IN THE MAGISTRATES COURT OF FIJI AT SUVA

CRIMINAL JURISDICTION

Criminal Case No.324 of 2024

STATE

-v-

MOHAMMED SANEEM

Prosecution: Ms Nancy Tikoisuva - DPP

Accused: Mr Devanesh Sharma – R. Patel Lawyers

Date of Hearing: 04/11/2024

Date of Judgement: 18/12/2024

RULING ON PRE-TRIAL MATTERS

Background

1. The accused is charged with one count of receiving a corrupt benefit contrary to section 137 of the Crimes Act of 2009 and the charge stipulates that;

COUNT 1

STATEMENT OF OFFENCE

RECEIVING A CORRUPT BENEFIT: Contrary to section 137 of the Crimes Act 2009.

PARTICULARS OF OFFENCE

MOHAMED SANEEM, between the 1st day of June 2022 and 31st day of July 2022, at Suva in the Central Division, whilst being employed as a public official as the Supervisor of Elections of the Republic of Fiji, without lawful authority and reasonable excuse, asked for and obtained a benefit for himself, that is, the approval and payment of deductible tax relief of the sum of $55,944.03 on his back-pay from **AIYAZ SAYED KHAIYUM,** the Acting Prime Minister of the

Republic of Fiji and also the General Secretary of the Fiji First Party, the receipt or expectation of the receipt, of the benefit would tend to influence **MOHAMMED SANEEM** in the exercise of his official duties as the Supervisor of Elections.

2. Charges against the accused were filed on 11/3/2024.

3. On 1/5/2024, the accused pleaded not guilty.

4. I have directed my mind on all the materials, submissions and oral evidence before me and have not produced the same as verbatim in my ruling however it does not necessarily mean that I have not gone over it or placed no weight on it.

5. I have decided to put pertinent issues with economy of words as all issues before this court is strictly pre-trial issues and orders pursuant to section 289 reading in conjunction with section 290 of the Criminal Procedure Act of 2009.

Jurisdictions of this court

6. In this matter pre-trial issue orders are sought pursuant to section 289 and 290 of the Criminal Procedure Act of 2009.

7. Section 289 is read in conjunction to section 290 of the Criminal Procedure Act of 2009 which read as follows;

"The objective of this Part are to –
(a) improve case management in the courts exercising criminal jurisdictions;

(b) apply procedures at an appropriate stage before the trial of a criminal case, which aim to-
    (i) clarify the triable issues in each criminal proceeding;
    (ii) confirm the charge that are to proceed to trial;
    (iii) ascertain the intention of the accused person to plead guilty to the charge against him or her, or to any other appropriate charge;
    (iv) determine the length of the trial, and explore means by which its hearing may be facilitated by the application of any appropriate procedure.

(c) Otherwise enhance the efficiency of the courts in determining criminal proceedings in any just manner.

8. Section 290 (1) reads as follows;

"*Prior to the trial of any criminal proceedings either party may make application to the court having control of the proceeding for any order necessary to protect the interests of either party or to ensure that a fair trial of all the issues is facilitated, and such applications may relate to:-*

(a) any determination as to the most appropriate locality of the court at which the trial should take place, and the transfer of the proceedings to the most appropriate court;

(b) compelling the attendance of any witness or the production of any evidence at the trial;

(c) compelling the provision by the prosecution to the defence of any briefs of evidence, copies of documents or any other matter which should fairly be provided to enable a proper preparation of the defence case;

(d) a challenge to the use of any report or other evidence that may unfairly prejudice the defence case;

(e) a challenge to the validity of the charge, complaint or information as disclosing no offence under the law;(emphasis added)

(f) a challenge to the proceedings on the grounds of the breach of any fundamental human right of the accused person, or any applicable human rights issue; and (emphasis added)

(g) any matter concerning the giving of an alibi notice and the information to be provided in such a notice.

(h) the signing of agreed facts under section 135(1) of this Act.

Issues to determine

Issue 1

9. The issue of investigation being carried out by Police and not by FICAC as defence challenges that the offences falls under electoral act and therefore should have been investigated and prosecuted by FICAC.

Issue 2

10. Section 290 of the CPA for court to ventilate pre-trial issues such as alleged human rights abuse of accused in leading up to investigation, subsequent charging and refusal of bail without reasons and filing of the charges.

Issue 3

11. The issue of former acting Director of Public Prosecutions Mr John Rabuku sanctioning the charge when the Supreme Court decision said that he was

not eligible for the position of DPP due to his conviction under Legal Practitioners Act on non-compliance to address a matter with Chief Registrar in a timely manner.

Issue 4

12. Objection to the consolidation of the charges by defence.

Issue 1 – Defence position

13. *Accused submits that the police had no jurisdiction to investigate the matter against him as the Electoral Act 2014 empowers all electoral criminal offence to be reported to and investigated by FICAC and that FICAC was the rightful body to investigate the allegation made against him.*

14. Defence submits that accused should have been investigated and prosecuted under electoral act by FICAC as the appropriate body.

15. Section 3(3) of the electoral act stipulates that;

"No member, officer, employee or agent of the Electoral Commission or the Supervisor or any officer, employee or agent of the Fijian Elections Office shall be held liable in any way in any criminal or civil proceeding for any act or matter done or omitted to be done since the date of their appointment in the bona fide exercise or attempted exercise of any of the powers, functions and duties, whether conferred by this Act or otherwise."

16. Section 18 further stipulates that;

"If the Electoral Commission or the Supervisor becomes aware at any time of the probable commission of an election-related criminal offence including any criminal offence prescribed in this Act, it must immediately report the matter in writing to FICAC, and all election officials must fully cooperate in the investigation of any election related offence."

17. Defence further submits that the current Supervisor of Elections should have been confined to section 18 in reporting the matter to FICAC.

18. Defence further submits that the appropriate charge could have been if the allegation discerned towards the accused acting in bad faith with an appropriate charge of bribery contrary to section 140 of the Electoral Act of 2014.

19. Defence also submitted that the alleged offence is covered during the election campaign period.

20. In furtherance to this argument, the accused gave sworn evidence and relied on his sworn affidavit, together with oral and written submissions.

States Position

21. State submits that this ground advanced by the accused is misconceived on the basis that the accused is charged under Crimes Act of 2009 with the offence of receiving a corrupt benefit contrary to section 137(1) of the Crimes Act of 2009.

22. State further submits that the accused is circumventing the trial process and causing delay.

Analysis of ground 1

23. In analysing this issue I have carefully examined the sworn evidence of the accused, cross examination, oral arguments and the written submissions of state and defence.

24. By virtue of section 289 premised into subsequent section 290 of the Criminal Procedure Act limits this court to discern into trial proper issues.

25. At this juncture, looking at the charge, the accused is aware of the offence covered under Crimes Act of 2009 with adequate particulars and disclosures provided by the state and is not prejudiced to prepare for his defence.

26. Power to investigate and charge under Crimes Act of 2009 is a trial issue based on states position and this court will not dwell any further on this as section 290 limits further enquiry on “facts in issues” which is best left for trial proper.

27. The offence of receiving a corrupt benefit contrary to section 137 of the Crimes Act of 2009 is clearly defined for the accused as per requirement of section 290 (e) to prepare his defence in accordance to the allegation.

28. Furthermore by virtue of section 290 the charge filed is valid as it defines the alleged offence and the accused have every right to challenge and defend it in court of law during trial proper.

29. Court also notes that alleged fault and physical element is distinctively provided for the accused in the charge sheet in order for the accused to understand the charge and prepare towards his defence as well.

30. As I have stated earlier that rest of the issues raised by the defence is trial issues which this court will not discern into as it might affect the fundamentals of fair trial for the accused.

31. The presumption of innocence is a long-standing tenet of the common law in criminal jurisprudence. There is a fundamental rule that it is for the prosecution to prove all elements of the offence charged beyond reasonable doubt. The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in ***Woolmingtonn v D.P.P. [1935] AC 462 at p 481*** to be that *"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."*

Determination

32. Based on my above reasoning and with the economy of words and by virtue of section 290 the grounds advanced by the accused is not meritorious at this juncture of the proceedings as it's a procedural trial issue for the court to determine at the conclusion of trial proper.

Ground 2 – Defence Position

33. *Accused submits that there was gross prosecutorial and police misconduct leading up to him being charged which constitutes a breach of fundamental human rights and such conduct has brought disrepute to the prosecution against him and therefore challenges the proceedings.*

34. The accused gave sworn evidence and relied on his affidavit as well.

35. Furthermore, this court also looked at the comprehensive submissions on the alleged human rights breaches and allegation of prosecutorial misconduct.

Police misconduct

36. The allege breaches were by way of arrest, subsequent detention, counsel of his choice being deprived and no bail granted without reasons as stated by virtue of section 20 of the Bail Act.

37. The place of detention was not conducive to health and safety of the accused as well.

Prosecutorial misconduct

38. This court has no powers to look into alleged prosecutorial misconduct by virtue of section 290 of the Criminal Procedure Act of 2009 which is limited to pre-trial issues only.

States Position – Ground 2

39. State submits that the grounds advanced by the accused resembles into alleged confession in the caution interview and in this matter there is no such alleged confession made by the accused.

Analysis of ground 2

40. The issue raised by the accused by virtue of section 290 premised through section of 289 of CPA limits this court to only look into pre-trial issues of any alleged confession obtained in the course of caution interview by holding trial within trial.

41. Section 290 gives powers to court to hold trial within trial prior to trial proper in order to look at all allegations pertaining to confession. This includes all mistreatment by police such as coercion, intimidation, threats, inducement, false promises and assault during the interrogation process that could compel or softened the accused in making a confession.

42. The trial within trial grounds are prepared by defence which outlines all bill of rights violations of an accused prior to trial proper.

43. In ***Ganga Ram and Shiu Charan v. R*** (1983), the Fiji Court of Appeal outlined the two grounds for the exclusion of a confession:

> *"It will be remembered that there are two matters each of which requires consideration in this area.* ***First*** *it must be established affirmatively by the Crown (sic) beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage - what has been picturesquely described as the flattery of hope or the tyranny of fear.* ***Ibrahim v. R*** *[1914] AC 599;* ***DPP v. Ping Lin*** *[1976] AC 574.*
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> ***Secondly****, even if such voluntariness is established there is also a need to consider whether the more general ground of unfairness exists in the way in which police behaved, perhaps by breach of the Judges' rules falling short of overbearing will, by trickery or by unfair treatment.* ***R v. Sang*** *[1979] UKHL 3; [1980] AC 402, 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account".* [Emphasis added]

44. In this matter, there is no admission by the accused on all the allegations placed, therefore there is no need to hold a trial within trial to determine the admissibility of the caution interview.

45. The accused aggrieved with the mistreatment by the police could however could still bring separate action in civil jurisdictions of the High Court to get appropriate remedies if he wishes to do so.

Determination

46. Section 290 is applicable to trial within trial on the admissibility of the caution interview issues only and therefore this ground advanced by the accused is not meritorious.

Ground 3

47. *The issue of former acting Director of Public Prosecutions Mr John Rabuku sanctioning the charge when the Supreme Court decision said that he was not eligible for the position of DPP due to his conviction under Legal Practitioners Act on non-compliance to address a matter with Chief Registrar in a timely manner.*

Defence Submission

48. Defence submits that the appointment of Mr John Rabuku and his sanctioning of the charges against the accused amounts to nullity on the basis of the decision of ***Supreme Court in the matter of interpretation and application of sections 105 (2) (b), 114 (2), 116 (4) and 117 (2) of the Constitution of the Republic of Fiji [2024] FJSC: Miscellaneous action 0001 of 2024 (28th June 2024)*** which later ruled that Mr Rabuku was not eligible to hold the position of DPP.

States submission

49. States submits that it was an opinion of the Supreme Court and did not extend to acting appointment.

50. Furthermore the state submits that this court does not have jurisdictions to determine the issue raised by the defence by virtue of section 290 of the Criminal Procedure Act of 2009 and only High Court Civil jurisdiction have such powers to determine.

Analysis of ground 3

51. In applying section 290 of CPA, this court has limited jurisdiction to deal on the issue of validity of the charge only on which this court will expound with economy of words as this a is pre-trial issue and this court must rule on this with the assistance of earlier decided high court decisions, where similar issues arose.

52. The issue of Mr John Rabuku in signing of the charge is well settled by the High Court earlier decision which this court is bound to follow when it comes to challenging the validity of the charges with similar circumstances as before this court now.

53. In the matter of ***Chaudhry v State [2014] FJHC 122; HAM236.2013 (6 March 2014)*** the high court dealt with the similar issues where Justice Paul Madigan adopted that;

> *14. "An identical application was made in respect of the D.P.P. in **Peniasi Kunatuba** HAM 66 of 2006, where Justice Shameen J. as than she was held that the Latin maxim "Omnia praesumuntur rite et solemniteresseactadonecprobetur in contrarium" (usually shortened to "omniapraesumuntur") is applicable. What that means is that until the contrary is proved, a man (or woman) who acts in an official capacity, is presumed to have been duly and properly appointed and has properly discharged his or her official duties. It is a principle that has been applied in England as recently as 1977.*
>
> *15. Counsel for the applicant would say of course that he can prove that the acting D.P.P. was not validly appointed and that this doctrine does not apply. Shameem J. suggested in her ruling that determination of the validity of an appointment is a matter for the civil courts and as a result:*
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> ***"the criminal courts must be cautious in venturing into fields which are within the jurisdiction properly of the civil courts – a failure to exercise such caution could lead to ancillary inquiries being launched during a criminal trial about the validity of the appointments of police officers, prosecutors and holders of statutory bodies with powers to prosecute. (emphasis added)***

"In this case I hold that the presumption of validity applies, to Mr.Naigulevu's position as D.P.P. and therefore to the information and the sanction."

54. In Chaudhary (supra) the court further ruled on the same issue before the court at paragraph 19 that;

"And so with Mr.Aca Rayawa, he was appointed by letter of the President dated 31 December 2009 (this Court having seen a copy of the appointment letter produced.) There is nothing to suggest that Mr.Rayawa knew that he was not eligible to be appointed as an acting Director of Public Prosecutions. He was appointed to the office, he acted in the office; all appropriate persons regarded him as and accepted him as the Acting Director of Public Prosecutions and he therefore became the de facto acting Director of Public Prosecutions whether he was eligible to be appointed or not. ***As the de facto officer all acts that he performed in office, all informations and other documents that he signed, all administrative decisions that he might have made were validly performed by him in the office of Acting Director of Public Prosecutions whether his appointment was valid or not. (emphasis added)***

Determination

55. Mr John Rabuku is an experienced counsel and have practiced in criminal law area for over 2 decades and as such he acted in his capacity as acting Director of Public Prosecutions, therefore all decisions during his tenure in relation of sanctioning of charges or staff appointments and as per earlier decisions of the high court on the similar issues raised in the matter ***Chaudhary v State (supra)*** is therefore is valid in law.

56. Supreme Court decision which only gave opinion to the cabinet on the interpretation of section ***105 (2) (b), 114 (2), 116 (4) and 117 (2) of the Constitution of the Republic of Fiji*** have no retrospective legal effect on Mr John Rabuku's earlier decisions to sanction charges and information or appointment's since he was in de-facto appointment only.

57. Therefore this ground advanced by the accused is not meritorious at all.

Ruling on consolidation

58. Defence objects to the consolidation of charges with CF 548 OF 2023 on the basis that both accused were not charged jointly with one year apart by timeline.

59. Defence further asserts that application for consolidation to CF 548 of 2023 are unrelated and that the affidavit of Inspector Melania Saukuru did not place any probative material before the court to satisfy the test for consolidation.

60. Defence further submits that it will prejudice the accused if tried together in the matter of CF 548 of 2023.

61. Defence further stated if consolidation is granted the key issue of interpretation of deed signed on 22nd June, 2022 and as such both accused will not be compellable witness to the proceeding.

States Position

62. State submits that the charges be consolidated on the basis that the offence alleged are found on same facts and that the same alleged offence were committed in same transactions.

Law on consolidation

63. Section 60 of the Criminal Procedure Act states that;

> *"The following persons may be joined in one charge or information and may be tried together —*
> *(a) person accused of the same offence committed in the course of the same transaction,*
> *(b) person accused of an offence and persons accused of-*
> *i. aiding or abetting the commission of the offence; or*
> *ii. attempting to commit the offence;*
>
> *(c). person accused of different offences provided that all offences are founded on the*
> *same facts, or form or are part of a series of offences of the same or a similar*
> *character; and*
> *(d) person accused of different offences committed in the course of the same transaction*

64. In ***State v Toa [2016] FJHC 219;HAC 116.2015 (4th April 2016),*** his lordship made the following observation that;

> *13. "Section 59 (1) generally provides an authorisation for the joinder of charges. Section 59 (1) (a) and (b) then introduce the limitation for the joinder of charges, providing two limitations. In order to join charges in one information, they must be either founded on same facts or form, or part of a series of offences of the same or a similar nature. Likewise, Section 60 has provided the general authorisation for the joinder of two or more accused persons. Section 60 (a) to (d) have then introduced the limitations*

for the joinder of accused persons. Section 59 (3) has stipulated the safeguard for the accused person, even if the charges are properly joined according to the principles stated under Section 59 (1). According to Section 59 (3), a discretionary power has been given to the court to order a separate trial if the court finds that the joint trial might either prejudice or embarrass the accused in his defence, or any other desirable reasons for doing such."

Analysis

65. Mr. Aiyaz Sayed Khaiyum in CF 548 of 2023 is charged with one count of Abuse of office contrary to section 139 of the Crimes Act of 2009.

66. In this matter the Mr. Mohammed Saneem is charged in CF 324 of 2024 with one count of receiving a corrupt benefit contrary to section 137 of the Crimes Act of 2009.

67. Court notes that both charges are framed on same transactions thus inevitably have probably some nexus to the facts, however at this stage it remains a mere allegation before this court which has to be proven beyond reasonable doubt and state carries that burden to prove its case.

68. The next question will consolidation embarrass or prejudice both accused in their defense.

69. In ***Balekivuya v State [2016] FJSC 37; CAV0014.2016 (26 August 2016)*** said that:

"It is permissible in law to charge a person for separate offences in the same charge or information if the offences are founded on the same facts or form or are part of a series of offences of the same or similar nature: s. 59(1) of Criminal Procedure Act of 2009. In **Kray 53 Cr App R 569, it was said:**
" By rule 3 of schedule I to the Indictments Act 1915: " Charges for any offences...may be joined in the same indictment if these charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character".

70. The discretion to hold a joint trial is also guided by the wider interests of justice that includes the public interest factors. The relevant factors were summarised by Justice Shameen .N as than she was in the matter ***State v Boila unreported Cr Case No. HAC0031 of 2005S; 17 June 2005:***

"There are many public interest reasons why such offenders should be tried together. One is the public expense involved in conducting several trials based on the same law and evidence. Another is that witnesses would be greatly inconvenienced by having to give the same evidence many times. A third is that a joint trial is more likely to lead to uniform treatment in respect of all connected defendants. Lastly, separate trials usually lead to delay in the hearing of cases."

71. At this juncture both accused face two different charges and both allegations have some resemblance to each other.

72. Prosecution carries burden to prove its case beyond reasonable doubt and therefore by consolidation of the charges with CF 324 of 2024 to CF 548 of 2023 in court would not embarrass or prejudice both the accused since both offence have different element of offence to prove and therefore both accused will not be prejudiced in their defense during trial proper.

Determination

73. Therefore this court rules that Mr. Mohammed Saneem's CF 324 of 2024 is consolidated to CF 548 of 2023 with Mr. Aiyaz Sayed Khaiyum matter for the reasons that the both allegations are based on similar facts and have some nexus to each other and on the principles enunciated in ***State v Boila (supra)*** be joined for the wider interest of justice.

Further orders – delay in proceedings

74. It is pertinent to note that accused Mr. Sayed Khaiyum's matter in CF 548 of 2023 proceeded in court on 2/5/2023 and from there the matter lingered in court for over 1 and half years based on the pre-trial and consolidation application with Mr. Mohammed Saneem's matter of CF 324 of 2024.

75. Now that the consolidation and all pre-trial issues have been ruled in this matter, it is prudent that this court sets out tentative trial date as per section 14 (g) of the 2013 constitution which succinctly states for the courts in Fiji to expedite trial without unreasonable delay.

76. The fact that delay has both these consequences was pithily expressed by Lord Templeman in the Privy Council in ***Mungroo v R: [1991] 1 WLR 1351*** ;

"The right to a fair trial 'within a reasonable time' secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum."

77. This court is therefore constitutionally bound to put a tentative trial date consolidated to CF 548 of 2023 to commence without further delay.

78. 28 Days to appeal to the High Court

MAGISTRATE'S COURT SUVA

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Yogesh Prasad
Resident Magistrate

Dated at Suva this 18th day of December, 2024.