

IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

APPEAL NO.CAV 0005 of 2010
[On Appeal from the Fiji Court of Appeal
Criminal Appeal No. AAU 0067 of 2006]

BETWEEN : **PENIASI KUNATUBA** *Petitioner*

AND : **THE STATE** *Respondent*

Coram : The Hon. Mr Justice Anthony Gates
Judge of the Supreme Court
The Hon. Mr Justice Saleem Marsoof
Judge of the Supreme Court

Counsel : Mr. A. Vakaloloma for the Petitioner
Mr. P. Bulamainaivalu for the Respondent
with Mr. R. Drau

Date of Hearing : 05 May 2011

Date of Judgment : 23 June 2022

JUDGMENT

Gates. J

- [1] This petition arises after a High Court trial, resulting in the conviction and sentencing of the Petitioner for 2 counts of abuse of office under the Penal Code [Section 111]. The Petitioner took his case to the Court of Appeal which dismissed his appeal against conviction and sentence.
- [2] The Petitioner was sentenced to 2 years imprisonment on each count, which terms were to be served consecutively, that is a total term to be served of 4 years imprisonment. The petition did not include any grounds of appeal against the sentences ordered. The petition was filed against the 2 convictions only.
- [3] The petition sought to raise issues in 4 grounds. They included directions on accomplices, weight to be given to potential witnesses who were not called to give evidence, directions on unreasonable delay, and the failure of proof it was said of 2 elements of the offence.
- [4] Before judgment could be given on the petition, one member of the panel, Mr. Justice Hettige, sadly passed away. The parties have given their consent for the remaining Judges to deliver judgement in this matter as provided in section 10 (1) of the Supreme Court Act 1998.

Facts and Evidence

- [5] The charges relate to the Petitioner's conduct in the periods from 6th of July 2000 to 30th of August 2001 [count 1] and 6th of July 2000 to 31st of December 2001 [count 2]. At the said times the petitioner was the Permanent Secretary of Agriculture, Fisheries and Forests, he implemented an Affirmative Action Farming Assistance Scheme. He allowed payments to Suncourt Hardware, Morris Hedstrom, Asco Motors, Regina Wholesalers and to R. C. Manubhai and Company. It was alleged in count 1 that he had acted dishonestly, without authority and for the purpose of gain for himself and others in permitting the payments.
- [6] In count 2 it was said he had persistently breached the rules and procedures regarding government expenditure of Public Funds under the Finance Act. It was alleged he had acted dishonestly, deliberately, arbitrarily, and for the purpose of gain, in allowing payments to the same companies.
- [7] The evidence included testimony from Civil Servants as well as from the Petitioner himself. He gave sworn evidence from the witness box. There were some agreed facts.

Almost all of the evidence was undisputed. The litigation challenge was as to the correct interpretation to be put on those undisputed facts derived from witness testimony and from documents.

- [8] It was agreed that on the 19th of May 2000, George Speight and a group of men staged a coup on the Peoples Coalition government which was led by Mr. Mahendra Chaudary. Prime Minister Chaudary and other Parliamentarians were held hostage in the Parliamentary Complex. Eventually on the 4th of July 2000, the Military forces took control of the country and appointed an Interim Civilian government. On the 28th of July 2000, the President appointed a civilian administration. Both the Interim Civilian government and the civilian administration were led by Mr. Laisenia Qarase as Prime Minister. General Elections were held in August 2001.
- [9] It was also an agreed fact that the Petitioner was employed in the Public Service, one of the necessary elements of the offence to be proved. He had been appointed Permanent Secretary of the Ministry of Agriculture, Fisheries and Forests on the 5th of July 2000. Prior to that, he had served as Permanent Secretary to the Prime Minister.
- [10] The monies paid to various suppliers under the Affirmative Action Agriculture Scheme were also not in dispute. Such acts were admitted. The Prosecution said they were done arbitrarily, in abuse of his authority, for the purpose of gain (for count 2) and that such acts were prejudicial to government, to its rights. Whilst admitting the payments out under his stewardship as Permanent Secretary, the Petitioner denied that they were made arbitrarily, in abuse of his authority, denied they were for gain, and denied the acts prejudiced the rights of the government.
- [11] Overall by the end of 2001, in excess of \$18 million dollars had been paid out to suppliers under the scheme either in cash or in commitments.
- [12] The nature of the payments out and the intentions of the Petitioner in doing so, comprised the main litigation issue for the Assessors and the Judge to decide.
- [13] Similarly the police interviews were not disputed. The Petitioner admitted in them not only that he was the Permanent Secretary, but also that he was the Chief Accounting Officer of the Ministry. What this last function entailed was explained by Finance Officials during the course of the Prosecution case.

- [14] The background to the scheme was also not in dispute. After the interim civilian government came into power in 2000, it agreed as a matter of policy to enforce a Blueprint for the advancement of indigenous Fijians and Rotumans. The rationale behind this Blueprint was to bridge economic gaps between the indigenous community and others, and thereafter to alleviate the resentment which the interim government considered to be one of the causes of the political instability of 2000. There was no specific vote approved for the Blueprint. Each department or Ministry wishing to implement a Blueprint project would need to ask cabinet and the Ministry of Finance for funds in order to implement it.
- [15] In the 2000 Budget the Ministry of Agriculture was granted funds under several votes and heads. But there was no specific vote for any type of Farming Assistance Scheme. In the past where farming assistance had been given out, the procedure was for applicants to be asked to put up one third of the grant and for the government then to contribute two thirds.
- [16] Mr. Joji Kotobalavu, the then Chief Executive Officer of the Prime Minister's Office, testified that this procedure was to encourage commitment to the project, and to discourage a "handout" mentality. The schemes pre-existing 2000 were, according to Mr. Kotobalavu, related to the expiry of the sugar cane farm leases to encourage farmers leaving their farms to resettle elsewhere to farm, and to assist landowners to farm sugar. There was no specific Farming Assistance Scheme separate from this project.
- [17] Inspector Nasir Ali, in the course of his evidence, said there was a form of farming assistance prior to 2000 in the Ministry of Agriculture based on the one third (1/3) contribution from farmers. In contrast the Affirmative Action Scheme implemented by the petitioner after 2000 was a scheme where no contribution from the farmer to be assisted, was demanded. His scheme was to be wholly paid for by government as a full grant. Such a scheme was never authorised by cabinet or by the Ministry of Finance.
- [18] It came out in evidence that IP Ali had been interdicted before he had completed his investigation. Defence counsel put to him that he had been removed because he was beginning to investigate the involvement of suppliers to the Ministry, some politicians, and government Ministers.
- [19] In a careful summing up the trial Judge had directed the assessors on this issue:
- “Whether or not other people were guilty of involvement in this Scheme, or are implicated in criminal activities in relation to it, is really not your concern. Your only concern is the guilt or innocence of this Accused.*

Other people may or may not be charged, depending on the discretion of the Commissioner of Police and Director of Public Prosecutions, and the strength of the evidence on each case. That is not for you to speculate about. The only question for you in this case is whether the prosecution has proved every element of the offence on each count against this Accused. Whether or not he is morally fully responsible, whether other people had their hands in the till, that is not your concern. Concentrate on the evidence, the law, the elements of the offence and this Accused. Similarly whether or not other people in Fiji, Cabinet Ministers for instance, believed the Scheme was properly authorized by government, is irrelevant. The question for you is what the Accused believed or knew was the status of the Scheme.”

[20] In the course of his cross examination, Inspector Ali said he had discovered no evidence to suggest that the Farming Assistance Affirmative Action Scheme had been authorised by government.

[21] Evidence was lead of the caution interview of the petitioner by the police investigators. The interviews were not disputed. The petitioner made several significant statements in those interviews. He considered himself to be the Chief Accounting Officer of the Ministry in his capacity as Permanent Secretary. He admitted it was his idea to give out free farming implements to Fijian and Rotuman farmers without asking for a one third contribution. At question 100, he was asked:

“Is it true that you being the Permanent Secretary formulated and implemented the policy in respect of affirmative action scheme during the year 2000?”

A: Yes.

And at Q.105 he was asked:

“Who initiated this Scheme?”

A: I did.”

[22] At Q.107 of the interview he was asked:

“Was there any Budget for this new Scheme?”

A: The Ministry was to utilize approved Budget for its activities and needed no new Budget.”

[23] He said that funds for the Scheme were vired from other allocations, that he had no authority to do this, but that it was regularised with the Ministry of Finance later. He said that the failure to seek prior approval was an oversight on his part.

[24] The Petitioner admitted that political pressure was a major push to implement the scheme. He was not, he said, inclined to support any political party or member of a party. The scheme lapsed in August or September 2001 because of a Ministry of Finance investigation into abuse of funds. He said initially there had been no abuse, his principal accountant had merely juggled funds within votes to meet expenditure requirements, which was creative accounting.

[25] The interviewing officer put to him:

- (i) examples of payments made to Suppliers without quotations
- (ii) repeated quotations
- (iii) no delivery dockets confirming supply.
- (iv) open and split LPOs [Local Purchase Orders].

The Petitioner then agreed that there had been abuse of the scheme. He explained that this was the fault of his staff and that he was in no way responsible.

[26] He said he had written a cabinet paper for cabinet approval in August 2000. He submitted it to his Minister. It was suggested to him that this had been typed not in 2000 but in 2001, and that he had asked his secretary to change the date to 2000. His secretary gave evidence of those instructions to her.

[27] She was Vani Leakai, a Senior Secretary, the petitioner's secretary at the time in the Ministry of Agriculture. She testified that in 2001, she had been asked by the petitioner to type a memorandum to the Minister, the Assistant Minister for Agriculture, seeking approval for the Affirmative Action Farming Assistance Scheme. Although she had typed it on the 9th of July, 2001 on the instructions of the petitioner, she had back dated it to the 9th of July, 2000. She added she could not have typed it on the 9th of July, 2000 because that day was a Sunday, and according to the attendance register, she had not been at work that day.

[28] The petitioner denied that he had made the request. He said he had done his part to seek cabinet authorisation in 2000 when the Scheme commenced. He did not state that this was prior approval, or that he had received official written approval in reply via the cabinet

secretary. He would of course have known the procedures well enough, having also served as Permanent Secretary to the Prime Minister. But he said his Minister had approved it, and that other Ministers and Ministries requested for payments to be made under the Scheme, which suggested to him that the Scheme had government authorisation.

- [29] He agreed that payments made on a daily basis far exceeded the budgetary limits, and that he had authorised a large number of Local Purchase Orders [LPO's], many of which were issued in breach of Finance Regulations, Finance Instructions, and Supplies and Services Instructions.
- [30] Evidence was given as to how government orders for goods and services were to be conducted. Limits were placed on expenditure for such matters. In 2001, the petitioners' authorised limit was \$10,000 for one purchase from one supplier. Any purchase above that amount had to be submitted to the Minor Tenders Board, or for large amounts, to the Major Tenders Board. The officer from the Ministry was required to obtain 3 quotations for the supply of the goods, but if the goods were available at the Controller of Government Supplies, they had to be obtained from that source.
- [31] The most competitive tender was to be chosen and an invoice requested from the supplier on the basis of an LPO issued, specifying the goods requested and the amount to be charged to the Ministry. The supplier was to supply precisely what was specified in the Local Purchase Order. The supplier was to be paid by cheque on supply of the goods. This restricted supply to what was required by the Ministry at the price agreed to by the government. The goods were then supplied to the Ministry concerned.
- [32] The level of authorising officer for the issue of the LPOs depended on the sum of each LPO. The petitioner as Permanent Secretary had authority to approve LPOs up to \$10,000. That was the normal and lawful procedure for the order of goods and services by the government at the time.
- [33] All of the LPOs, invoices, payment vouchers and delivery dockets seized by the police were listed in the exhibit listing. The learned judge invited the assessors to peruse any document they might wish to examine. Her Ladyship said, it was a matter for the Assessors but that it seemed that the Ministry of Agriculture throughout 2000 and 2001 had disregarded every approved procedure. She asked them to consider to what extent the petitioner was responsible for this, and whether this had been done in abuse of his office as Permanent Secretary.

- [34] In Inspector Raj Kumar's evidence the defence put to him various exhibits. This consisted of letters, written to the Ministry of Agriculture by Ministers, other Departments, the SDL party, and church groups seeking assistance or expressing appreciation for the scheme. Inspector Kumar maintained nevertheless that the scheme being implemented was not a Government approved scheme. He said that cabinet had only being informed about it officially in August 2001.
- [35] Mr. Apisai Tora gave evidence for the State. From the 29th of July 2000 he was the interim Minister of Agriculture. The petitioner addressed a minute to his Minister, dated 30th of July, 2000. He sought the Minister's approval of the Affirmative Action Farming Assistance Scheme. He said it was an ongoing programme pre-dating the events of 2000. The Minister said the petitioner informed him that it was difficult for the farmers to pay a one third contribution for the scheme. On the other hand, if the assistance were to be free, particularly in Tailevu and Naitasiri, it would help to defuse tension and allow them to better utilise their resources.
- [36] Under cross examination the Minister admitted he had agreed to the scheme. He added that because this was an ongoing scheme, it did not need his approval. He was shown a cabinet memorandum which only noted the scheme and agreed that the Minister of Finance was to monitor and run the scheme on behalf of the Ministry of Agriculture. This last decision was made on the 14th of August, 2001 and was conveyed to the Permanent Secretary of Agriculture on the 16th of August 2001.
- [37] In cross examination Mr. Tora agreed that the scheme had been much appreciated by the people of Fiji. He admitted that he had told the petitioner in minutes to "press on regardless". He was of the opinion that this was a government approved scheme. The Minister had participated in a trip to Naitasiri and to Navosa, taking with him farming implements and seven thousand dalo tops, he said all of this was done to assist the rural communities and to calm the Fijian population after the upheaval of 2000.
- [38] In his testimony, Mr. Kotobalavu, the CEO of the Prime Minister's Office already referred to, said that in 2000 cabinet had approved a "Blueprint for Affirmative Action for Fijians and Rotumans." The authors of the document were the Prime Minister and the petitioner. If any Ministry wished to launch a project under the blueprint, first a cabinet paper had to be submitted for approval and for staffing and monetary allocations. This was necessary because any new project with funding implications not provided for in the budget required cabinet approval. He said the scheme was consistent with the blueprint, but not a part of it.

- [39] Mr. Kotobalavu said the only cabinet decision on the Affirmative Action Agriculture Scheme administered by the Ministry of Agriculture was made on the 14th of August, 2001. The paper submitted to cabinet sought retrospective validation of the scheme, for the legitimisation of the procedures for screening requests, and for the virement of funds from one head to another. Cabinet had only noted the scheme and its procedures. It directed the Ministry for Finance to monitor the scheme because it was said to have been mismanaged. Cabinet also recommended a Commission of Inquiry into the scheme.
- [40] He said ministerial approval was not sufficient authority to proceed with such a scheme. The Permanent Secretary was expected to place the matter before cabinet for approval. He was not aware that the petitioner had tried to obtain approval in 2000 or that a cabinet paper was missing.
- [41]. Mr. Kotobalavu explained that the Chief Accounting Officer of a Ministry, the Permanent Secretary, was the officer responsible for controlling all votes and budget estimates, and his responsibility included the duty to ensure that all payments were properly authorised, and that all payments were properly charged. These were his duties under the Finance Act and the Regulations.
- [42] The Court put to the witness what was he to do if the Minister was directing the Permanent Secretary to do something improper or illegal. Mr. Kotobalavu said the PS was to express his views to the Minister in writing. If he received no response from the Minister, he should report the matter to the Ministry of Finance and to the Secretary of the Cabinet. He said this had been done in the past, and as a result a Minister had been removed from office.
- [43] Two witnesses gave evidence from the Ministry of Finance Audit team. The first Mr. Iliesa Lutu said that in the administration of the scheme there had been an excess expenditure of over \$5 million. As a result the government was faced with a deficit in its budget, ultimately to be borne by the tax payers. The over spending was unauthorised. The Ministry of Finance and the Public Service Commission were both partly responsible for failing to realize the extent of the mismanagement. The Audit Report concluded that the petitioner was chiefly responsible, for he was the Permanent Secretary and as such the Chief Accounting Officer for the Ministry.
- [44] Mr. Lutu found abuse in the issuing of the LPOs, the acceptance of supplies from particular suppliers without competitive quotations being obtained, in there being no reference to the Government Supplies Unit, in the splitting of the LPOs to defeat the authorising limit of

the Permanent Secretary, in the failure to keep a proper commitment ledger for the scheme, and in the failure to ensure that goods ordered and supplied were actually delivered.

- [45] In 2001 Umesh Prasad, the second witness from the Audit team was an Audit manager at the Auditor General's office. He tendered as an exhibit the Auditor General's Report, which had made similar findings to the report of the Ministry of Finance Audit team.
- [46] He sought the Permanent Secretary's written response on behalf of the Ministry on each head of inquiry. The objectives of the Audit was said by the Auditor General to be to ascertain whether the accounts of the Affirmative Action plan had been faithfully and properly kept, whether expenditure had been properly authorised, properly applied, and properly accounted for, and whether regulations and procedures applied were sufficient to ensure an effective control over expenditure, whether stores and other property were kept in proper custody, and whether provisions of the constitution and the Finance (Control and Management) Act had been complied with.
- [47] The Auditor General found that the Chief Accounting Officer could only incur expenditure when authorised to do so by the Ministry of Finance. Cabinet had not approved the Affirmative Action Plan in 2000. The petitioner had advised the team that the caretaker Minister had directed the implementation but this direction could not be substantiated. Even if the Minister had purported to give his direction or approval, the petitioner with his wealth of experience of government finances and procedure would have known the Minister lacked authority and jurisdiction to do so. That jurisdiction lay with the cabinet, and afterwards with the Ministry of Finance for implementation and with the provision of funds.
- [48] The witness said there was no budget for the scheme. Yet in 2000 and 2001 over \$18million had been spent on it, with outstanding payments still to be met of over \$5million.
- [49] The petitioner, as the Chief Accounting Officer, in his response to the report stated that "the authority to implement the programme had nothing to do with the Minister Apisai Tora as alleged, neither verbal nor written."
- [50] So the defence position, as admitted, was that there was no cabinet approval for the new scheme, that is the scheme without the one third contribution from the applicants, and that there was no approval either for virements from other votes. The approval was no small technical detail. The scheme was a matter involving considerable expenditure of

government funds amounting to over \$18 million in the first year alone. Other programmes from which funds were to be vired would mean those programmes would have to cease in order that the new unapproved scheme could be provided for and go ahead.

- [51] The Audit team found numerous other irregularities. Most of the goods purchased from one supplier were available at other suppliers at lower prices. One such supplier was paid over \$2.3million. No approach was ever made to the Controller of Government Supplies to ascertain availability with his department, nor were tenders called for. Many goods were obtained without the issuance of LPOs, up to \$3million worth. The petitioner explained:

“Given that no feedback was forthcoming from the Minister on the issue, the Chief Accounting Officer went ahead with the programme with the understanding that, approved allocations would be utilized. However, as reported and fully agreed to, the necessary approval for virement of funds from the Ministry of Finance was not obtained”.

- [52] It was said in defence that the scheme needed to be “kick started”. Signatories of the LPOs exceeded their set limits. The petitioner himself had signed 43 LPOs to a total value of \$636,451.13 in excess of his authorised limit. The Agriculture Ministry response had been that it was easier to get one supplier to provide all the supplies for one tikina and that this necessitated the making of LPOs above the authorised limit.

- [53] Some LPOs to suppliers were left open. It was left for the suppliers and farmers themselves to decide what items were to be supplied and what the cost should be. Some of these open LPOs were not entered in the Ministry’s main stock register. The Ministry said they were crossed checked at the Agricultural Stations. Bulk orders were made so that the benefits of the scheme could be widespread, and made available within the time period. The Headquarters main stock register did not have the details of such LPOs. The owner of Repina Wholesalers had written out quotations not only for Repina, but also for MH and Coral Island Traders, suggesting likely collusion. The Ministry made no answering comment to this allegation of abuse.

- [54] In addition the audit found that the scheme had been used to buy non-farming implements such as laptop computers. A number of payment vouchers were also missing. The Audit Report held the petitioner responsible for the vote and funds under his control, in particular citing:

- (i) the scheme had not been properly authorised and cabinet approval had not been obtained.

- (ii) the failure to charge his accounts properly
- (iii) the failure to keep a commitment ledger
- (iv) the failure to ensure that work of his Ministry was carried out without waste or extravagance.
- (v) the failure to give the Ministry of Finance and the Auditor General information concerning his accounts.
- (vi) the failure to ensure adherence to a system of internal control of expenditure and stores.
- (vii) the failure to ensure the safe keeping of public money and public stores.
- (vii) the failure to keep within his authorised limit of procurement of goods and services.

[55] The petitioner responded to this:

“It is an exercise in futility to keep harping on the fact that the funds were unauthorised. Fiji was in abnormal circumstances, and this called for abnormal solutions. As the CAO, Mr. Kunatuba was only exercising his best judgment. This is what he had been appointed as the Permanent Secretary of the Ministry. The situation called for vision and calculated risks. As CAO, in his judgment it was best not to keep to the modus operandi of normal times, and it would have been futile to do so. We submit though that the authority to utilize approve funds for the new programme was not sought. He and his management were working on the advice of his support staff.”

[56] The Audit Report also found the Ministry of Finance partly to blame. For its monitoring of the monthly statement of commitments and expenditure had been ineffective. The Public Service Commission also had failed to act swiftly to remove members of staff, and in particular the principal accounts officer from the Agriculture Ministry.

[57] On the 30th of May 2001, the Controller of Government Supplies wrote a memorandum to the petitioner. He pointed out that the farming implements bought by the Ministry of Agriculture from Suncourt Hardware were in fact available from the Government Supplies department at a much lower price. The petitioner did not respond to this memorandum. The Controller testified that these items were cheaper because they called for tenders and bought items in bulk. He accepted if items were not in stock there could be a delay of 2-3 months.

- [58] Govind Sami, the manager of Courts Homecentres gave evidence that he had received an order from Suncourt Hardware to deliver a home fitness gym to the petitioner's house. The price was \$1,100 and it was paid for by Suncourt.
- [59] The petitioner denied receiving money from Suncourt or for operating the scheme. He said he had been told by Manoj Bhika of Suncourt that the gym set sold to him for \$500 was in fact second hand. The petitioner had paid Bhika \$500 in cash. He also explained that the money deposited into his accounts were for his Faith Ministry and were from anonymous donors.
- [60] Ram Achal gave evidence of his work at the Ministry of Agriculture in the year 2000 - 2001. He was employed as a computer operator and data processor. He was involved with compiling the budget, issuing departmental warrants, requisitions to incur expenditure, and the preparation of the monthly expenditure reports. The commitment figures were posted online to be scrutinized by the Ministry of Finance.
- [61] Mr. Suliasi Sorovakatini, the principal accountant, had instructed him to create an allocation to retain funds under the allocation for Fruit Crop Development. In 2001 this allocation was showing a high expenditure figure for which there was no budgetary provision. Most of the charges under this allocation were for the Affirmative Action Scheme. There was an expenditure of a little over \$10million with no financial provision. Apart from this allocation, other capital project allocations were also used for the Affirmative Action Scheme. They included the Flatlands project, the Dalo and Yaqona Development Project, and the Ginger Development Project.
- [62] In cross examination he agreed that the Ministry of Finance had never queried the creation of the new allocation number, created without budgetary provision, and said there was never any approved project called the Farming Assistance Scheme.
- [63] Pita Alifereti was the Agriculture Specialist and Manager, Agriculture Section for Morris Hedstrom 2000 and 2001. According to Rigamoto Nawalu, his assistant, he gave her instructions to prepare quotations for the Ministry of Agriculture Farming Assistance Scheme, using Coral Island Traders quotations and Morris Hedstrom quotations. She printed out all the quotations. Applicants turned up at MH with applications made directly to Pita Alifereti. Mr. Alifereti did not give evidence.

[64] Evidence was adduced of monies paid into the petitioner's bank accounts. His Westpac account shows deposits:

<u>Date</u>	<u>Deposit</u>
<i>20th November 2000</i>	<i>\$2000</i>
<i>1st March 2001</i>	<i>\$2500</i>
<i>8th June 2001</i>	<i>\$2500</i>
<i>19th September 2001</i>	<i>\$2000</i>

After the 9th of June 2001, there were large withdrawals during June and July 2001.

[65] Other evidence from the ANZ Bank told of a Bank of Hawaii cheque made out in cash on account of Pita Alifereti in the sum of \$3000 on the 22nd of February 2001. On the 23rd of February 2001 the petitioners account with the Colonial Bank showed \$2200 deposited and later the same day another \$800, totalling \$3000. On the 6th of March 2001 a further \$2500 was deposited and on the 24th of August 2001 another \$1000.

[66] A number of Korean businessman and one from Taiwan gave evidence for the defence. They said they knew the petitioner from his days as Director of Fisheries. They said they supported his initiatives to help the poor. They had given him large sums of money as cash donations for the poor. They were unable to say that the deposits in his accounts in 2001 were the same as their donations.

[67] The Chief Accountant for the Ministry of Finance in 2000 and 2001 was a Ms. Vasuben Banwari. She dealt with the governing documents for Government current financial procedures – the Finance Instructions 1982, the Supplies and Services Instructions 1982, General Orders 1993, and Finance Circulars numbers 3 and 13 of 2000. She said that after the coup of May 2000 the Ministry of Finance put a control over the bank accounts of government. It limited daily cash flow of each department to \$20,000. On the 20th of October 2000, the Ministry of Agriculture sought approval of \$96,000 of so. It was approved.

[68] If a department wanted to incur expenditure not provided for in the budget, the procedure was for application to be made for cabinet and Ministry of Finance approval. The Ministry of Finance might then grant approval for additional funds or give its approval for the virement of funds from other existing heads.

- [69] She testified that on the 3rd of August 2001 a memorandum was written to the petitioner suspending his authority to issue LPOs. Earlier the monthly and quarterly warrants for the Ministry were suspended. She had written to the petitioner advising him that his Ministry had been incurring unauthorised expenditure in that the votes used were incorrect, that the LPOs used did not relate to actual approved projects and that there was no cabinet approval for such expenditure. She said that in her experience, this was the first time the Ministry of Finance had had to withdraw authority to spend from a Permanent Secretary.
- [70] Thereafter, the Ministry of Agriculture sought retrospective cabinet approval for the scheme. Because of the large sums of money already having been committed, the Ministry of Finance had to honour the due payments to suppliers. Other schemes had kept to the 1/3 / 2/3 contributions as a policy or practice. This was not an approved scheme for which there was a budget. This had been followed and implemented for the Ginger scheme and the Taro scheme: both of which had secured cabinet approval. The problem here had not come to light because the statements of accounts showed a saving of \$2.7 million and did not disclose the commitments which had yet to be paid. The Ministry of Finance had simply accepted what it had been told by the Ministry of Agriculture.
- [71] In his evidence, the petitioner had referred to the extraordinary circumstances after May 2000. The country was in turmoil and a large number of indigenous Fijians congregated in parliament. The Military Forces took over executive authority from His Excellency the then President Ratu Sir Kamisese Mara. The Commander of the Fiji Military Forces appointed an Interim Military Government which governed the nation from the 4th to the 27th of July 2000. Tension between the races was high. Some people had been shot and killed.
- [72] A new President was then appointed by the Great Council of Chiefs. In turn, he appointed a civilian interim administration. On the 14th of July 2000, the secretary to cabinet sent a copy of a Blueprint to assist indigenous Fijians and Rotumans to all Permanent Secretaries, asking them to support actively and to implement the measures proposed.
- [73] The petitioner denied that he had acted arbitrarily in the implementation of the Affirmative Action Farming Assistance Scheme. He said his scheme was not a new one. All he did he said was to remove the requirement for the applicants to have to contribute 1/3 share in order to obtain the assistance. He said he had the authority and approval of the Minister of Agriculture. He had not gained from the scheme. But the SDL Party and the members of the Interim Civilian Government had gained with the electorate in the General

Elections. He said that all payments had been made in accordance with standard regulations.

- [74] He had prepared a paper for his Minister. He had typed it into his laptop computer and taken it to his 2 Ministers, the Minister and the Assistant Minister. It had not been typed on his secretary's computer and was not in any of the inward and outward mail registers. The Minister had approved the plan in a handwritten note. It is not clear why this method of securing official clearance was followed and not the normal financial procedure.
- [75] He referred to other farming schemes before 2000. They required Ministry of Finance approval before funds could be used. He said it was the responsibility of the accounts department at the Ministry to obtain approvals for necessary virements from other heads of the vote.
- [76] Because the minutes of the ministerial meeting were missing together with the memo showing the Minister's approval, he had asked his secretary Ms. Leakai to retype the minute and put the date 2000 on it.
- [77] He referred to the fact that various government Ministers had used the scheme to assist persons and groups. He said Minister Tora had instructed him to "press on regardless", and that the Prime Minister and other Ministers had visited Rotuma with \$300,000 worth of farming implements –all this suggested to him that it was a government scheme. He referred to political speeches urging the people, in the absence of parliament, to take as much benefit as possible from the Interim Administration.
- [78] The petitioner said thousands flocked to his Ministry between May and August 2001 seeking assistance under the scheme. There was a sharp increase in expenditure on the scheme before the 2001 General Elections. No instructions were given to the Ministry of Agriculture to suspend the scheme. The Ministry of Finance continued to approve requisitions [RIE] and to permit spending above daily limits.
- [79] He said the people who benefitted from the scheme were not him, but the suppliers, the farmers, and the SDL government. He referred to the marked increase in the expenditure on the scheme from the moment the General Election was announced in May 2001. The elections were held in August 2001. It is to be noted the Ministry of Finance effectively shut down the scheme withdrawing the petitioners' powers from the 6th of August 2001.

[80] The learned judge in her summing up summarised the petitioner's response to audit criticism:

As for the discrepancies in the documents, the failure to supply or to deliver, the repeated use of quotations and the fictitious invoices, he said that any breakdown of procedures was motivated by the political crisis, and the need to establish normality in the country. He disputed the findings of the Internal Finance Audit and of the Auditor-General and said that to his knowledge all proper procedures and regulations were followed but that due to the large volume of assistance requests, the staff could have made mistakes. He similarly justified the splitting of LPOs by referring to the volume of requests made. He said that because this was not a new scheme, he was justified in using existing votes and allocations in his budget. He agreed that the goods supplied varied in price and that the Ministry had not always bought the cheapest but said the discrepancies did not take into account technical evaluations of the quality of the goods themselves. He said that LPOs signed in excess of authorised limits were done without his knowledge and that the LPOs he had signed were for different farm groups thus justifying orders made in one batch for the sake of convenience. He denied that open LPOs were in fact open, because the items to be supposed were specified, and the cost of supply was on the quotations. He said that there was a commitment ledger maintained but that due to work pressure, the Ministry had failed to show it to the audit team. He denied that there were irrelevant purchases because even computers were used for the support of the scheme. He denied being in breach of any provisions of the Financial Act and Regulations and said that any abuse of the Scheme was the responsibility of the accounts staff in the Ministry and the suppliers.

[81] However, some of these comments contradicted what he had told the audit team at that time.

[82] Finally he stated that he had been made a scapegoat in the entire affair. He denied any personal gain. The people who gained he said, were those who used the scheme to win the 2001 elections.

[83] A number of witnesses were called by the defence including Parliamentarians who had used the scheme to ask that assistance be given to members of their constituencies. This evidence was not disputed by the prosecution. Mr. Konisi Yabaki said he believed at the time that the scheme was an authorised one but now knew better.

[84] The Prime Minister Mr. Laisenia Qarase gave evidence. He said the scheme as implemented have not been approved by cabinet. On the trip to Rotuma, he had no idea that his boat carried \$300,000 worth of farming implements. This evidence could not lend support to the petitioner's case. The Prime Minister tendered one of his speeches delivered in Parliament about the Farming Assistance Scheme. The scheme he said was to assist rural dwellers to farm. It was also to counteract the failures of the SVT Commodity Diversification Framework between 1996 to 1999, and to assist a large number of farmers. Another purpose was to encourage supporters of George Speight to return to their villages. The PM said the scheme itself was not wrong. It was the way it was mismanaged by the officials of the Ministry of Agriculture, and they had only come to cabinet for clearance as late as the 14th of August 2001. He said cabinet refused to approve the scheme because of the alleged abuse of the programme.

[85] Another defence witness was Mr. Paula Uluinaceva, CEO of Finance Ministry, who dealt with RIEs and request for virements for the Agriculture Ministry in 2000 and 2001. He confirmed though that the Ministry of Agriculture had no specific budget allocation for an Affirmative Action Farming Assistance Scheme, and that no authority have been given to incur expenditure under any such scheme.

The Petition and its Grounds

[86] In argument before us, Mr. Vakaloloma did not urge the grounds relating to accomplice directions, weight to be given to a potential witness not called, or directions on unreasonable delay. He only pursued Ground 7.4, this was Ground 7 in the appeal before the Court of Appeal: that the prosecution had failed to prove the ingredients of both charges beyond all reasonable doubt. However, on this ground the Court of Appeal stated that the petitioner had failed to condescend to particulars. His counsel had not identified which specific elements of the offence the prosecution had failed to prove beyond reasonable doubt. To some extent counsel may have been referring to Grounds 5 and 6 in the lower court. Before dealing with these 2 Grounds and Ground 7.4 before this court, I will comment briefly on the grounds not urged.

Accomplices

[87] It had been suggested earlier in submissions to the Court of Appeal that the Judge should have given an accomplice warning with regard to witnesses called by the prosecution. However, this argument had not been well thought through. First, it was not made clear which witnesses were to be treated by the Judge as an accomplice, nor in what way those witnesses (unnamed) were to be treated as such. Was it being suggested that the Prime Minister, or the petitioner's line Minister, the Minister of Agriculture, or the CEO of the

Prime Minister's office were accomplices? What was the basis for them to be treated as accomplices? It was the petitioner's case at trial that there had been no wrong-doing, no arbitrariness, and no intentional breach of the Finance Regulations. He considered he had the approval of the government of the day for what had been a scheme of his devising to assist farmers. No doubt he had hoped for favourable evidence from the witnesses, and to some extent though not sufficiently, he had gained some support. Why would there be a need therefore for an accomplice warning? It was not put to these witnesses that they had indeed given him official authority and approval to proceed, or that their actions amounted to a criminal activity: **Korell –v- Texas** 253 3d 405 (2008). Nor was the defence case based on the unreliability of the evidence of these witnesses. Almost entirely the evidence for the prosecution had been uncontested by the defence.

- [88] The groundwork had not been provided here. The witnesses were not identified as accomplices in the appeal notices or before the Court of Appeal in argument. More importantly it had never been suggested by the defence at any time during the trial that any of the State witnesses were accomplices. Nor was a redirection sought from the judge to add to the summing up.

Whether need for directions for a person not called as a witness.

- [89] Witness Rigamoto Nawalu testified that her superior Pita Alifereti at Morris Hedstrom had given her certain instructions to prepare quotations for the Ministry of Agriculture in connection with the Farming Assistance Scheme. She said applicants turned up at MH with applications made directly to Mr. Alifereti. This allegation was put to the petitioner during the caution interview. But Mr. Alifereti as has been said, did not give evidence.
- [90] The assessors had been directed in the summing up that their opinions were to be based only upon the evidence, the testimony of the witnesses and the documents exhibited. Mr. Alifereti was not a witness before them. He gave no evidence therefore requiring corroboration. The Court of Appeal said that the defence case was handled by an experienced defence counsel. No objection was raised at the time of the testimonies of Inspector Ali or Ms. Nawalu. The question of the editing of the caution interview could have been raised between counsel as a pre-trial matter or brought to the judge for a pre-trial decision. It was not. The caution interview remained undisputed. Not surprisingly this ground was not urged by counsel before the Court of Appeal or this court.

Unreasonable delay.

- [91] It was claimed that the learned judge should have dealt with the unreasonable delay in bringing the case. The Court of Appeal observed at para:

[64] *“The learned trial judge was not obliged to give any direction to the assessors on unreasonable delay. Any objection claiming a breach of Article 29 of the former constitution should have been made at the beginning of the trial or even earlier, and it was not.*

[65] *“The ground and the others we have mentioned appear to place a responsibility on the trial judge to enter the arena and take objections even if neither side does so. It is a curious submission which has no basis in law. We therefore reject it.”*

[92] This was not a matter that could be entertained in the decision making process before the assessors in deciding whether the charges had been made out. If any relief were to be given, the judge could have granted a pre-trial remedy upon application. It was not a trial issue bearing on guilt or innocence.

Whether arbitrariness not proven.

[93] Grounds 5 and 6 before the Court of Appeal amounted to saying there existed substantial evidence before the trial court that the petitioner had not acted arbitrarily. It was the prosecution case that the petitioner had implemented the Affirmative Action Farming Assistance Scheme within the Ministry of Agriculture without the authorisation of the government, which he had done so dishonestly knowing that he was in breach of the rules and procedures regarding the expenditure of public funds, namely obligations created pursuant to the Finance Act.

[94] It was the defence case that the petitioner had acted with approval and authorisation. His counsel had referred to the evidence before the court, the letters, cabinet minutes, and witness testimony, to show that the petitioner was not acting arbitrarily or dishonestly. In rejecting this argument, the Court of Appeal referred to several pieces of the evidence. Defence counsel had referred to the Prime Minister’s speech in Parliament on the 15th of February, 2002 reported in Hansard at page 1624:

(i) *“Since these projects are ongoing in nature, the Ministry of Agriculture had full authority to incur funds as provided in the Ministry’s budget. The Ministry can also vire funds from other allocations in its annual budget to augment these projects but provided it consults and obtains the approval of the Ministry of Finance.”*

And further on:

- (ii) *“The scheme was needed to encourage the many hundreds of people who had gathered here in this parliamentary complex to return to their villages. This explains why the majority of the recipients of assistance under the scheme in the year 2000 came from nearby provinces. But the scheme was so successful in encouraging farmers to increase their farming production that it was extended to all provinces and indeed to all rural farmers based on application. As I have said, it is a mistake to refer to it as an affirmative programme for Fijians and Rotumans only. It is open to all farmers in all parts of Fiji.”*

Later at p 1625, the Prime Minister said:

- (iii) *“Mr. Speaker, Sir, I am not trying to make excuses for the mismanagement of the Farming Assistance Scheme by officials of the Ministry of Agriculture, Fisheries and Forests. But the question that must be asked is this, what did the SVT led Government and the Fiji Labour Party led People’s Coalition government do to stop abuses of authority and mismanagement of funds in that Ministry?”*

[95] The court considered these comments were hardly a condoning of the petitioner’s action. Though retrospective approval of that action appeared to have come a year later, there was no such approval in place when these actions were taken in 2001. That approval was restricted to limited virement and to permit the honouring of the commitments already made to suppliers. There never was any cabinet approval. The petitioner would have known that proposed virements needed to be cleared first with the Ministry of Finance. That was not done either. The failure to seek the Ministry’s clearance on virements, the switching of funds, to cover the \$18 million of expenditure was a serious matter. It was unlikely the assessors or the judge would have accepted the petitioner’s explanation that the failure was a mere oversight.

[96] In his own account the petitioner had said the Minister of Agriculture had told him to “press on regardless”. However, in his evidence the Minister had said this:

“I would like to say that when I came in as the Minister for Agriculture the assistance to farmer was already in progress. I do not know what scheme was it. Since I was briefed by Peniasi Kunatuba that the scheme was progressing well in the province of Naitasiri. I asked Peniasi Kunatuba about it, about the 1/3 contribution of the farmers and he told me that the farmers could not afford to pay for the 1/3 contribution. Because I was informed by Peniasi Kunatuba that farmers were advised to write application letters and to submit their concerns to Agricultural Officers for assessment. I wish to confirm that I gave no approval for the implementation of this free farming assistance.”

[97] Defence counsel chose not to cross examine the minister on this evidence. The Minister did not confirm the petitioner's story of having received the Minister's personal authorisation. Of course such a change of expenditure and budget required cabinet approval, nothing less. Purported ministerial approval could not provide the requisite authorisation. As a long standing civil servant and Permanent Secretary the petitioner would have known this. The High Court had evidence before it, the disregard for seeking cabinet approval, that was both deliberate and arbitrary.

[98] The learned judge in her sentencing remarks summarised not only the egregious nature of the breach of trust but also the extent of the series of disreputable transactions which had led to the charges of abuse of office. The Court of Appeal referred to the summary also.

[99] In accepting the unanimous opinion of the assessors and in proceeding to convict the petitioner, the trial judge said:

"I consider this case to be the most serious abuse of office case in the Fiji Courts thus far, I say this on the basis of the amount of money spent on what was an unauthorised scheme. I also assess its seriousness on the basis of your position of seniority in the public service. The more senior the officer the greater is the breach of trust."

[100] As Chief Accounting Officer and Permanent Secretary the petitioner was responsible for ensuring that he only incurred expenditure for the Ministry for which there existed both authority and authorised available funds. That would mean, if he intended to vire other funds from within his Ministry's budget, other votes, he must be certain the Ministry of Finance had been briefed and had given its approval before the expending of further public monies. The petitioner sought to shift blame and responsibility for failures in his duty in this regard to his accounts staff, and to other officers in the Ministry for the maladministration of the scheme.

[101] With regard to count 1 the judge observed:

"The aggravating factors are however considerable. As Chief Accounting Officer, and a public servant of some experience, you knew you were implementing a scheme which required cabinet approval and Ministry of Finance approval, but failed to take steps to obtain such approval until August 2001. By that time millions of dollars had been spent on the scheme, with millions more committed. On your own admission, hundreds and

thousands of people were rushing to the Ministry headquarters seeking free assistance. Suppliers were supplying goods (if indeed they were all supplied) without technical assessment or proper documentation. The picture presented to the court was that you implemented a scheme which led to a chaotic, uncontrolled and disreputable series of transactions from which the credibility of government suffered greatly.

The Minister's consent to the scheme does not assist you. Politicians will often try to put improper pressure on public servants because they have a political agenda to fulfil. But public servants must resist that pressure and act according to rules, regulations and procedures, and in a politically neutral way. You did not, and in failing to withstand political pressure you failed the public of Fiji. Further you yourself benefited financially from the scheme. Finally, in the period of political crisis and uncertainty after May 2000, when several institutions of the State were unable to function effectively, there was a greater need for the public service to adhere to procedures, and to jealously guard the public purse from irregular and unauthorised activity."

[102] With regard to count 2 Her Ladyship summed up the aggravating factors:

"The way in which virements were made and the Ministry of Finance misled, the sheer numbers of people who were given assistance without any checks and balances, the daily expenditure of \$200,000 or \$300,000 when the scheme was at its peak, the involvement of politicians who used the scheme to help their own constituencies and communities, and the serious consequences to the government accounting system are some of these aggravating factors.

The fact that the Ministry of Finance and the Public Service Commission failed to properly monitor the activities of the Ministry is not a mitigating factor. Public servants who deal in public funds cannot take advantage of a less than vigilant accounting process, to further their own agenda, financial or political. This is a case of a gross breach of trust."

[103] The petitioner said he had been made a scapegoat and that others had benefitted. He said, the interim government succeeded in the August 2001 elections with the help of the handout scheme. The judge had rightly contrasted the role and duty of the senior Civil servant with that of politicians, Ministers and the Government. The Finance Rules were there for good purpose and governance. A civil servant's duty is not to thwart the intentions and policies of elected political leaders. But it is part of his or her duty to ensure the executive keeps within the confines of the financial legislation of the land. This was a case where the flouting of those rules had been gross. The evidence of wrong-doing and of the specific elements of the offence, namely the arbitrariness and the abuse of the authority of

his office, had been substantial and overwhelming: **A G's Reference No. 3 of 2003 EWCA Crim 868**. The petitioner's case had been put fairly and fully by the judge but he was rightly convicted.

[104] The Court of Appeal was correct in its disposal of the appeal before it. This petition should be dismissed.

Marsoof J

[105] I have perused the draft judgement of the Hon. Mr. Justice Anthony Gates and agree that for the reasons set out therein with which I agree, there is no basis for the grant of leave to appeal. Accordingly leave to appeal has to be refused and the petition shall stand dismissed.

[106] The orders of the court therefore are:

- (i) leave to appeal refused
- (ii) petition dismissed.



A handwritten signature in blue ink, appearing to be 'A. Gates', written above a horizontal line.

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

A handwritten signature in blue ink, appearing to be 'S. Marsoof', written above a horizontal line.

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