

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. CAV 0005 of 2017**  
[On Appeal from the Court of Appeal Misc. No. 12 of 2012]

**BETWEEN** : INOKE BALEMILA DEVO  
*Petitioner*

**AND** : FIJI INDEPENDENT COMMISSION AGAINST  
CORRUPTION  
*Respondent*

**Coram** : The Hon. Mr. Justice Saleem Marsoof  
Judge of the Supreme Court  
The Hon. Mr. Justice Suresh Chandra  
Judge of the Supreme Court  
The Hon. Madam Justice Chandra Ekanayake  
Judge of the Supreme Court

**Counsel** : Mr. A. K. Singh for the Petitioner  
Mr. R. Aslam and Ms. S. Fatafehi for the Respondent

**Date of Hearing** : 7 July 2017

**Date of Judgment** : 20 July 2017

**J U D G M E N T**

Marsoof J

[1] I have had the advantage of perusing the draft judgment prepared by Chandra J, and I agree that there is no basis to grant leave to appeal. I also agree that the application has to be dismissed.

## Chandra J

- [2] The Petitioner is seeking leave to appeal to the Supreme Court from the judgment of the Court of Appeal dated 23 February 2017.
- [3] The Petitioner was charged with five counts of official corruption under Section 106(a) and four counts of abuse of office under Section 111 of the Penal Code. After trial he was acquitted on all counts of official corruption. He was convicted on three counts of abuse of office and was sentenced on 9 April 2010 to 9 months imprisonment on each count. The sentences were to run concurrently. Having served the sentence, he appealed against the conviction nearly two years later.
- [4] The Petitioner's appeal to the Court of Appeal was dismissed by the Full Court of the Court of Appeal by judgment dated 23 February 2017.
- [5] The Petitioner filed a timely application seeking leave to appeal to the Supreme Court and set out 10 grounds which were reduced to the following 7 grounds in his written submissions:

“Ground 1: Paragraphs 1-3: Wrongly deciding the element of arbitrary act against the facts;

Ground 2: Paragraph 8: wrongly deciding that an arbitrary act was proved in the absence of any supporting financial rules and regulations;

Ground 3: Paragraph 14: wrongly deciding that the petitioner had directed his staff to direct the driver of his official work vehicle GM472 to collect liquor for unofficial purposes and failing to specify the evidence of what was official and what was unofficial purposes and which financial rule and/or regulation was breached;

Ground 4: Paragraphs 19-21: wrongly deciding what constituted an arbitrary act when there was no evidence by way of financial rules and/or regulations and/or other cogent evidence to support such an assertion;

Ground 5: Paragraphs 22 and 23: wrongly deciding what constituted an abuse of office when there was no evidence by way of financial

rules and/or regulations and/or other cogent evidence to support such an assertion;

Ground 6: Paragraphs 24-30: wrongly deciding what constituted prejudice to the rights of another person when there was no evidence by way of financial rules and/or regulations and/or other cogent evidence to support such an assertion;

Ground 7: Paragraphs 35 and 36: wrongly deciding the appeal when the most crucial evidence being financial rules and/or regulations was not tendered in evidence to prove the elements of the offence.”

[6] The paragraphs set out in the above grounds are the paragraphs in the judgment of the Court of Appeal.

[7] The Petitioner submitted that the judgment of the Court of Appeal under review:

(a) contains serious errors of fact and law on matters of abuse of office and is one of great public importance to all citizens;

(b) was legally incorrect in making the findings that it did when deciding the appeal on the reasons stated in the above stated grounds of appeal in the petition; and

(c) a failure to grant leave would result in grave injustice to the petitioner.

[8] The jurisdiction of the Supreme Court is set out in Section 98(3) of the Constitution of Fiji which states:

“The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal.”

Section 98(4) of the Constitution provides:

“An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grant leave to appeal.”

Section 7(2) of the Supreme Court Act, 1998 provides:

“In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:

- a. a question of general legal importance is involved;
- b. a substantial question of principle affecting the administration of criminal justice is involved; or
- c. substantial and grave injustice may otherwise occur.”

[9] The threshold set by Section 7(2) is very high unlike in an appeal from the High Court to the Court of Appeal which is based on whether a ground of appeal is arguable. An appeal against the judgment of the Court of Appeal to the Supreme Court must satisfy the threshold for special leave to appeal in the first instance. The grounds of appeal should be in respect of the judgment of the Court of Appeal.

[10] I reiterate the views expressed in Sachindra Nand Sharma v The State Criminal Appeal No.CAV 001 of 2016 (26 August 2016) where I cited Kosar Mahmood v HKSR FAMC No.31 of 2012 (unreported) by Court of Final appeal of the Hong Kong Special Administrative Region to the following effect:

“We wish to stress that in all future applications on the substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norms; and why such departure is so seriously wrong that justice demand a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below.”

[11] In considering the present application, what has to be decided at the outset is whether the grounds of appeal raised by the Petitioner meet the threshold for granting of leave by the Supreme Court.

### Consideration of the Application of the Petitioner

- [12] Although the Petitioner had set out 10 grounds of appeal in his application seeking leave to appeal, the written submissions were confined to 7 grounds of appeal. The Petitioner has further stated that all seven grounds relate to arbitrary act and lack of evidence to prove such an arbitrary act.
- [13] The Petitioner in elaborating the said basis of the grounds of appeal has further stated that what has to be decided is whether:
- (a) on the facts and inference of the present case whether the arbitrary act was closely associated with the abuse of authority; and
  - (b) whether there were any rules and regulations which was disobeyed by the Petitioner and that he acted on his own whim.
- [14] Therefore it would be sufficient if these two questions are dealt with which encompass the seven grounds of appeal rather than dealing with each ground of appeal individually.
- [15] In the High Court although the Petitioner was charged with 9 counts he was found guilty of Count 3, 7 and 9. The counts on which he was found guilty were as follows:

*“Count 3 : Abuse of office: Contrary to section 111 of the Penal Code Cap.17. Particulars of the offence: Inoke Devo between the 1<sup>st</sup> day and 31<sup>st</sup> day of March 2006 at Suva in the Central Division being employed as the Commissioner Central and charged with the duties of election preparations, authorised the unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central Division which is an arbitrary act in the abuse of the authority of his office and prejudicial to the rights of the State.*

*Count No.7: Contrary to section 111 of the Penal Code, Cap 17. Particulars of the offence: Inoke Devo on the 2<sup>nd</sup> day of December 2005 at Suva in the Central Division being employed as the Commissioner Central and charged with the general duties as Commissioner Central, authorized the*

unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central Division for their office Christmas party, which was an arbitrary act in the abuse of the authority of his office and prejudicial to the rights of the State.

*Count No.9:* Contrary to section 111 of the Penal Code, Cap 17. Particulars of the offence: Inoke Devo between the 1<sup>st</sup> and 31<sup>st</sup> December 2006 at Suva in the Central Division being employed as the Commissioner Central and charged with the general duties as Commissioner Central, authorized the unlawful expenditure of public funds by sending out his staff members in government vehicles to collect liquor and alcoholic beverages from various liquor outlets within the Central Division for their office Christmas party, which was an arbitrary act in the abuse of the authority of his office and prejudicial to the rights of the State.”

[16] All three counts were based on section 111 of the Penal Code which provides:

“Any person who being employed in the public service, does or directs to be done in abuse of authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of misdemeanor. If the act is done or directed to be done for purpose of gain, he is guilty of a felony, and is liable to imprisonment for three years.”

[17] There is no dispute that the Petitioner held public office as he was the Commissioner Central at all times relevant to the charges.

[18] The question that had to be decided was whether under colour of his office he did an arbitrary act or acts which were prejudicial to the rights of another.

[19] The learned High Court Judge in his directions to the Assessors set out the elements that had to be proved and went on to explain as to what was an arbitrary act in the following manner:

“[15] In respect of counts 3, 7, 8 and 9 the accused is charged with the offence of abuse of office. In order to prove

the offence of abuse of office, the prosecution must satisfy you beyond reasonable doubt of the following elements:

1. The accused was employed in the public service.
2. He did an arbitrary act.
3. He acted in abuse of the authority of his office.
4. The act was prejudicial to the rights of another person.

[16] The second element is that the accused did an arbitrary act. In law, an arbitrary act is an unreasonable act, a despotic act, act which is not guided by rules and regulations but by the wishes of the accused. Let me give you an example. In a government department, the account officers are supposed to follow financial rules and regulations when it comes to raising payments on behalf of the government. If one accounts officer decided to ignore the financial rules and regulations when raising payments, that would be arbitrary act. That is because the act is guided by the wishes of the accounts officer and not by proper financial regulations.

[17] The third element of the offence is that the act must be in abuse of the authority of office. When someone abuses the authority of his office, he uses his position for some illegitimate agenda, some reason which is not a proper reason according to institutional procedure. He acts in bad faith, for an improper motive to harm someone or show someone an advantage or favour. So, for instance, returning to the accounts officer, if he ignores the financial regulations for one particular company who has promised to financially support the building of his church, then the officer is abusing the authority of his office. To decide what is an abuse of office, you need to consider what motivated the accused to act in the way he did. If he had some improper motive or acted in bad faith and used his position to achieve that motive, then this element is proven. In order to understand what the accused had in mind, you need to look at all the evidence and draw your own conclusions about his motives. His motives may lead you to decide whether he acted in abuse of office or not.

- [18] The last element is that his act must have prejudiced the rights of another. When a person is prejudiced, his interests are put at a disadvantage. Generally, all government departments are expected to run in an accountable manner without any kind of abuse of resources in their control. This is because government departments are public offices and the State has a right to ensure that government resources are used for official purposes only.
- [19] Whether the accused did an arbitrary act in abuse of authority of his office and thereby prejudiced the rights of the State as alleged in counts 3, 7 and 9 and the rights of Sachin Ram as alleged in count 8 is a matter for you to consider having regard to all the evidence including what the accused said in his caution interview and in his evidence in court.
- [20] The caution interview (P49) of the accused is in evidence. You may read the interview for yourselves. The prosecution contends that although you should not accept everything said by the accused in his interview nonetheless the interview, contain certain admissions by the accused and that the prosecution further contends that those admissions are true.”
- [20] In his caution interview (which was led in evidence) the Petitioner had admitted that he had authorized the use of an official vehicle to collect liquor from outlets for the office Christmas party and stated that the runs were unofficial. He also admitted that he may have abused the authority of his office by authorizing the use of G472 for unofficial runs to collect liquor.
- [21] The Court of Appeal dealt with the question of ‘arbitrary act’ and cited previous precedents where ‘arbitrary act’ had been interpreted to mean ‘as nothing more than the exercise of one’s own free will’ (**Tomasi Kubunavania v The State** (Criminal Appeal No.AAU0008 of 1992 (5 May 1993), as “an autocratic act, an act not guided by normal procedures but by “whims and fancies” of the accused (**State v Humphreys Kamsoon Chang** (HAC 0008 of 1991 (1 Nov 1991), as ‘an unreasonable act, a despotic act which is not guided by rules and regulations but by the whims of the accused’ (**The State v Rokovunisei** (HAC 37 of 2010 (26 April 2012).



[22] In relation to whether the act complained was in abuse of authority of office, the Court of Appeal cited the decision of the Supreme Court in Naiveli v The State (CAV 001 of 1994 (20 November 1995) where it was held:

“Central to the commission of an offence under S.111 is the doing or directing to be done of an arbitrary act, “in abuse of the authority of” the accused’s “office”. What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power or authority of an office of the public service, will constitute an abuse of office if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office. No doubt other instances may be given. But it would be unwise for us to attempt an exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression “abuse of the authority of his office.”

[23] The interpretation given in Naiveli’s case (supra) is a clear exposition of the aspect of ‘abuse of authority’ which also reveals the fact that such instances of abuse of authority are very wide, incapable of a precise definition and would depend on the particular case in hand.

[24] As regards to whether the act complained of was ‘prejudicial to the rights of another person’, the Court of Appeal stated as follows :

“[24] This has been described by the Supreme Court in Fiji as an act, which would result in some advantage of favour to oneself, friends, relations, individuals or corporate (Patel v FICAC (CAV 007 of 2011 (26 August 2013) and Qarase (supra). The learned High Court Judge states that when a person is prejudiced, his interests are put at a disadvantage (para 18 of the summing up at pg.138 of RHC). In this case is the rights of the State that in jeopardy.

[25] The charges while specifying the offence under which the appellant was charged with namely, section 111, described the offence with dates that they were committed, the places they were committed in and the acts done. The persons used in the commission of the crime were the staff employed by the State and the property involved was a government vehicle, namely, the official vehicle and the official driver of the appellant. The acts done were the collection of liquor and

alcohol beverages from liquor outlets of the Division of which the appellant had authority and control.”

- [25] Having considered the elements necessary to be proved regarding section 111 the Court of Appeal considered in detail the manner in which the High Court had dealt with the charges against the Appellant and arrived at the conclusion that the appeal lacked merit.
- [26] Therefore as regards the first question raised by the Petitioner before us as to whether the arbitrary act was closely associated with the abuse of authority had been adequately established, we see no error in the judgment of the Court of Appeal in that regard.
- [27] The second question raised by the Petitioner was as to whether there were any rules and regulations which were disobeyed by the Petitioner and that he acted on his own whim.
- [28] The basis of this question was as argued on behalf of the Petitioner that the prosecution had failed to produce any evidence regarding relevant rules and regulations which were said to be disobeyed by the Petitioner. The Petitioner argued that the example cited by the learned High Court Judge (paragraph [16] in his summing up explaining the aspect of ‘arbitrary act’ had stated that if an accounts officer had ignored financial rules and regulations when raising payments it would amount to an arbitrary act, and therefore to establish an arbitrary act rules and regulations had to be led in evidence.
- [29] The Court of Appeal dealt with this question and stated that it was only an example given by the learned High Court Judge in explaining what an arbitrary act was. The Court of Appeal went on to state that the requirement of rules and regulations was not a condition that was necessary to prove the charges against the Petitioner and that what was required was to prove the elements relating to section 111 of the Penal Code which the prosecution had proved beyond reasonable doubt.
- [30] In Qarase v FICAC [2013] FJCA 44; AAU66.2012 (30 May 2013) the abuse of authority was in relation to failure disclose personal interest in a situation where allocation of shares were involved. There were no rules and regulations that were

required to prove abuse of authority in the allocation of shares to an entity where the Appellant had a personal interest. Therefore the argument that to establish abuse of authority there should be rules and regulations produced in evidence has no merit.

- [31] We see no error in the judgment of the Court of Appeal and the grounds adduced by the Petitioner seeking leave to appeal have no merit and do not meet the required threshold for the granting of leave. In those circumstances the application for leave to appeal is refused and the appeal is dismissed.


**Ekanayake J**


- [32] I have read in draft the judgment in the above case. I agree with the reasoning and conclusions therein.


**Orders of Court:**

- (1) The application for special leave is refused;
- (2) The application of the Petitioner is dismissed.



  
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**Hon. Justice Saleem Marsoof**  
**Judge of the Supreme Court**

  
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**Hon. Justice Suresh Chandra**  
**Judge of the Supreme Court**

  
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**Hon. Madam Justice Chandra Ekanayake**  
**Judge of the Supreme Court**