IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0014.2017
(On Appeal from Court of Appeal No: AAU 0099.2014)

BETWEEN : **KENI DAKUIDREKETI**

Petitioner

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

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court

Counsel : **Mr. W. Clarke and Ms. M. Cole for the Petitioner**
Mr. M. Blanchflower, SC with Ms E.Yang and Ms F.Puleiwai for the Respondent

Date of Hearing: **17 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Saleem Marsoof, J

Introduction

[1] This is a timely application for leave to appeal from the unanimous judgment of the Fiji Court of Appeal [Calanchini P, Basnayake JA and Bandara JA] dated 14th September 2017, which dismissed the appeal of the Petitioner filed against his conviction and sentence imposed by the High Court of Suva on five counts of abuse of office contrary to section 111 of the Penal Code.

[2] The Petitioner was at all material times a member of the Native Land Trust Board (NLTB), which has since been renamed as the iTaukei Land Trust Board in terms of the Native Land Trust (Amendment) Act No. 8 of 2011, and also functioned as a director and Chairman of the Vanua Development Corporation Ltd., (VDCL), and a director of Pacific Connex Limited (PCX).

[3] One Kalivati Bakani (1st Accused), who was at the material times the General Manager of NLTB, and was a director of VDCL and PCX, was charged along with the Petitioner (2nd Accused) on ten counts of abuse of office. Bakani was charged with counts 1, 3, 5, 7 and 9 and the Petitioner was charged with counts 2, 4, 6, 7 and 10 on the same Amended Information.

[4] Count 2 against the Petitioner reads as follows:

> **KENI DAKUIDREKETI** between about 31st March 2004 and 21st September 2004, at Suva in the Central Division, *while being employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited*, in abuse of the authority of his office, did an *arbitrary act for the purpose of gain*, namely, *facilitated a loan of $2,000,000.00 FJD to be made by the Vanua Development Corporation Limited to Pacific Connex Limited, which was prejudicial to the Native Land Trust Board and indigenous Fijians.* (*Emphasis added*)

[5] The 4th and 10th counts against the Petitioner were also similarly worded except for the period of offence and the amount of the loan. Count 4 related to a loan of $900,000.00 FJD alleged to have been facilitated between 16th November 2004 and 29th November 2004, and count 10 involved a loan of $1,000,000.00 FJD alleged to have been facilitated between 23rd September 2005 and 29th September 2005, the recipient of the loans being in all these instances, the Pacific Connex Limited (PCX).

[6] Counts 6 and 8 differed from counts 2, 4 and 10 since they involved the alleged facilitation of government grants of $1,000,000,00 FJD each. Count 6 against the Petitioner reads as follows:-

KENI DAKUIDREKETI between about 28th February 2005 to 28th April 2005, at Suva in the Central Division, while being employed in the Public Service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a Government Grant of $1,000,000.00 FJD disbursed to Vanua Development Corporation Limited through the Native Land Trust Board to be used as security for a loan provided to PacificConnex Limited by Dominion Finance Company Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.

[7] Count 8 was couched in identical terms, except that it involved the facilitation of a Government grant of $1,000,000.00 FJD disbursed to VDCL through the NLTB to be used as security for overdraft and loan facilities provided to PCX by the Australia and New Zealand Banking Group Ltd between 27th April 2005 and 3rd July 2007.

[8] The charges filed against Kalivati Bakani were substantially similar to those made against the Petitioner, and they were tried together in the High Court of Suva (Janaka Bandara J) assisted by five assessors.

[9] All charges against Bakani and the Petitioner had been framed as alleged violations of the provisions of section 111 of the Penal Code (Cap. 17) which reads as follows:-

> "Any person who, *being employed in the public service*, does or directs to be done, in *abuse of the authority of his office*, any *arbitrary act prejudicial to the rights of another*, is guilty of a *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." (*emphasis added*)

It is noteworthy that section 47 of the Penal Code enacts that where no punishment is specially provided for any misdemeanor in the said Code, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both

[10] On 23 June 2014, which was the first day of trial, Bakani pleaded guilty to counts 1, 3, 5, 7 and 9. The "Summary of Facts for the 1st Accused" was read and agreed to by Bakani.

Thereupon, the trial judge entered convictions against Bakani in respect of each count, and adjourned his sentencing until the conclusion of Petitioner's trial, upon his plea of not guilty.

[11] The Petitioner's trial lasted 5 weeks. The High Court heard the testimony of 12 prosecution witnesses, and with the Petitioner's consent, the statements of 8 prosecution witnesses and 3 bankers' affidavits were read and admitted in evidence. In addition, the prosecution tendered 243 documentary exhibits. The Petitioner did not testify nor call any defence witnesses. He produced 33 documentary exhibits. Daily transcripts of the proceedings were prepared and supplied to the judge and the parties. During the trial the judge ordered breaks for the assessors to have time to read and understand the documentary exhibits. At the conclusion of the trial the Petitioner and Respondent prepared detailed written closing submissions which were supplied to the trial judge and assessors to assist them in following the addresses of counsel.

[12] On 1 August 2014 the trial judge delivered his summing-up to the assessors. Later the same day the assessors found the Petitioner guilty of the misdemeanor of abuse of office in respect of all five counts on the basis that the prosecution had not established the element of "gain" to make it a felony. In his judgement of 6 August 2014 the trial judge overturned the assessors' verdicts on absence of gain, and found the Petitioner guilty and convicted him of five counts of the felony of abuse of office for the purpose of gain.

[13] On 15th August 2014, the trial judge imposed on the Petitioner an aggregate sentence of 6 years of imprisonment with a non-parole period of 5 years with respect to all the five counts. This aggregate sentence was computed taking 12 months imprisonment as the head sentence for each of the counts and adding 12 months to each of the sentence on account of aggravating factors and deducting 6 months from each of the sentence taking into account certain mitigating factors. Accordingly, the total of 6 years of imprisonment was arrived at by imposing a sentence of 18 months imprisonment on count 2, a sentence of 18 months imprisonment on count 4, both sentences to be served consecutively, a sentence of 18

months imprisonment on counts 6 and 8 to run concurrently, and a sentence of 18 months imprisonment on count 10, to be served consecutively.

[14] The Petitioner by his Notice of Appeal dated 19th August 2014 appealed against his conviction and sentence to the Court of Appeal. Though the original notice of appeal contained 28 grounds against conviction and a single ground against the sentence, by the written submissions tendered on behalf of the Petitioner dated 9th January 2017, they were reduced to the following 6 grounds, the last of which relating to the sentence:

(a) The accused was not employed in the public service as a director of VDCL and so cannot be guilty of the offence of abuse of office for acting in that role (Public Service issue).

(b) FICAC did not prove the necessary criminal intent to make his acts arbitrary as required by the offence (Intent issue).

(c) FICAC's case that money paid by NLTB to VDCL was NLTB trust money is wrong. To the contrary it was paid and received as paid up capital in VDCL (VDCL Capital issue).

(d) FICAC did not prove any relevant purpose of gain to PCX as was the clear view of the Assessors (Gain issue).

(e) The trial Judge has erred by applying principles relating to the common law offence of misconduct to public office when sections 4 and 111 of the Penal Code do not reflect the language of the common law tests of public service nor the offence of misconduct in public office (Departure from Statutory Code issue).

(f) The sentence is based upon wrong principles (cumulative) and is excessive (Excessive Sentence issue).

[15] By its impugned judgment dated 14th September 2017, the Court of Appeal unanimously affirmed the Petitioner's conviction on all five counts and the sentence imposed on the Petitioner by the High Court on 15th August 2014.

Application for leave to appeal

[16] The Supreme Court has been vested with an exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal by section 98(3)(b) of the Constitution of the Republic of Fiji. Section 98(4) of the said Constitution provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[17] It is trite law that a petitioner seeking leave to appeal from the Supreme Court should satisfy the stringent threshold criteria as set out in section 7(2) of the Supreme Court Act, No. 14 of 1998. As this Court noted in paragraph 35 of its judgment in *Bulivou v The State* [2015] FJSC 6; CAV0001.2015 (24 April 2015), the parameters of section 7(2) of the Supreme Court are demarcated by the concepts of "general legal importance", "substantial question of principle" and "substantial and grave injustice", which were amply illustrated in the following *dictum* of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

> "Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by "a disregard of the forms of legal process", or by some "violation of the principles of natural justice or otherwise, substantial and grave injustice has been done": *In re Abraham Mallory Dittet* (1887) 12 App. Case. 459."

[18] In the petition of appeal filed on behalf of the Petitioner, 3 main grounds have been advanced for seeking leave to appeal, namely-

(a) the Petitioner, as Chairman of the Vanua Development Corporation Limited, was not a "person employed in the public service" when acting in that role" (Public Service issue);

(b) The Court of Appeal erred in finding that the Petitioner had committed arbitrary acts on the basis that the necessary criminal intent was proven by the

Petitioner suppressing information regarding PCX without regard or reference to evidence that such information was disclosed (Intent Issue); and

(c) the sentence against the Petitioner does not properly apply the law and is excessive (Excessive Sentence Issue).

[19] Grounds (a) and (c) had been taken up by the Petitioner in the Court of Appeal as ground (a) and (f) and considered by the Court of Appeal. These grounds were evaluated by the Court of Appeal in the light of the background facts set out in paragraphs 14 to 19 of the impugned judgment of the Court of Appeal and the facts relating to each count so well summarised by the said Court in paragraphs 20 to 34 of its judgment. However, as regards ground (b) above, objection has been taken by Mr. Blanchflower on behalf of the Respondent that though a ground described as "intent issue" was taken up by the Petitioner and considered by the Court of Appeal as ground (b), the matters raised by the Petitioner before this Court under ground (b) are entirely different and had not been considered by the Court of Appeal since the issue was not raised in this form in the lower court, and hence ground (b) raised before this Court is a fresh issue not taken up in the High Court or the Court of Appeal.

[20] In the circumstances, it is necessary to consider in the first instance the grounds raised by the Petitioner in his petition to this Court in the light of the aforesaid threshold criteria to decide whether leave ought to be granted on one or more of them. In doing so, this Court will be guided by the following observation of this Court in *Aminiasi Katonivualiku v State* (2003) FJSC Crim. App. No. CAV0001/1999S, (17th April 2003) which has been cited with approval in subsequent decisions of this Court such as *Raura v The State* (2006) FJSC 4; CAV0010U. 2005S (4th May 2006), *Chand v The State* (2012) FJSC6; CAV14/2010 (9th May 2012) and *Waqabaca v State* [2016] FJSC 11; CAV039.2015 (21 April 2016)-

> "It is plain from this provision that *the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to the Court as a matter of right* and, whilst we accept in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined

within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal....."(*emphasis added*)

[21] In *Devo v Fiji Independent Commission Against Corruption* [2017] FJSC 16; CAV0005.2017 (20 July 2017) this Court considered section 7(2) and the relevant principles for granting leave to appeal. His Lordship Justice Chandra, in the course of his judgment with which Mr. Justice Marsoof and Madam Justice Ekanayake concurred, cited with approval the observation in paragraph 6 of the judgment of Chief Justice Ma (with which Mr Justice Chan PJ and Mr Justice Ribeiro PJ agreed) in *Kosar Mahmood v HKSAR,* FAMC No. 31 of 2012 (16th October 2012) 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."(*emphasis added*)

[22] Having reiterating the above passage, His Lordship Justice Chandra in paragraph 9 of his judgment in *Devo v Fiji Independent Commission Against Corruption* went on to add that-

> "*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."(*emphasis added*)

[23] It is crucial therefore to examine whether the 3 grounds urged on behalf of the Petitioner satisfy the stringent criteria set out in section 7(2) of the Supreme Court Act.

The Public Service Issue

[24] The first ground raised by the Petitioner in this application is that he was not a "person employed in the public service" within the meaning of section 111 of the Penal Code.

[25] Section 111 of the Penal Code has been fully quoted in paragraph [9] of this judgment, and it is noteworthy that the phrase "*person employed in the public service*" has been defined in section 4 of the Penal Code in the following manner:-

> In this Code, unless the context otherwise requires-
>
> "person employed in the public service" means any person holding any of the following offices or performing the duty hereof, whether as a deputy or otherwise, namely-
>
> (i) any *civil office* including the office of President the power of appointing a person to which or of removing from which is vested in the State or in the President, in a Minister or in any public Commission or Board; or
>
> (ii) any office to which a person is appointed or nominated under the provisions of any Act or by election; or
>
> (iii) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of paragraphs (i) or (ii); or
>
> (iv)any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act.

[26] At the hearing of this application before this Court, Mr. Clarke emphasised that the offence for which the Petitioner was charged and convicted involved the alleged facilitation of certain loans and government grants as security for loans advanced to PCX by VDCL of which he had functioned as Chairman and Director, in the abuse of authority of his office, thereby committing an arbitrary act for the purpose of gain.

[27] The thrust of Mr. Clarke's submissions was that the Petitioner is not and was not at any point, a person employed in the public service. He argued that the "office" of chairman of the VDCL was not a "civil office" since VDCL was a private company with separate legal personality from the NLTB, and that the chairmanship of VDCL was not akin to a public office. He further argued that the power to appoint the Petitioner as a director and as chairman was not "vested" in the NLTB. In support of this latter contention, he stressed four points, namely that-

> (i) the NLTB did not have the power to appoint the Chairman and Directors of VDCL under its Act or in any other law – purporting to act as such was *ultra vires*;
>
> (ii) The Interpretation Act makes it clear that the power to appoint is one that must be granted under a written law;
>
> (iii) the articles of association of VDCL, the regulations made under the Companies Act of 1983 (now repealed) by which VDCL was bound to operate and regulate its proceedings and businesses, expressly gave that power of appointment to the shareholders of VDCL; and
>
> (iv) the law, not a course of conduct that had no basis in law, must be applied. The NLTB and Minister for Fijian Affairs arrogated their power thereby falling foul of section 4 which requires nothing less than actual and lawful power.

[28] Mr. Blanchflower, SC, responding to the submissions of Mr. Clarke pointed out that the respective charges on which the Petitioner was convicted, alleged that the Petitioner had committed offences contrary to section 111 of the Penal Code "while being employed in

the Public Service" as a Director of NLTB and Chairman of VDCL. Petitioner was appointed to be a member of NLTB pursuant to section 3(1) of the Native Lands Trust Act by the Fijian Affairs Board for a term of three years with effect 14 December 2001, which term was further extended by another 3 years, and hence he held that position until mid-2007. This was not contested at the trial. Consequently, at all material times covered by the counts of the Petitioner was a member of the NLTB and a "person employed in the public service", pursuant to section 4 of the Penal Code. He submitted that hence he held a "civil office".

[29] As to the Petitioner's position in VDCL, it was the submission of Mr. Blanchflower that the VDCL was specifically incorporated by NLTB for the purpose of investing funds held by NLTB in a more productive manner, and that the NLTB appointed the Petitioner as Chairman of VDCL and Mr. Bakani as a Director of VDCL to coordinate its affairs. He stressed that the definition of the phrase "person employed in the public service" in section 4 of the Penal Coded would apply to the Petitioner since he held two public offices simultaneously: (i) member of NLTB; and (ii) director and Chairman of VDCL and these two offices were inextricably tied together. He submitted that both were "public" or "civil" offices, notwithstanding the latter was connected to VDCL, a limited liability company.

[30] In this context, it is important to note that as far as the appointment of the Petitioner to NLTB was concerned, no issue was raised by the Petitioner in the courts below as well as in the Supreme Court in regard to the validity of the said appointment or that the appointment fell within the ambit of the definition of a "person employed in the public service". What was and still is in dispute is whether his appointment as a Director and Chairman of VDCL, which was made by NLTB, fell within the said definition, and the question is important in view of the related submission made on behalf of the Petitioner that the alleged offences with which the Petitioner had been charged involved not NLTB funds but VDCL funds, and the latter was a private limited liability company not falling within "public service."

[31] In dealing with this submission, the trial judge in his summing up as well as his judgment dated 6th August 2014, drew a distinction between two limbs of the definition found in section 4 of the Penal Code of a "person employed in the public service". Responding to a submission made on behalf of the Petitioner that the articles of VDCL only provided for the appointment of directors by the existing directors or the shareholders, and that according to the same articles, only a director may be appointed as Chairman, the learned trial judge made the following observation in paragraphs (xii) and (xiii) of the said judgment:-

> "(xii) Nevertheless, in terms of Section 4 of the Penal Code definition, "person employed in the public service" means, any person holding any of the *following offices* or *performing the duty hereof.*
>
> (xiii) "Following offices" in the first part of the section refers to the appointments and/or removals described in (i) (ii) (iii) limbs. The defence argument mainly focuses only only this aspect. The second part of the introduction, "performing the duty hereof," they say does not apply to VDCL. *The section elaborates two distinct steps; holding a public office after been appointed pursuant to (i) (ii) and (iii) limbs or performing the duties thereof. The mode of "appointment" may matter to the first part, but, what matters to the second part is the nature of the duty performed.* The 'Public Office' can be 'civil' in accordance with limbs (i) and (iii) or 'any office' according to limb (ii)."(*emphasis added*)

[32] The trial judge concluded as follows in paragraph (xix) of his judgment:-

> "(xix) In this background, I conclude that *irrespective of the mode of appointment, or appointing body,* if any person, *whilst holding an office of trust concerning the public and performs a duty of public nature, and receives a grant or remuneration whether directly from the State or otherwise,* pursuant to section 4 of the Penal Code, he holds a 'Public Office'."(*emphasis added*)

[33] The Court of Appeal adopted a similar approach in affirming the decision of the High Court in regard to the public service issue. In paragraphs [38] and [39] of the impugned judgment, His Lordship Justice Basnayake (with whom Calanchini P and Bandara JA concurred) observed as follows:-

> "[38] Vanua Development Corporation Limited (VDCL) is considered as the *commercial vehicle for NLTB and as trustee for Fijian landowners* (Ex-3 VDCL Memorandum of Association). *The paid-up capital of VDCL was $7.7 Million FJD. All these funds belonged to NLTB. VDCL was formed by a Resolution of NLTB.* The accused was appointed Chairman of VDCL by a NLTB Resolution on 8 December 2003 ((Ex-9).
>
> [39] The following facts also will show the *special public nature of VDCL* distinguishing it from other private companies:
>
> 1. *NLTB employees were made VDCL shareholders*. They held the shares and all property of VDCL in trust for NLTB, and exercised their powers and duties under NLTB direction (Ex P 6A, Deed for holding shares in trust (Supplementary Record pages 1-6).
> 2. *NLTB (as opposed to its nominee shareholders) appointed all directors of VDCL.* The original seven directors were NLTB employees. There is no evidence of the existence of the original seven directors excepting Mr. Bakani who was one of the seven original directors.
> 3. *NLTB (as opposed to its nominee shareholders) supplied all the funds for VDCL to invest.*
> 4. *NLTB paid the salary of VDCL's Board Secretary* (Transcript (pw6 Pg. 3364 (R/13))."

[34] After discussing some relevant case law which I do not consider it necessary to repeat here, His Lordship Justice Basnayake went on to conclude as follows in paragraph [42] of its judgment:-

"[42] It is abundantly clear that VDCL was a company that is public in nature. The shareholders were only name sake and without any authority. There is no evidence of any shareholders meetings. All the funds of the company belonged to the State. There is no evidence of distribution of dividends among shareholders. As already mentioned the Chairman and the Directors were appointed by the State. *The public nature of the company is visible on a perusal of the Memorandum. There is no dispute with regard to the public nature of NLTB where the accused had been a director. VDCL was a brainchild of NLTB.* The accused was made the Chairman of VDCL by virtue of his being a director of NLTB. In the event of removal from the directorship of NLTB, the accused would have naturally lost the chairmanship of VDCL too. Therefore the argument that the accused was not a public officer cannot hold water. *With that the accused became accountable to the public, to the company where he held the chairmanship, to NLTB and the indigenous Fijians with whose trust funds the company functioned.*" (*emphasis added*)

[35] These findings highlight one important fact that emerges from NLTB Board Paper No. 031/2003 (Exhibit D-9). This paper proposed in paragraph 2.0 thereof, the establishment of VDCL with immediate effect in view of the urgency of investing the funds of NLTB in VDCL "to generate additional revenue for the Board." This was because "additional revenue is needed to, among other things, finance initiatives the Board wants to undertake for the benefit of the landowners." The paper expressed the hope that-

"Also if well endowed financially NLTB can enjoy greater autonomy in its operation. Another objective of VDCL is to properly manage landowners' investments in the Trust Fund. Between $9 – 12 million is usually in the Trust Fund at any time. If managed professionally, earnings on this Fund can increase."

[36] Paragraph 8.0 of the said paper sought to deal with the shareholding structure and capital of VDCL. Apart from an anticipated $1,000,000.00 interest free loan from the Government,

the remaining estimated initial equity capital of VDCL estimated at $7,694,463 was to consist of NLTB investments. The said paragraph of the paper also contained the following proposal:

> "It is proposed that to start with, NLTB should be the only shareholder in VDCL. If the proposal to reinvest the saving in poundage is accepted, the shareholding can then be opened up to the landowners. Similarly, staff could be considered as shareholders, not individual but say through a trust."

[37] I find that the correctness of the distinction drawn by the trial judge and referred to in paragraph [31] of this judgment between (i) any person holding any of the following offices or (ii) performing the duty hereof, at the very commencement of the definition of the phrase "person employed in the public service" in section 4 of the Penal Code is confirmed and is in no way contradicted by the word "or" used between elements (i) and (ii) above, and is in conformity with the case law cited by the trial judge in his judgment. The Court of Appeal in paragraph [40] of its judgment adverted to the said case law in the following manner with apparent approval:-

> "[40] The learned trial Judge quoted Lord Mansfield in *R v Bembridge* (1783) 3 Doug 327; 99 ER 679 that *"if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the King in a criminal prosecution, for the King cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office, by whomever the office is given"*. Also Lawrence J in *The King v Whitaker* [1914] 3 KB 1283, 1296 that, "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer" (*R v Bowden* [1996] 1 Cr App R 104, 109, *R. v Cosford* [2013] 2 Cr App R 8)."

[38] The common law approach that is illustrated by the decisions referred to by the Court of Appeal in its impugned judgment does not seem to insist that the person concerned must be the holder of an 'office' in a narrow or technical sense. The authorities suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment. In *R v Dytham* (1979) 1 QB 723 Lord Widgery CJ talked of "a public officer who has an obligation to perform a duty". That is as wide as a court can go.

[39] Mr. Clarke, took pains to stress that the Fiji Penal Code was a complete code, and should not be construed in the light of English decisions which adopted a wide approach, but as already noted the interposition of the word "or" between the two limbs (i) any person holding any of the following offices *or* (ii) performing the duty hereof, at the commencement of the definition of the phrase "person holding public office" in section 4 of the Penal Code manifests a legislative intent to construe the said phrase in the widest possible manner. It is noteworthy that the liberal English common law approach of construing "public office" in the widest possible sense in applying legislation dealing with misconduct in or the abuse of public office has been followed in other common law jurisdictions as well. See, *R v Williams* (1986) 39 WIR 129; *R v Sacks* [1943] SALR 413; *R v Boston* (1923) 33 CLR 386. A similar approach was followed in Fiji by the Court of Appeal in *Qarase v Fiji Independent Commission Against Corruption* [2013] FJCA 44; AAU66.2012 (30 May 2013) and by the Supreme Court in *Patel v Fiji Indepenent Commission Against Corruption* [2013] FJSC 7; CAV0007.2011 (26 August 2013).

[40] I see no merit in ground (a) urged on behalf of the Petitioner for seeking leave to appeal, and hold that the Petitioner has failed to satisfy any of the criteria set out in section 2 of the Supreme Court Act in regard to this ground.

The Intent Issue

[41] Ground (b) relied upon by the Petitioner for seeking leave to appeal is that the Court of Appeal erred in finding that the Petitioner had committed arbitrary acts on the basis that the

necessary criminal intent was proven by *the Petitioner suppressing information regarding PCX* without regard or reference to evidence that such information was disclosed. As already noted in paragraph [19] of this judgment, Mr. Blanchflower on behalf of the Respondent has objected to this ground on the basis that though a ground described as "intent issue" was taken up by the Petitioner and considered by the Court of Appeal as ground (b), the matters raised by the Petitioner before this Court under the said ground (b) are entirely different and had not been considered by the High Court or the Court of Appeal. It is noteworthy that ground (b) raised in the Court of Appeal was that FICAC did not prove *the necessary criminal intent to make his acts arbitrary as required by the offence* which focused on the element of arbitrary act without raising any issue about the alleged suppression of information by the Petitioner to NLTB and VDCL.

[42] The submissions made by Ms. Cole at the hearing of this application in this Court stressed that the Court of Appeal had concluded that the 14 NLTB board papers and meetings from May 6, 2004, to August 24, 2006, had no mention of the meetings about VDCL's loans to PCX or the use of a Government grant as security for extension of PCX's loan with Dominion Finance and PCX's OD/loan facility with ANZ. Ms. Cole was here making reference to paragraph [33] of the impugned judgment of the Court of Appeal where it was discussing the facts relating to count 10.

[43] Ms. Cole submitted that the Court of Appeal based its decision on a misunderstanding of the evidence, which was the basis of the Petitioner's appeal. She further submitted that the 2005 Board papers showed that VDCL approved a shareholder loan of $2.9 million to PCX at the interest rate of nine per cent. She said information had been provided to the NLTB Board about a difficulty that PCX was experiencing in the process of obtaining business from the civil service and the public sector generally. Ms. Cole contended that it was impossible for the Petitioner to disclose information that he was unaware of and that the Court of Appeal erred by not looking at the evidence by itself, adding that it would have reached a completely different conclusion if it did.

[44] Responding to these submissions, Mr. Blanchflower made his submissions without prejudice to his position that the points raised by Ms. Cole were not taken up before the trial judge and the Court of Appeal in regard to which he relied on the dictum in the *Aminiasi Katonivualiku* case discussed in paragraph [20] of this judgment. He submitted that some of the evidence of the Petitioner's failure to report to NLTB and VDCL about PCX and VDCL's support of PCX, were set out in paragraphs 46, 56, 57, 60, 65, 70, 71, 74, 75, 76, 82, 86(3), 90, 94(3), 95(3), 97, 98, 106(1) and (2) of the Respondent's Submissions filed in the Court of Appeal. He contended that the assessors and trial judge reviewed and evaluated all the evidence, oral and documentary, and drew inferences and made findings about the Petitioner's lack of material disclosure to NLTB and VDCL. He submitted that the Petitioner did not inform NLTB of VDCL's loans to PCX and provision of security for PCX's banking facilities, and the assignment of proceeds under its agreement with NLTB, and PCX's financial problems, dependency on loans, and its assignments of proceeds under its agreement with NLTB.

[45] In this context it is important to note that the Petitioner as well as the 1st Accused Bakani were in the unique position of wearing 3 hats as directors of NLTB, VDCL and PCX. While NLTB was clearly a public body incorporated by statute, VDCL was a private limited liability company floated by NLTB to be its investment arm, and as far as the Petitioner and Bakani were concerned, there could not have been any conflict of interest in the positions they held in NLTB and VDCL. PCX however was a different kettle of fish, as it was a joint venture company in which VDCL had 51 per cent stake but the remaining 49 per cent was held as on 24th March 2004 by TUI Management Services Limited (TMSL) which had 9,899 shares and Mr. Ballu Khan, who had 99 shares (Exhibit 225), and this was a potential area of conflict of interest which both the Petitioner and Bakani had to guard against.

[46] It is also significant that the transactions which are the subject matter of counts 2, 4 and 10 involved trust funds transferred to VDCL for productive investment for the benefit of NLTB and landowners, and the two transactions relating to counts 6 and 8 were

government funds disbursed to VDCL through the intervention of NLTB, which placed the Petitioner and Bakani in a fiduciary position.

[47] It is in this background that this Court would consider the reasoning of the Court of Appeal, which was a clear endorsement of the reasoning of the trial judge, in regard to the state of mind of the Petitioner as seen from the below quoted paragraphs [48] to 52] of the impugned judgment of the Court of Appeal:-

> [48] What is the state of mind of the accused? Knowledge of the distressful financial position of PCX. He is with authority being the Chairman of VDCL. He thought that he could do anything with the funds that poured into VDCL and act according to his whims and fancy. That's how, I think, the acts of the accused comes within the ambit of *Naiveli* (supra) that, *"what differentiates something done in abuse of office in many cases will be the state of mind of the accused". "The act complained of should be done under colour of his office. This would mean that the act complained of should be done under colour of his office where use is made of such office by the accused"* (*Qarase*) (supra).
>
> [49] The question for the learned Judge was to find out whether the accused had any knowledge about the exact financial situation of PCX. "If the existing circumstances show either affirmatively or can be inferred through circumstances that the accused had actual knowledge of the facts or he wilfully shut his eyes to the obvious truth or did not make queries either wilfully or recklessly, as expected from a honest and reasonable man, it is the obvious conclusion that he had the *"knowledge"* of the existing situation." The learned Judge asked the question why the accused maintained a *"stoic silence"* when questions were raised by other Directors about the financial situation of PCX. It was due to improper motive. The accused could not have been a stranger to his role as the Chairman of VDCL.
>
> [50] The learned Judge was of the view that the accused must be quite privy to what existed in PCX compound as he was absent only once out of ten Board

Meetings of PCX held in 2004 and 2005. Thus while possessing the requisite knowledge of the negative financial status of PCX, why did he contribute or facilitate on each and every instances of the charges to achieve what PCX anticipated. Why did he not state his knowledge about PCX with NLTB or VDCL. Why did he not break the shackles at least when Mr. Whippy raised his concerns?

[51] Being a very high competent businessman for over decades, how did he fail to understand that from its very first business deal with NLTB, PCX was running the show on borrowings through various financial institutions, including VDCL, without a proper cash flow; Was he mindful that when PCX was expecting NLTB's first payment in January 2005 as its only income, its borrowings ran up close upon $5 Million; Why did he not enlighten VDCL and NLTB that PCX's original IT scheme is not a success and PCX was moving towards the *"3G wireless Mobile Licence"* as an alternative way out?

[52] The learned Judge held that it is with all these rational questions that this court has to decide whether the acts of the accused to facilitate the financial transactions in the five counts were rational and business investment oriented decisions with an honest belief. The learned Judge held that the answer is straight forward. The accused was acting with an "improper motive" at all material times. It is that improper motive that amounts to an abuse of authority of his office. His action clearly demonstrates that he simply acted according to his own free will or rather arbitrarily, without honouring his "fiduciary duties" towards VDCL and NLTB or the objectives and values of those institutes. *The results of the actions of the accused no doubt has prejudiced the rights of NLTB and indigenous Fijians. Whatever the money lost, approximately around $5 Million FJD, would have been used for the benefit of the concerned parties, had it not been wasted as a result of the accused's arbitrary acts which amounted to abuse of authority of his office.* (*emphasis added*)

[48] This is a case where the documentary evidence as well as witness statements and testimony on oath were voluminous, and the assessors and trial judge arrived at their decisions after careful examination and evaluation of the material presented at the trial. The case against the Petitioner was that he did not provide material, timely, and complete information to NLTB and the VDCL Board, on such matters as PCX's financial problems, its dependency upon loans, and its assignments of proceeds under the agreement with NLTB, and he had the opportunity of clarifying matters within his exclusive knowledge by providing his own testimony, but he chose not to. The trial judge's summing up, the opinions of the assessors (which in regard to the aspect of "purpose of gain" had to be varied by the trial judge after an independent assessment of the evidence) and the judgment of the trial judge were immaculate.

[49] In my opinion, there are three unsurmountable difficulties which the Petitioner has to face in regard to this ground of appeal. Firstly, the Petitioner raises factual issues which are properly within the province of a trial court to determine: *Aminiasi Katonivualiki v The State* (supra). Secondly, he asks this Court to reevaluate and reweigh evidence, and set aside concurrent findings of fact of the trial court and Court of Appeal on the basis of a ground that was not argued in the same way in the trial court or in the Court of Appeal. As this Court observed in paragraph 36 of its judgment in *Dip Chand v State* [2012] FJSC 6; CAV0014.2010 (9 May 2012)-

> "[36] The Supreme Court has been even more stringent in considering applications for special leave to appeal on the basis of *grounds of appeal not taken up or argued in the Court of Appeal.*"

Of course, the exception to the rule is a case where substantial and grave injustice might occur if the new point is not entertained on appeal, but the point raised by Ms. Cole in all the circumstances of this case is clearly not such a matter. Thirdly, the Petitioner seeks to select pieces of evidence for the Court to review, when the assessors and trial judge considered *all* the evidence. They read each document, heard all of the witness's

evidence and made findings about their credibility and reliability, drew inferences from the evidence, and made findings of fact. This Court does not have that advantage.

[50] For all these reasons, I hold that the Petitioner has failed to satisfy the threshold criteria set out in section 7(2) of the Supreme Court Act with respect to ground (b) set out in the Petitioner's petition of appeal.

The Excessive Sentence Issue

[51] Ground (c) urged by the Petitioner relates to his sentence. The Petitioner contends, as he has in the Court of Appeal as well, that the sentence against the Petitioner is contrary to law and is excessive. As already noted in paragraph 13 of this judgment, the sentence imposed on the Petitioner was an aggregate of 6 years imprisonment on all the 5 counts with a non-parol period of 5 years imprisonment. The breakdown of the sentence for each count of felony is also set out in paragraph [13] of this judgment. The sentences ultimately handed down on the Petitioner, aggregating to 6 years imprisonment, were as follows;-

Count 2	- 18 months imprisonment
Count 4	- 18 months imprisonment
Count 6 and 8	- 18 months imprisonment
Count 10	- 18 months imprisonment

[53] In the written submissions filed on behalf of the Petitioner, the said ground is further elaborated on the basis that the said sentence (a) does not properly apply to the "totality" principle; (b) does not properly apply the principles of consecutive and concurrent sentencing; (c) the consecutive sentences wrongly treat each offence as meriting the same punishment; and accordingly; and (d) the sentence is manifestly excessive.

[54] In the sentencing judgment of the trial judge dated 15th August 2014, he has taken 12 months imprisonment as the head sentence for each of the counts although the five counts

against the Petitioner attracted a maximum sentence of 3 years imprisonment for each count. It is also noteworthy that although there were altogether 5 counts, for purpose of sentence, the trial judge had imposed consecutive sentences on counts 2, 4 and 10 and concurrent sentences on counts 6 and 8, and as such on the basis of the head sentence, the total sentence would have been an aggregate of 4 years of imprisonment. The trial judge has then considered aggravating and mitigating factors, and adjusted the sentence.

[55] In paragraph 20 and 21 of the sentencing judgment, the trial judge dealt with the aggravating factors in the following manner:-

> "20. I now turn to see the aggravating features of this instance. Mr. Bakani and Mr. Dakuidreketi, you both held very high ranking offices in NLTB and VDCL as far as the 'decision making' process is concerned. You were expected and in fact empowered to make business decisions and implement the same in the light of the powers you acquired through the *'high public offices'* you held. The higher the 'public office' you hold, the greater the involvement and influence in decision making. That is one main aggravating factor. Then comes the huge sums of *public monies which were entrusted to your offices to manage and invest for the betterment of a larger community.* Therefore, it is indisputable that the much anticipated *'public trust'* been eroded, when you abused the authority of your high public offices. The abuse of your respective offices for a *long period of time, 3 years in total in this case,* is also an aggravating feature as for all this time you managed to conceal your arbitrary acts from the public. Finally, *the amount involved, or rather the loss to public* will definitely aggravate the nature of the offences. *VDCL had spent around $5 million over PCX and got only around $285,000 in return,* without any interests or dividends been received. The loss of around $5 million of Public money will have the effect of enhancing your sentence.

21. For the above stated aggravating factors, Mr. Bakani and Mr. Dakuidreketi, I will add 12 months imprisonment to the starting point of your sentences. The interim sentences now stand at 24 months imprisonment for each count."

[56] The trial judge has also considered the mitigating factors submitted on behalf of the Petitioner. These mitigating factors were dealt with in paragraphs 25 and 26 of his sentence ruling, and included the Petitioner's age, his marital status and the number of children, his educational qualifications and work experience, his business acumen, his active involvement with the Fiji Rugby Union and other public offices held, the fact that he is a first offender, the sole bread winner of the family who has also to fund his son's education, the delay in prosecuting the case, the potential loss of some of the Petitioner's business licences and the evidence of his good character. In consideration of all these mitigating factors, the trial judge reduced 6 months from each of the interim sentences which amounted to a reduction of the total sentence by 2 years of imprisonment, thereby reducing each of his interim sentence to 18 months imprisonment which works out to an aggregate sentence of 6 years imprisonment on a consecutive basis, as noted in paragraph [51] of this judgment.

[57] The Petitioner has appealed against his sentence to the Court of Appeal. His ground against sentence was ground (f) in the Court of Appeal, which read as follows: "The sentence is based upon wrong principles (cumulative) and is excessive (Excessive Sentence issue)." One ground referred to in the written submissions though not in the petition filed by the Petitioner in this Court, the totality principle was also raised in the Court of Appeal at the hearing and was considered by that Court.

[58] As the Court of Appeal explained in paragraph 11 of its judgment, in regard to counts 6 and 8, the sentence imposed was 18 months on each count, which was to run concurrently, and the sentences imposed on counts 2, 4 and 10 were to be served consecutively. Thus the total period of sentence was 6 years with a non-parole period of 5 years. Section 22 of the Sentencing & Penalties Act No. 42 of 2009 provides for the imposition of concurrent sentences unless it is otherwise directed by courts. The section states that every term of

imprisonment imposed on a person by a court must, unless otherwise directed by the court be served concurrently. Thus the courts are empowered to impose either concurrent or consecutive sentences, depending on the circumstances of each case. In paragraph 39 of his sentence judgemnt dated 15th August 2014, the trial judge has stated that in terms of section 22 (1), the court has discretion to order consecutive sentences. The question is whether that discretion was properly exercised.

[59] The Court of Appeal has examined the question carefully and in paragraph [68] to [72] of its judgment has observed as follows:-

> [68] The learned judge has given consideration to the theories involved in the imposition of consecutive sentences as stated by Pathik J in *Visa Waga v The State* [2003] FJHC 138 (23 September 2003) that, "The power to order sentences to run concurrently is subject to two major limiting principles, which may be called the *"one transaction rule"* and the *"totality principle"* (Thomas; Principles of Sentencing 2nd Ed pg. 53). It does not mean that consecutive sentences cannot be imposed, so long as the overall sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of the aggravating features (*Regina v Johnson*, The Times 22 May 1995).
>
> [69] The totality principle basically means that when a court passes a sentence with a number of consecutive sentences, it should review the aggregate or the totality of the sentences and consider whether the *"total"* is just appropriate when considering the *"offences"* as a whole. As Jiten Singh J said in *Namma v The State* [2002] FHHC 171 (6 September 2002), the application of this principle does not mean that there is judicial conduct offering for *"multiple offending"* or encourages offenders to continue offending, after a serious crime, with the impression that there is little to lose. It must always be made clear that the more the number of crimes and the more the gravity of those crimes, the longer the sentence is to be recorded.

[70] The totality principle is that consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences viewed as a whole (*R v Bradley* (1979) 2 NZLR 262 at 263). When a Judge is faced with the task of sentencing for multiple offences, as an initial step he is required to identify the appropriate sentence for each offence and then as the final step, to achieve a total sentence appropriate to the overall culpability of the accused (*HKSAR v Ngai Yiu Ching* [2011] 5 HLRD 690, par 13).

[71] Where multiple offences are committed, the object of the sentencing exercise is to impose individual sentences that, so far as possible, accurately reflect the gravity of each offence, while at the same time resulting in a total sentence which, so far as possible, accurately reflects the totality of criminality comprised of the totality of offences. This exercise involves a significant measure of discretion and accumulation of individual sentences according to the particular circumstances of each case (*Nguyen v The Queen* (2016) 256 CLR 656, para 64)).

[72] It appears that the learned Judge in paragraph 41 of his Sentencing Order delivered on 15 August 2014 had given serious thought to the counts separately. He states, thus that "the facilitation had been done in the same manner when entertaining the financial requirements of PCX. But, apart from VDCL term deposits in Dominion Finance and ANZ, which were used as securities for PCX loans, I do not see the other three instances, namely, granting of $ 2 million loan, $ 900,000.00 loan and $ 1 million loan to PCX, stemmed out of the "*same transaction*" or *"same incident"*. These three instances are distinct transactions with a considerable amount of time gap. The "*mental element*" or the "*improper motive*" gathers momentum and increases in degree, with that passage of time. This provides the main ingredient for a separate offence. Hence, charges pertaining to three VDCL loans to PCX will receive consecutive sentences". The facts relating to counts 6 and 8 have been treated differently and considered as forming one transaction. Therefore the submission that the learned Judge simply assumed that each count merited the same sentence cannot be accepted. It appears

that he had well considered each count separately and given reasons for imposing consecutive sentences in respect of some counts and concurrent sentences on others."

[60] In my view, the Court of Appeal has dealt with the question of sentence very comprehensively and there is no impropriety or misapplication of principles of law. The principles on which an appeal against sentence lie are firmly established in a series of cases such as *Shyam v State* AAU 98 of 2013 (15 January 2015) and *Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013)) and the questions to ask are whether the sentencing judge acted on a wrong principle, relied on extraneous or irrelevant matters, misunderstood the facts or failed to take into account some relevant considera tions. The trial judge has not fallen into any of these possible errors.

[61] In the present case the Petitioner has to establish that the errors in sentencing, if any, meet the threshold necessary for the grant of leave to appeal. The Petitioner has failed to satisfy the Court of Appeal regarding any of the errors set out above in relation to the sentences imposed on the Petitioner by the trial judge, and the grounds urged by the Petitioner for seeking leave to appeal on the sentence do not satisfy the criteria set out in section 7(2) of the Supreme Court Act for the grant of leave to appeal.

Conclusions

[62] For all the above reasons, I hold that the Petitioner's application for leave to appeal has to be refused, and his application must be dismissed. The impugned judgment of the Court of Appeal will stand.

Suresh Chandra, J

[63] I agree with the reasons and conclusions of Marsoof J.

Buwaneka Aluwihare, J

[64] I have had the advantage of reading the judgment of Marsoof J. in draft, and I am in agreement with his reasons, conclusions and the order.

Orders of Court:

1. *The Petitioner's application for Leave to Appeal is refused.*
2. *The Petitioner's application is dismissed.*
3. *The decision of the Court of Appeal is affirmed.*

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

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

Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court

Solicitors

Howards Lawyers for the Petitioner

The Office of the Fiji Independent Commission Against Corruption for the Respondent