IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0013 of 2023
[In the High Court at Suva Case No. HACD 008 of 2022]

BETWEEN : VIJENDRA PRAKASH

Appellant

AND : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Respondent

Coram : Mataitoga, RJA
Dobson, JA
Heath, JA

Counsel : Mr. S. Nandan for the Appellant
Ms. S. Fatafehi for the Respondent

Date of Hearing : 05 July 2024

Date of Judgment : 26 July 2024

JUDGMENT

Mataitoga, RJA

1. I have viewed the judgment prepared by Dobson JA and Heath JA. I concur with the reasons and the conclusion therein.

Dobson, JA and Heath, JA

Introduction

2. In 2018, Mr. Vijendra Prakash was elected as a Member of Parliament of the Republic of Fiji. Following his election, he was obliged to provide certain information to the Secretary

to the Parliament about his place of abode, for the purposes of determining when he may be eligible to receive specified allowances and benefits payable under the Parliamentary Remuneration Act 2014.[1]

3. After Mr. Prakash (and other new Parliamentarians) had taken the Oath of Office and Oath of Allegiance on 26 November 2018, two induction programmes were conducted in relation to day-to-day administrative issues. At the second, Parliamentarians were requested to provide a declaration affirming certain personal details, including place of abode. The relevant declaration requires its maker to specify the place at which he or she "permanently resides".[2]

4. On 27 November 2018, Mr. Prakash provided a declaration to the Acting Secretary General to the Parliament (the Acting Secretary General). However, that declaration was not accepted because Mr. Prakash had not identified one permanent address. Instead, he had identified two places at which he resided for part of each week, some distance away from each other.[3] On 11 February 2019, Mr. Prakash made a fresh declaration specifying "Waidracia, Vunidawa, Naluwai, Naitaisiri" as the place where he "permanently resides". Subsequently, he made claims on the basis that was his permanent residence. The claims totaled $33,670.

5. Following an investigation, the Fiji Independent Commission Against Corruption (the Commission) laid two charges against Mr. Prakash for making a false declaration[4] and obtaining an unlawful financial advantage.[5] The charges were expressed as follows:

'FIRST COUNT
Statement of Offence (a)

FALSE INFORMATION TO PUBLIC SERVANT: Contrary to Section 201(a) of the Crimes Act No. 44 of 2009.

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[1] The relevant part of the Schedule is set out at para 60 below.
[2] Parliamentary Remuneration Act 2014, Part B of Schedule.
[3] See para 71 below.
[4] Crimes Act 2009, s 201(a).
[5] Ibid, s 326(1).

Particulars of Offence (b)

VIJENDRA PRAKASH on or about 11th February 2019 at Suva in the Central Division gave Viniana Namosimalua the Acting Secretary General to the Parliament of Fiji a person employed in the Civil Service false information that [his] permanent place of residence is in Waidracia, Vunidawa, Nabuni, Naluwai Naitasiri which he knows to be false knowing it to be likely that he will thereby cause Viniana Namosimalua to approve allowance claims submitted by him which Viniana Namosimalua ought not to do if the true state of facts with respect to the permanent place of residence of **VIJENDRA PRAKASH** were known to her.

SECOND COUNT
Statement of Offence (a)

OBTAINING FINANCIAL ADVANTAGE: Contrary to Section 326(1) of the Crimes Act No. 44 of 2009.

Particulars of the Offence (b)

VIJENDRA PRAKASH between 1st August 2019 and 31st March 2020 at Suva in the Central Division engaged in conduct namely submitted Allowance Claims to the office of the Acting Secretary General to the Parliament of Fiji and as a result of that conduct obtained a financial advantage amounting to $33,670.00 from the office of the Acting Secretary General to the Parliament of Fiji knowing or believing that he permanently resides at Lot 1, Omkar Road, Narere, which is a place less than 30 kilometers away from the place of Parliament or Committee as per the **Parliamentary Remunerations Act 2014** and therefore was not eligible to receive the said financial advantage.*'*

The trial

6. The charges were summary offences that would, ordinarily, have been heard in the Magistrate's Court. The Commission applied for an order transferring the charges to the High Court for trial. The application was made under s 188(2) of the Criminal Procedure Act, which states:

Power to stop summary trial and transfer to High Court

188. —
...
(2) Before the calling of 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 of this Part.

7. The transfer application was heard in the Magistrate's Court at Suva, by Resident Magistrate Savou. It was heard together with similar applications made in respect of six other accused against whom the Commission had brought charges. The Resident Magistrate gave his judgment in respect of all seven applications on 6 December 2021.[6] Mr. Prakash sought to appeal that decision but the High Court dismissed it on the ground that it did not have jurisdiction.[7]

8. Mr. Prakash was tried in the High Court between 19 September 2022 and 21 November 2022. 23 witnesses were called for the prosecution. At the close of the prosecution case, Mr. Prakash was put to his election, in accordance with s 231(1) of the Criminal Procedure Act. An issue has arisen over whether Mr. Prakash was entitled to defer a decision as to when to give evidence on his own behalf until after at least some of the other witnesses whom he wished to call had given evidence. We explain the nature of the issue when addressing that ground of appeal.

9. The High Court delivered judgment on 9 December 2022.[8] Kumarage J found Mr. Prakash guilty on both charges. On 3 February 2023, Mr. Prakash was sentenced to three years

[6] ***Fiji Independent Commission Against Corruption v Rasova*** [2021] FJMC42; Miscellaneous Application 28 of 2021 (6 December 2021).
[7] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC 33; HACDA010.2021S (4 February 2022).
[8] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC 775; HACD008.2022S (9 December 2022).

imprisonment, of which 28 months were to be served immediately with a non-parole period of 22 months. The remaining period of eight months was suspended for five years.[9]

The appeal

10. Mr. Prakash sought leave to appeal against both conviction and sentence. No less than 28 grounds were advanced to support the intended conviction appeal. The leave application was heard by Mataitoga RJA on 19 February 2024. On 27 February 2024, His Lordship granted leave on two grounds of appeal against conviction, but otherwise dismissed the application.[10]

11. The two grounds on which leave to appeal against conviction was granted are:

    a. Did the trial Judge err in deciding that Mr. Prakash was not entitled to delay his election to give evidence on his own behalf until other defence witnesses had given their evidence?[11]
    b. Ought the Magistrate's Court to have transferred the hearing of the charges from that Court to the High Court and, if so, does that affect the convictions?[12]

12. On 5 July 2024, the Court heard Mr. Prakash's appeal on the two grounds permitted by Mataitoga RJA, and a renewed application for leave to appeal against conviction on 23 of the remaining grounds that were dismissed by the Resident Judge of Appeal. Mr. Prakash made a separate application for leave to adduce further evidence on the conviction appeal. That application was opposed by the Commission.

13. In addition, Mr. Prakash gave notice of an intention to seek leave to appeal against sentence on the grounds that it was too harsh, unjust and that the sentencing Judge failed to give proper consideration to all mitigating factors.

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[9] ***Fiji Independent Commission Against Corruption v Prakash*** [2023] HACD 008.2022S (3 February 2023), at para 20.
[10] ***Prakash v Fiji Independent Commission Against Corruption*** [2024] AAU 13.2023 (27 February 2024).
[11] Ibid, at paras 13–16.
[12] Ibid, at paras 50–53.

Structure of judgment

14. We adopt the following structure for this judgment:

   a. First, we consider Mr. Prakash's application for leave to adduce additional evidence on the conviction appeal.
   b. Second, we consider whether the High Court Judge erred in requiring Mr. Prakash to give evidence before his other witnesses. (the order of defence witnesses issue)
   c. Third, we consider whether the Magistrates Court's decision to transfer the charges to the High Court is affected by the appearance of bias, and if so, whether such appearance of bias also taints the High Court proceedings to an extent that Mr. Prakash did not receive a fair trial. (the apparent bias issue)
   d. Fourth, we deal in turn with the remaining 23 grounds on which the renewed application for leave to appeal against conviction is pursued.
   e. Fifth, we consider the sentence appeal.

The application for leave to adduce further evidence

15. Although dated 21 May 2024, Mr. Prakash's motion to adduce fresh evidence on appeal was provided to the Court and to counsel for the Commission shortly before the hearing on 5 July 2024. The nature of the additional evidence is explained in an affidavit sworn by Mr. Prakash in support of the application. Mr. Prakash seeks to introduce a copy of a statutory declaration made by Mr. Jeremaia Savou, the Resident Magistrate who determined the Commission's application to transfer the charges to the High Court.[13] The declaration, on its face, discloses discussions that took place in the period between the hearing before the Resident Magistrate and delivery of his judgment on 6 December 2021. According to the declaration, the then Chief Justice called Mr. Savou and a colleague to his chambers in November 2021 and gave an indication that the charges should be transferred to the High Court. The then Chief Justice is said to have added that he had spoken to both the Prime Minister and the Attorney-General, who did not want any technicalities to affect the case.

[13] See para 7 above.

At that stage, the Resident Magistrate had not given judgment. The declaration records that the Resident Magistrate completed his ruling "to reflect the direction of the then Chief Justice".

16. Mr. Nandan, for Mr. Prakash, submits that the evidence was recently discovered and provides cogent support for a submission that the Resident Magistrate had transferred the charges for hearing in the High Court for an ulterior purpose. Mr. Nandan submitted that the Court had jurisdiction to admit the evidence, and, on the evidence our discretion should be exercised in favour of Mr. Prakash.

17. Ms. Fatafehi, for the Commission, had limited time to consider and make submissions on the application. Nevertheless, she made it clear that it was opposed. Ms. Fatafehi raised some questions about the authenticity of the statutory declaration and criticized the late attempt to introduce it as evidence as something of an ambush. During the hearing, the Court indicated (provisionally) that it would admit the evidence but, at the conclusion, members of the Court met with counsel for both Mr. Prakash and the Commission in chambers to discuss the issue further. The Court extended the time for submissions in opposition to be made by counsel for the Commission and specifically asked to be advised if there were any disputes about the authenticity of the declaration.

18. Ms. Fatafehi filed further submissions on 10 July 2024. Nothing was said to indicate that authenticity of the statutory declaration was in issue. The Commission's opposition was based on a narrow reading of the Court's supplemental powers[14] to obtain additional information for the purposes of an appeal and a contention that the "new" evidence had been in the possession or control of the solicitors for Mr. Prakash since May 2024, at the latest. Ms. Fatafehi reiterated that, although the application appears to have been filed on 21 May 2024, the Commission was not served until the day before the hearing, 4 July 2024.

19. There is much merit in Ms. Fatafehi's submission of ambush. We accept that the focus of the ground of appeal based on the transfer of the charges from the Magistrate's Court has

[14] Court of Appeal Act 1949, s 28.

changed. However, in substance, the appeal point always challenged the fairness of the trial in the High Court. That position has not changed, even though the "new" evidence would bring an added dimension to the way in which the fair trial issues should be considered.

20. On 11 July 2024, the Registrar of this Court provided written advice to counsel for the parties that the Court had decided to grant the application. As indicated in that letter, the Court considers, in exercising what we consider to be a broad discretion to receive further evidence under s 28 of the Court of Appeal Act, that the paramount consideration must be the maintenance of public confidence in the judicial system. To refuse to admit evidence of this type would smack of an attempt to avoid a proper review of judicial action in a manner that might be seen as protective of the judiciary, rather than in the interests of justice in a particular case. Although the lateness and ambush points taken by the Commission would generally have assumed greater significance, on the facts of this specific case we consider that the evidence should be admitted. When dealing with the apparent bias issue, we explain the way in which we have used the evidence and the weight attached to it.

<u>Appellate review</u>

21. This Court's jurisdiction on a conviction appeal is set out in s 23 of the Court of Appeal Act. Relevantly, for the purposes of this appeal, s 23(1)(a) provides:

> *23.–(1) The Court of Appeal –*
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> *(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; and*
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> …
>
> *Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or against acquittal might be*

decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.

....

22. Section 23(1)(a) anticipates appeals against conviction on both questions of law and unreasonable verdicts. However, an appeal can only succeed if any error amounts to a miscarriage of justice and the proviso to s 23(1)(a) does not apply. In this case, there are two questions of law on which Mataitoga JA gave leave for Mr. Prakash to appeal against conviction and one on which a renewed application for leave to appeal is brought. The balance of the grounds raised go to the question whether the verdicts returned by the Judge are unreasonable, and should be set aside.

23. We were not referred to any relevant Fijian authority on the question when an appellate court should intervene in a trial conducted before a Judge, without Assessors. In ***Balemaia v State***,[15] the Supreme Court used Australian and Canadian comparator authorities, when considering the discrete question whether the verdicts were unreasonable because they were inconsistent. That question arose in the context of a trial before a judge, sitting with Assessors. By reference to *R v Darby*[16] and *Mackenzie v The Queen*,[17] the Supreme Court stated that, "a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts".[18]

24. Section 23(1)(a) of the Court of Appeal Act is in similar terms to s 385(1)(a) of the Crimes Act 1961 (NZ), a provision that has since been repealed and replaced by the Criminal Procedure Act 2011 (NZ). Section 385(1)(a) was considered by the Supreme Court of New Zealand in *R v Owen*.[19] In that case, in a judgment delivered by Tipping J, the Supreme

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[15] ***Balemaira v State*** [2013] FJSC 17; CAV0008.2013 (6 December 2013).
[16] ***R v Darby*** (1982) 148 CLR 668.
[17] ***Mackenzie v The Queen*** (1996) 190 CLR 348, at 368.
[18] ***Balemaira v State*** [2013] FJSC 17; CAV0008.2013 (6 December 2013), at para 21, per Goundar JA, with whom Gates P and Calanchini JA agreed by reference to an earlier decision of the Court of Appeal.
[19] ***R v Owen*** [2008] 2 NZLR 37 (SC).

Court made it clear that a verdict will be unreasonable "if having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty".[20] Tipping J added that a verdict that was unsupported by evidence must, necessarily, be an unreasonable verdict.[21]

25. Helpfully, the Supreme Court in *R v Owen*, endorsed, by reference to an earlier judgment of the Court of Appeal in *R v Munro*,[22] the relevant principles of appellate review under the equivalent of s 23(1)(a) of the Court of Appeal Act. We paraphrase the points made by the Supreme Court as follows:[23]

   a. The appellate court is performing a review function, not one of substituting its own view of the evidence.
   b. Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is an example.
   c. The weight to be given to individual pieces of evidence is essentially a jury function.
   d. Reasonable minds may disagree on matters of fact.
   e. The first instance court is charged with the fact-finding function in a criminal trial. Appellate courts should not lightly interfere in this area.
   f. An appellant who appeals on the "unreasonable verdict" ground must recognise that an appellate court is not conducting a retrial on the written record.
   g. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.
   h. The test is not whether the verdict is one that no jury could possibly have come to. A verdict will be unreasonable where it is one that having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt.

[20] Ibid, at para [5].
[21] Ibid, at para [12].
[22] ***R v Munro*** [2008] 1 NZLR 87 (CA).
[23] ***R v Owen*** [2008] 2 NZLR 37 (SC), at paras [13]–[15].

i. The appellate court must always keep in mind that it is not the arbiter of guilt, and that reasonable minds might disagree on findings of fact.

26. Unlike the position with Assessors in Fiji, guilty verdicts returned by juries in New Zealand lead to the entry of a conviction. There is no requirement for a judge to approve a jury's verdict. However, New Zealand legislation does provide for some classes of cases to be tried before a judge sitting alone. A more refined approach has been taken to the question of how the Court should determine whether an unreasonable verdict has been returned in such a case.

27. In general terms, an appellate court will consider the reasons given by the Judge for his or her conclusion, give due weight to the advantages of a judge hearing evidence, and have regard to the general need for explicit comment if the evidence of a critical witness were rejected. In *R v Connell,*[24] Cooke J, delivering the judgment of the Court of Appeal, said:[25]

> *"Only in most exceptional cases, if ever, is it likely to be consistent with the judicial role in trying an indictment to give no reasons for the verdict. If the verdict is not guilty, however, occasionally a very brief statement of reasons is best. In other cases, whether the verdict is guilty or not guilty, it is obviously impossible to work out a formula covering all circumstances. But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly."*

28. When section 385 of the Crimes Act 1961 was repealed, it was replaced by provisions setting out the roles of first and second tier appeal courts, and the circumstances in which they might interfere with trial verdicts. The ground of "unreasonable verdict" was retained for both jury and judge-alone trials. In ***Sena v Police***,[26] the Supreme Court of New Zealand

[24] ***R v Connell*** [1985] 2 NZLR 233 (CA), at 237.
[25] Ibid, at 237–238.
[26] ***Sena v Police*** [2019] 1 NZLR 575 (SC).

reconsidered application of that concept to a judge-alone trial. In giving the judgment of the Supreme Court, William Young J made it clear that the trial judge's reasons should (a) engage with the case, (b) identify the critical issues, (c) explain how and why those issues are resolved and (d) provide a rational and considered basis for the verdict. His Honour indicated that a conclusory credibility finding would not suffice.[27] He added that, if an appellate court were to come to a different view on the facts, the trial judge will necessarily have erred.[28] Nevertheless, appellate judges must always keep in mind the advantages of those who conduct a witness trial, and are aware of its particular dynamics.[29]

The order of defence witnesses issue

29. At the close of the prosecution case, Mr. Prakash indicated through counsel that he expected to give evidence and to call other witnesses. He intended to defer a decision on when he would give his evidence until at least some of the other defence witnesses had given theirs. The prosecution opposed that course. It was clearly a case in which there would have been little point in urging the Judge to exercise a discretion to allow Mr. Prakash an exemption from the usual rule, (instead of insisting on a right to do so) as the cross examination of numerous State witnesses showed that there were significant strongly contested matters going to credibility, so the concern that the appellant would tailor his evidence depending on the outcome of earlier witnesses called on his behalf was insurmountable. The trial Judge heard argument from counsel and issued a ruling declining the appellant's entitlement to defer a decision on when he would give his own evidence.[30]

30. The Judge held that relevant provisions in the Constitution of Fiji (the Constitution) and the Criminal Procedure Act 2009 (the CPA) were not in conflict and that the latter provision contemplated a sequence in which defendants electing to give evidence in their defence would do so before calling any other witnesses. The Judge cited authority, *R v Smith*,[31] a

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[27] Ibid, at para [36].
[28] Ibid, at para [38].
[29] Ibid, at para [40].
[30] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC643; HACD008.2022S (13 October 2022).
[31] ***R v Smith*** [1968] 1 WLR 636 (Cusack J).

judgment of the Court of Appeal of England and Wales which recognised the fair trial considerations that justified this practice:

> *"The general rule and practice in criminal cases is that witnesses as to fact on each side should remain out of court until they are required to give their evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing. In the view of this court the general practice to which I have referred is the correct practice which ought to be observed."*[32]

31. Since that Court of Appeal judgment, the position has been regularised by statute in England. The Police and Criminal Evidence Act 1984 (UK) now includes in section 79 the following:

> *"If at the trial of any person for an offence–*
>
> *(a) the defence intends to call two or more witnesses to the facts of the case; and*
> *(b) those witnesses include the accused, the accused shall be called before the other witness or witnesses unless the Court in its discretion otherwise directs."*

32. In New Zealand (see ***R v A***),[33] the same position has been taken as that reflected in the UK statute, namely that the convention is for any defendant intending to give evidence to do so before any other witnesses called on his or her behalf, but that the Court does have a discretion to consider an appropriate application to vary the order of the giving of evidence if the circumstances justify it.

33. The rare exceptions to that requirement will arise where considered by a trial judge to be justified, without interfering with the fundamental concern that a defendant should not be

[32] ***R v Smith*** [1968] 1 WLR 636, (1968) 52 Cr App R 224, per Cusack J.
[33] ***R v A*** *(order of accused's evidence)* HC Auckland CRI-2004-4-10735; [2014] NZAR 532.

given the opportunity to tailor his or her evidence by observing the evidence of others called on his or her behalf before him or her. *R v A* reviewed the situation in Australia as well as the United Kingdom, reinforcing the fact that the convention is consistent.

34. Mr. Nandan's argument required primacy to be given to section 14(2) of the Constitution which in material part reads:

> *"Every person charged with an offence has the right;*
>
> *(j) to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from exercise of any of these rights;…*
> *(l) to call witnesses and present evidence, and to challenge evidence presented against him or her."*

35. That provision is to be read together with section 232(2) of the CPA, which provides:

> *"[CP 232] The defence*
> *…*
>
> *(2) The accused person may then give evidence on his or her own behalf, and then–*
>
> *(a) any defence witnesses may be examined, cross-examined and re-examined; and*
> *(b) the defence case shall be summed up."*

36. We took Mr. Nandan to accept that, in other comparable jurisdictions exceptions to the general rule are at the trial judge's discretion, rather than as a right able to be asserted by a defendant. However, his argument was that the provisions in section 14(2) of the Fiji Constitution make the position different in this jurisdiction. He submitted that on its proper construction, these provisions create an entitlement for a defendant to call and present (his/her own) evidence in whatever sequence best suits the defendant's case.

37. However, the sequence in which the rights of a defendant are specified in section 14(2)(l) of the Constitution to the discrete activities of calling evidence from others, and that of giving

evidence him or herself, is insufficient to confer an important and unusual right. The provision follows closely after the confirmation of the right to silence in section 14(2)(j). Despite the primacy to be given to the provisions of the Constitution, there is insufficient in the broadly expressed recognition of rights to expand this right beyond its well-settled boundaries.

38. Given the existing provisions in s 232(2) of the CPA, if the drafters of section 14(2) had intended to create an additional right beyond that of long-standing, they could be expected to make that extension specific. This would have been achieved by the addition of words such as "… in whatever order the person charged elects …" after the recognition of the right to call evidence and present evidence.

39. In contrast, section 232(2) of the CPA is in proscriptive terms contemplating the sequence that reflects procedure internationally. The use of the permissive "may" in relation to giving evidence is necessary to retain the emphasis that there can be no compulsion on a defendant's election as to whether to give evidence. That use of "may" cannot reasonably be interpreted as recognising an option for a defendant to reverse the sequence of evidence reflected in the wording used.

40. Mr. Nandan rejected the notion that recognition of the right he contended for would lead to unfairness to the State in running criminal trials. He submitted that the settled rules for the conduct of trials are not intended to make them fair to both sides, with priority being given to the need to preserve a defendant's right to fair trial. That existing lack of balance cannot justify a forced interpretation of the scope of the right provided in section 14(2)(l) of the Constitution. Certain of the rules do exist to assist the State in attempting to establish the elements of charges beyond reasonable doubt, and to empower the Court to retain control of trial processes.

41. Mr. Nandan cited extensively from the High Court of Australia decision in *Lee v R* for the proposition that a finding there has been a miscarriage of justice does not require there to

have been any element of practical unfairness.[34] That appeal arose in very different circumstances. The appellants had been defendants in criminal proceedings and had, before charges were laid against them, been required to give evidence to the New South Wales Crimes Commission. They had provided that evidence on terms that it would not be published. In breach of the Commission's Direction to that effect, transcripts of the evidence were made available to the Police involved in the prosecution and to the prosecutors. The High Court of Australia overturned a Court of Appeal judgment that whilst this amounted to a miscarriage of justice, there was no "practical unfairness" so the trial result should not be disturbed. Although the general proposition may well be valid, that authority cannot add anything on this ground of appeal. As a matter of law, the appellant did not have a right to elect when, in the course of other evidence called in his defence, he would give evidence himself. There is no suggestion that anyone associated with the prosecution improperly influenced the scope of the appellant's election on giving evidence.

42. Permitting defendants to defer deciding when they will give evidence would, in many scenarios, seriously hamper the ability of the prosecution to test the defence evidence. One concern that was not canvassed in argument is the prospect of a defendant indicating an election to give evidence at the close of the State's case, calling other witnesses and then resiling from his or her election. Given the primacy to the right to silence in all circumstances, the Court and the State would likely have to accept that change, however much the course of evidence from the other defence witnesses had depended on the assumption that the defendant would also give evidence.

43. We consider that the additional difficulties created in orderly management of criminal trials, including elements of unfairness to the prosecution, add weight to what we are satisfied is the natural and intended scope of section 14 (2) (l) of the Constitution. It does not create the right asserted in this appeal and this ground of appeal is dismissed.

[34] ***Lee v R*** [2014] HCA 20.

The apparent bias issue

44. As previously indicated,[35] the focus of the argument based on the transfer of the charges for determination in the High Court has changed. We are now required to consider whether there was apparent bias on the part of the Resident Magistrate who made the transfer decision and, if so, whether that could have given rise to a miscarriage of justice sufficient to impugn the convictions.

45. We refer to the statutory declaration of the Resident Magistrate, Mr. Savou, which we have given leave to adduce as part of additional evidence provided by Mr. Prakash. By way of introduction, Mr. Savou confirmed that:

> *a. He was appointed around February/March 2021 as one of four Anti-Corruption Magistrates in Fiji.*
> *b. As a result of his appointment, he was given carriage over certain prosecutions that had been initiated by the Commission; particularly in the Navua, Suva, Nasinu, Nausori and Labasa jurisdictions.*
> *c. Several of the prosecutions for which he was given responsibility were those with which he dealt on the Commission's application to transfer the charges for hearing in the High Court.*
> *d. Applications to transfer those cases were extant at the time he received them. The Magistrate's Court was required to make an order for transfer because the charges were all summary in nature.*
> *e. On considering the application, Mr. Savou had regard to various documents, including legal submissions, put before him on behalf of both the Commission and the accused. In addition, he heard oral argument from counsel for all parties.*

46. Mr. Savou explains the nature of discussions that he had with then Chief Justice Kamal Kumar in the period between hearing the transfer application and rendering his decision on 6 December 2021. Mr. Savou's declaration states:

> *"That prior to delivering the decision for the abovementioned matters, my colleague (Ms. S Kiran) and I were summonsed in the month of November 2021 by the Honorable Chief Justice Kamal Kumar to his Lordship's office.*

[35] See para 19 above.

> *That whilst at the office of the Honorable Chief Justice Kamal Kumar, amongst other things discussed with regards to the Anti-Corruption Court, I was informed by Honorable Chief Justice Kamal Kumar to have the matters for all of [the persons who were the subject of the Commission's application] transferred to the High Court.*
>
> *That [the Chief Justice] stated as follows and I quote: "I want all the parliamentarian's cases to be sent up. I have spoken with the PM and the AG and they don't want any technicality to affect the case".*
>
> *That at the point I had not completed my ruling however I completed my ruling to reflect the direction of the Honorable Chief Justice Kamal Kumar."*

47. Following completion of oral submissions before us, we understood the transfer issue to be put on the following basis:

    a. The Commission had decided that the seven cases on which it made a transfer application should be removed to the High Court for trial. An application for transfer was duly made.
    b. To determine the applications, Mr. Savou properly heard from all parties, including oral submissions made by their respective counsel.
    c. After reserving his decision, Mr. Savou (and a colleague) were summonsed to a meeting with the Chief Justice, at which they were told:

        i. The Chief Justice wanted all anti-corruption cases involving Parliamentarians to be transferred to the High Court and
        ii. The Prime Minister and the Attorney-General did not want any technicality to affect the prosecutions.

    d. Although at the time of transfer, an "Anti-Corruption Division" of the High Court had been established, only one judge had been appointed, Kumarage J.
    e. The Chief Justice exerted improper influence on the Magistrate to determine cases before him (in which judgment had been reserved) in a particular way, without any of the parties to that application knowing that those discussions had taken place.

f. Had counsel for the accused known of the discussions involving the Chief Justice and the Resident Magistrate, they would have been entitled to seek recusal of the Resident Magistrate before any decision was given, on the grounds of apparent bias.

48. In ***Koya v State***,[36] the Supreme Court considered the test to be applied in a case in which a trial judge had been accused of apparent bias. At that time, different tests were used in Australia and New Zealand. In Australia, the test was whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has pre-judged or might pre-judge the case.[37] In New Zealand, the Court of Appeal had followed English authority,[38] asking whether, in the circumstances of the case, there was a real danger or real likelihood (in the sense of possibility) of bias.[39] Ultimately, the Supreme Court of Fiji (comprised of Sir Timoci Tuivaga CJ, Lord Cooke of Thorndon and Sir Anthony Mason) expressed the view that there was little practical difference between the tests but seems to have applied what might be regarded as the lower Australian threshold.[40] Importantly, for present purposes, the Supreme Court emphasised the need for any successful allegation of apparent bias to result in a miscarriage of justice before convictions could be disturbed.[41]

49. The test applied in New Zealand is now aligned to that of Australia. The test was restated by the Supreme Court of New Zealand, in both *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*[42] and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No. 2).*[43] The issue arose in the context of a challenge, based on apparent bias, against a judge who had heard an appeal (as part of a panel) on grounds of business and personal relationships between the judge and senior counsel for the successful party. The Supreme Court adopted what had been said by the High Court of Australia in *Ebner v Official Trustee in Bankruptcy.*[44] In both *Saxmere* judgments, the

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[36] ***Koya v State*** [1998] FJSC 2; CAV0002.1997 (26 March 1998).
[37] ***Webb v The Queen*** (1994) 181 CLR 41 (HCA).
[38] ***R v Gough*** [1993] AC 646 (HL).
[39] ***Auckland Casino Ltd v Casino Control Authority*** [1995] 1 NZLR 142 (CA).
[40] ***Koya v State*** [1998] FJSC 2; CAV0002.1997 (26 March 1998) at pp 6-7.
[41] Ibid, at p 6, citing s 23(1)(b) of the Court of Appeal Act.
[42] ***Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*** [2010] 1 NZLR 35 (SC).
[43] ***Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*** *(No. 2)* [2010] 1 NZLR 76 (SC).
[44] ***Ebner v Official Trustee in bankruptcy*** (2000) 205 CLR 337 (HCA).

Supreme Court held that the test for determining whether a judge was disqualified was met: "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[45] We apply that test.

50. The issues for our determination are:

a. Is the decision of the Resident Magistrate vitiated for apparent bias on his behalf?
b. If so, has there been any miscarriage of justice such as to require the convictions entered against Mr. Prakash to be quashed.

51. On the face of the evidence before us, there have been conversations involving the former Chief Justice and a Resident Magistrate about applications on which the Magistrate had reserved judgment. Assuming (without deciding for present purposes) that the Chief Justice supported any views by reference to those expressed by the Prime Minister and Attorney-General, we have no doubt that a fair-minded lay observer might reasonably apprehend that the Resident Magistrate might not bring an impartial mind to the resolution of the transfer application. It is the element of potential political influence that separates appropriate discussions about judicial administration from an attempt to influence a particular decision.

52. We interpolate to explain why we have assumed the correctness of the statutory declaration but made no finding in respect of it. In the absence of any challenge to the authenticity of the statutory declaration, we have assumed that it accurately records the discussions but we do not find (one way or the other) whether the conversations took place in the form set out. There has been no opportunity for the maker of the statutory declaration to answer any criticisms of it. It would be unfair for us to impugn the statutory declaration in the absence of its content being tested in that way.

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[45] ***Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*** [2010] 1 NZLR 35 (SC) at para [3] and ***Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*** *(No. 2)* [2010] 1 NZLR 76, at para [4].

53. The next question concerns the impact of the transfer order on the outcome of the criminal proceeding against Mr. Prakash. To succeed on an appeal, Mr. Prakash must demonstrate that apparent bias on the part of the Resident Magistrate gives rise to a "miscarriage of justice" that requires the appeal to be allowed.[46] Determination of that question involves a consideration of the basis of the Resident Magistrate's decision, and any concerns that it might raise about the fairness of the trial.

54. We consider that the Resident Magistrate's decision, on public interest grounds, is unimpeachable. These were cases attracting a high level of public interest, and of potentially important precedential effect. We were advised that all prosecutions of this type against politicians have been determined in the High Court. However, that is a neutral factor as it could be used to support the apparent bias or indicate that the cases demanded resolution in the High Court. Arguably, defendants have a potential advantage in being afforded appeal prospects to higher courts than would be available in respect of any Magistrate's Court convictions. Although the High Court declined to hear an appeal from the transfer on jurisdictional grounds, the Judge who dealt with that issue observed that the transfer order did no more than to change the forum for the criminal proceeding.[47]

55. While we conclude that a fair-minded but informed observer might reasonably apprehend or suspect that the Resident Magistrate had been influenced inappropriately by powerful outsiders in deciding to transfer the various criminal prosecutions to the High Court, we do not consider that apparent bias of that type vitiates the convictions entered after a High Court trial. In our view there is nothing to suggest that the High Court Judge who presided over Mr. Prakash's trial was influenced by knowledge of the conversation between the Chief Justice and the Resident Magistrate. No allegation of actual bias has been made against the High Court Judge. To the contrary, the record indicates that the trial Judge exhibited fairness in the way in which the trial was conducted. Save for the legal issue relating to the time at which the accused ought to have been entitled to make his election to give evidence himself,

[46] Court of Appeal Act s 23(1)(b).
[47] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC 33; HACDA010.2021S (4 February 2022), at para 21.

no process complaints have been made about the way in which Kumarage J conducted the trial.

56. We conclude that there has been no miscarriage of justice. That conclusion is supported by the Supreme Court's decision in ***Koya v State***.[48] The Court said:[49]

> *6. ... Here we are concerned with a trial which has actually taken place and with the question whether there has been a miscarriage of justice on the ground that there was a real danger of bias or a real apprehension or suspicion of bias. In the determination of that ground, the record of the trial, showing how it was conducted by the trial judge, is of fundamental importance. Generally speaking, if the record were to demonstrate that a judge ... conducted a trial impeccably, it would be difficult to establish that there was a real danger that the trial was vitiated by apparent bias or that a fair-minded observer, knowing the facts, would reasonably apprehend or suspect that such was the case.*

57. In the present case, there is no nexus between any apprehended bias on the part of the Resident Magistrate and the Judge who conducted the trial. Mr. Nandan suggested that the Chief Justice's encouragement of the Resident Magistrate to transfer the proceedings to the High Court was so that a particular Judge could deal with it in a manner that would produce a successful outcome for the Commission. However, we do not accept that to be an apprehension of apparent bias that would likely occur to a fully informed reasonable observer. There is a logical gap between choices of venue, and any partisan interest in outcome. Despite Mr. Nandan's strong urging, we are satisfied that the gap would remain in the minds of rational observers.

58. In our view, there is a break in the chain of causation between apparent bias in respect of the Resident Magistrate and determination of the charges by the High Court after transfer. There is nothing to indicate that Mr. Prakash's trial was unfair. It simply took place in a different forum. The fact that the accused may have lost a layer of appeal is, in our view, of

[48] ***Koya v State*** [1998] FJSC 2; CAV0002.1997 (26 March 1998).
[49] Ibid, at 6.

no significance. Even with the trial being held in the High Court, Mr. Prakash has appeal rights (albeit some with leave) to both the Court of Appeal and the Supreme Court.

59. For those reasons, the transfer issue fails.

<u>Permanent residence</u>

(a) The issue

60. A Member of Parliament's entitlement to accommodation and travelling allowances is set out in Part B of the Schedule to the Parliamentary Remuneration Act 2014. Relevantly, it provides:

> **MEMBERS OF PARLIAMENT (including Deputy Speaker, Government/Opposition Whip, and Leader of the House and excluding the Prime Minister, Ministers and Assistant Ministers, Speaker and the Leader of Opposition)**
>
> 1. Accommodation Allowance – For meetings of Parliament or Committee, *if the member permanently resides at any place* more than 30 kilometres away from the place of the meeting of Parliament or Committee, then the member shall be entitled to—
>
>   (a) an allowance of $150.00 per day, only if the member stays at a hotel at the place of the meeting of Parliament or Committee; or
>   (b) an allowance of $50.00 per day, if the member does not stay at a hotel at the place of the meeting of Parliament or Committee.
>
> 2. Travelling Allowance – For meetings of Parliament or Committee, *if the member permanently resides at any place* more than 30 kilometres away from the place of the meeting of Parliament or Committee, then the member shall be entitled to cost of travel by the most direct route to and from the meeting.
>
> [Emphasis added]

61. Part B of the Schedule to the Parliamentary Remuneration Act 2014 directs a Member's attention to the need to disclose where he or she "permanently resides" for the purposes of

claiming accommodation and travelling allowances.[50] Mr. Prakash was aware that he was answering questions about the place at which he "permanently resides" for the purpose of obtaining those allowances.

62. On 27 November 2018, Mr. Prakash provided a Member of Parliament Declaration Form to the then Acting Secretary-General to the Parliament. This Declaration was not accepted because it did not nominate a single place at which Mr. Prakash "permanently resides". A second declaration was made on 11 February 2019 at which Waidracia, Vunidwa, Naluwai, Naitasiri was shown as the place where Mr. Prakash "permanently resides".

63. Both at trial and in his application for leave to appeal, Mr. Prakash contended that a "permanent place of residence" (the words used in Count 1) had a different meaning from the place where a person "permanently resides" (the words used in the Schedule to the Parliamentary Remuneration Act and the form that he was asked to complete). Count 1 alleges that Mr. Prakash gave "false information that [his] permanent residence" was in Waidracia, Vunidwa, Naluwai, Naitasiri. This point has both procedural and substantive aspects.

64. As to procedure, the issue is whether the charge was framed in a manner that complied with section 58 of the CPA. That section provides:

> *"58. Every charge or information shall contain—*
>
> *(a) a statement of the specific offence or offences with which the accused person is charged; and*
> *(b) such particulars as are necessary for giving reasonable information as to the nature of the offence charged."*

65. In refusing leave on this procedural point, Mataitoga JA considered that there was no relevant distinction between "permanent place of residence" and a place at which a person "permanently resides". His Lordship ruled that a reasonable bystander would read the charge

[50] The relevant part of the Schedule is set out at para 2 above.

as if the two concepts were synonymous. For that reason, he held that s 58 of the Criminal Procedure Act had not been breached.[51]

66. In ***Nausara v State***,[52] Mataitoga JA (with whom Qetaki and Morgan JJA agreed) held that section 58 is infringed if the "variance between the charge information and the evidence led at trial … had a material effect on the conduct of the defence at the outset of the trial when the appellant pleaded not guilty".[53] On the facts of that case, the Court took the view that there was an error material to the merits of the prosecution. The Justice of Appeal added: "The formulation and presentation of charges is a matter of fundamental importance in the administration of criminal justice. It is apparent that this is a case where a failure to properly and accurately particularise reasonable information as to the nature of the offence charged, has had a material effect upon the manner in which the case of the appellant proceeded at trial".[54]

67. In our view, the distinction drawn between "permanent place of residence" and "permanently resides" is pedantic and lacks in merit. We adopt the *Nausara* approach to the interpretation of s 58 of the Criminal Procedure Act. We do not consider that there was any defect in the wording of the charges. Certainly, neither Mr. Prakash nor his legal representatives could possibly have been misled about the nature of the charges that Mr. Prakash was required to meet. Mr. Prakash would have been well aware that the critical question was whether he had knowingly given false information to the Acting Secretary-General that he "permanently resides" at Waidracia, Vunidwa, Naluwai, Naitasiri.

68. Further, Mr. Prakash knew that the purpose of the question was to determine whether he was eligible for Parliamentary travelling and accommodation allowances. The second induction process had dealt with this. Had he disclosed Lot 1 Omkar Road, Narere as the place at which he "permanently resides", he would not have been eligible for the allowance.

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[51] ***Prakash v Fiji Independent Commission Against Corruption*** [2024] AAU 13.2023 (27 February 2024), at paras 17–21, citing, in relation to s 58 of the Criminal Procedure Act, *Nausara v State* [2023] FJCA 135 at paras 20–36.
[52] ***Nauasara v State*** [2023] FJCA 135; AAU 108.2018 (27 July 2023).
[53] Ibid, at para 30.
[54] Ibid, at para 31.

For Mr. Prakash to have said that he "permanently resides" in Waidracia, Vunidwa, Naluwai, Naitasiri was the same as saying that it was his "permanent place of residence". In the circumstances of this case, it is a distinction without a difference. There is nothing in the pleading point. We shall use the terms interchangeably.

(b) Analysis: "permanently resides"

69. In dealing with this point in the High Court, Kumarage J adopted the definition of the term "permanent residence" that he had formulated in an earlier case, in ***Fiji Independent Commission Against Corruption v Nawaikula***.[55] That definition was: "a place where a person has his/her usual or settled abode continuously for a considerable period of time, where he/she is not less resident of the place due to his/her absence from time to time for the purposes of business or pleasure".[56]

70. We consider that there are two factors that drive a determination of the concept of "permanent residence" for the purpose of the present case. They are:

    a. The need to accommodate those who, in fact, do live in different places for significant parts of each week.
    b. The need to evaluate the answer given by Mr. Prakash in the context of the purpose of the declaration he was making.

71. In closing on behalf of Mr. Prakash, Mr. Nandan submitted that, initially, Mr. Prakash had filled out a declaration form (dated 27 November 2018) in which he disclosed: "…. I permanently reside at Waidracia, Naluwai, Naitasiri – 4 to 5 days and Lot 1. Omkar Road, Narere, Nasinu 3 to 4 days". That form was not accepted because the Acting Secretary-General required only one residence to be listed. As a result, Mr. Prakash prepared a second declaration in which he declared: "… I permanently reside at Waidracia Vunidawa, Nabuni

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[55] ***Fiji Independent Commission Against Corruption v Nawaikula*** [2022] FJHC 192; HACD005.2022S (3 May 2022).

[56] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC 775; HACD008.2022S (9 December 2022), at para 117.

Naluwai, Naitasiri …". That declaration was not accepted until Mr. Prakash made a statutory declaration explaining why he had said that he permanently resided at that place.

72. In his statutory declaration, Mr. Prakash disclosed that a family farm with which he was closely associated was in Naitasiri, at Waidracia Serea, Vunidawa, Naitasiri. The farm was known as Shiu Dula & Sons Farm No. 3392. Mr. Prakash went on to provide information about the supply of milk to Fiji Co-operative Dairy Co Ltd, and payment of the electricity bill. Mr. Prakash stated that he had managed the family farm for 20 years and that income from it was submitted on his income tax return. Mr. Prakash also declared that the farm that he owned at Nabuni did not have electricity. While he had spent most of his life in Naitasiri, Mr. Prakash acknowledged that he had a property in Omkar, Nasinu.

73. On the charge of giving false information to a public servant, the Commission had to prove that Mr. Prakash (at that time) did not permanently reside in Waidracia, Vunidawa, Nabuni, Naluwai, Naitasiri. The State did not attempt to prove beyond reasonable doubt that Mr. Prakash permanently resided at Omkar Road. Rather, it called a significant number of witnesses to cast doubt on Mr. Prakash's claims that he permanently resided in the vicinity of the family farm. On that approach to the case, it became necessary for the Commission to exclude the reasonable possibility that he resided permanently at "Waidracia, Vunidawa, Nabuni, Naluwai and Naitasiri".

74. Kumarage J analysed closely the State's evidence about where Mr. Prakash permanently resided. He considered direct evidence of others living in the Waidracia, Vunidawa, Nabuni, Naluwai, Naitasiri area who did not perceive Mr. Prakash as living in their area "permanently". He also referred to evidence from the Immigration Department of Fiji and the Land Transport Authority of Fiji through which documents were produced showing that Mr. Prakash had used the Omkar Road address when answering questions in forms that each of those government authorities sought answers. In addition, the Judge considered information about where Mr. Prakash was said to reside for electoral purposes and call data compiled from records of Vodafone Fiji in respect of Mr. Prakash's two mobile telephones. The Judge also discussed some of the evidence adduced to the contrary from both

Mr. Prakash and witnesses called on his behalf.[57] However, that evidence was rejected where it conflicted with that of the prosecution's witnesses.

75. In expressing his factual conclusions on the question of permanent residence, Kumarage J said:[58]

> *124. As per the evidence of these two witnesses from the Immigration Department of Fiji and the Land Transport Authority of Fiji, it is evident to this Court that throughout the offending period, when the Accused was returning home after foreign travel or when the Accused was renewing his driving license, he mentioned his permanent address or residential address as* ***Lot 1 Omkar Road****, Narere. Therefore, it is perceptible to this Court that the Accused had not mentioned* ***Waidracia, Vunidawa, Naluwai, Naitasiri*** *as his permanent or residential address to other government bodies, though he informed the Parliament that he permanently reside at* ***Waidracia, Vunidawa, Naluwai, Naitasiri****. When the facts are so compelling, this Court can't avoid noticing the falsity of the information provided by the Accused to the Parliament in* ***PEX4 (a)*** *and* ***PEX4 (b)*** *on 11/02/2019.*
>
> *125. As detailed above, though 13 witnesses gave evidence for the Defense, this Court had to reject that evidence as scrutinized in the evaluation. Therefore, this Court is of the view that the testimonies of the Defense witnesses were not capable in creating any impact that would amount to creating a reasonable doubt in the Prosecution case against the Accused.*
>
> 126. *From the above analysis of direct and circumstantial evidence led by the Prosecution in this matter, this Court is content that the Accused knew or believed that the information he provided to the Acting Secretary General to the Parliament mentioning in* ***PEX4 (a)*** *and* ***PEX4 (b)*** *that he "Permanently Reside" at* ***Waidracia, Vunidawa, Naluwai, Naitasiri*** *to be false.* Therefore, this Court is satisfied that evidence has been led in this Court by the Prosecution to prove and establish this element beyond reasonable doubt.
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> (Original emphasis in bold; emphasis added in italics)

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[57] Ibid, at paras 91–110.
[58] Ibid, at paras 124-126.

76. When concluding that the "permanent residence" element was proved, Kumarage J said:[59]

> *"136. In the present case also, this Court is satisfied that the Prosecution has by inference proved beyond reasonable doubt that the Accused knew, with the knowledge and information he was exposed to of the Parliamentary and state administrative processes, that he will cause the Acting Secretary General to reimburse his claims, which she wouldn't have done, if she knew that the permanent place of residence the Accused was not Waidracia, Vunidawa, Naluwai, Naitasiri."*

77. Although limited assistance can be gained from authorities on "permanent residence" to which Kumarage J referred in *Nawaikula* (adopted in the judgment under appeal), many of the older authorities were decided at a time when residential mobility was not as prevalent as it is today. That said, we consider that the actual test adopted by Kumarage J meets the purposes for which Mr. Prakash was being asked to disclose his permanent residence. The Judge's definition, "a place where a person has his usual or settled abode continuously for a considerable period of time, where he is not less resident of the place due to his absence from time to time for the purposes of business or pleasure" has the ring of a test based on "habitual residence". The term "habitual residence" has the advantage of turning the mind of a person answering the question to where he or she regards "home" to be, without the need to focus on the question of permanence. Even though a person may commute between two places, it would be typical for that person to identify their "habitual" residence easily. We regard the terms "permanent residence" and "habitual residence" as synonymous in the context with which we are concerned. Mr. Prakash's challenge to the meaning of "permanent residence" is rejected. We are satisfied that the test applied by the trial judge was correct.

78. We deal with remaining grounds on which leave to appeal against conviction has been sought on the basis that Mr. Prakash must demonstrate that, individually or collectively, any identified errors have resulted in unreasonable verdicts that have caused a miscarriage of justice.

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[59] ***Fiji Independent Commission Against Corruption v Prakash*** [2022] FJHC 775; HACD008.2022S (9 December 2022), at para 136.

Remaining grounds of appeal

Ground 5: unjustified reliance on evidence of Mrs. Akanisi Tinaiverewala

79. Mrs. Tinaiverewala is a relatively close relative of Mr. Prakash and had known him for more than 40 years at the time she gave her evidence. She was called to give evidence by the Commission. She stated that the two of them called each other "tavale", and one answer suggested that his father was her cousin. The Judge described her as Mr. Prakash's aunt, but a misapprehension on the precise relationship is not significant. Her family and his were neighbours and he was brought up in her location. Her evidence was that Mr. Prakash had been living on Omkar Road, Narere with his wife and children for about 25 years. She described his practice of visiting his farm in Waindracia at least twice a week, generally leaving it to go back to Omkar Road.

80. In cross-examination, she accepted that for several years including those to which the charges related, she had travelled to Navua to assist her nephew bringing up his children. She agreed with a question from Mr Nandan in the following terms:

> *"Q: ...because you had spent most times before the lockdown the first lockdown in 2020 in Navua you wouldn't know much about how Master Vijend used to go, how much time Mr Vijend spent in Vunidawa; would that be a correct statement?*
>
> *A: Yes, My Lord."*

81. She was, however, firm that she went back to her village in Waindracia on Fridays, spending the weekends there before travelling to Navua again on Sunday afternoon or Monday morning.

82. It was submitted for Mr. Prakash that this extent of absences from Waindracia disqualified her from providing any reliable evidence on where Mr. Prakash was actually living during the period to which the charges relate. Mr Nandan said that the concessions made in cross-

examination meant that the Judge ought to have discounted all her evidence as unreliable, so that it added nothing.

83. The Judge's review of Mrs. Tinaiverewala's evidence is not assisted by transposing the gender of the person he is speaking of in paragraph [46] of the judgment. When read in conjunction with the Judge's assessment of the evidence in paragraphs [61] and [62] of the judgment, it is clear that the description of her evidence in [46] ought to have read:

> *"... in Navua living with his family, where **she** would spend most of **her** time in 2018, 2019 and 2020 helping with **his** two children. But she confidently told the Court that though she was spending time in Navua during that period, **she** came back to her village Waindracia on Friday and went back on Monday, so that **she** spent some time in Waindracia every week."*

84. Given the extent of Mrs. Tinaiverewala's unchallenged familiarity with Mr. Prakash over a much longer period, and the confidence with which she was able to express knowledge about his whereabouts from her regular weekend visits back to Waindracia, there is no unreasonableness about the Judge's reliance on the overall effect of her evidence. The Judge's reasoning recognised the limited extent of first-hand knowledge of the circumstances in Waindracia in the relevant period. He made the valid point that apart from first-hand knowledge on this central point, her evidence on the longer-term pattern of living arrangements for Mr. Prakash and his family was not challenged. Much of that was corroborated by others. Mr. Prakash had not suggested that his living arrangements were different for the precise period to which the charges related than had been the case at other times. The Judge was impressed with the manner in which she answered questions in cross examination, and we do not accept that he should necessarily have discounted it all. He was entitled to give the weight he did to her evidence. This ground of appeal is not made out.

Ground 6: that the Judge erred in fact and in law in rejecting answers obtained in cross-examination from the prosecution witness, Eliki Latilati

85. Mr. Latilati has worked for Mr. Prakash for some 40 years and lived in a house on a farm owned by him in Waindracia for some 14 years at the time of giving evidence. His evidence-

in-chief was to the effect that Mr. Prakash and his family had lived at the home they have in Omkar Road for at least 14 years, that Mr. Prakash came to the farm where Mr. Latilati worked three times a week and sometimes would stay over in another house owned by Mr. Prakash's family in Waindracia. He described a positive employer-employee relationship, and a pattern of occasional visits to Mr. Prakash's home in Omkar Road to receive money.

86. A very different impression was given in answers in cross-examination. Mr. Latilati agreed with propositions that Mr. Prakash was not spending more than three days a week in Omkar Road and spending most of his time in the family home in the Waindracia area in 2018 and 2019.

87. The Judge recorded these different versions of Mr. Latilati's recollection, and rejected those given in cross-examination, initially on the ground that the rules for cross-examination at common law preclude counsel putting questions in terms that "the defendant will say", or variations on that proposition. In addition, the Judge was inclined to reject the alternative version provided in cross-examination because he apprehended that Mr. Latilati had been put under pressure to give the answers that he did.

88. The ground of appeal contends that it was an error for the Judge to reject the answers obtained in cross-examination when neither the Judge nor the prosecutor objected to the terms in which those questions were put. In defending his conduct at trial, Mr. Nandan submitted that he had been particularly gentle in the way in which he approached the topics on cross-examination, and that he had not in any way sought to pressure answers from the witness. He submitted that if the Judge was going to reject the answers he obtained on the basis of the wording of the questions, then counsel was entitled to be warned of that at the time.

89. That is, with respect, an unrealistic expectation and cross-examining counsel must exercise their judgement as advocates as to how they are going to elicit evidence that is likely to be most plausible. Asking direct (closed) questions that suggest the answer sought by counsel is a legitimate tactic to use in cross-examination. In this regard, we disagree with the trial

judge's criticisms of counsel's questioning. However, assessment of credibility will necessarily be informed by the way in which a witness responds to questions; the formulation and tone in which they are asked is a tactical decision for counsel to make. On that point, we note a flag was indeed raised by the Judge where the transcript records, near the end of cross-examination:

> *"This witness will just blindly answer without looking into the question carefully, without looking at the facts carefully?"*

90. Reviewing the evidence, it was certainly open to the Judge to find that Mr. Latilati felt considerable pressure not to offend his long-term employer. A number of Mr. Nandan's questions were prefaced with statements such as:

> *"I'm going to put some statements to you about Mr Vijend [the appellant] which Mr Vijend tells me you should have knowledge of. You can agree/disagree if you have no knowledge ..."*

and:

> *"Master Vijend tells me that you should know these things so I am going to put this ..."*

91. These statements were often followed by closed propositions seeking an affirmative answer, for example:

> *"Now during this time until April 2020, Master Vijend tells me he has been spending four to five days per week in Vunidawa, correct?"*

92. However politely these questions were expressed, they cannot avoid the implication of pressure given the relationship between Mr. Latilati and Mr. Prakash with the witness entirely dependent on Mr. Prakash for a home and livelihood. Given the advantage that the trial judge had in observing the witness, we do not accept it was an error for him to prefer the version of events given by Mr. Latilati in evidence-in-chief.

Ground 7: trial Judge erred in not treating evidence of Vodafone records as unreliable

93. The prosecution adduced evidence from Vodafone records establishing that the two mobile phone numbers issued to Mr. Prakash had made substantially more calls during much more of the period in question from the Narere area, which includes the Omkar Road residence, than had been made from the Waindracia area. In reviewing the evidence, the Judge said that the evidence of call records was not challenged by the defence.

94. Mr. Nandan disputed that he had in fact made strong objection to the admission of the call records and had also made submissions about their relative unreliability, which were not properly recognised by the Judge.

95. The transcript of the proceedings does indeed record relatively extensive exchanges by counsel with the Judge in addressing the defence objection to the admission of the Vodafone records. Once that objection was overruled, Mr. Nandan cross-examined the Vodafone officer who produced the records to establish that there would be no record of a call if a successful connection was not made. In addition, the appellant's and other defence evidence was to the effect that some parts of the Vunidawa area had very poor connectivity. This gave rise to the argument that the ratio of calls from that area relative to Omkar Road was not a reliable indication of the amount of time spent by Mr. Prakash in each location.

96. In addition, Mr. Nandan had made the point to the Judge that whilst both cell phones were indeed issued to Mr. Prakash, there was no reliable evidence that they were, at all relevant times, being used only by him and the Vodafone records could not discount the prospect that calls taken into account in the analysis had been made by others. That point was met by accepting in cross-examination that must, if not all, calls would have been made by him. In very extensive cross-examination comparing the location imputed to the appellant by reference to the calls made, the appellant gave explanation of movements inconsistent with the pattern of movements previously described.

97. Clearly, the Judge was wrong to state that there had been no challenge to the evidence. The Judge reviewed the effect of the Vodafone evidence when reviewing the totality of the evidence. However, in his analysis of whether the prosecution had established the elements of each of the charges beyond reasonable doubt, the Judge did not place substantial reliance on this evidence as a component of the State's case. Rather, it was seen as corroborative of other evidence establishing that Mr. Prakash did not habitually reside in Waindracia. It is therefore difficult for Mr. Prakash to make out any material error in the analysis on the elements of the charges.

98. As a practical matter, isolated errors in the number of calls recorded as transmitted through base stations operated by the mobile operators at various locations (as with the prospect of the phones being given to someone else using it at a different location) could not completely discredit the analysis that had been done of the records overall. The high proportion of calls in the relevant period made other than from the Waindracia/Vunidawa area, and the predominance of calls made from the Narere area, would have been a credible indication, although obviously not decisive, of the location of Mr. Prakash's mobile phones at the times in question. This type of evidence could not establish the whereabouts of a defendant at given times on its own, but it can have valid corroborative effect.

99. We accordingly dismiss this as a possible ground of appeal.

100. The remaining grounds for which leave had been declined and which Mr. Nandan sought to renew before the Full Court, were in grounds 8 to 25. Before dealing with them, it is necessary to acknowledge an issue raised by Mr. Nandan in advancing the grounds we have already considered. On the assumption that his application to adduce the fresh evidence was upheld, Mr. Nandan suggested that the Court had to assess the reasonableness of the Judge's findings that were being challenged in light of the spectre of apparent bias which, whilst advanced specifically in relation to the Magistrate's decision to transfer the proceedings to the High Court, was also suggested by Mr. Nandan to infect the appearance of a fair trial by the trial Judge.

101. However, as observed above, there is a clear gap between any apparent taint on the Magistrate's decision on transfer, and the trial Judge's assessment of the evidence at trial. Mr Nandan eschewed any suggestion that he was claiming actual bias affecting the trial, but rather that the appearance of bias ought in some way to influence the assessment on appeal of the reasonableness of the trial Judge's factual findings. There is no scope to do so, and we have addressed the challenges to the Judge's findings on usual terms.

Grounds 8 to 13, 16 to 23

102. In these grounds, Mr. Prakash renewed challenges to evidentiary findings that were made by the Judge and for which leave to appeal was refused. Leave had been refused essentially on the ground that the findings under challenge were all reasonably open to the Judge on the evidence at the trial.[60] These findings were each cited as errors of fact and law. They were addressed briefly in four paragraphs of the written submissions for Mr. Prakash without any elaboration in oral submissions.

103. They raised criticisms of the Judge's findings in relation to, first, the evidence of Mr. Prakash that the Judge had failed to accept:

a. that he provided his residential address in Omkar Road for "convenience and connectivity purposes";
b. that one of the main reasons he had to be in Waindracia/Vunidawa at night was because of theft of dalo and cattle;
c. that phone connectivity in Vunidawa was very weak (this also stated by other defence witnesses);
d. Mr. Prakash's evidence overall.

104. Further grounds were that the Judge erred in failing to accept or rely on the evidence of numerous defence witnesses:

a. Rishil Siddharth Dular;

[60] Ruling at [37] to [49].

b. Dhirendra Prakash;
c. Vishwa Jeath Singh;
d. Mahendra Kumar; and
e. Ram Brij.

105. Further grounds were that the Judge had failed to have proper regard to the evidence of defence witnesses:

a. Ulamila Bukanima;
b. Roneel Rajeev Dular Prakash;
c. Ashwin Praneet Chand; and
d. Raktnesh Kumar.

106. As to the rejection of Mr. Prakash's evidence and particular aspects of his explanation for his conduct, the Judge's thorough analysis of the evidence entitled him to come to each of those findings. It may have been something of an overstatement to find that Mr. Prakash's evidence was "... riddled with vital contradictions with other defence witnesses". However, the Judge relied on relevant inconsistencies on matters such as whether there were concerns about thefts of cattle and dalo in the district, and about the time period during which there had been poor mobile phone connectivity in the Vunidawa area.

107. Similarly, the rejection of the evidence of numerous witnesses called for the defence was not random or arbitrary. Rather, the Judge analysed the contrast between their evidence and that of prosecution witnesses and laid a reasonable foundation for his preference for the prosecution version of events. In a number of cases, the Judge supported his findings on the reliability of witnesses' evidence by observations on how they presented their evidence. If his rejection of the defence witnesses evidence had been based solely on demeanour, then there might be some cause for unease. However, in each case the analysis included concern at inconsistencies, lack of relevant personal knowledge, or inherent unlikelihood of the evidence.

108. In reaching his conclusion that the prosecution had proved the elements of the charges beyond reasonable doubt, the Judge was entitled to stand back and look at the totality of the prosecution evidence in the round. Mr. Prakash's immediate family lived in the substantial house that he owned in Omkar Road, in the case of his children until they, as adults, established themselves elsewhere. In the declaration of assets and liabilities he completed for parliamentary records on 1 October 2018 the Omkar Road house was valued at substantially more than all his other assets combined, including everything in the Waindracia district. It was the marital home. It remained permanently available to him and was where he spent the COVID lockdown. That home was much more conveniently located near Suva, for whenever parliamentary or other business required him to be in Suva.

109. In contrast, when staying overnight in the Waindracia area, the appellant would sleep either in the home owned by his brother, Dhirendra, where that brother and his immediate family were the primary occupants, or when "grog sessions" occurred, sometimes at more modest accommodation, the primary occupants of which were employees of his.

110. That contrast, which suggests his habitual place of residence was the home he owned in Omkar Road, could validly be taken into account in assessing whether the defence evidence had raised a reasonable doubt about the proof of the elements of the charges.

111. The prosecution produced a large number of various Fiji Government forms that had been completed by Mr. Prakash over a period of years for matters like passport and driver's licence applications. These required residential addresses to be detailed, and in the case of Immigration arrival cards, the person's "permanent address." All specified the Omkar Road address. Mr. Prakash's explanation for this was that it was more reliable or convenient as an address at which to receive communications. Seemingly inconsistent with that explanation was the postal address specified in the February 2019 statutory declaration, that was a Post Office box in Vunidawa. For the purposes of the relevant declaration, there seemed to be no concern at inadequacies in communications to the Waindracia area. On issues such as this, the Judge was entitled to assess critically the evidence of the appellant.

112. Similarly, a Facebook posting promoting the appellant as a parliamentary candidate stated, *"Vijendra Prakash is from Waidracia, Naitasiri. He resides in Nasinu."* Although the appellant deflected responsibility for the Facebook post onto others including his son, it seems highly unlikely that he was unaware of its terms, and likely that he approved of how he was described.

Grounds 14, 15, 24 and 25

113. As to the criticism that the Judge ought to have found it necessary for the prosecution to prove that Mr. Prakash resided within 30 kilometres from Parliament throughout the relevant time, that was not an element of the offence. Rather, the prosecution's burden was to establish beyond reasonable doubt that it was wrong for Mr. Prakash to claim his residence was outside a range of 30 kilometres from Parliament. The Judge was satisfied on the evidence that that had been made out. It follows that it is incorrect for Mr. Prakash to contend that the prosecution bore the burden of establishing that he was residing permanently in Omkar Road.

114. The last of the grounds was that the trial Judge was wrong to find that the prosecution had established beyond reasonable doubt the subjective elements first that Mr. Prakash knew or believed that the information he provided to the Parliamentary Office of the Acting Secretary-General was false, and secondly that Mr. Prakash knew there was likely to be reliance on information given to the Acting Secretary-General that was incorrect.

115. As to the proof required of the subjective elements of the charges, the Judge's analysis followed an entirely conventional process of considering whether the inferences required to make out such subjective elements were indeed proven beyond reasonable doubt. There can be no serious challenge to the findings made by the Judge being reasonably open to him.

116. On all these grounds dealt with compendiously, we therefore find that there is no basis for granting leave and the appeal on them is dismissed.

Sentence appeal

117. The original application for leave to appeal the sentence was declined, but the application was renewed on Mr. Prakash's behalf. It was submitted that the sentence was, in all the circumstances, too harsh and unjust, and that the Court had failed to give proper consideration to all the mitigating factors.

118. Neither the written submissions nor Mr. Nandan's oral submissions expanded on these grounds for challenging the appropriateness of the sentence. Understandably, nor did the respondent's submissions in reply.

119. The Judge's approach on sentencing was to adopt an instinctive synthesis of the factors that ought to be reflected, rather than adopting the two-step process of identifying a starting point and then considering the impact of relevant aggravating and mitigating factors. The Judge noted the maxima for the two offences of five years' imprisonment for tendering false information and 10 years' imprisonment for obtaining a financial advantage.

120. The Judge saw a high level of breach of trust as an important aggravating feature, noting that the community was entitled to expect a rigorous standard from Members of Parliament. He perceived a need for a profoundly strong signal to the community to condemn the conduct and treated this as a large amount, wrongly applied for, within a relatively short period. In submissions on sentencing, the prosecution had invited the Judge to treat the amount as higher than the annual salary for an average civil servant.

121. The Judge imposed a sentence of 36 months' imprisonment. Invoking the power in s 26 of the Sentencing and Penalties Act 2009, the Judge directed that the sentence was to be partially suspended so that the appellant was to serve a period of 28 months' imprisonment, with an applicable non-parole period of 22 months. The remaining period of eight months was suspended for a period of five years.

122. The Judge had imposed sentences in two earlier cases involving offending of the same type. These were in the cases of *Nikolau Nawaikula*[61] and *Ratu Suliano Matanitobua*,[62] with the sentences imposed in May and July 2002 respectively. In both those sentencings, the Judge had adopted the instinctive synthesis approach to assessing the appropriate sentence and imposed, in both cases, a notional sentence of 36 months' imprisonment. In both cases, part of the sentence was suspended, and minimum terms of imprisonment of less than 36 months were imposed. The amount involved in *Nawaikula* was some $20,000, and the amount in *Matanitobua* was approximately $38,300.

<u>Analysis</u>

123. Given the close link between the elements of each of the offences, these are obvious cases in which the Court should sentence on the basis of a single sentence reflecting the criminality in both convictions.

124. Any offending involving deceit to improperly be paid public monies is deserving of strong condemnation, with an eye to sentences being imposed that will effectively deter others from similar conduct.

125. Relative to a maximum sentence of 10 years' imprisonment, the sentences this Judge has imposed of three years' imprisonment for the offending in each of the cases is clearly within an acceptable range, although by no means at the top of it. If a two-step process beginning with the setting of an appropriate starting point was adopted, then we would suggest it would be an appropriate starting point to reflect the seriousness of offending of this type.

126. Aggravating factors include not just the amount of public money misappropriated, but also that it was obtained in a pattern of behaviour where the appellant had to repeat reliance on the wrongful declaration some 20 times over the period of the offending. It reflected a course of criminal conduct over approximately eight months.

[61] ***Fiji Independent Commission Against Corruption v Nawaikula*** [2022] FJHC 192; HACD005.2022S (3 May 2022).
[62] ***Fiji Independent Commission Against Corruption v Matanitobua*** [2022] FJHC 514; HACD004.2022S (15 August 2022).

127. Without double-counting, the gravity involved would justify a modest uplift from the starting point.

128. In terms of the personal circumstances of the appellant, factors submitted for him and accepted by the Judge on sentencing included Mr. Prakash's previous exemplary record, as attested to by a number of testimonials from persons of standing in the community. Further, he claimed as a mitigating factor that he had resigned from Parliament as soon as he was charged to minimise the adverse impact on the standing of Parliamentary process.

129. The Judge also gave credit for the exemplary co-operation in the conduct of the defence throughout the trial.

130. It was submitted for the appellant that at the age of 67 he did not enjoy good health, thereby implying that a prison term would be more onerous for him to serve than for a prisoner in good health.

131. A matter apparently not traversed on sentencing was the background to the appellant coming to complete the false declarations. He had begun the process by attempting to declare more than one place of permanent residence, and resorted to the wrong formula only after being directed to recast the terms of his declarations. On any view of the evidence, he would be entitled to a finding that he routinely spent some nights in each week at the Waindracia address he had nominated as his permanent residence, but the prosecution succeeded by establishing that was not in fact his permanent residence.

132. It was not a case of a complete fabrication, rather a distortion of the proper declaration that he ought to have made. However, in the end the appellant sought to defend the charges on the basis that he did maintain his permanent residence in Waindracia, whereas the prosecution established beyond reasonable doubt that he did not. Although the initial circumstances cannot carry any significant weight as a mitigating factor, we are mindful that the criminality began with his response to an unsuccessful attempt to identify his having more than one residence.

133. If a two-step sentencing process were undertaken, we are not satisfied that the increase from a starting point of 36 months for the aggravating factors and the reduction from it for mitigating factors would result in a materially different sentence.

134. A degree of amelioration of the impact has been provided by the Judge's quite proper suspension of part of the sentence.

135. Accordingly, we are not persuaded that leave ought to be given and the application for leave to appeal against sentence is declined.

Orders of the Court:

1. *The appeal against conviction on grounds for which leave had been granted is dismissed.*
2. *The application for leave to appeal on the remaining grounds in respect of convictions is declined.*
3. *The application for leave to appeal against sentence is declined.*

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Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

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Hon. Mr. Justice R. Dobson
JUSTICE OF APPEAL

....
Hon. Mr. Justice P. Heath
JUSTICE OF APPEAL

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