IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No: HBC 202 of 2022

IN THE MATTER of an Application for Committal under Order 52 of the High Court Rules.

BETWEEN: **THE ATTORNEY – GENERAL OF FIJI** of Level 4-8, Suvavou House, Victoria Parade, Suva.

APPLICANT

A N D: **RICHARD KRISHNAN NAIDU**, Legal Practitioner, Duncan Road, Domain in Suva C/- Munro Leys, Level Pacific House, Butt Street, Suva.

RESPONDENT

Appearance : Ms. Gul Fatima for the applicant
Mr Alfred Martin Daubney K.C with Mr. John Apted for the respondent

Hearing : Thursday, 10th November 2022 at 9.30am

Judgment : Tuesday, 22nd November, 2022 at 3.00 pm

JUDGMENT

[A]. Introduction

[1]. The respondent is charged with contempt of court. Quite plainly, the nature of the alleged contempt in this case is that of scandalizing the court. On 22.06.2022, the Attorney – General (the applicant) filed in court an ex parte

motion to apply for an order of committal against the respondent. On 27.06.2022 leave was granted ex parte to the Attorney – General.

[B]. A Brief Chronology of the Events

[2]. On 15 July 2022, the respondent filed Summons to 'Set Aside Ex Parte Order' granted by this Court on 27 June 2022. In support of this Summons, the respondent filed affidavit of one Lorraine Aplana Bhan and one Lenora Salusalu Qereqeretabua.

[3]. The court heard the Summons on 26 July 2022.

[4]. On the day of the hearing, the respondent's counsel submitted, from the bar table, that the respondent wishes to cross examine the applicant.

[5]. On 29 July 2022, the respondent filed Summons for 'Hearing, Orders for Cross-Examination and for Related Orders'. In support of this Summons, the respondent filed an affidavit of one Ronal Jasvindra Singh.

[6]. On 4 August 2022 (6 days later), the respondent filed Summons for 'Leave to Amend Summons to Set Aside Ex Parte Orders'.

[7]. On 11 August 2022, the court heard the two Summons.

[8]. On 1 September 2022, the court delivered its decision in respect of the Summons seeking Hearing, Cross- Examination and Related Orders, as well as the Summons seeking Leave to Amend Summons to Set Aside the Ex Parte Order.

[9]. On 2 September 2022, the court delivered its decision in respect of the Summons seeking to Set Aside the Ex Parte Order.

[10]. The respondent then entered a plea of not guilty through counsel.

[11]. On 22 and 23 November 2022 the respondent filed Notices of Motion for Leave to Appeal from High Court to Fiji Court of Appeal and for Stay Pending Appeal in respect of both decisions.

[12]. The court had scheduled the substantive hearing in the committal proceedings for 30 September 2022, and the said date was vacated when the respondent filed the Notices of Motion seeking Leave to Appeal and Stay.

[13]. Hearing of the substantive committal hearing was then scheduled for 10 and 11 November 2022.

[14]. On 3 October 2022 the court heard the applications and delivered its decision on 14 October 2022. Leave and Stay were refused in the High Court.

[15]. On 6 October 2022, the respondent filed Summons seeking orders to cross-examine the applicant at the time of the substantive committal hearing.

[16]. These Summons were heard by the court on 14 October 2022 and the decision was delivered on 28 October 2022. The respondent's application for an order for cross- examination of the applicant was refused.

[C] The Factual Backdrop

[17]. On 21 January 2022, the High Court of Fiji handed down a Judgment in **Civil Action No: HBC 217 of 2019** in **Naidu v Gulf Investment (Fiji) Pty Ltd**. The Judgment is annexed and exhibited to the applicant's affidavit and marked annexure B.

[18]. The 3-page Judgment was handed down by a Judicial Officer of the Fijian bench in respect of an application filed by one Krishna Sami Naidu for injunctive relief against the 1st, 2nd, 3rd and 4th defendants. The plaintiff filed the said Action HBC 217 of 2019 seeking an injunction restraining the first, second, third and fourth defendants from further dealing with the property comprised in Crown Lease No:- 16505 which is owned by the first defendant and mortgaged to the fifth defendant – Westpac Banking Corporation.

[19]. The 5th defendant in the proceedings was Westpac Banking Corporation, represented by the respondent's law firm Munro Leys. At the hearing of the plaintiff's application, the respondent's counsel, Mr Apted was present in court to conduct the hearing. Another lawyer from the respondent's law firm was present in court to receive the Judgment when it was delivered.

[20]. Paragraph 1 and 2 of the Judgment sets out the background of the case.

[21]. Paragraph 3 states that after the hearing, the court was informed that the 1st defendant had been wound up.

[22]. Paragraphs 3, 4 and 5 read as follows:

> 3. *After hearing counsel for the first to fourth Defendant had, informed that the first Defendant was wound up on 8.11.2021.*
>
> *4. This application for **injection** was heard on 22.11.2021.*
>
> *5. By the time **injection** application was heard a winding up order was made by the Court against the first Defendant.*

[23]. Paragraph 4 and 5 contain the word "injection" as opposed to the word "injunction".

[24]. In all of the 3-page Judgment, this word is misspelled in only two places, and only in paragraph 4 and 5.

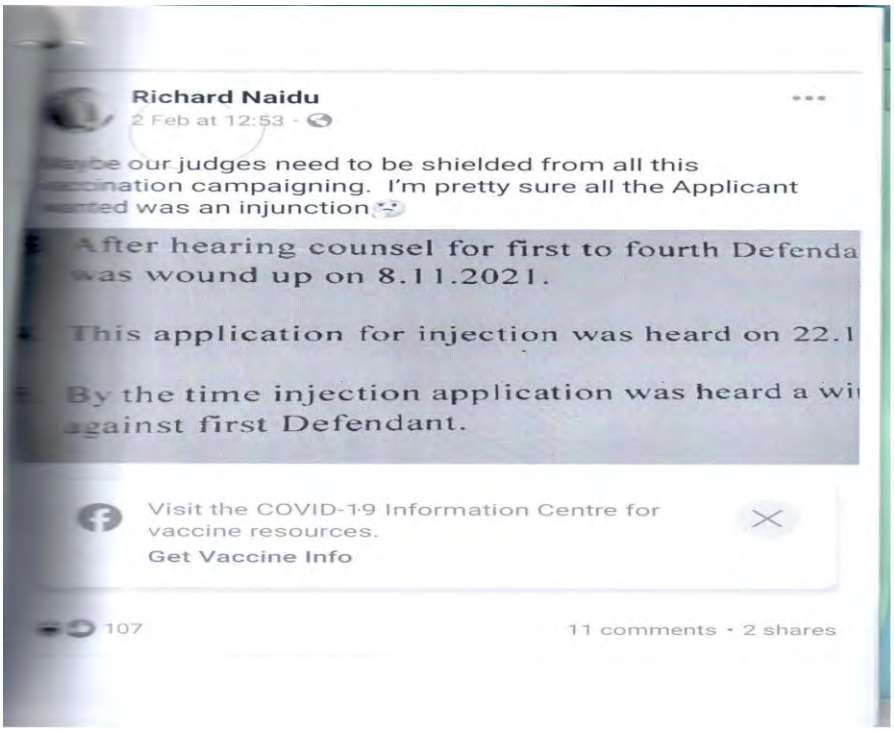
[25]. This word is correctly spelled in other parts of the Judgment. It appears in paragraph 8 of the Judgment, and its derivative injunctive appears in paragraph 9.

[26]. Paragraph 10 of the Judgment, which sets out the Orders made by the court again contains this word, and again the word is spelled correctly.

[27]. The judgment was delivered on 21.01.2022 refusing the application for interim injunction.

[28]. The Attorney - General alleges that about 12 days later, on 2 February 2022 at 12:53pm, the respondent published the post on his Facebook page which is the subject matter in these proceedings for contempt of court. A printed screenshot of the post along with the comments posted have been exhibited to the court as an annexure "A" in the affidavit of the Attorney-General sworn on 10.06.2022 and filed on 22.06.2022.

[29]. A scanned copy of the Facebook post is produced below for the sake of completeness.



[30]. The Attorney - General alleges that the respondent cropped out a portion of the said Judgment and published it on his Facebook page. It is further alleged that the respondent cropped out only the portion of the Judgment which contained the misspelled word.

[31]. The excerpt from the Judgment read:

> *"3. After hearing counsel for the first to fourth Defenda[...]*
> *4. This application for **injection** was heard on 22. 1[...]*
> *5. By the time **injection** application was heard a wi[...]*
> *against first Defendant."*

[32]. It is further alleged that the respondent then put together a caption for the excerpt. The alleged caption reads;

> *"Maybe our judges need to be **shielded** from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]'.*

[33]. The Attorney - General alleges that the respondent published this post and by this very publication, invited other Facebook readers to post comments.

[34]. The Attorney – General further alleges that the respondent's Facebook post was publicly accessible and attracted 107 reactions, 11 comments and was shared 2 times. **Out of the 107 reactions, 84 were laughing emojis or pictograms**.

[35]. The following are some of the comments allegedly posted ;

a. *Alanieta Vakatale commented with a GIF or graphics interchange format by adding an animation of a **woman laughing while holding her stomach**. The animation also - contains the words "**Ha Ha Ha Ha**".*

b. Tomasi Tuitoga commented with "Saw that. You couldn't resist RKN Richard Naidu...."

c. Monica Patel commented "Freudian slip no less'.

*d. Rohit Singh commented "**LoL**" which means laugh out loud, an expression used on social media or in messaging where the writer wishes to express **that he or she laughed audibly.***

*e. Asishna Ansu commented '**chota mota kisaan**' translated as '**short fat farmer**'.*

f. Grace Wise commented "OMG. Hope it's not an expat judge [emojis]"

[36]. The Attorney – General alleges the following in paragraph (16) of the affidavit verifying the facts sworn on 10.06.2022, and filed on 22.06.2022;

(16) ***I believe that the respondent's conduct in publishing the post and excerpt of the judgment, and his comments as set out above, were deliberately made and designed to:***

(i) Make fun of and scandalize the court and the Judicial Officer who has carriage of this case.

(ii) Bring into disrepute and lower the reputation of the Judicial Officer and the administration of Justice in Fiji.

[37]. Order 52, Rule 2(2) **charge statement** filed by the Attorney- General on 22.06.2022 sets out the following grounds on which his committal is sought:-

Grounds of Committal

For his Facebook Post of 2nd February 2022 at 12.53pm.

The Facebook post read ***"Maybe our judges need to be shielded from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]".***

The Facebook post also included an excerpt of the judgment delivered in Naidu v Gulf Investment [Fiji] Pty Ltd [2022] FJHC 23 which was delivered on 21st January 2022.

The plaintiff selectively cropped a portion of the judgment which read:

"3. After hearing counsel of the first to fourth defenda[…]
4. This application for ***injection*** *was heard on 22.1[…]*
5. By the time ***injection*** *application was heard a wi[…]*

The Facebook Post sought to:

i. Ridicule the presiding Judicial Officer and the Fijian Judiciary as a whole;

ii. Bring into disrepute and lower the reputation of the presiding Judicial Officer and the administration of justice in Fiji; and

iii. invite and encourage viewers of the post to cast aspersions against Expatriate Judicial Officer.

[38]. The Attorney - General **alleges** that the Facebook post published by the respondent on his Facebook post scandalized the court and the judiciary of Fiji on the basis that; (a) it is a scurrilous attack on the judiciary and (b) it lowered the authority of the judiciary and the court.

[39]. The underlying principle upon which this jurisdiction is exercised was stated in clear terms by Lord Diplock in his Lordship's speech in **Attorney-General -v- Times Newspaper Ltd** [1]

[1] (1974) AC 273 at 307 p

"In any civilized society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another."

[40]. Contempt proceedings are concerned with the maintenance of public confidence in the courts of law (and the judiciary) established and maintained by the state for the administration of justice. The ability of the judiciary and courts of law to effectively administer justice is dependent on, amongst other things, the authority of those courts and the judiciary. That in turn, depends on whether they (the courts and the judiciary) command the confidence of citizens to administer justice without fear or favour[2].

[41]. The nature of the jurisdiction was clarified in **Mahendra Pal Chaudhry — Attorney-General of Fiji**[3]. The Court of Appeal (Casey, Barker and Thompson JJA) said:

"This summary indicates that the common law offence of contempt scandalizing the Court involves attacks upon the integrity or impartiality of judges or Courts, the mischief aimed at being a real risk of undermining public confidence in the administration of justice which must be established beyond reasonable doubt."

[D] Preliminary Point

[42]. On 08.09.2022, the respondent through his counsel indicated that he pleads not guilty to the charge of contempt of court brought against him. On that day, directions were given to the respondent to file an affidavit in answer to the Attorney - General's affidavit in support of motion verifying facts sworn on 10.06.2022 and filed on 22.06.2022. The Attorney - General's affidavit was open to question since 22.06.2022. The respondent has not sworn and filed an affidavit in answer. **The respondent chose not to file an affidavit in opposition.** As such, I am **inclined** to accept the veracity of the matters that have been

[2] **Calanchini J in State v Citizens Constitutional Forum, ex parte Attorney - General [2013] FJHC 220; HBC195.2012 (3 May 2013) at page 15**

[3] (1999) 45 FLR 87. At page 92

deposed to by the Attorney - General in his affidavit sworn on 10.06.2022 and also the documentary evidence exhibited in the affidavit[4].

[43]. The respondent in this case was allowed the full opportunity to defend the alleged contempt or to respond to the alleged contempt by filing an affidavit in answer denying the allegation or provide some explanation. Furthermore, at the hearing of the substantive application, the respondent was allowed the full opportunity to give oral evidence on his behalf[5] pursuant to Order 52, Rule 5 (4) of the High Court Rules, 1988.

[44]. The respondent did not give evidence.

[45]. The affidavit of the Attorney - General sworn on 10.06.2022 in support of the grant of leave to commit the respondent for contempt of court was relied on at the substantive hearing as the Attorney - General has filed no further affidavits.

[46]. The Attorney - General deposed the following in his affidavit in support of motion verifying facts relating to leave for committal sworn on 10.06.2022;

(2) I depose to this Affidavit from my own knowledge, from legal advice rendered to me by Solicitors and where so stated from information and belief, the source of which I have identified.

(3) My office was alerted to a Facebook post published by the Respondent on 27th February 2022 at 12:53pm on his Facebook page. Screenshots of the Facebook post and comments to the post are annexed hereto and marked "A".

(4) The Facebook post read "Maybe our judges need to be Shielded from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]

(5) The Facebook post also included a photograph of the Judgement delivered in Naidu v Gulf Investment (Fiji) Pty Ltd [2022] FJHC 23 on 21 January 2022

[4] HKSAR v Lee Ming Tee –Unreported Hong Kong Court of Final Appeal - Hklii: [2003] HKCFA 54.
Jai Prakash Narayan v Savita Chandra; Fiji Court of Appeal case No. 37 of 1985, Date of Judgment 08.11.1985

[5] Order 52, Rule 5(4) provides "If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so."

(6) The Respondent selectively cropped a portion of the Judgement which read:

> *"3. After hearing counsel for the first to fourth Defenda[...]*
> *4. This application for injection was heard on 22. 1[...]*
> *5. By the time injection application was heard a wi[...]*
> *against first Defendant."*

The ellipses indicate portions which have been cropped out from the excerpt of the Judgment posted by the respondent.

(7) The written Judgement of the presiding Judicial Officer, included two spelling errors. The word injunction was misspelled as "injection" in two places. The Respondent deliberately cropped and published on his Facebook page, the portion of the Judgement where the word injunction was misspelled. In the remainder of the Judgement, the word injunction was spelled correctly.

(8) The Respondent's Facebook post was publicly accessible and attracted 107 reactions, 11 comments and was Shared 2 times. Out of the 107 reactions, 84 were laughing emojis or pictograms.

(9) One Facebook user by the name of Grace Wise, commented as follows:

> ***"OMG. Hope it's not an expat judge [emojis]"***

(10) I understand that the presiding Judicial Officer is a Sri Lankan national. This comment by one Grace Wise was not deleted by the Respondent, but remained on his Facebook post for other viewers to read.

(11) My Solicitors represented Krishna Sami Naidu, the Plaintiff in Naidu v Gulf Investment (Fi) Pty Ltd [2022] FJHC 23. I am advised by my Solicitors and verily believe as follows:

a. The Respondent is a Legal Practitioner and a Partner in Munro Leys.

b. Munro Leys represented Westpac Banking Corporation, the Fifth Defendant in the proceedings.

c. *Mr Jon Apted, another Partner in Munro Leys, had conducted the hearing on 22nd November 2021 before the presiding Judicial Officer. A Solicitor from Munro Leys had appeared in Court to collect the Judgment when it was delivered.*

A copy of the said Judgment is annexed hereto and marked "B".

(12) I believe that as a Legal Practitioner, if the Respondent was concerned with the spelling errors in the Judgment, he should have written to the High Court Registry and asked that the matter be brought to the attention of the presiding Judicial Officer.

(13) The Respondent published the excerpt of the Judgment on his Facebook page with a scurrilous, sarcastic and sneering post, designed to attract attention, to encourage and invite viewers and other Facebook users to mock the Judicial Officer, the Judgment and the Fijian Judiciary.

(14) I am advised by my Solicitors and I believe that the post published by the Respondent is tantamount to contempt in that the Respondent's comments were made to make fun of and scandalize the Court and the Judicial Officer who has carriage of the case and to bring the administration of justice in Fiji into disrepute.

(15) The Respondent is a Legal Practitioner. Legal Practitioners must show respect and act with courtesy towards the Court.

(16) I believe that the Respondent's conduct in publishing the post and excerpt of the Judgment, and his comments as set out above, were deliberately made and designed to

i). Make fun of and scandalize the Court and the Judicial Officer who has carriage of this case.

ii). Bring into disrepute and lower the reputation of the Judicial officer and the administration of justice in Fiji.

(17) For the reasons set out in this Affidavit, I seek leave to issue committal proceedings against the Respondent.

[47]. During the substantive hearing on 10.11.2022, there were specific objections that have been made in the oral submissions of Mr. Daubney KC to the affidavit of the Attorney - General sworn on 10.6.2022, pursuant to Order 41, Rule 5(1) of the High Court Rules, 1988, which states "…… *an affidavit may contain only such facts as the deponent is able of his own knowledge to prove*."

[48]. I note that whilst objections were raised in the oral submissions of the respondent's counsel at the substantive hearing on 10.11.2022, no objections were raised by the respondent's counsel at the call over of this matter since 08.07.2022. [See the chronology of the proceedings at part **B** above].

[49]. I also note that on 29.07.2022 the respondent filed summons for hearing, orders for cross examination of the Attorney - General on his affidavit sworn on 10.06.2022 and for related orders. No objections were taken to the paragraphs in the affidavit of the Attorney - General or to the admissibility of the matters deposed to in the affidavit.

[50]. Again on 06.10. 2022, the respondent filed summons seeking an order to cross-examine the Attorney - General on his affidavit sworn on 10.06.2022 at the time of the substantive committal hearing. Again no objections were taken to the paragraphs in the affidavit of the Attorney - General or to the admissibility of the matters deposed to.

[51]. The substantive hearing was delayed on many occasions by reason of the particular challenges presented by the respondent. [See the chronology of the proceedings at part **B** above].

[52]. The respondent is raising objections to the paragraphs of the Attorney - General's affidavit when everything else has failed. Just before, I was to hear the substantive application for an order of committal against the respondent, counsel for the respondent made oral submissions from the bar table raising objections to the admissibility of the Attorney - General's affidavit. I get the distinct impression that the objections to the admissibility of the Attorney – General's affidavit was developed or perhaps conceived when everything else has failed. In the circumstances, I am sceptical about the genuineness of the objections raised by the respondent's counsel to the affidavit of the Attorney - General.

[53]. The respondent submits **primarily** that all of paragraph (3) of the Attorney - General's affidavit should be struck out or ruled inadmissible because: [Paragraph (5) of the respondent's written submission filed on 10.11.2022]

a). *Paragraph 3 does not contain evidence which the applicant is able of his own knowledge to prove. It therefore does not comply with the primary rule.*

b). *At best, paragraph 3 purports to adduce hearsay or secondary evidence. But even if the court were inclined to allow the applicant's affidavit to include hearsay or secondary evidence on this hearing [which, for obvious reasons, it should not] paragraph 3 comprehensively fails to adduce that evidence in compliance with the requirements of Order 41, rule 5(2) because [despite what he says at paragraph 2 of his affidavit] there is complete absence of disclosure by the applicant of either the original sources of his information or the grounds of his beliefs.*

c). *It "swears the issue" in respect of matters which are for the court to determine - that is to say, it asserts a matter for legal determination as a fact.*

[54]. In relation to paragraph (3), the first objection is that:

- *The applicant does not identify which "office" he is referring to.*
- *The applicant does not disclose how and when he was "alerted".*
- *The identity of the "informant" is not disclosed.*

[55]. In my view, this does not affect the primary issue as to the following:

- *The alleged Facebook post existed.*
- *The alleged Facebook post was posted at 12.53pm on 02.02.2022.*
- *It was the respondent's Facebook post.*

[56]. The applicant exhibited as annexure 'A', a printed copy of an electronic document which he describes as a printed screenshot of the alleged post and also the screenshot of the comments received to the post.

[57]. Screenshot is electronic evidence. Electronic evidence is admissible. The screenshot is admissible under section 17(1) of the Cybercrimes Act 2021 which is in the following terms:

> 17(1) *In any proceeding related to any offence under any written law, the fact that evidence has been generated, transmitted or seized from, or identified in the search of the computer system* ***must not of itself prevent that evidence from being presented, relied on or admitted****.*
>
> [Emphasis added]

[58]. It is important to keep in mind that section 17 (1) of the Cybercrimes Act, 2021 does **not** demand the requirement of authentication or identification as a condition precedent to the admissibility as evidence in court.

[59]. The electronic evidence, viz, the printed screenshot [Exhibit 'A'] showed the following: [See paragraph 29 above]

- *A post dated 02nd February on a Facebook profile under the name of Richard Naidu*
- *The photograph on that profile resembling Richard Naidu.*
- *The post reads ;*

  "Maybe our judges need to be shielded from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]".

- *The comment posted on Facebook page by one Tomasi Tuitoga's was that "saw that you could not resist RKN Richard Naidu".*

[60]. The electronic evidence, viz, the screenshot is exhibited and tendered to court by the Attorney - General on 22.06.2022 for proving that:

- *The alleged Facebook post existed.*
- *The alleged Facebook post was posted on the respondent's Facebook page at 12.53 pm on 02.02.2022.*
- *The respondent posted it.*

- *The post was published, meaning it was communicated.*

[61]. **On 15.07.2022, the respondent Mr. Richard Naidu was made aware of the printed screenshot of a Facebook post on a profile under the name of Richard Naidu and also he was made aware that there is a photograph on that profile resembling the respondent Mr. Richard Naidu and also about the comment posted on the Facebook page by Tomasi Tuitoga reads that "*saw that you could not resist RKN Richard Naidu*"**. Furthermore, the respondent was well aware that the Attorney - General has adduced the printed screenshot into evidence ["exhibit A"]

[62]. A stark illiterate country – dweller – contemnor may require more words in simplistic language to understand what this offence before the court.

[63]. The respondent Mr. Richard Naidu is an experienced and a very senior barrister and solicitor and has great experience and is very conversant with proceedings for contempt of court and by training and experience, understands the pith and essence of the offence of contempt of court.

[64]. The respondent Mr. Richard Naidu did not demand the authenticity or identity of the printed screenshot and also did not call for an evidential investigation as to the authenticity and the identification of the printed screenshot despite he was being made aware **on 15.07.2022 ; (1) of the printed screenshot of a Facebook post on a profile under the name of Richard Naidu and (2) that there is a photograph on that profile resembling Richard Naidu and (3) of the comment posted on the Facebook page by Tomasi Tuitoga's reads "*saw that you could not resist RKN Richard Naidu*".**

[65]. **Despite all this, the respondent chose not to file an opposing motion *in limine* disputing the admissibility by challenging the authenticity and identity of the screenshot of the post on the Facebook profile under the name of Richard Naidu which carried a photograph on that profile resembling Richard Naidu.**

[66]. **In the circumstances, I conclude and it is safe to conclude that the proponent Attorney – General needs not rule out all possibilities inconsistent with authenticity, or prove beyond any reasonable doubt that the item is what the proponent Attorney - General claims it is.**

[67]. **The court has the discretion to determine whether evidence [the printed screenshot] is relevant an admissible. It is for the trier of facts to make the ultimate determination on admissibility and relevancy.**

[68]. **I find that the printed screenshot of the Facebook post on a Facebook profile under the name of Richard Naidu [Exhibit A] is properly authenticated by the following mentioned contents shown in the printed screenshot of the Facebook page ;**

- *A post dated 02nd February on a Facebook profile under the name of Richard Naidu*
- *The photograph on that profile resembling Richard Naidu*
- *The post reads ;*

> ***"Maybe our judges need to be shielded from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]".***

- *The comment posted on the Facebook page by Tomasi Tuitoga's reads "saw that you could not resist RKN Richard Naidu".* **[This indicates circumstantially that it was Richard Naidu's Facebook page and Richard Naidu was the publisher]**

[69]. **In light of the above items of circumstantial evidence I find that the item is what the proponent Attorney – General claims it is and I find in favour of authenticity and identification and I am satisfied beyond reasonable doubt that it was the respondent's Facebook page and the respondent is the publisher and he is responsible for its contents.**

[70]. **No** attempt was ever made to raise a doubt that any person other than the respondent created and published the post. The respondent **never** claimed that:

1). *A third party posted the alleged Facebook post.*
2). The respondent has no actual knowledge of the alleged Facebook page.
3). The respondent's social media has been hacked.

[71]. It is not for the Attorney - General to speculate on those. In the circumstances, it was not necessary to the Attorney - General to eliminate the possibility that any person other than the respondent created and published the post.

[72]. Returning back to the respondent's preliminary objection to paragraph (3) of the Attorney – General's affidavit, I unhesitatingly **reject** the respondent's contention that paragraph (3) contains hearsay or secondary evidence for the reasons adduced below.

[73]. The rule against hearsay is formulated by **Cross**[6] as follows;

> *".....express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted."*

[74]. The classic judicial pronouncement on hearsay is to be found in the case of **Subramaniam v Public Prosecutor**[7]

> "*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.*"

[75]. If a document is tendered for the purpose of proving that it was prepared, or that a statement it contains was actually made, then it is capable of being received as original evidence so far as those issues are relevant, and it is not hearsay [for an example exhibit **A** in the case before me]. If, however, it is tendered for the purpose of proving the truth of a statement which it contains, a document is hearsay unless the person making the statement is called as a witness.

[76]. The printed screenshot of the post [exhibit A] is tendered to court by the Attorney – General for the purpose of proving that it was the respondent's Facebook page and the respondent created the post and it was posted by the

[6] Cross on Evidence, (1980) at 456 [J. Gobbo (Ed)
[7] (1956) 1 WLR 965, at 969 -70

respondent. This laid the evidential foundation to the Attorney – General for his depositions in paragraph (3), (4), (5), (6), (7), (8), (9) and (10) of his affidavit sworn on 10.06.2022. Once this evidential foundation is successfully laid by the Attorney – General, his depositions in paragraph (3), (4), (5), (6), (7), (8), (9) and (10) as to what the document shows and what the documents contains is capable of being received by the court as **original evidence** [for an example exhibit **A** in the case before me] so far as those issues are relevant, and it is not hearsay. What is important to discern is that it [exhibit **A**] is **not** tendered for the purpose of proving the truth of the statement which it contains. A document is hearsay unless the person making the statement is called as a witness[8] when the purpose of tendering the document is to establish the truth of the statement contained in it.

[77]. With all due respect, as best as I tried to understand Mr. Daubney's objection based on documentary hearsay, he failed to convince me.

[78]. **I have already found that the item is what the proponent Attorney –General claims it is and I already found in favour of authenticity and identification and I am satisfied beyond reasonable doubt that it was the respondent's Facebook page and the respondent published it and he is responsible for its contents.**

[79]. In light of the above, I unhesitatingly **reject** the respondent's contention that the deposition in paragraph (3), (4), (5), (6), (7), (8), (9) and (10) of the Attorney – General's affidavit is hearsay and without any evidential foundation.

[80]. In relation to paragraph (11) and (15) of the Attorney- General's affidavit the primary objection is that the paragraphs deposed to facts which are not mentioned in the charge statement filed pursuant to Order 52, Rule 2(2) of the High Court Rules, 1988.

[81]. What is important to discern is that the matters deposed to in paragraph (11) and (15) **do not** form part of the charge statement filed pursuant to Order 52, Rule 2 (2). Under Order 52, Rule 2 (2), an application for leave to commence committal proceedings must be supported by a statement setting out:

a). *The name and the description of the applicant*
b). *The name, description and address of the respondent sought to be committed; and*

[8] See, Myers v Director of Public Prosecutions (1965) A.C. 1001

c). *The grounds on which his committal is sought.*

In light of the above, I reject the respondent's objection to paragraph (11) and (15) of the Attorney – General's affidavit.

[82]. In relation to paragraph (12) the objection is that it is nothing more than a statement of opinion. I agree with this concern and no weight whatsoever will be given to paragraph (12).

[83]. In relation to paragraph (13) and (14) the objection is that it is more than an inadmissible statement of the applicant's opinion. In my view, the deposition is based on the advice of the solicitors and the privilege in that advice has not been **expressly** waived by the Attorney- General and therefore it is admissible. Therefore, I reject the objection raised.

[84]. The objection to paragraph (16) is that the applicant is purporting to swear the fundamental issues which are for the court to determine. I cannot accept this objection.

[85]. In my view, the deposition in paragraph (16) is based on the advice of the applicant's solicitors and the privilege in that advice has not been **expressly** waived by the Attorney- General and therefore it is admissible. Therefore, I reject the objection raised.

[86]. **In sum, the depositions in the affidavit of the Attorney- General sworn on 10.06.2022 and filed on 22.06.2022 is admitted into evidence with the exhibit 'A' and 'B' except for the deposition in paragraph 12.**

[E]. The Analysis and Finding

[87]. As Lord Diplock said in **Attorney General v Times Newspapers Ltd**[9] contempt of court is a generic term which may take many forms.

[88]. A civil contempt is a breach of a court's order or an undertaking[10].

[89]. There are two modes of conduct which falls within the scope of criminal contempt, first, there is contempt '*in facie curiae'*, which encompasses any

[9] [1974] AC 273 at 307
[10] Perram j in Re Group Pty Ltd v Kazal [No. 4] [2017] FCA 1084.

words spoken or act done within the precinct of the court that obstructs or interferes with the due administration, or is calculated to do so.

[90]. Secondly, the offence may be committed '*ex facie curiae*' by words spoken or published or acts done which are intended to interfere with, or are likely to interfere with, the fair administration of justice. An example of this type of contempt is described as 'scandalizing the court'. It is committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt.

[91]. The contempt in question here is of the kind described by Rich j in **King v Dunbabin ex parte Williams**[11] :

> *"Any matter is a contempt which had a tendency to deflect the court from the strict and unhesitating application of the letter of the law ….. such inferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."*

[92]. The above passage was approved by Gleeson CJ and Gummow J in their joint judgments in **Re Colina; ex parte Torney**[12] where their Lordships describe it as setting out the "essence" of the offence known as "scandalizing the court".

[93]. There are two "classic examples" of publications which scandalize the court. There are those which are; (1) scurrilously abusive **and** (2) those which are intended to or are calculated to disparage the courts or its Judges so as to make the public lose confidence in the courts and lessen its authority[13]. The two

---

[11] [1935] 53 CLR 434 at 442

[12] [1999] 200 CLR 386 at 390

[13] Borrie and Lowe, Law of contempt 2nd Ed at p229.
R v Hoser & Kotabi Pty Ltd [2001] VSC 443 at para 46.
Hope JA in Attorney - General [NSW] v Mundey [1972] 2 NSWLR 887 at 910 said; " The cases seem to establish two such qualifications. In the **first place**, criticism will constitute contempt if it is merely scurrilous abuse. …. In the **second place** the criticism may constitute contempt if it "excites misgivings as to the

categories sometimes may overlap so that a statement constitutes both scurrilous abuse and an attack upon the authority of the court.

[94]. In the case before me the contempt alleged is in the second category; it was calculated to disparage the court and its judges so as to make the public lose confidence in the court and lessen its authority. That is the *actus reus* of the offence. **There are many ways in which the administration of justice as a continuing process can be interfered with. They certainly include undermining public confidence. Interference with the administration of justice as a continuing process may take many forms which includes ; (1) diminishing the authority of the court (2) bringing the court into disrepute and (3) reducing public confidence in the system.**

[95]. I do not for a moment wish to say that the mere fact that the words are capable of bringing the administration of justice into disrepute does suffice. What must be shown is that, by reason of the post published by the respondent, that there is a serious risk that the administration of justice would be interfered with. The risk or prejudice must be serious, real or substantial[14].

[96]. With these principles in mind, let me now turn to the **statement of charge** filed in this case pursuant to Order 52, Rule 2(2) of the High Court Rules, 1988.

[97]. As to the grounds for committal, the particulars contained in the statement of charge are:

> ***Grounds of Committal***
>
> *For his Facebook Post of 2nd February 2022 at 12.53pm.*
>
> *The Facebook post read* ***"Maybe our judges need to be shielded from all this vaccination campaigning. I'm pretty sure all the Applicant wanted was an injunction [Thinking Face Emoji]".***
>
> *The Facebook post also included an excerpt of the judgment delivered in Naidu v Gulf Investment [Fiji] Pty Ltd [2022] FJHC 23 which was delivered on 21st January 2022.*

---

integrity, propriety and impartiality brought to the exercise of the judicial office".

[14] Solicitor General v Radio Avon Ltd [1978] 1 NZLR 225 at page 239

The plaintiff selectively cropped a portion of the judgment which read:

"3. After hearing counsel of the first to fourth defenda[…]
*4. This application for **injection** was heard on 22.1[…]*
*5. By the time **injection** application was heard a wi[…]*

[Emphasis added]

[98]. The grounds upon which relief is sought by the Attorney - General are:

The Facebook Post sought to:

i). Ridicule the presiding Judicial Officer and the Fijian Judiciary as a whole;

*ii). **Bring into disrepute and lower the reputation of the presiding Judicial Officer and the administration of justice in Fiji;** and*

iii). invite and encourage viewers of the post to cast aspersions against expatriate Judicial Officer.

[Emphasis added]

[99]. It bears repeating that I already found in favour of the authenticity or identification of the screenshot of the post on the Facebook page and the comments received. I also found that the item is what the Attorney General claims it is. As a result, I already admitted into evidence the printed copy of the screenshot of the Facebook post on the Facebook profile under the name of Richard Naidu and also the comments posted on the Facebook profile under the name of Richard Naidu. [Annexure "A" referred to in the affidavit of Aiyaz Sayed Khaiyum sworn on 10.06.2022). (See paragraph (68) and (69) above)

[100]. The respondent in this case was allowed the full opportunity to defend the alleged contempt or to respond to the alleged contempt by filing an affidavit in answer denying the allegation or provide some explanation. Furthermore, at the hearing of the substantive application, the respondent was allowed the full opportunity to give oral evidence on his behalf[15].

[15] Order 52, Rule 5(4) provides "If on the hearing of the application the person sought to be committed expresses a wish

The respondent chose not to file an affidavit in answer. The respondent did not give evidence in court.

[101]. I have already found that the item is what the proponent Attorney –General claims it is and I already found in favour of authenticity and identification and I am satisfied beyond reasonable doubt that it was the respondent's Facebook profile and the respondent is the publisher of the post and he is responsible for its contents. [See paragraph (68) and (69) above] **I proceed to the merits of the application for contempt on that basis.**

[102]. I take judicial notice of the fact that the publication of the post actually occurred during the period of 'vaccination promotion campaign' launched by the executive branch of the government in the context of the global pandemic of Covid 19. The government advised the citizens about the benefits of the vaccination and the risk of skipping vaccination.

[103]. I am satisfied beyond reasonable doubt that **an ordinary, fair minded and a reasonable** Facebook reader would conclude that **the words in the Facebook post** when taken in conjunction with the excerpt of the judgment published by the respondent which highlighted the spelling mistakes in the judgment [See, paragraph 97 above], **in their natural and ordinary meaning were meant and were understood to mean the following**[16];

---

to give oral evidence on his own behalf, he shall be entitled to do so."

[16] The relevant principles as to the **objective test** were helpfully summarized by the Court of Appeal of New Zealand in **New Zealand Magazines Ltd v Hadlee (No. 2) [2005] NZAR 621 at 625 as follows ;** (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?; (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs. (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication;(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines; (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other; (f) The

- *The judges of the Judiciary of Fiji are affected by the Covid – 19 vaccination*.

- *As a result, they do not bring a competent mind to the discharge of their judicial duties.*

- *Therefore, the judges of the Judiciary of Fiji lack competency in the discharge of their judicial duties and therefore they are unfit to hold public office.*

[104]. I am satisfied beyond reasonable doubt that the above publication imputed lack of competency to the Judges and the courts of Fiji in the discharge of their judicial duties[17] as a whole which "*excites misgivings as to the propriety and competency brought to the exercise of the judicial office*" and does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. That is the *actus reus* of the offence. It bears repeating that there are many ways in which the administration of justice as a continuing process can be interfered with. They certainly include undermining public confidence. The words of the post have the effect of raising doubts in the minds of the public that their disputes will not be resolved by competent judges. It is a publication reflecting **adversely** upon the competency of the judicial process and its officers as a whole. There is a real risk which is equated to present and imminent danger that the administration of justice as a

---

words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared ..."

In **Viner v Australian Building Construction Employee's and Builders Labourers Federation and Another [1982] 2 1.R 177 at p 185** Northrap J observed:

"In any event it is for the court to construe the statement made having regard to the understanding of the ordinary man. The words are not to be construed in any technical way but in the practical sense having regard to the reality of the situation in which they were published".

[17] The imputation of lack of competency on the judges and the courts of Fiji in the discharge of their judicial duties lacked reasoned argument and is neither rational nor reasonable and is without credible support and is not fairly conducted and is not directed to some definite public purpose and therefore amount to contempt of court because it does not lie within the bounds of 'reasonable argument or expostulation' . **In general**, See; R v Gray (1900) 2 QB 36 , R v Commissioner of Police of the Metropolis , ex parte Blackburn (No- 2) [1968] 2 QB 150, A.G v Mundey [1972] NSWLR 887 and Hope LA, quoting Rich J in R v Dunabin, ex parte Williams [1935] 53 CLR 434.

continuing process would be interfered with in the sense that public confidence in its due administration would be undermined.

[105]. In addition, the respondent's conduct in publishing the excerpt of the judgment which carried spelling mistakes, viz,

- *This application for **injection** was heard on 22.1;*

- *By the time **injection** application was heard a wi….. against first defendant;*

[106]. The respondent conveyed a criticism of the judge for having published reasons with typographical errors which "*excites misgivings as to the propriety and competency brought to the exercise of the judicial office*" and does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. That is the *actus reus* of the offence.

[107]. It is not necessary to establish a specific intent to interfere with the administration of justice.

[108]. **There are many ways in which the administration of justice as a continuing process can be interfered with. They certainly include undermining public confidence. Interference with the administration of justice as a continuing process may take many forms which includes ; (1) diminishing the authority of the court (2) bringing the court into disrepute and (3) reducing public confidence in the system.**

[109]. I cannot shut my eyes to the fact that the printed screenshot of the comments received to the post [exhibit A] shows that the post has received 107 reactions, 11 comments and was shared two times. Out of 107 reactions, 84 were laughing emoji or pictograms. This is the natural and probable result of the respondent having posted the post. Given the gravity of the remarks posted, I would say that the respondent added fuel to the fire.

[110]. Judges have not got two brains. They are also human beings. They are, liable to commit mistakes. Why do people want to publish an excerpt of a judgment which carries typographical errors? Does it stand to benefit from? Is it something constructive? The citizens of Fiji regards the court as their ultimate and sure refuge from injustice and oppression. One need go no further than to

consider the likely effect upon the confidence of the ordinary citizen or an ordinary litigant in the administration of justice in its widest sense if a very senior barrister and solicitor indulges in sustained attacks upon the court or judges which go unchecked. If tolerated, the conduct would give rise to the misconception that such conduct is permissible.

[111]. What is necessary to discern is that the respondent posted the excerpt of the judgment which carried spelling mistakes of the court decision on an internet – based social media platform and made the court's decision and the judge who presided over the matter an object of laughter at the expense of justice which is unethical and unprofessional for a very Senior Barrister and Solicitor who is used to the courts and their purposes and who by training and experience, understands and also conversant with the pith and the essence of the offence of scandalizing the court. A stark illiterate country – dweller – contemnor may expect his friends to make sympathetic replies because he does not know what is permissible and not. The post implicitly invited Facebook readers to do harm to the dignity and the authority of the court by ridicule, insult, humiliation, belittle or make caricature of the court and the judge presided therein and does create a real or substantial risk (as opposed to remote possibility) of impairing public confidence in the administration of justice as a continuing process by bringing the courts into disrepute and public ridicule. The respondent certainly ought to have anticipated the potential impact of his post. Once the comment exists, the respondent cannot do anything to avoid being treated as its publisher. The respondent will be a publisher from the moment the comment is posted and unable to avoid that consequence by removing the comment from the Facebook page.

[112]. I find beyond reasonable doubt that the respondent has exposed the administration of justice to a grave danger by ; (1) inhibiting the regards of the citizens that the courts as their ultimate and sure refuge from injustice and oppression and (2) inhibiting the necessity of the people confidently having recourse to our courts for the settlement of their disputes. Any diminution of the authority and respect of the courts is an invitation to chaos and disorder[18].

If this pursuit of the respondent goes unchecked it will almost certainly lead to interference with the administration of justice as a continuing process.

[18] Franklin O. Atake v The Attorney General of Federation and Anor, Supreme Court of Nigera, 3 PLR/1982/12 [SC], [1982] NSCC 444

Confidence in the legal system, the maintenance of the rule of law and the authority of the court are matters of special importance in our society. It is of utmost importance to restore the dignity and authority of the court. For a judge presiding over such a charge of contempt of court to let it go unchecked, to use the words of Lord Diplock to - ***be quite irrational and subversive of the rule of law*.** [19]

[113]. I do **not** for a moment assert that by punishing people for scandalizing the court, the court reinforces its 'blaze and glory' and reasserts its exalted 'world of power'. If any criticism attacks the faith or public confidence in the administration of justice, it would be according to courts, hostile as it would hinder the administration of justice, which is of public interest.

[114]. The respondent is a barrister and solicitor of many years of experience and learned in the law at the bar and appointed to a position of leading counsel and a distinguished member of the Fiji Law Society. The public would expect his criticisms and statements to be considered and knowledgeable. The printed screenshot of the comments received to the post shows that:

- The Respondent's Facebook post received 107 reactions, 11 comments and was shared 2 times. **Out of the 107 reactions, 84 were laughing emojis or pictograms.**

- These are some of the comments received to the post;

    a. Alanieta Vakatale commented with a GIF or graphics interchange format by adding an animation of **a woman laughing while holding her stomach**. The animation also - contains the words "**Ha Ha Ha Ha"**.

    b. Tomasi Tuitoga, a legal practitioner commented with "***Saw that. You couldn't resist RKN Richard Naidu...."***

    c. Monica Patel commented "Freudian slip no less'.

    d. Rohit Singh commented "LoL" which means laugh out loud, an expression used on social media or in messaging where the writer wishes to express that he or she laughed audibly.

[19] Chokolingo v Attorney – General of Trinidad and Tobago (1981) WLR 106 at 112.

e. Asishna Ansu commented '"**chota mota kisaan**' translated as '**short fat farmer**'.

f. Grace Wise commented "OMG. Hope it's not an expat judge [emojis]"

[115]. The post was published on an internet- based **social media platform which has a wide circulation.** I find beyond reasonable doubt that the publishing of imputation of lack of competency on the entire members who take part in the administration of the Justice in Fiji to Facebook post readers **of that size and nature** which excites misgiving as to the propriety and competency brought to the exercise of the judicial office, **does create a real or substantive risk as opposed to a remote possibility**, impairing public confidence in the administration of justice and injuring the system as a whole in relation to its capacity to administer justice in the future. In view of the size and the nature of the circulation and the number of the reactions attracted and in view of the fact that it had been almost nine months and twenty days since the post was published it continued to remain on the respondent's Facebook page, I am satisfied beyond reasonable doubt that the publication crossed the fine line between the tolerable and intolerable[20].

[116]. The facts established beyond reasonable doubt that there was a real risk as, opposed to a remote possibility, that the post which was published on an internet based social media platform which has a wide circulation would undermine the public confidence in the administration of justice. A real risk of that kind was established[21].

[117]. In paragraph (27) and (28) of the written submissions filed on behalf of the respondent, it is submitted that;

27. It is risible to suggest, as the Attorney General apparently does, that this alleged Facebook post was so egregious as to give rise to a real risk to the administration of justice in Fiji by undermining the authority, integrity and impartiality of any of the judges or Courts of this country.

[20] The Australian Judiciary – Enid Cambell and H. P Lee, Cambridge University Press, 2001 at page 183.

[21] Solicitor General v Radio Avon Ltd [1978](1) **NZLR 225 at 239**. R v Kopyto [1988] 470 (1) DLR 213; Lord Parker C.J in Reg v Duffy, Ex parte Nash [1960] 2. Q.B. 188 at 200

28. Equally absurd is the notion that the words of this alleged Facebook post, viewed objectively[22] and as understood by a fair minded and reasonable reader[23], were calculated to bring the administration of justice or the courts into disrepute.

[118]. I do not agree and I therefore reject this submission unhesitatingly. As I said in paragraph (104) above, I am satisfied beyond reasonable doubt that an ordinary, fair minded and a reasonable Facebook reader would conclude that **the words in the Facebook post** when taken in conjunction with the excerpt of the judgment published by the respondent which highlighted the spelling mistakes in the judgment [See, paragraph 97 above], **in their natural and ordinary meaning were meant and were understood to mean the following**[24].

- *The judges of the Judiciary of Fiji are affected by the Covid -19 vaccination*.
- *As a result, they do not bring a competent mind to the discharge of their judicial duties.*
- *Therefore, the judges of the Judiciary of Fiji lack competency in the discharge of their judicial duties and therefore they are unfit to hold public office.*

[119]. **At the cost of some repetition,** I reiterate that I am satisfied beyond reasonable doubt that the above publication imputed lack of competency to the Judges and the courts of Fiji as a whole in the discharge of their judicial duties which "*excites misgivings as to the propriety and competency brought to the exercise of the judicial office*" and does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. That is the *actus reus* of the offence. There are many ways in which the administration of justice as a continuing process can be interfered with. They certainly include undermining public confidence. The words of the post have the effect of raising doubts in the minds of the public that their disputes will not be resolved by competent judges. It is a publication reflecting **adversely** upon

[22] Re - Chaudhry [1998] 44 FLR 39 at 48
[23] Fiji Times v AG [2017] FJSC 13
[24] Viner v Australian Building Construction Employee's and Builders Laborers Federation and Another [1982] 2 1.R 177 at p 185 Northrop J observed:
"In any event it is for the court to construe the statement made having regard to the understanding of the ordinary man. The words are not to be construed in any technical way but in the practical sense having regard to the reality of the situation in which they were published".

the competency of the judicial process and its officers as a whole. There is a real risk which is equated to present and imminent danger that the administration of justice as a continuing process would be interfered with in the sense that public confidence in its due administration would be undermined.

[120]. In addition, as I said before, the respondent's conduct in publishing the excerpt of the judgment which carried spelling mistakes, viz,

- *This application for **injection** was heard on 22.1;*
- *By the time **injection** application was heard a wi….. against first defendant;*

[121]. The respondent conveyed a criticism of the judge for having published reasons with typographical errors which "*excites misgivings as to the propriety and competency brought to the exercise of the judicial office*" and does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. That is the *actus reus* of the offence

[122]. Without prejudice to what I have found and concluded above, I would say **alternatively**, the respondent must have actually foreseen such a probability and have been reckless as to the result.

[123]. Moving on, in a case of a different kind of contempt, that of statements which had a tendency to influence prospective jurors and so influence the outcome of a criminal trial, in the decision of **Attorney-General for New South Wales v. Dean**[25] the court held;

> *'Although contempt is criminal in nature, proof of an intention to interfere in the administration of justice is not an ingredient of the charge … the present case may be thought to be a good example of why the law stands as it does. The matter of overriding importance is to prevent interference with the proper course of trials; that interference is just as real, and needs to be prevented, whether it is intentional or not. At all events, the law binding on and applied by this court is clear. It is sufficient that the prosecution show that the alleged contemnor had the intention to make the statement, which, objectively, had the requisite tendency to interfere in the fair trial of the accused.*

[25] (1990) 20 NSWLR 650 the Court of Appeal (Gleeson CJ, Kirby P and Priestly JA) said (655-656):

The statements must be looked at objectively to determine whether they were calculated to interfere with the course of justice. It is necessary for the prosecutor to prove that tendency beyond reasonable doubt. ***The absence of the specific intent, by those words, to interfere in the administration of justice is no answer or defence to a charge of contempt.'***

[Emphasis added]

[124]. **R v Odhams Press Ltd**[26] makes it clear that an intention to interfere with the due administration of justice is **not** an essential ingredient of the offence of contempt of court. It is enough if the action complained of is **inherently likely** so to interfere.

[125]. Contempt by 'scandalizing' the court is, of course in Lord Diplocks's words[27], is calculated to undermine the public confidence in the proper functioning of the courts. Lord Diplock makes no distinction between one form of contempt and another from the point of view of the **intention** of the defendant. In this respect no meaningful distinction can be drawn between interfering with the administration of justice in relation to a pending case, or injuring the system as a whole in relation to its capacity to administer justice in the future[28]. In **Parashuram Detarans Shamdasami v King – Emperor**[29], the test was stated in this way:

"For words or actions used in face of the court, or in the course of the proceedings, for they may be used outside the court, to be contempt, ***they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted."***

[Emphasis added]

[126]. The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent

[26] [1957] 1 Q.B 73. In support of the same proposition as related to scandalizing the court, refer to Attorney General v Butterworth [1963] 1 Q.B 696. See also, R v New Statesman [1928] 44 TLR 301

[27]. Attorney-General v Times Newspaper Ltd [1974] AC 273, [1973] 3 ALL.E.R 54

[28] Solicitor General v Radio New Zealand Ltd [1994] 1 NZLR 48 at page 55

[29] [1945] AC 264at 268

tendency of the matter published[30]. I have already found beyond reasonable doubt that the conduct complained of does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. I also found that there is a real risk which is equated to present and imminent danger that the administration of justice as a continuing process would be interfered with in the sense that public confidence in its due administration would be undermined. [See paragraph (105) and (107) above]

[127]. Mr. Daubney KC counsel for the respondent during the course of his oral submissions to the court advanced the contention [assuming the role of the final arbiter of humor] that the Facebook post was a ***light-hearted quip***. He further says that "***it was a satirical observation in a context of significant topical interest"***. (See also paragraph (25) of the written submission filed on behalf of the respondent).

[128]. Mr. Daubney's erudition and eloquence notwithstanding, I remain very much unpersuaded.

[129]. The respondent is concerned of the issue of whether the words in the post were contemptuous. Whatever the respondent's views, opinions and perceptions in respect of the statement in the post which are subjective are not relevant to the question of liability for publication. The issue is not whether the respondent considered the post to be a 'satirical observation' and therefore not 'contemptuous'. The issue is whether a fair minded and a reasonable person would consider the words undermined and risked the public confidence in the administration of justice. **The subjective views of contemnor are certainly not relevant**. The inquiry at this point is simply an inquiry into the objectively possible meaning of the words. The intention of the author or the publisher does not form part of that inquiry. I have found already beyond reasonable doubt that an ordinary and a fair minded and a reasonable Facebook reader would consider the words in the statement undermined and risked the public confidence in the administration of justice. [See paragraph (105) above]

[130]. A contempt of court is committed where the publication was calculated to impair the confidence of the public in the administration of justice or there is a risk that the publication tended to lower the authority of the court as a whole or that of its judges and excites misgivings as to the competency, integrity,

[30] John Fairfax & Sons Pty Ltd v Mc Rae [1955] HCA 12.

propriety and impartiality of the judicial office. **In all these matters the test was not what the respondent contemnor intended but the likely result of the publication.**[31] When one is looking at an allegedly scandalizing statement, or an allegedly defamatory or fraudulent one, the enquirer has to ask what the effect of the statement was likely to have been. It is an objective test, applied with the standard measure of reasonableness, in order to establish whether harmful at which the law strikes, came about or not. Therefore, one does not ask - indeed it is not permissible for a party to prove – what the actual effect of the disputed statement. The law regards it as more reliable to infer from an interpretation of the statement what its consequence was. Ultimately, whether the test is worded this way or that way, **the real question is whether the trier of fact has been satisfied,** with the requisite preponderance depending on the nature of the case, that the publisher of the offending statement brought about the particular result. In the case of scandalizing the court that result must have been to bring the administration of justice into disrepute.[32] In the present case I already found that the facts have established beyond reasonable doubt that the respondent has brought the administration of justice into disrepute by ; (1) publication of the post which imputed lack of competency to the judges and the courts of Fiji in the discharge of their judicial duties (2) publication of the excerpt of the judgment which carried spelling mistakes conveying a criticism of the judge for having published reasons with typographical errors and impliedly inviting Facebook readers to ridicule, insult , belittle or make caricature of the court and the judge presided therein.

[131]. The respondent is a very senior, well experienced Barrister and a Solicitor, who is used to the courts and their purposes and who by training and experience understands the pith and essence of the offence of contempt of court. Without prejudice to what I said in paragraph (130) and (131) above, let me assume for a moment that the statement in the post is a satirical expression [which I am not by any means saying]. Nevertheless, the respondent cannot find shelter behind

---

[31] R v Odhams Press, ex parte A-G (1957) 1 QB 73 , A-G v Mundey (1972) 2 NSWLR 887
Solicitor General v Radio Avon Ltd (1978) 30 WLR 372 Chokolingam v Law Society of Trinidad and Tobago (1978) 30 WIR 372
Badry v DPP of Mauritius (1983) 2 AC 297 , Solicitor General v Radio New Zealand Ltd (1994) 1 NZLR 48
A-G v Lingle (1995) 1 SLR 696

[32] J Kriegler in The State v Russell Mamabolo , A decision of the Constitutional Court of South Africa, Case No- 44/00, Date of Judgment 11 April 2001, at paragraph 43 and 44 of the judgment.

the umbrella of 'satirical expression' because 'satire' is a form of artistic expression and social commentary and, by its inherent features of 'exaggeration' and 'distortion of reality', naturally aims to provoke and agitate. What is necessary to discern is that the respondent has imputed lack of competency to the entire Fiji judiciary in the discharge of their judicial duties and this imputation is neither rational nor reasonable and lack reasoned argument or expostulation and lack credible support and not within the limits of reasonable courtesy and good faith and has distorted the reality[33]. The criticism is painful.

[132]. To use the words of English court in **King v Davies**[34] the Facebook post was calculated to "excite in the minds of the people as general dissatisfaction with all judicial determinations and excite misgiving as to the propriety and competency brought to the exercise of the judicial office".

[133]. The next submission made by Mr. Daubney KC which I propose to discuss is this; *"even if the court finds that the alleged Facebook post conveyed a criticism of the judge for having published reasons with typographical errors, such criticism does not amount to contempt scandalizing the court".*

[134]. Mr. Daubney KC relied on the following mentioned celebrated passage from the judgment of Lord Atkin in '**Ambard v Attorney General**[35]'.

---

[33] The imputation of lack of competency on the judges and the courts of Fiji in the discharge of their judicial duties is **not** fairly conducted and also **not** honestly directed to some definite public purpose' and therefore amount to scandalizing court. **In general**, See, R v Gray (1900) 2 QB 36 , R v Commissioner of Police of the Metropolis , ex parte Blackburn (No- 2) [1968] 2 QB 150, A.G v Mundey [1972] NSWLR 887 and Hope LA, quoting Rich J in R v Dunbabin, ex parte Williams [1935] 53 CLR 434. See footnote (17) above.

[34] [1906] 1 KB 32 at 40

[35] [1936] AC 322 at 335. The passage cited by Mr. Daubney KC refers to a defence based on the ' right of criticizing in good faith, in private or public, the public acts done in the seat of justice'. The passage cited by Mr. Daubney KC should be read in conjunction with **The Queen v Gray,** (1900) 2 Q.B 36**.** See also **R v Commissioner of Police, Ex parte Blackburn** (No- 2) (1968) 2 Q.B 150. Speaking of this right of the press or the public to criticize the work of the courts, Lord Morris in **McLeod v ST. Aubyn (1899) AC 549 at 561** said ***"Hence, when a trial has taken place and the case is over, the judge is given over to criticism."***

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any members of the public who exercise the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: ***provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune.*** *Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."*

[Emphasis added]

[135]. The passage which Mr. Daubney KC cited in **Ambard v Attorney-General** can be interpreted as **excluding from protection***; (1) any form of criticism which imputes improper motives to those taking part in the administration of justice". (2) conduct of any form of malice; (3) conduct attempting to impair the administration of justice.*

[136]. Turning now to the facts of the present case, I found beyond reasonable doubt the followings.

[137]. The publication imputed lack of competency to the Judges and the courts of Fiji as a whole in the administration of justice and it does "*excite misgivings as to the propriety and competency brought to the exercise of the judicial office*" and it does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice. There are many ways in which the administration of justice as a continuing process can be interfered with. They certainly include undermining public confidence. The words of the post have the effect of raising doubts in the minds of the public that their disputes will not be resolved by competent judges. It is a publication reflecting **adversely** upon the competency of the judicial process and its officers as a whole. There is a real risk which is equated to present and imminent danger that the administration of justice as a continuing process would be interfered with in the sense that public confidence in its due administration would be undermined.

[138]. In addition, the respondent's conduct in publishing the excerpt of the judgment which carried spelling mistakes, viz,

- *This application for **injection** was heard on 22.1;*
- *By the time **injection** application was heard a wi….. against first defendant;*

[139]. The respondent conveyed a criticism of the judge for having published reasons with typographical errors which "*excites misgivings as to the propriety and competency brought to the exercise of the judicial office*" and does create a real or substantial risk [as opposed to remote possibility] of impairing public confidence in the administration of justice.

[140]. **I have already found beyond reasonable doubt that the conduct complained of impairing the administration of justice and therefore the respondent has entered the arena of contempt of court and therefore is excluded from the protection from the defense of right to fair criticism. [See paragraph 136 above]**

[141]. Furthermore, as I found, the respondent has imputed lack of competency to the entire Fiji Judiciary in the discharge of their judicial duties and this imputation is neither rational nor reasonable and lack reasonable argument or expostulation or credible support and by doing so the respondent had exceeded his right to fair criticism and entered the arena of contempt of court and therefore is excluded from the protection from the defence of right to fair criticism. In addition, the court found that the respondent's post conveyed a criticism of the judge for having published reasons with typographical errors and that such criticism of judge and the court is **not for public good and is not within the bounds of reasonable argument and expostulation[36] and is not within the limits of reasonable courtesy and good faith[37]** and the 'pursuit' is **not** fairly conducted and is **not** honestly directed to some definite public purpose and therefore would amount to contempt of court by scandalizing the court and therefore cannot find shelter behind the qualification of the right to criticize on matters of public concern.

[36] R v Gray (1900) 2 QB 36
[37] R v Commissioner of Police of the Metropolis, ex parte Blackburn (N0-2) (1968) 2 QB 150

[142]. Hope LA, quoting Rich J in **R v Dunubin, ex parte Williams**[38] made it very clear that the ' law permits in respect of courts, as of other institutions , the fullest discussions of their doings **so long as the discussion is fairly conducted and is honestly directed to some definite purpose'**. I find on the nature of the words in the post that the publication of the post undoubtedly constituted contempt by scandalizing the court and the respondent can find no shelter behind the qualification of the right to criticize on matters of public concern.

[143]. Moving on, allowing the defence of fair criticism expose the integrity of the courts to unwarranted attacks[39].

[144]. I have not overlooked the submissions of Mr. Daubney K.C. made to court based on the respondent's right to **freedom of expression** guaranteed by Section 17 of the constitution.

[145]. The issue is whether the respondent's freedom of speech and expression expressed in section 17 of the constitution is wide enough to include and protect the conduct of the respondent in this case.

[146]. Is the faith in the judiciary so fickle as to denigrate by caricatures shared on a social networking platform? Are judges so sensitive to the winds of public opinion? Aren't they supposed to be men of fortitude, able to thrive in a hardy climate? Why do people want to make judges above everybody? Do people want to make judges a Super God? **These are some of the questions generally raised by various counsel in various jurisdictions when defending an alleged contemnor in relating to a charge of contempt of court by scandalizing the court.**

[147]. My unease relates to this – The problem arises when speech is used in a manner calculated to undermine the very institution designed to protect all fundamental rights, including the right to free expression.[40]

---

[38] (1935) 53 CLR 434

[39] Sim v Daily Telegraph Ltd [1968] 2 Q.B. 157

[40] More than a century ago Kotze J said in *In re Phelan* (1877) Kotze 5 at 9-10, quoted in Van Blerk ;

' The administration of justice is [like the freedom of the press] a matter of public importance. Consequently, the law – the very protector of the liberty of the press- will not, on grounds of public policy , allow that liberty – its own creature- to be abused and employed as an instrument to bring the administration of justice into contempt'.

[148]. Section 17 of the constitution provides: -

(1) Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes—

a). freedom to seek, receive and impart information, knowledge and ideas;
b). freedom of the press, including print, electronic and other media;
c). freedom of imagination and creativity; and (d) academic freedom and freedom of scientific research.

(2) Freedom of speech, expression, thought, opinion and publication does not protect—

a. propaganda for war;
b. incitement to violence or insurrection against this Constitution; or
c. advocacy of hatred that—

i). is based on any prohibited ground of discrimination listed or prescribed under section 26; and
ii). constitutes incitement to cause harm.

(3) To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of—

*a). national security, public safety, **public order**, public morality, public health or the orderly conduct of elections;*

b). the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including—

i). the right to be free from hate speech, whether directed against individuals or groups; and

ii). the rights of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law;

c). preventing the disclosure, as appropriate, of information received in confidence;

d). preventing attacks on the dignity of individuals, groups of individuals or respected offices or institutions in a manner likely to promote ill will between ethnic or religious groups or the oppression of, or discrimination against, any person or group of persons;

*e). **maintaining the authority and independence of the courts;***

f). imposing restrictions on the holders of public offices;

g). regulating the technical administration of telecommunications; or

h). making provisions for the enforcement of media standards and providing for the regulation, registration and conduct of media organizations.

[Emphasis added]

[149]. The constitution makes it clear that freedom of speech is not absolute or to be applied in isolation. The "**Public Order**" includes the due administration of justice. The limitation in Section 17 (3) (a) applies and scandalizing contempt is a necessary exemption to freedom of expression. Therefore, freedom of expression does not authorize or permit the conduct of the respondent in this case. The right does not encompass the contempt alleged and found in this case.

[150]. Furthermore, section 17 (3) (e) requires the limitation to be necessary in the **interest of maintenance of the authority and the independency of the judiciary.**
[See paragraph 154 below]

[151]. In the result, nothing in the Bill of Rights saves the respondent from the application of the law of contempt in this case.

[152]. On balance, while recognizing the fundamental importance of freedom of expression in the open and democratic society envisaged by the constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalizing the court[41].

[41] It is interesting to note in this context the observations of the Indian Supreme Court in ***Narmada Bachao Andolan v Union of India and Others*,(1999) 8SCC 308**: "We wish to emphasise that

[153]. I have already found that the facts in this case established beyond reasonable doubt that the offending conduct carried a real risk, as opposed to a remote possibility that the public confidence in the administration of justice would be undermined. [See paragraph (105), (106) and (107) above.] This is equated with "clear and present danger" to the administration of Justice. Therefore freedom of expression does not authorize or permit the conduct of the respondent in this case. The right does not encompass the contempt alleged and found in this case.

[154]. In **Attorney General v Times Newspapers Ltd** [42] Lord Reid stated:

---

under the cover of the freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. The right of criticising,, in good faith in private or public, a judgement of the court cannot be exercised, with malice or by attempting to impair the administration of justice. **Indeed, freedom of speech and expression is the 'lifeblood of democracy' but this freedom is subject to certain qualification. An offence of scandalising the court per se is one such qualification, since that offence exists to protect the administration of justice and is reasonably justified and necessary in a democratic society.** It is not only an offence under the Contempt of Court Act but is sui generis. **Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately give a slant to its proceedings, which have the tendency to scandalise the court or bring it to ridicule, in the larger interest of protecting administration of justice.**"

[42] [1973] 3 ALL. E.R. 54 at p 60 .

In ***R v Kopyto*** (1987) 47 DLR (4th) 213 (Ont . CA) at 241, the Ontario Court of Appeal divided 4 - 1 on the question of whether or not the crime of scandalizing the court survived the advent of the Charter guarantee of the right to freedom of speech. Although the four judges who held that it could survive were split on what the appropriate test should be, they all agreed that the impact on the administration of justice had to be substantial. Cory JA laid down the following requirements for the offence of contempt of scandalizing the court: (i) intent or recklessness (ii) extreme seriousness (iii) **real, substantial and immediate threat to the administration of justice.**

Kopyto case arose out of a lengthy statement made to a newspaper reporter by a lawyer following the dismissal of a case in which he had acted as counsel for the plaintiff.

"Freedom of speech should be not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

[155]. The European Convention on Human Rights in article 10 provides for the right to freedom of expression but the exercise of this right carries with it duties and responsibilities and may be subject to restrictions as are prescribed by law and are 'necessary in a democratic society for the prevention of disorder …… or for maintaining the authority and impartiality of the judiciary'.

In **The Sunday Times v United Kingdom**[43], the European Court of Human Rights decided that 'maintaining the authority and impartiality of the judiciary is one purpose of the law on contempt of court.'

[156]. No one is entitled under the guise of freedom of speech and expression to make irresponsible imputations or accusations against the Judiciary.[44] The fundamental right to freedom of expression does not mean that a judge or judiciary must endure attacks upon the court or judges and it must be regarded as "coming with the job".

[157]. There is a further aspect of the administration of justice which is of importance**. In Arlidge, Eady and Smith on contempt [2nd Ed] at para 16 -8,** the authors put it in this way and I adopt their formulation;

"While it is true that the law of contempt is not concerned with the dignity of the individuals taking part in the judicial process, or even with upholding respect for the law in any purely deferential sense, ***the administration of justice needs to proceed in circumstances of calm and dignity in order to be effective"****.*

[Emphasis added]

Turning now to the facts of the preset case, I found beyond reasonable doubt [See paragraph 105, 106 and 107 above] that the facts of this case established a real or substantial risk (as opposed to remote possibility) of impairing public confidence in the administration of justice.

[43] (1979) 2 EHRR 245

[44] A.G. v Lingle [1995] (1) SLR 696 at 761

There is no room for doubt that nothing in the Bill of Rights saves the respondent from the application of the law of contempt in this case.

[158]. In our constitutional order the judiciary is an independent pillar of state constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest and vulnerable of the three pillars, yet its manifest independence and authority are essential.[45]

[159]. It must be remembered that the Judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. Judges do not have the habit of issuing public statements to defend themselves. Judges feel constrained by their position not to react to criticism and have no official forum in which they can respond. That does not mean that they can be attacked with impunity. It is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective device is to deter disparaging remarks calculated to bring the judicial process into disrepute. If any criticism attacks the faith or public confidence in the administration of justice it would be, is hostile, as it would hinder the administration of justice, which is of public interest. The court seeks only to prevent criticism which hampers the administration of justice or which erodes the faith in the objective approach of judges. It is important to discern that by punishing people for contempt of court by scandalizing the court, the court **does not wish** to reinforce its 'blaze of glory' and also the court **does not wish** to reassert it's 'exalted world of power'. They rest on surer foundation. The law of contempt by scandalizing the court is not made for the protection of judges or to put the judges above the constitution and make them above everybody or to make them a Super God. Judges are supposed to be men of fortitude, able to thrive in a hardy climate in the winds of public opinion **if and when the public opinion** ; (1) is within the limits of reasonable courtesy and

[45] Kriegler J in The State v Russell Mamabolo , A decision of the Constitutional Court of South Africa, Case No- 44/00, Date of Judgment 11 April 2001, at paragraph 16 of the judgment.

good faith (2) is rational and reasonable (3) is fairly conducted and is honestly directed to some definite public purpose.

Conclusion

[1]. The preliminary objection to the admissibility of the depositions in the affidavit of the Attorney- General sworn on 10.06.2022 and filed on 22.06.2022 is partly allowed.

[2]. I conclude that the deposition in paragraph (12) of the Attorney – General's affidavit is a statement of opinion and therefore I give it no weight whatsoever.

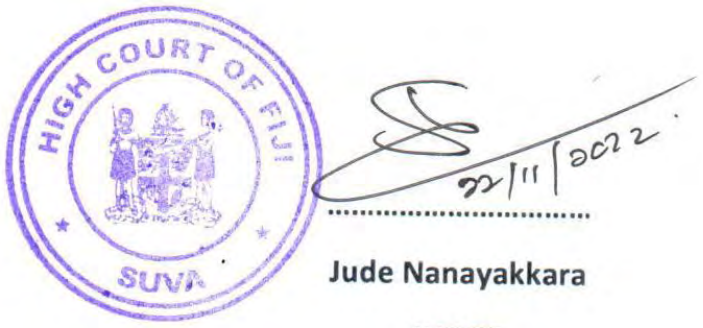
[3]. Except the deposition in paragraph (12), all other depositions in the Attorney-General's affidavit are admitted in to evidence including Exhibit **A** and **B.**

[4]. I find that the particulars contained in the statement of charge filed pursuant to Order 52, Rule 2 (2) is proved beyond reasonable doubt by the evidence relied on by the Attorney – General in his affidavit sworn on 10.06. 2022.

[5]. I find the respondent guilty of contempt scandalising the court as charged in the statement of charge.

[6]. I convict the respondent for contempt scandalising the court.

[7]. I invite counsel's submissions on mitigation and sentence.



Jude Nanayakkara

JUDGE

High Court – Suva

Tuesday, 22nd November 2022