IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 119 OF 2024

IN THE MATTER		Of an application for the Acting Chief Justice to recuse himself from hearing Criminal Appeal No. HAA 016 of 2024.
BETWEEN	:	JOSAIA VOREQE BAINIMARAMA
		First Applicant
AND	:	SITIVENI TUKAITURAGA QILIHO
		Second Applicant
AND	:	THE STATE
		Respondent

Counsels	:	**Mr. D. Sharma and Ms. G. Fatima for the First and Second Applicant.**
	:	**Ms. N. Tikoisuva and Ms. L. Tabuakoro for the Respondent.**

Date of Hearing	:	2 May 2024
Date of Judgment	:	2 May 2024
Date of Written Reasons	:	28 April 2025

WRITTEN REASONS FOR DENYING THE APPLICANTS' RECUSAL APPLICATION

A Background:

1. On 19 June 2023, the following charges were put to both applicants, in the presence of their counsels, in the Suva Magistrate Court:

> *"...**FIRST COUNT***
> ***Statement of Offence***
>
> ***ATTEMPTED TO PERVERT THE COURSE OF JUSTICE:*** *Contrary to section 190 (e) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
> *JOSAIA VOREQE BAINIMARAMA sometime between July 2020 and September 2020 at Suva in the Central Division, attempted to pervert the course of justice by telling Sitiveni Tukaituraga Qiliho, the Commissioner of Police of the Republic of Fiji to stay away from the USP investigations that was reported under CID/HQ PEP 12/07/2019.*
>
> ***SECOND COUNT***
> ***Statement of Offence***
>
> ***ABUSE OF OFFICE:*** *Contrary to section 139 of the Crimes Act 2009*
>
> ***Particulars of Offence***
>
> *SITIVENI TUKAITURAGA QILIHO on the 15th day of July 2020 at Suva in the Central Division being employed in the civil service as the Commissioner of Police of the Republic of Fiji, directed the Director of Criminal Investigations Department Serupepeli Neiko and Inspector Reshmi Dass to stop investigations into the police complaint involving CID/HQ PEP 12/07/2019, in abuse of the authority of his office, which was an arbitrary act prejudicial to the rights of University of the South Pacific which is the Complainant in CID/HQ PEP 12/07/2019..."*

2. Both applicants pleaded not guilty to the charges. Later, the case went to trial. The prosecution called a total of 25 witnesses, and submitted 32 exhibits. The court found a case to answer against both applicants. Both applicants gave evidence and submitted 2 exhibits. Altogether, there were 27 witnesses (25 from prosecution and 2 from the defence) and 34

exhibits (32 from the prosecution and 2 from the defence). The parties also submitted an *"Agreed Facts".*

3. On 12 October 2023, in 135 pages, the trial Magistrate delivered her judgment. She acquitted both applicants.

4. The Respondent State was not happy with the acquittals. On 2 November 2023, they filed their petition of appeal in the High Court in Suva. The respondent asked the High Court to quash the acquittals and substitute the same with a guilty and conviction findings. They filed 8 grounds of appeal. The appeal hearing was time-tabled with the filing of written submissions. The High Court heard the parties on 29 February 2024.

5. On 14 March 2024, the High Court upheld the respondent State's appeal. The High Court quashed both applicants' acquittals in the Magistrate Court, and substituted the same with a finding of guilt on Count No. 1 for the first applicant, and a finding of guilt on Count No. 2 for the second applicant. The High Court also convicted them on the above counts.

6. In paragraphs 66 and 67 of its judgment, the High Court said as follows:

> *"…**66**. Pursuant to section 256 (2) (b) and (e) of the Criminal Procedure Act 2009:*
>
> *(i) This Court orders that this matter be brought before Resident Magistrate S. Puamau on 18 March 2024 at 9.30am, at the Suva Magistrate Court, for her to abide the decision of the High Court above mentioned and pronounce the 1st and 2nd respondent guilty as charged and convict them accordingly; and*
>
> *(ii) The 1st and 2nd respondent to file their plea in mitigation and sentence submissions by 20 March 2024, at the Suva Magistrate Court before 4pm.*
>
> *(iii) The State to file their sentence submission at the Suva Magistrate Court by 20 March 2024 before 4pm.*
>
> *(iv) Resident Magistrate S. Puamau to hear the Sentence hearing on 21 March 2024 at 9.30am.*

(v) The Resident Magistrate to pass Sentence on the two respondents on 28 March 2024 at 9.30am.

(vi) Since the Suva Magistrate Court is a court of summary jurisdiction, and since this case started on 10 March 2023, and since section 15 (3) of the 2013 Constitution required cases to be decided within a reasonable time, the above timetable is to be followed strictly.

67. *I order so accordingly…"*

7. On 28 March 2024, the trial Magistrate Resident Magistrate S. Puamau, on Count No. 1, granted the first applicant an absolute discharge pursuant to section 15 (1) (j) of the Sentencing and Penalties Act 2009. On Count No. 2, Resident Magistrate S. Puamau fined the second applicant $1,500 to be paid within 30 days in default 30 days imprisonment. The Learned Magistrate further added that on payment of the $1,500 fine, she will invoke section 15 (1) (f) of the Sentencing and Penalties Act 2009, by not recording a conviction.

8. The respondent state was not happy with the above sentence. On the same date, that is, 28 March 2024, they filed their petition of appeal in the Suva High Court. They submitted four grounds of appeal. They asked the High Court to quash the above sentence and substitute the same with a sentence warranted in law, pursuant to section 256 (3) of the Criminal Procedure Act 2009.

9. On 3 April 2024, the High Court heard the parties on timetabling the appeal. The parties were given time to file their submissions. The appeal hearing was set for 2 May 2024 at 10.30am. It was during that time-tabling of the appeal hearing, that exchanges were made in the court room that gave rise to the recusal application.

B. <u>The Recusal Application:</u>

10. On 18 April 2024, the two applicants filed a Summon, supported by the second applicant's affidavit, asking myself to recuse myself from hearing the Respondent's State appeal against the Learned Magistrate sentence of the two applicants, dated 28 March 2024. In his affidavit, the second applicant submitted various grounds he submitted was sufficient for myself to

recuse myself. The respondent State filed Ms. Nancy Tikoisuva's affidavit, dated 26 April 2024, challenging and disputing the second applicant's submitted grounds. In their submission to the Court, the Applicant's counsel submitted that the comments the Court made in court on 3 April 2024 about the Learned Magistrate Puamau was enough to suspect or apprehend bias on the part of the court, for example, the sentence was invalid, the law on precedent and others. The parties had filed very helpful submissions.

11. On the 2 May 2024, I heard the parties in court. The parties relied on the documents they filed in court, and made very helpful oral submissions. At the end of the hearing, I dismissed the applicant's recusal application and said I would give my written reasons later on notice.

12. Written below are my reasons;

C. The Law on Recusal:

13. In **Fred Wehrenberg v Others**, Civil Petition No. CBV 0019 of 2019, Supreme Court, Suva, 30 December 2024, the Court said the following:

> *"…12. In the law governing the recusal of judges in presiding over a case, I quote with approval what His Lordship Mr. Justice Paul K Madigan said in **Mahendra Pal Chaudhry** v **The State**, Criminal Miscellaneous Application No. 181 of 2013, delivered on 18 September 2013:*
>
> *"[4] …The test for disqualification is the perception of reasonable apprehension of bias. The test is an objective one and was set out by the Supreme Court in **Amina Koya** CAV 002/97. In that case in dealing with previously divergent tests coming from the House of Lords in **Gough** [1993] AC 646 and the Australian High Court in **Webb** (1994) 181 CLR41, the Supreme Court referred to and adopted the New Zealand position expounded in **Auckland Casino Ltd v Casino Control Authority** (1995) 1 NZLR 142: The Court said:*
>
> *"Subsequently the New Zealand Court of Appeal, in **Auckland Casino Ltd v Casino Control Authority** (1995) 1 NZLR 142, held that it would apply the **Gough** test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed observer would reasonably apprehend or suspect bias".*

*[5] The Court of Appeal in **Pita Tokoniyaroi and another** AAU0043/2005, in following this test, added that (para 46)*

> *"the reason why the Supreme Court…..thought 'there is little difference if any between **Gough** and **Webb**' is because the Court investigates the actual circumstances and makes findings thereon and then imputes them to the 'reasonable and informed observer as is described in the **Webb** test.*
>
> *(para 47) It follows that the word "informed" which qualifies the word "observer" is of vital importance".*

*[6] After hearing the applicant's earlier recusal application to him, on the basis of perceived prejudice or bias, Justice Goundar said **(Mahendra Pal Chaudhry** HAM 160 of 2010):*

> *"This contention of the applicant miscomprehends the role of a Judge. It is almost universally recognized that Judges discharge their duties in accordance with the oath they take to do right to all manner of people in accordance with the laws and usages of their countries, without fear or favour, affection or ill will."*
>
> *To suggest otherwise "is an affront to the judicial oath and to the presumption of judicial impartiality."*

*[7] In the case of **Muir v C.I.R.** [2007] NZCA 334, the New Zealand Court of Appeal in reviewing the case law on the test for bias said this (para 12)*

> *"In our view the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual enquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias ball" in the air. The second enquiry is to then ask whether those circumstances as established might lead to a fair minded lay-observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasizes to the challenged Judge that a belief in his own purity will not do; he must consider how others would view his conduct…"*

D. Application of the Law to the Facts:

14. In trying to discern the applicants' main reasons for their recusal application, the court had carefully looked at and analyzed their verbal submission on 2 May 2024, as recorded in the

court transcript, that is, from pages 1 to 29. The court had also examined the court transcript, pages 1 to 9, of the 3rd April 2024. The court had also examined the papers submitted by the parties. It appeared that one of the applicants' complaint was the court labelling the learned Magistrate's sentencing of 28 March 2024 sentence as *"an invalid sentence"*. The applicants' counsel appear to complain that the comment seemed to show that the High Court had already prejudged the appeal hearing, even before hearing the same.

15. Secondly, the applicants' counsel appear to be saying that *"the court doesn't like the fact that she gave a discharge to both the Defendants or Respondents when the High Court had convicted them".* The applicants' counsel also said, *"And I know why you did that because you made the comment in your transcript and said I convicted these people, how on earth did this Magistrate disobey me and then discharged them".* The applicants' counsel also said, *"as you will realize that the Magistrate Court in fact did respect your decision. She acknowledge the High Court decision but she went off to do a different path when it came down to the sentencing.* The applicants' counsel also said, *"Your Lordship said, to any law student, they know what the law of precedent is about, and of course the State said, that is correct, My Lord, but this case really has nothing to do with the law of precedent. It strictly a case, if you them, should a discharge have been entered."*

16. The applicants' counsel continued, *"if you declare at a pre-trial at a direction in the sentence in your view is invalid, that is the end of the matter…The appeal is about the fact that the sentence should be set aside. Once the court says that is was invalid, then to us it is game, set and match, My Lord and there is nothing more we can really do about that."*

17. The applicants' counsel further said, *"you are saying that by putting this people in the dock and bathing them when they were discharge, to us it seemed like as if, and the court has confirmed that they were convicted by the High Court in the High Court, they are still treated as being convicted."* Applicants counsel also said *"My Lord, given those, what we are saying is this, that if Your Lordship is of the view that the utterance that were made on this particular day on 3rd April was a bit strong and it might have shown a predisposition to a predetermination then I will respectfully ask that ….you consider a recusal in the matter."* The applicants' counsel also commented on the court's intention to initiate contempt

proceeding against the learned sentencing Magistrate for disobeying its conviction orders on 28 March 2024.

18. As stated in **Muir** v **CIR** [2007] NZCA 334, in reviewing the case laws on the law governing the recusal of judges in presiding over a case, the correct enquiry involved a two stage process. *"First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual enquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias ball" in the air. The second enquiry is to then ask whether those circumstances as established might lead to a fair minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasizes to the challenged Judge that a belief in his own purity will not do; he must consider how others would view his conduct."*

19. What was the actual circumstances in this case? In this case, both applicants were being charged with two serious offences as outlined in paragraph 1 hereof on 19 June 2023. After a trial involving 27 witnesses and 34 exhibits, including an Agreed Facts, the Suva Magistrate Court acquitted both applicants on 12 October 2023. On 2 November 2023, the Respondent State appealed the two applicants' acquittals. On 14 March 2024, the High Court overturned the Suva Magistrate Court's acquittals. It found both applicants guilty as charged and convicted them accordingly. The High Court then remitted the matter back to the Suva Magistrate Court to sentence the two applicants. Pursuant to section 256 (2) of the Criminal Procedure Act 2009, the High Court had reverse the acquittal decision of the Magistrate Court, by finding both applicants guilty as charged and convicted them accordingly. The High Court went further. It ordered that the case be brought before the trial Magistrate to *"abide the decision of the High Court and pronounce both applicants guilty as charged and convict them accordingly.*

20. On 28 March 2024, when sentencing the two applicants, Learned Magistrate Puamau did not follow the High Court above orders. She did not abide the decision of the High Court, which is a superior court to the Magistrate Court. She did not pronounce both applicants

guilty as charged. She did not convict both applicants as ordered by the High Court. She merely acknowledged the decision of the High Court which is not the same as what the High Court ordered her to do. As an inferior Court, she was bound to follow the High Court orders. But she did not do so. Her sentencing powers and discretions under section 15 (1) of the Sentencing and Penalties Act 2009, given the above High Court orders, were now limited to the following: Section 15 (1) (a), (b), (d), (e) and (f), but not *"without recording a conviction",* (g), (h) and (k). It was against the above background that the Court commented that the Learned Magistrate's 28 March 2024 sentencing's decisions appear *"invalid"*.

21. Furthermore, it was not unusual in appellate proceedings, which I had observed in the High Court, Court of Appeal and Supreme Court, for appellate judges to ask probing questions to test Counsels' understanding of the legal issues emanating from the case. Some probing questions may appear to be theoretically *"prejudging",* but its purpose is to test the litigating counsels' understanding of the legal problems arising in a case, and challenged them to offer solutions to the problem, while they are on their feet. The legal problems encountered in the two applicants' case, were such a case, especially so when an inferior court was perceived to be disobeying a superior court's decision. This development, in my 31 years on the bench in Fiji, was a very rare occurrence.

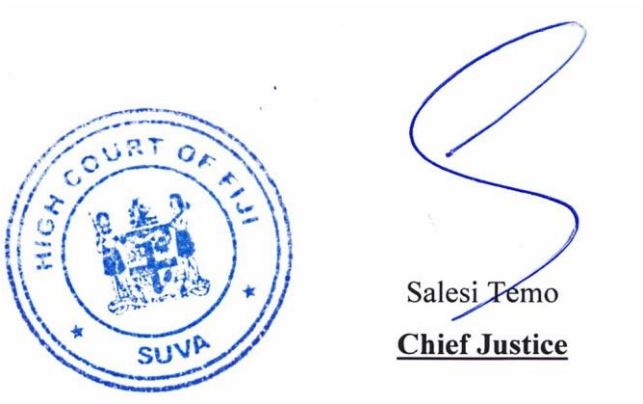
22. Furthermore, the suggestion on activating the High Court contempt powers, in the proceeding against the learned Magistrate, was also a probing question, to test litigating counsels' understanding of the legal problems arising in the case, and challenged them to offer legal solutions to the problems arising. In the midst of these courtroom legal exchanges, judges never forget their legal oaths *"to do right to all manner of people in accordance with the laws and usages of their countries, without fear, favour, affection or ill will".* Most legal counsels in Fiji do offer solutions to the legal problems emanating from cases, but there was unfortunately a slight rise in the propensity of some counsels asking for the recusal of judges, when they appear to have run out of legal ideas. In my view, with the utmost respect, this was one such a case.

23. Furthermore, the complaint that the High Court cannot hear the appeal on sentencing since it originally found the two applicants guilty as charged and convicted them accordingly, on the Magistrate Court's acquittal decision, was somewhat misleading and misconceived. It was well settled in practice and law in the Magistrate Courts and High Courts that, the court that finds an accused guilty as charged on a criminal charge and enters a conviction accordingly, was the court that had to deal with the ultimate sentencing of the accused. That was what occurred in this case, and for it to be used as a ground to establish bias on the part of the judge was wholly misconceived.

24. Furthermore, the application of my recusal, demonstrated a lack of understanding and appreciation of what appellate judges go through when writing their judgments. After reading all the papers submitted by the parties, hearing them in court while they make their case and submissions, and after thorough research, the judges minds are not closed until they put pen to paper. And this may be so after numerous drafts. As it was said in **Muir** v **CIR** (supra), *"complainants cannot lightly throw the "bias ball"* in the air. In my view, with respect, this was a case where the complainants threw the *"bias ball"* lightly in the air.

25. The second enquiry is to then ask whether those circumstances as established might lead to a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasizes to the challenged judge that a belief in his own purity will not do; he must consider how others would view his conduct. According to **Pita Tokoniyaroi and Another (supra),** *"how the others would view his conduct"* is imputed to a reasonable informed observer as is described in the **Webb** test, by the Court. In this case, with respect, a reasonable informed observer would take into account the matters described and explained in paragraphs 14 to 24 hereof, and would not take the position that the judge would not bring an impartial mind to the resolution of the present case. Proof thereof can be seen in the lenient sentence given to the applicants, at the end of the case.

26. The above were my reasons for dismissing the two applicants' recusal application.



Solicitor for the Applicants: R. Patel Lawyers, Suva.

Solicitor for the Respondents: Office of the DPP, Suva