

IN THE MAGISTRATES COURT OF FIJI AT SUVA

CRIMINAL JURISDICTION

Criminal Case No.548 of 2023

STATE – APPLICANT

-v-

AIYAZ SAYED-KHAIYUM – RESPONDENT 1

MOHAMMED SANEEM – RESPONDENT 2

Prosecution: Ms Nancy Tikoisuva - DPP
Both Accused: Mr Devanesh Sharma – R. Patel Lawyers
Date of Hearing: 27th of May, 2025
Date of Ruling: 6th of June, 2025

RULING ON TRANSFER OF PROCEEDINGS PURSUANT TO SECTION 188 and 191 OF THE CRIMINAL PROCEDURE ACT OF FIJI

Background and History of Proceedings

1. Respondent 1 is charged for the offence of Abuse of office which is triable indictable summarily pursuant to section 139 of the Crimes Act of 2009 and Respondent 2 is charged with the offence of Receiving of corrupt benefit triable summarily pursuant to 137 of the Crimes Act of 2009.
2. Applicant is now seeking for the matter to be transferred to the High Court pursuant to section 188 and 191 of the Criminal Procedure Act of 2009 on the basis that there are matters of complex Constitutional interpretation in which the magistrate does not have jurisdiction to adjudicate and decide matters upon.
3. Applicant submits that High court can under its original and unlimited jurisdiction have varied powers to interpret and determine on the issue of “**public service**” as part of trial issues when the matter reaches no case to answer submission.

4. Applicant also submits that the matter be transferred to the High Court pursuant to section 188 and 191 of the Criminal Procedure Act of 2009 on the basis that magistrates court have limited jurisdictions to interpret the Constitution pursuant to section 100 (7) during trial proper stage on elements of offence linked constitutionally.
5. Applicant also states that High Court have powers to adjudicate on matters of constitutional or any legal issues with its original and unlimited jurisdictions to ventilate and rule on issues pertinent to objections during trial proper on matters of constitutional importance.
6. Both Respondents oppose the transfer through their counsel with their oral and written submission together with their sworn affidavits dated 23rd of May, 2025.
7. Both respondents maintain with strong objection that the matter should remain in the magistrate court on the basis that both accused have chosen and elected to be tried in the magistrate court as of their constitutional right and also that the magistrate have powers to interpret constitution pursuant to section 100(7) of the 2013 constitution and make a ruling which could be appealed as way of right.
8. I have directed my mind on all the materials before this court, which includes both Respondents sworn affidavits, oral and written submissions together with Applicants written and oral submissions before me.
9. I have not reproduced the same as verbatim in my ruling but that does not necessarily mean that I have not gone over it or placed no weight on it. I have carefully looked through the submission and case authorities from the High Court and Supreme Court of Fiji to assist me in making the decision, together with helpful submissions of Applicant and Respondent.

Jurisdiction to determine transfer of matters before trial

10. Magistrate court is specifically guided by section 188 and 191 of the Criminal Procedure Act of 2009 on the issue of transfer of the proceedings to the High Court.
11. Section 188 and 191 of the CPA stipulates that;

“188 (1) If before or during the course of a trial before a Magistrate Court it appears to the Magistrate that the case is one which ought to be tried by the High Court the Magistrate may transfer the case to the High Court under Division 3.

(2) Before the calling of the evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the Magistrate shall-

(a) hear and consider the reasons for the application;

(b) hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and

(c) otherwise determine matters relevant to the grounds for the application, and may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3.

191. A Magistrate may transfer any charges or proceedings to the High Court.”

12. Furthermore common law position is guided by various jurisprudence developing under section 188 and 191 of the Criminal Procedure Act of 2009.
13. In this matter the Applicant is making an application for transfer by virtue of section 188 (2) (a) (b) (c) of the Criminal Procedure Act of 2009 in conjunction with section 191 of the Criminal Procedure Act of Fiji.
14. In the matter of **FICAC v Khan [2022] FJHC.122; HACD001.2012S (18th March 2022)**, Hon. Justice Thushara Kumarage as than he was stated that any transfer from the magistrate court to high court under 188 and 191 of the Criminal Procedure Act have two prong tests;

*“In view of the legislative provisions applicable in this matter, the accused has been given a right by the legislature as to where he should be tried, when he is tried with an indictable offence triable summarily, as per **section 4 (1) (b) of the Criminal Procedure Act of 2009**. Therefore, when an accused has chosen the Magistrate’s Court and when a Magistrate is transferring a case under **Section 188 and Section 191** to the High Court under the discretionary power vested under a statute, the Learned Magistrate has to be mindful that the decision needs to be made over an election made by the accused to be tried in the Magistrate’s Court under a right granted to the accused by a statute.*

Therefore, this Court is of the view that the Learned Magistrate should have a very plausible and cogent reasons to make such a transfer.”(emphasis added)

Issues to determine

15. Right of elections for Respondent 1 to be tried in the magistrate court charged with an offence which is indictable triable summarily and effect of transfer for Respondent 2 charged under summary offence to be tried by the High Court.
16. Is there any plausible and cogent reasons of transfer by virtue of section 188 and 191 of the CPA to the High Court for trial proper?

17. The issue of 100 (3) (4) of the High Courts unlimited and original jurisdiction as opposed to 100 (7) of the magistrates limited jurisdiction as per the 2013 Constitution when interpreting the Constitution, in particular the interpretation of section 163 of the 2013 Constitution on the issue public service in conjunction with section 139 of the Crimes Act of 2009 definition of civil service is an important aspect of this matter.

Applicants Submission

18. Applicants submits that the both Respondents should be tried in the High Court on the issue of Respondent 1 appears to be not covered as part of the element of an offence under section 163 definition of the 2013 Constitution on the issue of public service.

19. Applicant further submits that Crimes Act section 139 which defines abuse of office, has civil service as crucial part of its elements, therefore it is in the interest of justice that the matter be decided in the High Court under its unlimited and original jurisdiction for interpretation.

20. Applicant submits that by virtue of section 100 (3) (4) of the 2013 Constitution, the High Court have unlimited and original jurisdiction to deal with the issues raised by the defence during preliminary proceedings to deal with during trial proper.

21. Section 100 (3) (4) of the 2013 Constitution stipulates that;

“100(3) – The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdictions as is conferred on it under this Constitution or any written law.

(4) - The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation.

22. State further submits that Respondent 2 is charged with summary offence and should be tried in the High Court together with the Respondent 1 from the decision and principles enunciated in the Supreme Court decision in the matter of **Tasova v DPP [2022] FJSC 43; CAV0012.2019 (26 September 2022)** which stated that;

*“Section 188 of the CPA gives Magistrates Court unfettered discretion to transfer any case to the High Court, **but only for trial purposes, regardless of whether the offence is indicatable, summary or otherwise unassigned**”.(my emphasis)*

23. State also relies on section 59 and 60 of the CPA which stipulates and says there is a proviso for section 4 (1) (c) of the CPA on the issue of joinder of counts or where two or more accused connected by same facts and transaction such as aiding and abetting could be tried together in the High Court for efficient administration of justice.

24. Section 4 (1) (c) of CPA states that;

“any summary offence shall be tried by a Magistrates Court.”

Respondent One – Submission

25. Respondent one submits that the charges should have not been filed in the first place since the crucial element of the offence for abuse of office which is on the issue of “public service” is not covered in section 163 interpretation clause of the 2013 Constitution to implicate him as Acting Prime Minister and Chair of the Constitutional Offices Commission at the time of alleged commission of offence.
26. Respondent further asserts that as the time of being performing the duty as Acting Prime Minister and Chair of Constitutional Offices Commission he was not part of being employed as public service or being a civil servant by virtue of section 163 interpretation of the 2013 Constitution thus no offence committed.
27. Respondent one further submits that the matter could be heard in the magistrates court and that magistrate court have powers by virtue of section 100 (7) of 2013 of the Constitution to interpret constitution during trial process. Section 100 (7) of the Constitution states that;
- “If in any proceedings in a Magistrates Court or a subordinate court, a question arises as to the interpretation of this Constitution, the Magistrates Court or a subordinate court may decide the matter, and its decision may be appealed as of right to the High Court.”*
28. Respondent one further submits that it's his right to be tried in the Magistrates Court when election was given, he opted to be tried in the Magistrates Court and this status must remain under the principles of right to election.
29. Respondent one further submits that the matter could be sent to the High Court by virtue of section 266 of the Criminal Procedure Act of 2009 after parties have been heard on the contested issue during trial on ;
- a) Erroneous in point of law or
 - b) In excess of jurisdiction

Respondents Two – Submission

30. Respondent two submits that the application to transfer the matter pursuant to section 188 and 191 is coming in late in the proceedings and objects to the transfer.
31. Respondent two further asserts that he is charged with a summary offence and irrespective of consolidation, the matter must be tried in the magistrate court.
32. Respondent two further states that his charge to be severed in the event the matter is transferred for Respondent 1 to High Court with him.

33. Respondent two also submits that the magistrates have powers to interpret the Constitution by virtue of section 100 (7) and parties could appeal decisions arising out of Constitutional issues.
34. Respondent two also submits that he is also not charged as a person employed in civil service but charged as a public official.

Analysis

35. In analysing the submissions of the Applicant and Respondent I know ventilate pertinent issues in relation to the right of election of an accused person, transfer of summary offence to High Court and jurisdiction of the magistrate court to interpret constitutional issues when there is conflict in law, such as in the section 163 of the Constitution against section 137 of the Crimes Act on the issue of public service and civil service.
36. From the submission of the State and Respondents on the issue of election, this court notes that there has to be cogent and plausible reasons to transfer the proceedings by virtue of section 188 and 191 to the High Court.
37. The gist of the argument advanced by the Applicant is on the issue of magistrates court limited jurisdiction to address the issue of constitutional interpretation when there is a complex issue such as conflict between section 139 definition of the Crimes Act on the issue of "civil service" with various exception rule on positions not covered under public service from section 163 interpretation clause of the 2013 Constitution.
38. It is also important to note that whenever there is conflict in law, and this is defined precisely in 2013 Constitution by virtue of section 3(1) and (2) of the 2013 Constitution which states that;

"3 (1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equity and freedom.

*(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a **reasonable interpretation of that law that is consistent with the provision of this Constitution over an interpretation that is inconsistent with this Constitution. (emphasis added)***

39. Realistically looking at the provision of section 3 (1) and (2) on the issue of principles of constitutional interpretation, the objective question is that do magistrate's court have powers to interpret beyond something which is not distinctively inclusive such as the word "Public Service" which Respondent have alleged to have committed an abuse of his authority whilst being employed?
40. In a recent decision by Hon. Justice R.D.R.T Rajasinghe on the issue of the jurisdiction of the magistrate court appears to be well settled by virtue of section 100(7) of the 2013 Constitution. "

41. From this same associated matter but by way of appeal on a different issue by Respondent 2 to the High Court in the matter of **Saneem v State [2025] FJHC 128; HAA01.2025 (17 March 2025)** the issue of jurisdiction for magistrates in interpreting the constitution was ventilated at length by the High Court from paragraph 31 to 37. His lordship Hon. Justice R.D.R.T Rajasinghe elucidated on the matter of magistrates jurisdiction at length that;

“Section 100 (7) of the Constitution

31. Section 100 (7) of the Constitution states that:

“If in any proceedings in a Magistrates Court or a subordinate court, a question arises as to the interpretation of this Constitution, the Magistrates Court or a subordinate court may decide the matter, and its decision may be appealed as of right to the High Court.

32. *The Magistrate’s Court has been granted jurisdiction to determine questions regarding the interpretation of the Constitution if such issues arise during any proceedings before it. So as to understand the scope and boundaries of the interpretative jurisdiction conferred upon to the Magistrates’ Court, it is prudent to comprehend the jurisdiction of the High Court as outlined under Section 100 (4) of the Constitution, which states:*

“The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation”(emphasis added)

33. *Section 100 of the Constitution defines the High Court and its jurisdiction. In doing so, Section 100 (4) grants the High Court original jurisdiction over two Constitutional matters, i.e. any issue arising under the Constitution and the interpretation of the Constitution. Original jurisdiction refers to a Court's power to hear and decide an issue for the first time.*

34. **Conversely, Section 100 (7) does not confer original jurisdiction for interpretation but rather a limited interpretative jurisdiction if such a question arises during any proceedings before the Magistrate’s Court. Hence, the interpretive jurisdiction of the Magistrate’s Court under Section 100 (7) of the Constitution is restricted to the issues of interpretation that arise in the proceedings. Moreover, Section 100 (7) does not grant the Magistrate’s Court the jurisdiction to address any other issues arising under the Constitution. (emphasis added)**

35. *Determining whether the first Appellant's rights guaranteed under the Constitution have been breached, as alleged, requires applying the relevant provisions of the Bill of Rights to the alleged facts. Thus, it is not a matter of interpreting the provisions of the Constitution but rather enforcing the rights granted under it in the event of any contravention. Section 44 of the Constitution outlines the legal mechanism for enforcing the rights under the Bill of Rights in case of any breaches.*

36. *On the same note, I could conclude that determining whether the Acting Director of Public Prosecutions had legally and correctly exercised the power given under Section 117 (8) of the Constitution does not fall within the scope of interpretation but within the boundaries of other matters arising under the Constitution, as stated under Section 100 (4) of the Constitution.*

37. *Considering the reasons outlined above, the two main issues raised by the first Appellant in the Notice of Motion filed in the Magistrate's Court do not come within the jurisdiction stipulated under Section 100 (7) of the Constitution. **Thus, I find the Learned Magistrate erred in interpreting Section 100 (7) of the Constitution, concluding that he had the jurisdiction to hear and determine the two main issues raised in the Notice of Motion.***

42. In applying the maxim enunciated in **Saneem** (supra) High court have succinctly pointed out that magistrates court have limited jurisdiction to interpret Constitution or elements of an offence linked constitutionally on matters of interpretation.

43. Furthermore in another recent decision by his lordship Hon. Justice Daniel Goundar in the matter of **State v Josaia Voreqe Bainimarama and another HAM 05 of 2025** on a similar issue before the High Court but different accused persons, on the issue of conflict in law between section 163 of the 2013 Constitution which exempts certain offices as "public service" and the Crimes Act definition of civil service was not ventilated in court due to the following reason;

"16. In the present case, the transfer was not for trial, but for an opinion on a legal issue concerning elements of the offence. There is no statutory basis for such referral". (emphasis added)

44. It appears therefore by virtue of section 188 and 191 is the right conduit to transfer the entire proceedings to the high court for determination by way of trial rather than through interlocutory applications to determine a constitutional issue.

45. In **Bainimarama** (supra) his lordship Hon. Justice Goundar stated on the issue of interlocutory applications in criminal trials appears to be done deliberately in order to delay the trials by stating that;

*"22 – There is well established jurisprudence against fragmenting criminal trials through interlocutory questions. As held in **Singh v DPP [2003] FJHC 221; HAM00432D (18 November 2003)**, such premature applications disrupt the integrity of criminal trials and may undermine judicial economy".*

46. There is one more issue that this court feels needs to be decided by the High Court from the analysis of this case is on the issue of ouster clauses at section 163 under the heading interpretation in the Constitution which magistrates court certainly have no powers to deal with in the strictest sense by virtue of section 100 (7) of the 2013 Constitution limited interpretation powers.

47. The issue of ouster clause by virtue of section 163 of the 2013 Constitution in excluding such as “public service” means the service of the State in a civil capacity **but not include** –

(a) **service in judicial branch**

(b) **service in the office of a member of a commission; or**

(c) **service in an office created or continued in existence under this Constitution (emphasis added)**

“Public Office” means –

(a) an office created by, or continued in existence under, this Constitution;

(b) an office in respect of which this Constitution makes provision;

(c) an office of a member of a Commission;

(d) an office in a State service;

(e) an office of Judge;

(f) an office of Magistrate or an office in a court created by written law;

(g) an office in, or as a member of, a statutory authority, or

(h) an office established by written law;

“public officer” means the holder of a public office”(emphasis added)

48. Against the ouster clause where the Respondent is not included in “public service” definition comes the issue of abuse of office by virtue of section 139 of the Crimes Act of 2009 which states as follows;

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

49. The determination and exception rule to ouster clause together with any proviso of the law in section 163 of the Constitution needs high court guideline judgements at the ruling of no case to answer in fairness to both Respondents.

50. In the matter of **Seremaia Tuiteci v Supervisor of Elections HBJ 05 of 2022**, his lordship as then he was Hon. Justice Yohan Liyange stated on the issue of ouster clauses in law that;

“One would argue that ouster clauses undermine rule of law. An ouster clause would become an exception to the long standing principles of everyone is subject to law and every person is entitled to have his or her rights decided by court of law”.

Determination

51. Therefore section 188 and 191 allows magistrate court with discretionary powers after hearing both parties and in the interest of justice, that the Constitutional matter arising out of conflict in law is best resolved at a trial

proper in the High Court instead of ruling on the specific provisions of the constitutional law and interpretation in the magistrates on which it has no or limited powers.

52. High court through its unlimited and original jurisdiction could ventilate that if the crucial elements of the offence is not proven which is on the definition of “public service” or “civil service” as not being in the Constitution precisely but covered under Crimes Act of 2009 than there is no offence committed and all related matters with similar charges should fail since Constitution will prevail over Crimes Act by virtue of section 3(1) and (2) on the Principles of constitutional interpretation of the 2013 Constitution.
53. Similarly if the High Court could also determine the issue of ouster clauses, or any proviso or exception rule under its unlimited and original jurisdiction to interpret the Constitution on the issue of “public service” with cogent and varied reasons to assist the litigants as the trial progresses.
54. In essence, the High Court's unique structure, authority, and role in the legal system make it the most appropriate body for interpreting the Constitution and ensuring its proper application on section 163 of the interpretation act to assist the Applicant and both Respondents.
55. The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under the law.
56. It also has original jurisdiction in any matter arising under our Constitution or involving its interpretation.
57. This will also inevitably save litigant’s costs and time since jurisprudence will develop to assist should similar cases arise in future.
58. For respondent 2 on the issue of objection to get the matter transferred as he is charged under summary offence, the law on this well settled from the decision in **Tasova** (supra) that the matter could be tried together with Respondent 1 in the High Court as the charges are now consolidated and is covered by section 59 and 60 of the Criminal Procedure Act on the issue of Joinder of Counts arising out from the same facts as alleged in this case.
59. Therefore based on my above analysis, I am satisfied that there is plausible and cogent reasons advanced by the Applicant to transfer the substantive matter of both Respondents to the High Court for trial on the following reasons;
 - a. Magistrate court have limited jurisdictions when it comes to interpreting Constitutional provisions in terms of 163 of the 2013 Constitution on the issue of public service exemption for Respondent 1 which runs into conflict with the abuse of office

charge pursuant section 139 of the Crimes Act of 2009 on the issue of civil service.

- b. The relevant case authority which this court is bound to follow is **Saneems** where magistrate court have limited jurisdiction to deal with complex constitutional issues. (supra)
- c. From the case management perspective the decision of the High Court will assist litigants in swift administration of justice rather than going back and forth with interlocutory applications to determine legal issues and this inevitably contravenes both accused right to be tried within reasonable time as enshrined in section 15 (3) of the 2013 Constitution.
- d. Respondent 2's reason for transfer is by virtue of **Tasova (supra)** principles is transferred to the High Court on the basis of better case management as charges for both Respondents are arising from the same allegation pursuant to 59 and 60 of the Criminal Procedure Act of 2009.
- e. The matter is to be called in High Court from 21 days from today with all certified court records on all proceedings so far to assist the learned High Court Judge.
- f. There is no order for costs against any parties.

60.28 Days to appeal to the High Court.



A handwritten signature in blue ink, appearing to be "Yogesh Prasad".

Yogesh Prasad
Resident Magistrate
Dated at Suva this 6th of June, 2025