

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION**

**CRIMINAL CASE NO: HAC 007/2010**

**BETWEEN: THE FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION  
AND**

- 1. TEVITA PENI MAU**
- 2. DHIRENDRA PRATAP**

**COUNSEL: Mr R Aslam with Ms Leweni and Ms Lomani for the FICAC  
Ms B Malimali and Ms M Savou for the 1st Accused  
Mr M Raza for the 2<sup>nd</sup> Accused**

**Dates of Trial: 08-23/05/2013**

**Date of Summing Up: 27/05/2013**

## **SUMMING UP**

Madam and Gentlemen of Assessors,

1. It is now my duty to sum up this case to you. I will direct on matters of Law which you must accept and act upon. On matters of facts however, which witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for yourselves. So if I express my opinion to you about facts of the case or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinions. In other words you are the judges of facts. All matters of facts are for you to decide. It is for

you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.

2. You have to decide what facts are proved and what inferences drawn from those facts. You then apply law as I explain it to you and form your individual opinion as to whether the accused persons are guilty or not guilty to their respective charges.
3. Prosecution and defence made submissions to you about the facts of this case. That is their duty. But it is a matter for you to decide which version of the facts to accept or reject.
4. You will not be asked to give reasons for your opinions but merely your opinions of yourself and your opinion need not be unanimous but it would be desirable if you agree on them. Your opinions are not binding on me but I can tell you that they carry great weight with me when I deliver my judgement.
5. On the question of proof, I must direct you as a matter of law that the onus of burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused persons to prove their innocence. Under our criminal justice system accused persons are presumed to be innocent until they are proved guilty. This is the golden rule.
6. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt before you can express an opinion that they are guilty. If you have any reasonable doubt about their guilt then you must express an opinion that they are not guilty.
7. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence that who saw the incident or felt the offence being committed. The other kind of evidence is circumstantial evidence that you put one or more circumstances together and draw certain irresistible inferences. Evidence presented in the form of a document is called Documentary evidence.
8. In assessing evidence of witnesses you need to consider certain tests. Examples:

- Consistency: That is whether a witness saying the story on the same lines without variations and contradictions.
  - Probability: That is whether the witness was talking about in his/her evidence is probable in the circumstances of the case.
  - Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the available opportunity about the incident.
  - Spontaneity: That is whether a witness has behaved in a natural or rational way in the circumstances that he/she talking about.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court room and upon nothing else. You must disregard anything you have heard about this case outside of this court room.
10. Your duty is to find the facts based on the evidence apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.
11. Now let's look at the charges.

### **The First Count**

#### **Statement of Offence**

**ABUSE OF OFFICE:** Contrary to Section 111 of the Penal Code Cap.17.

#### **Particulars of Offence**

**TEVITA PENI MAU** on or about the 27<sup>th</sup> day of January, 2006 at Suva in the Central Division being a person employed in the public service namely as Managing Director of Post Fiji Limited, in the course of or in relation to his public office and in abuse of that office, did an arbitrary act in that he approved the payment of \$5,400.00 to Dhirendra Pratap the General Manager Finance of Post Fiji Limited, without the authority of Post Fiji Limited Board and or the Higher Salary Commission, in prejudice to the rights of the said Post Fiji Limited.

## The Second Count

### Statement of Offence

**EXTORTION BY PUBLIC OFFICERS:** Contrary to Section 107 of the Penal Code Cap 17.

### Particulars of Offence

**DHIRENDRA PRATAP** between the 31<sup>st</sup> day of January 2006 and the 28<sup>th</sup> day of February, 2006 at Suva in the Central Division, being a person employed in the Public Service as General Manager Finance for the Post Fiji Limited accepted a reward of \$5,400.00 for performance of his duty as General Manager Finance beyond his proper pay and emoluments.

12. In order to prove the offence of Abuse of Office against the 1<sup>st</sup> accused, the prosecution has to prove following elements beyond reasonable doubt.
  1. The accused was employed in the public service,
  2. He did an arbitrary act,
  3. He acted in abuse of the authority of his office,
  4. The act was prejudicial to the rights of another.
  
13. The term “person employed in public service” is interpreted under section 4 of the Penal Code. According to the section;

*“person employed in public service” means any person holding any of the following office or performing the duty hereof, whether as a deputy or otherwise, namely*

  - (i) *any civil office including the office of President the power of appointing a person to which or of removing from which vested in the state or in the President in a Minister or in any public commission or Board; or*
  - (ii) *Any office to which a person is appointed or nominated under the provisions of any act or by election; or*

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

14. In the light of agreed facts and documents of the 1<sup>st</sup> accused, it is clearly established that Post Fiji Limited falls within an Act namely the Public Enterprises Act of 1996 and therefore the appointment of Managing Director falls within the meaning of ‘person employed in the public service’ under section 4 of the Penal Code.
15. The second element in 1<sup>st</sup> count is that the 1<sup>st</sup> accused did an arbitrary act. In law, an arbitrary act is an unreasonable act, a despotic act, which is not guided by rules and regulations but by the wishes of the accused.
16. The arbitrary act alleged against the 1<sup>st</sup> accused is that he approved and authorized payment of \$5,400.00 to 2<sup>nd</sup> accused without the authority of the Post Fiji Limited Board or the Higher Salary Commission. According to prosecution the first accused deviated from this procedure and acted unreasonably, despotically, in accordance with his wishes.
17. The third element in the 1<sup>st</sup> count is that the act must be in abuse of the authority of office. When someone abuses the authority of his office, he uses his position for some illegitimate agenda, some reason which is not a proper reason according to institutional procedure. He acts in bad faith, for an improper motive to harm someone or show someone an advantage or favour. If he had some improper motive or acted in bad faith and used his position to achieve his motive, then this element is proved. In order to understand what the 1<sup>st</sup> accused had in his mind whether he acted in bad faith or with improper motive, you need to look all the evidence and draw your own conclusions and decide whether he acted in abuse of office or not.
18. The last element is that the act of the 1<sup>st</sup> accused must have prejudiced the rights of another. The prosecution alleges that the rights of Post Fiji Limited were prejudiced. So the question for you is whether the 1<sup>st</sup> accused’s action prejudiced the rights of the Post Fiji Limited.

19. May I also direct on the mistake of fact.

First you have to consider when approving the payment to 2<sup>nd</sup> accused whether 1<sup>st</sup> accused required to follow the procedure, that is to obtain the approval of the Board and Higher Salary Commission. If you feel sure that the 1<sup>st</sup> accused was required to follow the said procedure then you must consider whether 1<sup>st</sup> accused was honest and reasonable but mistaken belief that he had the authority to approve the payment. Mistake of fact exonerate criminal responsibility. However to absolve 1<sup>st</sup> accused from criminal liability the belief though mistaken must be honest and reasonable. The prosecution must negate 1<sup>st</sup> accused's belief that he acted under an honest and reasonable mistaken belief. You must be satisfied beyond reasonable doubt that the 1<sup>st</sup> accused honestly believed that he was not wrong and that what he did was reasonable. In deciding that, you must consider what a reasonable and a prudent man would do when applying the standard of 1<sup>st</sup> accused as Managing Director of Post Fiji Limited with qualification and experience.

20. In order to prove the offence of Extortion by Public Officers against 2<sup>nd</sup> accused, the prosecution has to prove following elements beyond reasonable doubt.

1. The accused was employed in the Public Service,
2. He accepted any reward,
3. It was beyond his proper pay and emoluments,
4. He accepted it for the performance of his duty as such officer.

21. It was agreed between 2<sup>nd</sup> accused and the prosecution that the Managing Director of Post Fiji limited signs the contract of 2<sup>nd</sup> accused. Therefore he comes within the interpretation of person employed in the public servant.

22. It is not in dispute between the prosecution and the 2<sup>nd</sup> accused that the 1<sup>st</sup> Accused approved a sum of FJ\$5400.00 to be paid to the 2<sup>nd</sup> Accused as per letter dated 23<sup>rd</sup> January 2006. It is not in dispute

between prosecution and 2<sup>nd</sup> Accused that he received a sum of FJ\$ 5400.00 payment along with his salary. It is also not in dispute that the Post Fiji payment voucher for cheque No: 077473 was raised to pay the 2<sup>nd</sup> accused.

23. Therefore the remaining element in dispute that the reward of FJ\$5400.00 was beyond his proper pay and emoluments and that he accepted it for performance of his duty as such officer in public service.
24. I now remind you of the prosecution and defence cases. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by the counsel. I will summarize the salient features. There are also a number of documents admitted by both accused and constantly referred to during the trial. If I do not mention a particular witness, or a particular piece of evidence, or a particular document or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.
25. You are required to make separate assessment of evidence as it relates to each of the elements of the charges against the accused persons and the prosecution has to prove each element in each count against the accused persons beyond reasonable doubt.
26. In this case the prosecution and the defence have agreed to certain facts and documents. You have been given Agreed facts and Agreed Documents in respect of both accused separately. Agreed facts and Agreed Documents are part of the evidence and you should accept these Agreed Facts and Agreed Documents as accurate and the truth. They are, of course, an important part of the case. The Agreed Facts and Agreed Documents have avoided the calling of number of witnesses, and thereby saved a lot of court time.
27. You must not speculate why certain witnesses were not called to give evidence. You must not speculate on any evidence that has not been called. However if you are of opinion that the prosecution could have called a witness who could have given material evidence and no suitable explanation has been given for his or her absence you may draw the inference that witness would not given evidence favourable to the prosecution.

**The Prosecution Evidence.**

28. I will summarize the prosecution evidence first.
29. The first witness was Ms Lute Powell (PW1). According to her she was a Board member of Post Fiji Limited since 2002. She has attended all Board Meetings which were held every quarter of the year. Board Meetings were presided over by Chairman Motibhai Patel. There were 08 members in the Board. Minutes of the previous meeting along with Board Papers were given at least one week prior to the meeting. During the Board Meeting the secretary of the Board takes notes. Witness was shown two Board Minutes dated 30<sup>th</sup> November 2005 and 29<sup>th</sup> March 2006 which had been marked as P1 and P2 respectively. According to her in both P1 and P2 no decision had taken to pay Mr. Dhirendra Pratap General Finance for compiling Income Tax Returns on behalf of Post Fiji Limited. She further said if there was a decision it should reflect in the minutes of the Board Meeting. Also said that if any payment to be made to a contracted officer or a Manager, any payment beyond their contracted remuneration, anything extra from what is given to them, should come up to the Board and approval should be obtained from Higher Salary Commission. According to her final authority for extra payment would be the Higher Salary Commission.
30. Next she was shown the Contract of Employment (P3) of the 2<sup>nd</sup> accused which had been agreed between the parties. According to clause 4 under remuneration part of the same Board of Directors has the power to review any remuneration.
31. In the cross examination by counsel for 1<sup>st</sup> accused witness agreed that she was a Board Member of Post Fiji Limited since 2002 to 2006. According to her Post Fiji Limited is a company and the shareholders are Ministry of Finance and Ministry of Public Enterprise of the Government of Fiji. Company returns are lodged every year with the names of Directors. Witness said that the company was making money and was not running at a loss. According to her if there was going to increase in salary it would be

discussed in the Board. She said that the CEO level authority can approve \$50000.00 and she subsequently came to know it was \$100000.00. This for capital and operational cost. But this was subject to certain guidelines. According to her the payment of \$5400.00 should come up to the Board. Witness admitted that a director Fiji Post Limited called Set Narayan was present during the Board Meeting held on 30<sup>th</sup> November 2006. Before the Board Meeting minutes of the last meeting together with Board Papers are circulated one or two weeks before the meeting and financial statements also provided along with the Board Papers. Things which were not budgeted also come for discussion during Board Meeting. But that item was in agenda of the meeting. She further said that things that are discussed some time do not appear in the Board Minutes. She had not come across that things not discussed entered into the minutes. She further said that she don't recollect that extra payment to 2<sup>nd</sup> accused discussed on 30<sup>th</sup> November 2006.

32. In the cross examination by the counsel for 2<sup>nd</sup> accused witness said that she would go through all papers before the Board Meeting. According to her Mr Benefield was the secretary of the Board and he takes notes. Notes are fairly brief and the Board Papers are very thick. She admitted some of things which were not recorded in the minutes. But amendments were done before it was adopted. But she never came to a situation where it was not recorded. She further said that she don't remember anything discussed about the payment of \$5400.00 to 2<sup>nd</sup> accused. She reiterated that the secretary was the person who recorded the minute of every Board Meeting. Witness agreed that she mentioned about bonus payment to 2<sup>nd</sup> accused in her statement. She continued that some of the managers were given huge bonus. Witness agreed that word recognition has various definitions and also agreed that the salary is a total different thing than recognition or a bonus. According to her she was unaware that the 2<sup>nd</sup> accused compiled the Tax Return outside his working hours.

33. In the re-examination witness said that the Post Fiji Limited was subsidiary to the Government and it was called Government Commercial Company. According to her the shareholders of the company received little and it was not below one million dollars. According to contract the incentive bonus mentioned under benefits

at clause 13 but the calculating terms are not entered. Further for all contracted personnel, any extra, any approval for any extras to their contract and salaries should come to the Board. She said that she never come across in the Income and Expense Statement any payment made to 2<sup>nd</sup> accused with regard to Income Tax filing. She has no recollection about the payment being discussed. She said that there can't be any formal decisions without having a minute in proper writing. According to P7 the 2<sup>nd</sup> accused sought recognition for his specialised tax job. Witness identified the writings of 2<sup>nd</sup> accused on P7. (Minute "C")

34. Vueti Logoyau (PW2) was called next by the prosecution. He was a Director of Post Fiji Limited between 1998-2006. According to him Post Fiji became a company in the year 1996. When he was there 1<sup>st</sup> accused was the Managing Director while Mahendra Motibai Patel was the Chairperson. He identified the Board Minutes dated 30/11/2005 (P1) and Board Minutes dated 29/03/2006 (P2). According to him in both Board Minutes no decision had been taken by the Board to pay 2<sup>nd</sup> accused for compiling the Income Tax Returns of the company. He confirmed his presence in both Board Meetings referred above.
35. In the cross examination by counsel for 1<sup>st</sup> accused witness said that Board Minutes and Board Papers were received prior to the Board Meeting enabling Board Members to read , analyse and submit their recommendations either to approve or disapprove what is written in the Board Paper. Witness agreed that P2 talks about financial performance of month of January and February 2006, revenue, expenditure and profit of Post Fiji Limited. Witness said that it is not possible that things which were discussed during the Board Meeting of 30<sup>th</sup> November 2005 had not been taken into the minutes. Specially recognition that given to 2<sup>nd</sup> accused. He further said that he can't recall any such incident happened during the Board Meetings. He agreed that sitting allowance which he requested in advance is not in the minute.
36. In the cross examination of counsel for 2<sup>nd</sup> accused witness agreed that he gave a statement to FICAC with regard to extra benefit to the 2<sup>nd</sup> accused. According to him the secretary had taken the notes in writing during the Board Meetings.

37. In the re-examination witness said that he had never come across a situation where the secretary complained that he was tired of writing Board Minutes. Witness further said that Board approval is not necessary to claim his entitled allowance. After going through the Board Minutes P2 witness said financial statements are not attached to the Board Minutes.
38. Susana Naiwasetawa (PW3) gave evidence next. According to her she had worked for Post Fiji Limited about 17 years. Her last posting in the Post Fiji Limited was Human Resources Manager. During her stay she had been granted a scholarship to go to Australia and she obtained her Diploma in Human Resources. Upon her return she was entrusted the task of preparing Corporate Governance Manual by the 1<sup>st</sup> Accused. According to her she codified all procedures which were required by the Ministry of Public Enterprise. She was the Senior Administrative Assistant when she codified the Corporate Governance Manual. Further she had checked the Job Description of the company and circulated among employees of the company. Final approval was given by the Managing Director. The document was marked as P4. According to her preparing for Income Tax Return of the company comes under Job Description of the General Manager Finance. He is responsible for all financial functions of the company including internal and external contacts which had been mentioned under Principle Accountability of the Job Description. Compiling Income Tax Return comes under Duties and Responsibilities of the Job Description. According to her the overall in charge of the Finance is General Manager Finance. This is mentioned in the job summary. Witness confirmed that she compiled the Job Description of General Manager Finance dated 1<sup>st</sup> January 2004.(P5) After P5 another Job Description was compiled with several changes to existing positions. But Job Description of General Manager Finance was not changed. Though Managing Director assigns any new duties to General Manager Finance but he can't claim any claim outside the contract. She further said that as per letter dated 15<sup>th</sup> October 1997 2<sup>nd</sup> accused was appointed as Authorised officer for Inland Revenue by Andrew Nelson acting General Manager Post Fiji Limited.(P6) According to her bonus payment cannot be made without the approval of Board of Directors. Incentive bonus payment to General Manager Finance is mentioned under No: 13 of the contract of General Manager Finance. Bonus

payment is calculated by Human Resource Department and payment was not consistent. According to P7 payment to General Manager Finance had been authorised by Managing Director but it had not gone to Human Resources Division. According to the witness Managing Director cannot approve or authorise a bonus payment to the staff and the General Manager Finance cannot claim extra payment for compiling Income Tax Return outside his salary.

39. In the cross examination by counsel for 1<sup>st</sup> accused witness said that she compiled Job Description for every position of the company. According to her Post Fiji Limited became a company in the year 1996 and the operational matters are dealt by General Managers and Managing Director. According to witness in P7 nothing in that document says it is a bonus. Her contract was not extended and therefore she left Post Fiji Limited.
40. In the cross examination by counsel for 2<sup>nd</sup> accused witness said that she went to Australia on a scholarship for two years with paid leave. She admitted that she said in her statement that claiming the payment for doing the Tax Agent Job by Dhirendra Pratap was unethical. Witness admitted that as per P7 last paragraph 2<sup>nd</sup> accused only asked some recognition but witness said that the 2<sup>nd</sup> accused was seeking a payment indirectly. She said that Job Description of the 2<sup>nd</sup> accused remained same for year 2004 and 2006. According to her she was unaware that 2<sup>nd</sup> accused doing taxation work on his own to save the company's cost.
41. In the re-examination witness said that that Managing Director can authorise payment under certain categories with the concurrence of Board of Directors. She further said that the 2<sup>nd</sup> accused was recognised by paying half of the sum.
42. Anjula Latchman(PW4) gave evidence next. She had joined Post Fiji Limited in the year 1980 and worked there for about 31 years. She was the Acting Accountant Insurance and Fixed Assets in the year 1998 and she held the post till she left Post Fiji in 2011. According to her she prepared the Tax Depreciation Schedule for Income Tax Return from 1998 to 2010. The following documents were marked through the witness.

- The Income Tax Return for the year 2006 was marked as P8 and the schedule 4 was marked as P8A.
- The Income Tax Return for the year 1998 was marked as P9 and the schedule 5 was marked as P9A and schedule 1 as P9B.
- The Income Tax Return for the year 1999 was marked as P10 and the schedule 5 was marked as P10A and the schedule 1 as P10B.
- The Income tax Return for the year 2000 was marked as P11, the schedule 5 marked as P11A and schedule 1 as P11B.
- The Income Tax return for the year 2001 was marked as P12, schedule 5 as P12 A and schedule 1 as P12B.
- The Income Tax return for the year 2002 was marked as P13, the schedule 5 marked as P13A and schedule 1 as P13B.
- The Income Tax return for the year 2003 was marked as P14, the schedule 9 marked as P13A, schedule 1 as P14B and Income Tax Return “C” as P14C.
- The Income Tax return for the year 2004 was marked as P15, the schedule 6 marked as P15A, schedule 1 as P15B and Income Tax Return “C” as P15C.
- The Income Tax return for the year 2005 was marked as P15, the schedule 6 marked as P16A, schedule 1 as P16B and Income Tax Return “C” as P15C.

According to witness at Company Tax Return 2<sup>nd</sup> accused signed as the officer of the company. She further said without the schedule prepared by her no income Tax return can be prepared.

43. In the cross examination by counsel of 1<sup>st</sup> accused witness said that Post Fiji was not a company when she joined. It became a company in the year 1996 and majority of the policy decisions are made by the Board of the company. Operational matters are decided by General Managers and Managing Director. Her authority level is \$50000. She said that Board approved payment are final. She had prepared Capital Expenditure Report and which is part of General Manager Finance’s report. She was not sure about the approval Authority of 1<sup>st</sup> accused.
44. In the cross examination by counsel for the 2<sup>nd</sup> accused witness said her duty was to prepare Asset and Tax Depreciation and submitting to General Manager Finance who signed as a Authorised Officer.

45. In the re-examination witness confirmed the 2<sup>nd</sup> accused was in Post Fiji Limited. She further said that all entitlements of the employees are mentioned in the Corporate Manual. According to her Chargeable Income Statements are prepared by the General Manager Finance.
46. Dharmend Chand (PW5) gave evidence next. He is the Manager Operations Finance in Post Fiji Limited. In 2008 he was Acting Manager Financial Accounts Payable and Payroll. In 2008 his duties were to oversee the Accounts Payable and Payroll Section. He admitted that he hand over salary slip pertains to 2006 of 2<sup>nd</sup> accused to investigators of this case. Witness identified the February payslip of 2<sup>nd</sup> accused and marked as P17. In P17 2<sup>nd</sup> accused had been paid a salary arrears including \$ 5400.00. Witness was shown P7 and witness identified the signature of 2<sup>nd</sup> accused and also the contents of the minute. Witness said that as there was no code for adhoc payments \$5400.00 was paid to 2<sup>nd</sup> accused as salary arrears.
47. In the cross examination by counsel for 1<sup>st</sup> accused witness said any payment approved by the Board should be paid. Witness has no idea about the limits of the Managing Director.
48. Answering to question put forward by counsel for 2<sup>nd</sup> accused witness said that he can't comment on P7. Witness further said there is no data erased from the system. The original payslip dated 1/7/2007 was marked for identification by the defence. It was marked as 2D1. Witness explained the deference. According to the witness the salary slip which was given to investigators of FICAC had obtained from the back up tape and which was printed on an A4 sheet. Witness admitted that format of P17 and 2D1 are different. Witness admitted pay number had been mistakenly printed on P17. Witness denied any manipulation done to payroll of the 2<sup>nd</sup> accused.
49. In the re-examination witness said that the 2D1 is a computer printout. According to witness the correct pay number should be pay 4. He admitted the mistake. Answering further he said that payment of \$5400.00 had been processed by Robert Rajesh on the instructions of 2<sup>nd</sup> accused.

50. Prosecution called Sevesi Tora (PW6) next. He is the Head of Postal Services of Post Fiji Limited. After working as a Post Master he had assumed duties as the Manager Philatelic from 1<sup>st</sup> August 2007 to 2<sup>nd</sup> February 2009. After that he was appointed as an Acting Chief Executive Officer of Post Fiji Limited for about 18 months. In the year 2007 the position of Managing Director was changed to CEO. The last Managing Director was the 1<sup>st</sup> accused. When he was the Acting CEO the Government appointed the Board of Director to Post Fiji Limited under the Chairmanship of Ioane Naivalurua. According to the witness salaries for contracted employees is decided by Managing Director in consultation with Board of Directors. After the decision it should go to Higher Salary Commission for their endorsement. All extra payments are brought to the attention of the Board. According to him approval for extra payment should approved by the Board. To all extra payments Board approval is a must. He identified the minute "B" written by 1<sup>st</sup> accused on P7. According to him no approval sought from the Board to effect the payment of \$5400.00 to 2<sup>nd</sup> accused. He further said that Income Statement comes under the purview of General Manager Finance. He further said that the 2<sup>nd</sup> accused was the person in charge of Income Tax Return of Post Fiji Limited from 1996 to 2005. According to the witness contracted employees is entitled for bonus which depends on the profitability of the company.
51. In the cross examination by counsel for 1<sup>st</sup> accused witness said that during his period as CEO Board meetings were held almost every month. Previously it was 3-4 times a year. According to the witness all financial aspects comes under General Manager Finance. Witness said that after 2005 Post Fiji Limited Tax Services were outsourced to G Lal & Company as the General Manager Finance was not a Chartered Accountant. Witness reiterated that emoluments should be directed to the Board and to the Higher Salary Commission. Witness said that he received \$3000.00 in the year 2005 for his achievement in Philatelic Bureau which was approved by Managing Director without his request. He further said that his contract does not come under the arm pit of Higher Salary Commission.

52. In the cross examination by counsel for 2<sup>nd</sup> accused witness said that by writing P7 2<sup>nd</sup> accused claimed some recognition.
53. In the re-examination witness reiterated that his position Manager Philatelic Bureau did not come under Higher Salary Commission.
54. Next Amalaini Kuruvakadua(PW7) gave evidence. She had worked for Higher Salary Commission from 2004 to 2011 as Senior Economic Planning Officer and promoted to Manager of the Commission in the year 2009. According to her the Higher Salary Commission was governed under Higher Salary Commission Act. The purpose of the act was to look after the remuneration of all the executive positions under the ambit of the Commission. According to her remuneration includes salary plus all allowances and the benefits payable to all executive positions under the Commission as guided by the definition of the salary in the Higher Salary Commission Act. With regard to remuneration Commission receives proposals from requesting agencies or the stakeholders and it prepares submissions and tables for Commissions deliberations on the request received and reforms the requesting party through the chairperson of its decisions. Requiring documents are circulated in the Administrative Guideline. According to her Chief executive Officer and the General Managers of Post Fiji Limited are come under Higher Salary Commission purview. To review of an existing position it must come under with Board resolution, the draft contract and Financial Annual Reports of requesting party for the last three years as well as their Corporate Plan and Strategic Plan. Witness read out the section 2 of the Higher Salary Commission Act which has been marked as P18. Witness said any benefit or any payment in excess of the package cannot be given without approval of Higher Salary Commission. Next witness showed a copy of the Administrative Guidelines of Higher Salary Commission which was marked as P19. Any proposal of payment should come from the Board to Higher Salary Commission before the payment. Witness further confirmed that without the Commission's approval no bonus or incentive payment made to anybody who comes under the purview of the commission.
55. In the cross examination by counsel for 1<sup>st</sup> accused witness said that the Higher Salary Commission is no longer in existence and did not want to comment on the reason for its decommission. She

further said that the Commission uses statistics from Government Departments of Public Enterprise that looks after all the Government Commercial Companies and share information. She agreed that the role of the Commission is to consider and determine the salary of the CEO and other senior office holders. Further she said that the Administrative Guidelines (P19) is circulated every year to different stakeholders under the signature of the Chairperson with a covering letter. Witness admitted giving two statements to FICAC. Job Description and Contract of Employment of the General Manager Finance were not shown to the witness at the time of recording the statements. But she had been only shown P7. As per P7 witness said that payment made was an incentive pay which is not documented in the Higher Salary Commission Act or in the Administrative Guidelines. Witness further said that asking for recognition for the doing Tax Job is not an incentive. She further said though it not incentives pay it looks like it should be part of his Job Description. After payment it should have referred to Higher Salary Commission for review. According to her what 2<sup>nd</sup> accused mentioned in P7 is not part of his Job Description.

56. In the cross examination by counsel of 2<sup>nd</sup> accused witness said as per P7 2<sup>nd</sup> accused only requested for recognition of his performance.
57. In the re-examination witness said that Administrative Guidelines P17 is normally circulated by the Chairman of Higher Salary Commission to all Boards under the Commission's ambit. According to witness on remuneration matters the Higher Salary Commission overrides any other written law on remuneration. She also referred section 11(1) and (3) of Higher Salary Commission Act.
58. Lily Bingwor (PW8) was called next by the prosecution. Witness had joined the Inland Revenue Commission in 1983. She was the Secretary to the Tax Agent Registration Board in 1993. In 2006 the applicable law was Income Tax Act. A first Degree in Accounting is necessary to be a Tax Agent. A Chartered Accountant can be a Tax Agent. He need not go through any exams. According to witness registration of a Tax Agent comes under section 54 (j) of the Income Tax Act. According to the section "no person other than a Tax Agent shall demand or receive any fee for

or in relation to the preparation of any return to the Commissioner”. According to section 45 of the said Act Authorised Officer is responsible for making and signing the Income Return of the Company.

59. In the cross examination by 1<sup>st</sup> accused’s counsel witness said that the Authorised Officer can be appointed within the company. According to witness the Company Tax Identification Number begins with 50 and Government Departments begin with 90.
60. In the cross examination counsel for 2<sup>nd</sup> accused witness said in the Job Description (P4) under the Principle Accountability the 2<sup>nd</sup> accused is responsible to carry out the duties of company secretary and this will entail the attending on the Board of Directors, Board Meetings, filling of Company Returns and statutory obligations as provided by the Companies act. Answering further witness said that the Companies are required to report their income and that for tax purposes. The Tax Agents responsibility is to prepare Tax Returns. They may represent the company for other matters like objections or preparation of returns and payment of taxes.
61. Witness was not subjected to re-examination.
62. Prosecution then marked remaining documents from Agreed Bundle of Documents as follows.
- Payment Voucher for Cheque No: 077473 as P20.
  - Appointment Letter of Mr Peni Mau as the Director as P21.
  - Contract Employment of Mr Peni Mau as P22.
63. After calling 08 witnesses and marking documents P1-P22 prosecution closed their case.
64. Defence was called and explained their rights to both accused persons. 1<sup>st</sup> accused elected to give evidence from witness box and expressed his intention to call witnesses.
65. 2<sup>nd</sup> accused elected to remain silent.
66. 1<sup>st</sup> accused said in his evidence that he is 64 years, married and has six children. He had joined the Post and Telegraphic Department of Fiji in the year 1968. After working 22 years he

resigned and joined Post and Telecom Limited as Manager Postal Operation in the year 1989. Thereafter Post and Telecom Limited split into two and he was appointed as Managing Director of Post Fiji Limited in July 1996. A new Board was appointed for Post Fiji limited in the year 1999. The Chairman was Mr Motibhai Patel and the Secretary was Mr Mike Benefield. Before the Board Meeting all members are given Board Papers. Witness said one day before a Board meeting 2<sup>nd</sup> accused raised to him that he was performing the duty of a Tax agent for the company and he has not been paid for it. When this was put to the Board in November 2005, it was appreciated. As it was an operational issue he sanctioned the payment to 2<sup>nd</sup> accused after he wrote him formally in the year 2006. Witness admitted this was not in the minutes of November 2005(P1). Witness said not everything that is discussed in the Board Meetings are written down in the minutes. After referring Tax Return of 2006 (P8) witness confirmed that the Directors of Post Fiji Limited except him had received their fees for the years 2004, 2005 and 2006. According to witness as Managing Director of Post Fiji Limited he had two monetary limits. For capital issue the limit was \$100,000 and for operational issues the limits was \$100,000. According him he had never seen the Higher Salary Commission Guidelines while employed in Post Fiji Limited.(P19) Witness said on two occasions two managers were recognised for their outstanding performance by way of a cash reward. General Manager Marketing Vinesh Kumar was awarded \$48,000 and Tora was awarded \$3000. As per witness the payment of \$5400.00 to 2<sup>nd</sup> accused not affected the Finances and profitability of the company.

67. Answering few questions put forward by counsel for 2<sup>nd</sup> accused witness said that nowhere in the Contract (P3) and Job Description (P4) mentioned that 2<sup>nd</sup> accused to do the Tax Return of the Company.
68. In the cross examination witness admitted that the Post Fiji Limited is a Government Commercial Company and the shareholding is by Government of Fiji. He agreed that he sits as Director during the Board Meetings and carry out the Board decisions. According to him the minutes of the Board Meetings are very important. Witness admitted those minutes is evidence of the proceedings but he said that in a Board Meeting not everything is recorded. Witness agreed that nothing mentioned in the minutes of Board Meeting held on

30/11/2005 with regard to the payment made to 2<sup>nd</sup> accused for compiling Income Tax. Witness admitted that no reference of discussion he held with 2<sup>nd</sup> accused mentioned in P7. Witness said that he recognised 2<sup>nd</sup> accused's service by authorizing a payment which was never questioned by the 2<sup>nd</sup> accused. Witness admitted that the payment to 2<sup>nd</sup> accused is something outside his salary package mentioned in the contract. But according to witness this is an operational issue that fall outside of the contract. But any allowance or any privilege that falls within the Guidelines of Higher Salary Commission has to be tabled for approval of the Board. He agreed that perks, remuneration and the benefits of the General Manager Finance come under Higher Salary Commission Act. According to his knowledge the Manager Finance comes under the Higher Salary Commission Act. After reading section 11(3) of the Higher Salary Commission Act witness agreed that he cannot authorise any excess salary of what he has agreed. Witness agreed as per clause 2 (a) of the Contract of 2<sup>nd</sup> accused(P3) the Managing Director or his representatives shall from time to time assign him or vest in him certain duties. Witness further agreed that 2<sup>nd</sup> accused was appointed as authorised officer of Post Fiji Limited by Acting Managing Director Andrew Nansen in 1997 (P6). Witness agreed in all Income Tax Returns the 2<sup>nd</sup> accused has signed as Authorised Officer of the Company. Witness further agreed that in the Balance Sheet Income Tax is mentioned under current liability of the Company and the Income Tax payable comes within the Finance and Accounting of the Company. He agreed that Directors payment or allowance comes under Higher Salary Commission purview. Witness further said that his authority of incurring expenditure is laid down in Corporate Manual. He agreed that in the event of any inconsistency the agreement would take precedent.

69. In the re-examination witness said that the payment of \$5400.00 to 2<sup>nd</sup> accused was in recognition of work done as a Tax Agent of the company. A reward was awarded after discussing the matter in the Board.
70. That was the evidence of 1<sup>st</sup> accused.
71. As assessors and judges of facts, it is evidentially established that Post Fiji Limited falls within an Act namely the Public Enterprises Act of 1996 and therefore the appointment of Managing Director

falls within the meaning of 'person employed in the public service under section 4 of the Penal Code. When he approved the payment to 2<sup>nd</sup> accused, you decide whether he did an arbitrary act and he acted in abuse of his authority as Managing Director. 1<sup>st</sup> accused says that the 2<sup>nd</sup> accused was rewarded for rendering Taxation Services to the Company for the last 9 years. According to prosecution the payment to 2<sup>nd</sup> accused was outside the contract. The proper procedure would be to get the approval of the Post Fiji Limited Board and Higher Salary Commission. You have heard the evidence on all witnesses on the procedure that should be adopted when approving the payment to 2<sup>nd</sup> accused.

72. 1<sup>st</sup> accused in his evidence said that he had the authority to sanction the payment to 2<sup>nd</sup> accused for his taxation services. It is matter for you to decide whether he had the authority and if he so believed whether it was an honest and reasonable but mistaken belief. When deciding on that, the same test which I explained to you applies. You have to consider this evidence with great caution.
73. As assessors and judges of facts, it was agreed between 2<sup>nd</sup> accused and the prosecution that the Managing Director of Post Fiji limited signs the contract of 2<sup>nd</sup> accused. Therefore he comes within the interpretation of person employed in the public service. It was agreed that the 2<sup>nd</sup> accused received the payment of \$5400.00 with his salary. According to prosecution witnesses preparing and filing Income tax Return of the Company comes within the Job Description (P5) of the General Manager Finance and thus accepting a reward for such act is beyond his proper pay and emolument.
74. The 2<sup>nd</sup> accused took up the position that he only sought some recognition for his specialised Tax Services to the company. You have to consider this evidence very carefully.
75. Madam and gentlemen of assessors, in this case 1<sup>st</sup> accused elected to give evidence from witness box and 2<sup>nd</sup> accused remained silent. Those are their rights.
76. 1<sup>st</sup> Accused in his evidence said that the payment to 2<sup>nd</sup> accused in recognition of his Tax Services was discussed in the Board before its approval. But minutes of Board meeting dated 30/11/2005 does not contained the discussion. But he further said that he had the authority to approve the payment without the approval of the Board

and Higher Salary Commission. You have to consider this evidence with great care.

77. You have heard all the prosecution witnesses. You have observed them giving evidence in the court. You have observed their demeanour in the court. Considering my direction on the law, your life experiences and common sense, you should be able to decide which witness's evidence, or part of his/her evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject. Use the tests mentioned above to assess the evidence of witnesses.
78. You must also carefully consider the both accused's position as stated above. Please remember, even if you reject the versions of both accused that do not mean that the prosecution had established the case against them. You must be satisfied that the prosecution has established the case beyond reasonable doubt against both accused persons.
79. Madam and gentlemen of assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.
80. Once again, I remind, that your duty is to find the facts based on the evidence, apply the law to those facts and come to a correct finding. Do not get carried away by emotions.
81. If you find that the prosecution has proved all the elements of 1<sup>st</sup> count against the 1<sup>st</sup> accused beyond reasonable doubt, you may find him guilty. If you have reasonable doubt on the elements you must find him not guilty.
82. If you find that the prosecution has proved all the elements of 2<sup>nd</sup> count against the 2<sup>nd</sup> accused beyond reasonable doubt, you may find him guilty. If you have reasonable doubt on the elements you must find him not guilty.
83. You must consider evidence against each accused on each count separately.

84. This is all I have to say to you. You may now retire to deliberate. The clerks will advise me when you have reached your individual decisions, and we will reconvene the court.
85. Any re-directions ?

P Kumararatnam

**JUDGE**

At Suva

27/05/2013



