

**IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL MISCELLANEOUS CASE No: HAM 93 OF 2023**

**[Anti-Corruption Division Magistrates Court Criminal Case No MACD 04/21]**

**BETWEEN:** **RONALD RITESH NARAYAN**  
**1<sup>st</sup> Applicant**  
**SAT NARAYAN**  
**2<sup>nd</sup> Applicant**

**AND: FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**  
**("FICAC)**  
**Respondent**

**Counsel:** **Mr R. Singh for Applicants**  
**Ms A. Vaganalau for Respondent**

**Dates of Hearing/Submissions:** **18 July 2023 and 23 August 2023**  
**Date of Judgment:** **12 September 2023**

**JUDGMENT**

**Introduction**

1. In the substantive matter (Anti-Corruption Division case MACD 04/2021), the 1<sup>st</sup> Applicant is charged in Lautoka Magistrates Court with four counts of Abuse of Office for Gain contrary to section 139 of the Crimes Act of 2009 and is jointly charged with the 2<sup>nd</sup> Applicant with one count of Obtaining a Financial Advantage contrary to Section 326(1) of the Crimes Act of 2009

2. The matter proceeded to trial and upon the close of the Prosecution case, the Applicant's counsel made an application of No Case to Answer. Both parties were given an opportunity to file written submissions. Thereafter, the Learned Magistrate delivered his Ruling wherein he found that there was a case to answer and put the Applicants to their defence.
3. It is the said Ruling on No Case to Answer application that the Applicants are now challenging under Section 246(7) of the Criminal Procedure Act (CPA) and Section 100(6) of the Constitution.
4. Although the Applicants, in their petition, based their application on the said two provisions, the Counsel for Applicants at the arguments stage substantially relied on Section 100(6) of the Constitution.
5. The Respondent objects to the application on the basis that the Applicants do not have a right to appeal interlocutory orders such as no case to answer rulings to the High Court under Section 246(7) of the CPA. The Respondent also argues that Section 100(6) of the Constitution should be read together with Section 262(1) of the CPA which deals with the revisionary power of the High Court and since the Applicants have not fulfilled the requirements under Section 262(5) of the CPA, there is no legal basis for this application.
6. In view of those arguments, I would first deal with the law on appeals and revisions under the CPA and the supervisory jurisdiction under Section 100(6) of the Constitution.

#### **Law on Appeals**

7. The relevant law that deals with appeals from the Magistrates court to the High Court is Section 246 of the CPA. Section 246 (1) of the CPA states that:

Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence"

8. Section 246(7) of the CPA specifically deals with the appeals against orders of the Magistrates Court which ought to be read subject to Section 246(1) of the CPA. Section 246(7) provides as follows:

An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, **but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law** (emphasis added).

9. In Prakash v Fiji Independent Commission against Corruption (FICAC) [2022] FJHC 33; HACDA010.2021S (4 February 2022) Rajasinghe J in interpreting the said section observed as follows:

Section 246(7) of the Criminal Procedure Act consists of two main components. The first component has defined the scope of the right of appeal to the High Court against the orders of the Magistrate's Court. Accordingly, any order of the Magistrate's Court can be appealed to the High Court, notwithstanding the Magistrate's Court has proceeded to a conviction in that matter or not. Hence, the right of appeal against the orders of the Magistrate's Court is not limited to any specific or certain orders. The second component states when the right of appeal to the High Court could be exercised. Accordingly, the right of appeal to the High Court can be exercised after the Magistrate's Court has finally determined the accused's guilt. Consequently, the existence of the final determination of the guilt of the accused in the Magistrate's Court is the *sine qua non* to invoke the Appeal jurisdiction of the High Court against the judgments, sentences or orders of the Magistrate's Court.

10. In State v Chand [2015] FJCA 64; AAU085 2012 (28 May 2015), the Court of Appeal at [24] observed as follows:

I would answer the question whether the limitation contained in section 246(7) applies to an order of discharge under section 169(2)(b)(ii) in negative. In my judgment, the limitation placed by section 246(7) applies to those orders incidental to a trial where the Magistrates' Court is determining the guilt of the accused. If an accused elects to contest the charge by not pleading guilty, he has no right of appeal against interlocutory orders made by the Magistrates' Court (unless expressly provided by statute) until the Magistrates' Court has finally determined the guilt. Examples of such interlocutory orders would include voir dire rulings on admissibility of evidence, joinder of counts or accused persons, no case to answer rulings or any other orders of similar nature. The mischief that the limitation is trying to address is appeals that fragment trials or cause delays in disposal of criminal cases.

11. According to this Judgment, since interlocutory orders such as no case to answer rulings generally do not finally determine the guilt of the accused and the right of appeal is not

expressly provided by statute, the Applicants have no right of appeal. That does not however mean that interlocutory orders cannot be appealed. No doubt, such orders can be appealed, but only when the time is ripe. As Rajasinghe J correctly pointed out in **Prakash**, the party aggrieved by an interlocutory order could vindicate his/her right of appeal in the High Court only when his/her guilt has finally been determined by the Magistrates Court. This formulation will sit well with the purposive approach the Court of Appeal has taken in **Chand** when it said of the mischief that the limitation is trying to address, namely, to discourage the appeals that fragment trials or cause delays in disposal of criminal cases.

12. In **Chand**, the Court of Appeal held that an order of discharge (without acquittal being recorded) could be appealed to the High Court as the discharge order brought the proceedings at the Magistrates Court to an end. In other words, a discharge order made under Section 169(2) of the CPC is not an interlocutory order covered under Section 246(7) as it brought the proceeding to an end.
13. The Court of Appeal in **Sowane v State** [2020] FJCA 181; AAU131 2019 (28 September 2020), having dealt with an appeal from the Magistrates Court, vested with extended jurisdiction of the High Court, named the conditions precedent to invoke the appellate jurisdiction of the Court of Appeal under Section 21(1) read with Section 22 of the Court of Appeal Act on the assumption that the extended jurisdiction of the Magistrates Court is deemed to be an original jurisdiction of the High Court. The Court stated at [18]

What the appellant is appealing against in this appeal is an interlocutory or interim order by the learned Magistrate in a pending case. The Magistrate has not in any way finally determined the guilt of the appellant. **The existence of a conviction, sentence, acquittal and an order granting or refusing bail pending trial of the Magistrates court is a condition precedent or a sine qua non to invoke and cloth the Court of Appeal with appellate jurisdiction under section 21(1) read with section 22 of the Court of Appeal Act**

14. It is clear, the bail rulings, though such rulings are considered interlocutory orders and do not finally determine the guilt of the accused persons, are obviously appealable under Section 246(7) of the CPC because the right of appeal is expressly provided by statute, namely the Bail Act 2002.

15. However, whether mere existence of a conviction without a resultant sentence gives rise to an appealable right has been the subject of controversy in this jurisdiction.
16. In Ismail v State (2018) FJHC 794; HAA 01 2018 (22 August 2018), the High Court addressed an appeal filed against a conviction recorded in the Magistrates Court when sentence was still pending. The Sharma J stated at [17]

In my view, section 246(7) literally means an accused person's guilt is not finally determined until the accused is sentenced. The entering of a conviction is a step towards finality of guilt but not the final determination of guilt. It is only when an accused is sentenced that his or her guilt is finalized, not before that. This provision should be given a wide interpretation to achieve its purpose which is to consider appeals from the final determination of a matter in the Magistrates court.

17. Justice Sharma further went on to state at [21] and observed:

Before I leave it is important to mention that the legislative drafters would have never contemplated "piece meal" appeals from the Magistrates Court to the High Court. If the legislation had allowed a right of appeal after an accused was convicted and before Sentence was pronounced, a chaotic situation would have arisen.

18. The contention of the Applicants is that the Learned Magistrate in his No Case to Answer Ruling found the Applicants guilty of the charge / charges. In view of the said contention, which I shall deal with in the following paragraphs. I do not believe that this Court should delve any further into the issue of whether it is the conviction or the sentence that finally determines the guilt of an accused person.
19. Even if I were to accept the contention of the Applicants that the Learned Magistrate found them guilty in the No Case to Answer Ruling, they, in view of Ismail judgment, could not invoke the appellate jurisdiction of the High Court as the Magistrates Court has not yet passed the sentence and therefore not finally determined the guilt of the Applicants. On the other hand, if I were to accept that even a conviction (before sentence) could be appealed, as the Court of Appeal in Sowane observed, I shall still hold that the Applicants do not have the right of appeal as the Learned Magistrate has not yet recorded a conviction. [According to the options available under Section 15 of the Sentencing and Penalties Act the court has discretion not to record a conviction even where it has found the accused guilty] Therefore, I find that the Applicant's have no right of Appeal under Section 246(7) of the CPA.

### **Revisionary Jurisdiction of the High Court**

20. Although the Applicants have not invoked the revisionary jurisdiction of this Court, in view of Respondents' argument that the Section 100(6) of the Constitution should be read with Section 262(1) of the CPA, I should explore the possibility of whether revisionary jurisdiction was available to the Applicants.
21. Section 262(1) of the CPA stipulates the procedure for the revisionary power of the High Court. The question is whether the High Court in the present case could invoke this jurisdiction.
22. In Nadan v State [2019] FJSC 29; 07.2019 (31 October 2019), Keith JA discussed the manner of invoking the revisionary power of the High Court under Section 262(1) of the CPA and observed as follows:

The record in the magistrates' court had not been "called for. It could only have been called for if the Chief Justice had requested it, and he had not: see section 260(2) of the CPA. Nor had the record "been reported for orders". That only applies when a magistrate wishes to report something to the High Court under section 261(2) of the CPA. So the only route by which the High Court's powers under section 262(1) of the CPA could have been invoked in this case was if the record of the proceedings in the magistrates' court had come to the knowledge of the high Court in some other way. In this case, it had come to the knowledge of the high Court by the transfer of Nadan's case under section 190(3) of the CPA CPA to the High Court for sentencing. So was the High Court's revisionary power under on 262(1) of the CPA intended to cover cases which had come to the knowledge of the High Court by that route? I do not think so. (Emphasis mine).

23. In State v Tabusoi [2016] FJHC 1003; HAC168.2016 & HAC180.2016 (3 November 2016) the High Court exercised its revisionary powers to set aside a ruling of the Magistrates Court pursuant to Section 262(1)(b) of the CPA. In that case, Rajasinghe J thought it fit to exercise revisionary power when the Magistrate transferred the case to the High Court under Section 194 (c) of the Criminal Procedure Act stating that the Magistrates Court had no jurisdiction to hear that case.
24. It does not appear under what limb of Section 261(1) of the CPA, His Lordship had exercised the revisionary power. It could only have been invoked in that case if the record

of the proceedings in the Magistrates Court had come to the knowledge of the High Court in some other way. In any event, the error was manifest on the face of the record when the Learned Magistrate transferred the case to the High Court when it in fact had jurisdiction to try the matter.

25. In Nair v State [2023] FJHC 7; HAM201.2022 (20 January 2023) Sharma J refused to exercise revisionary powers (or inherent powers) of the High Court to nullify a no case to answer Ruling of the Magistrates Court on the basis that he had not received a report under the hand of the Chief Justice in terms of Section 260 (2) of the CPA requesting him to exercise revisionary powers to take action. However, His Lordship thought it fit to exercise supervisory jurisdiction under Section 100(6) of the Constitution and proceeded to annul the impugned ruling.
26. In view of the observations made by the Supreme Court in Nadan, I agree with the Respondent that a situation has not arisen in this application to exercise revisionary jurisdiction to set aside the impugned No Case to Answer Ruling under Section 262 (1) of the CPA.
27. Furthermore, Section 262(5) of the CPA states:- "Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. Although the right of appeal is not available to the Applicants at this stage to challenge the No Case to Answer Ruling, that right will definitely be available at the end of the trial. Therefore, the revisionary powers should not be exercised as the Applicants do have the right of appeal.

#### **Supervisory Jurisdiction of the High Court**

28. Section 106 (6) of the Constitution provides for the supervisory jurisdiction of the High Court. The Respondent argues that this section must be read together with Section 262(1) of the CPA which provides for revisionary jurisdiction of the High Court and since the Applicants have not fulfilled the requirements for a revision, this Court has no power to entertain this application.
29. Section 100(6) of the Constitution provides as follows:

The High Court has jurisdiction to supervise any civil or criminal proceedings before a Magistrates Court or other subordinate courts and may, on an application duly made to it, make such orders, issue such writs and give such directions as it considers appropriate to ensure that justice is duly administered by the Magistrates Court and other subordinate courts”

30. According to this Section, the supervisory jurisdiction of the High Court could be invoked only on an application duly made to it. Other than that, the supervisory jurisdiction is not contingent upon any qualification as far as this power is exercised “to ensure that justice is duly administered by the Magistrates Court and other subordinate courts”.
31. There is no indication that Section 100 (6) of the Constitution should be read together with Section 262(1) of the CPC and, no authority is cited by the Counsel for Respondent to substantiate her claim. The case law of course suggests otherwise.
32. In Nitin Nitesh Nair v The State Lautoka High Court Criminal Misc. Number HAM 201 of 2022 the High Court dealt with an application under its revisionary power under Section 260 of the CPA. In providing relief under the supervisory power of the High Court under Section 100 (6) of the Constitution the Court at [25] stated as follows:

Although the applicant's counsel has filed an application for review or revision, the proper application in my view should have been to seek directions under the supervisory jurisdiction of the High Court. However, after considering the urgency of the matter this court can exercise its supervisory jurisdiction (as opposed to inherent jurisdiction) by issuing directions with the view to correct an inadvertent oversight in paragraphs 10, 11 and 12 of the ruling delivered by the Magistrates Court on 11th November, 2022. Section 100 (6) of the Constitution of Fiji gives this court the power to intervene under its supervisory jurisdiction.
33. Unlike the Nair case, in the present case, there is an application duly made under Section 106(6) of the Constitution and therefore this Court is in a better position to deal with this application under the Constitution.
34. The Constitution of Fiji is the Supreme Law of the land [Section 2 (1) and (2) of the Constitution] The Courts are supposed to uphold the Constitution and guard the rights guaranteed in the Bill of Rights Chapter. The Constitution shall be enforced through the courts to ensure that laws and conduct are consistent with the Constitution [s 2(4)(a)].



Therefore, Section 100 (6) of the Constitution be given precedence over other statutes and the courts must intervene if it appears that the rights guaranteed under the Constitution have been violated or about to be violated.

35. The application of the Applicants concerns two rights guaranteed under the Bill of Rights Chapter of the Constitution, namely, the right to be presumed innocent guaranteed under Section 14(2)(a) of the Constitution, right to a fair trial guaranteed under Article 15 (1) of the Constitution and the common law right to be heard that originates from the fundamental rule of natural justice, *audi alteram partem*.
36. In view of s 7(1)(b) of the Constitution, an interpretation of Bill of Rights would involve international law. That provision warrants the courts, if relevant, to consider international law applicable to the protection of the rights and freedoms in the Bill of Rights Chapter and must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognised in the Bill of Rights Chapter [Section 7(4)].
37. Section 14 (2)(a) of the Constitution provides that every person charged with an offence has the right to be presumed innocent until proven guilty according to law. This presumption is a legal one as opposed to a factual presumption and shall remain intact until the guilt is proven beyond reasonable doubt.
38. The presumption of innocence is a long-standing tenet of the common law criminal jurisprudence and under the international human rights law developed after the advent of the Universal Declaration of Human Rights (UDHR)[ see: Article 11(1) of the UDHR, Article 14.2 of the International Covenant on Civil and Political Rights (ICCPR) to which Fiji is a party, Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
39. The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in Woolmington v D.P.P. [1935] AC 462 at p 481 to be that "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. [State v Abourizk [2023] FJHC 402; HAC126.2015 (16 June 2023)].

40. If the court finds an accused guilty of a criminal offence when there exists a reasonable doubt, it offends the right of an accused to be presumed innocent guaranteed under Section 14(2)(a) of the Constitution. The guilt can only be determined at the end of the trial not half way through the trial.
41. The golden thread that runs through the criminal procedure is that the accused must be given an opportunity of being heard, a basic rule of natural justice originates from *audi alteram partem*. This rule signifies a fundamental feature of the right to a fair trial guaranteed in Section 15(1) of the Constitution. In Biblical literature, even the God is stated to have given an opportunity of being heard to Adam and Eve before punishing them for eating the forbidden fruit in the Eden Garden. [see: **Hruday P.B. vs The Vice Chancellor, The National Law School University of India and another**-Writ Petition 9395/202018(November2020)PerDixitJ.(JudgmentLink:<http://judgmenthck.kar.nic.in/judgmentsdsp/bitstream/123456789/348727/1/WP9395-20-18-11-2020.pdf>)]
42. After all, procedural fairness or due process is a constitutional mandate under Section 15 (1) of the Constitution.
43. Right to be heard before a decision is made by the Magistrates Court is recognised in Section 183 of the CPC in following terms:

The court **having heard both the prosecutor and the accused person and their witnesses and evidence**, shall either —

(a) find the accused guilty and pass sentence or make an order according to law; or

(b) acquit the accused; or

(c) make an order under the provisions of Part IX of the Sentencing and Penalties Act 2009. (Emphasis added)

44. The High Court, as the guardian of the rights entrenched in the Constitution, no doubt has jurisdiction to exercise supervisory jurisdiction conferred under Section 100(6) of the Constitution and make such orders, and give such directions as it considers appropriate to ensure that justice is duly administered by the Magistrates Court. I accept that this is a

fit case to exercise that jurisdiction if the Court is satisfied that the Magistrates Court has made the impugned No Case to Answer Ruling in violation of the rights alluded to above.

### Analysis

45. I now proceed to inquire into the application to see if this Court should exercise the supervisory power under the Constitution.
46. The 1<sup>st</sup> Applicant has been charged with the offences of Abuse of Office as follows:

#### COUNT 1

##### Statement of Offence

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Act of 2009

##### Particulars of Offence

RONALD RITESH NARAYAN between 15 September 2016 and 315 October 2017 at Lautoka in the Western Division, whilst being employed in the public service as an Executive Officer with the Ministry of Health, in abuse of the authority of his office did arbitrary acts for gain, namely caused a tender of the Ministry of Health for the Nukuilau Nursing Station project to be awarded to the Brink Home Builders, a company in which he had direct interest in, which was prejudicial to the rights of the said Ministry of Health or other competitive bidders.

#### COUNT 2

##### Statement of Offence

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Act of 2009

##### Particulars of Offence

RONALD RITES NARAYAN between 15 September 2016 and 31st October 2017 at Lautoka in the Western Division, whilst being employed in the public service as an Executive Officer with the Ministry of Health, in abuse of the authority of his office did arbitrary acts for gain, namely caused a tender of the Ministry of Health for the Bukuya Health Centre project to be awarded to the Brink Home Builders, a company in which he had direct interest in, which was prejudicial to the rights of the said Ministry of Health or other competitive bidders.

#### COUNT 3

##### Statement of Offence

ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Act of 2009

##### Particulars of Offence

RONALD RITESH NARAYAN between 1st September 2016 and 315 October 2017 at Lautoka in the Western Division, whilst being employed in the public service as an Executive Officer with the Ministry of Health, in abuse of the authority of his office did arbitrary acts for gain, namely caused a tender of the Ministry of Health for the Ba Mission Hospital project to be awarded to the Brink Home Builders, a company in which he had direct interest in, which was prejudicial to the rights of the said Ministry of Health or other competitive bidders.

COUNT 4

Statement of Offence ABUSE OF OFFICE: Contrary to Section 139 of the Crimes Act of 2009

Particulars of Offence

RONALD RITESH NARAYAN between 1st September 2016 and 31st October 2017 at Lautoka in the Western Division, whilst being employed in the public service as an Executive Officer with the Ministry of Health, in abuse of the authority of his office did arbitrary acts for gain, namely caused a tender of the Ministry of Health for the Raiwaga Health Centre project to be awarded to the Brink Home Builders, a company in which he had direct interest in, which was prejudicial to the rights of the said Ministry of Health or other competitive bidders.

47. The 1st and 2nd accused are jointly charged with the offence of Obtaining a Financial Advantage. The charge and the particulars of the offence are as follows:

COUNT 5

Statement of Offence OBTAINING A FINANCIAL ADVANTAGE: Contrary to Section 326 (1) of the Crimes Act of 2009

Particulars of Offence

RONALD RITESH NARAYAN and SAT NARAYAN between 1st September 2016 and 31st October 2017 at Lautoka in the Western Division, whilst being an Executive Officer with the Ministry of Health, and the Director of BRINK HOME BUILDERS respectively, engaged in conduct namely obtained tenders from the Ministry of Health projects and as a result of that conduct obtained a financial advantage amounting to a total of \$101,041.12 from the Ministry of Health and knowing that they were not eligible to receive the said financial advantage.

48. The Applicant's complaint is that the Learned Magistrate, in his no case to answer Ruling, whilst finding that there is a case for the Applicants to answer, went a step further and found them guilty of the offence/s. Let me now examine the relevant parts of the Ruling of the Learned Magistrate.

49. At paragraph 23 of the Ruling there was a finding of fact that:

I find that the prosecution has **established with sufficient and relevant evidence** that the Brink Home Builders owned by the father of the 1st Accused was directly benefited by the conduct of the 1st Accused. The very conduct of the 1st Accused led to gain a benefit to his own father( emphasis mine)

50. At paragraph 25 there was a finding of fact that:

Having considered overall evidence, I find that the prosecution has led sufficient evidence to prove all elements of the 1st to 4th counts. In the said backdrop I hold that the prosecution has established with sufficient and relevant evidence that the 1st Accused being employed in the public service as an executive officer with the Ministry of Health in abuse of authority of his office did arbitrary acts for gain namely caused tenders of the Ministry of Health for Nukundu Nursing station project, Bukuya Health Centre project, Ba Mission Hospital project and Raiwaga Health Centre project to be awarded to the Brink Home Builders a company which the 1 Accused had a direct interest and it was prejudicial to the rights of the Ministry of Health or other competitive bidders. (emphasis mine)

51. At paragraph 33 there was a finding of fact that;

On the other hand the 1st Accused had withdrawn cash from the Brink Home Builders business account opened with the Westpac Banking Corporation. Same evidence is corroborated by the endorsements made in the cheques tendered in evidence marked as PEX45, PEX46, PEX48, PEX49, PEX51, PEX52, PEX54, PEX70, PEX73, and PEX75. As such I find that the prosecution has established sufficient to prove that both the Accused obtained a financial advantage from the Ministry of Health. (Emphasis mine)

52. At paragraph 35 there was a finding of fact:

I find that the prosecution has led sufficient evidence to prove all elements of the 5th count. Accordingly I hold that the prosecution has established with sufficient and relevant evidence that the 1st and 2nd Accused whilst being an executive officer of for the Ministry of Health and the Director Brink Home Builders respectively engaged in a conduct namely obtained tenders from Ministry of Health projects and as result of that conduct obtained a financial advantage amounting to a total sum of \$101,041.12 from the Ministry of Health and knowing that they were not eligible to receive the said financial advantage.(emphasis mine)

53. Upon perusal of the paragraphs cited above, I am unable to reject the contention of the Applicants that the Learned Magistrate has evaluated evidence and found as a matter of fact, as opposed to as a matter of law, that the elements of the offences have been proved.

54. The test to be satisfied at the close of the prosecution case is whether there is relevant and admissible evidence on each element of the offence or whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it but not that they are proved. At this stage, the accused would still need to run their defence for the court to be satisfied that the elements are proved beyond reasonable doubt.

55. **The Queens Bench in Practice Note** [1962] 1 All ER 448 provided that:

A submission that there is no case to answer may properly be made and upheld: (a) where there has been no evidence to prove an essential element in the alleged offence; (b) where the evidence adduced by the prosecution has been so discredited as result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it... ..the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

56. In **State v Temo Roy Sekope Stuart** Criminal Appeal No. 20 of 1989 / at Suva Justice Fatiaki approved the above practice note at page 5 and cited with approval the decision of Privy Council in *Haw Tau Tau v Public* (1982). It is clear, that the decision as to whether there is a case to answer should depend not so much on whether the adjudication tribunal would at that stage convict or acquit but whether the evidence is such that a reasonable tribunal properly directing its mind to the law and the evidence could or might convict on the evidence so far laid before it.

57. In other words, the court at that (no case to answer) stage should adopt an objective test as distinct from the subjective test which the court should ultimately adopted at the close of the trial. The subjective test would entail an evaluation of the evidence holistically to see if the standard of beyond reasonable doubt required to prove all the elements of the offence has been established.

58. Therefore, the test for a No Case to Answer Ruling would involve a question of law and not a question of fact and would need to be assessed on an objective basis. In **Sanjay Singh Verma v The State** Criminal Petition CAV0019 of 2014 the Supreme Court of Fiji stated at paragraph 16 thus:

Either way, the question is whether the evidence is capable of amounting to proof of guilt, and whether the evidence is capable of amounting to proof of guilt is a question of law only. Indeed, the fact that a submission of no case to answer involves the determination of a question of law only was regarded as axiomatic in *R v Abbott* [1955] 2 QB 497, in which at P 505 Lord Goddard C referred to the determination of a submission of no case to answer as a "decision in point of law". By the same token, in *& v Garside* (1967) 52 Cr App R 85, Winn L at p 89 described a submission of no case to answer as a "point of law". Similarly, in *R v Cockley* 1984] Crim L R 429, the court assumed that the wrongful rejection of a submission of no case to answer would mean that "the judge had been wrong in law." These cases all led the Court of Appeal in Fiji in *The State V Mosese*

Tuisawau (Criminal Appeal No 14 of 1990) to say, without apparent disapproval, that "[i]t has been held that where a submission of no case to answer is made at the close of the prosecution case it calls for a decision of a question of law .

59. In McPhee v S Bennett Ltd (1934] 52 WN NSW18 at [9] the Jordan CJ stated that,

The question whether there is any evidence of a particular fact is also a question of law: Sittingbourne Urban District Council v Lipton Ltd [1931] 1 KB 539 at 544 and Mersey Docks and Harbour Board v West Derby Assessment Committee [1932] 1 KB 40 at 110, 111. But if there is evidence of the fact, the question whether that evidence ought to be accepted in whole or in part, or ought to be accepted as sufficient to establish the fact, is itself a question of fact and not a question of law, unless, of course, there is some law which provides that the particular evidence, when given, is to be taken to establish the fact.

60. The Learned Magistrate in his No Case to Answer Ruling found as a matter of fact that there was sufficient evidence to establish or prove the charge when he stated at paragraph 23 of the Ruling that –**I find that the prosecution has established with sufficient and relevant evidence’**....at paragraph 25,- Having considered overall evidence, **I find that the prosecution has led sufficient evidence to prove all elements of the 1<sup>st</sup> to 4<sup>th</sup> counts.. I hold that the prosecution has established with sufficient and relevant evidence...**, at paragraph 33...**I find that the prosecution has established sufficient (sic) to prove that both the Accused obtained a financial advantage from the Ministry of Health and at paragraph 35 –“I find that the prosecution has led sufficient evidence to prove all elements of the 5<sup>th</sup> count. Accordingly I hold that the prosecution has established with sufficient and relevant evidence ....**
61. Upon careful perusal of the paragraphs cited above, it is obvious that the Learned Magistrate has made a subjective assessment of evidence, which he is supposed to make at the end of the trial as a matter of fact and thereby found the guilt halfway through the trial without an opportunity of being heard was given to the Applicants.
62. In view of that, the Court is bound to accept that the Applicant’s right to a fair trial is in jeopardy even though the defence case was called and rights under Section 179(1) of the CPA were explained to the Applicants by the Learned Magistrate.

63. Further, I find that the finding of guilt at the No Case to Answer stage of the trial offends the right of innocence protected by Section 14 (2) (a) of the Constitution. Therefore, the impugned order is liable to be set aside to ensure that justice is duly administered by the Magistrates Court at Lautoka.
64. The next important question to be decided is whether a fair trial is possible if the matter were returned to the same Learned Magistrate who made the impugned finding to continue with the hearing for the defence case as he has already given the rights of the accused pursuant to Section 179(1) of the CPA.
65. I would answer this question in the negative for two reasons. Firstly, having so decided, it would be next to impossible for the Learned Magistrate to erase from his mind the facts he found in his Ruling and come to a different conclusion in his final judgment. Secondly, such a course would offend the famous maxim '*justice must not only be done but must manifestly and undoubtedly be seen to be done*' propagated by Lord Chief Justice Hewart.
66. In the circumstances, it is inevitable for the Applicants to perceive that, even if evidence were to be adduced for defence, they will not get fair justice in a situation where the court has already decided their guilt. On the other hand, if it appears that there is any real possibility that present Learned Magistrate's participation in the case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. [see: **Livesey v The New South Wales Bar Association** [1983] HCA 17; (1983) 151 CLR 288, p 293,294].
67. In **Webb v The Queen** [1994] HCA 30, the High Court of Australia held that the test (for perceived bias) to be applied is whether "a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case. [This test was adopted by the Supreme Court of Fiji in **Kova v The State** [1998] FJSC 2].
68. For the reasons given above, it is not appropriate in this case to direct the Learned Magistrate who tried the matter to deliver an amended ruling on No Case to Answer



application and proceed to hear the defence case as Sharma J did in Nair case. Therefore, the best course available is to order a re-trial before another magistrate.

69. Before ordering a re-trial, I must address the 'floodgate argument' raised during the hearing. This argument was first raised by the Court in view of the observations made in Chand and Ismail judgments discussed above regarding the suitability of allowing 'piece meal appeals' to challenge interlocutory orders in criminal matters.
70. I have already decided that the impugned Ruling cannot be appealed at this stage. As discussed above, the revisionary jurisdiction is also not available to the Applicants. In such a situation, the exercise of supervisory jurisdiction is entirely in agreement with the constitutional mandate conferred on the High Court under Section 100(6) of the Constitution to ensure that justice is duly administered by the Magistrates Court, particularly in the absence of alternative remedies.
71. The powers under Section 100(6) will be exercised by the High Court only in exceptional cases when there is a real possibility that the rights guaranteed in the Constitution would be in peril. Therefore, there is no basis for anxiety that this decision will open flood gates.
72. When ordering retrials, the appellate courts must always be mindful of the prejudice that will be caused to the parties and the witnesses, the expenses they have to incur and the time wasted in the process of a new trial, not to mention the case management difficulties of the courts below which are already overburdened with huge backlogs. The witnesses lose their memory over time paving way for contradictions with their previous testimonies and some important witnesses may have dead or gone missing by the time of the re-trial. All in all it is the constitutional right to a speedy trial and the confidence in the judicial system that will ultimately be at stake.
73. The alleged offences in this case were committed in 2016. It is evident from the affidavit filed on behalf of the Respondent, that the Applicants had been arraigned on 31 August 2018 and the plea taken on 16 October 2018. Thereafter the matter has been heard by at least two magistrates. Altogether 21 witnesses have been called and 110 documents tendered at the trial so far. The Learned Magistrate who made the impugned order has adopted the proceedings of his predecessor in office, apparently with the concurrence of

the Applicants. Therefore, I don't see a possibility of considerable prejudice being caused to the Applicants if they cooperate with the new magistrate to whom this case is assigned to adopt the proceedings and evidence led so far before his predecessor in office.

74. Following Orders are made:

- i. The Application is allowed.
- ii. The Ruling made on 13 March 2023 by the Learned Magistrate at Lautoka on the no case to answer application is set aside.
- iii. A retrial is ordered before a different magistrate who shall with the concurrence of the Applicants adopt the proceedings and evidence led so far before his predecessors in office and deliver a fresh ruling on the No Case to Answer application, considering the submissions and the evidence so far led.
- iv. If the Learned Magistrate to whom the re-trial is assigned finds that there is a case for the Applicants to answer, he is directed to proceed to the defence case and deliver the judgment according to law.



Aruna Aluthge

Judge

At Lautoka

12 September 2023

Solicitors:

Messrs Patel & Sharma Barristers & Solicitors for Applicants

Fiji Independent Commission against Corruption for Respondent