

IN THE MAGISTRATES' COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. 347 of 2023

STATE

v.

1. JOSAI VOREQE BAINIMARAMA
2. SITIVENI TUKAITURAGA QILIHO

For the State: Ms. J. Prasad for the Director of Public Prosecutions
For the Accused: Mr. D. Sharma & Ms. G. Fatima of R. Patel Lawyers

RECUSAL RULING

1. **Josaia Voreqe Bainimarama** (the first Defendant) and **Sitiveni Tukaituraga Qiliho** (the second Defendant) are charged as follows:

Count 1

Statement of Offence

Abuse of Office; contrary to section 139 of the Crimes Act 2009

Particulars of Offence

Josaia Voreqe Bainimarama sometime in the month of July, 2020, at Suva in the Central Division, being employed in the public service as the Prime Minister of the Republic of

Fiji, directed the Commissioner of Police to stop investigations into the police complaint involving CID/HQ PEP 12/07/2019, in the abuse of the authority of his office, which was an arbitrary act prejudicial to the rights of the University of the South Pacific, which is the complainant in CID/HQ PEP 12/07/2019.

Count 2

Statement of Offence

Abuse of Office: contrary to section 139 of the **Crimes Act 2009**

Particulars of Offence

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

2. The matter was called before me this morning and after the Defendants' due process rights were put to them, they entered a not guilty plea and this Court turned its mind to bail.
3. The State made clear from the outset that they do not consider either Defendant to be a flight risk. This is perhaps informed by the Defendants' individual willingness, expressed through counsel, to surrender their travel documents to the Court and be subject to orders banning travel subject to the Court's leave.
4. However, the State asks the Court to subject the Defendants' to a court imposed curfew to have effect from 8.00pm to 5.00am every day. They premise their application on the fact that these Defendants' are people of influence who have the reach and the power to interfere with Police witnesses and the State's case in the lead up to trial.
5. The following conversation ensued in open Court:

“ ...
State: We have issues with tugging on loyalties. Also on issues with interference, verbal and physical interference.

Court: Well, I will leave it to adults to be adults, and professionals to be professionals but this is an abuse of office charge pertaining to one thing, pertaining to one incident in the course of their employment. This is not a robbery charge or burglary case. If you have substantive evidence to persuade me that these men are capable at this time of doing the thing that you fear, I would be happy to mitigate it by way of conditions. But I don't intend to treat them any different from any other defendants.

State: Yes Madam, and neither does the State have that intention. But the charge is one of interference with police investigations.

Court: Yes, when one was the Prime Minister and the other the Commissioner of Police. If a former CEO and a former Financial Controller were before me and they were separated from the companies they previously worked at, I would need – as I do now, substantive evidence that there was a linkage back that would make the type of risk that you suggest likely.

State: Well, unfortunately, these accused persons are not in the same boat as a CEO and Financial Controller. They have very high positions of responsibility.

Court: They had, at the time, yes – and they may well do in the future, yes. But at this present moment, I think one is the Leader of Opposition and one is awaiting the result of his disciplinary process. That is different...”

Underline added

6. Following this, the learned prosecutor wrapped up her submissions, learned counsel for the Defendants' offered submissions in opposition, the learned prosecutor replied and I stood the matter down to 11.00am to allow the State to adduce evidence to establish their claim

of likely interference, first; and then, thereafter, if established, to explain to me how the imposition of a curfew helped with that.

7. When the matter was re-called at 11.00am, State Counsel, after observing all the courtesies, applied for me to recuse myself. State Counsel argued that because I had suggested that the Defendants may one day become Prime Minister and Commissioner of Police again, a reasonably informed by-stander would apprehend bias on my part.
8. The test for bias is clear. There are two rules that apply. The first is the rule against actual bias. This rule requires the decision maker to ask himself or herself the following question:
 - Is there actual bias *i.e.* am I directly or indirectly a party to these proceedings, or do I have a direct or indirect interest in this matter?
9. The second is the rule against the reasonable apprehension of bias. This rule requires the decision maker to ask himself or herself the following question:
 - Would a fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that I was biased?
10. If the answer to either of these questions is "yes", then the application for recusal succeeds.
11. The State do not assert actual bias. They assert a reasonable apprehension of bias. That is the only question that stands to be determined.
12. The question in full, therefore, is as follows:
 - Would a fair-mind and informed observer, being appraised of the impugned comment in its context, conclude that there was a real possibility that I was biased?
13. I thank the State for bringing the matter to my attention. I thank counsel for the State and for the Defendants for their thoughtful and considered submissions on the matter.

12. The question in full, therefore, is as follows:

14. Having examined the comment in its context, I do not think that a reasonably informed bystander apprised of the comment in its context, the nature of the application made, and the submissions that were being made in support of that application, would apprehend bias.

15. The application for recusal is denied.



Seini Puamau
RESIDENT MAGISTRATE

Dated at Suva this 10th day of March 2013.

15. If application for recusal is denied.

Dated at Suva this 10th day of March 2013.

15. If application for recusal is denied.