IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC026 OF 2009

BETWEEN: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

A N D: **1. KALIVATI BAKANI**
2. KENI DAKUIDREKETI

Counsel : Mr. V. Perera& Ms. H. Matakitoga for State
: Mr. F. Vosarogo for 1st Accused
: Mr. B King – Queen's Counsel with Mr. W. Clarke with Ms. Cole M for 2nd Accused

Date of Ruling : 08th August 2013

RULING ON THE APPLICATION TO AMENDTHE INFORMATION

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1. Fiji Independent Commission Against Corruption (FICAC) made an application to Court on 18th July 2013 to amend the information by substituting 8 counts of 'Abuse of Office' against the two accused (four counts against each) instead of existing four counts of 'fraudulent conversion' and one count of abuse of office. This application was made in terms of section 214 (9) of the Criminal Procedure Decree.

2. It was averred by the prosecution that they obtained advice from their overseas counsel recently and it was after that they decided to enter a '*nolle prosequi'* against LaiseniaQarase and sought this last amendment to ensure 'that trial could be expeditiously heard and effectively conducted'. The prosecution has cited number of case authorities and legal back ground on some other overseas jurisdictions in support of their application to amend the

information and urges that their application should be allowed as there is no prejudice caused to the accused as the trial is yet to start with all the disclosures provided. The crux of their argument is that the amendment sought is based on the substantially same evidence and witnesses but the case is reformulated whilst the substance of the allegation remains unchanged.

3. The comprehensive and pertinent written submission on behalf of the 2nd accused categorically denies the assertion of the prosecution. It says that the prosecutions arguments of no prejudice caused to the defence, disclosures are completely served and the evidence is substantially the same are plainly wrong and should not be accepted. The learned counsel has elaborated the number of times the amendments took place; the undertakings given by the FICAC prosecutors to court that there will be no more amendments to the information and the waste of time and money that the accused had to incur due to those changes of stance by the prosecution. The learned counsel went on to say that this is an abuse of process of court by the prosecution as the 2nd accused while preparing for trial was asked to get ready for different charges for 2 times, and now for the 3rd time. The crux of the argument of the counsel is that as a consequence of this approach by the prosecution, the 2nd accused is severely prejudiced in his defence and therefore the court should exercise its inherent powers to refuse this application for leave to amend the information for the 4th time.

4. The first accused or his counsel did not file any written submissions on the given time frame and therefore this court proceeds to rule the issue with the available material.

5. Before proceeding to see the legal background for amendments to Information, this court wishes to reproduce certain instances which took place since the matter was first referred to court in 2008.

- On 13th May 2008 Mr.LaiseniaQarase was produced in the Magistrate's court as the accused of case no. 921/2008 with one count of Abuse of Office. The learned Magistrate transferred the matter to High Court by his Ruling dated 02nd of February 2009.

- Mr.Qarase appeared before High Court on 05th of March 2009 and matter was adjourned to 01st May 2009 for mention to set a hearing date.

- Matter was then fixed for one week trial commencing from 19th January 2010 when Mr.Qarase appeared in court on 22nd of July 2009. Matter was to mention on 27th of November 2009 for Pre-trial conference.

- On 27th of November 2009, FICAC sought leave to amend the information pursuant to section 274 (1) of the Criminal Procedure Code and the leave was granted by court as there was not that much of resistance from the defence. Then the information replaced with 7 counts of 'Fraudulent Conversion' instead of one 'Abuse of Office' charge. Because of this amendment, the trial date of 19th January 2010 was vacated and converted to a mention date.

- 19th of January 2010, 25th of February 2010, 21st of May 2010 and 04th of June 2010 matter proceeded without much significance.

- On 25th of June 2010, FICAC informed court that the matter will be consolidated with HAC 116/2009. Ruling on the consolidation had been delivered on 24th of January 2011, allowing the prosecution to consolidate HAC 026/2009 with HAC 116/2009. Mr.KalivatiBakani, was added to this case as a result of that consolidation. Charges remained unchanged with 7 counts of 'Fraudulent Conversion'. Both Mr.Qarase and Mr.Bakani had pleaded not guilty to the 7 counts. A one month trial was anticipated and the trial was fixed from 5th of March 2012 onwards.

- With the application of the prosecution, HAC 179/2011 was then consolidated to this case on 20th of January 2012. The case then comprised with 3 accused by the addition of Mr.KeniDakuidreketi. On 8th March 2012, the amended information was filed and it contained 2 counts of Abuse of Office against the then 1st accused Mr.Qarase, 2 counts of 'Fraudulent Conversion' charges against 2nd and 3rd accused Mr.Bakani and Mr.Dakuidreketi and one count of 'Abuse of Office against Mr.Bakani. All 3 accused pleaded not guilty to each count on 3rd of May 2012. Mr.Perera, appearing in court on behalf of the prosecution, undertook to serve the proposed agreed facts to the defence by mid June 2012.

- Since May 2012 this matter had been adjourned to finalise the issues pertaining to the disclosures for several times until the prosecution decided to enter a '***nolleprosequi'*** against Mr.Qarase, then 1st accused on 26th of June 2013. This court

discharged Mr.Qarase accordingly and the two counts faced by him then faced a natural death.

- Then this court expressed its willingness to fix the matter for trial against the two existing accused as this being the oldest pending case in this court since March 2009. When the matter was mentioned on 18th of July 2013 to fix the matter for trial, Mr.Perera on behalf of the prosecution sought permission of court to amend the information again with the advice of their overseas counsel. The intended charges would be 10 counts of 'Abuse of Office', five against each accused. It is this application of the FICAC, defence vehemently objects to and both parties are seeking an order from court in favour of their contentions.

6. With this sequence of events, I now turn to see what the applicable law relating to the amendment of Information. Section 214 (8), (9) and (10 of the Criminal Procedure Decree 2009 state as follows:

> (8) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.
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> (9) The Court may, upon application by the prosecution, grant leave to amend an information, whether by way of substitution or addition of charges or otherwise.
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> (10) In deciding whether or not to grant leave, the Court may consider whether the amendment might embarrass the accused in his defence and whether such embarrassment might be appropriately mitigated by way of adjournment of trial.

7. In the above context, it is quite clear the deciding factor, either to grant leave or not to amend an information,is embarrassment caused to the accused in his defence.

8. As Justice Ashworth commented in Johal [1973] QB 475:

> *"In the judgment of this court there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise…*
>
> *On the other hand this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment*

is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

If there is no prejudice caused to the accused amendments can even be made at the later stages of the case as decided in ***Collison****(1980) 71 Cr. App R. 249* and ***Teang Sun Cherah****[1991] Crim. L.R 463*. In the case of ***Swaine*** *[2001] Crim. L.R. 166*, it was decided that the later the amendment is, the greater the risk that it could cause injustice to the accused and therefore it should not be allowed.

9. There is no dispute in Law or general practice in courts in respect of the prosecution's eligibility to amend their own information. Nevertheless, such an amendment should be done within a justifiable time frame where the accused is not faced with any embarrassment in his defence. Whereas it was highlighted in **State v. K.R.A.K**. *[HAC 73 of 2013 (04th July 2013)]*, though there is no specific time bar stipulated in Section 214 (9) of the Criminal Procedure Decree 2009 to move court for any amendment to an Information, such an application cannot be made by the prosecution as of right. It is, then the duty of the prosecution to prove, that the proposed amendment does not embarrass the accused or even though the proposed amendment embarrasses the accused, it can be appropriately mitigated by way of an adjournment of trial. [Section 214 (10)].

10. In coming back to the matter before hand, I have to say that this is unique in its characteristics. This matter has proceeded this far since March 2009, for almost three and a half years in the High Court, with several amendments to the information coupled with two consolidations and *nolleprosequi*. The sequence of events of the court proceedings highlighted in paragraph 05, is indeed pathetic, if not disappointing. That itself amply demonstrates the labyrinth the prosecution is struggling to get away with. The court record shows that each and every time a new prosecutor appeared in court, a new strategy is been adopted in respect of the Information. The latest has come out with the 'overseas counsel'. The accused who was at the very outset in this Information is been discharged by the request of the prosecution itself. The accused that were subsequently added to the Information still remain with varying charges in time to time. This attitude of the prosecution is not acceptable at all and cannot be entertained. Hence, it is needless to say that the accused are prejudiced to its highest and simply embarrassed in formulating their defence. I do agree with the learned counsel for the 2nd accused that this embarrassment is indeed a 'costly' one.

11. It is now left to this court to determine whether or not such an embarrassment can be appropriately mitigated by way of an adjournment of trial. The trial proper is yet to begin in this case. The prosecution claims that the evidence that they wish to lead is substantially the same, even on the amended information. May it be substantially same or not, prosecution has a continuing duty to provide the necessary and relevant disclosures to the defence. Before this application was made to amend the information, defence was liaising with the prosecution in obtaining the relevant disclosures. Therefore, the grievance of the defence that the much needed disclosures are yet to be provided can

be mitigated with a specific and monitored time frame. Hence, it is the view of the court that granting leave to the proposed amendment to the Information can be adequately mitigated by the way of an adjournment of trial. It will allow the defence to have more breathing space to get ready for the trial proper.

12. Finally, this court is of the firm opinion that this should be the final amendment to the Information. No other amendment to the Information will be allowed or entertained in future. Subject to that condition, the application to amend the Information by the prosecution is allowed. Prosecution is ordered to provide all the necessary disclosures to the defence in order to prepare for the case.

JanakaBandara
Judge

At Suva

Office of the Fiji Independent Commission Against Corruption for the State
Mr. F. Vosarogo for the first Accused
Howards Lawyers for the second Accused