

# **IN THE MAGISTRATES' COURT OF FIJI**

## **AT SUVA**

Criminal Case No: 215/2024

**BETWEEN THE STATE**

**APPLICANT**

**AND JOSIA VOREQE BAINIMARAMA & SITIVENI  
TUKAITURAGA QILHO**

**RESPONDENTS**

**For the applicant: Ms.L.Tabuakuro & Ms.Mishra (ODPP)**

**For the Respondents: Mr.D.Sharma & Ms.F.Gul (R. Patel)**

**Date of Hearing: 02<sup>nd</sup> of June 2025**

**Date of Ruling: 09<sup>th</sup> of June 2025**

### **RULING ON TRANSFER TO THE HIGH COURT**

1. On 14<sup>th</sup> of May 2025, the applicant filed a Notice of Motion accompanied by a supporting affidavit, seeking an order for the transfer of the present proceedings to the High Court pursuant to section 188 of the Criminal Procedure Act.<sup>1</sup>
2. In her affidavit, Ms. N. Tikoisuva, the Acting Director of Public Prosecutions, deposed that the basis for the State's application lies in the necessity for the High Court to interpret and apply section 163 of the Constitution.<sup>2</sup> This position follows from a ruling delivered by the High Court on 9<sup>th</sup> of May 2025, which indicated that the constitutional interpretation in question constitutes a substantive trial issue. Accordingly, the State submits that such matters fall within the exclusive jurisdiction of the High Court and should be determined during trial proceedings in the High Court.
3. The respondents opposed the application and, on 27<sup>th</sup> of May 2025, filed an affidavit in opposition through the first respondent. The first respondent contended that the constitutional issue may appropriately be addressed in this court as a pre-trial matter pursuant to the provisions of the Criminal Procedure Act.<sup>3</sup> Furthermore, it was submitted that the respondents intend to raise this issue as part of their defence, and that the Magistrates' Court is competent to hear and determine the matter at that stage.
4. The application was set down for hearing on 2<sup>nd</sup> of June 2025. On that date, both parties appeared before the court and made oral submissions in support of

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<sup>1</sup> No 43 of 2009.

<sup>2</sup> 2013 Fiji Constitution.

<sup>3</sup> S260, Criminal Procedure Act.

their respective positions. In addition, comprehensive written submissions were filed and duly considered by the court.

5. Having carefully examined the submissions of counsel, the affidavits filed by the parties, and the relevant statutory and constitutional provisions, I now proceed to deliver my ruling on the matter.

6. This application is brought by the State pursuant to Sections 188 and 191 of the Criminal Procedure Act.

#### **s188**

**(1) If before or during the course of a trial before a Magistrates Court it appears to the magistrate that the case is one which ought to be tried by the High Court the magistrate may transfer the case to the High Court under Division 3 of this Part.**

**(2) Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the magistrate shall —**

**(a) hear and consider the reasons for the application;**

**(b) hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and**

**(c) otherwise determine matters relevant to the grounds for the application —**

**and may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3 of this Part.**

#### **s191**

**A magistrate may transfer any charges or proceedings to the High Court.**

7. In *State v Singh*<sup>4</sup> the court held:

**“According to Section 191 of the Criminal Procedure Act, a Magistrate can transfer any charges or proceedings to the High Court. However, the jurisdiction given to the Magistrate under Section 191 should be exercised according to the provisions of the Criminal Procedure Act.”**

8. In *State v Bainimarama*<sup>5</sup> His Lordship Justice Goundar held:

**“The Supreme Court in *Tasova v DPP* [2022] FJSC 43; CAV0012.2019 (26 September 2022), held that section 188 gives Magistrates unfettered discretion to transfer any case to the High Court, but only for trial purposes, regardless of whether the offence is indictable, summary, or otherwise unassigned.”**

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<sup>4</sup> [2017] FJHC 582; HAC329.2016 (31 July 2017) .

<sup>5</sup> [2025] FJHC 280; HAM055.2025 (9 May 2025).

9. The first respondent is charged with one count of *Unwarranted Demands Made by a Public Official*,<sup>6</sup> while the second respondent faces a charge of *Abuse of Office*.<sup>7</sup> Both offences are indictable in nature but are triable summarily under the *Crimes Act*. The respondents have elected to have their matter heard in this court. Furthermore, during the hearing of the transfer application, learned counsel for the respondents expressly confirmed to the court that his clients wish for the matter to proceed before the Magistrates' Court.

10. The court of appeal in Kumar v State<sup>8</sup> held:

**“An indictable offence triable summarily instituted before a Magistrates Court must be transferred to the High Court only if an accused indicates that he wishes to be tried in the High Court and not otherwise [section 35(2)(b)(ii)]. If the accused facing an indictable offence triable summarily instituted before a Magistrates Court makes a positive election to be tried in the Magistrates Court, he must be tried accordingly [section 2(b) of Part I of the Criminal Procedure Act]. Faced with an indictable offence triable summarily before a Magistrates Court, if the accused neither indicates that he wishes to be tried in the High Court; nor elects to be tried in the Magistrates Court, by default his case remains where it is instituted and shall be tried in the Magistrates Court. Here, the accused is deemed to have elected to be tried in the Magistrates Court for the indictable offence triable summarily. This does not derogate from the Magistrate’s discretion to transfer the indictable offence triable summarily to the High Court on his or her own motion pursuant to section 188 (1) or on application of the prosecutor in terms of section 188 (2) of the Criminal Procedure Act (emphasis mine).”**

11. Therefore, notwithstanding the respondents’ election for this matter to be heard in the Magistrates’ Court, the court retains a discretion, either on its own motion or upon application by the prosecution, to order a transfer of proceedings to the High Court. This discretion was acknowledged by the respondents, who nonetheless urged the court to exercise it in their favour by declining the application for transfer.

12. In their written submissions, counsel for the respondents submitted that in determining whether a transfer to the High Court is appropriate, a Resident Magistrate must consider the following factors:

- A. The nature and seriousness of the case;**
- B. Whether a novel legal issue is raised that requires determination and has not previously been adjudicated in Fiji; and**
- C. The extent to which the matter implicates public interest considerations.**

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<sup>6</sup> S355, Crimes Act, No 44 of 2009.

<sup>7</sup> S139, Crimes Act, No 44 of 2009.

<sup>8</sup> [2023] FJCA 189; AAU009.2019 (28 September 2023).

9. In the present matter, the first and second respondents are charged with offences carrying maximum penalties of twelve and ten years' imprisonment, respectively. These are undoubtedly serious offences as per the Crimes Act. The anticipated trial duration is approximately one month, during which the prosecution intends to call fifteen witnesses, and there are no agreed facts between the parties. However, these factors, while significant, do not in themselves warrant a transfer to the High Court, particularly in light of the respondents' preference for the trial in this court. I also take into account that a transfer to the High Court may result in the respondents losing certain appellate rights that would otherwise be available to them if the trial proceeds in the Magistrates' Court.

10. The central issue now before the court is whether the matter raises a novel constitutional/legal question that may have broader implications for other pending cases. Specifically, the issue concerns an alleged inconsistency between the *Crimes Act* and the 2013 Constitution in relation to the definition of a person "employed in the public service."

11. The applicant submits that this issue requires interpretation of the Constitution and, therefore, falls within the exclusive jurisdiction of the High Court.<sup>9</sup>

11. Conversely, counsel for the respondents submits that this court is competent to interpret constitutional provisions, including section 163, within the context of these proceedings.

12. I accept the submission by the Respondents that the Magistrates' Court does possess limited interpretive jurisdiction under section 100(7) of the Constitution. However, as observed by His Lordship Justice Rajasinghe in ***Saneem v State***<sup>10</sup>, such jurisdiction is confined to questions that arise *during* the course of proceedings before this court. It does not extend to matters that fall outside the procedural scope of the trial or that require broader constitutional adjudication dealing breach of rights.

13. The respondents have, through their submissions, indicated their intention to raise a defence under section 163 of the Constitution during trial, contending that the second respondent is exempt from prosecution under the *Crimes Act*. Although the respondents reject the applicant's characterisation of this defence as an assertion of "immunity," I find that, if accepted, the respondents' position would amount to a claim that the second respondent is not subject to prosecution for the offence of Abuse of Office due to his constitutional status.

14. Both parties acknowledge that this is a novel defence, and there is presently no binding jurisprudence in Fiji on this issue. It is further noted that there are three other matters currently pending before different Magistrates'

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<sup>9</sup> S100(4), Fiji Constitution, 2013.

<sup>10</sup> [2025] FJHC 128; HAA01.2025 (17 March 2025).

Courts in which a similar defence has been raised.<sup>11</sup> I have been informed that in at least one of those cases, my brother magistrate in Magistrates' Court 6 has exercised discretion to transfer the matter to the High Court for trial on 06<sup>th</sup> of June 2025.

15. The novelty of the defence advanced by the respondents arises from the second respondent's former role as Commissioner of Police at the time of the alleged offending. The respondents assert that the second respondent is a constitutional office holder pursuant to the 2013 Constitution and is therefore excluded from the definition of "public service" under the relevant constitutional provisions.

16. Section 163 of the Constitution defines the Public Service as:

**"public service" means the service of the State in a civil capacity but does not**

**includee—**

**(a) service in the judicial branch;**

**Constitution;**

**(b) service in the office of a member of a commission; or**

**(c) service in an office created by, or continued in existence under, this**

17. Under the *Crimes Act*, the definition of "public service" expressly includes all persons belonging to a disciplined service of Fiji.

18. It is evident—and as conceded by both parties—that a potential conflict exists between the relevant provisions of the *Crimes Act* and those of the 2013 Constitution, particularly with respect to the definition and scope of persons considered to be within the public service.

19. Section 2(1) of the Constitution provides that if any law appears to be inconsistent with a provision of the Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the Constitution over an interpretation that is inconsistent with it.

20. I indicated during the hearing that even if this court were to determine the issue of constitutional interpretation and its applicability to the offence of *Abuse of Office*, such a ruling would only carry persuasive authority and would not bind other magistrate courts. Consequently, the same legal issue may be raised and adjudicated differently in other proceedings. For this reason, I am of the considered view that the more appropriate forum for resolving this issue is the High Court, which holds original jurisdiction to interpret constitutional provisions and whose determinations are binding on the subordinate courts.

21. Moreover, the issue of whether the second respondent is liable for the offence of *Abuse of Office*—in light of his claimed exclusion from the ambit of the *Crimes Act* due to his status as a constitutional office holder—has

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<sup>11</sup> CF 548/2023, CF 184/2024.

implications that extend well beyond this particular case. The argument, if accepted, could potentially apply to senior positions within the disciplinary services,<sup>12</sup> and thus may be invoked as a defence in future prosecutions unless the issue is authoritatively resolved.

22. Accordingly, I find that the matter raises a novel legal issue, and based on the foregoing reasons, I conclude that the High Court is the most suitable forum for its determination.

23. I now turn to the public interest considerations, as raised by counsel for the respondents.

24. This is a case of significant public interest involving high-profile individuals, and it has been pending before the court for nearly one and a half years without resolution. Delays of this nature can erode public confidence in the administration of justice. At the same time, the respondents are entitled to have the charges against them disposed of without unreasonable delay.<sup>13</sup> It is worth noting that the constitutional defence now being advanced only emerged after my predecessor drew attention to its possible relevance.

25. The High Court has already indicated that the constitutional issue should be addressed as a trial issue and the respondents retain the liberty to make a no-case-to-answer submission should the prosecution fail to establish sufficient evidence on any element of the offence. However, as the prosecution intends to call approximately 15 witnesses over the course of a month, a determination of the legal issue at the conclusion of trial may entail considerable expenditure of judicial time and resources. This is why the respondents initially proposed that the issue be determined as a pre-trial matter under section 260 of the *Criminal Procedure Act*.

26. Nevertheless, resolving this issue as a pre-trial matter also carries the risk of further delaying the substantive trial. Any dissatisfied party would have a right of appeal against the pre-trial ruling,<sup>14</sup> thereby causing potential delays not only in this case, but also in related or similar matters, including other pending proceedings and investigations involving public officials.

27. In my assessment, the public interest is best served by an early and authoritative resolution of this issue by the High Court. This also supports the decision to transfer the case to the High Court.

28. Counsel for the respondents proposed an alternative approach, suggesting that the trial proceed in this court and that, at its conclusion, the legal issue be referred to the High Court by way of a case stated under section 266 of the *Criminal Procedure Act*.

29. While that course of action may appear appealing, it is nonetheless fraught with inherent uncertainty. After a month-long trial, it is entirely possible that the legal issue may never be reached—particularly if the prosecution fails to establish other elements of the Abuse of Office offence and the second respondent is acquitted after a no case submission.<sup>15</sup> In such a scenario, the constitutional question would remain unresolved, and the case-stated procedure would be rendered moot.

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<sup>12</sup> s130(2), Fiji Constitution .

<sup>13</sup> s15(3), Fiji Constitution.

<sup>14</sup> S100(7) , Fiji Constitution.

<sup>15</sup> S178, Criminal Procedure Act.

30. I am mindful of the respondents' concerns, particularly regarding the potential for increased legal costs should the matter proceed in the High Court for trial. I have sympathy for this position. However, given the far-reaching implications of the legal issue at hand—for this case, other pending cases and future proceedings involving constitutional office holders—I am satisfied that the interests of justice, consistency in the application of constitutional law and Crimes Act provisions, and judicial economy support the transfer of this matter to the High Court.

31. Should the High Court determine this contested issue and remit the proceedings back to this court, I am inclined to grant an expedited hearing date within the current calendar year, subject to the availability of counsel for both parties. Such a course of action would serve the dual purpose of demonstrating to the public that undue delays in high-profile cases are not tolerated, while also safeguarding the Respondents' right to a trial within a reasonable time frame.

32. Accordingly, I grant the application by the State. This matter is hereby transferred to the High Court for trial pursuant to section 188 of the *Criminal Procedure Act*.

