IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 154 of 2025

STATE

vs.

1. **JOSAIA VOREQE BAINIMARAMA**
2. **SITIVENI TUKAITURAGA QILIHO**

Counsel:	Ms. L. Tabuakuro with Ms. P. Mishra for State
	Mr. D. Sharma with Ms. G. Fatima for Accused Persons
Dates of Hearing:	5th, 6th, 7th, 12th, 13th, 19th 25th, 26th 27th and 28th August 2025
Date of Closing Submission:	1st and 4th September 2025
Date of Judgment:	02nd October 2025

JUDGMENT

1. The Acting Director of Public Prosecutions, on the 26th of June 2025, filed this Amended Information, charging the first Accused, Mr. Josaia Voreqe Bainimarama, with one count of Unwarranted Demands Made by a Public Official, contrary to Section 355 (a), (b) (i) and (c) (iii) of the Crimes Act, and the second Accused, Mr. Sitiveni Tukaituraga Qiliho, with two counts of Abuse of Office, contrary to Section 139 of the Crimes Act. The particulars of the offences are:

COUNT ONE

Statement of Offence

UNWARRANTED DEMANDS MADE BY A PUBLIC OFFICIAL:

Contrary to Section 355 (a) (b) (i) and (c) of the Crimes Act 2009.

Particulars of Offence

JOSAIA VOREQE BAINIMARMA *between May 21, 2021 to August 18, 2021 at Suva in the Central Division as the Prime Minister of Fiji made an unwarranted demand with menace to Acting Police Commissioner Rusiate Tudravu by threatening his employment as the Commissioner of the Fiji Police Force to influence the Acting Commissioner of Police Rusiate Tudravu to comply with his unwarranted demand for the termination of Sgt. 2878 Penieli Nayare Ratei and PLC 6042 Tomasi Matanisiga who came under the supervision and authority of the Commissioner of Police.*

COUNT TWO

Statement of Offence

ABUSE OF OFFICE: *Contrary to Section 139 of the Crimes Act 2009.*

Particulars of Offence

SITIVENI TUKAITURAGA QILIHO *between August 5, 2021 to August 18, 2021 at Suva in the Central Division, whilst being employed as the Commissioner of Police directed the termination of Sgt. 2878 Penieli Nayare Ratei without due process which was an abuse of his authority as the Commissioner of Police and the termination was prejudicial to the rights of Sgt. 2878 Penieli Nayare Ratei.*

COUNT THREE

Statement of Offence

ABUSE OF OFFICE: *Contrary to Section 139 of the Crimes Act 2009.*

Particulars of Offence

SITIVENI TUKAITURAGA *between August 5, 2021 to August 18, 2021 at Suva in the Central Division, whilst being employed as the Commissioner of Police directed the termination of PC 6042 Tomasi Matanisiga Naulu without due process which was an abuse of his authority as the Commissioner of Police and the termination was prejudicial to the rights of PC 6042 Tomasi Matanisiga Naulu.*

2. The two Accused pleaded not guilty to these offences; consequently, the matter proceeded to a hearing, which commenced on 5th of August 2025 and concluded on 28th August 2025. The

Prosecution presented evidence from 20 witnesses and tendered eighty-two exhibits, while the two Accused provided evidence for the Defence and tendered three exhibits. Subsequently, the Court heard the oral closing submissions from the Learned Counsel for both the Prosecution and the Defence. Furthermore, the Court instructed the parties to file written submissions, which they submitted as directed. I must extend my gratitude to the Learned Counsel for the Prosecution and the Defence for their comprehensive written submissions on the contested issues, which greatly assisted me in making this judgment. Having carefully considered the evidence presented, along with the respective written and oral submissions of the parties, I now pronounce the judgment in this matter.

Burden and Standard of Proof

3. The two Accused are presumed innocent until proven guilty. The burden of proof of the charge against them is on the Prosecution. This is because they are presumed innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence beyond a reasonable doubt.

4. The parties submitted 27 admitted facts and 42 admitted documents in accordance with Section 135 of the Criminal Procedure Act, which are included in this judgment as an annexure.

The Prosecution's Evidence

5. I will first briefly outline the factual background of the three counts based on the evidence presented by both the Prosecution and the Defence. For clarity and convenience, I will discuss the factual background of this matter under the following headings.

   i) The incident involving the late Mr. Jonacani Bainimarama (who will be referred to as Mr. JB) and the Police Officers on 21st May 2021.
   ii) The communication between Mr. Bainimarama and Mr. Tudravu, including the alleged Viber message exchange between them, as well as the disciplinary proceedings initiated by the Police against the officers involved in Mr. JB's incident.
   iii) Incidents following the alleged Viber message exchange, demanding Mr. Tudravu to either terminate the officers involved or for Mr. Tudravu to resign.

iv) The termination of Sergeant Penieli and Cpl. Naulu by Mr. Qiliho on 18th August 2021,

Incident occurred on the 21st of May 2021,

6. Mr. JB was the elder brother of the first Accused, Mr. Josaia Bainimarama, who served as the Prime Minister of Fiji until December 2022. In 2021, Mr. JB worked as a taxi driver after retiring from the Military.

7. On 21 May 2021, Mr. JB was stopped by a team of Police Officers while transporting a passenger in his taxi. The five Police Officers searched him and his vehicle for drugs. The leader of the Police team, Sergeant Penieli Ratai, had an encounter with Mr. JB a month earlier, at Delainavesi, Lami. On that previous occasion, Sergeant Penieli received a call from an officer attached to the Narcotic Unit of the Fiji Police, alerting him about a suspect delivering cannabis in his taxi. He found Mr. JB in the taxi, along with a bag of dried leaves on the passenger seat. Mr. JB told him that he was delivering the substance to someone at the other end of Delainavesi Bridge. Sergeant Penieli then permitted him to proceed towards the bridge to meet the other person. However, Sergeant Penieli then saw the same officer from the Narcotics unit standing there, raising his suspicion, and he aborted his operation and left the scene.

8. This previous encounter with Mr. JB was the sole reason that led Sergeant Penieli to stop Mr. JB. During the search, the Police found nothing on Mr. JB's or his taxi, but they asked Mr. JB to sit down, took close-up photographs of his face, his taxi, and his driver's licence. Those photographs were then uploaded to a Police Viber group, along with a typed note stating that Mr. JB was a known suspected transporter and circulated among members of the Viber group. Sergeant Penieli then uploaded those photographs to another Viber group of Police Officers as well.

Communication between Mr. Bainimarama and Mr. Tudravu, as well as the Police Discipline Proceedings

9. Mr. JB informed his brother, Mr. Bainimarama, about this incident. The following day, 22 May 2021, Mr. Bainimarama contacted Mr. Rusiate Tudravu, who was Acting Police Commissioner at that time, as the substantive Police Commissioner, Mr. Qiliho, was on overseas study leave. Mr. Tudravu's substantive position was Deputy Police Commissioner.

10. According to Mr. Tudravu, Mr. Bainimarama sounded very angry when he received the call from Mr. Bainimarama on 22 May 2021, in which he asked him to investigate what the Police had done to Mr. JB and demanded that the Police Officers be sacked. Mr. Bainimarama swore at the Police, questioning what had happened to them. Mr. Tudravu immediately took action to investigate the matter. He suspended the five Police Officers who had stopped Mr. JB, set up a disciplinary tribunal under Section 32 of the Police Act, and appointed Mr. Anil Prasad as the tribunal. He informed Mr. Bainimarama about the steps taken, which Mr. Bainimarama agreed to.

11. The tribunal concluded its findings, holding the two Police Officers, Sergeant Penieli and Constable Naulu, guilty, while the other three officers were found not guilty. The tribunal determined that, although the Police's act of taking photographs of Mr. JB and uploading them was unlawful, the Police had generally been engaging in this practice of taking photos and sharing them on their Viber groups for some time, and Senior Police Officers were aware of it. None of them acknowledged it was unlawful. Hence, the tribunal recommended a lenient punishment of a fine and made no recommendation for termination.

12. On 3rd of August 2021, Mr. Tudravu, as the Acting Commissioner of Police exercising his powers under Sections 32 and 33 of the Police Act, and on the recommendation of the tribunal, imposed a fine and issued a Commissioner's warning letter to the two officers but decided not to terminate them. The decision was formally communicated to the two Police Officers on 4th August 2021.

13. Mr. Bainimarama, on the morning of 4th August 2021, messaged Mr. Tudravu via Viber, requesting an update on the matter relating to Mr. JB. After learning the outcome and the imposed punishment, Mr. Bainimarama sent a message demanding that Mr. Tudravu must terminate the Police Officers, if not he should resign. Mr. Tudravu explained to Mr. Bainimarama that due process had been followed and that was the outcome. Mr. Tudravu asked Mr. Bainimarama if he could continue his position until he finished the remaining few months of his service contract. Mr. Bainimarama replied, refusing and telling him to resign immediately.

14. Mr. Bainimarama then deleted all the Viber messages. Mr. Tudravu did not attempt to save the messages or take any screenshots. He explained that he saw no reason to do so, as he had no ill

intentions towards the Prime Minister. He felt that the Prime Minister did not want him to be in the Police and decided to stand by his decision; therefore, he chose to resign from the Police. Mr. Tudravu also explained that he never intended to pursue legal action or make any public statements about this incident, as he wished to protect the reputations of both the office of the Prime Minister and the office of the Commissioner of Police. Nevertheless, he was shocked by the way he was treated after serving in the Police for over 39 years.

15. Mr. Bainimarama appointed Mr. Tudravu as Chairman of the Tailevu Provincial Council. However, it remains unclear whether this happened after he resigned from the Police Force or while he was still serving in the Force.

16. As per the Appointment Letter issued by the President of the Republic of Fiji, on 5th August 2020, following the recommendation of the Constitutional Offices Commission, the Acting Appointment of Mr. Tudravu as Acting Commissioner of Police came to an end on 5th August 2021, a day after the alleged Viber message exchange with Mr. Bainimarama. Mr. Tudravu reverted to his substantive position as Deputy Commissioner of Police.

Incident After the Viber messages

17. Mr. Tudravu submitted his resignation letter on 11 August 2021, stating that he would take his annual leave from 13 August 2021 and would resign from the Police Force at the end of his annual leave, which was on 23 August 2021. He did not specify any reason for his resignation nor mention Mr. Bainimarama's demand. He thanked the Police Force for allowing him to serve for 39 years. Mr. Qiliho accepted the resignation letter and acknowledged Mr. Tudravu's service in his letter dated 12 August 2021.

18. Mr. Tudravu testified, explaining his reasons for submitting his registration letter on 11th August 2021, which was seven days after the alleged demand by Mr. Bainimarama. He mentioned that he waited over the weekend and, more importantly, for any change in the demand for him to resign. Since no change occurred, he decided to resign and leave the Police Force. Mr. Tudravu did not specify whether he spoke to anyone to ascertain if the decision had been changed.

19. Mr. Inia Seruiratu, who was the Minister of Defence in 2021, explained in his evidence that Mr. Tudravu once mentioned to him during a normal phone conversation that his relationship with the Prime Minister was not good over the incident involving Mr. JB and two Police Officers. Mr. Seruiratu, knowing the Prime Minister for many years, told Mr. Tudravu to wait calmly until the appropriate time comes, then speak to Mr. Bainimarama. Mr. Seruiratu further testified, stating that Mr. Bainimarama, as Prime Minister, had high expectations of his ministers and government officers regarding the performance of their duties.

20. Mr. Tudravu admitted that he did not keep any contemporaneous notes or diary entries about this Viber conversation, as he saw no need to do so since he was not planning any action against the Prime Minister. He further clarified that he always respects the decisions of his superiors and follows them. He never filed any report against Mr. Bainimarama or made any public statement. He was not the person who lodged the initial complaint that led to these proceedings. Initially, he was reluctant and refused to make any statement during the investigation stages, stating that he did not wish to be involved as he had moved on with his life. Mr. Tudravu specifically mentioned that he still respects the former Prime Minister and the former Police Commissioner.

21. The Prosecution presented evidence to establish that Mr. Tudravu returned his office mobile phone when he resigned, but it had defects that could not be fixed; so, the phone was eventually discarded. The Police only recovered Mr. Bainimarama's official mobile phone, which he used to communicate with Mr. Tudravu on 4 August 2021, during this hearing. However, no forensic evidence related to those Viber messages was found on the phone, as it had been reset in March 2023.

22. The Court heard evidence from Mr. Tudravu, who described his observations of unnecessary interference in Police work. According to his testimony, it was a different experience for someone like him, a career Police Officer under the leadership of Mr. Qiliho, who has a military background. If the Prime Minister demanded something, the Police had to comply. However, Mr. Tudravu did not specify or identify any particular incident of interference or any demand made by the former Prime Minister that the Police followed.

23. According to the testimony given by Mr. Tudravu, Mr. Qiliho told him that he should have followed what Mr. Bainimarama wanted when he went to Mr. Qiliho to hand in his resignation

letter. However, during cross-examination, Mr. Tudravu explained that he found no reason to discuss the demand made by Mr. Bainimarama with Mr. Qiliho, as he believed they had already discussed it and had made up their minds.

24. The Prosecution presented evidence from Mr. Seruiratu and Mr. Tudravu that Mr. Bainimarama and Mr. Qiliho served together in the Fiji Military, with Mr. Bainimarama as Commander of the Military Force and Mr. Qiliho as a Brigadier General, and that they were very close to each other.

The termination of Sergeant Penieli and Cpl. Naulu

25. Mr. Qiliho returned from his overseas study leave on 24 July 2021 and was required to spend time in quarantine before physically presenting himself at his office on 6 July 2021. It is established from the evidence given by Mr. Rajesh Krishna, the Director of Legal at the Fiji Police, that Mr. Qiliho conducted meetings and briefings *via* Skype with Police Officers while he was in quarantine. Mr. Krishna asserted that he also attended such meetings with Mr. Qiliho. Mr. Tudravu also confirmed that Mr. Qiliho attended such meetings via Skype with the other officers. However, Mr. Tudravu insisted that he chaired the meetings but admitted during cross-examination that he addressed Mr. Qiliho as the Commissioner during those meetings where Mr. Qiliho attended virtually.

26. Mr. Qiliho left Fiji for England, commencing his overseas study leave on 24 July 2020. Prior to his departure, he informed the Minister of Defence, Mr. Seruiratu, in a letter dated 21 July 2020, that he had appointed Mr. Tudravu to act as the Commissioner of Police during his absence from Fiji, as well as to re-engage Mr. Tudravu as Deputy Commissioner of Police for a period of one year from 14 December 2020 to 13 December 2021. (*see PE 8*). The Minister endorsed and approved the re-engagement of Mr. Tudravu for the specified period in a letter dated 24 July 2020. (*see PE 7*). On 20 July, Mr. Qiliho appointed Mr. Tudravu as Acting Commissioner of Police, effective from 30 July 2020 until any other appointment is made. (*see PE 9*). The Permanent Secretary for the Ministry of Defence and National Security, along with Mr. Tudravu, later executed a contract of engagement. (*see PE13*)

27. The President of Fiji appointed Mr. Tudravu as Acting Commissioner of Police for a period of one year, effective immediately on 5th August 2020, on the advice of the Constitutional Offices

Commission, pursuant to Section 129 (4) and 163 (2) of the Constitution. This Appointment Letter was not copied to the Commissioner of Police, Mr. Qiliho.

28. Having returned to his office, Mr. Qiliho sought advice from Mr. Rajesh Krishna, Director of Legal, on whether he had the authority to review the decision made by Mr. Tudravu as the Acting Commissioner of Police on three matters, *viz*, the actions taken following the tribunal's review, the extension of contracts for retiring officers, and promotions. Mr. Krishna then requested permission from Mr. Qiliho to seek legal advice from the Solicitor General, to which Mr. Qiliho consented. On 11 August 2021, Mr. Krishna wrote to the Solicitor General seeking legal advice on these three issues. Additionally, he sent an email to the Solicitor General. Mr. Krishna stated that Mr. Qiliho did not specifically mention this case involving the two Police Officers when he sought legal advice from him.

29. On 12th August 2021, Ms. Nazia Ali, a solicitor from the Solicitor General's office, asked Mr. Krishna to provide the Appointment Letter for Mr. Tudravu as Acting Commissioner of Police. Mr. Krishna responded *via* email, attaching the Appointment Letter issued by Mr. Qiliho on 20th July 2020, which appointed Mr. Tudravu as Acting Police Commissioner. It is significant to note that the letter from His Excellency, the President, appointing Mr. Tudravu as Acting Commissioner, was not sent to the Solicitor General's Office by Mr. Krishna. Additionally, the email Mr. Krishna sent to Ms. Ali was not copied to Mr. Qiliho.

30. Mr. Qiliho forwarded a note to the Deputy Commissioner of Police *via* a Police Correspondence Form, informing that he had reviewed the disciplinary proceedings and punishment against Sergeant Penieli and PC Naulu and revoked the punishment. He further noted that they were to be terminated with immediate effect. The Human Resources division then drafted the termination letters for the two officers. Mr. Qiliho issued a further directive on 13th August 2021, asking the CAO to issue show-cause letters to the two Police Officers, requesting that they provide reasons why they should not be terminated by 17th August 2021. The show-cause letters were issued accordingly, and Sgt Penieli and PC Naulu submitted their responses within the allocated time. After reviewing the show-cause letters, Mr. Qiliho decided on 17th August 2021 to terminate the services of the two Police Officers with immediate effect, which was formally communicated to them on 18th August 2021.

31. On 19 August 2021, Mr. Krishna received written advice from the Solicitor General's Office. Ms. Seema Chand, a Principal Legal Officer at the Solicitor General's Office, advising that Mr. Qiliho that he could review the proceedings heard by the tribunals during Mr. Qiliho's absence, if there was any procedural impropriety in the decision made by the Acting Commissioner of Police. (*see PE 28*)

32. Sgt Penieli and PC Naulu initiated a judicial review in the High Court, challenging the decisions made by Mr. Tudravu on 4 August 2021 and Mr. Qiliho on 18 August 2021. Before the hearing of leave to proceed with the judicial review application, Ms. Sharon Pratap, a legal officer from the Solicitor General's Office, wrote to Mr. Qiliho on 14 February 2022, advising him to settle the matter outside Court on certain grounds, *inter alia* that the two Police Officers were punished twice, which is prohibited under Section 30 of the Police Act, and that Mr. Qiliho was *functus officio* to review the punishment imposed by Mr. Tudravu pursuant to Section 33 of the Police Act. (*see PE 60*) Upon receiving this advice from the Solicitor General's Office, Mr. Qiliho agreed to settle the matter by reinstating the two officers into the Police Force with all their benefits and ranks. However, the settlement proposal did not materialize as the Solicitor General advised the Commissioner of Police not to accept the counteroffer made by the two officers. Eventually, the High Court refused leave to proceed with the judicial review, which the two Police Officers appealed.

The Case of the First Accused,

33. Mr. Bainimarama vehemently denied sending any Viber messages, demanding that Mr. Tudravu dismiss the Police Officers or else Mr. Tudravu should resign. He admitted that he informed Mr. Tudravu about the incident involving Mr. JB after hearing it from his elder brother, and he asked Mr. Tudravu to investigate it. Subsequently, he did not follow up with Mr. Tudravu; therefore, he had no idea what had happened to those Police Officers. Additionally, Mr. Bainimarama denied making any request or demand to Mr. Qiliho to dismiss those officers from the Police.

The Case of the Second Accused,

34. Mr. Qiliho claimed that he resumed his role as Commissioner of Police upon returning to Fiji on 24 July 2021, despite being in quarantine. He was able to perform his duties *via* Skype, attending meetings and briefings with Police Officers, including Mr. Krishna and Mr. Tudravu,

both of whom confirmed this in their testimonies. Therefore, Mr. Tudravu had no legal authority under Section 33 of the Police Act to review Anil Prasad's tribunal findings or to impose punishment under Section 32 of the Police Act, as his Acting Appointment as Commissioner had ended. Consequently, Mr. Qiliho was not *functus officio* to exercise the powers of the Commissioner of Police under Sections 32 and 33 of the Police Act to impose punishment on the two Police Officers.

35. Additionally, Mr. Qiliho claimed that he was not aware of the Appointment Letter issued by the President, on the advice of the Constitutional Offices Commission, appointing Mr. Tudravu to act as the Police Commissioner until 5th August 2021. The letter was never copied to him, and he only learned of it during this hearing.

36. Regarding his relationship with Mr. Bainimarama, he explained that, although they served in the military under Mr. Bainimarama's command, Mr. Qiliho had spent a significant period abroad under different commanders. Apart from the professional connection, he has no close personal relationship or affiliation with Mr. Bainimarama. Furthermore, Mr. Qiliho stated that if he had been acting under the influence of, or in conjunction with, Mr. Bainimarama's wishes or demands, he would not have agreed to the settlement proposal when the Solicitor General's Office advised him.

37. Mr. Qiliho testified, stating that the punishment imposed by Mr. Tudravu was very lenient considering the serious nature of the incident involving Mr. JB. The Police had allegedly breached the right to freedom from unreasonable search and the right to privacy, as outlined in the Constitution. Furthermore, he emphasized that this incident could constitute an offence under the Online Safety Act. The two Police Officers knowingly exposed the cover of one of the Police informants, putting him at unnecessary risk. Therefore, the conduct of the two officers was closer to the worst end of the spectrum of the wider offence of conduct prejudicial to the good order and discipline of the Force, and their claim that they did not know their actions were illegal should not be tolerated.

The legality of the Incident that occurred on the 21st of May 2021.

38. Having appraised the factual background of this matter, it is now necessary to assess the legality of the conduct of the two Police Officers when they stopped, searched, photographed Mr. JB and uploaded them into two Police Viber groups on the 21st of May 2021, so as to determine

whether the Police Officers had violated any laws under the Police Act or infringed any rights guaranteed under the Constitution. This evaluation is essential, as this incident triggered and led to the subsequent alleged conduct of Mr. Bainimarama and Mr. Qiliho.

39. In this evaluation, the Court is not venturing to review or determine the correctness of the findings made by Anil Prasad's disciplinary tribunal, as it is not an issue in this matter. Considering the fact that the Director of Public Prosecution is representing the State in these proceedings, I am satisfied that there is no requirement to issue a notice to the Attorney General under Section 44 (8) of the Constitution so as to determine whether the conduct of the two Police Officers had breached the rights given to Mr. JB under the chapter of the Bill of Rights of the Constitution.

40. The New Zealand Supreme Court in **Mahia Tamiefuna v the King (2025) NZSC 2023** found that photographing a person during a random traffic stop and then uploading the image along with the person's name and other details into the National Intelligence Application (NIA) of the New Zealand Police constitutes a breach of Section 21 of the New Zealand Bill of Rights Act 1990, which protects the right to be secure against unreasonable searches or seizures. Section 21 of the Bill of Rights Act is similar to Section 12 (1) of the Constitution of Fiji, which states that:

> *"Every person has the right to be secure against unreasonable search of his or her person, or property and against unreasonable seizure of his or her property"*

41. The facts involving **Tamiefuna (supra)** are similar to the incident that occurred on 21st May 2020. The Appellant, Mr. Tamiefuna, was stopped by the Police during a routine traffic check while he was travelling in a car driven by another person. They were instructed to exit the vehicle, and then the Police discovered that the driver did not have a valid driver's licence; as a result, the car was impounded. The occupants of the car had to unload certain items from the car and wait at the roadside until the vehicle they had arranged to collect them arrived. The Police, noticing the nature of the items unloaded from the car, took photographs of Mr. Tamiefuna and uploaded them, along with his name and other details, into the National Intelligence Application (NIA) of the New Zealand Police.

42. Mr. Tamiefuna was later prosecuted and convicted of one count of aggravated robbery, with a photograph of him uploaded to the NIA serving as crucial evidence to identify him, as it closely resembled the suspect in CCTV footage at the crime scene based on the clothing. He challenged the admissibility of the photograph on the grounds that it was obtained through a breach of his rights under Section 21 of the Bill of Rights Act, but the High Court refused his challenge. The Court of Appeal found that photographing Mr. Tamiefuna and uploading the image to the NIA violated his rights under Section 21 yet considered the evidence admissible. The Supreme Court determined that Police actions breached his rights under Section 21, rendering the photograph inadmissible as evidence.

43. The incident that took place on 21 May 2021 consisted of two main phases: first, stopping Mr. JB and searching him and his vehicle for drugs. The second phase involved taking close-up photographs of him, including a picture of his taxi and his driver's licence, then uploading these to two Police Viber groups with a note referring to him as a suspected transporter.

44. The New Zealand Supreme Court in **Hamed v R (2012) 2 NZLR 305** discussed the definition of "search" under Section 21 of the Bill of Rights Act, relating to Police activities, which, in my view, is a persuasive definition that could be adopted to define the search under Section 12 of the Constitution. It was held in **Hamed v R (supra)** that:

> *"There would be a "search" under s 21 of the New Zealand Bill of Rights Act 1990 when Police activity, whether in-person or through technology such as video surveillance, invaded a reasonable expectation of privacy. (per Blanchard J, McGrath and Gault JJ) Whether such activity intruded on reasonable expectations of privacy depended on whether the person who complained of a breach of s 21 subjectively had an expectation at the time of the activity and that expectation was one that society was prepared to recognise as reasonable and (per Elias CJ) whether there had been interference with the underlying values of freedom and dignity (see [10], [11], [13], [161], 163], [164], [165], [166], [220], [221], [222], 223], [224], [263], [281)"*

45. As outlined in **Hamed v R (supra),** the conduct of Sgt Penieli and Cpl. Naulu can be regarded as a search if it invaded the reasonable expectation of privacy held by Mr. JB when he was stopped, searched, photographed, and uploaded the photos with a note, referring to him as a

known transporter. The test for determining whether Mr. JB has a reasonable expectation of privacy is twofold, i.e. first, the subjective test of whether he had an expectation of privacy at the time of the alleged incident, and second, an objective test of whether society considers that expectation reasonable.

46. Winkelmann CJ in **Tamiefuna (supra)** considered four factors so as to determine whether a person had a reasonable expectation of privacy, *viz*, the nature of the place, how the information was used, the way the information was obtained, and the type of information involved.

The nature of the place & how the information was used

47. Considering the first factor as outlined above, Winkelmann CJ in **Tamiefuna (supra)** observed that:

> *[32] It is true that CCTV coverage and the use of mobile phone photography are ubiquitous. But footage from either CCTV or a mobile phone is not generally targeted at a named individual, as this photography was. The targeted nature of what occurred here is apparent in the fact that DS Bunting put a name (and other details) to the photograph. The photograph plainly would have had less value without the addition of the name.*

48. In this case, as Sgt Penieli stated in his testimony, the Police took a mugshot of Mr. JB's face after asking him to sit down at the Mead Road Police Post despite finding nothing suspicious in his taxi. According to Defence Exhibit One, which Sgt Penieli and Cpl Naulu both confirmed in their respective statements, they uploaded not only a photograph of Mr. JB but also images of his driver's licence, which showed his name, address, and taxi number.

49. Neither Sgt Penieli nor Cpl Naulu explained in their respective testimonies before the Court the purpose of uploading the photograph of Mr. JB and his details. Sgt Penieli merely stated that it had been a Police practice to upload such photos into Viber groups for other officers and stations to check if this person was wanted. Therefore, the photographs were uploaded for an unspecified purpose without a clear timeframe. Winkelmann CJ in **Tamiefuna (supra)** observed that there is no free ranging right to take and retain close-up photographs of the public acting lawfully in public places, even if they may look suspicious or different.

50. In this case, Mr. JB was neither acting suspiciously nor differently when the Police spotted him. He was driving his taxi with a passenger. The only reason, according to Sgt Penieli's evidence, was his previous encounter with Mr. JB a month earlier at Delainavesi. The then Director of the Narcotic Unit of the Police, Mr. Neiko, specifically explained that Mr. JB was transporting two passengers when he was detected and arrested at Delainavesi therefore, he was not prosecuted, but the two others were. Mr. JB later became a Police informant in drug operations. Mr. Neiko, a Senior Police Officer, explained in detail that the Police are only permitted to take photographs and recordings of suspects in drug cases if authorized by the High Court under Section 12 of the Illicit Drugs Act. Therefore, considering the location and purpose of the search, including taking photographs and uploading them, Mr. JB would have a reasonable expectation of privacy when this incident occurred.

The way the information was obtained

51. As stipulated under Section 16 of the Illicit Drugs Control Act, a Police Officer may detain and search a person only if he has reasonable grounds to suspect that the person has committed an offence against the Act or is in possession of an illicit drug. As outlined above, there was no other reasonable cause, apart from the previous encounter involving Mr. JB, for Sgt Penieli to suspect that Mr. JB had committed an offence under the Illicit Drugs Control Act on 21 May 2021. Sgt Penieli had no interception warrant granted by the High Court under Section 12 of the Illicit Drugs Control Act. Having searched, Sgt Penieli found nothing suspicious on Mr. JB or in his taxi. He was not arrested; therefore, he was not in lawful custody, which did not permit Sgt. Penieli or Cpl. Naulu to take photographs of Mr. JB pursuant to Section 18 of the Police Act. Consequently, considering how the information about Mr. JB was obtained, Mr. JB would have a reasonable expectation of privacy during the search and photographing.

The nature of the Information

52. The information obtained was personal to Mr. JB. The Police collected his image in a photograph and his personal details from his driver's licence. In discussing the powers of the Police to take and retain photographs of individuals under the right to privacy as set out in Article 8 of the European Convention on Human Rights, the Court of Appeal of England in **R (on the application of Wood) v Metropolitan Police Commissioner (2009) All ER (D) 208 (May)** outlined the scope of a person's personal autonomy, where it held;

"Applied to the myriad instances recognized in the art 8 jurisprudence, that presumption meant that, subject to certain qualifications, an individual's personal autonomy made him, and should make him, master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image and of the 'zone of interaction' between himself and others. He was the presumed owner of those aspects of his own self, his control of them could only be loosened, abrogated, if the state showed an objective justification for doing so. That cluster of values, was a defining characteristic of a free society, which needed to be preserved even in little cases, albeit it should not be read so widely that its claims became unreal and unreasonable". (emphasis added)

53. As observed in **R (on the application of Wood) v Metropolitan Police Commissioner (supra),** an image of a person forms part of their personal autonomy and private life, over which they are entitled to exercise full control, without unjustified interference by the State. Winkelmann CJ in **Tamiefuna (supra)**, having referred to the joint report of the Privacy Commissioner and the Independent Police Conduct Authority, noted that photographs of individuals constitute sensitive biometric information. Accordingly, Mr. JB had a reasonable expectation of privacy regarding his image and personal details.

54. Considering all the reasons discussed under the four factors outlined by Winkelmann CJ in Tamiefuna, Mr. JB had a reasonable expectation of privacy when he encountered Sgt Penieli and Cpl Naulu on 21 May 2021. Therefore, the Police's actions in stopping, searching him and his taxi, taking photographs, and uploading them to two Viber groups with a note claiming him as a known transporter constitute a search under Section 12 of the Constitution. I will now proceed to assess whether this conduct of search was unreasonable under Section 12 of the Constitution.

55. As evident from the discussion above, the search was conducted without statutory authorization (*see sections 12 & 16 of the Illicit Drugs Control Act, and Section 18 of the Police Act*). Section 5 of the Police Act sets out the functions of the Force, where it states:

"The Force shall be employed in and throughout Fiji for the maintenance of law and order, the preservation of the peace, the protection of life and property, the

prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged; and shall be entitled for the performance of any such duties to carry arms.

56. Section 17 (1) of the Police Act then outlines the general powers and duties of Police Officers.

> *"Every Police Officer shall exercise such powers and perform such duties as are by law conferred or imposed upon a Police officer, and shall obey all lawful directions in respect of the execution of his or her office which he or she may from time to time receive from his or her superiors in the Force or from any other Police Officer in the same rank as himself or herself but senior in service.*

57. Accordingly, Police Officers must exercise the powers and perform the duties conferred or imposed upon them by law. They must follow the lawful directions given by their superiors. Cook P in **R v Jefferies (1994) 1 NZLR 290** discussed the importance of Police discharging their duties, which are authorized by law and which they have sworn to uphold. Cook P observed that:

> *"The argument that it is reasonable within the meaning of a Bill of Rights to allow the prosecution to make use of the fruits of an illegal search suggests that the law should turn blind eye to illegality, and that in dealing with suspected criminals the Police may disregard with impunity the law according to which they are sworn to do their best to discharge their duties".*

58. Richardson J in **R v Jefferies (supra)** stated that a search could become unreasonable in two instances: *viz,* the circumstances making the search itself unreasonable or an initially reasonable search being carried out in an unreasonable manner. Richardson J further clarified that the provision of freedom from unreasonable search is a negative right, which restricts government action and does not grant any power to the government, particularly a power of "reasonable search".

59. Returning to ***Tamiefuna (supra),*** Winkelmann CJ considered whether the common law authorizes a search which is carried out without any statutory authorization, where it was observed:

"As we have found there was a search, in the absence of any statutory authorization for the search, it is necessary to consider whether the search is authorized at common law. In our view, it is clear that it has never been the case that the warrantless search power at common law extends to what would be, in essence, a free-standing right to search a person, without a warrant, for general intelligence gathering purposes".

60. Therefore, there is no standalone right for the Police to search an individual without a warrant if there is no reasonable suspicion that they have committed an offence under the Illicit Drugs Control Act. The Police were certain, after searching Mr. JB and his taxi, that he was not carrying or possessing any illicit drugs, yet they proceeded to photograph him and upload the photograph alongside his details, which is entirely disconnected from any law enforcement purpose and legal circularity. Hence, the search conducted by the Police on the 21st of May 2021 was unreasonable.

61. The Court of Appeal in England in **R (on the application of Wood) v Metropolitan Police Commissioner (supra)** determined that the Police photographing an individual and retaining those images breached that person's right to privacy. The facts in **R (on the application of Wood) v Metropolitan Police Commissioner (supra)** were largely similar to those of this case. The Police photographed the claimant after he attended a shareholders' meeting of a company involved in the arms industry, where he had voiced objections to the company's activities. The Police retained the photographs for unspecified potential future use. The Court of Appeal held that the Police's actions constituted a violation of the claimant's right to privacy guaranteed under Article 8 of the European Convention on Human Rights.

62. I am acutely aware that the Court never heard Mr. JB's narration, which cannot now happen, as he passed away before the hearing of this matter. However, the Court heard the evidence of Sgt Penieli, Cpl Naulu, the former Director of the Narcotic Unit, Mr. Neiko, Mr. Anil Prasad, and Mr. Krishna during this hearing, which I find sufficient to properly understand the legality of the incident that occurred on 21st May 2021 and its effect.

63. Considering the reasons outlined above, it is apparent that the conduct of Sgt Penieli and Cpl Naulu in stopping Mr. JB while he was driving his taxi with a passenger, searching him and his

taxi, and, having found nothing, then photographing Mr. JB and uploading the Photograph along with his driver's licence with a note referring to him as a known transporter, breached and violated Mr. JB's right to freedom from unreasonable search guaranteed under section 12 of the Constitution, as well as his right to privacy as stipulated under section 24(1) of the Constitution.

The First Count of Unwarranted Demand with Menace

64. I shall now proceed to consider the first count of unwarranted demand with menace by a public official under Section 355 (a) (b) and (c) (iii) of the Crimes Act, which states:

"A public official commits an indictable offence (which is triable summarily) if he or she

a) makes an unwarranted demand with menaces of another person; and

b) the demand or the menaces are directly or indirectly related to—

i) the official's capacity as a public official; or

ii) any influence the official has in the official's capacity as a public official; and

c) the official does so with the intention of

iv) influencing another public official in the exercise of the other official's duties as a public official

65. The main elements of the offence of unwarranted demand with menace by public officials are:

i) The accused, being a public official,

ii) Makes an unwarranted demand with menaces of another person,

iii) The demand or the menaces directly or indirectly related to his official capacity as a public official, or any influence he has in the official capacity as a public official,

iv) The unwarranted demand with menace was made with the intention of influencing another public official in the exercise of the other official's duties as a public official.

66. Section 352 of the Crimes Act outlines the factors to consider when determining an unwarranted demand with menace, and Section 353 explains how conduct becomes a menace, as well as the criteria for establishing the element of menace.

67. It is essential to determine whether the Prosecution has proven beyond a reasonable doubt that Mr. Bainimarama indeed made a demand to Mr. Tudravu, while serving as the Acting Commissioner of Police, on 22nd May 2021, to terminate the Police Officers involved in the incident that occurred on 21st May 2021. Additionally, on 4th August 2021, he reiterated his demand to Mr. Tudravu, insisting that if he did not dismiss those officers, he should resign from the Police Force.

68. The Prosecution presented evidence from Mr. Tudravu and Mr. Inia Seruiratu, as well as evidence explaining the call log history between Mr. Tudravu, Mr. Bainimarama, and Mr. Neiko on 22 May 2021, to establish that Mr. Bainimarama made such demands on 22 May and then again on 4 August 2021. Additionally, the Prosecution provided evidence explaining the reason for not tendering any forensic or scientific evidence to establish the existence and contents of the Viber messages exchanged between Mr. Bainimarama and Mr. Tudravu on 4 August 2021.

69. Meanwhile, Mr. Bainimarama, although he admitted to communicating with Mr. Tudravu on 22 May 2021 to inform him about the incident after hearing it from Mr. JB and requesting Mr. Tudravu to check it, denied making any demand for the termination of those Police Officers. Mr. Bainimarama further denied ever messaging Mr. Tudravu *via* Viber demanding the Police Officers be terminated or threatening resignation if his demands were not met. His position is that he did not follow up with Mr. Tudravu after their communication on 22 May 2021.

70. In evaluating evidence, the Court must consider all the evidence presented during the trial, including the Defence's evidence, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused committed these crimes. The Court's role is not to decide who is more credible, the Prosecution or the Accused.

71. Brennan J in **Liberato and Others v The Queen* (1985) 159 CLR 507 at 515** has succinctly described the proper procedure for guiding the Jury when there are conflicting accounts of evidence from the Prosecution and Defence. Brennan J stated that:

> *"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."*

72. The Accused is not required to give evidence. He does not need to prove his innocence, as it is presumed by law. However, in this case, the Accused elected to give evidence. Therefore, the evidence provided by the Accused must be considered when establishing the facts of this case. The archaic but highly distinguished passage of Lord Reading C.J. in **Abramovitch (1914) 84 L.J.K.B. 397)** noted that:

> *"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden impose upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."*

73. The influence of Lord Reading CJ's passage in **Abramovitch (supra)** was emphasized by the New Zealand Court of Appeal in **The Queen v Strawbridge — [1970] NZLR 909**, where North P, discussing the scope of the Woolmington guideline, adopted the passage from **Rex v. Greenacre 8 C. & P. 35**, highlighting the importance of **Abramovitch (supra),** where it observed that:

> *".....In our opinion the true ratio of Woolmington's case emerges in the following passage from the opinion of the Lord Chancellor when he was discussing Rex v. Greenacre 8 C. & P. 35. He said:*
>
> *". . . But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence, This is the real result of the perplexing case of Rex v Abramovitch."*

74. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused's version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information. (***see Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022), Liberato and Others v The Queen (1985) 159 CLR 507 at 515), Abramovitch (1914) 84 L.J.K.B 397***)

75. Comprehending the above outlined legal principles and the precedence on the onus of the Prosecution in proving the case beyond a reasonable doubt, I now evaluate the evidence presented by the parties to determine the testimonial trustworthiness of the evidence. The Court must consider two aspects in determining the testimonial trustworthiness of the evidence: the credibility of the witness's evidence and the reliability of the evidence. Credibility is linked to the correctness or veracity of the evidence, while reliability is related to the accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence

of corroboration where it is relevant. (*see; **Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022)***

Evaluation of Evidence (The First Count).

76. As outlined above, despite some differences, both Mr. Tudravu and Mr. Bainimarama admitted that they had communicated on 22nd May 2021 to discuss the incident involving Mr. JB and the Police. According to Mr. Bainimarama, he met Mr. Tudravu to talk about this incident. However, Mr. Tudravu testified that he received a call from Mr. Bainimarama on the morning of 22 May 2021, asking him to check what had happened to the Police, as they had taken photographs of Mr. JB and circulated them over Viber groups. Mr. Bainimarama sounded very angry about the incident. Mr. Tudravu immediately contacted Mr. Neiko, then Director of the Narcotics Unit of the Police, to meet Mr. JB and obtain a statement. According to the Prosecution's evidence, the officers were suspended immediately, and a disciplinary tribunal was established, with Mr. Anil Prasad as the tribunal Chair. Mr. Tudravu informed Mr. Bainimarama about the steps taken, to which he agreed. However, there was no other evidence to confirm whether Mr. Bainimarama restated his demand to terminate those officers or rescinded it.

77. The Prosecution presented the call log summary of calls made and received by Mr. Bainimarama, Mr. JB, Mr. Tudravu, and Mr. Neiko on the morning of 22 May 2021 as Prosecution Exhibit 68. This document corroborates and supports Mr. Tudravu's account of the call exchange between himself and Mr. Bainimarama, as well as his subsequent call to Mr. Neiko. During his testimony, Mr. Neiko confirmed receiving a call from Mr. Tudravu, asking him to meet Mr. JB and obtain a statement from him, which he attended to immediately. Accordingly, on the basis of this evidence, I accept Mr. Tudravu's account that Mr. Bainimarama called him, rather than meeting in person, on the morning of 22 May 2021, and conveyed the information regarding the incident involving Mr. JB and the Police.

78. The Prosecution Exhibits 13 and 20 confirm that Sgt Penieli and Cpl Naulu were interdicted on the same day, which was 22 May 2021. Mr. Anil Prasad stated that he was appointed as the tribunal under Section 32 of the Police Act. The promptness of taking action following the call from Mr. Bainimarama demonstrates that Mr. Tudravu took the call very seriously, as he

asserted during his evidence, stating that he had to act immediately because it was a call from the Prime Minister, and he sounded really angry.

79. I shall now proceed to consider whether Mr. Bainimarama messaged Mr. Tudravu, *via* Viber, demanding that he terminate the Police Officers and if not, for Mr. Tudravu to resign.

80. Mr. Tudravu received a Viber message from Mr. Bainimarama on the morning of 4th August, asking for an update on the incident involving Mr. JB. This Viber conversation eventually led to the alleged demand by Mr. Bainimarama, asking to terminate the Police Officer or, if not, for Mr. Tudravu to resign. According to Mr. Tudravu, the messages were deleted by Mr. Bainimarama immediately after the conversation. It did not occur to him to save them or take any screenshots.

81. The evidence from Inspector Coka, Manager of Communication at the Fiji Police, and Ms. Kamsoo of the Communication Unit at the Fiji Police, confirmed that the mobile phone used by Mr. Tudravu was returned to the Unit upon his resignation. However, the phone had a problem and was therefore disposed. Although the Prosecution managed to locate the mobile phone used by Mr. Bainimarama in August 2021 during this hearing, which was in the possession of Mr. Pawa, an officer working at the Prime Minister's Office, the attempt to retrieve any forensic evidence of those Viber messages failed because the phone was reset in March 2023, leaving no scientific or forensic evidence about the exchange of those Viber messages before the Court.

82. The Viber message exchange took place privately between Mr. Bainimarama and Mr. Tudravu. The absence of forensic evidence clearly affects the process of evaluating the trustworthiness of Mr. Tudravu's evidence in this case. According to Mr. Tudravu, the messages were deleted immediately after the conversation. Therefore, it is essential to consider whether Mr. Tudravu properly saw and understood and is now able to reliably recall the meaning of the messages sent by Mr. Bainimarama. He explained in his testimony that he asked Mr. Bainimarama whether he could continue until the end of his contract, which Mr. Bainimarama denied, replying that he should resign immediately. This part of the conversation certainly demonstrates that Mr. Tudravu correctly perceived and understood Mr. Bainimarama's demand and his response to Mr. Tudravu's request, thereby further affirming the demand.

83. The evidence of Mr. Tudravu's conduct after the 4th of August, leading up to his resignation and then post-resignation conduct, is not evidence of facts establishing the truthfulness of the occurrence of the Viber message exchange and the demand made in it. However, the evidence that proves the existence of any act, state of mind, or affairs occurring after the alleged transaction, if accepted as credible and reliable, could lead to an inference that the alleged act occurred or that a particular state of mind or affairs existed. Such evidence is known as retrospectant circumstantial evidence. (*see Cross on Evidence, 10th Ed, pg. 17*).

84. Mr. Tudravu submitted his resignation letter on 11th August, stating that he would take his remaining unused annual leave starting from 13th August and resign at the end of that leave, which was on 23rd August 2021. He explained why he submitted his resignation on 11th August, seven days after the alleged demand. He noted that a weekend followed after 4th August, as well as Mr. Qiliho's return from quarantine after coming back to Fiji. Additionally, Mr. Tudravu stated that he waited to see if the demand would change. When he realized there was no change, he decided to submit his resignation on 11th August.

85. The evidence provided by Mr. Seruiratu is relevant for assessing the credibility and reliability of Mr. Tudravu's testimony. He is the only witness to whom Mr. Tudravu disclosed details of his relationship breakdown with Mr. Bainimarama concerning the incident involving Mr. JB. According to Mr. Seruiratu, he was told by Mr. Tudravu that his relationship with the Prime Minister, Bainimarama, was strained over the matter involving the Police Officers. This conversation occurred during a general phone call with Mr. Tudravu. During cross-examination, Mr. Seruiratu further explained that Mr. Tudravu did not provide many details about the incident but mentioned that two Police Officers had taken photographs. He cannot recall precisely when this conversation took place. He then advised Mr. Tudravu, based on his experience working with Mr. Bainimarama, to remain calm and wait for the appropriate moment to discuss the matter with the Prime Minister.

86. It is unhelpful that Mr. Tudravu did not mention such a conversation he had with Mr. Seruiratu during his testimony. Mr. Seruiratu appears to be an independent witness, and the Defence did not challenge or suggest otherwise during the cross-examination about the existence of this conversation that Mr. Seruiratu referred to. Hence, it is not unsafe to conclude that the absence of the confirmation by Mr. Tudravu about such a conversation with Mr. Seruiratu has not diminished the credibility and reliability of the evidence given by Mr. Seruiratu.

87. The claim that Mr. Tudravu told Mr. Seruiratu that his relationship with Mr. Bainimarama was not good suggests this conversation possibly took place after 4th August. According to Mr. Tudravu, the Prime Minister sounded very angry with the Police when he called him on 22 May and later agreed to move forward with disciplinary actions after he explained to Mr. Bainimarama the steps he had taken immediately. This evidence shows that Mr. Bainimarama, although angry with the Police Officers involved in the incident, did not have a problematic relationship with Mr. Tudravu until the incident on 4th August.

88. Additionally, Mr. Seruiratu was told by Mr. Tudravu that two Police Officers were involved in taking photographs. Mr. Tudravu was not aware that only two officers were guilty of taking photographs before he received the recommendation of Anil Prasad's tribunal, as he initially interdicted and charged five officers. Therefore, it is safe to conclude that this conversation between Mr. Seruiratu and Mr. Tudravu took place after 4th August.

89. Another important aspect of Mr. Seruiratu's evidence is his advice to Mr. Tudravu, urging him to stay calm and wait for the right moment to discuss the matter with Mr. Bainimarama. Mr. Seruiratu affirmed that, with his experience working with Mr. Bainimarama, they needed to wait for an appropriate time to discuss certain issues with Mr. Bainimarama if he was angry or upset. This evidence supports Mr. Tudravu's testimony that he waited to see if the demand would change; it was one of the reasons he waited until the 11th of August to submit his resignation letter.

90. During his testimony, Mr. Tudravu specifically explained that he had no ulterior motives in taking screenshots of the Viber messages. It was usual for him to receive Viber messages from Mr. Bainimarama. He asserted that he was not paying much attention because he was shocked when he received those messages during that conversation. Mr. Tudravu said that he should have made a record or note, but at that moment, it was not on his mind. He comes from a background where he listens to people in authority and is not someone who retaliates or rebels. When he received those messages, he decided not to terminate the officers but to resign.

91. Mr. Tudravu provided a detailed explanation, stating that his decision was made for the benefit of everyone, including the Prime Minister. He did not wish to bring disrepute upon either the office of the Prime Minister or that of the Commissioner of Police. After his resignation, he did not lodge any complaint. Neither did he initiate any civil claim. He remained silent and

continued with his life. He was not the person responsible for making the complaint about this matter, which led to the Prosecution. In fact, he was reluctant and did not wish to become involved in this issue. The Investigation Officer stated during his evidence that Mr. Tudravu initially refused and was reluctant to give a statement to the Police regarding this matter.

92. Mr. Sharma, in his closing submission, argued that Mr. Tudravu resigned on 11 August of his own free will, after reaching the peak of his career, which was serving as Acting Commissioner of Police for a year. That is why he did not mention any of these demands in his resignation letter but instead expressed his gratitude to the Police for giving him the opportunity to serve.

93. The Defence never invited Mr. Tudravu to respond to this proposition during his evidence and only raised it during the closing submissions. Setting aside that omission, Mr. Tudravu made it clear that he did not wish to disrespect the Police; therefore, he chose not to mention any of these demands. Furthermore, he asked Mr. Bainimarama, when he demanded that he resign, to permit him to complete his contract, which was due to end in December 2021.

94. Under clause 9 of Mr. Tudravu's contract of engagement, he was required to give at least two months' notice or pay two months' salary in lieu of notice if he wished to resign early without fulfilling the agreed term. If Mr. Tudravu resigned voluntarily, he was obliged to adhere to clause 9, which was not actually considered when he submitted his resignation on 11 August. On 12 August 2021, Mr. Qiliho accepted the resignation without requesting that Mr. Tudravu follow clause 9 of the contract. If he had been required to follow clause 9 when resigning in August, he would have needed to give two months' notice. Consequently, he could have resigned in October, only two months before the end of the contracted period.

95. The fact that Mr. Tudravu was reluctant and initially refused to make a statement on this matter, along with his silence in not filing any complaint or initiating proceedings against Mr. Bainimarama for pressuring him to resign, demonstrates that Mr. Tudravu had no *mala fide* motive to fabricate an allegation.

96. Taking into account Mr. Tudravu's conduct after his resignation, it is safe to accept his explanation for not taking screenshots of the Viber messages, not making any records or diary notes, and not mentioning anything about this incident in his resignation letter as credible and reliable evidence.

97. Furthermore, considering the close temporal proximity between his resignation and the 4th of August, the manner in which he resigned, and his subsequent conduct, allows the Court to make an undisputable inference that the conversation *via* Viber message between Mr. Bainimarama and Mr. Tudravu had happened on the 4th of August 2021. Accordingly, I accept Mr. Tudravu's account of what happened on the 22nd of May and then on the 4th of August 2021 as credible and reliable.

Unwarranted Demand with Menace

98. Having concluded that the Prosecution proved beyond a reasonable doubt that Mr. Bainimarama called Mr. Tudravu on the morning of 22nd May, demanding the termination of Police Officers, and then messaged him on 4th August 2021, again demanding that they be terminated, if not, Mr. Tudravu was to resign, I shall now proceed to determine whether those demands constitute menace as stipulated under Section 353 of the Crimes Act as well as unwarranted demand with menace as stated under Section 352 of the Crimes Act.

99. **Stroud's Judicial Dictionary of Words and Phrases (6th Ed, Vol 2, p. 1601)** defines the word menace as a threat of injury, and the injury may relate to reputation as well as to the person or property. The use of the preposition "with" between demand and menaces indicates that the menace accompanies the demand. Therefore, there are two main forms of demand with menace, i.e. either the demand is followed by or preceded by a separate act of menace, or the element of menace is inherent within the act of demand itself.

100. It appears that the demand made by Mr. Bainimarama consists of two main components, *viz,* the demand to dismiss the Police Officers and the demand for Mr. Tudravu to resign from the Police. Accordingly, the Court must determine whether the element of menace was incorporated within these two demands. There are two possible situations in which a demand with menace is likely to affect and influence a person's mind. In the first instance, the threat might impact the mind of an ordinary person of normal stability and courage, but it may not affect the person who was actually targeted. Nevertheless, such circumstances still constitute a menace. There are instances where the threat would influence a person's mind, although it would not affect a person of normal stability and courage, which is still considered a "menace". Under such circumstances, the Prosecution must establish that the Accused was aware of the likely effect

of his actions on the victim. (see; *Archbold, 2025, 21-214, p 2647, Stroud's Judicial Dictionary of Words and Phrases (6th Ed, Vol 2, p. 1602).*

101. The two situations outlined above have been enacted under Section 353 (2) (a) (i) & (ii), and (b) of the Crimes Act. It is apparent from the evidence presented that the Prosecution is relying on the situation stated in Section 353 (2) (b) of the Crimes Act, which states:

"For the purpose of this Division, a threat against an individual is taken not to be menaces unless;

b) the threat would likely to cause a person of normal stability and courage to act unwillingly."

102. Under Section 353 (2) (b) of the Crimes Act, the primary focus is not on the victim's state of mind but on that of the Accused. The test is whether the Accused threatened the victim, which would likely have disturbed the mind of a person of normal stability and courage, thereby removing the element of free will and voluntariness from his acts, causing him to act unwillingly. It is not necessary for the threat to have affected the victim's mind. (***see; R v Clear (1968) 1 All ER 74***). Accordingly, it is an objective test, where a person of normal stability and courage is placed in the situation established by the facts of this case. Then, the question is whether such a person would act unwillingly under those circumstances.

103. The individual of normal stability and courage is an imaginary, abstract figure who has an average level of emotional resilience and bravery. He is neither excessively fearful nor weak, but also not fearless or heroic. This person is reasonable, possessing a fair amount of knowledge, expertise, and capabilities. This individual is employed under Section 353 (2) (b) of the Crimes Act to assess how Mr. Bainimarama's demand impacts him within the same factual background and circumstances that existed when he made the same demand to Mr. Tudravu. This person does not share the same personality, qualities, intellectual abilities, and skills as Mr. Tudravu. He is in similar circumstances to Mr. Tudravu, with his own reasonable qualities, including normal stability and courage.

104. Having comprehended the quality of the person of normal stability and courage, I shall now turn to consider the factual circumstances that prevailed.

105. Under the Constitution and the Police Act, the Prime Minister has no authority to remove the Commissioner of Police. He only serves as the Chairperson of the Constitutional Offices Commission, and the Commissioner of Police can be removed solely according to the procedure specified in Section 137 of the Constitution. The Police Act empowers the Commissioner of Police to appoint and remove Police Officers in accordance with the procedures stipulated under the Act. Therefore, the Prime Minister has no legal power to remove the Acting Commissioner of Police or the Deputy Commissioner of Police. On the other hand, the Prime Minister serves as both the head of the government and the Chairman of the Cabinet of Ministers. Consequently, he is the leader of the executive branch of the State.

106. The Prosecution provided evidence that Mr. Bainimarama and Mr. Qiliho served together in the military and shared a close relationship. However, there is no evidence to suggest that Mr. Bainimarama held any power or authority over Mr. Qiliho in carrying out the Commissioner's duties. Mr. Bainimarama himself admitted to communicating directly with Mr. Tudravu on various issues regularly, a point also confirmed by Mr. Tudravu during his testimony.

107. It was established that Mr. Bainimarama directly contacted Mr. Tudravu and informed him about the incident. He sounded very angry and swore at the Police for what they had done to Mr. JB. Mr. Seruiratu, a senior and longstanding Minister in Mr. Bainimarama's cabinet, explained that they had to wait for the appropriate time to discuss the issue with Mr. Bainimarama, if he was upset with the person over the matter. Moreover, Mr. Seruiratu said that Mr. Bainimarama had very high expectations of his Ministers and officials.

108. Another significant factor is that Mr. Tudravu immediately took steps to suspend the Police Officers and set up a disciplinary tribunal upon receiving the call from Mr. Bainimarama. Mr. Tudravu wished to continue his employment until the end of his contract.

109. Considering the factors outlined in the foregoing paragraphs, it is clear that Mr. Bainimarama had no legal authority to terminate or remove Mr. Tudravu from either the Acting Commissioner of Police or Deputy Commissioner of Police positions. However, a reasonable person is expected to make a reasonable decision, not a legally and factually rational one. Hence, the legally correct conclusion of a lack of authority to remove must be taken into consideration in conjunction with all other factual circumstances prevailing at that time.

110. It is important to assess how a person with normal stability and courage would respond to the Prime Minister's call, demanding that the Police Officer be dismissed, made in a clearly angry tone. Mr. Tudravu, a highly Senior Police Officer with over 39 years of experience and holding the top position in the Force, reacted promptly, suspending the officers on the same day and then establishing a disciplinary tribunal, which efficiently concluded its proceedings, thus completing the entire disciplinary process outlined under Sections 32 and 33 of the Police Act within nearly three months.

111. Considering Mr. Tudravu's reaction alongside Mr. Seruiratu's evidence, it is highly likely that someone with normal stability and courage would act unwillingly after receiving the same call from Mr. Bainimarama on 22nd May and then Viber messages on 4th August, demanding him to either terminate the Police Officers or resign from the Force, even though he knew Mr. Bainimarama had no legal authority to remove him from the Police.

112. In view of the foregoing reasons outlined, I am of the view that the Prosecution established beyond a reasonable doubt that the demands made by Mr. Bainimarama on the 22nd May and 4th of August respectively constituted a menace pursuant to Section 353 (2) (b) of the Crimes Act.

113. As discussed above, there was no separate conduct of menace either before or after the demand to "terminate the Police Officers or you resign". This demand implied a general threat of detrimental and unpleasant behaviour due to the status, office, and position held by Mr. Bainimarama, as per Section 353 (1) (b) of the Crimes Act.

114. Section 352 (1) of the Crimes Act states that a person makes an unwarranted demand with menace only if,

i) The first person makes a demand with menaces of the other person,

ii) The first person does not believe that he or she has reasonable grounds for making the demand, and

iii) The first person does not reasonably believe that the use of the menaces is a proper means of reinforcing the demand,

115. Mr. Bainimarama denied making any such demand with menace; therefore, he did not claim to have reasonable grounds for such a demand, nor did he believe that using threats was an appropriate way to enforce it. Given the serious breach of Mr. JB's rights to freedom from unreasonable searches and the right to privacy by the Police Officers, it was reasonable for Mr. Bainimarama, as the Prime Minister, to express his grave concern to the Police. This was not because Mr. JB was his elder brother, but because it was a grave matter involving a citizen. However, under the legal framework set out in the Constitution and the Police Act, he has no legal authority to demand that the Acting Police Commissioner dismiss the officers or for the Acting Police Commissioner to resign. Based on these facts, it is clear that there was no reasonable ground for the demand, nor any reasonable basis to believe that threats were a proper means of enforcing it.

116. Based on Mr. Bainimarama's conduct in making this unwarranted demand with menaces, it is clear that he intended to influence Mr. Tudravu in exercising his official duties under Sections 32 and 33 of the Police Act.

117. Taking all these issues discussed together, I am satisfied that the Prosecution has proved beyond reasonable doubt that Mr. Bainimarama committed the offence of Unwarranted Demands made by a Public Official as stated under Section 355 (a) (b) (i) and (c) (iii) of the Crimes Act.

Counts Two and Three (Abuse of Office)

118. Section 139 of the Crimes Act states:

> *"A person commits an indictable offence which is triable summarily if, being employed in the civil service, the person does or directs to be done, in abuse of the authority of his or her office, any arbitrary act prejudicial to the rights of another,*

119. Accordingly, the main elements of the offence of Abuse of Office are:

i) The Accused, being employed in the civil service,

ii) Does or directs to be done,

iii) In abuse of the authority of his office,

iv) Any arbitrary act,

v) Prejudicial to the rights of another,

120. An act performed without reasonable justification, capriciously, or in disregard of law, procedure, or fairness is considered an arbitrary act. Such acts are usually committed outside lawful authority or lack a rational foundation. If such an arbitrary act results in detrimental, disadvantageous, or harmful effects on the rights of another, it is regarded as an arbitrary act prejudicial to those rights.

121. The alleged arbitrary acts under counts two and three involve the termination of the two Police Officers without due process, which amounts to an abuse of Mr. Qiliho's authority as the Commissioner of Police, and such termination was prejudicial to the rights of the two officers.

122. The central plank of Mr. Qiliho's defence is that he was the legally appointed Commissioner of Police on 4th August 2021; therefore, the punishment handed down by Mr. Tudravu to Sgt Penieli and Cpl Naulu under Sections 32 and 33 of the Police Act was not legally valid, as Mr. Tudravu was not acting as the Commissioner of Police on 4th August 2021. Consequently, Mr. Qiliho's review of Anil Prasad's tribunal findings, recommendations, and the penalties imposed on Sgt Penieli and Cpl Naulu were lawful and consistent with the laws and procedures outlined in Sections 32 and 33 of the Police Act.

123. Conversely, the Learned Counsel for the Prosecution submitted that Mr. Tudravu was appointed by the President of Fiji, based on the recommendation of the Constitutional Offices Commission, on 5 August 2020, for a one-year term. Therefore, despite Mr. Qiliho's return to Fiji after his overseas study leave and his ability to perform the functions of the office, Mr. Tudravu continued to serve as the Acting Commissioner of Police by virtue of his appointment made by the President.

124. In light of this argument, it is necessary to determine who was legally entitled to perform the function of the Commissioner of Police on the 4th of August 2021.

125. As outlined in Section 129 (4) of the Constitution, the Commissioner of Police is appointed by the President on the advice of the Constitutional Offices Commission, following consultation with the Minister responsible for the Fiji Police Force. Once appointed, the Commissioner of Police is not subject to directions or control by any person, except as provided under the Constitution or by written law, in the performance of his duties, functions, and the exercise of his powers. (*see Section 135 (4) of the Constitution*). Accordingly, the President or the Constitutional Offices Commission has no authority to control or issue directives to the Commissioner of Police, affecting the performance of his duties, once he is appointed, pursuant to Sections 129 (4) and 135 (4) of the Constitution.

126. Section 163 (2) of the Constitution provides for the appointment of a person to act in a public office, where it states that:

> *"A reference in this Constitution to a power to make appointments to a public office includes a reference to—*
>
> *d) a power to make appointments on the promotion or transfer to the office; and*
>
> *e) a power to appoint a person to act in the office while it is vacant or its holder is unable to perform the functions of the office."*

127. Accordingly, the President is empowered to appoint a person to act as the Commissioner of Police on the advice of the Constitutional Offices Commission only in two instances, *viz*, when the position is vacant or the substantive office holder is unable to perform the functions of the office.

128. The Acting Appointment under Section 163 (2) (b) of the Constitution is temporary, existing only when the substantive position is vacant, or the office holder is absent or unable to perform his duties. Once the substantive position is filled, or the office holder returns and is ready to resume duties, the Acting Appointment ends. Therefore, a person cannot continuously act in a public office under Section 163 (2) (b) of the Constitution once the vacant position is filled or the substantive holder is capable and ready to perform the office's functions. The substantive

position was not vacant. Mr. Qiliho held the position of Commissioner of Police at all material times. Mr. Tudravu was appointed as Acting Commissioner of Police because Mr. Qiliho was unable to perform his duties during his absence overseas. Pursuant to Section 163 (2) (b) Mr. Tudravu's appointment as the Acting Commissioner of Police ended when the substantive position holder was capable and ready to function as the Commissioner.

129. As raised by the Learned Counsel for the Prosecution, if Mr. Tudravu was allowed to continue performing the duties of the Commissioner of Police as an Acting Commissioner when Mr. Qiliho, the substantive officer holder, was capable and ready to perform his duties, before the specific date of Mr. Tudravu's Acting Appointment expired, would it affect the operation of Section 135 (4) of the Constitution.

130. Tuilevuka J in **Raju v The Permanent Secretary for Education [2025] FJHC 148; ERCC 06 of 2021 (25 March 2025)** observed that an Acting Appointment is temporary and made to fill a temporary vacancy in the substantive position, so there is no contractual entitlement to the Acting Appointment. The Acting Appointment discussed in **Raju v The Permanent Secretary for Education (supra)** was an acting position of teacher, which is not a Constitutional position like that of the Commissioner of Police. However, I find the principle enunciated by Tuilevuka J applies to the present case.

131. Maxwell on the Interpretation of Statutes states (11th ed. at p. 3):

> *"The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning, and the second, that the phrases and sentences are to be construed according to the rules of grammar. ...If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences."*

132. Bindra's Interpretation of Statues (12th Edition, p 208 -209) states:

> *"The legislature is deemed not to waste its words or to say anything in vain. The presumption is always against superfluity in a statute. An Act should be*

construed as to avoid redundancy or surplusage.... A construction which would render the provision nugatory ought to be avoided.

133. In light of the aforementioned interpretation rule, Section 163 (2) (b) of the Constitution should be interpreted in its literal and ordinary sense, avoiding any interpretation that introduces redundancy or surplusage to any other provision in the Constitution, especially Section 135 (4) of the Constitution.

134. Section 135 (4) of the Constitution is essential for protecting the independence of office holders, as outlined in Section 134 of the Constitution. As previously mentioned, once appointed, the Commissioner of Police is not subject to directions or control by anyone except as specified in the Constitution or by written law, in the execution of his duties, functions, and powers. The President or the Constitutional Offices Commission has no authority to direct or control the Commissioner of Police after his appointment. If the President, on the advice of the Constitutional Offices Commission, appoints a person to act as a Commissioner of Police, after the substantive officeholder is available, capable, and ready to perform his duties, this would clearly amount to exercising control over the substantive Commissioner's performance, which is contrary to Section 135 (4) of the Constitution.

135. Considering the constitutional framework and interpretation rules outlined above, I will now consider when the Acting Appointment of Mr. Tudravu made by the President ceased to exist. The Appointment Letter of the President dated 5th August 2020 states:

"....., I hereby appoint you to act as the Commissioner of the Fiji Police Force for a period of one (1) year, with immediate effect."

136. The Privy Council in **Chief Fire Officer & another v Felix-Phillip [2019] UKPC 27 (Trinidad & Tobago)**, applying a purposive and textual interpretation, outlined the scope of the Acting Appointment, where the Court held:

"14. The Board agrees with the Court of Appeal. The key, applying a purposive interpretation, when it comes to genuinely temporary appointments, is that there should be transparency and that, interpreting the appointment against the matrix of fact known to both parties at the date of the appointment, the appointee should

be in no doubt that his appointment is only temporary. This interpretation gives effect to what may be presumed was the intention of the legislature. The reasons for making an Acting Appointment include such matters as illness of the permanent office holder. In those circumstances the legislature must have anticipated that an Acting Appointment would have to be made other than for a pre-determined fixed period. It would, moreover, be artificial and unsettling and thus contrary to good industrial relations practice to require that the Acting Appointment was renewed from week to week.

15. Furthermore, a textual interpretation leads to the same result. The expression "specified period" does not mean that there have to be specified dates or that the dates have to be specified in advance. It simply means that the period has to have a transparent, fixed reference point so that the employer cannot evade his obligations to treat a person as a permanent employee by employing him on an indefinite basis.

137. Mr. Tudrəvu was appointed Acting Commissioner of Police because Mr. Qiliho was on overseas study leave in July 2020, which prevented him from performing the duties of the Commissioner of Police under the second limb of Section 163 (2) (b) of the Constitution. Mr. Tudravu, in his evidence, admitted that he was aware of these reasons for his appointment. As the Privy Council found in **Chief Fire Officer & another v Felix-Phillip (supra),** that was the factual background known to both parties at the time of this Acting Appointment, making it clear that this appointment was temporary and contingent on Mr. Qiliho's inability to perform the role of Commissioner due to his absence from Fiji, which was indeed in line with Section 163 (2) (b) of the Constitution.

138. Adopting the purposive and textual interpretations used by the Privy Council in **Chief Fire Officer & another v Felix-Phillip (supra)**, the clear and specific fixed reference point for the duration of this temporary appointment is the period from Mr. Qiliho's departure overseas to his return to Fiji, allowing him to perform his duties in his role. This period may be extended if Mr. Qiliho remains unable to carry out his duties after returning to Fiji. Consistent with the purposive and textual interpretation principles, Mr. Tudravu's Acting Appointment would end when Mr. Qiliho is able to resume his role as Commissioner of Police upon his return to Fiji or on 5 August 2021, whichever occurs first.

139. According to PE 3 & 77, Mr. Qiliho's term as Commissioner of Police ended on 4 March 2021, while he was still overseas. On 26 February 2021, the Secretary of the Constitutional Offices Commission informed the President of the Commission's advice, recommending that the President appoint Mr. Qiliho under Section 129 (4) of the Constitution to serve for a period of three months or until a substantive appointment was made. Under the heading "Appointment as the Commissioner of the Fiji Police Force," the President appointed Mr. Qiliho under Section 129 (4) of the Constitution as the Commissioner of Police. Unlike Mr. Tudravu's appointment letter dated 5 August 2020 (*see PE71*), there was no mention that Mr. Qiliho's appointment was made under both Sections 129 (4) and 163 (2) of the Constitution, making it clear that Mr. Qiliho's appointment was substantive. However, it was only for three months or until a substantive appointment was made following an open merit recruitment process. Subsequently, Mr. Qiliho was appointed as the Commissioner of Police for a five-year term on 16 September 2021 (*see PE72*). Accordingly, Mr. Qiliho remained the substantive Commissioner of Police when he returned to Fiji in July 2021 and continued in that role.

140. There is no dispute between the parties that Mr. Qiliho returned to Fiji a few weeks before 4 August 2021 but was in quarantine and physically returned to his office on 6 August 2021. Accordingly, the main factual reasons for appointing an Acting Commissioner of Police ended when Mr. Qiliho returned to Fiji, leaving only one issue to decide, *viz*, whether he was able to perform the functions of the Commissioner of Police while in quarantine after his return. The issue is not whether Mr. Qiliho actually resumed his duties as the Commissioner while in quarantine, but whether he was able to perform those functions.

141. The burden is on the Prosecution to prove beyond a reasonable doubt that Mr. Qiliho was unable to perform his duties as the Commissioner of Police while in quarantine, despite physically returning to Fiji after his overseas study leave. (*see 57 (1) & 58 of the Crimes Act*). This issue is significant to this matter, because the alleged arbitrary act of Mr. Qiliho, as charged, is that he did not follow due process.

142. There is no legal burden on Mr. Qiliho to prove beyond a reasonable doubt that he was capable of performing his duties. It is sufficient for Mr. Qiliho to adduce or point to evidence that suggests a reasonable possibility he was able to perform his role as Commissioner of Police upon returning from overseas, despite being in quarantine. (*see Section 59, especially Section*

59 (7) of the Crimes Act) If Mr. Qiliho adduced or pointed to such evidence suggesting a reasonable possibility of his ability to perform his duties, the Prosecution must then disprove this beyond a reasonable doubt as required by Section 57 (2) of the Crimes Act.

143. There is no evidence presented before the Court by the Prosecution to establish that Mr. Qiliho remained unable to perform his duties after returning to Fiji on 24 July 2021. In fact, the evidence suggests that Mr. Qiliho was capable and, in fact, discharging his duties as Commissioner whilst in quarantine. There is no evidence before the Court, adduced by the Prosecution, to establish the location of the quarantine. There is no evidence before the Court to determine whether Mr. Qiliho was confined to an isolated facility without access to the internet, computers, or other equipment reasonably needed to engage with his officers. Instead of providing such evidence, Mr. Krishna and Mr. Tudravu affirmed that Mr. Qiliho conducted meetings and briefings with the officers *via* Skype while he was in quarantine upon his return to Fiji.

144. Mr. Krishna stated during his cross-examination that he knew Mr. Qiliho returned around 23rd July 2021 and was in quarantine. He specifically admitted that Mr. Qiliho held meetings *via* Skype with officers, and he attended some of the briefings as Director of Legal. The briefings that Mr. Krishna attended involved multiple participants. Besides such meetings and briefings with Mr. Qiliho while he was in quarantine, Mr. Krishna stated that Mr. Qiliho also contacted him by phone.

145. Mr. Tudravu also confirmed that Mr. Qiliho participated in Skype meetings during his quarantine period. However, he stated that he chaired the meetings while Mr. Qiliho listened. During cross-examination, Mr. Tudravu mentioned that he referred to Mr. Qiliho as the Commissioner in those meetings.

146. As testified by Mr. Krishan and Mr. Tudravu, it is clear that Mr. Qiliho had been actively participating in meetings and briefings with Police Officers while in quarantine upon his return to Fiji. This not only confirms that he was able to perform his duties but also demonstrates that he engaged in his responsibilities by attending meetings and briefings with the officers. Therefore, I find that the Prosecution has failed to prove beyond reasonable doubt that Mr. Qiliho was unable to carry out his functions as the Commissioner of Police while in quarantine. Consequently, I am satisfied that Mr. Qiliho was prepared and capable of fulfilling the duties

of his office as the Commissioner of Police on 4th August 2021, thus removing the necessity for an Acting Appointment under Section 163 (2) (b) of the Constitution.

147. As previously determined, the President, on the advice of the Constitutional Offices Commission, is not permitted under Sections 135 (4) and 163 (2) (b) of the Constitution to prevent Mr. Qiliho from performing his duties as Commissioner when he is able to do so by appointing someone to act continuously as the Commissioner. The sole circumstance in which the President, on the advice of the Constitutional Offices Commission, may prevent the Commissioner from executing his duties, even if he is physically capable, is to suspend the Commissioner under Section 137 (4) of the Constitution, pending an investigation.

148. Therefore, it is my view that the Acting Appointment of Mr. Tudravu as the Commissioner of Police, made by the President of Fiji on 5th August 2020, ended when Mr. Qiliho was able to perform his function upon his return to Fiji. Accordingly, the person legally entitled to perform the duties of the Commissioner of Police on 4th August 2021 was the substantive officeholder, Mr. Qiliho.

149. Under Section 32 (1) (b) of the Police Act, the tribunal, after finding a person guilty, must make recommendations to the Commissioner regarding the punishment. Mr. Anil Prasad submitted his recommendations to the Commissioner. The Commissioner is then required to review all proceedings related to the tribunal in accordance with Section 33(1) of the Police Act. Although Mr. Tudravu reviewed the recommendation on 3rd August 2021 and subsequently punished Sgt Penieli and Cpl Naulu on 4th August 2021 under Sections 32 (1) (a) and 33 (2) (c) of the Police Act, he lacked the legal authority to perform this function, since his Acting Appointment had ceased by that time.

150. I find no fault or malfeasance in Mr. Tudravu's actions in imposing the punishment, as he was under pressure from Mr. Bainimarama's demand made on 22 May 2021. As previously outlined, it was evident from the expedient manner in which the disciplinary proceedings were conducted. Therefore, Mr. Tudravu may have wished to conclude it as quickly as possible. Additionally, he was not advised of the legal position; thus, it was reasonably open for Mr. Tudravu to believe that he still had lawful authority to act.

151. On 11 August 2021, Mr. Qiliho recorded on the Police Correspondence Form (*see PE61*) that he had reviewed the disciplinary proceedings and the punishment against Sgt Penieli and Cpl. Naulu and had rescinded the punishment. He also ordered that the two officers be immediately dismissed from the Force. The review of the disciplinary proceedings and the imposition of the punishment were carried out in accordance with the powers granted to the Commissioner under Section 32 (1) (a) and 33 (1), (2) (c) of the Police Act.

152. The two officers were given an opportunity to present their show cause on 13th August 2021, which they did before the deadline of 17th August 2021. Mr. Qiliho then dismissed them, exercising his authority under Section 32 (1) (a) of the Police Act. Considering the lack of legal authority of Mr. Tudravu to punish the two officers on 4th August, as well as Mr. Qiliho's directive to rescind the punishment imposed by Mr. Tudravu, the subsequent dismissal of the two officers does not amount to a double punishment under Section 30 (b) of the Police Act.

153. As a consequence of the reasons outlined, I find that Mr. Qiliho's act of terminating the two Police Officers was not unlawful. He followed the procedure set out in the Police Act when exercising his powers under Sections 32 and 33 of the Act. Therefore, he did not carry out this act without reasonable justification, capriciously, or in disregard of law, procedure, or fairness. Accordingly, the Prosecution had failed to prove beyond a reasonable doubt that the act of Mr. Qiliho was arbitrary under Section 139 of the Crimes Act.

154. In case the above finding, that Mr. Tudravu's Acting Appointment ceased to exist when Mr. Qiliho was capable of performing the function of the Commissioner of Police upon his return to Fiji, is incorrect, I shall now proceed to examine whether the Prosecution proved beyond reasonable doubt that Mr. Qiliho was aware of the appointment made by the President appointing Mr. Tudravu as the Acting Commissioner of Police until the 5th of August 2021. Hence, it was not open for Mr. Qiliho to assume that he was the Commissioner on the 4th of August 2021.

155. On 20 July 2020, Mr. Qiliho appointed Mr. Tudravu as Acting Commissioner of Police, effective from 30 July 2020 (*see PE 9*). The following day, 21 July 2020, he informed the Minister of Defence that he had appointed Mr. Tudravu to act as Commissioner of Police during his absence. By the time the President appointed Mr. Tudravu as Acting Commissioner on 5

August 2020, Mr. Qiliho had already left Fiji. Furthermore, that letter was not copied to Mr. Qiliho.

156. According to Mr. Krishna, the Appointment Letter from the President was hand-delivered directly to Mr. Tudravu by the Solicitor General's Office. However, ASP Devika Narayan testified that she did not find any such appointment letter from the President in Mr. Tudravu's personal file, which was kept in the Human Resources Division. Additionally, Mr. Krishna stated that the only letter found in Mr. Tudravu's personal file was the letter provided by Mr. Qiliho on 20 July 2020, appointing Mr. Tudravu as Acting Commissioner of Police, when the Solicitor General's Office requested the appointment letter on 12 August 2021. He then emailed that letter to the Solicitor General's Office, which was not copied to Mr. Qiliho. (*see PE 59*) Therefore, there is reasonable doubt whether the President's Appointment Letter was included in Mr. Tudravu's official personal file in the Human Resources Division of the Police. More significantly, the Prosecution tendered the President's Appointment Letter as PE 71, which was retrieved from the President's Office during the trial.

157. Upon returning to the office, Mr. Qiliho sought legal advice from Mr. Krishna regarding whether he had the authority to review the decision made by Mr. Tudravu as the Acting Commissioner of Police. According to Mr. Krishna, Mr. Qiliho sought legal advice on three general matters and did not specifically mention this issue. Mr. Qiliho, in his testimony, stated that the reason for not mentioning this was that he firmly believed he was the Commissioner when Mr. Tudravu imposed the punishment. Therefore, he only sought legal advice concerning the decision made between 24th July 2020 and 24th July 2021. Accordingly, there is no direct or circumstantial evidence to infer that Mr. Qiliho had seen or had access to the Appointment Letter by the President.

158. The Prosecution presented evidence from Mr. Seruiratu and Mr. Tudravu, stating that Mr. Bainimarama and Mr. Qiliho worked in the military before assuming their respective roles as Prime Minister and the Commissioner of Police. Mr. Bainimarama was the Commander of the military when he left, while Mr. Qiliho was a Brigadier General. Mr. Seruiratu stated that, as a former military officer, he is also very close to Mr. Bainimarama, as is Mr. Qiliho. Mr. Bainimarama and Mr. Qiliho concurred that they both worked in the Military and have always maintained close professional relationships.

159. By presenting this evidence, the Learned Counsel for the Prosecution urged the Court to consider the close relationship between Mr. Bainimarama and Mr. Qiliho as former military officers, to infer that both intended to dismiss the two Police Officers and acted together to accomplish that aim.

160. Keith JA in **Naicker v State [2018] FJSC 24; CAV0019.2018 (1 November 2018)** has explained the nature of circumstantial evidence and its evidential effects, where His Lordship held that.

> *"It is sometimes said that circumstantial evidence is less compelling than direct evidence. What better evidence can there be than that someone saw the defendant commit the crime he is accused of? But eyewitnesses can sometimes be mistaken, and they have also been known to lie. That is why it is also said that circumstantial evidence can be just as compelling, if not more so. If I go to bed at night and the ground outside is dry, and I wake up in the morning to find that it is wet, true, I have not actually seen it rain, but the inference that it rained during the night is irresistible. As long ago as 1866, 8 years before Fiji became a Crown Colony, a distinguished judge likened circumstantial evidence to a rope comprised of several chords. He said that "one strand of the chord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength……"*

161. The Supreme Court of India, in **Navaneethakrishnan v. The State by Inspector of Police (CRIMINAL APPEAL NO. 1134 OF 2013),** has clarified the importance of distinguishing conjecture or suspicion from legal proof. It further emphasized the necessity of establishing each link in the chain of circumstances. The Indian Supreme Court held that:

> *'The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in*

the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between may be true and must be true and the same divides conjectures from sure conclusions"

162. The Prosecution presented no evidence to prove that Mr. Bainimarama and Mr. Qiliho communicated during the relevant period. There was no evidence that they were meeting or discussing this matter. Mr. Tudravu stated in his evidence that Mr. Qiliho told him he should have followed Mr. Bainimarama's instructions when he submitted his resignation letter. However, during cross-examination, he stated that he did not discuss the issue involving Mr. Bainimarama with Mr. Qiliho, as he believed they had already discussed it and made up their minds. Hence, it was not clear whether Mr. Qiliho actually made such a statement to Mr. Tudravu. Furthermore, Mr. Tudravu's conclusion that Mr. Bainimarama and Mr. Qiliho had discussed this matter was clearly based on speculation.

163. Mr. Krishna stated that Mr. Qiliho, without any hesitation, agreed to settle the Judicial Review case filed by Sgt Penieli and Cpl Naulu upon receiving advice from the Solicitor General's office. He agreed to reinstate both officers with all their rights, salaries, and ranks. During his testimony, Mr. Qiliho maintained that if he was acting according to the directions of Mr. Bainimarama, who was still the Prime Minister, he could not accept reinstating the two officers when the Solicitor General provided the second opinion.

164. For these reasons, there is reasonable doubt whether Mr. Bainimarama requested or influenced Mr. Qiliho to dismiss the two Police Officers, and Mr. Qiliho acted accordingly.

165. I am satisfied that there is reasonable doubt as to whether Mr. Qiliho was unaware of the appointment made by the President, and therefore believed he was the Commissioner of Police on 4 August 2021, when Mr. Tudravu imposed the punishment. Based on that earlier conclusion, there is further reasonable doubt whether Mr. Qiliho had the required fault element

of the offence of abuse of office, which was recklessness as defined under Section 21 of the Crimes Act, when he terminated the two Police Officers. (*see as per Prematilaka RJA in **Fiji Independent Commission Against Corruption (FICAC) v Vasu [2021] FJCA 53; AAU0004.2020** (23 February 2021*)

166. I will now examine whether the termination of two Police Officers caused detrimental, disadvantageous, or harmful effects on their rights, rendering it an arbitrary act prejudicial to the rights of others.

167. As previously outlined, the conduct of Sgt Penieli and Cpl Naulu was a serious breach of Mr. JB's rights to freedom from unreasonable search, as stipulated under Section 12 of the Constitution, and the right to privacy guaranteed under Section 24 of the Constitution. Having explained the gravity of the actions of the two Police Officers, Mr. Qiliho stated in his evidence that one of the reasons he considered when deciding to dismiss them was their explanation that they were unaware that taking photographs of a person who was not in their lawful custody and uploading those photographs with a note referring to Mr. JB as a known transporter to Viber groups was unlawful. Sgt Penieli had been a Police Officer for nearly 20 years by that time.

168. "*Ignorantia legis neminem excusat*" is a common law principle stating that ignorance of the law is no defence for contravening it. It is essential that Police Officers, whose primary duty is to maintain law and order, possess sufficient knowledge and understanding of laws related to their basic daily operational responsibilities. (*see Sections 5 & 17 of the Police Act*). Richardson J in **Jefferies (supra)**, citing Sir Thaddeus McCarthy, observed that;

> *" ...we have been cautious in our grant of powers to the Police. A Police force not operating under the rule of law would soon become an instrument of oppression and tyranny."*

169. It is not necessary to determine whether the punishment imposed by Mr. Tudravu on the two Police Officers was wrong or inadequate; however, considering the reasons discussed above, it was also reasonably open for Mr. Qiliho to arrive at the conclusion he did regarding the appropriate punishment under Section 32 of the Police Act.

170. Taking into consideration all the reasons outlined above, it is my conclusion that the Prosecution has failed to satisfy the Court beyond reasonable doubt that Mr. Qiliho committed the second and third counts as charged in the Amended Information.

Logically Consistent Verdicts

171. In view of the two different verdicts that I reached, I will now briefly examine whether they are logically consistent with the evidence presented during the hearing. The Fiji Court of Appeal in **State v Khan [2023] FJCA 141; AAU122.2015 (28 July 2023)**, discussed the test of 'logical reasonableness 'as propounded in **Mackenzie v R (1996) 190 CLR 348** in detail. However, Young J in **Khan v State [2024] FJSC 30; CAV0013.2023 (29 August 2024)**, observed that:

> *"I see little or no need to resort to these principles when dealing with an appeal against the reasoned judgment of a professional Judge. Such a judgment should make clear the basis on which the Judge has acted. Any later challenge to the verdict or verdicts should be directed to the reasons of the Judge. In this case, the reasons given by the Judge provided a clear and rational basis for his verdicts."*

172. The primary issue in evaluating the logical consistency of the verdicts is whether the conviction was safe, not the acquittal. (*see B (SC12/2013) v R — [2014] 1 NZLR 261*). Based on the evidence presented, Mr. Bainimarama was the Chairman of the Constitutional Offices Commission, which recommended that the President appoint Mr. Tudravu as Acting Police Commissioner on 5th August 2020 for a period of one year. Therefore, he was aware of this appointment, but Mr. Qiliho, as discussed above, may not have been aware of it. Furthermore, there is no direct or circumstantial evidence to prove that Mr. Bainimarama and Mr. Qiliho acted together in dismissing the two Police Officers. Hence, I am convinced that the evidence before the Court supports different verdicts.

The Conclusion

173. In conclusion, I find that the Prosecution has proved beyond a reasonable doubt that the first Accused, Mr. Bainimarama, made an unwarranted demand with menace to Mr. Tudravu as charged. Therefore, I find the first Accused, Mr. Bainimarama, guilty of the first count of

Unwarranted Demands Made by a Public Official, contrary to Section 355 (a), (b) (i) and (c) (iii) of the Crimes Act, and I convict him accordingly.

174. I further find that the Prosecution has failed to prove beyond reasonable doubt that Mr. Qiliho committed the two counts of Abuse of Office as charged under the second and third counts in the Amended Information. Therefore, I find him not guilty of the second and third counts of Abuse of Office contrary to Section 139 of the Crimes Act and acquit him of the same accordingly.

175. Thirty (30) days to appeal to the Fiji Court of Appeal.

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Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

02nd October 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

R Patel Lawyers for Accused persons.