**VISANTI PETERO MAKARAVA**

**v.**

**DIRECTOR OF PUBLIC PROSECUTIONS & ATTORNEY-GENERAL**

[HIGH COURT, 1998 (Byrne J) 10 September]

Revisional Jurisdiction

*Judicial review- when available in respect of proceedings for committal for trial- High Court Rules 1988 – Order 53.*

*Words and phrases- "public officer" – whether constitutional definition applicable to the Penal Code- Constitution (1990) Sections 149 and 150; Penal Code (Cap 17) Section 4.*

The High Court reaffirmed that judicial review of committal proceedings is only available in the most exceptional circumstances. It also HELD: that the constitutional definition of public officer has no bearing on the meaning of "public officer" as defined in the Penal Code.

Cases cited:

*Attorney-General for Ontario v. Attorney-General for Canada* [1912] A.C. 571
*Australian Alliance Assurance Co. Ltd. v. Attorney-General of Queensland* (1916) St. R. Queensland 135
*Bay Marine Pty Ltd. v. Clayton Country Properties Pty Ltd.* (1986-87) NSWLR 104
*Clyde Engineering Co. Ltd. v. Cowburn* (1926) 37 CLR 466
*Connor v. Sankey and Others* (1976) 2 NSWLR 570
*Damudamu and Others v. The Lautoka Magistrates Court* HBJ 0012/97L
*Ex-parte: Cousens: Re Blacket and Another* (1946-47) S.R. NSW 145
*GSA Industries Pty Ltd. v. NT Gas Ltd.* (1990) 24 NSWLR 710
*G.P. Lala v. Suva Magistrates' Court* Civ. Action 862/83
*Lamb v. Moss* (1983) 49 ALR 533
*Lodhia and Others v. Suva Magistrates' Court* Action No. 45 of 1982
*Neill v. North Antrim Magistrates' Court and Another* [1992] 1 WLR 1220
*R v. Burah* (1877-78) 3 App. Cas 889
*re Geoffrey Miles Granger Johnson* (1995) 41 FLR 181
*re Tony Udesh Bidesi* HBJ0020 of 1997
*Reg. v. Colchester Stipendiary Magistrate, ex parte Beck* [1979] Q.B. 674
*Reg. v. Horseferry Road Stipendiary Magistrate, ex parte Adams* [1977] 1 W.L.R. 1197
*Reg. v. Coleshill Justices, ex parte Davies* [1971] 1 W.L.R. 1684
*Reg. v. Highbury Magistrates' Court, ex parte Boyce* (1984) 79 Cr. App. R. 132

*Reg. v. Governor of Brixton Prison, ex parte Armah* [1968] A.C. 192
*Regina v. Bedwellty Justices, ex parte Williams* [1997] AC 225
A *Reg. v. Lincoln Magistrates' Court, ex parte Field* (unreported), 19 July 1993
*Sankey v. Whitlam* (1978) 142 CLR 1
*Suresh Charan and Others v. Shah and Others* HBJ0014/94
*The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd and Ors* (1920) 28 CLR
B *The Queen v. Schwarten, Ex parte Wildschut* (1965) Qd.R. 276
*Will v. United States* (1967) 389 U.S. 90

Application for leave to move for judicial review in the High Court.

*G.P. Lala* and *G.P. Shankar* for the Applicant
*K. Wilkinson* for the 1st Respondent
C *D. Singh* for the 2nd Respondent

**Byrne J**:

The Applicant, the former Chief Manager of the National Bank of Fiji was committed for trial in the High Court by the Suva Magistrates' Court on the 12th of January 1998 on six charges of abuse of office whilst being employed
D in the Public Service as Chief Manager of the National Bank of Fiji relating to his alleged authorising of loans amounting to $150,000.00 to one Koresi Leba Matatolu between February 1992 and August 1993 and one charge of official corruption alleging that between the 14th of December and 23rd December 1994 he corruptly received the sum of $50,000.00 as a benefit on
E account of his having approved a loan of $400,000.00 to Bula Piscatorial Limited.

He now seeks the leave of this Court to apply for Judicial Review of the decision to commit him. The proceedings in the Magistrates' Court extended over the period 25th August 1997 to 12th January 1998. It was agreed that the learned Magistrate should consider all the substantial documentary evidence
F and written submissions by the parties and then give his decision.

The grounds on which the Applicant seeks leave are:

(a) there was no evidence that he committed the alleged criminal offences;

G (b) the facts set out in the written statements do not constitute criminal offences; and

(c) the learned Magistrate was wrong in not taking a relevant matter into consideration that the Applicant was not a public officer within the meaning of the Fiji Constitution of 1990.

Section 149(1) of that Constitution defines a public officer as a person holding or acting in any public office.

"Public office" means subject to the exceptions mentioned in Section 150, which do not apply here, an office of emolument in the public service. The "public service" means the service of the State, whether in a civil or military capacity in respect of the Government of Fiji.

Section 150 states so far as relevant that the expression "public office" shall be construed

(a) .....

(b) as not including -

(iv) the office of member of any council, board, panel, committee or other similar body established under any law.

Section 4 of the Penal Code Cap. 17 defines "person employed in the public service" as any person holding any of the following offices or performing the duty hereof, namely -

(ii) any office to which a person has been appointed or nominated under the provisions of any Act.

The Applicant submits that at the relevant times he was employed by the National Bank of Fiji under the National Bank of Fiji Act (Cap. 213). Section 17 of that Act states that the Chief Manager shall be appointed by the Minister for a period not exceeding five years but shall be eligible for re-appointment. Therefore the Applicant submits that he was employed under a contract and was therefore never a public servant within the meaning of the Constitution of 1990.

It is interesting to note that the first time this argument was ever raised in the Magistrates' Court was in the reply by the Applicant to the Prosecutions' submissions. Until then the State Prosecutor assumed, quite rightly in my view, that there was no dispute about the Applicant being employed in the public service at the relevant times. She submitted, naturally in my view, after reading the Applicant's primary submissions, that there was no dispute on the first element.

After having received written submissions from the parties I heard further argument on the 21st of August on a statement by the Applicant's counsel on page 3 of his submissions of the 23rd of July 1998 that "Order 53 rule 3(6) clearly manifests the clear intention that applications for judicial review extend to criminal matters".

Sub-rule (6) reads:

> "Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

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However Order 1 rule 8(2) of the High Court Rules 1988 states:

> "These Rules shall not apply to any criminal proceedings in the High Court."

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The law according to the cases:

Although this is only an application for leave to seek Judicial Review the Applicant has filed four sets of submissions, one undated, but three others variously on 11/5/98; 1/7/98 and 23/7/98. In addition, the Applicant filed a reply to the Respondent's submission on 18/6/98 and after hearing oral argument on the 21st of August 1998 on the question of whether the definition "person employed in the Public Service" contained in Section 4 of the Penal Code (Cap. 17) was ultra vires Section 149 of the 1990 Constitution I received comprehensive written submissions on this question from the Respondent. All in all, therefore, the quantity of these submissions and the multitude of cases cited therein, particularly by the Applicant, might give the impression that this was a trial on a difficult substantive question of law and not merely an application for leave to obtain Judicial Review.

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That said however, it is only fair to remark that according to the Applicant this is no ordinary application for leave because the Applicant based his arguments mainly on the alleged inconsistency between Section 4 of the Penal Code and Section 149 of the Constitution thereby requiring a consideration of cases dealing with the inconsistency of provisions in a constitution in any law and of statutory interpretation, a challenging menu indeed for a judge to consider.

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I do not propose to consider every case cited to me by the parties; to do so would cause this judgment to be almost of the length of a major treatise on the applicability of Judicial Review to committal proceedings which is not the function of a judge at first instance dealing with a preliminary application. However it is important so that the parties may understand the reasons for my eventual conclusion in this case that I pay more than passing reference to what I consider are the more important cases cited to me by the parties.

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The Respondent's primary submission is that because of Order 1 Rule 8 of the High Court Rules Judicial Review is simply not available at all to the Applicant. Order 1 Rule 8(2) in its terms appears to clearly support that contention but I remind myself of the need to ensure that the rules are servants not masters. Here the remarks of Kirby P. in Bay Marine Pty Ltd. v. Clayton Country Properties Pty Ltd. (1986-87) NSWLR 104 at p.108 are relevant

when he said:

> "It was long ago said that "the rules must be the servant not the master of the Court": see Clune v. Watson (1882) Tarl 75. It is all too easy for those whose lives are daily engaged in the administration of rules to overlook the fact that they exist and are designed, not as an end in themselves but as a means to the end of the attainment of justice. There is no necessary justice in the inflexible and unthinking application of rules for neatness' sake, especially when the rules themselves contain ample powers of dispensation which may be utilised in appropriate cases."

His Honour repeated this statement in the later case of GSA Industries Pty Ltd. v. NT Gas Ltd. (1990) 24 NSWLR 710 at p.714.

It follows therefore that Order 1 Rule 8 is not as mandatory as it appears at first sight and the cases both here and overseas show that review is available in committal proceedings in exceptional circumstances.

Thus in Civil Action No. 862 of 1983 in the then Supreme Court of Fiji G.P. Lala v. Suva Magistrates Court Kearsley J. had no doubts after reviewing the statement in Volume 11, Halsbury's Laws of England, 4th Edition and cases from Ireland, Canada, England and Australia that certiorari does lie to committal proceedings. His Honour said at p.12 of his judgment that having carefully examined the record of the preliminary inquiry he had no hesitation in saying that, if he were the Magistrate, he would not have committed the Applicant for trial and would have discharged him. However he concluded at p.16 that:

> "In the present case the magistrate did not do or fail to do anything to render his decision a nullity. Nor did he commit any error of law as far as I can see; and there was some evidence before him on which to base his decision."

In Judicial Review re Geoffrey Miles Granger Johnson (1995) 41 FLR 181 Scott J. said this at p.7:

> "In my opinion, save in the most exceptional circumstances, such circumstances being saved by section 3 (3), there is no scope or purpose whatever for Judicial Review of a decision of a Magistrates' Court to be brought in the High Court under the provisions of Order 53 of the High Court Rules. I would go further. In my view, the attempt to graft Judicial Review under the provisions of Order 53 onto the Criminal Procedure Code so as to provide a fourth channel or procedure for reversing decisions of the Magistrates' Court is wholly unwarranted and unnecessary. It can only lead to confusion, error and delay."

Formidable words one might think but clearly not sufficient to deter the

Applicant in this case who, of course, is entitled to have a decision from this Court as to whether the circumstances of his case are exceptional and of whether in any event the committal proceedings are a nullity in view of the Magistrate's apparent disregard of the constitutional point taken before him by the Applicant in his last submissions to the Magistrates' Court.

In his later decision in Judicial Review No. HBJ0020 of 1997 re Tony Udesh Bidesi unreported judgment of 3rd October 1997 Scott J. returned to the question in words with which I respectfully agree at pp.2-3 of his judgment when he said:

> "Although Lala's case is a rare example of the High Court's Judicial Review jurisdiction being invoked to challenge a decision to commit it does not provide authority for the circumstances in which it is proper for that jurisdiction to be exercised.
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> The reference to English authorities in this field of the law must be treated with especial care since the statutory foundations for the Magistrates' Courts and Crown Courts in England are quite different from those upon which our own Magistrates Courts are based."

Nevertheless, he does not say categorically that any Applicant for leave to seek Judicial Review of committal proceedings is barred completely from putting his case but it is obvious I think from my brother's remarks that at least he would take an enormous amount of persuading before granting leave in a particular case. Reading his judgment it is clear that His Lordship bases himself mainly on the requirement of an Applicant to first exhaust other remedies available to him and in support of his opinion in Johnson's case he referred to a decision of my own HBJ0014/94 Suresh Charan and Others v. Shah and Others in which I held that the High Court will not entertain an application for Judicial Review until an Applicant has exhausted his rights to first pursue other remedies available to him.

This was also the view of Lyons J. in Judicial Review No. HBJ 0012/97L Damudamu and Others v. The Lautoka Magistrates' Court unreported judgment of 21st October 1997. In that case His Lordship said at p.10 that:

> "If I were inclined to grant leave for Judicial Review on application from a committal proceedings, it would most certainly be in this case. I do, however, consider the administration of justice requires this matter be approached by a more suitable method."

In that case the Magistrates' Court had breached Section 229 and Section 230 of the Criminal Procedure Code (Cap. 21) by not giving the Accused who had been charged with murder and assault occasioning grievous bodily harm the opportunity to make any statement to the Court or to adduce evidence as required by those sections.

Lyons J. preferred to exercise the High Court's supervisory and revisionary powers by returning the matter to the Magistrates' Court for completion of the committal proceedings.

Here it is pertinent to consider what alternative procedures are available to a person dissatisfied with a decision by a Magistrate's Court to commit him for trial in the High Court. They are contained in certain Sections of the Criminal Procedure Code beginning with Section 308(1) which reads:

> "Any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order."

Section 323 of the Criminal Procedure Code states:

> "The High Court may call for and examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court."

Section 325 so far as relevant here allows the High Court to alter or reverse any order made by a Magistrate's Court except an order of acquittal.

Finally, there is a third method available to any such dissatisfied person, although this appears to be very rarely used, namely by stating a case for the High Court which under Section 334 may reverse, affirm or amend the Magistrates' Court order. There are further provisions contained in Sections 330 to 340. None of these procedures has been availed of by the Applicant. The time for his appealing from the Magistrate's order to commit him expired on the 9th of February 1998 (S.310 CPC) but this time may be enlarged either by the Magistrates' Court or the High Court at any time for good cause. For reasons which have not been disclosed the Applicant chose not to use the appeal procedure.

The view that a decision of a Magistrates' Court to commit should only be reviewed in exceptional circumstances has received support overseas and even by parity of reasoning in the United States of America.

In decisions of the United States Supreme Court which are referred to in a Paper to be delivered by Mr. Marshall Cooke Q.C. at the Fiji Law Society Convention to be held later this month, the Supreme Court has stated that it will be reluctant to issue a Prerogative Writ if its remedy would disrupt an ongoing grand jury investigation. Thus in Will v. United States (1967) 389 U.S. 90 the Supreme Court was asked to rule on the propriety of a Writ of Mandamus issued by the Court for the Seventh Circuit to compel a judge to vacate a pretrial order in a criminal case.

In delivering the opinion of the Court Chief Justice Warren said at 96 inter alia that:

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> "This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him."

He later said:

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> "But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that
C a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offence."

Mr. Cooke's comment, with which I respectfully agree, is that:

> "It will be seen from an analysis of this selection of cases that the United States despite differences in procedure applies similar
D law on the issue of writs for judicial review of preliminary criminal proceedings as the courts in the other common law jurisdictions reviewed in this paper."

In Ex-parte: Cousens: Re Blacket and Another (1946-47) S.R. NSW 145 the Full Court of New South Wales held that the act of an examining magistrate,
E in deciding whether an accused should be committed for trial is purely executive in its nature and is not within the category of executive acts over which a superior Court can exercise supervisory jurisdiction.

By contrast however, the Full Court of Queensland in The Queen v. Schwarten, ex parte Wildschut (1965) Qd.R. 276 held that it had power to make absolute
F an order nisi for prohibition against a magistrate who had intimated that he intended to proceed with the adjourned hearing of committal proceedings which had been commenced by another magistrate who was then presiding in another Court.

In the later New South Wales case of Connor v. Sankey and Others (1976) 2 NSWLR 570 by a majority the Court of Appeal of New South Wales refused
G to hold that Ex parte: Cousens had been wrongly decided but in a strong dissenting judgment on this point Street C. J. held inter alia that the Court has the power and the duty to grant declaratory relief to a person who is able to establish that the information laid against him, and a Summons issued pursuant thereto, allege an offence not known to the law, which, of course, is the Applicant's contention here.

Contrary to this however in Lamb v. Moss (1983) 49 ALR 533 the Full

Court of the Federal Court held that the decision of a Magistrate that a *prima facie* case had been made out by the prosecution was reviewable but that the Court as a matter of discretion should not do so except in the most exceptional circumstances. A

At p.546 the Court said:

> "There is a considerable body of authoritative judicial opinion that exceptional circumstances will generally be required before a superior court will consider interfering in committal proceedings, particularly at an interlocutory stage. Failure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances constitute an error of principle." B

The High Court of Australia has repeatedly commented on the importance of refraining from interfering with the ordinary course of committal proceedings. In Sankey v. Whitlam (1978) 142 CLR 1 at p.26 Gibbs A.C.J. said: C

> "Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order." D

In the same case at p.83 Mason J., as he then was, referred to the long-standing controversy as to the availability of common law prohibition and certiorari to a magistrate hearing committal proceedings and said that the Supreme Court in New South Wales and Victoria had held that the writs do not lie. He then referred to the contrary view expressed in Schwarten's case and expressed his own opinion thus: E

> "In this conflict of authority my preference is for the view that prohibition will lie to a committing magistrate to correct for want or excess of jurisdiction." F

Two recent decisions of the House of Lords may also be mentioned. In Neill v. North Antrim Magistrates' Court and Another (1992) 1 WLR 1220 the House granted Judicial Review of a decision by a Magistrate to admit statements by two youths who refused to give oral evidence because of threats made to them. The House of Lords held that their statements should not have been admitted in evidence. G

Lord Mustill who delivered the judgment of the House said at p.1230:

> "That committal proceedings are in principle susceptible to judicial review is beyond doubt, and the fact that certiorari will lie in cases of procedural irregularity in such proceedings is I believe also quite clear. For recent statements on this I would refer to Reg. v. Colchester Stipendiary Magistrate, Ex parte Beck

[1979] Q.B. 674, and especially per Robert Goff J., at p.686; Reg. v. Horseferry Road Stipendiary Magistrate, ex parte Adams [1977] 1 W.L.R. 1197; Reg. v. Coleshill Justices, ex parte Davies [1971] 1 W.L.R. 1684; Reg. v. Highbury Magistrates' Court, ex parte Boyce (1984) 79 Cr. App. R. 132, 134. (I leave aside here a passage from the speech of Lord Reid in Reg. v. Governor of Brixton Prison, Ex parte Armah [1968] A.C. 192 which in my opinion cannot be understood as excluding the right to complain of a breach of natural justice: see on this Wade, *Administrative Law*, 6th ed. (1988), p.294) The question is, however, whether the reception of inadmissible evidence will found this remedy. As with many problems of judicial review, this question does not admit of an outright answer. Everything depends on the circumstances."

He added, "Thus I think it would be impossible to maintain that all errors of this kind on the part of examining magistrates must necessarily be fatal to the committal," but on the particular facts considered that the admission of the two statements constituted a procedural irregularity which called for the intervention of the Court by way of certiorari. Earlier in his judgment at p. 1231 he stated on a note of caution:

> "I wholly share the sentiments of those who, over the years, have exclaimed in dismay at the vision of the streams of applications by persons committed for trial seeking to put off the evil day by drawing attention to supposed errors in the application at the committal stage of the highly technical rules of criminal evidence. It is only in the case of a really substantial error leading to a demonstrable injustice that the judge in the Divisional Court should contemplate the granting of leave to move."

Scott J. quoted this passage with approval at p.6 of his judgment in Tony Udesh Bidesi and I also respectfully agree.

In the latest House of Lords decision of Regina v. Bedwellty Justices, ex parte Williams [1997] AC 225 the House of Lords held that:

> "A committal for trial by jury at the Crown Court was liable to be quashed in judicial review proceedings where there had been a procedural error by the justices in performing their functions under section 6(1) of the Magistrates' Courts Act 1980; that although certiorari was at the discretion of the court, it would normally follow where there had been no admissible evidence before the justices of the defendant's guilt or where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant, whereas the court would be slow to interfere on a

complaint that evidence had been admissible but insufficient, which was more appropriately dealt with at trial."

In delivering the judgment of the House of Lords, Lord Cooke of Thorndon referred at p.232 to the unreported judgment of the Court of Criminal Appeal in Reg. v. Lincoln Magistrates' Court, ex parte Field (unreported), 19 July 1993 where Watkins L.J. observed:

> "Before I say what I think must be said about the quality of the evidence which came before the justices, I should say that it must clearly be recognised by anyone who seeks to move this court in respect of a decision by justices to commit for trial, that an application of that kind can only succeed where there has clearly been an error of law; an error of law including, for example, where there has been a committal by justices in circumstances where it can properly be said there was simply no evidence upon which they could exercise their power to commit a defendant for trial."

Then at p.233 His Lordship said:

> "To convict or commit for trial without any admissible evidence of guilt is to fall into an error of law. As to the availability of certiorari to quash a committal for such an error, I understood at the end of the arguments that all your Lordships were satisfied that in principle the remedy is available and that the only issue presenting any difficulty relates to the exercise of the court's discretion. This conclusion about principle reflects the position now reached in the development of the modern law of judicial review in England."

In my judgment therefore it is clear from this recitation of authorities, and I think now conceded perhaps reluctantly by counsel for the Applicant, that it is only in a very exceptional case will leave be granted to judicially review committal proceedings.

Nevertheless, the Applicant has two further arguments on which he relies. The first is that there are at present no criminal proceedings in the High Court. There were criminal proceedings against the Applicant only in the Magistrates' Court.

The answer to that argument in my judgment is given by the Court of Appeal in Lodhia and Others v. Suva Magistrate's Court Action No. 45 of 1982 judgment delivered on 19th November 1982. At p.12 of the judgement the Court said:

> "In our opinion the proceedings before the Chief Magistrate were criminal in nature and on the authorities their criminal nature resulted in the cause or matter in the Supreme Court being a

criminal proceeding."

A I therefore reject this submission.

Before passing to the Applicant's last argument on *ultra vires* I should state that according to counsel for the Applicant there are exceptional circumstances in his case namely that he is not a public officer within the meaning of the 1990 Constitution and should not be put to any further strain or waste of money by allowing the committal order to stand.

B I fail to see any thing unusual or exceptional in the present circumstances of the Applicant which would make his a special case warranting this Court's intervention. I therefore turn now to the last major argument of the Applicant on whether Section 4 of the Penal Code is inconsistent with Section 149 of 1990 Constitution.

C Earlier in this Judgment I summarised the definitions of "public office", "public officer" and "the public service" appearing in Section 149(1) of the 1990 Constitution.

In deference to the very full submissions I received from the Director of Public Prosecutions on this question I now set them out in full:

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> "'public office' means subject to the provisions of the next following section, an office of emolument in the public service;
>
> 'public officer' means a person holding or acting in any public office;
>
> E 'the public service' means the service of the State, whether in a civil or military capacity, in respect of the government of Fiji."

This Constitution came into force on 25 July 1990, as a schedule to and by virtue of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, which itself came into existence and was gazetted F on that day: Fiji Republic Gazette Vol. 4 No. 47. It was entitled Government of the Republic of Fiji Decree 1990 ("the Decree").

Section 8(1) of the Decree continued the existence of prior laws, of which the Penal Code, Cap. 17 and Criminal Procedure Code, Cap. 21 were but two examples of the existing laws.

G Section 8(1) of the Decree provided:

> "*Existing Laws*
>
> 8(1) All existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them

into conformity with the Constitution and this Decree."

The brief historical background to that legislation shows that:

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(1) Penal Code Ordinance was initially enacted on 1st May 1945.

(2) The Ordinance was reprinted in Laws of Fiji Vol. 1, 1955 Section 3 and defined "person employed in the public service" - definition same as Section 4 Cap. 17 Ed. 1978.

B

(3) The Ordinance was reprinted in Laws of Fiji Vol. 1, 1967 - definition not changed.

(4) The Ordinance was reprinted as an Act in 1978.

(5) The Act was reprinted in 1985 - definition not changed.

C

Similar enactments can be found internationally - see the Penal Code and Criminal Procedure Code in India and Jamaica as but two examples. Of course, other countries do not have Constitutions that parallel the 1990 Constitution of Fiji. Thus these examples only are persuasive but are also inconclusive.

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Section 9(1) further provides for "Public Officers" a savings provision in relation to the continuance of their office following the coming into force of the Decree and the Constitution. This provision neither advances nor impedes the understanding of what does constitute a "public officer" for the purposes of question I have now to decide.

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In addition to the savings in Section 8(1) of the Decree set out above, Section 168 of the Constitution further provides for the continuance of pre-existing laws.

Finally, the Constitution, Section 2 provides that the Constitution is the supreme law of Fiji, in the following terms:

F

"*Constitution is supreme law*

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

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For the purposes of this case the crucial words of this provision are:

> ".....if any other law is inconsistent with this Constitution, that other law shall to the extent of that inconsistency, be void."

Section 149(1) is headed "Interpretation". The introductory words to this definition section are as follows:

"In this Constitution, unless the context otherwise requires." (my emphasis)

A I consider that the clear literal meaning of these introductory words is that the list of terms and the definition of those terms that follow is to be interpreted as stated, purely for the express purpose of understanding those terms as used in the Constitution. (my emphasis)

The term "public officer" is referred to in the Constitution proper by way of
B inclusion and exclusion, but without adding to the definition of that term contained in Section 149(1). Thus:

(i) Section 123(3)(b) where a "public officer" is precluded from appointment of the Judicial and Legal Services Commission if he has served as such during the past 3
C years; and

(ii) Section 127(1) which provides for appointment, etc., of "public officers". Sub-section 127(4) lists categories of persons who cannot be public officers, for the purposes of Section 127, but none is relevant to the appointment of the Applicant in this matter.
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By contrast, the definition in the Penal Code, Section 4, which is relevant to the offence of abuse of office, (S.111), contains a specific definition in terms of a "person employed in the Public Service". This definition is in the following terms so far as relevant:

E "*Definition of certain expressions and terms*:

"....person employed in the public service" means any person holding any of the following offices or performing the duty hereof, whether as a deputy or otherwise, namely -

(i) any civil office including the office of Governor-
F General the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor-General in a Minister or in any public Commission or Board; or

G (ii) any office to which a person is appointed or nominated under the provisions of any Act or by election; or

(iii) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of paragraphs (i) or (ii)."

Reconciling of provisions:

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The Respondent refers to certain guides to the interpretation of statutory provisions which have been established by the Common Law over the years and refers to judicial pronouncements by the High Court of Australia and the Privy Council on the force and effect of certain sections of the Australian Constitution and the Canadian Constitution which I consider are of great help in deciding the question posed by the Applicant. The Australian cases B concern the legality of any State laws which are inconsistent with the Commonwealth Constitution. I shall come to these in a moment but first refer to the statement by Lord Selborne in R. v. Burah (1877-78) 3 App. Cas 889 at pp.904-905 to the case where a question arises as to whether any given legislation exceeds the power granted.

C

> "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

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In Attorney-General for Ontario v. Attorney-General for Canada [1912] A.C. 571 at p.583 Lord Loreburn L.C., for the Judicial Committee, said:

> "....if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to context and scheme of the Act."

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In the landmark decision of the High Court of Australia The Amalgamated Society of Engineers v. The Adelaide Steamship Company Limited and Others (1920) 28 CLR 129 ("The Engineers Case") the Court enunciated some basic rules of construction when deciding the paramountcy of competing enactments. In a majority judgment delivered by Isaacs J. the Court refers to this question at p.148:

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> "The first, and "golden rule" or "universal rule" as it has been variously termed, has been settled in Grey v. Pearson and the Sussex Peerage Case in well-known passages which are quoted

by Lord Macnaghten in Vacher's Case."

A He then quoted some observations of Lord Haldane L.C. in the same case [1913] A.C. at pp.117-118 who said:

> "In endeavouring to place the proper interpretation on the sections of the statute ..... I propose, therefore, to exclude consideration of everything excepting the State of the Law as it was when the statute was passed, and the light to be got by reading it as a
B whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems its natural sense."

In another landmark decision Clyde Engineering Co. Ltd. v. Cowburn (1926)
C 37 CLR 466 the test of whether a State Law was inconsistent with a Commonwealth Law dealing with the same subject matter was discussed by the Court. Isaacs J., who agreed with the majority (5-2), said at p.489 on the subject of inconsistency when dealing with a conflict between a Federal and State Law, the vital question would be:

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> "Was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect at all to the first Act, because the second was intended entirely to exclude it."

Isaacs J. indicated that the above proposition was merely one test but not the
E only test and went on to postulate a test that had universal application namely if, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.

Another principle of statutory interpretation relevant here is that the Courts
F should be reluctant to discover inconsistencies in statutes. Thus in Australian Alliance Assurance Co. Ltd. v. Attorney-General of Queensland (1916) St. R. Queensland 135 Cooper CJ said at 161:

> "The duty of the court is to give the words the construction that produces the greatest harmony and the least inconsistency."

G Another principle is that once an Act comes into operation it can only cease to operate -

(a) by repeal, express or implied;

(b) by expiry (if a temporary statute);

(c) by something made a condition of its continued operation coming to an end.

In my judgment nothing in the language used in the 1990 Constitution suggests that the Penal Code provision has been expressly repealed. The remaining question is whether there has been an implied repeal. Implied repeal occurs when an enactment radically alters the effect of an earlier enactment so that the two cannot stand together. The provisions of a later Act which are inconsistent and irreconcilable with the provisions of the former Act dealing with the same subject matter are thus an implied repeal of them.

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The fundamental rule is that plain words must be given their plain meaning. Accordingly I consider that the meaning of the words used in the Constitution, "in this Constitution", is clear and they should be given full effect. Thus in my view the various definitions which follow are to be used in determining the meaning of those terms as used in the Constitution and nowhere else. I find nothing in Section 149 to indicate a clear legislative intention that those definitions should apply universally.

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Furthermore I can discover no express intention in these provisions indicating an express repeal of any other meaning that has been given to similar but not identical provisions in other enactments.

My conclusion is therefore that the draftsman of Section 149 meant the various definitions to be confined to usage within the Constitution.

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I therefore hold that there is no inconsistency between Section 149 of the Constitution and Section 4 of the Penal Code in its definition of "person employed in the public service".

Furthermore, I do not take the terms defined to be intended to apply to a whole group of persons. The Penal Code gives the definition just stated of a person employed in the public service but other Acts define the term "officer" and "public officer" (Interpretation Act Cap. 7) and the terms "officers", "public service" and "office" are all defined in the Public Service Commission (Constitution) Regulations 1990. The actual terms defined in the Constitution are "public office", "public officer" and "the public service".

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In short in my opinion they are not intended to prohibit any other meaning in any other legislation.

For these reasons I do not find any inconsistency between Section 4 of the Penal Code and Section 149 of the Constitution.

In my judgment the Magistrates' Court at Suva committed no reviewable error in committing the Applicant for trial. There was evidence on which it could find the Applicant was a person employed in the public service.

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Lastly, if the Applicant should eventually be presented for trial in the High Court on the charges on which he has been committed there is no reason to prevent him submitting to the trial judge that the charges disclose no offence in law which I venture to suggest is the course taken in most cases.

Accordingly I refuse the Application for leave.

A *(Application dismissed.)*