IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 4 OF 1992
(High Court Criminal No.12 of 1992)

BETWEEN

BENIAMINO NAIVELI	APPELLANT
-and-	
THE STATE	RESPONDENT

AND

CRIMINAL APPEAL NO. 2 OF 1992

BETWEEN

THE STATE	APPELLANT
-and-	
BENIAMINO NAIVELI	RESPONDENT

Mr Gates for the Appellant in Appeal No. 4
and the Respondent in Appeal No. 2
Ms Rice for the Respondent in Appeal No. 4
and Appellant in Appeal No. 2

Date and Place of Hearing : 3rd August, 1994, Suva
Delivery of Judgment : 12th August, 1994

JUDGMENT OF THE COURT

On 12th of June 1992 after a six day trial Beniamino Naiveli (Naiveli) was found guilty of a breach of section 111 of Penal Code Cap 17. He was sentenced to nine months imprisonment suspended for 1 year and a fine of $1,000.00 in default six months imprisonment. $750.00 of the fine if paid to be handed on to the complainant (Mrs Vosararawa). Section 111 reads :-

> "Any person who, being employed in the Public Service does or directs to be done in abuse of the authority of his office, an arbitrary act prejudicial to the rights of another is guilty of misdemeanour. If the act is done or directed to be done for the purpose of gain he is guilty of a felony and is liable to imprisonment for three years."

The section is briefly described as "Abuse of Office"

The offence with which Naiveli was charged is as follows:

> "Beniamino Naiveli, between the 1st day of August, 1990 and thy day of January, 1991 at Suva in the Central Division, being employed in the Public Service as Assistant Commissioner of Police (Crime), in abuse of the authority of his office directed Sgt. 776 Josefa Delailomaloma to do an arbitrary act, that is, to effect the eviction of Mrs. Kesaia Vosararawa from Native Land Property known as Wainigasau, Veisari in which property the said Beniamino Naiveli had a personal interest, which act was prejudicial to the rights of the said Kesaia Vosararawa."

The State appealed against the sentence imposed and Naiveli appealed against conviction. We deal first with the appeal against conviction. The grounds of the appeal were eventually reduced to two only, namely :

1. That the learned trial judge erred in omitting to direct the assessors on an essential ingredient of the offence namely the requisite mental element.

2. That the learned trial judge erred by directing the assessors incorrectly in relation to the evidence properly to be considered to establish that the appellant "....directed Sergeant 776 Joseph Delailomaloma to do an arbitrary act, that is to effect the eviction of Mrs Kesaia Vosararawa...."

The learned judge began by directing the assessors on the burden of proof. He then went on to note the section was in two parts. The first part dealt with the simple abuse of office

which is a misdemeanour he said, and carries the sentence of two years imprisonment as the maximum. The second part proceeds further and says that if the act is done or directed to be done for the purpose of gain the accused is guilty of a felony and is liable to imprisonment for three years. He pointed out that the Prosecution did not allege that the accused did the action for gain although there was a reference to personal interest and that the assessors were concerned only with the first part of the offence. He pointed to the four ingredients or elements of the offence. Firstly a person must be employed in the Public Service, secondly he must do or direct to be done any arbitrary act, thirdly that act should be prejudicial to the rights of another and fourthly that act should have been done in abuse of the authority of his office. He said

> "the defence in this case is that whatever the accused did was done lawfully. His defence is that he wanted to deal with the complainant Mrs Vosararawa under the Penal Code. He wanted her to be dealt with for criminal trespass that is his defence". He then set out the facts.
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> > "In about 1974, the Vosararawas went into that farm at Wainigasau in Veisari to start a poultry farm. They borrowed money from the Fiji Development Bank. They were doing well until the landslide of 1985 when the poultry farm was buried and they suffered a loss. They were heavily indebted to the FDB. You heard the FDB officer, Taoba, saying that the Vosararawas owed about $90,000 to the FDB. They could not manage to repay. Mr Vosararawa had gone to Australia and Mrs. Vosararawa found it very difficult to make the repayments. There came a time in 1990 when the Bank decided to foreclose. They asserted their rights as mortgagee and advertised the property for sale. The accused tendered and his tender of $6,000 was accepted by the Bank. The Bank lost heavily in this deal but they accepted $6,000 as something is better than nothing. The transfer had not yet been effected in favour of the accused. At this time there was a sort of interregnum - it was no man's land. The property was no longer vested in the Vosararawas. The property had not come into the legal title and possession of the accused. Technically and

> **legally, the FDB were still the owners. In fact, the manager at FBD who gave evidence said that the Bank would have, in normal circumstances, moved for eviction and given the accused vacant possession but that had not yet happened."**

He then went on to point out that the sale was subject to the occupation of the Vosararawas and was subject to the right of the bank to cancel the sale before it was completed. He said

> **"The sale had not been completed in the legal sense. Of course you have heard the accused say that he believed honestly and bona fide that he had become the owner of the property of Wainigasau once he paid the amount of $6,000.00. It is a matter for you to consider whether the highest ranking police officer so far as crimes are concerned in the Fiji Police Force, an officer of 28 years standing, whether he was entitled to entertain such a bona fide opinion. That is a matter for you to decide."**

The learned judge then directed the assessors to look for the four ingredients that he had pointed out. There was no question but that the accused was employed in the public service. The second element was whether an arbitrary act was done. He pointed out that the defence was that it was not an arbitrary act it was a lawful act which the accused was entitled to do. The accused, he said, invoked the criminal law of trespass against Mrs Vosararawa. That is contained in section 197 of the Penal Code. He then set out section 197 of the Penal Code and pointed out that that could not have been invoked against Mrs Vosararawa because what it did was to protect the person in occupation. He said

> "That could not have been invoked against Mrs Vosararawa. Of course what the defence counsel said was that the accused may have been honestly mistaken. That is a matter for you but I can tell you that this is not a section under which Mrs Vosararawa could have been charged and that is the only section in the Penal

Code which deals with Criminal Trespass".

Clearly he was there leaving to the assessors the determination whether the accused may have been honestly mistaken.

He then dealt with the question whether the act was prejudicial to the rights of another and asked the assessors to determine whether Mrs Vosararawa had the right to remain in the property until there was legal formality, until she was given notice under section 169 of the Land Transfer Act and evicted after that notice. Here he pointed out that the Police Officers visited her on a number of occasions, took her in an open police vehicle. He asked whether her rights to possession were invaded by the accused. He left that question to the assessors.

He then dealt with the fourth ingredient which was whether the act was done in abuse of the authority of the accused officer. He asked the assessors to determine whether a police officer of high rank was right in using public property, that is a police vehicle, in order to find alternative accommodation for Mrs Vosararawa so that the accused could take over possession of the property. Was it proper? He said that was a matter for the assessors. He asked whether it was proper for the accused to use police officers to go and give her messages. He pointed out that the assessors who were laymen would know what effect such messages would have on the mind of a layman i.e. Mrs Vosararawa. He left after further direction, the question whether the accused

abused his authority to them. He then went on to describe another incident where the Sergeant threatened to arrest Mrs Vosararawa if she refused to vacate and told her that he would have to arrest her and produce her in court on the next morning. He said

> **"Sergeant Jo said, then she asked him" `what shall I do Sergeant?' then she cried and hugged her children and then said `alright I'll move'."**

Referring to the evidence of the accused and the fact that the accused had gone into the witness box and given evidence he said

> **"the burden of his evidence was that he did everything bona fide. It is a matter for you to consider".**

He concluded his directions to the assessors by asking counsel whether he had missed anything and counsel for the accused said only that in case of doubt they should acquit and the learned judge repeated what he had already told the assessors about doubt.

In a full and careful submission Mr Gates for Naiveli submitted that in cases of this kind, misconduct or misbehaviour by public officers, the conduct under review is to be examined on the basis of whether the officer acted with an honest genuine belief that he was properly exercising his powers. He referred to R v Llewellyn-Jones & Anr (1967) 51 Cr App R 4 at p.7. The Court of Appeal held that the words "dishonestly" and "fraudently" though they did not appear in the words of the count

were inherent in the description of the offence. See also R v **Llewellyn-Jones** (1968) 1 Q.B. 429 at 437. Here the assessors were directed, to determine whether the accused abused his power and whether his acts were arbitrary and prejudicial to Mrs Vosararawa. The passages we have quoted from the direction in our view adequately direct the assessors to determine the state of mind of the accused. Did he have an honest belief? Was his opinion bona fide? Was he honestly mistaken? Did he behave properly?

But the matter does not stop there because section 9 (3) of the Penal Code provides

> **"Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility".**

It was not necessary therefore for the state to establish the mental element except to the extent that that is inherent in the arbitrary abusing of power. Abuse is simply using wrongly and the outlining by the trial judge of the four elements of the event that needed to be proved to establish the offence was all that was necessary. There is no express declaration in section 111 that the action must have been corrupt. We hold therefore that the learned trial judge did not omit to direct the assessors on the requisite mental element.

Further the learned trial judge adequately directed the assessors in relation to the evidence properly to be considered to establish that the appellant directed Sergeant 776 Joseph

Delailomaloma to do an arbitrary act. The assessors had heard the evidence given by the Sergeant and by the appellant himself. There could be no doubt but that Naiveli directed the Sergeant as to what he had to do. What Naiveli wanted was to get possession of the property. The appeal against conviction is dismissed.

Turning then to the question of the sentence. After the accused had been found guilty the learned trial judge heard a plea in mitigation from Naiveli's counsel. He noted the illustrious career the accused had in the police force but said he could not overlook the gravity of the offence. The act of the eviction he said carried out by the accused under official guise was an outrage on a defenceless woman who was left to her own resources with five school- going children on her hands in the absence of her husband who had gone abroad. The learned judge said that the case called for a deterrent sentence as a warning to like-minded others.

He then went on however to consider whether the sentence should be suspended. He noted the spotless antecedents and that the likelihood of reoffending in a similar matter was remote as it was fairly certain that the accused would lose his present job with all that entailed. He referred to the fact that this was one of the first crop of corrupt cases that had come up recently under section 111 of the Penal Code which had been dormant for far too long. He therefore suspended the sentence of 9 months imprisonment for a period of one year. He also imposed a fine of $1,000.00 in default 6 months imprisonment and directed the

Registrar to hand over to the complainant $750.00 out of the fine if paid as compensation for the loss and humiliation she suffered as a result of the acts of the accused.

In Principles of Sentencing by D.A. Thomas second edition the learned author at page 240 says

> "The court has stated many times that a sentencer contemplating a suspended sentence should first consider whether the offence would justify a sentence of imprisonment in the absence of a power to suspend. If the offence would justify an immediate sentence of imprisonment the proper length of the sentence should be determined having regard to the gravity of the offence and the mitigation. If the length of the sentence so determined is not more than two years the sentencer may consider suspension."

Clearly the learned judge followed this principle in determining the sentence to be imposed. The learned author of Thomas goes on at page 244 to say:

> "The difficulty that arises at this point is that if the first two stages have been followed correctly all factors which are relevant to the sentence should have been taken into account already. The sentencer must either give double weight to some factors for which he has previously made allowance in calculating the length of the sentence or search for some new factors which would justify suspension although they are not relevant to the other issues which the sentencer has already considered".

At page 245 the learned author says:

> "The most typical use of the suspended sentence so far as the Court of Appeal is concerned is the case of an offender of previous good character who has committed an offence of a relatively serious nature (but not in the first order of gravity) under circumstances of substantial mitigation".

In DPP v Jolame Pita 20 FLR 5 at p.7 the then Acting Chief Justice said that "**once a court had reached a decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension**".

The State before us submitted that the circumstances relied on by the learned judge were :

1. **spotless antecedents of the accused;**
2. **the unlikelihood that accused would reoffend;**
3. **that the accused would lose his employment**

She submitted that these do not amount to special circumstances. She submitted that there were special circumstances in the case which should have worked against the suspension of the sentence. They were:

1. **The respondent was a senior ranking police officer who unlawfully used his position to evict a defenceless woman;**
2. **The respondent had declared a commercial interest in the farm from which the woman was being evicted;**
3. **The use of tax payers' resources to carry out the eviction with no reciprocal return.**

We note that such offences strike at the very roots of the administration of law and order and justice in this country. Such an offence can be committed only by a person who is in a position of authority and trust. If it became a pattern that because of their high position they would not serve a term of imprisonment it could only be to the detriment of the whole

country. 375

We note that in the case the **State** v **Chang** Criminal Case No 8 of 1991 on 1 November 1991 an offence against section 111 was punished by a term imprisonment for 12 months which was suspended for a period of two years. That sentence was imposed by the same judge as was involved in the case before us. Again on 30th April 1993 a case of **Kubunavanua** v **The State** Cr App No. 8b of 1992 came before this court. That concerned a police officer who wrongfully used a television screen and radio. He was convicted of an offence against section 111 and was sentenced to 9 months imprisonment suspended for 18 months. This court did not deal with the sentence because the appeal against sentence was not pursued.

We have given most anxious consideration to whether the suspension should be lifted and Naiveli be required to serve an immediate prison sentence. We are conscious of the fact that this possibility has been hanging over his head since July 1992 when the State appealed against the sentence. He has lost his position and has not only been disgraced but has suffered severe financial loss as a result. He was aged 47 when he was sentenced and would not normally have retired until he was 55. Apart from this one lapse he has had an exemplary career record. The fine imposed is a very heavy one and undoubtedly Mrs Vosararawa will benefit greatly from the amount she will receive. Further he was convicted only of the misdemeanour (what Thomas calls "not of the first order of gravity") and not of the felony.

We have come to the conclusion, in spite of the other factors urged upon us by the state that we would not be justified in

The lifting of the suspension and requiring Naiveli to serve an immediate term of imprisonment would be a very severe extra penalty particularly now when the period of suspension has long since expired.

We wish to make it clear however that people in high office who abuse their power may well in the future be required to serve an immediate prison sentence. This comment should serve as notice to any such people that the courts are not prepared to regard such offences lightly and that they will not suspend sentences just because the consequences for such a person are severe.

The appeal against sentence is also dismissed. If the fine has not been paid within one month of the date of this judgment a default summons should be issued and Naiveli required to serve the 6 months imprisonment imposed for default. The payment to Mrs Vosararawa will be made from the fine.

.....
(Sir Moti Tikaram)
President Fiji Court of Appeal

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(Sir Peter Quilliam)
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal