IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0014 of 2023
[Court of Appeal No. AAU 001 of 2019]

BETWEEN : **VILIAME KATIA**

Petitioner

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

Coram : **The Hon. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Justice Lowell Goddard, Judge of the Supreme Court
The Hon. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Ms. L.B. Ratu and Ms. P. Mausio for the Respondent**

Date of Hearing : **16 August 2024**

Date of Judgment : **29 August 2024**

JUDGMENT

Gates, J

[1] I agree.

Goddard, J

Background facts

[2] The petitioner commenced employment in the Suva office of the Official Receiver (the OR) as a clerical officer in 2003. He was then aged 23. In that role he assisted in the operation

of the Bankruptcy Trust Account for bankrupt individuals and the Liquidation Trust Account for liquidated companies. His tasks included assisting with the payment out to creditors of funds received by the OR from petitions granted by the High Court. He apparently performed these tasks extremely well and four and a half years later, at age 28, was promoted to the role of Acting Deputy Official Receiver. In that position he was responsible for and entrusted with ensuring the proper safekeeping and management of the funds in the OR's bankruptcy and liquidation accounts.

[3] Within days of his promotion to this position and continuously over the next eight years in breach of his fiduciary duty, the petitioner abused his position by devising and implementing various fraudulent means via which he systematically stole a total of $4,118,447.43 from the OR's bankruptcy and liquidation trust accounts.

[4] On 29 March 2017, he pleaded guilty in the Magistrates Court to 11 charges of fraudulent and corrupt conduct laid by the Fiji Independent Commission Against Corruption (FICAC). The charges alleged abuse of office for gain, forgery, embezzlement as a servant, providing false information to a public servant, unauthorised modification of data, and obtaining financial advantage. He was sentenced to 14 years imprisonment with a non-parole period of 12 years.

[5] In the event, that sentence imposed in the Magistrate's Court was vacated on application of the respondent and the case transferred to the High Court for sentence. On 28 December 2018, the petitioner was sentenced by the Temo J (as he then was) to a term of 23 years imprisonment with a non-parole period of 22 years.

The modus

[6] The bankruptcy and liquidation accounts of the OR operate to facilitate the processing of monies received from creditors' petitions in bankruptcy and liquidations. Although the OR has offices in Lautoka and Labasa, all of the bankruptcy and liquidation payments are processed in the Suva office and all debtor and creditor records are held there in a system known as the FOX PRO system.

[7] The FOX PRO system contains the individual Ledger accounts for all creditors and debtors, the various amounts paid by the debtors who are the bankrupt individuals and liquidated firms, the amounts paid to creditors and the balance available for each account. The system is also used to report bankruptcy information requested by financial institutions and stakeholders

[8] The petitioner had become fully conversant with the FOX PRO system and its functions and knew the system was open to editing.

<u>Counts 1- 4</u>

[9] Between 1 July 2008 and 31 January 2010, the petitioner manufactured false documents purporting to be from an employee in the Lautoka office and bearing her forged signature. He then typed false emails purporting to be from the same employee and attached the false internal memoranda to them.

[10] In those emails and internal memoranda, the petitioner would state that certain creditors had agreed to take part in reduced payments from debtors who owed them money and thus needed their payments processed.

[11] The petitioner would then place his own minute onto the falsified emails and produce them to the accounts section of the OA's office for the payments to be processed. He would then collect the cheques made out to these purported creditors and cash them for his personal use.

[12] As a result of the petitioner's fraudulent actions, bona fide creditors lost their rights to claim a part or the whole of $339,201.05 and the Government of Fiji through the office of the OR was unable to keep a proper accounting of the funds entrusted to it.

<u>Counts 5-8</u>

[13] Between 1 February 2010 and 31 December 2015, the petitioner engineered the processing of 906 false payments by editing the bankruptcy records in the FOX PRO system; and a

further 420 false payments by similarly editing the liquidation records in the system, in each case by adding false debtor and creditor information. He then manufactured false emails, purportedly sent by an employee in the Lautoka office, stating that certain creditors, which he had created in the FOX PRO system, had agreed to take part or reduced payments from debtors who owed them money and needed their payments processed.

[14] The petitioner would then print out these false emails and write his own minutes on them as purported endorsements of the false claims.

[15] After having the claims approved for processing by the accounts section of the OR's office, he would collect the cheques that had been made out to the fictional creditors and cash them for his personal use.

[16] His fraudulent activities caused bona fide creditors to lose their rights to claim a part or the whole of $2,472,161.18 from the bankruptcy account; and $1,307,085.20 from the liquidation account; and the Government of Fiji was again unable to keep a proper accounting of the funds entrusted to the office of the OR.

<u>Count 9</u>

[17] This count charged the petitioner with being reckless as to whether the modifications he made to data held in the records of the FOX PRO system, by falsifying the debtor and creditor information held within it, would impair the reliability and security of this data, which was relied on by the OR as well as by financial institutions and stakeholders requiring accurate bankruptcy and liquidation records.

<u>Count 10</u>

[18] This count charged the petitioner with obtaining a total financial advantage of $3,779,246.38 from the OR’s bankruptcy and liquidation accounts between 1 February 2010 and 31 December 2015, in the knowledge that he was not eligible to receive this advantage.

Count 11

[19] This count charged the petitioner with making a false document; namely, a winding up order purporting to have been made by the High Court in Lautoka as well as proof of debt general forms, intending these false documents to induce public officials within the OR's accounts section to accept them as genuine and so process payments falsified by the petitioner for his personal gain.

The reasons for sentence

[20] The accused pleaded Guilty to all 11 counts on 29 March 2017.

[21] After outlining the charges and the facts, the learned Judge observed that the petitioner had not made any restitution of the $4,118,447.38 he had falsely obtained from the OR's Bankruptcy and Liquidation Accounts over the period 2008 to 2015.

[22] After traversing the elements of each category of the 11 counts for sentence, the Judge referred to sentencing levels and tariffs that had been identified in previous cases of corruption coming before the High Court, noting that some of the petitioner's offending (counts 1, 2, 3 and 4) was committed before the Penal Code, Chapter 17 was replaced by the Crimes Act 2009; and that offending committed after 1 February 2010 was liable to the more severe penalties under the new Act.

[23] Counts 5 and 6, abuse of office for gain (section 139 of the Crimes Act 2009), were the most serious of the offences, carrying a maximum penalty of 10 years imprisonment and attracting an uplift to 17 years imprisonment if the offending were done for gain. Relevant principles and a helpful tariff of 1 – 12 years imprisonment for such offending had been formulated in *FICAC v Laqere*[1].

[1] [2017] FJHC, 337

[24] Count 4, charging embezzlement by a servant (section 274 (b) (ii) of the Penal Code, Chapter 17), was considered by the learned Judge to be the next most serious offence, attracting a maximum penalty of 14 years imprisonment. As the Judge observed, stealing from employers is a very serious matter often meriting deterrent sentences.

[25] There was no sentencing precedent available for counts 7 and 11 concerning forgery (section 156 (1) of the Crimes Act 2009) which carry a maximum penalty of 10 years imprisonment.

[26] Nor was there any sentencing precedent for the offence of obtaining a financial advantage (section 326 (1) of the Crimes Act 2009), which attracts a maximum penalty of 10 year's imprisonment.

[27] The facts of the petitioner's case demonstrated a need to treat the offences of unauthorized modification of data to cause impairment very seriously. In the learned Judge's view, a tariff between 2 to 7 years imprisonment was called for in relation to such offending, in order to protect the public and the integrity of public institutions.

[28] Similarly, with count 9, concerning the unauthorised modification of data (section 341 (1) of the Crimes Act 2009), no precedent or sentencing tariff had been established.

[29] The Judge considered the aggravating factors in the petitioner's case to be the gross breach of his employer's trust, his repetitive and systematic breaches of procedure, the amount of money involved, the fact there had been no restitution or attempts at restitution, and the motivating factor of greed.

[30] The mitigating factors acknowledged by the Judge were:

> *"(i) At the age of 38 years, this is your first offence.*
> *(ii) Although, you pleaded guilty to the charges 4 months 11 days after first call in the Suva Magistrate Court, you nevertheless saved the Court's time.*
> *(iii) You were in custody for approximately 1 year 6 months 27 days prior to being sentenced today.*
> *(iv) You cooperated with FICAC investigators during the investigations"*

[31] Given the very serious aggravating factors, the Judge took the view that any discount given would be small. After particularising each count, he determined the appropriate sentence for each as follows:

> *"(i) Count no. 1: Abuse of Office for Gain - 2 years imprisonment*
> *(ii) Count no. 2: Forgery - 1 year imprisonment*
> *(iii) Count no. 3: Forgery - 1 year imprisonment*
> *(iv) Count no. 4: Embezzlement by Servant - 5 years imprisonment*
> *(v) Count no. 5: Abuse of Office for Gain - 14 years imprisonment*
> *(vi) Count no. 6: Abuse of Office for Gain - 14 years imprisonment*
> *(vii) Count no. 7: Forgery - 6 years imprisonment*
> *(viii) Count no. 8: False Information to Public Servant - 3 years imprisonment*
> *(ix) Count no. 9: Unauthorized Modification of Data - 6 years imprisonment*
> *(x) Count no. 10: Obtaining a Financial Advantage - 6 years imprisonment*
> *(xi) Count no. 11: Forgery - 6 years imprisonment"*

[32] In concluding his sentencing remarks the Judge said:

> *"Mr. Katia, you engineered 1,415 fraudulent transactions within the Official Receiver's Office to steal $4,118,477.43 of trust money. In other words, you were entrusted with this money, and as a trustee, you stole this money. The level of deceit and evil you perpetuated among your co-workers and supervisors to steal the money was the height of all evil. You smiled at them and behind their back, stole the $4 million dollar plus. You made a mockery of not only the Official Receiver's Office, but also the High Court, by pretending to be a judge issuing court orders. You had made no restitution or attempted to do the same. You have not explained where the money is, nor how it was used. It appears you are willing to serve, from your point of view, a short prison sentence, come out and enjoy the fruits of your crime. Because of the above, and the need to punish you in a manner that is just in all the circumstances, and in the interest of justice, I direct that the sentence in count no. 5 be made consecutive to the sentences in count no. 7 and 8, making a total sentence of 23 years imprisonment.*
>
> *Because of the totality principle of sentencing, I direct that all the sentences in the other counts, be made concurrent to the 23 years sentence mentioned above. The final total sentence is 23 years imprisonment.*
>
> *Mr. Viliame Katia, for the eleven offences you committed against the Office of the Official Receiver at Suva in the Central Division, between 1 July 2008 and 31 December 2015, I sentence you to 23 years imprisonment, with a non-parole period of 22 years, effective forthwith."*

The appeal

[33] The petitioner lodged a timely appeal to the Court of Appeal against his sentence on 2 grounds, which were recorded by the Appeal Judge as follows:

> *"The Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive, and he failed to take into consideration the case authorities provided on behalf of the Appellant.*
>
> *The Learned Judge erred in law when he failed to follow the principle of sentencing in Veresa v State AAU 101/13."*

[34] In the event, as the Appeal Judge further recorded, only the second ground of appeal was pursued:

> *"[14] However, in the written submissions filed on behalf of the appellant it has been stated that the appellant would not proceed with the first ground of appeal but rely only on the second ground of appeal. The counsel for the appellant reiterated this position at the oral hearing of the leave to appeal application."*

[35] The petitioner's wish to proceed with only the second ground of appeal is further clear from the Judge's following statement, that the "*pith and substance of the appellant's sole ground of appeal*" was error of law by the High Court in imposing a sentence in excess of the powers of the Magistrate's Court (section 256(3) Criminal Procedure Act, 2009).

[36] It is also clear from the concluding paragraphs of the judgment:

> *"[34] Since the appellant has relied only on the single ground of appeal by asking the question whether the High Court judge had erred in law when he failed to follow the principle of sentencing in Veresa, the answer has to be firmly in the negative. Veresa never sought to set down a principle of law to say that the High Court in acting under 190 (3) of the Criminal Procedure Act, is impeded by limitations of the sentencing powers of the Magistrate Court or put it in another way, the High Court cannot pass a sentence in excess of the sentencing powers of the Magistrate Court in acting under section 190(3) of the Criminal Procedure Act, 2009 and exercising sentencing powers of the High Court.*
>
> *[36] As I have already discussed, it could now properly be said regarding the single ground of appeal relied on by the appellant that it has absolutely no*

possibility of success and its unsuccessful outcome is so obvious that it cannot be reasonably said to be arguable having a reasonable prospect of success."

[37] The sole ground of appeal, based on Veresa, was dismissed. However, the Appeal Judge did not make an order for dismissal of the abandoned ground of appeal against severity of sentence.

Jurisdiction to nevertheless consider and determine the petition

[38] Notwithstanding his abandoned appeal against severity of sentence in the Court of Appeal, the petitioner, representing himself, seeks the leave of this Court to petition against the length of his sentence on the following ground:

> *"The great disparity of sentence between accused persons charged and sentenced with the same offences compared to the petitioners' sentence which is harsh and excessive because the Learned Sentencing Judge failed to take into consideration the case authorities and other facts provided on behalf of the petitioner."*

[39] The question of whether a new ground of appeal not previously argued and subsequently raised in the Supreme Court could be validly entertained, was most recently considered in *Navuda v State*[2]. In *Navuda,* Keith J referred to a previous decision of the Court in *Vaqewa v The State* [3] 2016. In *Vaqewa,* the Court had considered whether a ground not argued in either the High Court or the Court of Appeal would be entertained. At para 29 Gates P said:

> *"In such circumstances this court would not entertain a fresh ground of appeal unless its significance on the special leave criteria was compelling."*

[40] That reasoning was developed by the Court in *Navuda,* as reflected in the following statement:

> *"…the fact that Akuila Navuda's sole ground of appeal against sentence was not a ground of appeal in the Court of Appeal does not prevent him from seeking to argue it now."*

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[2] [2023] FJSC 45; CAV0013.2022 (26 October 2023)
3 [2016] FJSC 12.

[41] Following the guidance in *Navuda and Vaqewa*, it is appropriate for the Court to consider the petitioner's sole ground of appeal (now revived), in order to assess whether it is of sufficient substance to meet the stringent threshold criteria upon which an application for leave to appeal to the Supreme Court requires assessment.

The grounds advanced in support of the petition

[42] Various grounds were advanced by the petitioner in support of his argument that the sentence he received is harsh and excessive and disparate with sentences for similar offending. His major ground was disparity of sentence when compared with other sentences imposed on persons charged with similar offences concerning abuse of office. Further grounds raised were whether the sentence in count 5 should have been made consecutive to the sentences in counts 7 and 8; whether the sentencing Judge's apparently adverse impression of the petitioner was an extraneous matter; whether there had been a mistake of fact concerning the petitioner's responsibilities and authority in the OR's office; whether counts 1, 5 and 6 (abuse of office for gain) were incorrectly charged if there was no evidence of gain by him; and whether he should have been entitled to a one third reduction in sentence because of his early guilty plea.

[43] The grounds relating to the sentencing Judge's impression of the petitioner; and to an alleged mistake of fact as to his responsibilities and authority in the OR's office; and to the lack of evidence of any gain by him, are frivolous and meritless and do not require a considered response from the Court.

(i) Disparity of sentence compared with similar cases

[44] The petitioner produced a table of cases in which sentences have been imposed for similar charges to those to which he had pleaded guilty. The table is quite comprehensive, in terms of capturing data for sentencing levels in cases of corruption.

[45] The Court invited counsel for FICAC to respond to the petitioner's table of cases in writing and counsel has done so, providing a synopsis of the facts in each case and outlining the

degree of involvement of each offender in each case and the timeframe of over which the offending occurred.

[46] The facts in each of the cases differ and are different also to the facts of the petitioner's case, particularly in relation to the scale of his offending, the huge number of separate offences he committed and the 6 ½ year timeframe over which he committed them.

[47] There are four separate comparative cases in the table of cases, some of which involved a number of offenders working in collaboration. It is useful to briefly state the facts and timeframe over which the offending in each of these cases occurred and the nature of the offending.

1. **Peniasi Kunatuba:** *State v Kunatuba*[4]:
   This case concerned two counts of abuse of office for gain contrary to section 111 of the Penal Code. The amount of funds involved was $18 million and the sentence imposed after trial was four years to be served consecutively. As this was a misdemeanour offence under the Penal Code, it attracted a lower tariff. The accused was employed as the permanent secretary and chief accounting officer for the Ministry of Agriculture. He implemented a free farming assistance scheme for which he did not have Cabinet approval and which was a deviation from the Government accounting regulations. Politicians used the scheme to help their own constituencies and communities and there were serious consequences to the government accounting system.

2. **Peni Mau and Patel***: Fiji Independent Commission Against Corruption v Mau*[5]:
   The two accused were the most senior executives of Post Fiji limited and were convicted of abuse of office for gain, contrary to section 111 of the Penal Code. Post Fiji is fully owned by the Government of Fiji. There was no personal gain involved but the seniority of their positions was an aggravating factor. Their offending concerned a failure to follow proper procedures on the purchase of a Seiko clock for

[4] [2006] FJHC 169
[5] [2011] FJHC 209

$75K from a company of which Mr Patel was the chairman. Their default led to the Board of Post Fiji approving this capital expenditure. The money used for the purchase was not recovered. The accused were convicted after trial. The sentences imposed were nine months imprisonment for Mr Mao and 12 months imprisonment for Mr Patel.

3. **Feroz Jan Mohammed, Iliesa Turagacati and Navitalai Sereivalu Tamanitoakula:** *Fiji Independent Commission Against Corruption [FICAC] v Mohammed*[6]:
   The accused Mohammed owned a company named TF Jan Bulldozing Limited, which through the assistance of Turagacati and Tamanitoakula, obtained $3.13 million from the Public Works Department via bogus claims. Mr Mohammed was charged with 1 count of bribery and one count of obtaining a financial advantage. The amount involved was 3.132 million and he was sentenced to 8 years imprisonment with an order for forfeiture under the Proceeds of Crime Act. Mr Turagacati was charged with 1 count of bribery and 1 count of causing a loss contrary to section 324 (2) of the Crimes Act. He was sentenced after trial to six years imprisonment for receiving bribes to a total amount of $110,100 to facilitate the $3.13 million loss. There was a settlement under the Proceeds of Crime Act. Mr Tamanitoakula was similarly charged with causing a loss contrary to section 324 (2) of the Crimes Act. He had authorised a payment of $2.46 million to TF Jan Bulldozing Limited. These monies were not recovered. He was sentenced to 4 years imprisonment.

4. **Ana Laqere, Amelia Vunisea, Laisa Halafi, Vaciseva Lagai, Vilisi Tuitavuki, Kiniviliame Taviraki and Shalveen Narayan:** *Fiji Independent Commission Against Corruption v Laqere*[7]:

The six accused were charged with abuse of office, causing a loss, and obtaining a financial advantage while performing and discharging duties and responsibilities at various stages in the procurement process. Altogether they facilitated 101 false

[6] [2015] FJHC 479
[7] [2017] FJHC 337

transactions of purchasing stationery and hardware materials to the Divisional Engineer Central Eastern, resulting in the payment out of 60 cheques totalling $362,944.37 to Shavel Stationery, On Time Stationery and Phoenix Hardware. All three businesses were owned by Shelveen Narayan, the eighth accused.

Ana Laqere signed all the cheques as counter signatory. Amelia Vunisea, signed 59 cheques as signatory. Laisa Halafi checked and signed payment vouchers for 13 transactions. Vaciseva Lagai certified payments in 9 transactions, and Vilisi Tuitavuki checked and signed payment vouchers relating to 5 transactions. Kiniviliame Taviraki raised requisition orders for 2 of the transactions.

Additionally, Vilisi Tuitavuki as cashier, issued number of manually written cheques relating to some of the transactions. She then entered incorrect figures and details in the payment cash book concerning two of the cheques. Vaciseva Lagai signed and approved printed purchase orders after they were approved by Ana Laqere.

Following trial the following sentences were imposed.

Ana Laqere as the mastermind of the scheme was sentenced to 10 years imprisonment with a non-parole period of 8 years. Laisa Halafi was sentenced to 10 years imprisonment with a non-parole period of 7 years.

Amelia Vunisea, Vaciseva Lagai and Vilisi Tuitavuki were sentenced to 8 years imprisonment with non-parole periods of 6 years.

Kiniviliame Taviraki was sentenced to 6 years imprisonment with a non- parole period of 4 years.

[48] All four of the above cases turned on their own facts, as does the petitioner's case. There is nothing in the cases to suggest disparity, or that he has been treated more harshly, or that his sentence is out of range or manifestly excessive. The degree of deception, the magnitude of his offending over a 6 ½ year period and his position of high authority and trust place his offending in a category of its own.

[49] This ground of appeal cannot succeed.

(i) Whether the sentence in count 5 should have been consecutive to the sentences in counts 7 and 8?

[50] The Judge clearly explained his reasons why the sentence of 14 years' imprisonment for abuse of office for gain in count 5 would be served consecutively with the sentences in counts 7 and 8, and in doing so he had express regard to the totality principle.

[51] The judgment in *Dakuidreketi v Fiji Independent Commission Against Corruption (FICAC)*[8] provides sound reasoning in its explanation of the totality principle, by reference to relevant international authorities:

> *"[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] NZCA 33; (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*

[8] [2018] FJSC 4

involves a significant measure of discretion and accumulation of individual sentences according to the particular circumstances of each case (Nguyen v The Queen [2016] HCA 17; (2016) 256 CLR 656, para 64)).”

[52] The following statement in *Koroikakau v The State*[9] is also apt:

> *“When a sentence is reviewed on appeal, ... it is the ultimate sentence rather than each step in the reasoning process that must be considered.”*

[53] It is abundantly clear from the careful and thorough exercise conducted by the learned Judge in computing a sentence appropriate to the gravity of the petitioner’s offending, that he was very mindful of the totality principle. The aggregate sentence had to reflect the overall seriousness of the petitioner’s offending, which was grave indeed. The end sentence arrived at appropriately met this object. It was proportionate to the gravity of the petitioner’s offending. It was neither wrong in principle nor manifestly excessive. Nor was is it excessively harsh compared with the sentences in the corruption cases to which the petitioner drew the Court’s attention and are referred to in paragraph 47 (1) (2) (3) and (4) **above**.

[54] This ground of appeal cannot succeed.

(ii) Should there have been a greater discount given for the early guilty pleas?

[55] Provision for discounting a guilty plea is found in section 4(2)(f) of the Sentencing and Penalties Act. It is a discretionary exercise and thus very much a factor for the individual sentencing judge to assess.

[56] In assessing an appropriate discount in the petitioner’s case, the learned Judge paid careful regard to the leading authorities in *Aitcheson v State*[10] and *Mataunitoga v State*[11] and in particular to the statement of Chief Justice Gates in *Aitcheson* case, that a careful appraisal

[9] [2006] FJSC 5 at para 13
[10] Criminal Petition CAV 012 of 2018, Supreme Court Suva
[11] Criminal Appeal N0. AAU 125 of 2013

of all relevant factors is the correct approach and "*In cases of abhorrence or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably*."

[57] The high-water mark of a 3-month discount for an early guilty plea was clearly out of the question in the petitioner's case, given the extremely serious aggravating factors of the number of offences and the timeframe over which his offending occurred. It is not unduly cynical to opine that the petitioner would likely still be offending in the same manner had his corrupt activities not been uncovered when they were. The effect of his early guilty pleas was considerably diluted by the inevitability of conviction had the matter gone to trial. The Judge allowed a very small discount of 2 months for the guilty pleas and his exercise of discretion in that regard cannot be seen as manifestly inadequate.

[58] The Judge also factored into the equation that the petitioner was a first offender and allowed a separate discount of 1 month for that. Allowing him any discount for that could be considered a leniency, given his offending had spanned seven and a half years and involved 1415 separate and carefully constructed fraudulent transactions, involving a high degree of premeditation and careful planning. While he was given credit for being a first offender, in truth he was only appearing before the Courts for the first time because he had managed to conceal his serial offending so successfully for so many years. His deception was such that he was able to avoid his activities being uncovered years' earlier.

(iii) The non-parole period:

[59] The one-year non-parole period allowed by the Judge, resulting in an effective sentence of 22 years imprisonment, is a cause of concern, given the length of the head sentence and the proximity of the non-parole period to that head sentence. In the 2016 decision in *Bogidrau v The State*[12], Keith J expressed the view that a non-parole period should not be set too close to the head sentence, citing the earlier reasoning of Calanchini P in *Tora v The State*[13]:

[12] [2016] FJSC 5 at para 4
[13] [2015] FJCA 20 at para 2

"The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent."

[60] The question of the proximity of a non-parole period to a head sentence was most recently discussed in detail in *Inoke Ratu v State*[14] (per Keith J). In that case, the non-parole period had been fixed at one year less than the head sentence. Keith J's observations on the issue were:

> *"33. The fixing of a non-parole is an innovative feature of Fiji's criminal justice system. Its purpose is well-established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the grant of parole or the practice of remitting one-third of the sentence for "good behaviour" in prison. However, since a Parole Board has never been established in Fiji, the only route by which an offender can be released earlier than the expiration of his head sentence, but for a non-parole period being fixed in his case, is by the operation of the practice relating to remission of sentence: see Ilaisa Bogidrau v The State [2016] FJSC 5 at para 4.*
>
> *34. One of the issues on this appeal is whether there was an insufficient gap between the non-parole period and the head sentence. The fixing of a non-parole period has been a source of much litigation and legislative intervention in recent years. Many different issues needed to be resolved. In the recent case of Akuila Navuda v The State [2023] FJSC 45, I said at para 47:*
>
> > *"The resolution of these issues resulted in some of the court's original pronouncements about the non-parole period being lost sight of. One was important for this case. It was that the non-parole period should not be too close to the head sentence. As Calanchini P (as he then was) said in Tora v The State [2015] FJCA 20 at para 2:*
> >
> > > *'The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent.'*
> > >
> > > *Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave*

[14] Criminal Petition No. CAV 0024 of 2022, 25 April 2024.

> *themselves in prison, and the advantages of incentivizing good behaviour in prison by the granting of remission will be lost."*
>
> *These observations apply with equal force to Inoke's case. Mr Vosawale agreed. He accepted that the difference between the non-parole period and the head sentence was too short. It should have been longer. If the head sentence had been what the Court of Appeal reduced it to – 12 years' imprisonment – the non-parole period should have been fixed at, say, 10 years. However, now that the head sentence should be 8 years' imprisonment, I think that the non-parole period should be 6 years and 6 months, subject, of course, to the need to reflect the length of time Inoke was in custody on remand awaiting trial. A non-parole period of 6 years and 6 months is itself 14 months longer that Inoke would have had to serve if he had been entitled to one-third remission."*

[61] In the petitioner's case the Court has reached the view that a non-parole period of only one year is manifestly inadequate and results in a sentence that is crushing. Although there has been no restitution of the embezzled funds, the petitioner in his 100 page caution interview with FICAC officials gave some explanation as to how the stolen funds had been dissipated and frequently expressed contrition and remorse. He is still a relatively young man. It is to be hoped that redemption will ultimately be possible, and he will emerge from serving his time to be a useful citizen. To assist in realising that hope the Court is of the view that a non-parole period of 3 years is appropriate.

Result

[62] Leave to appeal against sentence is granted on the basis that a substantial and grave injustice may otherwise occur. While the appeal against sentence was not pursued in the Court of Appeal it does involve a substantial question of principle affecting the administration of criminal justice. The appeal against sentence is allowed and in substitution a sentence of 23 years imprisonment is imposed with a non-parole period of 20 years.

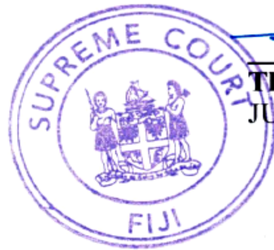
<u>Qetaki, J</u>

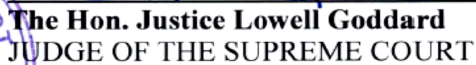
[63] I have read the judgment of Honourable Justice Goddard in draft, and I agree with it, the reasoning and orders.

Orders of the Court:

1. Leave to appeal is granted.
2. The appeal against sentence is allowed.
3. Sentence: 23 years imprisonment with a non-parole period of 20 years.

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT





The Hon. Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

The Hon. Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT

Solicitors:

Petitioner in person
Fiji Independent Commission Against Corruption Legal for the Respondent