IN THE HIGH COURT OF FIJI
AT SUVA

ANTI-CORRUPTION DIVISION

CRIMINAL CASE NO. HACD 005 of 2022S

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC))

vs

NIKOLAU NAWAIKULA

Counsel: *Mr. Aslam R and Mr. Work J with - for the Prosecution*
Mr. Hickes D and Mr. Nand A
Mr. Valenitabua S. R and Rokodreu V - for the Accused

Dates of Trial: ***28th March – 19th April 2022***
Date of Judgment: ***03rd May 2022***
Date of Sentence: ***20th May 2022***

SENTENCE

1. In this matter, the Accused (**NIKOLAU NAWAIKULA),** was charged by the Fiji Independent Commission against Corruption with two counts, as below:

FIRST COUNT

Statement of Offence (a)

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

Particulars of Offence (b)

Nikolau Nawaikula on or about 10th April 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 Buca Village, Buca Bay 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 Nikolau Nawaikula were known to her.

SECOND COUNT

Statement of Offence (a)

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

Particulars of the Offence (b)

Nikolau Nawaikula between 1st August 2019 and 30th April, 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 $20,201.35 from the office of the Acting Secretary General to the Parliament of Fiji knowing or believing that he permanently resides at 15 kilometers Kings Road, Koronivia, Nausori 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.

2. At this trial, 19 witnesses were called for the Prosecution and 88 documents were marked **(PEX1 – PWEX88).** For the Defense, the Accused gave evidence under oath and 3 more witnesses were summoned. Further, 42 documents **(DEX1 – DEX42)** were marked. On pronouncing the verdict in this case on 03/05/2022, the Accused was convicted on both counts by this Court and today this matter is coming up for sentence.

3. In comprehending the gravity of the offences committed by the Accused in this matter, I am mindful that the maximum punishment for the offence of tendering false information to a public servant, contrary to **Section 201(a)** of the **Crimes Act No. 44 of 2009** is an imprisonment term of five (05) years and the maximum punishment for obtaining financial advantage, contrary to **Section 326(1)** of the **Crimes Act No. 44 of 2009** is an imprisonment term of ten (10) years.

4. In the absence of a confirmed tariff regime enunciated by the Superior Courts in our country for the two offences the Accused had committed in this matter, without venturing into a mathematical jujitsu, I intend to take guidance from the pronouncement made by **His Lordship Justice Marsoof** of the **Supreme Court of Fiji** in the case of **Solomone Qurai v The State**[1], where His Lordship observed the sentencing methodology followed in Fiji, as below:

   > *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case."*

5. However in making reference to the **Sentencing and Penalties Decree 2009** of Fiji, **His Lordship Justice Marsoof** states that:

   > *"It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors."*

6. Therefore, in determining the appropriate sentence for the Accused in this matter, I intend to depart from the two-tiered process and adopt an instinctive process of reasoning in arriving at the final determination. For this end, I intend to analyze the aggravating and mitigating factors tendered by the Prosecution and the Defense meticulously.

[1] [2015]FJSC 15

Aggravating Factors

i) Breach of Public Trust

7. The Accused in this matter was a Parliamentarian of this country for several years. As a consequence, the Accused was well aware that he was reposed with trust and responsibility on behalf of his voters on one hand, and he had a responsibility to the constitution of this country on the other hand by the oath of office and the oath of allegiance he took in the Parliament. As claimed by the Prosecution, the level of trust that was posed on the Accused by his voters was of the highest degree and by breaching the laws, as seen in this matter, the Accused committed the highest breach of trust in the eyes of the public, to the Parliament of this country and to this nation, which the Prosecution expect me to consider as an aggravating factor in passing the sentence. For this end Prosecution brings to the attention of this Court the Canadian case of **R v Bruneau**[2], where the Court has pronounced as below:

> *"The responsibility of a member of parliament to his constituency and to the nation requires a rigorous standard of honesty and behavior, departure from which should not be tolerated."*

8. Considering the circumstances of this case, I observe that this is a case where a Parliamentarian has misused allowances provided to Parliamentarians through public money, in recognition of the onerous duty expected from members of Parliament. Right throughout this trial it was echoed by the Accused that Buca village is the land of his father and forefathers. In high insight, the money that was wrongfully obtained by the Accused could have been used to provide more computers to the young kids like his grandchildren in the Kama District School or to train more health care professionals from the Buca village to provide better health services to the elderly in the Buca village like his mother. In recognizing that conduct of this nature by the members of an honorable institution like the Parliament could spread like a cancer resulting in bringing the apparatus of the government to a standstill, as recently seen in some jurisdictions, this Court identifies its responsibility to take positive action to nip such conduct in the bud and send a profoundly strong signal to discourage potential wrong doers within the contours of the law.

[2] [1963] CarswellOnt 22; [1964]1CCC 97

ii) *Serious Damage to the Reputation Parliament*

9. Prosecution contends that the Accused, by his conduct, betrayed the public trust in honorable members of Parliament. It is further stated that the immediate result of such action is a serious damage to the reputation of the Parliament that could result in an overall reduced confidence in the democratic system of our country. In support of this claim, Prosecution highlights the sentiments expressed by the **English Crown Court** judge in the case of ***R v Chaytor***[3], as below:

> *"Some of those elected representatives, vested with the responsibility for making the laws which govern us all, betrayed public trust. There was incredulous consequent public shock. The result was serious damage to the reputation of Parliament with correspondingly reduced confidence in our priceless democratic system and the process by which it is implemented and we are governed"*

iii) Pre-meditation

10. At the trial in this matter, Prosecution lead evidence through phone records and demonstrated to Court how the Accused had always visited Buca village few days before the Parliamentary sittings to create a case for his claims. Therefore, it was noticed by the Court how visits to Buca village were meticulously pre-planned by the Accused and taken steps to create his own acquittals, when needed. I intend to take this into consideration in the final sentence.

Mitigating Factors

i) Cooperation during trial

11. The highly commendable and exemplary degree of cooperation provided by the Counsel for the Defense and the Accused in this matter during trial should be given due credence in sentencing. In this regard, due to this cooperation, the length of the trial was significantly

[3] [2011] 1 All ER 805

shortened, where the contested issues and documents were promptly identified. Also the trial was conducted very professionally, offering professional courtesies when warranted. As tendered by FICAC, I should take cognizance of this conduct and award the due discount to the Accused, as pronounced by **Fullerton J** of the **Supreme Court of New South Wales, Australia** in the case of ***R v Macdonald; R v Edward Obeid; R v Moses Obeid***[4]**, as below:**

> *"…….the Crown recognized the generally cooperative manner in which the trial was conducted by and on behalf of the offenders. I also acknowledge that the pre-trial directions I issued in 2018 in order that the objections to aspects of the Crown case to be dealt with in an orderly fashion were compiled with to the credit of all participating counsel. I also note that in large part of the continuity and provenance of documents was not disputed and that there were prepared from time to time during the course of the trial lengthy agreed facts."*

ii) Previous Character of the Accused

12. It is the contention of the Defense that I should take into consideration the character of the accused in determining the sentence in complying with **Section 5 o**f the **Sentencing and Penalties Act of 2009 (the Act)**. In this regard, **Section 5** of **the Act** recommends the sentencing Court to consider previous convictions recorded against the Accused and significant contributions made by the Accused to the community in reaching the appropriate sentence. For this end, I take notice that there are no recorded previous convictions against the Accused and, as lead in evidence during the trial and conceded by both Defense and Prosecution witnesses, the Accused had actively contributed to the Buca community. This position was demonstrated by the Defense through the documents marked as **DEX18**, **DEX22, DEX24** and **DEX25**.

13. In challenging this position, though the Prosecution has tendered few case authorities pronouncing that Parliamentarians accused of committing offences have already benefited from their character by having been elected to the Parliament, I beg to disagree with this

[4] [2020] NSWSC 382; BC202002715

position. Historically, voters used to appoint people with good character to represent them in Parliament. However, the demographics of reasons to vote for a particular politician have drastically changed in the resent political environment. At present, a voter will vote for a political candidate in considering the candidate's political ideology that resonate well with his or her own political views regarding important issues to that individual, regardless of the character of the candidate. Therefore, the presumption that politicians are of good character has gradually diminished from our societies. Not so long ago, the entire world witnessed an individual having many skeletons in the cupboard and with a not so positive reputation been elected to the most powerful politician position in this world. Surely, he did not get elected or become so politically powerful with utmost responsibility due to his unblemished character. Therefore, I am not willing to disregard the good character of the Accused on the premise that he has already obtained what is due for his character by being elected as an MP.

iii) Losing Public Credibility and Earnings

14. Defense submits that due to this conviction the Accused has lost credibility and integrity in the eyes of the public locally and internationally. Further, Defense claims that as a result of the conviction, the Accused has lost his earnings as a Parliamentarian and has been deprived of his Practicing Certificate to practice as a lawyer. As a consequence, Defense is of the view that the Accused has been already punished and he should not be punished anymore.

15. Unfortunately, I cannot agree with this submission. The Accused lost his Parliamentary seat and the Practicing Certificate not due to any misdemeanor of the judicial system of our country or due to the enmity of FICAC against the Accused. The Accused has been deprived of these positions due to his own wrongful conduct, which resulted in wrongfully claiming public money of this country. Therefore, according to the law of our country, if someone commits an offence, regardless of the designation, i.e. famer or politician, that person needs to be punished according to the contours of the existing law. **This demonstrates the Rule of Law in operation in our country.** Therefore, this contention of the Defense is without merit.

iv) <u>Restitution</u>

16. Defense brings to my attention the provisions stipulated in **Section 4 (2)(h)** of the **Sentencing and Penalties Act of 2009**, where it is stated, as below:

"*4 (2) In sentencing an offender, a Court must have regard to –*

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Act"

17. On the above, Defense claims that the Accused has now restituted the total sum that he was found guilty of taking advantage of by submitting false information to the Parliament. Therefore, the Defense informs this Court to take due notice of this development. Further, it is submitted that the accused could have repaid this money earlier, if the issue of Permanent Residency was clarified earlier.

18. In relation to restitution, I am of the view that restitution should not be used as a fig leaf with the expectation of lenience from Court when everything else has failed. In this matter, the Accused decided to repay the money after the conclusion of a trial that went on for 3 weeks ending up in his conviction. I see a clear distinction between an accused intending to restitute at an early stage of a criminal proceeding, which could also carry certain level of remorse of the accused, contrary to deciding to restitute at the tail end of a criminal trial, as in this matter. However, the restitution will be considered.

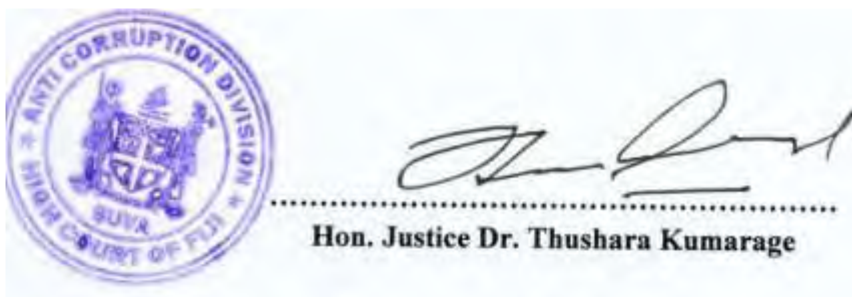
19. Considering the above espoused circumstances of this case, I notice that this is an appropriate case where an aggregate sentence could be imposed in terms of **Section 17** of the **Sentencing and Penalties Act 2009** in view that the Accused was convicted on each count based on the same facts. Hence, I would impose an aggregate sentence against the Accused for Count 1 & 2.

20. **Mr. Nikolau Nawaikula,** consequent to your conviction, I sentence you to 36 months imprisonment. Further, in considering your contribution to community service in this country and your active representation in Parliament of your community, with the authority given to me by **Section 26** of the **Sentencing and Penalties Act of 2009 (the Act),** your

sentence is partially suspended, where you shall serve 24 months of your sentence forthwith with an applicable non-parole period of 18 months under **Section 18 (3) of the Act**, and the remaining period of 12 months is suspended for five (05) years.

21. If you commit any crime punishable by imprisonment during the above operational period of five (5) years and found guilty by the Court, you are liable to be charged and prosecuted for an offence according to **Section 28** of the **Sentencing and Penalties Act of 2009.**

22. You have thirty (30) days to appeal to the Fiji Court of Appeal.



At Suva
20th of May 2022

Cc: ***Office of Fiji Independent Commission against Corruption***
Office of Ratumaiyale Law