

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

Court of Appeal No. AAU 0099 of 2014
(High Court Case No: HAC 26 of 2014)

BETWEEN : KENI DAKUIDREKETI

Appellant

AND : FIJI INDEPENDANT COMMISSION AGAINST
CORRUPTION

Respondent

Coram : Calanchini P
Basnayake JA
Bandara JA

Counsel : Mr. B.P. Keene Q.C. with Ms. M.E. Cole and Ms. P. Low
for the Appellant.
Mr. M. Blanchflower with Ms. E. Yang and Ms. F. Peleiwai
for the Respondent.

Date of Hearing : 6 & 7 February 2017

Date of Judgment : 14 September 2017

JUDGMENT

Calanchini P

- [1] I have read in draft form the judgment of Basnayake JA and agree that the appeal against conviction and sentence should be dismissed.

Basnayake JA

- [2] This is an appeal against the conviction and the sentence of the accused appellant (accused) (on 6 August 2014) by the High Court of Fiji. The accused was charged with five counts of “*abuse of office*” contrary to section 111 of the Penal Code (now repealed). After trial, the accused was found guilty unanimously by the assessors for the offence of abuse of office (misdemeanour). The learned High Court Judge, acting in terms of Section 237 (4) of the Criminal Procedure Act, found the accused guilty of all five charges of abuse of office for the purpose of gain and sentenced him to 6 years imprisonment with a non-parole period of 5 years.
- [3] The original notice of appeal contained twenty eight (28) grounds against the conviction and one ground on the sentence. At the hearing of the leave to appeal application, the accused confined the appeal to seven grounds on the conviction and a single ground on the sentence. Leave was granted on 24 March 2016, on the grounds so relied on. Written submissions were filed thereafter for the accused and the respondent.

The grounds of appeal

- [4] In the written submissions tendered for the accused dated 9 January 2017, the grounds relied on by the accused have been reduced to six. They are as follows:-
- (a) The accused was not employed in the public service as a director of VDCL and so cannot be guilty of the offence of abuse of office for acting in that role (Public Service issue).
 - (b) FICAC did not prove the necessary criminal intent to make his acts arbitrary as required by the offence (Intent issue).
 - (c) FICAC’s case that money paid by NLTB to VDCL was NLTB trust money is wrong. To the contrary it was paid and received as paid up capital in VDCL (VDCL Capital issue).

- (d) FICAC did not prove any relevant purpose of gain to PCX as was the clear view of the Assessors (Gain issue).
- (e) The trial Judge has erred by applying principles relating to the common law offence of misconduct to public office when sections 4 and 111 of the Penal Code do not reflect the language of the common law tests of public service nor the offence of misconduct in public office (Departure from Statutory Code issue).
- (f) The sentence is based upon wrong principles (cumulative) and is excessive (Excessive Sentence issue).

The counts

[5] The accused was charged with Mr. Bakani in the same indictment. Counts 1, 3, 5, 7 and 9 were against Mr. Bakani who pleaded guilty to all of them. The accused was charged with counts 2, 4, 6, 8 and 10, which are as follows; (For the purpose of completion I will mention one charge in verbatim and give only the relevant particulars of the other charges. All those charges mentioned the fact that the accused whilst being a Director of NLTB and the Chairman of VDCL, in abuse of authority of office committed an arbitrary act for gain);

- 2. Between 31 March 2004 and 21 September 2004 at Suva, in the Central Division, while being employed in the public service as the Director of the Native Land Trust Board and Chairman of Vanua Development Corporation Limited, in abuse of the authority of his office, did an arbitrary act for the purpose of gain, namely, facilitated a loan of \$2,000,000.00 FJD to be made by Vanua Development Corporation Limited to Pacific Connex Limited, which was prejudicial to the Native Land Trust Board and indigenous Fijians.
- 4. Between 16 November 2004 and 29 November 2004, facilitated a loan of \$900,000.00 FJD to be made by Vanua Development Corporation Limited to Pacific Connex Limited, which was prejudicial to the Native Land Trust Board and indigenous Fijians.

6. Between 28 February 2005 and 28 April 2005, facilitated a Government Grant of \$1,000,000.00 FJD disbursed to Vanua Development Corporation Limited through the Native Land Trust Board to be used as security for a loan provided to Pacific Connex Limited by Dominion Finance Company Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.
8. Between 27 April 2005 and 3 July 2007 facilitated a Government Grant of \$1,000,000.00 FJD disbursed to Vanua Development Corporation Limited through Native Land Trust Board to be used as security for overdraft and loan facilities provided to Pacific Connex Limited by the ANZ banking Group Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.
10. Between 23 September 2005 and 29 September 2005 facilitated a loan of \$1,000,000.00 FJD to be made by Vanua Development Corporation Limited to Pacific Connex Limited, which was prejudicial to Native Land Trust Board and indigenous Fijians.

Submissions of the learned counsel for the accused (appellant)

- [6] The learned counsel for the accused submitted that the section under which the accused was charged with (section 111 of the Penal Code) covers acts done and not failure to act. The accused was however charged in an amended indictment for facilitating loans to be made to PCX by VDCL or facilitating Government Grants to be used as security for overdrafts and loans obtained from Dominion Finance or ANZ Bank, thus bringing the positive role played by the accused. The positive acts done by the accused were either approving the loans or signing the cheques etc. The learned counsel also appears to have omitted to address in both the oral and written submissions on ground (e). I have noted that the learned counsel for the respondent too had mentioned that fact and avoided making oral submissions on ground (e). I presume the learned counsel for the accused has thus abandoned the same.

- [7] Referring to the ground relating to the public service (ground (a)), the learned counsel made reference to section 4 of the Penal Code and submitted that VDCL was a private limited liability company. He submitted that in terms of Articles 72 and 73 (Ex. P4 (pg. 664) of the VDCL, the directors can be appointed by its shareholders. It was further submitted that the maximum number of directors is seven and this number cannot be exceeded. Already there were seven directors and the accused is not one of them. The accused was appointed a director by the NLTB, who is not a shareholder. The learned counsel submitted that being a director of a private limited liability company, the accused does not fall within section 4 of the Penal Code. The section is as follows:-

“The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment...”

The learned counsel submitted that the accused cannot be convicted of abusing the authority of an office to which he was not appointed. Article 97 of the VDCL's Articles of Association is also to the same effect and the learned trial Judge had adverted to this in his judgment.

- [8] On ground (b), namely, the intent issue, the learned counsel submitted that there is no direct evidence at all to support a finding that the accused had an improper motive at the particular times the loans to PCX were made. He further submitted that all of the loans to PCX had VDCL Board approval. None were authorised solely by the accused. The process followed in considering and granting the loans to PCX was not “autocratic”.
- [9] With regard to the capital issue (ground (c)) the learned counsel submitted that although the prosecution case is that funds transferred by NLTB to VDCL were all trust funds, they were received by VDCL as paid capital. The \$ 7.7 m was received from NLTB Finance Division and thus were its “own Funds” and not funds held in trust for landowners. It was further submitted that the NLTB held its own money in its Finance division and other people's money in its Trust Section.

- [10] On ground (d), namely the gain issue, the learned counsel submitted that at the time of granting loans to PCX, the VDCL was assisting its 51% owned subsidiary to achieve its business plans and fulfil its contractual obligation to NLTB. The learned counsel also submitted that for the presumption of gain to arise the benefit in question must be illicit.
- [11] On the sentence (ground (f)) the learned counsel for the accused submitted that the sentence imposed is manifestly excessive. The accused was imposed with consecutive sentences of 18 months each on counts 2, 4 and 10. On counts 6 and 8, the sentence imposed was 18 months on each count, which was to run concurrently. This 18 month sentence imposed on counts 6 and 8 was to run consecutive to the sentences imposed on counts 2, 4 and 10. Thus the total period of sentence was 6 years with a non-parole period of 5 years.
- [12] Counts 2, 4 and 10 are on facilitating to the granting of loans to PCX. Counts 6 and 8 are concerning the use of the \$1 m grant used as security for PCX's debt with Dominion Finance and thereafter with ANZ. Consecutive sentences were imposed on counts 2, 4 and 10 on the basis that they are separate transactions committed on different dates in abuse of authority. The maximum sentence that could be awarded under section 111 of the Penal Code for the offence of felony is 3 years. The learned counsel relying on Archbold (2012 edition at 5-588 pg.732) citing **R v Lawrence** 11 Cr. App. R (S) 580 submitted that consecutive terms should not be imposed for offences which arise out of the same transaction or incident, whether or not they arise on precisely the same facts, but much is left to the discretion of court. It was further submitted that in sentences delivered in previous cases the applicable tariff was 12 months concurrent for all charges.
- [13] The learned counsel submitted that each charge is essentially related to the same transaction. However counts 2, 4 and 10 are concerning three different loans of different amounts granted on different dates and it is not correct to assume that the offences involving counts 2, 4 and 10 arose in the same transaction. The case of **R v Lawrence** (supra) could be relied on if the facts relating to those charges formed the same transaction. It does not. The learned counsel also submitted that the learned trial Judge

had failed to properly apply the “totality” principle and had not properly applied the principles of consecutive and concurrent sentencing.

The events leading to the commission of the offences

- [14] The NLTB is a Board of Trustees established under the Native Land Trusts Act. It controls all native lands vested in it and administer such lands for the benefit of Fijian owners. The trusts funds of NLTB consist of Extinct Mataqali Funds (EMF) and its investments. EMF were funds kept by the NLTB until the extinction of Mataqali was confirmed whereupon they were transferred to the Fijian Affairs Board (FAB). Until 2003 the NLTB held these funds in bank accounts and unit trusts such as Fijian Holdings LTD. As it was a trustee for the funds it could not invest them in order to achieve greater rate of return.

Vanua Development Corporation Limited

- [15] In 2003 the NLTB had created Vanua Development Corporation Limited (VDCL) a limited liability company. VDCL was established for a public purpose (NLTB board paper 31- 2003 (Ex- P 11- R 3 pp 737-747)).

*“The main object of VDCL is to **invest the funds it receives from NLTB to generate additional revenue for the board.** Additional revenue is needed to among others, to finance initiatives the Board wants to undertake **for the benefit of the land owners.** Also if well endowed financially NLTB can enjoy greater autonomy in its operation. Another objective of VDCL is to **properly manage land owners investments in the Trust Fund.** Between \$ 9-12 m is usually in the trust fund at any time. If managed professionally earnings on this **Fund can increase**”* (emphasis added).

- [16] With the establishment of VDCL the NLTB had transferred its funds consisting of EMF deposited with various financial institutions totalling over \$ 3,400,000.00 as well as its

investments totalling \$ 3,100,000.00 to VDCL (Ex-P 11). The NLTB had also transferred to VDCL, \$ 1 Million FJD that it received from the government as a grant. These funds were held by VDCL in trust for NLTB and indigenous Fijians.

- [17] The NLTB appointed the accused, who was already a director of the NLTB as Chairman of VDCL with four others as Directors. One of the directors was Mr. Bakani, the first accused, who was the General Manager of NLTB.

Pacific Connex Limited and the award of NLTB to upgrade its IT (information technology) system

- [18] In 2003, the NLTB decided to upgrade their IT system. In January 2004 the NLTB put out tenders for computer companies to bid on this contract. A number of computing companies put in tenders including TUI Consulting Inc. (TUI Consulting). TUI was a US company. Balu Khan (Khan) was its Chief Executive Officer. Khan was also a Director/Chairman of Pacific Connex Limited (PCX). TUI/PCX and a short list of other companies made presentations to NLTB. TUI/PCX was awarded the tender. Khan offered VDCL a joint venture enjoying a majority share of 51%. The balance 49% was to remain with Khan. VDCL Board agreed to this proposal on 11 February 2004. In July 2004, VDCL appointed the accused, Mr. Bakani and another as Directors of PCX. They were paid an allowance. Thus the accused was in a unique position, being a Director of NLTB, Chairman of VDCL and a Director of PCX.

- [19] The appellant attended PCX Board meetings. He knew the operations of PCX and its financial situation. He participated in the discussions and PCX's board decisions to request VDCL for loans and security for its banking facilities. These decisions were taken with the participation of the accused as a director of PCX who is also the Chairman of VDCL. The accused and Mr. Bakani had a responsibility to report to NLTB about VDCL affairs and investments and PCX affairs and its (PCX's) financial problems. The accused had failed to provide material and timely information to NLTB about VDCL's loans to PCX and provision of security for PCX banking facilities. The accused also did not

provide material and timely information to the VDCL Board on PCX's financial problems. The case against the accused is that while knowing the financial crisis of PCX with regard to handling their day to day operational costs, continuing to support PCX especially with regard to matters involved in the charges and for not providing true and accurate information about PCX to NLTB and VDCL.

The summary of the prosecution case based on the evidence adduced on the counts separately

Count 2

- [20] Count 2 is about facilitating a loan of \$2 million by VDCL to PCX. There was a discussion to upgrade the NLTB computer system. At an extra-ordinary meeting held on 12 March 2004 where the accused and Mr. Bakani were present, there were queries about the costs the NLTB is to commit to this project. At this meeting Khan gave a clear assurance that the upfront costs of \$ 4.6 Million would be borne by PCX (P 31 Minutes). With this assurance the NLTB Board assigned the contract to PCX. At this meeting the accused commended the management for taking a bold decision to upgrade the computer system.
- [21] On 31 March 2004, the Chief Financial Officer of PCX, Mr. Jager makes a request to the accused in writing for a loan of \$ 2 million with no mention of the undertaking of Khan made on 12 March 2004. The VDCL board (P 45) approved the loan on 23 June 2004. The accused does not say a word about the undertaking of Khan. Only the accused and Mr. Bakani were aware of the undertaking. The accused had a duty to inform the board about the undertaking (VDCL board member Mr. Whippy's evidence).
- [22] The loan proposal was on 31 March 2004. There were NLTB meetings on 6 May 2004, 24 June 2004 and 26 August 2004. The loan was approved by the VDCL on 23 June 2004. The proposal or the approval were not intimated to by VDCL to the NLTB Board

members. The gain was to PCX. It obtained a loan it was not entitled to. The loan was to be repayable in two years. This loan was never paid.

Count 4

[23] Count 4 is a loan for \$900,000.00. This loan was approved by the accused, Mr. Bakani and Mr. Kaloumaira, another member of the VDCL board. This is the second time the accused withheld knowledge that the proceeds had been used for a PCX loan. The accused knew that in August 2004, the PCX had a \$ 310,000.00 loan and \$ 2 million loan from Merchant Finance. In September 2004, the PCX had approved \$ 1 million from Dominion Finance. In September 2004, Mr. Jager had noted that despite \$ 1 million from Dominion, ongoing funding is a continued concern and Khan had requested the Directors to consider all funding options to assist PCX. On 18 November 2004 the accused had signed on behalf of VDCL the deed of assignment under the Business Solution Agreement. Again the PCX gained.

[24] On 30 November 2004, the PCX had a debit bank balance of \$ 357,000.00. It returned to a credit balance of \$ 500,000.00. The next day \$ 450,000.00 had gone to a company belonging to Khan (PCMS) and three days later again it had returned to a debit balance. PCX had defaulted this loan too.

Count 6

[25] In respect of count six; the accused knew that PCX was heavily indebted. The accused was aware of what the PCX board was informed (Ex- P 100) that, "*February (2005) was not a very good month for PCX*". On 22 February 2005 the accused signed the Memorandum of Agreement between the Government and the NLTB for 2005 Grant (Ex-99). It stipulated that the funds VDCL received from NLTB were to be invested to generate additional revenue for NLTB. At that time the PCX had \$ 1 million loan from Dominion Finance which it was unable to repay by the due date of 31 January 2005. It had to roll over settlement of the loan to February 2005. PCX was unable to repay on 28

February 2005. PCX requested and the Dominion agreed to extend the loan until 15 March 2005 subject to the deposit of funds with Dominion Finance by 15 March 2005. On 7 March the Dominion confirmed that it agreed to the \$ 1 million loan being extended until 15 March 2005 “subject to NLTB placing deposit funds with Dominion Finance on the same date (15 March 2005) and the payment of a \$ 40,000.00 extension fee (Ex-P 102 pg. 1272 R-5).

- [26] On 14 March 2005, Mr. Bakani instructed Mr. Boila (VDCL actg. Board Secretary) to issue on NLTB cheque payable to VDCL. On 15 March 2005 Mr. Boila (P.W. 5) picked up \$1 a million cheque for NLTB’s 2005 Government Grant. On 16 March 2005 the funds were credited to the VDCL bank account. The VDCL Board met on 16 March 2005. It was only the accused, Mr. Bakani and Mr. Kaloumaira that attended this meeting. The Board approved to deposit \$1 million with the Dominion Finance. On the same day it was deposited with the Dominion Finance. The PCX and the VDCL agreed to maintain the deposit with Dominion Finance until the PCX loan was repaid. Thus the VDCL’s term deposit of \$ 1 million was used as security for the extension of PCX’s loan.
- [27] The abuse by the accused was to facilitate the deposit of the 2005 Government Grant with Dominion Finance as security for the extension of PCX’s loan with Dominion Finance. The other Board members, namely, Mr. Patel and Mr. Whippy were not informed that PCX was unable to pay its loan from Dominion Finance on its due dates or that the Government Grant of 2005 was used to secure the extension of PCX’s loan.

Count 8

- [28] Count 8; On 28 April 2005 VDCL withdrew \$ 1 million (Government Grant) from the Dominion Finance before its intended maturity date and transferred the sum to a term deposit with ANZ at .75% interest per annum. The term deposit was a guarantee for PCX’s overdraft facility with ANZ. There is no evidence of VDCL Board approval for the deposit of \$ 1 million with ANZ as security for PCX’s overdraft and loan facilities (The approval of only three directors namely the accused, Mr. Bakani and Mr.

Kaloumaraia were taken. Mr. Patel and Mr. Whippy were unaware). Thus the accused facilitated the use of \$ 1 million Government Grant as security for PCX's overdraft facility.

- [29] If this facility was not granted one could imagine the plight of PCX. To that extent it was a gain for PCX. The VDCL could not use these funds to make investments which was the objective of the grant thus causing prejudice to NLTB and the indigenous Fijians. PCX was unable to repay the loan. In July 2007 a majority of the \$ 1 million was used to pay the outstanding balance of PCX's loan with ANZ. Only \$ 108,939.19 remained.
- [30] The accused' abuse was to facilitate the use of \$ 1 million as security for extensions of PCX's overdraft with ANZ. The accused, although he attended NLTB meetings where VDCL and PCX draft financial statements were discussed, he did not inform NLTB that \$ 1 million was used to secure PCX's overdraft facility with ANZ or PCX's true financial situation or that PCX depended upon loans for its operational expenses.

Count 10

- [31] During PCX meeting on 25 July 2005, the corporate report of PCX was presented. The report recorded that, "*the revenue level remains below budget*". On 1 August 2005 ANZ extended PCX's OD facility. During PCX's board meeting on 12 September 2005, the directors discussed PCX's funding arrangements which were at a critical stage as refinancing of the NLTB costs had not been complete. This has resulted in constraints on PCX's operating cash flow. PCX had a contract with Vinod Patel. Patel withheld payment to PCX. On a request for a loan of \$ 1 million to pay its debts with Vinod Patel, the accused facilitated the loan with his approval (Ex- P 160), signing the loan agreement on behalf of VDCL and signing VDCL cheques for the loan.
- [32] The accused did not inform NLTB of this VDCL loan. The gain for PCX was to obtain the loan within the time period. PCX did not repay the loan. By October 2006, almost all of VDCL's funds were committed to PCX with \$ 3.9 million in loans and \$ 1 million as

security for PCX's overdraft facility with ANZ. As a result VDCL was unable to make other investments. VDCL did not receive any dividends from PCX (P 192) and did not receive interest payments on its loans to PCX. Interest only accrued (P 189) (P.W. 10 and 11 at pgs. 3714 and 3841 (HCR-13)).

[33] In the 14 NLTB board papers and meetings from 6 May 2004 to 24 August 2006, there was no mention in any of the board papers or minutes of the meetings about VDCL's loans to PCX or the use of the \$ 1 million 2005 Government Grant as security for extension of PCX's loan with Dominion Finance and PCX's OD/loan facility with ANZ or PCX's financial problems or PCX's loans with financial institutions or Banks or PCX being unable to pay its OD facility with ANZ.

[34] All these charges are concerning funds of VDCL. The beneficiary of all these funds was PCX who got enriched at the expense of NLTB and indigenous Fijians. All that VDCL owned belonged to NLTB. VDCL is a company formed by a Resolution of the NLTB. The prosecution case is that all these transactions were made possible or facilitated by the accused and Mr. Bakani. Knowing very well the dire financial situation of PCX, the accused and Mr. Bakani kept supporting PCX to obtain financial assistance from VDCL with no return which caused financial loss to NLTB and indigenous Fijians. The learned Judge thus found that the actions of the accused and Mr. Bakani were done in order to obtain a "gain".

Section 111 of the Penal Code

[35] The accused was charged under section 111 of the Penal Code which states thus:-

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

This section requires proof of five elements, namely;

1. Whether the accused was employed in the **public** service,
2. That he did an **arbitrary act**,
3. The act was in **abuse of the authority** of his office,
4. The act was **prejudicial to the rights** of another,
5. It constitutes a felony where the act was done for the purpose of **gain**.

(Laisenia Qarase v Fiji Independent Commission Against Corruption (AAU 66 of 2012 (30 May 2013)), Inoke Devo v Fiji Independent Commission Against Corruption (AAU 104 of 2015 (23 February 2017))

Public Service

[36] The accused was appointed a member of NLTB in terms of section 3 (1) of the Native Land Trust Act. There is no dispute that the NLTB is a public body. In terms of section 4 of the Penal Code the accused having been appointed “*under the provisions of any Act*”, was held to be the holder of a public office. The issue was with regard to the chairmanship of the accused at VDCL. VDCL is a limited liability company. However VDCL is required to submit their financial reports to NLTB for inspection (Ex. 92 & 133). The shares of VDCL were held in trust for NLTB (Ex 14). Being a Chairman of a limited liability company registered under the Companies Act 1983, the defence argument is that the accused was not employed in the public service.

[37] A similar issue arose in Qarase v FICAC (supra) where Fiji Holdings Limited was held to be a unique company although incorporated as a private company. The objective of VDCL is to invest funds that it receives from the NLTB. The purpose is to generate more funds for the Board. Additional revenue is needed *inter alia* to finance initiatives the Board wants to undertake for the benefit of land owners (Ex-11-NLTB Board paper No. 31/2003).

[38] Vanua Development Corporation Limited (VDCL) is considered as the commercial vehicle for NLTB and as trustee for Fijian landowners (Ex-3 VDCL Memorandum of Association). The paid-up capital of VDCL was \$7.7 Million FJD. All these funds belonged to NLTB. VDCL was formed by a Resolution of NLTB. The accused was appointed Chairman of VDCL by a NLTB Resolution on 8 December 2003 ((Ex-9).

[39] The following facts also will show the special public nature of VDCL distinguishing it from other private companies:

1. NLTB employees were made VDCL shareholders. They held the shares and all property of VDCL in trust for NLTB, and exercised their powers and duties under NLTB direction (Ex P 6A, Deed for holding shares in trust (Supplementary Record pages 1-6).
2. NLTB (as opposed to its nominee shareholders) appointed all directors of VDCL. The original seven directors were NLTB employees. There is no evidence of the existence of the original seven directors excepting Mr. Bakani who was one of the seven original directors.
3. NLTB (as opposed to its nominee shareholders) supplied all the funds for VDCL to invest.
4. NLTB paid the salary of VDCL's Board Secretary (Transcript (pw6 Pg. 3364 (R/13)).

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

have an interest in the duties he discharges, he is a public officer” (**R v Bowden** [1996] 1 Cr App R 104, 109, **R. V Cosford** [2013] 2 Cr App R 8).

- [41] The learned Judge held that, *“If any person, whilst holding an office of trust concerning the public and performs a duty of public nature and receives a grant or remuneration whether directly from the State or otherwise, pursuant to section 4 of the Penal Code, he holds a public office”*. Thus he held for the purposes of the charges that the accused being the Chairman of VDCL, held “public office”.
- [42] It is abundantly clear the public nature of this company. The shareholders were only name sake and without any authority. There is no evidence of any shareholders meetings. All the funds of the company belonged to the State. There is no evidence of distribution of dividends among shareholders. As already mentioned the Chairman and the Directors were appointed by the State. The public nature of the company is visible on a perusal of the Memorandum. There is no dispute with regard to the public nature of NLTB where the accused had been a director. VDCL was a brainchild of NLTB. The accused was made the Chairman of VDCL by virtue of his being a director of NLTB. In the event of removal from the directorship of NLTB, the accused would have naturally lost the chairmanship of VDCL too. Therefore the argument that the accused was not a public officer cannot hold water. With that the accused became accountable to the public, to the company where he held the chairmanship, to NLTB and the indigenous Fijians with whose trust funds the company functioned.

Arbitrary Act

- [43] An arbitrary act has been described as *“an unreasonable act, a despotic act, an act which is not guided by rules and regulations but by the wishes of the accused”* (**Inoke Devo v Fiji Independent Commission Against Corruption** (supra)). The arbitrary act committed in the above case by the accused who was the Commissioner Central and who had the authority to issue liquor licences was to use the official vehicle and the staff to collect liquor from various outlets for office parties. In **Tomasi Kubunavanua v The**

State (Criminal Appeal No. AAU0008 of 1992 (5 May 1993)) a police officer was charged under section 111 for removing a screen and a video deck, productions in a pending case, from the exhibit room of the police station. "*Arbitrary act*" has been interpreted by court as nothing more than the exercise of one's own free will.

[44] The Court of Appeal Qarase's (supra)) considered favourably the following statements as interpreting "*arbitrary act*". "*An autocratic act, an act not guided by normal procedures but by the "whims and fancies" of the accused*"; Jesuratnam J in State v Humphrey Kamsoon Chang (HAC 0008 of 1991 (1 Nov 1991)). An arbitrary act was said to include an unreasonable act, a despotic act which is not guided by rules and regulations but by the whims of the accused (The State v Rokovunisei (HAC 37 of 2010 (26 April 2012))).

[45] The learned trial Judge in the case under consideration in his summing-up explained "*Arbitrary Act*" as an act of omission or commission of one's own free will without being guided by the rules and regulations, but by his own whims and fancies. In the five charges the 'arbitrary act' material to this case denotes the 'facilitation' of loans to PCX, either directly from VDCL or through Dominion Finance and ANZ.

Abuse of office

[46] In Beniamino Naiveli v The State (1995 FJSC 2, Criminal Appeal No. CAV0001 of 1994 (23rd November 1995)) where an Assistant Commissioner of Police was charged under S.111 it was stated that: "Central to the commission of any offence under s.111 is the doing or directing to be done of an arbitrary act, "in abuse of the authority of" the accused's "*office*". What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power of authority of an officer of the public service, will constitute an abuse of office, if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office.

No doubt other instances may be given. But it would be unwise for us to attempt an exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression "*abuse of the authority of his office.*"

[47] According to the learned Judge, the unsatisfactory financial position of PCX was evident through the evidence of Mr. Saukawa, Mr. Boila, Mr. Whippy, Mr. Patel and ANZ Bank officials. The learned High Court Judge while describing the abuse of authority stated in paragraph 17 of the summing-up, "*When someone uses his position for some illegitimate agenda, some reason which is not proper according to institutional procedure, he acts in bad faith, for an improper motive to harm someone or show someone an advantage or favour....To decide what is an abuse of office you need to consider what motivated the accused to act in the way he did. If he had some improper motive or acted in bad faith and used his position to achieve that motive, then this element is proven. In order to understand what the accused had in his mind, you need to look at all the evidence and draw your own conclusions about his motives. His motives may lead you to decide whether he acted in abuse of office or not*".

[48] What is the state of mind of the accused? Knowledge of the distressful financial position of PCX. He is with authority being the Chairman of VDCL. He thought that he could do anything with the funds that poured into VDCL and act according to his whims and fancy. That's how, I think, the acts of the accused comes within the ambit of Naiveli (supra) that, "*what differentiates something done in abuse of office in many cases will be the state of mind of the accused*". "*The act complained of should be done under colour of his office. This would mean that the act complained of should be done under colour of his office where use is made of such office by the accused*" (Qarase) (supra).

[49] The question for the learned Judge was to find out whether the accused had any knowledge about the exact financial situation of PCX. "If the existing circumstances show either affirmatively or can be inferred through circumstances that the accused had actual knowledge of the facts or he wilfully shut his eyes to the obvious truth or did not make queries either wilfully or recklessly, as expected from a honest and reasonable man,

it is the obvious conclusion that he had the “*knowledge*” of the existing situation. The learned Judge asked the question why the accused maintained a “*stoic silence*” when questions were raised by other Directors about the financial situation of PCX. It was due to improper motive. The accused could not have been a stranger to his role as the Chairman of VDCL.

- [50] The learned Judge was of the view that the accused must be quite privy to what existed in PCX compound as he was absent only once out of ten Board Meetings of PCX held in 2004 and 2005. Thus while possessing the requisite knowledge of the negative financial status of PCX, why did he contribute or facilitate on each and every instances of the charges to achieve what PCX anticipated. Why did he not state his knowledge about PCX with NLTB or VDCL. Why did he not break the shackles at least when Mr. Whippy raised his concerns?
- [51] Being a very high competent businessman for over decades, how did he fail to understand that from its very first business deal with NLTB, PCX was running the show on borrowings through various financial institutions, including VDCL, without a proper cash flow; Was he mindful that when PCX was expecting NLTB’s first payment in January 2005 as its only income, its borrowings ran up close upon \$5 Million; Why did he not enlighten VDCL and NLTB that PCX’s original IT scheme is not a success and PCX was moving towards the “*3G wireless Mobile Licence*” as an alternative way out?
- [52] The learned Judge held that it is with all these rational questions that this court has to decide whether the acts of the accused to facilitate the financial transactions in the five counts were rational and business investment oriented decisions with an honest belief. The learned Judge held that the answer is straight forward. The accused was acting with an “improper motive” at all material times. It is that improper motive that amounts to an abuse of authority of his office. His action clearly demonstrates that he simply acted according to his own free will or rather arbitrarily, without honouring his “fiduciary duties” towards VDCL and NLTB or the objectives and values of those institutes. The results of the actions of the accused no doubt has prejudiced the rights of NLTB and

indigenous Fijians. Whatever the money lost, approximately around \$5 Million FJD, would have been used for the benefit of the concerned parties, had it not been wasted as a result of the accused' arbitrary acts which amounted to abuse of authority of his office.

[53] The attention of the learned Judge had been drawn to the following transactions, namely:

1. VDCL loan of \$2 Million FJD to PCX on 14 July 2004 (Ex 59-Count 2).
2. Loan from Merchant Finance to PCX amounting to \$310,000.00 (Motor Vehicle loan).
3. \$392,000.00 (Hardware) to PCX from Merchant Finance, both loans taken in August, 2004 (Ex 136).
4. \$ 1 Million loan to PCX from Dominion Finance taken on 20 September 2004 (Ex 71-Count 6).
5. \$450,000.00 FJD loan to PCX from Westpac Bank in November 2004 (Ex 136).
6. \$900,000.00 on 21 December 2004 from VDCL to PCX (Count 4).
7. FDB loan of \$3.6 Million to PCX on 21 April 2005.
8. ANZ overdraft facility of \$1 Million to PCX on 27 April 2005 (Count 8).
9. VDCL loan of \$1 Million on 28 September 2005 to PCX (Count 10).

Knowledge (intention)

[54] The learned Judge turned to the following authorities on this, namely, Lord Denning MR in **CiaMaritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd. The Eurysthenes** [1976] 3 All ER 243 at 251; *"And when I speak of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry-so that he should not know it for certain-then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it"*.

[55] Millet J in Agip (Africa) Ltd v Jackson [1992] 4 All ER 385 stated that, "Knowledge may be proved affirmatively or inferred from circumstances. The various mental status which may be involved were analysed by Peter Gibson J in Societe Generale pour Favoriser le developement du Commerce et de l'Industrie en France SA (1982) [1992] 4 All ER 161 at 235 as comprising, "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would put an honest and reasonable man on inquiry". According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) and (v) are necessarily cases of constructive notice only. The distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the inquiries, the question is: why not?"

See the relevance of Naiveli's case

Sequence of events

[56] The learned Judge had made it a point to mention several events which confirmed his suspicion with regard to the complicity of the accused with Mr. Bakani and Mr. Khan.

- The emergence of PCX. (As if PCX was formed to award the NLTB IT tender. Who are the architects of PCX. Who are the architects of the joint venture).
- A discussion had and approved on principle with regard to a joint venture between VDCL and PCX at the VDCL Board meeting held on 11 February 2004.
- A presentation by Khan made at the Board Meeting of the NLTB on 12 March 2004, on the credentials of PCX and TUI Consulting to canvas the Board members to award the IT contract to PCX (Ex- 31). The

appreciation of the management of NLTB in taking the decision to improve the IT system by the accused added strength to Khan's proposal. Mr. Bakani was the General Manager of NLTB. At this meeting, Khan laid down the following conditions, namely; PCX to bear the up-front cost in implementing the solution. That would be \$4.6 Million FJD. PCX to be paid after the implementation. On failure to perform, NLTB to get redress.

- Although the canvassing was done on the strength of TUI Consulting, the revelation that TUI Consulting is not a shareholder of PCX, but TUI Management Services Limited. (TUI's Chief Executive Officer was Mr. Khan. It appears that TUI Consulting was used only to have the IT contract awarded. Once it was awarded PCX came into being which succeeded to the tender. All this appears to be part of a scheme).
- The signing of the Business Solution Agreement was done between NLTB and PCX on 31 March 2004. Soon thereafter (Ex-38) a letter with a proposal for a loan of \$2 Million FJD from VDCL was sent to the accused. It is evident from this letter that PCX was formed by VDCL and Khan. This letter is to convey a message to VDCL to know its responsibility in the affairs of PCX. This loan request was approved on 23 June 2004. (The learned counsel for the accused submitted that VDCL had a duty to protect PCX as it (VDCL) was owned by VDCL having 51% shares. The accused was the Chairman of VDCL. Was it the accused and Khan who formed PCX and if so then the accused had a motive to finance PCX irrespective of its viability?).

[57] The learned Judge went on to pose the question whether VDCL was involved in the formation of PCX together with Khan. This letter was addressed to the accused. The accused was aware of the undertaking given by Khan at the Board Meeting of NLTB on 12 March 2004. If PCX was to bear the up-front cost why should PCX ask money without even starting the project? What is the response of the accused to this information of the two partners responsible in forming PCX? If VDCL is responsible in forming PCX, VDCL must see to the smooth functioning of PCX. The accused was the Chairman

of VDCL and a Director of PCX. The other question the learned Judge posed is as to why PCX made a proposal for a loan of \$2 Million FJD even before the joint venture agreement was signed.

For the purpose of Gain

- [58] Any act which would result in some advantage or favour to oneself, friends, relations, individuals or corporate has been described as an act for gain (**Patel v FICAC** (supra) and **Qarase** (supra)). In this case it is the rights of the State that are in jeopardy. The loss is approximately \$ 5 million FJD. Who gained? It is PCX. Admittedly the gain to PCX was substantial. It benefitted from VDCL loans and VDCL providing security for its banking facilities.
- [59] The learned Judge in paragraph 28 in the judgment deals with this issue as follows; *"Approving and endorsing financial assistance requests from PCX, one after the other had undoubtedly resulted "gain" to PCX. It managed to survive, continue and may have overcome with its financial hardships at least for the time being...because VDCL was continuously pumping money to PCX"*. The learned counsel for the accused submitted that the gain should be illicit. However there is no such requirement. What is needed is to prove an arbitrary act for gain.

Prejudicial to the rights of another person

- [60] When a person is prejudiced, his interests are put at a disadvantage. In this case it is the rights of the State that are in jeopardy. The funds that would have been used for the benefit of NLTB, VDCL and ultimately the indigenous Fijians were put in jeopardy. Their rights have been prejudiced.

Collective responsibility

- [61] Another matter that was taken up by the learned counsel for the accused is that the decisions to grant loans and security to PCX was taken up by the VDCL Board. Therefore it is the Board that should be held responsible. The learned counsel for the respondent submitted that the "*collective responsibility*" does not absolve the accused from criminal responsibility. The accused being a Director of NLTB, Chairman of VDCL and a Director of PCX was in a unique position; His co-accused Mr. Bakani was the General Manager of NLTB, a Director of VDCL and Deputy Chairman of PCX. In addition to that he held the position of Board Secretary as well.
- [62] Thus Bakani and the accused were well acquainted with the poor financial position of PCX. At the same time these two accused were aware of the reasons for establishing VDCL and the reason for transferring the NLTB Trust Fund to VDCL. The two accused did not make available all the information they were possessed with to the Boards of NLTB and VDCL. The two Directors, namely, Patel (PW. 10) and Whippy (PW. 11) expressed their ignorance with regard to the financial mayhem of PCX. It did not matter that the accused was one of many making decisions. The accused was responsible for his decisions to facilitate financial assistance to PCX. It is no answer for the accused to say that he was one of a number of VDCL directors who facilitated the financial assistance to PCX.
- [63] The accused neither gave evidence nor called any witnesses, but marked in evidence 33 documents. The accused was found guilty of facilitating the transactions referred to in the charges by approving loans to PCX and signing loan agreements etc. The facts as transpired in evidence has been given in detail as the learned counsel for the accused did not dispute the evidence that was led. The submissions of the learned counsel were confined to points of law of which I have already adverted to. There is no dispute with regard to various acts performed by the accused. They are not denied. One matter that is challenged is the validity of the appointment of the accused. If the acts done are valid the liability of the accused would remain. The accountability cannot be removed. The

argument of the learned counsel is that if there is no valid appointment there cannot be an office to abuse. This argument appears to be hypothetical. The question is whether he is accountable.

- [64] The accused always held public office as a member of NLTB and Chairman of VDCL. Both were public offices notwithstanding that the latter a limited liability company. These two offices were inseparable. It is evident that the accused regularly attended meetings of NLTB as a member. He represented VDCL as its Chairman while attending NLTB meetings. The accused was at the same time under the direction and control of NLTB. On the above circumstances I see no merit in the submissions of the learned counsel for the accused. The only other matter that is left to consider is the question of sentence.

The propriety of the sentence

- [65] I have already mentioned in paragraphs 11, 12 and 13 on the sentence. The learned counsel for the accused submitted that when passing consecutive sentences the totality principle requires the court to take into account the offending as a whole. The court should stand back and say given the gravity, timing and interrelation (if any) of the offending, is the sentencing consecutively fair and just compared to the tariff arising from previous like decisions. If a consecutive approach is applied then, subject to the totality principle, the court should look at the facts of each individual case and set a sentence appropriate to the offending.

- [66] The learned counsel submitted that each count of abuse of office carries a maximum penalty of 3 years which must be taken as a whole when considering the appropriate sentence. The learned counsel complained that the learned Judge had simply assumed that each count merited the same sentence. He further submitted that the offence relates to one transaction for the reason that the counts relate to:

- (i) The same source of funds, that is VDCL capital;
- (ii) The accused acting as Chairman of VDCL in all situations;

(iii) And the PCX benefitting in all cases.

Sentencing and Penalties Act

[67] Section 22 of the Sentencing & Penalties Act provides for the imposition of concurrent sentences unless it is otherwise directed by courts. The section states that every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court be served concurrently. Thus the courts are empowered to impose either concurrent or consecutive sentences. In paragraph 39 of the Sentence (15 August 2014), the learned Judge states that in terms of section 22 (1), the court has discretion to order consecutive sentences.

[68] The learned judge has given consideration to the theories involved in the imposition of consecutive sentences as stated by Pathik J in Visa Waga v The State [2003] FJHC 138 (23 September 2003) that, “The power to order sentences to run concurrently is subject to two major limiting principles, which may be called the “*one transaction rule*” and the “*totality principle*” (Thomas; Principles of Sentencing 2nd Ed pg. 53). It does not mean that consecutive sentences cannot be imposed, so long as the overall sentence is not unduly harsh and by the same token the outcome of the concurrent sentences are not rendered unduly lenient in view of the aggravating features (Regina v Johnson, The Times 22 May 1995).

Totality Principle

[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] FJHC 171 (6 September 2002) the application of this principle does not mean that there is judicial conduct offering for “*multiple offending*” or encourages offenders to continue offending, after a serious crime, with the impression that there is little to lose. It must always be made clear

that the more the number of crimes and the more the gravity of those crimes, the longer the sentence is to be recorded.

- [70] The totality principle is that consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences viewed as a whole (R v Bradley (1979) 2 NZLR 262 at 263). When a Judge is faced with the task of sentencing for multiple offences, as an initial step he is required to identify the appropriate sentence for each offence and then as the final step, to achieve a total sentence appropriate to the overall culpability of the accused (HKSAR v Ngai Yiu Ching [2011] 5 HLRD 690, par 13).
- [71] Where multiple offences are committed, the object of the sentencing exercise is to impose individual sentences that, so far as possible, accurately reflect the gravity of each offence, while at the same time resulting in a total sentence which, so far as possible, accurately reflects the totality of criminality comprised of the totality of offences. This exercise involves a significant measure of discretion and accumulation of individual sentences according to the particular circumstances of each case (Nguyen v The Queen (2016) 256 CLR 656, para 64)).
- [72] It appears that the learned Judge in paragraph 41 of his Sentencing Order delivered on 15 August 2014 had given serious thought to the counts separately. He states, thus that “the facilitation had been done in the same manner when entertaining the financial requirements of PCX. But, apart from VDCL term deposits in Dominion Finance and ANZ, which were used as securities for PCX loans, I do not see the other three instances, namely, granting of \$ 2 million loan, \$ 900,000.00 loan and \$ 1 million loan to PCX, stemmed out of the “*same transaction*” or “*same incident*”. These three instances are distinct transactions with a considerable amount of time gap. The “*mental element*” or the “*improper motive*” gathers momentum and increases in degree, with that passage of time. This provides the main ingredient for a separate offence. Hence, charges pertaining to three VDCL loans to PCX will receive consecutive sentences”. The facts relating to counts 6 and 8 have been treated differently and considered as forming one transaction.

Therefore the submission that the learned Judge simply assumed that each count merited the same sentence cannot be accepted. It appears that he had well considered each count separately and given reasons for imposing consecutive sentences in respect of some counts and concurrent sentences on others.

[73] The learned Judge have given thought to each charge and drew a distinction between counts 2, 4 and 10 on one side and counts 6 and 8 on the other side. Section 111 carries a maximum sentence of 3 years if committed for gain. The learned Judge did not consider imposing the maximum sentence on any single count. The sentence imposed on each count is half of the maximum sentence. If the maximum sentence was imposed the aggregate sentence would be 15 years. I believe that the learned Judge has followed in advance the principle set out in Nguyen v The Queen (supra) which was decided 2 years after.

[74] As mentioned by the learned counsel for the accused, the money used for lending are from VDCL funds. It does not mean that the learned Judge should impose a concurrent sentence. The learned Judge had given reasons for distinguishing counts 2, 4 and 10 from counts 6 and 8. The learned Judge had also considered the time period within which the offences were committed. At the time of committing the second offence (count 4) the accused had more time to reflect on the first (count 2). The offence is not just the approval of granting the loan. The offence is the arbitrary act committed in the abuse of authority. The manner of doing it. Why did he not disclose what he did to the fund giver, the NLTB? Why did he not disclose it to his own colleagues (Mr. Patel and Mr. Whippy)? The accused was able to get round Mr. Kalmoraira with whose support they formed the majority.

[75] It is evident that in many instances resolutions had been passed even without noticing the minority directors. This shows the gravity of the offences each time they were committed. First time it was \$ 2 million FJD. Next time it was \$ 900,000.00. Thereafter it was \$ 1 million. These three offences were committed on different dates and under different circumstances. I am of the view that the learned Judge was correct in treating

the acts committed under these three offences as distinct. The learned Judge has quite correctly considered counts 6 and 8 to impose a concurrent sentence. This shows that the learned Judge was mindful of each count and considered the circumstances to decide on consecutive sentences.

[76] For the foregoing reasons I am of the view that this appeal is without merit and should be dismissed.

Bandara JA

[77] I agree with the reasoning and conclusions of Basnayake JA.

The Order of the Court is:

Appeal is dismissed.



Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice N. Bandara
JUSTICE OF APPEAL