charges in terms of Section 111 of the Penal Code (Chapter 17 the Laws of Fiji). Section 111 read 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 a misdemeanour.*

*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.”*

[10] As can be seen, the wording of Section 111 of the Penal Code and Section 139 of the Crimes Act are almost identical. Therefore, the principles laid down in the above case authorities can be made applicable in determining the elements of the offence of Abuse of Office, in terms of Section 139 of the Crimes Act.

[11] It has been upheld in the above cases that the main elements of Section 111 of the Penal Code which require proof are the following:

1. That the accused was employed in the public service;

2. That he did an arbitrary act;
3. The act was in abuse of the authority of his office;
4. That was prejudicial to the rights of another; and
5. The act was done for the purpose of gain.

[12] In determining as to whether the act was in abuse of the authority of his office it was held by the Supreme Court in Patel's case (*Supra*);

*"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 (Beniamino) Naiveli v The State (Criminal Appeal CAV 001 of 1994) (23 November 1995) (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 or benefit on the office. Therefore giving someone an advantage or favour would come within the ambit of abuse of office."*

[13] The Court of Appeal in Qarase's case (*Supra*) held in a similar view;

*"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 (Beniamino) Naiveli v State (Criminal Appeal CAV 001 of 1994) (23 November 1995) (Supra) the Supreme Court held at page 3:*

*"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 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 or benefit on the office. 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 any*

*exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression 'abuse of the authority of the office.'"*

*It would seem therefore that giving someone an advantage or favour would come within the ambit of abuse of office."*

[Emphasis is mine].

**[14]** This is the position that has been consistently followed by the Superior Courts of Fiji.

**[15]** It is clear that the state of mind of the accused or the fault element was in-built in the element "in abuse of the authority of his office", with the predominant element being intention.

**[16]** The Crimes Act 2009 has now repealed the Penal Code (Section 391 of the Crimes Act).

**[17]** Chapter II of the Crimes Act sets out the General Principles of Criminal Responsibility. Section 10 of the Crimes Act provides:

*"(1) The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of Fiji.*

*(2) This Chapter contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created."*

**[18]** Section 15 of the Crimes Act makes reference to the physical elements of an offence in the following manner:

*"(1) A physical element of an offence may be —*

*(a) conduct; or*

*(b) a result of conduct; or*

*(c) a circumstance in which conduct, or a result of conduct, occurs.*

*(2) In this Decree—*

*"conduct" means an act, or an omission to perform an act or a state of affairs;*

*"engage in conduct" means —*

*(a) do an act; or*

*(b) omit to perform an act.*

[19] Similarly, Section 18 of the Crimes Act makes reference to the fault elements of an offence in the following form:

*“(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.*

*(2) Sub-section (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.”*

[20] Section 23 of the Crimes Act makes provision for situations where an offence does not specify a fault element.

*“23. — (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*

*(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”*

[21] It must be emphasized that similar provisions to Section 15, 18 and 23 were not found in the now repealed Penal Code.

[22] Having considered this matter I agree with the submission made by Mr. Vosarogo, Counsel for the first accused, that Section 139 of the Crimes Act does not specifically set out a fault element. There is no dispute that the section sets out the physical element of the offence to be one of conduct. Therefore, in terms of Section 23 of the Crimes Act where the law creating the offence does not specify a fault element for a physical element that consist only of conduct, intention is said to be the fault element for that physical element.

[23] Accordingly, I am of the opinion, that in terms of the provisions of the Crimes Act, the fault element for the offence of Abuse of Office in terms of Section 139 of the Act is one of intention.



A handwritten signature in black ink, appearing to read 'Riyaz Hamza'.

**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 28<sup>th</sup> Day of November 2019

<b>Solicitors for the State:</b>	<b>Fiji Independent Commission Against Corruption (FICAC), Suva.</b>
<b>Solicitors for the Accused:</b>	<b>Vosarogo Lawyers, Barristers &amp; Solicitors, Suva for the 1<sup>st</sup> Accused.</b>
	<b>Ravono &amp; Raikaci Law, Barristers &amp; Solicitors, Nausori for the 2<sup>nd</sup> Accused.</b>