IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 036 OF 2023

IN THE MATTER of an Appeal from the Decision of the Resident Magistrate, Acquitting the Respondents at the Magistrate Court of Suva, in Criminal Case No. 347 of 2023.

BETWEEN : **THE STATE**

APPELLANT

AND : **JOSAIA VOREQE BAINIMARAMA**

FIRST RESPONDENT

AND : **SITIVENI TUKAITURAGA QILIHO**

SECOND RESPONDENT

Counsels : **Mr. S. Leweniqila, Ms. N. Tikoisuva and Ms. L. Tabuakoro for the Appellant.**

: **Mr. D. Sharma and Ms. G. Fatima for the Respondents.**

Date of Hearing : 29 February, 2024

Date of Judgment : 14 March, 2024

JUDGMENT

1. On 19 June 2023, in the presence of their counsels, the following charges were read over and explained to both respondents:

FIRST COUNT

Statement of Offence

ATTEMPTED TO PERVERT THE COURSE OF JUSTICE: Contrary to section 190 (e) of the Crimes Act 2009.

Particulars of Offence

JOSAIA VOREQE BAINIMARAMA sometime between July 2020 and September 2020 at Suva in the Central Division, attempted to pervert the course of justice by telling Sitiveni Tukaituraga Qiliho, the Commissioner of Police of the Republic of Fiji to stay away from the USP investigations that was reported under CID/HQ PEP 12/07/2019.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SITIVENI TUKAITURAGA QILIHO on the 15th day of July 2020 at Suva in the Central Division being employed in the civil service as the Commissioner of Police of the Republic of Fiji, directed the Director of Criminal Investigations Department Serupepeli Neiko and Inspector Reshmi Dass to stop investigations into the police complaint involving CID/HQ PEP 12/07/2019, in abuse of the authority of his office, which was an arbitrary act prejudicial to the rights of University of the South Pacific which is the Complainant in CID/HQ PEP 12/07/2019.

2. Both respondents said they understood the charges. As for the 2nd respondent, he had already elected a Magistrate Court trial on Count No. 2 on 10 March 2023, in the presence of his counsel. Both respondents pleaded not guilty to the charges. Count No. 2 was further amended by consent of the parties on 2 August 2023. The phrase *"which is the complainant in CID/HQ PEP 12/07/2019"* in the particulars of offence was deleted. The 2nd respondent maintained his not guilty plea to Count No. 2.

3. As always in a criminal trial, the burden of proof is on the prosecution from the start to the end of the trial. The prosecution must prove both accuseds' guilt beyond a reasonable doubt. There is no burden on the accuseds to prove their innocence. If, at the end of the trial, there is a reasonable doubt on the accuseds' guilt, they must be acquitted forthwith.

4. In this case, the prosecution called 25 witnesses. Sixteen (16) witness's evidence were tendered via their written statements, pursuant to section 134 (1) of the Criminal Procedure Act 2009. The summaries of their evidence are contained in paragraphs 4 to 19 of the learned Magistrate's 12 October 2023 judgment.

5. Nine (9) prosecution's witnesses were called into court to give their evidence, and they were cross-examined by the defence. They were:

   (i) Dulari Doris Turagabeci Trail (PW17);
   (ii) Kuliniasi Saumi (PW18);
   (iii) Rusiate Tudravu (PW19);
   (iv) Biu Matavou (PW20);
   (v) Reshmi Dass (PW21);
   (vi) Rajesh Kumar (PW22);
   (vii) Mesake Waqa (PW23);
   (viii) Suliasi Dulaki (PW24); and
   (ix) Serupepeli Neiko (PW25).

6. In the learned Magistrate's notes, the summaries of PW17 to PW25's evidences are contained in pages 631 to 675 of the record (Volume 2). On the transcript of the recorded evidence, the witnesses's evidence are recorded from pages 250 to 450 of the record (Volume 1).

7. The prosecution also tendered 32 prosecution exhibits (PE). They were as follows:

PE 1 - D1 Minute from Director CID
PE 2 - Letter dated 25/08/2020 from Biu Matavou
PE 3a - Minute sheet to D CID dated 4/01/2022; PE 3b - Minute sheet to D/DEC dated 10/07/2020; PE 3c - Minute to D CID dated 31/01/2023; PE 3d - Minute sheet to D DEC dated 10/07/2020
PE 4a - Oath for Ministers for Josaia Voreqe Bainimarama PE 4b - Oath of Allegiance for Josaia Voreqe Bainimarama PE 4c - Legal Notice for Ministerial Assignment for Josaia Voreqe Bainimarama dated 22/11/2018
PE 5 - Appointment letter dated 26/02/2021 for Sitiveni Qiliho
PE 6 - Contract for Sitiveni Qiliho dated 23/09/2021
PE 7 - Suspension letter of Sitiveni Qiliho dated 26/01/23
PE 8 - Acting appointment letter – Commissioner of Police dated 23/05/2019
PE 9 - Letter appointing Sitiveni Qiliho as Acting Commissioner of Police dated 10/11/2015
PE 10 - Contract of Service for Sitiveni Qiliho dated 29/03/16
PE 11 - Fiji Police Force Standing Orders (FSO no. 189 (pgs. 556-566)

PE 12 - Page relating to 15/07/2020 from Note Book of Reshmi Dass
PE 13 - Page relating 15/07/2020 from Note Book of Serupepeli Neiko
PE 14 - Investigation diary of Reshmi Dass for USP case
PE 15 - USP Special Council Meeting 29/08/2019 and 30/08/2019 (containing BDO report)
PE 16 - Minutes of the Special meeting of the USP council – 04/09/2020
PE 17 - Minutes of the Executive Committee (1/19) – 06/03/2019
PE 18 - Minutes of the Special Meeting of the USP Council – 19/06/2020
PE 19 - Council Executive Committee: Update on the implementation of Whistleblowing policy
PE 20 - Minutes for the Special meeting of the USP Council – 29/08/2019 and 30/08/2019
PE 21 - Minutes of the meeting of the Executive Committee (2/19) – 17/04/19
PE 22 - FICAC Letter to the Chairperson of Council – 01/07/19
PE 23 - Copy of FICAC Search List dated 25th April, 2019 from University of the South Pacific (USP) Council and Senate Secretariat (CSS) Office, B319 (2 pages)
PE 24 - Copy of FICAC Search List dated 25th April, 2019 from University of South Pacific Laucala Campus, Suva (1 page)
PE 25 - Copy of FICAC Search List dated 25th April, 2019 from University of the South Pacific, Human Resource (2 pages)

PE 26 - Copy of FICAC Search List dated 25th April, 2019 from University of the South Pacific, Assurance and Compliance Section, Laucala Campus (5 pages)
PE 27 - Copy of FICAC Search List dated 25th April, 2019 from University of the South Pacific, HR Office (2 pages)
PE 28 - Copy of FICAC Search List dated 25th April, 2019 from University of the South Pacific, Finance Office – Payroll Section (3 pages)
PE 29 - Transcript of Extracted Audio Recording from 17/9/20 at 11.28am between Bainimarama and Tudravu
PE 30 - Transcript of Video Caution Interview of Qiliho on 8/2/23 and 9/3/23
PE 31 - Office of DPP's letter dated 23/6/20
PE 32 - Vodafone Fiji Search Warrant Report

8. The parties also submitted an "*Agreed Facts*'" pursuant to section 135 of the Criminal Procedure Act 2009. The details of the Agreed Facts were contained in paragraph 2 of the learned Magistrate's judgment dated 12 October 2023 (page 10, Volume 1 of the court record).

9. At the end of the prosecution's case, the defence indicated to the court that they want to make a submission of *"no case to answer ".* They filed their submission on 8 August 2023. The State replied with their submission on 14 August 2023. The defense filed a reply submission on 15 August 2023.

10. On 7 September 2023, the learned Magistrate, in a 98 pages ruling, found that the two respondents had a case to answer. Her ruling were recorded in pages 144 to page 241 of the record (Volume 1). She later explained their rights to them and called upon them to make their defence. Both respondents choose to give sworn evidence in their defence, and called no supporting witness.

11. The two respondent's evidences were recorded in pages 558 to 574 of the record (Volume 2) for the 1st respondent, and pages 575 to page 601 (Volume 2) for the 2nd respondent. They tendered two Defence Exhibits (DE). They were as follows:

DE 1 – Fiji Broadcast (FBC) Article – Police to investigate.
DE 2 – Transcript of Extracted Audio Recording (3 pages).

12. Altogether, there were 27 witnesses (25 from the prosecution and 2 from the defence), including 34 exhibits (32 from the prosecution and 2 from the defence), including the parties' *"Agreed Facts",* which constituted the entire evidence, on which the court will have to make a decision.

13. On 12 October 2023, in 135 pages, the learned Magistrate delivered her judgment on the matter. On pages 1 and 2 of the judgment, the learned Magistrate referred to the two counts, which the two respondents denied. From page 3 to page 11, she summarized the evidence of the 16 state witnesses, whose evidence were accepted via the operation of section 134 of the Criminal Procedure Act 2009. From pages 11 to 43, she summarized Prosecution Exhibits No. 1 to 29. From pages 43 to 73, she summarized the evidence of the nine (9) state witnesses mentioned in paragraph 5 hereof. From pages 75 to 98, she summarized the two respondent's case. From pages 103 to 112, she analyzed the 1st respondent's case and she reached the conclusion that the 1st respondent was not guilty as charged. From pages 117 to 135, she analyzed the 2nd respondent's case and she reached the conclusion that the 2nd respondent was not guilty as charged. The learned Magistrate then acquitted both of the respondents, on the charges laid against them.

14. The State was not happy with the two respondent's acquittals. On 2 November 2023, they filed their Petition of Appeal in the High Court of the Republic of Fiji. They were asking the High Court to reverse the learned Magistrate's acquittal orders for the two respondents, and substitute the same with a finding of guilt and conviction.

15. The State, in their petition of appeal, raised eight (8) grounds of appeal, and they were as follows:

1. *THAT the learned Magistrate erred in law and in fact in failing to consider and apply the principles of law laid down in the case of **Browne v Dunn (1893) 6.R. 67. H.L** when the 1st Respondent was giving evidence under oath, in his defence.*

2. *THAT the learned Magistrate erred in law and in fact in failing to consider and apply the principles of law laid down in the case of **Browne v Dunn (1893) 6.R.67. H.L** when the 2nd Respondent was giving evidence under oath, in his defence.*

3. *THAT the learned Magistrate erred in law and in fact when she failed to indicate to the State that it was available to the State to recall any of its prosecution witnesses, to challenge the new defenses and evidence raised by both the 1st and 2nd Defendants, thereby resulting in an unfair trial.*

4. *THAT the learned Magistrate erred in law and in fact in arriving at a finding that Prosecution Witness 19, Rusiate Tudravu **"clearly came to court with an axe to grind following his dismissal from the Fiji Police Force due to an unrelated event"** when such an imputation was not put to Rusiate Tudravu during cross examination and there was no evidence to support such a finding.*

5. *THAT the learned Magistrate erred in law and fact in arriving at the finding that what witnesses SSP Serupepeli Neiko and A/ASP Reshmi Dass wrote in their police notebooks regarding the conversations they had with the 2nd Respondent was **"what they understood to be his intent and this view was, unfortunately coloured and potentially tainted by the subsequent conversations they had had with each other, another and possibly others and it was not a verbatim recording"** when such imputation was not put to either of the witnesses in cross examination and there was no evidence to support such a finding.*

6. *THAT the learned Magistrate erred in law and in fact in arriving at her findings in paragraph 143 of her judgment, in respect of the 1st Respondent when such findings were based on an erroneous assessment of the elements of the offence, the evidence called by the State and the evidence of the 1st Respondent which was in blatant breach of the Browne v Dunn rule.*

7. *THAT the learned Magistrate erred in law and in fact in arriving at her findings in paragraph 172 of her judgment, in respect of the 2nd Respondent when such findings were based on an erroneous assessment of the elements of the offence, the evidence called by the State and the evidence of the 2nd Respondent which was in blatant breach of the Browne v Dunn rule.*

> *8. THAT the learned Magistrate erred in law and in fact in failing to place proper weight on the entire evidence of the State but instead erroneously placed more weight on the recent concocted evidence of the 1st and 2nd Respondent, thereby resulting in her returning erroneous orders of acquittal on both Respondents.*

16. On the powers of the High Court on an appeal from the Magistrate Court, section 256 of the Criminal Procedure Act 2009 reads as follows:

> *"…**256** (1) At the hearing of an appeal, the High Court shall hear-*
>
> *(a) the appellant or the appellant's lawyer; and*
>
> *(b) the respondent or the respondent's lawyer (if the respondent appears); and*
>
> *(c) the Director of Public Prosecutions or the Director's representative (if there is an appearance by or for the Director).*
>
> *(2) The High Court may-*
>
> *(a) confirm, reverse or vary the decision of the Magistrates Court; or*
> *(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*
>
> *(c) order a new trial; or*
>
> *(d) order trial by a court of competent jurisdiction; or*
>
> *(e) make such other order in the matter as to it may seem just, and may by such order exercise a power which the Magistrates Court might have exercised; or*
>
> *(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred…"*

1. *FIRST RESPONDENT*

Appeal Ground No. 1, *"…THAT the learned Magistrate erred in law and in fact in failing to consider and apply the principles of law laid down in the case of Browne v Dunn (1893) 6.R.67 HL, when the 1st Respondent was giving evidence under oath, in his defence…"* ***and***

Appeal Ground No. 6, *"…THAT the learned Magistrate erred in law and in fact in arriving at her findings in paragraph 143 of her judgment, in respect of the 1st Respondent when such findings were based on an erroneous assessment of the elements of the offence, the evidence called by the State and the evidence of the 1st Respondent which was in blatant breach of the Browne v Dunn rule…"* ***and***

Appeal Ground No. 8, *"…THAT the learned Magistrate erred in law and in fact in failing to place proper weight on the entire evidence of the State but instead erroneously placed more weight on the recent concocted evidence of the 1st and 2nd Respondents, thereby resulting in her returning erroneous orders of the acquittal on both Respondents..."*

17. I have decided to deal with the above three appeal grounds together, because they appear to be discussing the same issues, that is, the alleged breach of the **Brown** v **Dunn** rule, and its potential effects on the weight and value to be placed on a witness's evidence, particularly on the witness that had broken the rule.

18. In her 7 September 2023 ruling on the defence's application that they had no case to answer at the end of the prosecution's case, the learned Magistrate defined the elements of count no. 1, in paragraph 90, as follows:

> *"… (i) Mr. Josaia Voreqe Bainimarama*
>
> *(ii) did some act*
>
> *(iii) which had a tendency to deflect the police from invoking the jurisdiction of the court*
>
> *(iv) with intent to deflect the police from invoking the jurisdiction of the court,*
>
> *(v) in circumstances where an investigation into a matter could lead to a prosecution for some offence,*
>
> *(vi) and in circumstances where Mr. Bainimarama was aware, or ought to have been aware, that an investigation into that matter could potentially lead to a prosecution for some offence: see section 23, section 21 and section 20 of the* ***Crimes Act 2009*** *as applied to the principles extrapolated above…"*

19. She summarized the prosecution's witnesses evidence from paragraph 4 to 19 (16 witnesses) and then from paragraph 46 to 73 (9 witnesses). She also summarized the prosecution's exhibits from paragraphs 21 to 45.

20. In her ruling, as Judge of fact and law, the learned Magistrate accepted that the 1st respondent was Prime Minister of Fiji from 2014 to 2022. She accepted that the 2nd respondent was on 10 November 2015, a Colonel in the Republic of Fiji Military Force (RFMF), and from that date was appointed Acting Commissioner of Police by His Excellency the President, Ratu Epeli Nailatikau, on the advice of the 1st respondent as Prime Minister and Chair of the Constitutional Office Commission, after consulting the Minister responsible for the Fiji Police Force (FPF). She accepted that when the 2nd respondent signed his 5 years contract as Commissioner of the Fiji Police Force on 29 March 2016, the 1st respondent signed the contract as Prime Minister and Chair of the Constitutional Office Commission, for and on behalf of the Government of Fiji.

21. The learned Magistrate accepted that if the 1st respondent was Commander of the RFMF from 01/03/1999 to March 2014 (15 years), then he would be the 2nd Respondent's Prime Minister and Commander for some years before the 2nd respondent's appointment as Acting Commissioner of Police on 10 November 2015. The learned Magistrate posed the question: *"Why the positions and these relationships matter, one might fairly ask. They matter because they provide context for the conversation Mr. Bainimarama admits to having had during the course of his communication with A/Commissioner of Police Tudravu at the National Security Council Meeting held at the Prime Minister's Boardroom on 17 September 2020."* **(paragraph 98, page 222 of the record, Volume 1).**

22. The learned Magistrate continued, *"…see Prosecution Exhibit 29. Here is the admission in context.*

Mr. Rusiate Tudravu	*Sir, we…can we discuss later on this some of the investigation that are currently pending. Just wanted have clarification on the our stand that USP thing, it's …we discuss it later or tou sa veitalanoa ga.*
Mr. Bainimarama	*Oh I suggested earlier to Tuks to stay away from that investigation.*
Mr. Rusiate Tudravu	*The issue here now is…because they are saying that the audit is already been done now*

	then the complainant is asking what we are doing because they know that the DPP has already directed us ah to if we can just interview those ah….that is our stand and then I came to talk with DPP…well DPP told me that's operational matter you need to do it because you will be answerable to that. I have had advised them the guidance that it was given and that his stand to me so I just want a clarification on…because we are holding everything up and they are pushing. They want feedback on…we are holding all the investigations.

In context, the investigation referred to is the USP investigation that were currently pending," it was accepted by Tudravu and Mr. Sharma, as counsel for both respondents, that the word *"Tuks"* was usually a reference to the 2nd respondent. The learned Magistrate accepted that on 17 September 2020, the 1st respondent told Tudravu that he *"suggested earlier to Tuks to stay away from that investigation",* and the same constituted the first two elements of Count No. 1 that *"the 1st respondent did some act"* **(see paragraph 90 (i) and (ii), page 220, Volume 1 of the court record).**

23. The learned Magistrate then turn to examine element (iii) and (iv) of Count No. 1 as described in paragraph 90 (iii) and (iv) that is, *"whether there is relevant and admissible evidence to indicate that suggesting to Mr. Qiliho to stay away from the investigations had the tendency to deflect the police from prosecuting a criminal offence and whether that was in fact Mr. Bainimarama's intent when he made that suggestion to Mr. Qiliho"* **(paragraph 99, page 223 of the record, Volume 1).**

24. The learned Magistrate then held, *"…I am prepared to find, and do in fact find, that there is relevant and admissible evidence to prove that when Mr. Bainimarama in his capacity as Prime Minister and Chair of the National Security Council made a suggestion to members of the National Security Council, members of the National Security Council took it as a directive and obeyed. That was certainly the evidence of Mr. Tudravu, a very experienced and very senior member of the Fiji Police Force…. When he heard what the then Prime Minister had suggested to the Commissioner, despite his knowledge that there were investigations afoot, investigations that were potentially meritorious, investigations that were nearing finality, investigations which could potentially invoke the jurisdiction of the court, he returned and directed the CIIP to stop investigations. That is enough, at this point,*

to indicate that a suggestion from Mr. Bainimarama to stay away from investigations had the tendency, during his time as Prime Minister of Fiji, to deflect senior police officers, and thereafter, the men and women under their command, from investigating matters that could ultimately invoke the jurisdiction of the court." **(paragraph 100, page 223 and 224 of the court record, Volume 1).**

25. In paragraph 101 of her ruling, the learned Magistrate said, *"…The final question to be determined is (whether Mr. Bainimarama intended his suggestion to deflect the Fiji Police Force from potentially invoking a court's jurisdiction by bringing charges after investigations.)"*

26. In paragraphs 104 and 105 of her ruling, the learned Magistrate talked about the Commissioner of Police's powers and functions under section 129 of the 2013 Constitution and the Police Act 1965. In paragraph 106, she said, *"…I am prepared to find at this point, and do, in fact, find according to the Laws of Fiji, Mr. Sitiveni Qiliho as Commissioner of Police had overall command of the Fiji Police Force; was responsible for the organization and administration of the Fiji Police Force and the deployment and control of its operations; had the power to appoint, remove and discipline all ranks, members and employees of the Fiji Police Force; was responsible for ensuring that the Fiji Police Force was employed throughout Fiji in the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime, and the enforcement of all criminal laws and regulation; had command, superintendence and direction of the Fiji Police Force; was vested with the administration of the Force throughout Fiji; and was never off duty".* In paragraph 107, the learned Magistrate said, *"…I am prepared to find, and do in fact find, that there is relevant and admissible evidence that Mr. Bainimarama in his capacity as Prime Minister and as Chair of the Constitutional Offices Commission was constitutionally responsible for recommending the appointment of the Commissioner of Police in consultation with the Minister responsible for the Fiji Police Force, and I find that it is open for a trier of law and fact to infer from that a knowledge of the roles, duties and responsibilities of the Commissioner of Police…"*

27. In paragraph 112 of her ruling, the learned Magistrate said, *"<u>…From the immediate way in which Mr. Bainimarama responded to Mr. Tudravu's tentative raising of the then current investigations into the USP "thing", and his request for clarification of the executive branch's</u>*

stand on the USP investigation, it is open to a trier of fact and law to infer that Mr. Bainimarama was aware that the USP investigations were afoot, that he did not want the investigations to continue, and in that context, I hold that there is some relevant and admissible evidence to draw the permissible inference that when Mr. Bainimarama made his suggestion to Mr. Qiliho - as he admits he did, he did so with the intent to deflect him and by extension the investigative organization that he led from pursuing criminal investigations that might potentially lead to the filing of charges in court."

28. The learned Magistrate then considered elements (v) and (vi) of Count No. 1, as described in paragraph 90 of her ruling.

29. In paragraph 114 of her ruling, the learned Magistrate said the following, *"…I note that there is relevant and admissible evidence that Fijian Government representatives sitting in the Executive Committee to the USP Council were notified on 6 March 2019 that the Audit and Compliance arm of the University of the South Pacific contemplated filing criminal complaints against current and former senior executives: see* ***Prosecution Exhibit 17.*** *There is relevant and admissible evidence that Fijian Government representatives sitting in the Executive Committee to the USP Council were notified on 17 April 2019, that the Director Audit and Compliance Unit, Ms. Dulares Traill had lodged 9 reports with the Fiji Independent Commission against Corruption. This is an independent, executive branch office charged with, amongst other things, investigating and prosecuting abuse of authority and financial crimes under the* ***Fiji Independent Commission against Corruption Act 2007*** *and the* ***Prevention of Bribery Act 2007*** *on behalf of the State. I note that there is undisputed evidence that a Police Report was filed at the Totogo Police Station on 8 July 2019 asking the Fiji Police Force to investigate the matters raised in Island Business news articles regarding financial mismanagement at the University of the South Pacific; and bringing to the Fiji Police Force's attention, Professor Pal Ahluwalia's Issues, Concerns and Breaches of Past Management and Financial Decisions paper that had been handed up to the Executive Committee to Council on or around 6 March 2016: see* ***Prosecution Exhibit 17*** *and Statements of* ***Prosecution Witnesses 15 & 16****. I note from* ***Prosecution Exhibits 15 – 21*** *that Fijian Government representatives to the Executive Committee to the USP Council and to the USP Council had taken a stance against Professor Pal Ahluwalia, his report, and to some of the measures taken to address the concerns raised therein. I note from Mr. Tudravu's testimony that the Fijian Government had taken a public stand prior to*

*the National Security Council meeting of 17 September 2020 in respect of the regional diplomatic row brewing within the Executive Committee to Council and within Council. I note per **Prosecution Exhibit 4** that Mr. Bainimarama in his capacity as Prime Minister had appointed to himself in his capacity as Prime Minister and Minister for iTaukei Affairs, Sugar Industry and Foreign Affairs, responsibility for the conduct of foreign affairs, the Ministry of Foreign Affairs, and all written laws relating to foreign affairs on 22 November 2018. I note that according to **Prosecution Exhibit 14**, on 12 July 2019, IP Reshmi Dass had been instructed by SP Loraini Seru (DDEC) to have a meeting with Doras Traill of USP in respect of a case reported by them regarding an allegation against the Pro Chancellor, VCP Rajesh Chandra and other staffs for abuse of office; and I note from **Prosecution Exhibit 14** that on 12 July 2019, IP Reshmi Dass had that meeting with Doras Traill. This is the first and second entries for Investigation Diary in P.E.P. No. CID/HQ PEP 12/7/19. I note that there is relevant and admissible evidence that there were investigations afoot at the Fiji Police Force from at least <u>12 July 2019</u>: **Prosecution Exhibit 14**, and that by at least 6 July 2020, the investigations were well on their way toward the interview of suspects and possible charges by the Office of the Director of Public Prosecutions: see **Prosecution Exhibits 1, 3 and 14**. It was clear to me, listening to the evidence of **Prosecution Witness 18: Kuliniasi Saumi** and **Prosecution Witness 21: Reshmi Dass** that both these very senior investigating officers, one from the Fiji Independent Commission against Corruption and the other from the Fiji Police Force, felt that their investigations were yielding good fruit, were on track toward possible interview of suspects and very likely charges…"*

30. In paragraph115, the learned Magistrate said, *"…I am prepared to find at this point, and I do, in fact, find that there is relevant and admissible evidence to indicate that investigations into any of these matters could lead to prosecutions for some offence; see section 56 of the **Criminal Procedure Act 2009.** I am also prepared to find, and I do, in fact find that there is relevant and admissible evidence to indicate that Mr. Bainimarama in his capacity as Prime Minister and Minister in charge of Foreign Affairs was aware or ought to have been aware that a court's jurisdiction could be invoked if investigations were launched into the findings of the Audit & Compliance Unit of the University of the South Pacific, or into the matters raised in the Professor Ahluwalia report…"*

31. In paragraph 116, the learned Magistrate said, *"…There being some relevant and admissible evidence going to each element of the offence of **Attempted to Pervert the***

Course of Justice, *I find that the first Defendant, Mr. Josaia Voreqe Bainimarama has a case to answer in respect of Count 1".*

32. In paragraphs 157, 158 and 159 of her ruling, the learned Magistrate explained to the 1st respondent his rights, and call upon him to defend himself, if he so chooses. The 1st respondent choose to give sworn evidence in his defence and he called no supporting witness. His evidence were contained in pages 558 to 575 of the court record, volume 2.

33. On oath, the 1st respondent denied Count No. 1. He denied the allegation against him. He said, he did not tell the 2nd respondent to stop any police investigation. He said he had never heard of police file CID/HQ PEP 12/07/2019. I had carefully read the 1st respondent's entire evidence to find out whether or not the appellant's complaint in Appeal Ground No. 1 and 6 were made out. The thrust of the 1st respondent's defence was that he was not aware of the police investigation in CID/HQ PEP 12/07/2019, which concerned alleged mismanagement of USP funds by senior executives of the USP Council. He said he was only aware of public gatherings by USP staff and student who were threatening to boycott classes and exams if their demands were not met. The matter was reported in the Fiji media, as shown in Defence Exhibit No. 1. This was at the height of the Covid-19 pandemic in Fiji, and the police were ready to arrest and prosecute those who breached the Covid-19 restriction. The 1st respondent said this was the USP police investigation he was aware of, not that concerning CID/HQ PEP 12/07/2019.

34. I have carefully read all the evidence of the state witnesses mentioned in paragraph 5 hereof, that is, from PW17 to PW25. None of the police officer witnesses were ever cross-examined on the issue concerning the police investigation into the possible breaches of the Covid -19 restriction at the USP, as reported in Defence Exhibit No. 1. Rusiate Tudravu (PW19), Biu Matavou (PW20), Reshmi Dass (PW21), Mesake Waqa (PW23) and Serupepeli Neiko (PW25) were not cross-examined by the 1st respondent on the matters raised in Defence Exhibit No. 1 **(Please refer to page 646 to 675 of the court record, Volume 2, pages 308 to 450 of the court record, Volume 1).** The appellant submitted that by failing to cross-examine the police witnesses' on the matters raised in Defence Exhibit No. 1, the 1st respondent had breached the rule in **Brown** v **Dunn** (1893) 6.R.67.HL.

35. The appellant referred the court to what the Court of Appeal said in **Rajiv Kumar** v **State**, Criminal Appeal No. AAU 137 of 2020, on 8 March 2023:

> *"The general rule of practice ('**Brown** v **Dunn** Rule') requires that where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation. Thus, as a general rule, defence counsel should put to witnesses for **the State/Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence.** In **MWJ v The Queen (2005) 80 ALJR 329** at 333 [18]; 222 ALR 436 at 440-441, it was noted that in many jurisdictions this rule has been held to apply in the administration of criminal justice." [Emphasis mine]*

36. Generally speaking in criminal trials, when the accused person breaks the **Brown** v **Dunn** rule, it was often seen as a sign of unfairness to the prosecution's side, although the burden to prove the charge beyond reasonable doubt remains with them until the end of the trial. In this case, there is no burden on the 1st respondent to prove his innocence. He may choose to remain silent. However, if he chooses to exercise his right to give sworn evidence, as the 1st respondent had done here, his evidence will be treated and analyzed in accordance with the law of evidence, as it was applicable to all witnesses. Witnesses give evidence in court to persuade the court to accept their evidence and version of events. In her ruling on *"the defence's no case to answer submission",* the learned Magistrate found that there were some relevant and admissible evidence, provided by the State's witnesses, going to each element of the offence of Attempted to Pervert the course of justice, and found that the 1st respondent had a case to answer. She spelt out her reasons from paragraphs 83 to 115 of her ruling ***(see pages 217 to 229 of the court record, Volume 1).*** On the issue that 1st respondent did not know about police file CID/HQ PEP 12/07/2019 on 17 September 2020 at the National Security Council meeting, the learned Magistrate held, in her *"no case to answer"* ruling, that he did know about CID/HQ PEP 12/07/2019 ***(see paragraphs 112, 114 and 115 of the ruling, pages 227 to 229 of the court record, Volume 1.)***.

37. Having read the whole of the prosecution's witnesses' evidence, including the prosecution's exhibits, the two respondent's evidence and their two exhibits, yes I am of the humble view that the rule in **Brown** v **Dunn** had been breach by the 1st respondent, when he didn't put his Covid-19 police investigation to the State witnesses for comments. What is the effect of

that? In my view, the 1st respondent's version of events and evidence is tainted by the word *"unfairness",* and its weight and value, as a consequence, somewhat decreases. When you fight your case in a criminal trial, you must do so with honour, fairness and pride. To do so increases the weight and value of your evidence. To do otherwise decreases the weight and value of your evidence. In my humble view, the learned Magistrate erred in law and in fact, when she accepted the 1st respondent's evidence, given what was discussed above and given her solid reasoning in her *"no case to answer"* ruling.

38. Furthermore, even without the breach of the **Brown** v **Dunn** rule, and this relates to Ground 8 of the Appeal Grounds. There was a total of 25 State witnesses and 32 prosecution exhibits, 2 defence witnesses and 2 defence exhibits. On the totality of the evidence, it was apparent that the problem emanated from the financial abuse and mismanagement by senior members of the USP Council. The Fiji taxpayers contribute approximately $34 million per year to funding the University of the South Pacific (USP). The 1st Respondent, at the material time, was the Prime Minister of the Republic of Fiji and was bound by law to see that the $34 million was used properly. In all USP Council meeting, the Fiji government was well represented. As Minister for Foreign Affairs at the material time, he was bound to know what was happening at USP Council meeting by his representative and advisers. Therefore, in my view, he constructively knows what's happening at the USP Council meetings. By law, he was duty bound to stop and contain the alleged abuse by senior members of the USP Council, especially so when they appear to be citizens of the Republic of Fiji. In my view, the 1st respondent knew or ought to have known about the mismanagement by senior officials at the USP Council. Based on the totality of the State's evidence, I accept that the State had proven their case against the 1st respondent beyond a reasonable doubt on Count No. 1. In my view, all the State witnesses were credible and I accept their evidence, as reported in the court record. I accept the State's version of events. In my view, the learned Magistrate erred in law and in fact in not considering the totality of the State's evidence, and consequently she erred when she found the 1st respondent not guilty as charged on Count No. 1. I therefore uphold the State's appeal in ground 1, 6 and 8 of the Appeal Grounds.

2. *SECOND RESPONDENT*

Appeal Ground No. 2, "…*THAT the learned Magistrate erred in law and in fact in failing to consider and apply the principles of law laid down in the case of* ***Brown*** *v*

Dunn** (1893) 6. R. 67. HL. when the 2nd respondent was giving evidence under oath, in his defence…",* ***and

Appeal Ground No. 7, *"…THAT the learned Magistrate erred in law and in fact in arriving at her findings in paragraph 172 of her judgment, in respect of the 2nd respondent when such findings were based on an erroneous assessment of the elements of the offence, the evidence called by the State and the evidence of the 2nd Respondent which was in blatant breach of the **Brown** v **Dunn** rule…",* ***and***

Appeal Ground No. 8, *"…THAT the learned Magistrate erred in law and in fact in failing to place proper weight on the entire evidence of the State but instead erroneously placed more weight on the recent concocted evidence of the 1st and 2nd respondent, thereby resulting in her returning erroneous orders of acquittal on both Respondents…"*

39. I have decided to deal with the above three appeal grounds together, because they appear to be discussing the same issues, that is, the alleged breach of the **Brown** v **Dunn** rule, and its potential effects on the weight and value to be placed on a witnesses' evidence, particularly on the witness that had broken the rule.

40. On 7 September 2023, in her ruling on the defence's application of there been no case to answer against them, the learned Magistrate defined the elements of Count No. 2, in paragraph 133, as follows:

(i) Sitiveni Tukaituraga Qiliho

(ii) Whilst employed in the civil service

(iii) Intentionally

(iv) Directed an act

(v) That was (a) arbitrary in nature, (b) an abuse of the authority of his office, and (c) prejudicial to the rights of another

(vi) Intending, or knowing, or being reckless as to (a) the acts arbitrariness, (b) the fact that it was an abuse of the authority of his office, and (c) its prejudicial effect on the rights of another…" **(page 233, court record, Vol.1.)**

41. Like in the first respondent's case, the learned Magistrate summarized the prosecution's witnesses' evidence from paragraph 4 to 19 (16 witnesses) and then from paragraph 46 to 73 (9 witnesses). She also summarized the prosecution's exhibits from paragraphs 21 to 45.

42. On the elements of count no. 2, as described in paragraph 133 (i) and (ii) of her ruling, the learned Magistrate said:

> *"…It is an uncontroverted fact that the second Defendant was employed as Commissioner of Police on 29th March 2016 for a period of 05 years, and thereafter from 21st September 2021 for a period of 05 years. It is an uncontroverted fact that he held and performed the duties of that office from 15 November 2015 until his suspension on 26 January 2023. It is an uncontroverted fact that he held the office of, and performed the duties of Commissioner of Police on 15 July 2020, the day this alleged offence is said to have happened. Pursuant to Part 6 of the* ***Constitution****, the Fiji Police Force is a disciplined service provided by the State, for all that it is not a public service. As a member of the Fiji Police Force he is, and was at the relevant time, a person belonging to a disciplined service, and by virtue of section 4 of the* ***Crimes Act 2009*** *is, and more importantly, was at the time "a person employed in the civil service." There is relevant and admissible evidence implicating the accused in respect of this element."* **(page 234, court record, Vol.1.)**

43. Moving on to the elements described in paragraph 133 (iii) and (iv) of Count No. 2, the learned Magistrate said as follows:

> *"…It is an uncontroverted fact that he directed an act on the 15th of July 2020.* ***Prosecution Witness 21: Reshmi Dass*** *and* ***Prosecution Witness 25: Serupepeli Neiko*** *testified that the second Defendant directed them to stop the investigations they were conducting in respect of allegations emanating from USP, the results of which, at that time was being compiled in Police Docket CID/HQ PEP 12/07/19 per the requirements of the Force Standing Orders. During his Interview with the Police, as is recorded in* ***Prosecution Exhibit 30,*** *the second Defendant admits that he directed the investigating officer* ***Reshmi Dass*** *to stop investigations into the USP matter. There is relevant and admissible evidence implicating the accused in respect of this element…"*
>
> *"…The following questions and answers are contained in* ***Prosecution Exhibit 30:***

"D/IP Suliasi: During the process of investigation, do you have any powers to call for a stop to any, in any investigation?
Sitiveni Qiliho: In this case, I asked for that stop so that I could get a summary to be updated on a case that had become of national interest. I don't normally do it. But because I wasn't updated, I, I had to take this action.

D/IP Suliasi: That means that this case was of national interest and you need to know some of the facts from that case?
Sitiveni Qiliho: Yes, I needed to know if I was questioned, like I had to brief the Minister, or I had to be, I had to know what was going on.
D/IP Suliasi: Do you know what was the interest of the Minister in relation to this case? What was his interest in this case?
Sitiveni Qiliho: No, but I was, I was preparing myself if I needed to, to give a briefing that I knew what was going on."

> *"…I am prepared to find at this point, and do in fact find that this constitutes relevant and admissible evidence capable of establishing that the second Defendant meant to direct the stop of investigations into the allegations referred to in Police Docket CID/HQ PEP 12/07/19* **(pages 234 and 235 of the court record, Volume1.)**

44. On the elements of Count No. 2, as described in paragraph 133 (v) of her ruling, the learned Magistrate said as follows:

> *"…I am prepared to find at this point, and do, in fact, find according to the Laws of Fiji, Mr. Sitiveni Qiliho as Commissioner of Police had overall command of the Fiji Police Force; was responsible for the organization and administration of the Fiji Police Force and the deployment and control of its operations; had the power to appoint, remove and discipline all ranks, members and employees of the Fiji Police Force; was responsible for ensuring that the Fiji Police Force was employed throughout Fiji in the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime, and the enforcement of all criminal laws and regulation; had command, superintendence and direction of the Fiji Police Force; was vested with the administration of the Force throughout Fiji; and was never off duty…"*
>
> *"…I note that according to* ***Prosecution Exhibit 14****, on 12 July 2019, IP Reshmi Dass had been instructed by SP Loraini Seru (DDEC) to have a meeting with Doras Traill of USP in respect of a case reported by them regarding an allegation against the Pro Chancellor, VCP Rajesh Chandra and other staffs for abuse of office; and I note from* ***Prosecution Exhibit 14*** *that on 12 July 2019, IP Reshmi Dass had that meeting with Doras Traill. This is the first and second entries for Investigation Diary in P.E.P No. CID/HQ PEP 12/7/19. I note that there is relevant and admissible evidence that there were investigations afoot at the Fiji Police Force from at least 12 July 2019****: Prosecution Exhibit 14,*** *and that by at least 6 July 2020, the investigations were well on their way toward the interview of suspects and possible charges by the Office of the Director of Public Prosecutions: see* ***Prosecution***

__Exhibits 1, 3, and 14__. It was clear to me, listening to the evidence of __Prosecution Witness 18: Kuliniasi Saumi__ and __Prosecution Witness 21: Reshmi Dass__ that both these very senior investigating officers, one from the Fiji Independent Commission against Corruption and the other from the Fiji Police Force, felt that their investigations were yielding good fruit, were on track toward possible interview of suspects and very likely charges…"

"…Moreover, I highlight the fact that by statute it is the Fiji Police Force's core function to be employed throughout Fiji in the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime, and the enforcement of all laws and regulations which it is directly charged. The Crimes Act 2009 is one such law that the Fiji Police Force is charged with enforcing. And in furtherance of their core objectives, "every police officer shall be deemed to be on duty at all times." It is a little difficult, at this juncture, to understand then how directing a stop to a legitimate and meritorious investigations so that the person on top can get a brief aligns with that statutory mission and objective..."

"…__Prosecution Witness 21: Reshmi Dass__ testified that she was shocked when she received the directive of 15 July 2020 because it was the first time in her 25 years career that she had ever received such a directive from a Commissioner of Police. Usually, directives relating to investigations would come through the Director Criminal Investigations Division. <u>I am prepared to find, and do find, that there exists relevant and admissible evidence capable of implicating the second Defendant in an arbitrary act that was done in abuse of the authority of his office</u>…" **(pages 236 to 238 of the court record, Vol.1.)**

45. The learned Magistrate said the following in paragraph 145 of her ruling:

"…I now turn my mind to whether there is relevant and admissible evidence to indicate that the second Defendant <u>intended</u> to be arbitrary and <u>intended to act</u> in abuse of the authority of his office; or that <u>he knew</u> his directive was arbitrary and <u>knew that his directive</u> was an act in abuse of the authority of his office; or <u>was reckless</u> as to the fact that his directive was arbitrary and <u>was reckless</u> to the fact that his directive was an act in abuse of the authority of his office. I refer to paragraph 69 of this ruling, and to the contents of __Prosecution Exhibit 30.__ From the questions contained in __Prosecution Exhibit 30__, it is clear that the second Defendant as Commissioner of Police knew what the ambits of his authority was. Logically then, the inference can legitimately be drawn that if he knew what was permissible and the right thing to do, then he also knew what was not permissible and the wrong thing to do. <u>That is enough at this stage to establish a case to answer in respect of these elements</u>…"

46. In paragraph 146 of her ruling, the learned Magistrate said the following:

"…Finally, I turn my mind to whether there exists relevant and admissible evidence to indicate that directing the stop of investigations into the allegations referred to in CID/HQ PEP 12/07/19 was an act prejudicial to the rights of another, and whether the second Defendant in his capacity as Commissioner of Police intended to prejudice said rights, or comprehended that it would or could prejudice the rights of another, or was reckless as to whether it would prejudice the rights of another…"

47. In paragraph 149 of her ruling, the learned Magistrate said the following:

*"…It is clear from the Minutes tendered into evidence at trial by the State that the University of the South Pacific cared deeply about its internal governance; that at Executive Committee level and at Council level it wanted matters that had criminal implications investigated by law enforcement; and that the University wanted to explore avenues to potentially recover monies that were stolen – and here I note that the **Proceeds of Crimes Act 1997** is one such potential legal vehicle…"*

48. In paragraphs 151, 152 and 153 of her ruling, the learned Magistrate said as follows:

*"…To the contrary, there is relevant and admissible evidence to indicate that investigations did stop, that they stopped from 15 July 2020 to 15 October 2020, and that they stopped for no other reason than a senior officer did not know enough about the facts of a particular course of investigations to be able to sensibly prepare for a potential briefing to a politician: see answers contained in **Prosecution Exhibit 30**. The maxim "justice delayed is justice denied" comes to mind. I am prepared to find, and do in fact find that there is relevant and admissible evidence to show prejudice to the rights of the University of the South Pacific…"*

"…Finally, I turn my mind to whether or not the second Defendant intended to cause prejudice to the University of the South Pacific thereby, or knew that prejudice would be or could be caused thereby, or was reckless as to any prejudice caused thereby. It is open for a trier of fact and law to infer from the contents of the second Defendant's own admissions that he was unconcerned about the length of time it would take to arrive at a decision to re-commence investigations after he had issued his directive to stop said investigations. These admissions are relevant and admissible and is sufficient at this juncture to indicate, if nothing else, recklessness as to whether prejudice to the University of the South Pacific would occur thereby…"

*"…There being relevant and admissible evidence going to each element of the offence of **Abuse of Office**, I find that the second Defendant Sitiveni*

Tukaituraga Qiliho has a case to answer in respect of Count 2…” **(pages 239 to 240 of the court record, Volume1).**

49. Like in the case of the 1st respondent, the learned Magistrate, in paragraphs 157, 158 and 159 of her *“no case to answer ruling”* explained to the 2nd respondent his rights, and called upon him to defend himself, if he so chooses. The 2nd respondent choose to give sworn evidence in his defence and he called no supporting witness. His evidence were contained in pages 575 to 601 of the court record, Volume 2.

50. On oath, the 2nd respondent denied Count No. 2. He denied the allegation against him. He denied directing then Director of Criminal Investigation Department Serupepeli Neiko and Inspector Reshmi Dass to stop investigation into the police complaint involving CID/HQ PEP 12/07/2019. He denied abusing the authority of his office as the Commissioner of Police by allegedly directing the above case to be closed and filed away, as a result of the alleged direction of the 1st respondent, as the then Prime Minister of the Republic of Fiji. He denied that his alleged acts were arbitrary acts and prejudicial to the rights of the University of the South Pacific. The 2nd respondent said he only directed Serupepeli Neiko (PW25) and Inspector Reshmi Dass (PW21), on 15 July 2020, to stop investigating the case they were working on, and provide him a brief of the case. He said, he never told them to stop investigating CID/HQ PEP 12/07/2019. He said, he needed the brief to enable him to brief the then Prime Minister’s Office, if the need arises.

51. The 2nd respondent said that prior to 15 July 2020, he never knew of the USP police investigation recorded in CID/HQ PEP 12/07/2019. He said, the only USP police investigation he knew about was the possible breach of Covid-19 restriction at the USP during a student/staff gatherings, as recorded in Defence Exhibit No. 1. He said, he also knew about a FICAC investigation into the USP, including an investigation by an accounting firm BDO, that he read in the media. He said he only knew about the police investigation in CID/HQ PEP 12/07/2019 when Neiko (PW25) told him on 15 July 2020.

52. Like the 1st respondent’s case, I have carefully read all the evidence of the State witnesses mentioned in paragraph 5 hereof, that is, from PW17 to PW25. None of the police officer witnesses were ever cross-examined by the 2nd respondent on the issues concerning the police investigation into the possible breaches of the Covid-19 restrictions at the USP, as reported in Defence Exhibit No.1. Like in the 1st respondent’s case, Rusiate Tudravu

(PW19), Biu Matavou (PW20), Reshmi Dass (PW21), Mesake Waqa (PW23) and Serupepeli Neiko (PW25) were not cross-examined by the 2nd respondent on the matters raised in Defence Exhibit No. 1. (**Please, refer to page 646 to 675, court record, Volume 2, pages 308 to 450, court record, Volume 1).** Like the 1st Respondent's case, the appellant submitted that by failing to cross-examine the police witnesses on the matters raised in Defence Exhibit No.1, the 2nd respondent had breached the rule in **Brown** v **Dunn** (1893) 6.R.67.HL.

53. Like in the 1st respondent's case, the appellant repeats what the Court of Appeal said in **Rajiv Kumar** v **State** (supra) in paragraph 35 hereof:

> *"35 The general rule of practice ('**Brown** v **Dunn** Rule') requires that where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation. Thus, as a general rule, defence counsel should put to witnesses for **the State/Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence**. In **MWJ v The Queen (2005) 80 ALJR 329** at 333 [18]; 222 ALR 436 at 440-441, it was noted that in many jurisdictions this rule has been held to apply in the administration of criminal justice." [Emphasis mine]*

54. Like in the 1st respondent's case, the court repeats what it said in paragraph 36 hereof; with reference to the 2nd respondent:

> "*36. Generally speaking in criminal trials, when the accused person breaks the **Brown** v **Dunn** rule, it was often seen as a sign of unfairness to the prosecution's side, although the burden to prove the charge beyond reasonable doubt remains with them until the end of the trial. In this case, there is no burden on the 2nd respondent to prove his innocence. He may choose to remain silent. However, if he chooses to exercise his right to give sworn evidence, as the 2nd respondent had done here, his evidence will be treated and analyzed in accordance with the law of evidence, as it was applicable to all witnesses. Witnesses give evidence in court to persuade the court to accept their evidence and version of events…"*

55. In her ruling on *"no case to answer submission",* the learned Magistrate found there were some relevant and admissible evidence, provided by the State's witnesses, going to each element of Abuse of Office and found that the 2nd respondent had a case to answer. She

spelt out her reasons from paragraphs 117 to 152 of her ruling **(see pages 229 to 240 of the court record, Volume 1)**. On the issue that the 2nd respondent did not know about police file CID/HQ PEP 12/07/2019 on 15 July 2020, Reshmi Dass (PW21) said, when the 2nd respondent told her to stop investigating the police file CID/HQ PEP 12/07/2019, the 2nd respondent told her that FICAC had stopped their investigation into the matter, as it was, according to them, an *"internal breach",* and also, the 1st respondent had directed the stop. **(see page 654, court record, Volume 2).** It was arguable, despite the 2nd respondent's view to the contrary, that given the above, it was highly probable that the 2nd respondent knew about the existence of police investigation CID/HQ PEP 12/07/2019.

56. Like the 1st respondent's case, having read the whole of the prosecution's witnesses' evidence, including their 32 exhibits, the two respondents' evidence, including their 2 exhibits, yes I am of the humble view that the rule in **Brown v Dunn** had been breached by the 2nd respondent, when he didn't put his Covid-19 police investigation to the State witnesses for comments. Like the 1st respondent's case, what is the effect of that? Like in the 1st respondent's case, the 2nd respondent's version of events and evidence is somewhat tainted by the word *"unfairness"*, and consequently the weight and value of the 2nd respondent's evidence somewhat decreases. As was said in the 1st respondent's case, a criminal trial is about the contest between two opposing version of events. Those who fight with honour, fairness and pride, tend to attract acceptability from the trier of fact on their version of events and evidence. Those who do otherwise, tend to suffer the probable rejection of their version of events and evidence. In my humble view, the learned Magistrate erred in fact and in law, when she accepted the 2nd respondent's evidence, given what was discussed above and given her solid reasoning in her "no case to answer" ruling against the 2nd respondent.

57. Furthermore, even without the breach of the **Brown v Dunn** rule, and this relates to Ground 8 of the Appeal Grounds. Like in the 1st respondent's case, there was a total of 25 State witnesses and 32 prosecution exhibits, 2 defence witnesses and 2 defence exhibits. On the totality of the evidence, it was apparent, as in the 1st respondent's case, that the problem emanated from the alleged financial abuse and mismanagement by senior members of the USP Council. The evidence showed that the Fiji taxpayers contribute approximately $34 million per year to funding the University of the South Pacific (USP). On 1 March 2019, the Vice Chancellor of the USP, Professor Ahluwalia wrote a confidential paper titled ***"Issues,***

Concerns and Breaches of Past Management and Financial Decisions”. **(see pages 725 to 730, court record, Volume 2).** Allegations of financial mismanagement and abuse of office were levelled at senior members of the USP Council, who appeared to be citizens of the Republic of Fiji. The paper were discussed at various USP Council meetings, where Fiji was well represented. The paper became public when it was reported in the media, ***“Island Business”,*** on 10 May 2019 and in June 2019 **(see page 731 to 733, court record, Volume 2).** The matter was reported to Totogo Police Station on 8 July 2019 and 30 October 2019. **(see PW15 and PW16’s police statements, page 723 to 734, court record, Volume 2)**. Prior to the above, Dulari Doris Turagabeci Trail (PW17) had reported the alleged abuse to Fiji Independent Commission Against Corruption (FICAC) on 17 April 2019. FICAC began investigating the matter by uplifting relevant documents **(see Prosecution Exhibit No. 23 to 28, page 696, court record, Volume 2).** The evidence showed that from April and July 2019, the alleged financial mismanagement and abuse of office at USP were in the hands of the FICAC and the police – the two criminal investigative arms of the State.

58. Somehow on 1 July 2019, the Acting Deputy Commissioner of FICAC wrote to the Chairperson of the USP Council, saying that FICAC would cease investigating alleged financial abuse and mismanagement of USP funds by senior members of the council because the allegations were *“administrative in nature”* **(see Prosecution Exhibit No. 22, pages 899 to 900, court record, Volume 2)**. It was somewhat surprising that FICAC held that view because in most *“Abuse of Office”* allegations and convictions, the offences were fundamentally administrative in nature. Even the BDO report written by the NZ accounting firm, confirmed the allegation of the *“abuse of the Professional Development Leave entitlement of the former VCP of the USP”***(see page 787, court record, volume 2)** was substantiated. In any event, in my view, if the above was one of the reasons that the 2nd respondent used to order investigation officer Reshmi Dass to stop investigating CID/HQ PEP 12/07/2019, it will not be unreasonable to infer that he knew about the allegations in police file CID/HQ PEP 12/07/2019.

59. Furthermore, when A/COMPL at the time Rusiate Tudravu (PW19) sought clarification from the 1st respondent, as the Prime Minister at the time, at the National Security Council meeting on 17 September 2020, on the government stand on the police investigation against senior members of the USP Council, the 1st respondent replied, *“…Oh I suggested*

earlier to Tuks to stay away from that investigation…" (Prosecution Exhibit 29, page 185, Volume 1). Obviously, in my view, a reasonable inference from the 1st respondent's answer mentioned above, was that he (1st respondent) had discuss the CID/HQ PEP 12/07/2019 police case with the 2nd respondent. Both the 1st respondent and the 2nd respondent, at the time, were entrusted by law to look after the welfare and safety of the people of Fiji. Even though the Covid-19 pandemic was affecting Fiji at the time, it does not mean they had to forget the issues raised in CID/HQ PEP 12/07/2019, because according to the 2nd respondent it had attracted national interest. Furthermore, when the 2nd respondent ordered Reshmi Dass (PW21) to stop investigating CID/HQ PEP 12/07/2019, PW21 said the directive was from the Prime Minister's Office **(see page 345, court record, Volume 1, page 654, court record, Volume 2).**

60. It was obvious that when you put the above evidence together, and consider them within the surrounding circumstances, a reasonable inferences drawn therefrom was that the 1st respondent, as the Prime Minister of Fiji, was directing the 2nd respondent, the Commissioner of Police, to stop investigating the allegations in CID/HQ PEP 12/07/2019. It was a fact that the 2nd respondent rose through the ranks to Brigadier General under the watch of the 1st respondent, when he was Commander of the RFMF and Prime Minister of Fiji. It was a reasonable assumption and inference that because of the above, he would be loyal to the 1st respondent, both as a professional soldier and as a citizen. It was during the 1st respondent's watch, that he became, first as Acting and then as Commissioner of Police. It was a fact that as Prime Minister of Fiji, and Chair of the Constitutional Office Commission, at the time, the 1st respondent signed his contract as Commissioner of Police **(see Prosecution Exhibit 6 and 10).**

61. However, it appeared from the evidence that once he became formally the Commissioner of Police, the 2nd respondent does not appreciate nor realized that he is not subject to anyone's authority, but the law **(see section 129 (5) of the 2013 Constitution)**. In terms of the investigation of crime, the 2nd respondent is not subject to the directive of the Prime Minister, although he signed his contract of employment on behalf of the government. It is the Commissioner's duties to see that the function of the Police Force as mandated by section 5 of the Police Act 1965 is carried out 24 hours 7 days a week. The independence of the Commissioner, from other authorities, is necessary and fundamental for the protection of our society. By acceding to the 1st respondent's directive to stop investigating

CID/HQ PEP 12/07/2019, the 2nd respondent had obviously abuse the authority of his office. It is obviously an arbitrary act done with his full knowledge and intent. The evidence show that the investigation into CID/HQ PEP 12/07/2019 did not stop outright from 15 July 2020. It suffered a *"slow death"* from that date. Given the 2nd respondent's verbal directive to Reshmi Dass (PW21) and Serupepeli Neiko (PW25) on 15 July 2020, it appeared that no police officer was eager to bring the investigation to a proper conclusion, while the 2nd respondent was formally the Commissioner of Police. This was obvious because as the Commissioner, he had the right to hire and fire any police officer for any disciplinary offence (section 129 (7) of 2013 Constitution).

62. In my view, the learned Magistrate erred in fact and in law in failing to put proper weight and value on the State's witnesses' evidence, as opposed to the 2nd respondent's evidence. I accept the evidence of all the State's witnesses, as recorded in the court record. I find them credible. I don't accept the 2nd respondent's evidence that he did not know the existence of police file CID/HQ PEP 12/07/2019. I therefore uphold the State's appeal on Appeal grounds 2, 7 and 8.

3. *<u>THE OTHER GROUNDS OF APPEAL - GROUNDS NO. 3, 4 AND 5</u>*

63. Appeal Grounds No. 3, 4 and 5 will not decide the success or otherwise of the appeal. The State's appeal will be determined by the other grounds. I therefore consider Appeal grounds No. 3, 4 and 5 unnecessary, and arguably a waste of the Court's time. I therefore dismiss the above grounds.

<u>CONCLUSION</u>

64. After considering Appeal Grounds No. 1, 6 and 8 for the 1st Respondent, and Appeal Grounds No. 2, 7 and 8 for the 2nd Respondent, I uphold the State's appeal on those grounds. For the 1st respondent, my reasons were outlined in paragraphs 17 to 38 hereof, and for the 2nd respondent, my reasons were outlined in paragraphs 39 to 62 hereof.

65. Pursuant to section 256 (2) (a) of the Criminal Procedure Act 2009, given the reasons explained above:

(i) This court finds that the learned Magistrate had erred in fact and in law when she found the first respondent not guilty and acquitted him of the offence of Count No. 1: Attempted to Pervert the Course of Justice, contrary to section 190 (e) of the Crimes Act 2009;

(ii) This court finds the first respondent guilty and is convicted of the offence of Count No. 1: Attempted to Pervert the Course of Justice, contrary to section 190 (e) of the Crimes Act 2009;

(iii) This court finds that the learned Magistrate had erred in fact and in law when she found the second respondent not guilty and acquitted him of the offence of Count No. 2: Abuse of Office, contrary to section 139 of the Crimes Act 2009;

(iv) This court finds the second respondent guilty and is convicted of the offence of Count No. 2: Abuse of Office, contrary to section 139 of the Crimes Act 2009.

66. Pursuant to section 256 (2) (b) and (e) of the Criminal Procedure Act 2009:

(i) This Court orders that this matter be brought before Resident Magistrate S. Puamau on 18 March 2024 at 9.30am, at the Suva Magistrate Court, for her to abide the decision of the High Court above mentioned and pronounce the 1st and 2nd respondent guilty as charged and convict them accordingly; and

(ii) The 1st and 2nd respondent to file their plea in mitigation and sentence submissions by 20 March 2024, at the Suva Magistrate Court before 4pm.

(iii) The State to file their sentence submission at the Suva Magistrate Court by 20 March 2024 before 4pm.

(iv) Resident Magistrate S. Puamau to hear the Sentence hearing on 21 March 2024 at 9.30am.

(v) The Resident Magistrate to pass Sentence on the two respondents on 28 March 2024 at 9.30am.

(vi) Since the Suva Magistrate Court is a court of summary jurisdiction, and since this case started on 10 March 2023, and since section 15 (3) of the 2013 Constitution required cases to be decided within a reasonable time, the above timetable is to be followed strictly.

67. I order so accordingly.

Salesi Temo
Acting Chief Justice

Solicitor for the Appellant: Office of the Director of Public Prosecution, Suva
Solicitor for the Respondents: R. Patel Lawyers, Suva